



**Jari Uimonen**

**From Unitary State to  
Plural Asymmetric State:  
Indigenous Quest in France,  
New Zealand and Canada**



**UNIVERSITY OF LAPLAND  
LAPIN YLIOPISTO**

University of Lapland  
Faculty of Law

© Jari Uimonen

Cover: Mikko Sippola  
Layout: Essi Saloranta / Kronolia

Sales:  
Lapland University Press  
BOX 8123  
FI-90101 Rovaniemi  
Phone +358 40 821 4242  
fax +358 16 362 932  
julkaisu@ulapland.fi  
www.ulapland.fi/lup

Paperback  
Acta Universitatis Lapponiensis 275  
ISBN 978-952-484-717-9  
ISSN 0788-7604

pdf  
Acta Electronica Universitatis Lapponiensis 142  
ISBN 978-952-484-718-6  
ISSN 1793-6310

# Acknowledgements

This research has a long history. I participated in the seminar of ethnohistory at the University of Helsinki in 1993. There I became for the first time interested in indigenous peoples. I continued with this theme when studying different branches of history, and becoming acquainted with the questions of legal cultures and legal pluralism has opened up for me new perspectives on the Indigenous presence in various countries. For me, the collecting of material and the writing of the dissertation have been a rich expedition. I have done most of the research alongside my work, but for the last 1.5 years it has been possible to concentrate full-time on the research. For this I owe the Legal Cultures in Transnational World programme whose Finnish board I want to thank for the opportunity. No less important has been the positive attitude of my co-workers, especially Rev. Anne Angervo, Vaara-Karjala Parish Council and the Chapter of Kuopio Diocese, who have supported my studying in all its phases.

I owe my utmost gratitude to two professors: to the late Matti Viikari, Professor of General History at the University of Helsinki, who encouraged me for the first time to approach the Indigenous world, and to my tutor, Professor Jaakko Husa, whose support, encouragement and guidance has been vital to the successful outcome of this research. I want also to thank the personnel in the following libraries and institutions for their patience and aid: the University of Helsinki, the University of Turku, The University of Joensuu/Eastern Finland, The University of Lapland, The University of Tampere, The University of Jyväskylä, The University of Åbo Akademi; The Library of the Finnish Parliament; the Embassy of Canada; Centre culturel français; Dag Hammarskiöld Institute (Uppsala); La bibliothèque nationale (Paris); the British Library (London); the Congress Library (Washington, D.C.); McGill University and l'université de Montréal (Montréal); the National Library of Canada (Ottawa); Waikato University (Hamilton); and Victoria University and the National Library of New Zealand (Wellington). And I want also to thank Mr. Nicholas Kirkwood for the language check and Mr. Juhani Lautala for technical support. Last but not least, my family has been the best source of inspiration. I dedicate this work to my parents, to my wife Taru and my children Katariina and Lauri.

On the 28 August 2013, at Kontiolahti

*Jari Uimonen*

# Table of Contents

Acknowledgements .....	3
Abbreviations .....	9
Terminology .....	12
<b>1. Introduction .....</b>	<b>21</b>
1.1. General introduction .....	21
1.2. The Many Faces of Law .....	23
1.2.1. Comparison: Similarity or Difference? .....	23
1.2.2. Legal Positivism v. Legal Pluralism .....	24
1.2.3. Mixing Law: Family Tree, Legal Culture and Tradition .....	27
1.2.4. Contextual Aspects .....	30
1.3. Legal Environment .....	34
1.3.1. France: Domain of Civil Law .....	34
1.3.2. New Zealand: Britain Overseas .....	38
1.3.3. Canada: A Hybrid System .....	42
1.4. The Indigenous Communities .....	45
1.4.1. France: Invisible Minorities .....	45
1.4.2. New Zealand: Polynesian Presence .....	47
1.4.3. Canada: Three Strands of Indigenuity .....	48
1.5. Search of Plurality .....	50
<b>2. Unitary State and the Devolution of Powers .....</b>	<b>54</b>
2.1. Basic Principles .....	54
2.1.1. Sovereignty .....	54
2.1.2. State .....	58
2.1.3. Self-Determination, Autonomy and Secession .....	62
2.2. Indigenous Rights .....	66
2.2.1. Noble Savage .....	66
2.2.2. Marshall Trilogy and the Colonial Policy .....	68
2.2.3. Modern Developments and Discussion .....	71
2.3. The Constitutional Principles .....	74
2.3.1. France .....	74
2.3.1.1. <i>Une république indivisible</i> .....	74
2.3.1.2. Secularism .....	76
2.3.1.3. Democratic and Social Republic .....	77
2.3.1.4. Equality and Education .....	78

2.3.1.5.	Language Rights .....	79
2.3.2.	New Zealand: Unwritten Principles .....	81
2.3.3.	Canada.....	82
2.3.3.1.	Fundamental Principles .....	83
2.3.3.2.	Rights in the Constitution Act, 1982 .....	87
2.4.	Decentralisation / Devolution .....	88
2.4.1.	France: From Centralisation to Decentralisation .....	88
2.4.2.	New Zealand.....	92
2.4.2.1.	Realm of New Zealand .....	92
2.4.2.2.	Local Government .....	92
2.4.3.	The Provinces and Territories in Canada.....	93
2.5.	Conclusions .....	94
<b>3.</b>	<b>Law and Justice .....</b>	<b>97</b>
3.1.	France.....	97
3.1.1.	<i>Spécialité législative</i> .....	97
3.1.2.	<i>Loi du pays</i> .....	100
3.1.3.	Indigenous Courts and Institutions.....	102
3.1.4.	Customary Law .....	103
3.1.5.	<i>Indigénat</i> and Customary Enforcement of Law .....	105
3.2.	New Zealand .....	106
3.2.1.	Legislation and Bylaws .....	106
3.2.2.	<i>Tikanga Māori</i> .....	108
3.2.3.	Waitangi Tribunal and the Indigenous Courts .....	110
3.2.4.	Customary Dispute Resolution .....	116
3.2.5.	Māori Wardens .....	117
3.3.	Canada .....	117
3.3.1.	Application of General Legislation .....	117
3.3.2.	Indigenous Legislation .....	119
3.3.3.	Bylaws .....	120
3.3.4.	Indigenous Courts .....	121
3.3.5.	Customary Law .....	123
3.3.6.	Alternative Dispute Resolution .....	127
3.3.7.	Enforcement of Law.....	130
3.4.	Conclusions .....	131
<b>4.</b>	<b>Administration and Self-Determination .....</b>	<b>133</b>
4.1.	France.....	133
4.1.1.	New Caledonia: <i>Sui Generis</i> Collectivity .....	133
4.1.1.1.	Heavy Burden of the Past .....	133
4.1.1.2.	Turbulent Period of Transformation .....	135
4.1.1.3.	Accord of Nouméa and the Process of Reconciliation.....	139

4.1.2.	French Polynesia: Overseas Country .....	141
4.1.3.	Wallis and Futuna: the Republican Kingdoms.....	147
4.1.3.	French Guiana: Long Time Forgotten.....	150
4.1.5.	The Caledonian Citizenship and Electoral Rights.....	152
4.1.6.	Pacific Tax Haven? .....	153
4.1.7.	European Dimension.....	154
4.2.	New Zealand .....	156
4.2.1.	Treaty of Waitangi.....	156
4.2.2.	<i>Tino Rangatiratanga</i> .....	161
4.2.3.	Settlement Policy.....	166
4.2.4.	<i>Mana Motuhake</i> .....	171
4.2.5.	Outside the <i>Iwi</i> and <i>Hapū</i> : Urban Māori.....	174
4.2.6.	Associated States and Territories .....	175
4.2.7.	Māori Constituencies .....	180
4.2.8.	Taxation and Financial Autonomy .....	182
4.2.9.	Citizenship .....	182
4.3.	Canada .....	182
4.3.1.	The Constitutional Status of the Indigenous Peoples.....	182
4.3.2.	Indigenous Definition .....	188
4.3.3.	The Treaties and Agreements .....	190
4.3.3.1.	Allies Become Wards .....	190
4.3.3.2.	Numbered Treaties: the Era of Extinguishment.....	192
4.3.3.3.	Renewed Treaty Policy .....	196
4.3.3.4.	Modern Treaties .....	199
4.3.3.5.	Nunavut: a Public Government .....	203
4.3.3.6.	Other Arctic Agreements.....	205
4.3.4.	Reserves and Settlements.....	209
4.3.4.1.	From Reductions to Reserves: Isolation and Assimilation.....	209
4.3.4.2.	Post-War Reserves: Integration and Survival .....	213
4.3.4.3.	The Métis Settlements.....	215
4.3.5.	Traditional and Alternative Forms of Self-Government.....	218
4.3.6.	Emerging Structures.....	221
4.3.7.	Citizenship: Access to Canadian Society .....	223
4.3.8.	Enfranchisement and Electoral Rights.....	223
4.3.9.	Tax Exemption .....	226
4.4.	Conclusions.....	229
<b>5.</b>	<b>Community.....</b>	<b>231</b>
5.1.	France.....	231
5.1.1.	Customary Family Law .....	231
5.1.2.	Education: Tool of Unitary State.....	232
5.1.3.	Media: Monopoly or Freedom of Expression?.....	233
5.1.4.	Social Republic: Health and Social Services.....	234

5.2.	New Zealand .....	235
5.2.1.	Gender Equality and the Decline of Customary Family Law.....	235
5.2.2.	Assimilation Through Education and the Recovery .....	237
5.2.3.	Māori Media .....	239
5.2.4.	Recovering Health and Social Programmes .....	241
5.3.	Canada .....	243
5.3.1.	Long Way to Gender Equality .....	243
5.3.2.	Increasing Responsibility on Family Affairs.....	245
5.3.3.	Indigenous Education: Shadow of Residential Schools .....	247
5.3.4.	Indigenous Media .....	252
5.3.5.	Gap in Health and Social Conditions.....	253
5.4.	Conclusions .....	258
<b>6.</b>	<b>Land and Environment .....</b>	<b>260</b>
6.1.	France.....	260
6.1.1.	Customary Lands .....	260
6.1.2.	Fishing and Sea Resources.....	265
6.1.3.	Nickel and Nuclear Testing.....	266
6.2.	New Zealand .....	267
6.2.1.	Purchase and Confiscation: Reducing Māori Land Base.....	267
6.2.2.	<i>Wi Parata</i> -Era: Denial of Rights and Attempts to Consolidation .....	270
6.2.3.	Renewed Importance of Land .....	274
6.2.4.	<i>Whenua Tūpuna</i> .....	280
6.2.5.	Land in the Associated States and Territories .....	283
6.2.6.	<i>Kai Moana</i> .....	285
6.2.7.	Crown Forests.....	288
6.2.8.	Resource Management and Environment .....	289
6.3.	Canada .....	293
6.3.1.	Long Road to Recognition: Aboriginal Title .....	293
6.3.2.	Aboriginal Title in Case Law .....	299
6.3.3.	Métis Title .....	306
6.3.4.	Inuit Title.....	309
6.3.5.	Hunting, Fishing and Trapping .....	310
6.3.6.	Timber Rights.....	319
6.3.7.	Resource Management and Environment .....	322
6.4.	Conclusions .....	330
<b>7.</b>	<b>Culture.....</b>	<b>333</b>
7.1.	France.....	333
7.1.1.	Caledonian Identity .....	333
7.1.2.	Names and Symbols.....	334
7.1.3.	Language: Expression of Unity and Pluralism .....	334

7.1.4.	Cultural Objects .....	339
7.1.5.	Religion Challenges the Secular State .....	339
7.2.	New Zealand .....	341
7.2.1.	Preserving the Cultural Identity.....	341
7.2.2.	Names and Symbols.....	343
7.2.3.	<i>Te Reo Māori</i> .....	343
7.2.4.	<i>Taonga Tūturu</i> .....	346
7.2.5.	<i>Wairuatanga</i> .....	347
7.3.	Canada .....	348
7.3.1.	Distinct Cultural Test: What is Indigenous Culture? .....	348
7.3.2.	Names and Symbols.....	352
7.3.3.	Indigenous Languages .....	352
7.3.4.	Cultural Objects .....	356
7.3.5.	Old Faith in Modern Society .....	358
7.4.	Conclusions .....	360
<b>8.</b>	<b>General Concluding Remarks.....</b>	<b>362</b>
	References.....	371



# Abbreviations

ABS	Aotearoa Broadcasting System
ADR	Alternative Dispute Resolution
ADRAF	Agence de développement rural et de l'aménagement foncier
A.G.	Attorney-General
al.	alinéa
BCCA	British Columbia Court of Appeal
CAA	Cour d'appel administrative de Paris
CAQ	Cour d'appel du Québec
CBC	Canadian Broadcast Company
CC	Conseil Constitutionnel
CCP	Consultative Clearance Process
CE	Conseil d'Etat
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Convention on Economic, Social and Cultural Rights
cf.	confer
CJ	Chief Justice
CNI	Central North Island Iwi Collective
COM	Collectivités outre-mer
CSA	Comité supérieure d'audiovisuel
CSQ	Cour Suprême du Québec
DDHC	Déclaration des droit de l'homme et du citoyen
DGLFLF	Délégation générale à la langue française et langues de France
DIAND	Department of Indian Affairs and Northern Development
DOM	department d'outre-mer
EC	Environmental Court (New Zealand)
ECC	Exchequer Court of Canada
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
EEC	European Economic Council
EEZ	Exclusive economic zone / zone économique exclusive
EFO	Établissements français d'Océanie
ELLAP	Existing Leases Land Access Panel
EU	European Union
FC	Family Court (New Zealand)
FCC	Federal Court of Canada
GATT	General Agreement on Tariffs and Trade

GDI	Gabriel Dumont Institute
GDPL	Groupement de droit particulier local
HBC	Hudson Bay Company
IBA	Impact and Benefit Agreement
ICCPR	International Covenant on Civil and Political Rights
IFA	Inuvialuit Final Agreement
INAC	Indian and Northern Affairs Canada
ISEE	Institute statistique et économique de l'Etat
ITC	Inuit Tapirisat of Canada
ITQ	Individual Transferable Quota
IWGIA	International Workgroup for Indigenous Affairs
J	Judge, Justice
JBNQA	James Bay and Northern Quebec Agreement
JCPC	Judicial Committee of the Privy Council
ICJ	International Court of Justice
ILO	International Labour Organization
LAP	Land Access Panel
LILCA	Labrador Inuit Land Claims Agreement
MBQB	Manitoba Court of Queen's Bench
MAC	Maori Appellate Court
MLC	Maori Land Court
MMP	Mixed Proportional System
MNC	Métis National Council
M.N.R.	Minister of Natural Resources
MP	Member of Parliament
MRP	Minority Rights Publishing
NAC	Native Appellate Court
NAD	Northern Administrative District
NBPC	New Brunswick Provincial Court
NUCA	Nunavut Court of Appeal
NUCJ	Nunavut Court of Justice
NEQA	Northeast Quebec Agreement
NfLCA	Newfoundland and Labrador Court of Appeal
NLCA	Nunavut Land Claims Agreement
NGO	Non-Governmental Organisation
NLC	Native Land Court
NRTA	Natural Resources Transfer Agreement
NSCA	Nova Scotia Court of Appeal
NSCC	Nova Scotia County Court
NUCJ	Nunavut Court of Justice
NWAC	Native Women's Association of Canada
NWMP	Northwest Mounted Police
NWT	Northwest Territory / Territories
NWRCA	Northwest Territories Court of Appeal

## Abbreviations

NWTTTC	Northwest Territories Territorial Court
NZ	New Zealand
NZCA	New Zealand Court of Appeal
NZHC	New Zealand High Court
NZSC	New Zealand Supreme Court
ONCA	Ontario Court of Appeal
OMR	Outermost Region
OSCJ	Ontario Supreme Court of Justice
OTS	Office of Treaty Settlements
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
POM	Pays d'outre-mer
PTOM	Pays et territoires d'outre-mer
QMS	Quota Management System
R.	rex/regina, king/queen
RCAP	Royal Commission on Aboriginal Peoples
RCMP	Royal Canadian Mounted Police
Rev.	Reverend, pastor
RMA	Resource Management Act
SCA	Saskatchewan Court of Appeal
SCC	Supreme Court of Canada
SLN	Société Le Nickel
SMSP	Société Minière du Sud Pacifique
SOE	State-Owned Enterprises
SPC	Saskatchewan Provincial Court
TAAF	Territoires australes et antarctiques françaises
TEEC	Treaty Establishing the European Communities (Treaty of Rome)
TEK	traditional environmental knowledge
TFEU	Treaty on the Functioning of the European Union
TLA	Treaty Land Entitlement claim
TOM	territoire d'outre-mer
TREPAS	Société française des transports aériens de Pacific du Sud
UCKB	Upper Canada's Court of King's Bench
UCQB	Upper Canada's Court of Queen's Bench
UFA	Yukon Umbrella Final Agreement
UK	United Kingdom
UN	United Nations
UNHRC	United Nations Human Rights Committee
USSC	Supreme Court of the United States
WGIP	Working Group on Indigenous Peoples
WHO	World Health Organisation
WT	Waitangi Tribunal
YTC	Yukon Territorial Court

# Terminology

aajiiqatigiinniq	decision-making through discussion and consensus
adaakw	Nisga'a customary property law
adoption plenière	full adoption
adoption simple	simple adoption
ahuatunga Māori	burning fire, Māori tradition
ayuukhl	Nisga'a ancient legal code
ad medium filum aquae	to the middle thread of the stream
agai fenua	custom
ahi kā	continual presence
ahu whenua	common Māori land trust
aire coutumier	customary area
akitsiraqvik	assize stones, meeting place of Inuit Great Council
aliki	noble family
alter	another
amérindien	Indian
ancien régime	the old regime, the pre-1789 France
angakkuq	shaman
angol-oskw	family hunting/fishing/trapping territory
ante	before
Aotēaroa	White Long Cloud, New Zealand
a posteriori	from the later, a proposition derived from observed fact
ara korero	customary meeting
aranga	well-being
ara tiroa	customary duty to work for local chief
ari'i	paramount chief
ariki	ruler, paramount chief
aronga mana	council of chiefs
arrondissement hors du commune	district outside the municipality
Assemblée Nationale	the lower house of the French Parliament; Québec's provincial Legislature
Assemblée Territoriale	Territorial Assembly
autochtone	indigenous
avatittinnik kamatsiarniq	responsibility and care on land, animals and environment
baccalauréat	secondary school diploma
bloc de constitutionnalité	entity of constitutional norms
bona fide	in/with good faith

certiorari	writ issued by a superior to inferior court requiring the production of a certified record of a particular case tried by the latter court
chambre d'annulation	section of the Court of Appeal, able to quash a lower court's decision
collectivité territoriale	territorial collectivity
Code civil du Bas-Canada	Civil Code of Lower Canada
Code de l'indigénat	code restricting the colonial subjects' civil rights
Code Napoléon	Civil Code of Emperor Napoleon I
collectivité ultraphérique	Outermost region
compétence régalienn	competence of Crown/state
Congrès	Congress of New Caledonia
Conseil Constitutionnel	Constitutional Council
Conseil d'Etat	State Council, the supreme administrative court
contrat social	social contract
corvée	labour service
Cour de Cassation	Cassation Court, the supreme private law court in France
cour de comptes	court of auditors
coutume de Paris	customary law in Île-de-France and New France
coureur du bois	fur hunter
cul-de-sac	blind alley
culture de convergence	interculturalism
décret	degree
de facto	in fact, actually
de jure	of right, by right and just title
demesne	lands not granted out in tenancy but reserved by the lord for his own use and occupation
departement d'outre-mer	overseas department
doctrine	legal writing
dominium	ownership, property, sovereignty, title
droit commun	national law
Eeyou istchee	Grand Council of the Crees
encomienda	Spanish plantation in the South America
erga omnes	in relation to everyone, obligation to all states
Établissements français d'Océanie	French Establishments of Oceania
exception de inconstitutionnalité	exception of inconstitutionality
fa'aamu	customary adoption
failautuhi	village clerk and treasurer
faipule	chairman of the village council
fait accompli	deed accomplished (irreversibly)
fakamau'agu	customary tribunal
faufa mata'eina'a	patrimonial land
fangihinga	funeral ceremony

fari'ihau	feudal land
fatogia	customary land tax
faux amis	wrong friends, similar words in different languages, which have a different meaning
fono faka kole	village council
fono faka palokia	district council
fono laki	royal council, council of ministers
fono royal	royal council
Gayanashagowa	Great Binding Law, Iroquois Constitution
gendarmerie	military police
General Fono	meeting of Tokelauan chiefs
grand-chef	great chief
Groupement de droit particulier local	local customary title lands' category
Grundnorm	basic norm
hapū	tribal grouping, subtribe
hari tuupaapaku	translation of human remains
haut conseil	High Council
He Korokai Oranga	Māori Health Strategy
Hodenoosaunee	People of the Longhouse, Iroquois Confederation
hui	gathering
ikajuqtigiinniq	working together for a common cause
ihumatuyuk	traditional knowledge expert
imperium	jurisdictional presence
indigène	indigenous
insinnaqtun	immersion school
in situ	in place
in statu nascendi	in state of birth, a territory entitled to statehood
inuit qaujimajatuqangit	Inuit traditional knowledge
Inuit Uqausinnik Taiguusiliuqtiit	Inuit Language Authority
Inutuqait Miamiksijiit Angngutiksanik	Elders Advisory Committee
inuuqatigiitsiarniq	respect and care on other people
ius civile	civil law
ius positivum	positive law
ius cogens	peremptory rules of international law that are binding on all without exception
ius sanguinis	the right of blood; a person's citizenship is determined by the citizenship of the parents
ius soli	person's citizenship is determined by place of birth
iwi	group of hapū
Journal Officiel	Official Journal
jurisdiction de renvoi	right to hear an entire court case again

jurisprudence	case law
kaiga	extended family, family land
kai moana	sea food
kai tiaki	trust for minor or disabled person
kaitiaki	environmental steward
kaitiakitanga	environmental stewardship principle
kanohi ki te kanohi	face to face, customary dispute resolution session
karere	Māori police
Ka tika ka ora	Māori Health Provisional Work Programme
kauhanganui	Great Council
kaumatua	elder
kaupapa	fundamental principles, plan, tactics, strategy, methods
kawa	Māori procedure
kāwanatanga	governance, governorship
χθόν	land
kīngitanga	Maori kingdom
kivalu	prime minister
kōhanga reo	language nest, preschool
kōkiri	to advance-unit of devolution philosophy
komiti	committee
kotahitanga	unity through consensus, Māori parliament
koutonui	council of hereditary chiefs
kovana	governor
kuia	female elder
kungax	Nisga'a customary law
kura hourua	partnership school
kura kaupapa māori	Māori immersion school
kutuga	clan
laïcité	the state ideology of secularism in France
λαϊκός	belonging to people, to parish
Lálém Te Stó:lō Sí:yá:m	Stó:lō House of Justice
lavelua	ruler of Uvéa
leges imperii	laws of government
legitima gubernatio	legitimate government
leveki mangafaoa	trustee of family unit
lingua franca	common language of communication
locus	place
loi ordinaire	ordinary law
loi organique	organic law, law under constitutional review
loi du pays	law of the country, a statute / bylaw in New Caledonia and French Polynesia.
mahinga kai	food gathering place
manaakitanga	looking after one's neighbours
mana	power, authority, ownership, status, influence, dignity

mana atua	sacred power of gods
mana motuhake	self-determination
mana tuku iho	inherent status, mana through descent
mana whenua	tribal power, power associated to land
mana tangata	power of the people
mana tūpuna	inherited chiefly power
mana wairua	spiritual or cultural values/beliefs/practices
manahune	local chief
mangafaoa	family unit
marae	local community, meeting place, buildings
masse indivise	property held in common
mata'iaipo	district chief
mātaitai	customary fishing reserve
matapule	district chief
mātauranga	knowledge
matootao	cold fireplace, dead tradition
matua whāngai	special children's programme
ma'ukava	respect
mauri	force of life
modus operandi	method of operating
midewiwin	Ojibwa's Grand Medicine Society
mixité	mixture
murū	forgiveness
mūtoi	indigenous police; customary law officer
ngā pou mana	foundations of control and authority
Ngā ringa whakahaere o te iwi Māori	National Association of Māori Healers
ngati	extended family
Ngāti Tumatauenga	tribe of the god of war, New Zealand Army
nuevos leyes	new laws, Spanish legislation in the 16 <sup>th</sup> century
nuku	village land
nunalingni iqqatuijit	community judge
Nu Tireni	New Zealand
occupation	possession
Office québécois de la langue française	The Office of the French Language in Quebec
opinio juris	subjective element comprising customary international law
opinio necessitatis	opinion of necessity, a belief that custom conforms a legal obligation
ordonnance	ordinance, regulation
O'taite	Tahiti
pā	fort, occupation site
paihere tangata	joining together for common goals



Paix des braves	The Great Peace of Montreal
Pākehā	New Zealander of European descent
palabre	customary council
parlement	regional court of appeal in pre-revolutionary France
partage amiable	agreement on common lands
patu-iki	chief of chiefs, king
pays d'outre-mer	overseas land
per incuriam	court decision is given in error
petit-chef	small chief
pieds-noirs	French population in Algeria
pijitsirniq	serving families and communities
piliriqatigiinni	working together for a common cause
piqujaq	customary law
πολις	Greek city-state
Pōrīnetia Farāni	French Polynesia
poroporoaki	farewell feast
potlatch	gift-giving festival
pouvoir constituant	constituting power
praesumptio similitudinis	presumption of similarity
prima facie	at first sight, so far as can be judged from the first disclosure
procès-verbal	customary organ's decision
propriété claniques	clan title
publicité foncière	property register
puke kolo	village chief
pulenuku	village mayor
pulu'i'uvea	chief of customary police
Puni Kōkiri	Ministry of Māori Development
purangi	green stone
pūtea	trust for small or uneconomic interests
qanuqtuurniq	being innovative, resourceful
qaugiminilik	traditional knowledge expert
qua	considered as
qulliq	Innuktun school
qwi:qwelstóm kwelam t'ey	Stó:lō alternative justice program
ra'atira	chief
rangatahi	council member
rangatira	chief, leader
rangatiratanga	exercise of power, authority derived from the gods, exercise of chieftainship
rapporteur	reporter of bill
ratione materiae	subject-matter, court's authority to decide a particular case
raupatu	confiscation of land
rawa	resource
reducción	Jesuit mission in South America

réduction	Christian indigenous settlement in New France
région outre-mer	Overseas Region
règlement	decree
reo māori	Māori language
reo ma'ohi	Tahitian language
res nullius	a thing which has no owner
rohe	geographical territory of hapū/iwi
rongoā Māori	traditional Māori healing
rūnanga	council of hapū/iwi, court
rūnanganui	tribal council
section contentieuse	litigation section in Conseil d'Etat
seigneurie	feudal fief in New France
sénatus-consulte	degree voted by the Senate, having a status of law
sigidimhaunuk	matriarch
simgiyut	hereditary chief
smómiyelhtel	alternative justice assistant
souveraineté partagée	divided sovereignty
specialité législative	legal exception in overseas territories
status quo ante	existing state of affairs before
statut civil coutumier	customary title
structure d'intercommunalité	municipal agglomeration
sui generis	Of its own kind, peculiar
sukumowati	Mi'kmaq customary law
Sûreté	Provincial Police of Quebec
tabula rasa	empty picture
taha hiremgaro	mental health
taha tinana	physical health
taha whānau	family health
taiapure	system of customary fishing
take ōhākī	land allocated through the wish of a dying chief
take raupatu	land acquired by conquest and occupation
take tipu	ancestral land passed down according to Māori custom
take tuku	gifted land
takiwa	zone of traditional authority
tangata kaitiaki/tiaki	Māori official for customary fishing
tangata whenua	people of land, Māori
tangi	funeral
taniwaha	spirit-being
taonga	treasure, valued possession
taonga tuku iho	asset inherited from earlier generations
taonga tūturu	Māori artifact
tapere	district
tapu	sacredness, spiritual power, protective force
tavana	president of the District Council

teama	grand chief
Te Ao Auahetanga Hauora Māori	Māori Health Innovation Fund
Te kaitiaki o Te Aho Matua	Māori advisory body for education
τέλος	end, goal
Te Māngai Pāho	Māori Broadcast Agency
Te Ohu Kai Moana	Treaty of Waitangi Fisheries Commission
te parau taroa	royal regulation
terra nullius	territory over which no state possesses sovereignty
terre coutumière	customary land
territoire d'outre-mer	overseas territory
tertium comparationis	common comparative denominator
Te Taura Whirii te Reo Māori	Māori Language Commission
Te ture whakaimena o te awa o Waikato	customary law on Waikato River
Te Whare Ahupiri	Justice Department of the Māori Parliament
tikanga	customary, correct ways of doing things
tikanga Māori	customary law
tikanga rua	customary nest, a policy to create a Māori house to parliament
tinu rangatiratanga	exercise of paramount authority and power, sovereignty, autonomy
tirigiisuusiit	prohibition, obligation
tohunga	skilled person, artisan, expert, priest, wizard
tōohitu	court of appeal
tribu	tribe
tricolore	the national flag of France
tuiagaifo	king/queen of Alo
tuisigavé	king/queen of Sigavé
tuku whenua	allocation of land use rights
tunngararniq	fostering good spirit by being open, welcoming and inclusive
tūpuna	ancestor
tūpuna ara	ancestral river
turangawaewae	rights of a tribe and its individual members to land
tū tangata	people standing tall – policy
ulu	chairman of General Fono
umialik	group leader
urupā	burial place
usucaption	acquisition by prescription
uti posseditis	retaining possession of a thing; the pre-existing boundaries are honoured
utu	retaliation
vice versa	reciprocally

vis-à-vis	face to face
Volksgeist	spirit of the people
wāhi tapu	special, sacred places
wāhi whakahirahira	significant site
wairuatanga	spirituality
vaka	district
waka	canoe, confederation
waka umanga	a special corporation of local administration
wānanga	tradition
whakakotaki	shared traditions and aspirations
Whakakohitanga	The National Māori Congress
whakamana	information
whakapapa	genealogy, ancestry
Whakatataka Tuarua	Māori Health Action Plan
whānau	extended family group, family trust
whanaungatanga	kinship, relationship
whāngai	customary adoptions
whatakotahi	shared traditions, aspirations
whenua rangatira	unchallenged lands
whenua tōpū	tribal trust
whenua tupuna	ancestral land

# 1. Introduction

## 1.1. General introduction

*He aha tem ea nui o tea ao?*

*He tangata, he tangata, he tangata.*<sup>1</sup>

Indigenous rights are among the most challenging legal questions. Many indigenous groups have struggled for a long time to get their voices heard. A long history of encounter, its gains and losses, past wrongs and redress and an increased self-esteem of the indigenous peoples, together with the development of legal theory on the subject in international and municipal law have guaranteed that the question has remained at the forefront and that the Indigenous presence cannot be denied. A significant landmark has been the coming into force of the long-prepared United Nations' Declaration on the Rights of Indigenous Peoples on 13 September, 2007. It has been estimated that there are approximately 370 million indigenous people representing over 5,000 peoples in 70 countries, spread over all continents.<sup>2</sup> Their status and conditions differ from one to another - they live in independent countries which want to justify the existence of their unitary state and common culture.

The significance of nation states has changed remarkably during the last few decades. Globalisation, supranational structures and transmission of influences have reduced the significance of nation states. Despite this, they remain as proper subjects of international law. The indigenous peoples form a challenge to this pattern. What is their role in society? How can the unitary state's structure and state ideology cope with the first people with whom they share a common history, a people loaded with a heritage of past grievances, one searching for remedies and new ways to express particularism, a right to difference? A major tension between the Western liberal tradition and indigenous self-understanding has been the question on right to difference. The Western major political ideology has stressed the equality of all citizens. This has been also related in the past to the Western civilising mission: an idea that sees Indigenous cultures and communities as backward, or at most, as noble savages – an idea which has its reflections to this day. At the same time, the Indigenous communities have found new strength by expressing their specific nature as first peoples. They demand a right to difference and asymmetry of political and legal structures.

This comparative research has two major poles: the unitary states and the Indigenous peoples' place within them. I will compare two geographical theatres – the Americas and Oceania - and three different models of unitary state: France as a stereotypical, strict unitary state; New Zealand as a unitary state based on the union of two peoples; and Canada as a federal state. They are intertwined by colonial past, the interaction of British and French

---

1 "What is the most important thing in the world? It is people, people, people" (A Māori proverb).

2 Lâm (2000), Preface, p. xx; International Workgroup for Indigenous Affairs (IWGIA).

influence, modern encounter and globalisation. Despite the differences they have common denominators, foremost the challenge of unitary state. Law defines the place of the indigenous peoples in a unitary state. It has traditionally reflected imported settlers' laws and views. Therefore, the surface of legal system seems to be at first sight a monolith haven of positive law. But beyond the surface the image is different. The legal pluralism is out there. It could be defined as the existence of multiple legal systems in one geographical area. John Griffiths has defined that legal pluralism refers to a normative heterogeneity attendant on the fact that social action always takes place in the context of multiple, overlapping semi-autonomous social fields.<sup>3</sup> Even the customary, traditional, unorthodox structures of law coexist in unitary states with indigenous peoples. Important questions are: How much do the legislators tolerate this pluralism? Is it a durable solution for national-level challenges? How much there is legal import from third countries?

The key aspects to compare are, *first*, the study of change, which means historical understanding of legal plurality's development in society with focus on the Indigenous question. In this research there is a common historical determinant of colonial encounter, but instead of stressing a common theoretical tool or unifying goal, the emphasis is in the presumption of pluralism, how it appears, how it works, and what its place is in the change of legal and political system. The change is historical. I will introduce in chapter 1.2.4. the methodology of Fernand Braudel on different vertical levels of historical change (individual, social and geographical time), which find their equivalents from different aspects of legal change. Despite the differences between the legal systems to be compared, I will analyse the possible similarities in stages of legal change. These are encounter, assimilation/segregation, integration, reconstruction and urban stage. The direction of change is from unitary state to an asymmetric, plural state.

The *second* aspect is the forms of legal plurality and their relation to society. Legal plurality is approached here horizontally through different sectors and dimensions of society: through the plurality of law and justice; administration and self-determination, family law, education, media and social law; land, resources and environmental law; and culture, including identity, names, objects and symbols, language and religion. The purpose of this kind of classification will be described in chapter 1.5.

The *third* aspect is the contextuality, which also tries to find answers for why there is legal pluralism and legal change. The contextual aspects of history, geography, culture, religion and morality, and language all influence and shape the relation of law and society. I will return to this question in chapter 1.2.4.

The Indigenous peoples demand the right to difference.<sup>4</sup> If there is recognised difference, there is also *de jure* pluralism. In a unitary state it can signify difference in unity, an asymmetrical model of a unitary state. In this research asymmetry appears in three different meanings: as an opposite to the symmetric form of a unitary state with equal rights for all (as used in the French administrative law); as recognition of difference, but stressing the common goals and responsibilities of a unitary state (e.g. Canadian liberal political theory);

---

3 Griffiths (1986), p. 38.

4 "Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such". United Nations Declaration on the Rights of Indigenous peoples, Preamble.

and imbalance between traditional and dominant society (cultural theory). The fourth possibility is a dynamic model of co-existence, which does not take for granted the betterness of the European legal and political system.

There are generally two major possibilities for Indigenous peoples: to live inside a modern state or to secede. Many former colonies have since World War II chosen the latter option. Many Indigenous people, however, do not have this opportunity. They are often numerically small groups and most of them live as minorities in their traditional areas or are scattered all over the national territory, in growing numbers in urban centres. There is the question of how to cope with the tension of reality and aspirations. Therefore, another major question in this research is the evaluation of the development from a Eurocentric system towards a plural and asymmetric system. Is it a realistic option?

## 1.2. The Many Faces of Law

### 1.2.1. Comparison: Similarity or Difference?

I will compare here three different countries, legal systems and many different Indigenous realities. One could, however, expect that there are also common denominators to be compared. Two central theoretical problems of comparative law are the epistemological question of why to compare and the ontological question about what can be compared. One possible answer to these questions is a broad definition, which represents a macro law approach and approaches the sociology of law. Accordingly, comparative law looks at the world of law and the environment in which it lives; it provides knowledge about law as rules, law in context and law as culture, which allows an understanding of legal phenomena and their interactions in society. Understanding the phenomena around us necessitates the comparison. Viewed broadly, comparative law and sociology of law are committed to the single enterprise of understanding law in interaction with the society and context.<sup>5</sup>

The functional method has been the traditional approach of comparative law. The function is a common question to all compared systems, a conceptual construction that enables a meaningful and disciplined comparison of legal systems. A functional researcher has to become acquainted with the methods, practices and customs of a particular country so that an overall view of law can be formed as a reliable picture. This method developed since the first international conference of comparative law in Paris (1900) on the similarity of comparable legal institutions and the problems in different systems. In the background was the idea to show that all forms of law are in some sense similar. To be able to compare - according to this definition - there is a need of *tertium comparationis*, a common comparative denominator. The objects of comparison must share common characteristics which serve as a common determinator. Zweigert and Kötz excluded from functional comparison the strong moral and ethical aspects of social life - religion, historical tradition, cultural development or people's character. To them, the search for similarities included also some basic dangers: choosing a factual approach may find similarity in accidental divergencies of facts. The compared

---

5 Nelken, & Feest (2003), pp. 76; Örucü (2004), pp. 11, 19.

categories can also be imprecise and open to different interpretations. Zweigert and Kötz tried to yield this by developing a special syntax and vocabulary with concepts large enough to embrace the heterogeneous institutions. The solutions found from different legal systems had to be separated from their context and national voices to satisfy the special legal need.<sup>6</sup>

The prototype of this functional method, searching for similarities, has been rightly criticised from many directions. To mention some of them, Günter Frankenberg has attacked the neutral legal comparison as being one with no real basis: functionalism does not take enough notice of the concepts, legal techniques, professional ethics or politics, through which the dominant culture directs single researcher's work. Michaela Graziadei estimates that functionalism, working with models and a hypothesis, is clinical and external. Pierre Legrand has criticised functionalism's obsession with legal rules. His keyword is difference, instead of similarity. To him, the legal comparison is hermeneutic explanation and meditation, or critical metalanguage. Jaakko Husa has also strongly concentrated on similarity as a needless tool of the functional method, including methodological intolerance. An alternative is a moderate legal comparison, which supports the aim of strict comparability and gives explanations for revealed similarities and differences. It sees the legal comparison as a means of legal understanding and communication. The method of legal comparison is pluralistic, stressing deconstruction and difference and the significance of the *other*, that is, someone different from one's own experience. It is, therefore, evident that the pluralism of approaches enriches the research. There are many inter-related levels of comparison and most work has to proceed on a number of levels that cannot be kept artificially separate. The virtue of an emphasis on difference is that it points towards a richer comparative law, one aware of the way the world is changing. The legal comparison can open the door into holistic communication.<sup>7</sup>

### **1.2.2. Legal Positivism v. Legal Pluralism**

The traditional Indigenous world view and modern law seem at first sight to contradict each other in many ways. Modern law is predominantly positive law, based on intentional human action, which is continuously amendable. Western science and law have worked out the idea that it is possible to change the world and law. The roots of legal positivism can be traced to Thomas Aquinas, who first laid the principle of making law for all subjects. During the seventeenth and eighteenth centuries, legal centralism took the throne of law and brought forth the legal ideology of modernity. The nineteenth century evolutionism saw law and legal systems as the most advanced and civilised forms of normative ordering which was linked to growing ethnocentricity. While people had been subjectified as free individuals, the external nature was objectified as a mechanism obeying causal laws and the political community as a

---

6 Zweigert & Kötz (1998), pp. 39-40, 43-45; Legrand & Munday (2003), pp. 104-108; Örüçü (2004), pp. 21, 31; Örüçü & Nelken (2007), pp. 221-222.

7 Twining (2001), p. 178; Harding & Örüçü. (2002), p. 15; Husa (2003), pp. 7-10, 14-15, 17-20-24; Legrand & Munday (2003), p. 112; Örüçü & Nelken (2007), p. 147. Ralf Michaels describes the functional method as "both the mantra and the *bête noire* of contemporary comparative law". Cf. Michaels (2010), p. 340.



centralised state apparatus. Traditional law, closely tied up with moral and religious norms, was surpassed and subordinated by expressly enacted positive law.<sup>8</sup>

H.L.A. Hart summarised the basic features of positive law as follows: the laws are commands of human beings; there is no necessary link between law and morality; analysing the meaning of legal concepts is worth pursuing and differs from historical and sociological inquiries; the legal systems are closed logical systems which can be objectively analysed; and moral judgments cannot be established by rational arguments. To him, the regress of the chain of legal norms is closed by an ultimate rule of recognition. The fact and the statements possess a truth-value. An internal point of view includes the acceptance of the rule as a legitimate standard for behaviour. This forms a developed legal system of a health society. A similar expression used by John Rawls is a well-ordered society, which is designated to advance the good of its members and is effectively regulated by a public conception of justice.<sup>9</sup>

The modern legocentric (state-centred) model relies on law's exclusive attachment to the state as being dominant, technically superior and more powerful than the other forms of institutionalised ordering. Its normative claim is that the state has the sole and supreme authority in a given territory or space and a monopoly on the legitimate use of force. The law is always a product of official institutions. This rational-bureaucratic and instrumental, universal, secular and self-contained view has often excluded non-state law, e.g. indigenous and religious law, outside the definition of law. There are, however, strong arguments that all human societies have law in the sense of principles and processes. There are variations in law. Fritz von Benda-Beckmann mentions as morphological variations the following: the extent to which general legal cognitive and normative conceptions have been institutionalised and systematised; the extent of knowledge, interpretation and application of law; the basic underlying legitimisation of legal systems ranging from theoretical construction of Kelsen's *Grundnorm*; the extent to which legal rules are defined as mandatory; how the normative relation between rules and decision makers' relative autonomy towards general rules is expressed; the technology of transmission; social and geographical scope for which validity is asserted; and differences in substantive content.<sup>10</sup> All these dimensions indicate that the law is not a monolith.

The tendency to assert the uniformity and superiority of law is often fuelled by those in positions of power, reinforcing the positivism. This evolutionary programme has defined the limits of acceptable law. These approaches can be regarded as self-protection mechanisms on the part of Western secular, state-centred legal establishments.<sup>11</sup> Werner Menski estimates that mainstream legal communities do not see that the global harmony and understanding will only be achieved by greater tolerance of diversity. Much of the debate on globalisation is still inspired by the theme of a civilising mission in the name of universalism and human rights. It means a Western-focused process of development in a linear fashion, moving towards

---

8 Benda-Beckmann (2002), pp. 52-53; Tuori (2002), p. 11; Menski (2009), pp. 151-152; Husa (2011), p. 4; *Ius positivum* as a notion was in use in Europe at least since the twelfth century.

9 Hart (1997), pp. 19-20, 67, 268-272; Rawls (1971), p. 453; Menski (2009), pp. 151-152.

10 Durie (1996), p. 449; Benda-Beckmann (2002), pp. 49-50; Twining (2001), p. 52; Twining (2009), pp. 49, 507.

11 Friedman (1977), p. 1; Legrand & Munday (2003), p. 27-29, 31, 35; Tamahana (2008), pp. 375, 381, 410. According to J. Griffith, "Legal centralism is a myth, an ideal, a claim, an illusion."

global uniformity. The positivistic models of legal study fail to grapple with global socio-legal realities. It is problematic to talk about law as a phenomenon living a purely independent, meta-social life. The law is a social product. There is also under way the disengagement of law and state: legal pluralism is everywhere and it is multiplying - it is even inherent. Law cannot be viewed as solely emanating from the state: a deeper awareness of interlegality can help to understand how law functions in a pluralistic global context. Understanding the law requires multiple lenses and the analysis of law must be sensitive even to informal and unwritten concepts, that is, to reach a more rich and full picture of law in context.<sup>12</sup> Séan Patrick Donlan has also indicated that legal pluralism has strong roots even in European law. It was normative before the nineteenth century. This coexistence began to change during the eighteenth century, when the national legal systems began to strengthen as part of the unitary states' ideology. This was further supported by the rise of the positive law a century later. The customary and religious laws were banished to the private realm.<sup>13</sup>

Legal pluralism as a universal phenomenon can be applied to legal orders, systems, codes or other bodies of rules, sources of law and to single rules or principles. A legocentric legal pluralism is widely recognised, but often the concept is associated with non-state law. The early pioneers of holistic and culturally orientated interpretation of law were two Frenchmen, Jean Bodin and C.S. de Montesquieu. The historical school of the nineteenth century in England and Germany stressed the particularity of national law.<sup>14</sup> Later Eugen Ehrlich emphasised living law, whose sources of knowledge are above all modern legal documents, the direct observation of life, of trade and other activities, of habits and customs, and of all organisations – both legally acknowledged and overlooked or marginalised.<sup>15</sup>

The custom is the oldest form of law. It is mostly unwritten, but is related to human action and need to resolve disagreement, like in written law. It exists in intimate interdependence with social practice. Jeremy Webber sees as important the understanding of different normative orders although it is not useful to search for full agreement which is not possible.<sup>16</sup> Also for Werner Menski a peaceful co-existence in a globally interconnected world demands giving space and recognition to different visions. Despite the globalising effects, the plurality and diversity are going to prevail. Based on this plurality, the method must acknowledge a situation-specificity. A socio-legal focus with a pluralist orientation must challenge the predominance of authoritative law-making by rulers and nations-states. The legal system could be understood as a body of rules in specific contexts. Law itself is internally dynamic from the start. A universal definition of law is only feasible if it accounts for the plural phenomenon of law itself. In Menski's model the state positivism; society and socio-legal

---

12 Menski (2009), pp. 6, 11, 26, 83.

13 Donlan (2010), pp. 3, 10, 19-25.

14 Twining (2001), pp. 20, 225-226; Legrand & Munday (2003), pp. 83, 86-90, 94; Cotterrell (2006), p. 93; Twining (2009), p. 478. Norbert Rouland has estimated that there exist more than 10,000 distinct legal systems in the world. Cf. Joseph (2009), p. 83.

15 Ehrlich (1913), p. 399; Das lebende Recht ist das nicht in Rechtsätzen festlegende Recht, das aber doch das Leben beherrscht. Die Quellen seiner Erkenntnis sind vor allem die moderne Urkunde, aber auch die unmittelbare Beobachtung des Lebens, des Handels und Wandels, der Gewohnheiten und Gebräuche, dann aber alles Verbände sowohl der rechtlich anerkannten als auch der von dem Rechte übersehenen und übergangenen, ja sogar der rechtlich mißbilligten. Cf. Ehrlich (1913), p. 399.

16 Twining (2000), p. 139; Webber (2009), pp. 581-582, 584, 623-624.

approaches; and the religion, ethics and morality with natural law features form together a triangle of law-making sources. Legal pluralism signifies all scenarios and conflict situations where none of the three above-mentioned major law-making sources rules absolutely. The laws of the world comprise, however, an enormous plurality of triangles in time and space. Foreign legal transplants and ethnic implants are not located in the space of the triangle, but are closely attached to it from the outside and strategically implanted at a particular point in the periphery. To achieve a more profound, globally conscious, plurality-focused understanding and approach, we have to look at the internally complex structures of law as a whole and the constantly changing plurality of interactions of various plural elements across time and space in individual situations.<sup>17</sup>

### 1.2.3. *Mixing Law: Family Tree, Legal Culture and Tradition*

The idea about legal families is partly based on Max Weber's neo-Kantian heritage. The reification of rigid categorisation and taxonomy in the traditional family tree model of legal cultures is, however, today outmoded and strongly West-orientated. In recent decades there have been added the legal cultures of great world religions and socialist law. The last-mentioned can be today regarded as a relic. This taxonomy gives a too narrow picture of legal systems. The whole world does not follow one rule system, language, culture or law: the reality is more pluralistic. All around the world, different legal cultures have developed their own ways of law-talk. All Eurocentric comparatists may fall into the legal families trap because they tell only about legal systems' general style and method.<sup>18</sup>

The using of the legal cultures' concept means a wish to escape from mere "law in books" and a hope to place law in a wider society of cultural contexts. It is an integrally methodical framework in the general methodology of the comparative study of law, which is characteristically restricted to a certain system or geographical area. Sociologically inclined scholars insist that the surrounding society shapes and reshapes law.<sup>19</sup> For Lawrence Friedman social forces are constantly at work on law. A legal culture is rooted in general culture. It points to differences embedded in larger networks of social structure and culture which constitute and reveal the place of law in society.<sup>20</sup> John Bell has defined the legal culture as "a configuration of values, concepts, practices and institutions, through which individuals interpret and apply legal norms."<sup>21</sup> According to Mark Van Hoecke and Mark Warrington, to distinguish legal systems one must locate them and their cultures within the broader context of societal culture to which they belong.<sup>22</sup> Roger Cotterrell sees that the concept of legal culture stretches on the one hand towards broad comparison and the recognition of wide historical tendencies and movements, and on the other, recognise familiar themes of legal pluralism as understood in its social scientific sense. Instead of legal culture he favours the concept of

---

17 Menski (2009), pp. 4-5, 15-16, 184, 186, 188.

18 Riles (2001), pp.54-55; Harding (2002), p. 49; Menski (2009), pp. 3, 129.

19 Nelken & Feest (2003), pp. 8-25; Husa (2012), pp. 5, 8.

20 Friedman (1977), p. 15.

21 Bell (1995), p. 70.

22 Hoecke & Warrington (1998), p. 498.

legal ideology, which is to him an overlay of ideas, beliefs, values and attitudes embedded in, expressed through and shaped in practice, and tied in a specific way to legal doctrine.<sup>23</sup>

In comparative research the legal culture is understood and studied in a broader context than positive law or the extended socio-legal framework. There is a need to ask what shapes the ideas understood as legal culture. A comparatist has to concentrate on problems of meaning, identity and tradition, and in this way offer a particular focus on legal discourse. A neutral standpoint between legal cultures can be a problem: there is a need to identification by difference. Also Ronald Dworkin insists that interpretive theories are by their nature addressed to a particular legal culture, generally to a culture to what their authors belong. The metaphors, narratives and myths are a glue of social and cultural life, which knit together different domains where concepts and relations exist and provide an overarching framework guide to interpretation. The law is an excellent storehouse of stories about us in ways that build reality.<sup>24</sup>

An alternative concept of speaking about legal reality is legal tradition. John Merryman has introduced an alternative notion of legal tradition as “a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organisation and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught”.<sup>25</sup> Most traditions are not closed but interact between each other. While Merryman’s definition is closer to socio-legal studies, Patrick H. Glenn combines history-sensitive comparative law with a heavy dose of legal anthropology. For him the concept of tradition, a body of self-conscious information, describes better the temporal connection between the past and present. A tradition allows one to step outside of the system, still remaining within law. It is a process of human communication, involving an extension of the past to present. In many cultures this takes place by spoken word, recalled by human memory. It is the way the Indigenous law is expressed, although the Western, written law has the advantage of physical duration.<sup>26</sup>

The Indigenous peoples have always followed their own customary means of identity where kinship relations, tradition and historic continuity are essential. There does not exist, however, a pure form of Indigenous culture or tradition: many Indigenous peoples have suffered from radical discontinuity. The massive European settlement has been debilitating for Indigenous law whose identity practices are multilayered, open-textured and affected by the experience of colonialism. The influence of traditional community on law is at its strongest when other types of community are least involved. Law’s relation to traditional community is focused on providing basic conditions for co-existence. The most important indicator of the

---

23 Cotterrell (2006), pp. 84, 88-89;

24 Rosen (2006), pp. xii-xiii, 9, 132; Twining (2001), p. 40; Nelken & Feest (2003), pp. 9, 28; Webber (2009), p. 614; Husa (2012), p. 10.

25 Merryman, (1985), p. 2.

26 Glenn (2010), pp. 5-13. Among the other definitions of legal traditions could be mentioned that of Ghislaine Otis, according to which it is a living heritage that organises the consciences, thoughts and practices of tradition’s contemporary practioners. Cf. *Indigenous Legal Traditions* (2007), p. 136. Jaakko Husa has indicated that the notions of legal culture and legal tradition are epistemologically not so different after all. Similarly, a French law dictionary sees the legal tradition as just one component of legal culture, covering all law-related beliefs, doctrines, practices and techniques that have current authority and legitimacy based on their real or alleged transmission from the past. Cf. Husa (2012), pp. 11-12; Arnaud (1993), p. 619.

interdependent character of Indigenous identity today is the state. The Indigenous peoples' relation to Western tradition is within the states complex and variable. The legal exchange can best succeed, if found, in a guaranteed middle-ground. The interaction of law and custom, and status and identity is part of the irreparable historical experience. Part of a state's crisis is its losing grip on indigenous peoples. The non-European legal systems must be studied in their own right and in the spirit of respect for plurality - the hegemonistic claims of official law are bound to fail in social reality. A traditional society offers a challenge to Western thought with static forms of social order by being creative and dynamic. In legal tradition, the information from the past tells us which particular characteristics are fundamental in defining social identity. Each generation increases the scope of information. Identities represent the current preoccupation in the world. They are interrelated, receiving information from each other and forming an epistemic community in a network. Even ideas of nationality or statehood are rooted in this model to a particular tradition.<sup>27</sup>

The Indigenous law, or chthonic legal tradition (Glenn), is the oldest "legal family/tradition" whose most particular feature is the orality of form and substance. Indigenous law rejects formality in the expression. The Indigenous peoples use oral traditions to chronicle important information, which is stored and shared through a literacy that treasures memory and the spoken word. The transmission of the oral tradition by remembering is a dynamic, daily process. It allows for a constant recreation of their systems of laws and their reinterpretation meets the contemporary needs. The oral custom may remain consistent over time and be reliable for explaining the background and can be treated as a different intellectual exercise from conventional historical work. However, some critics hold that memory can be unreliable and oral custom is based on recycled memory entrances potential to error and changeable over time. The dispute resolution is usually informal and the chiefs and councils rule through consensus, as an expression of a link with past generations.<sup>28</sup>

The Indigenous law has also sacred and aesthetic dimension. All indigenous cultures and societies have creation stories that remind them of origins and belonging to land by telling of the ancient law of Indigenous groups which is a covenant or gift of Creator. The pantheistic religiosity is holistic feature of Indigenous society. The worldview is built on circles of family, tribe/clan, nation and universe where the communal character of society, social harmony and web of beliefs are important. The law is an ever-present, although almost imperceptible, social glue, inextricably interwoven with all community's beliefs.<sup>29</sup>

Law is on the move. Many complex processes have increased interaction and interdependence across national and cultural boundaries, often operating at sub-global levels. This co-existence means many different types of interrelations and social practices. At the substantive level all legal systems are mixed. Global migration patterns and multiple exchanges

---

27 Final Report of the Royal Commission on Aboriginal Peoples (RCAP, 1995), Vol. 4, p.454; McHugh (2004), pp. 219-221; Menski (2009), p. 17, 65; Webber (2009), p. 609; Glenn (2010), pp. 12-15, 34-45, 54-55, 86-90.

28 Borrows (2002), pp. 8-11; Glenn (2010), pp. 62-63. Chthonic comes from the Greek χθόν (land). The concept is also widely used in the French language: "*autochtone*... qui est issu du sol même où il habite, qui n'est pas venu par immigration ou n'est pas de passage". Rey-Debove, Josette & Rey, Alain, ed. (2007), p. 182.

29 Imai & Logan & Sherin (1999), pp. 120-121, 129; Little Bear & Boldt & Long (1984), pp. 5-8; Borrows (2002), pp. 14-15; Webber (2009), p. 614; Glenn (2010), pp. 63-67.

have over time created transnational, inherently plural, multiethnic and multicultural legal environments. While Lawrence Friedman sees the borrowing of other people's law as a just method of speeding up the process of finding legal solutions to similar problems, Alan Watson stands for autonomy of law from other social phenomena. The latter's argument is that a large proportion of law – an independent authority – in any society is based on legal transplants, transmitted by lawyers, and owe its form and content to its origins in other times and places. Both stress the need for legal transfers to be somehow domesticated to fit into their new context. Pierre Legrand, who is against the idea of legal transplants, sees that the best that can be achieved is to give people a taste of otherness.<sup>30</sup>

Transmigration of law has followed the paths of colonisation, settlement, occupation, expansion and encounter. These processes have included imposition, reception, imposed reception, co-ordinated parallel development, infiltration, imitation and variations of these. Structure and substance can be transposed more easily than legal cultures which are part of socio-culture. Today many legal systems in both ordinary and extraordinary places are in transition. Indigenous presence is such an extraordinary place, not covered by conventional comparative law. Even the indigenous peoples have formed transnational linkages. When elements from different internal logics come together, the usual outcome is a mixed or mixing system.<sup>31</sup>

#### **1.2.4. Contextual Aspects**

According to Ernst Rabel, the information about foreign legal systems is only valuable in so far as it is contextualised. The law operates on the basis of social reality, and therefore, the context is of fundamental importance for the understanding of legal sources.<sup>32</sup> The contextual aspects approached here are history, geography, culture, religion and morality, and language.

*History*, the past and temporal aspect, is always present when speaking about society and its law. The law is part of previous social and economic order. By including this temporal framework the national legislator aims at the future, looking for desired social, political and economic change. There is, at the same time, a danger of idealising the past: it cannot be directly coped with by the present conditions. The historical events and decisions are fundamentally unique, even though they strongly influence the later solutions and phenomena. In the state-indigenous relations history is strongly present. It is used continuously to explain and to justify legal acts and decisions or demands of redress, and to ask questions about the Indigenous self-understanding.

History has the element of change. Legal change can involve a wide variety of aspects of law which may depend on social movements, revolutions, evolutions or great individuals.

---

30 Watson, (1993), pp. 89-90, 297; Legrand & Munday (2003), pp. 437, 440; Nelken & Frees (2003), pp. 12-13, 22, 36, 40; Menski (2009), pp. 5, 51; Twining (2009), pp. 504-505. Legrand's idea has echos of Montesquieu, who believed that the close relationship between law and society are themselves similar. Watson sees that Montesquieu overestimated the extent to which environmental factors hinder legal borrowing.

31 Twining (2001), p. 240; Harding & Örüçü (2002), p. 13; Legrand and Munday (2003), pp. 468, 472, 489; Örüçü (2004), pp. 156-157.

32 Riles (2001), p. 199; Hoecke (2004), p. 1.

History is touched by different agents of change: among these bearers of change are the states, national, international and transnational bodies, non-governmental organisations, economic actors and individuals. The law is reshaped by change but at the same time it also plays a part in constituting, filtering and changing the balance of forces in society. Different local patterns have been influenced by various historical impacts of exchange.<sup>33</sup>

According to Fernand Braudel time obeys different speeds. It is related to human action, to its length and pace. Braudel employs the terms individual (*temps court/histoire traditionnelle*), social (*conjuncture/histoire lentement rythmée*) and geographical time (*longue durée/histoire lente*). Individual time measures agitation of surface, human action on which the actor is immediately conscious; social time determines the rhythm of action on which the individuals are not necessarily aware and which is related to economies, states and societies; while the geographical time has dimensions which permit in time and place essential comparisons, experimentations and experiences according to a preconceived aim. This kind of history is half-motionless (*demi-immobile*). The underlying structures of different civilisations cannot be changed without fundamental change of tradition. The retrospective reality presents itself as a laboratory of experiences, of comparisons between places and times, capable of replace us to the perspective of continuity, rules of tendency and repetitions.<sup>34</sup>

When speaking about time, we must take into consideration its different meanings. The Indigenous cultures do not traditionally share the Western, linear time-concept. The Indigenous notion of time is an envelope, an environment, which surrounds us as we live. For many - if not all - Indigenous peoples time stands still: there is no past and no future, no distinction between the dead, the living and yet to be born. A conservationist indigenous tradition is that of inter-generational equity. But even there is a change: from life to death, from summer to winter. The world dies every winter: yet it must be made to re-live and all have an obligation to make it re-live. The world must be re-cycled and continue to support all the beings who seek to live within it. The nature of tradition controls the perception of change where the past is brought to the present.<sup>35</sup>

*Geography* is another important contextual determinant since Montesquieu. The process of legal encounter takes place in geographically confined social space. For Roger Cotterrell geographical locality is significant as a plausible identifier of community where it identifies a high intensity of interaction within the population and developed communication networks.<sup>36</sup> Also William Twining defines different levels of law in geographical means: the world-wide aspects of law are global, international, regional or transnational; inside the states can be diversified inter-communal, territorial state, sub-state or religious law or non-state law. Another dimension is the mental geography: the legal orders are made up of complexes of social relations, ideas, ideologies, norms, concepts, institutions, people, techniques and traditions.<sup>37</sup>

For Indigenous peoples the territory and its ecology are dynamic and holistic. They describe the way societies have existed and become to experience their life and challenges.

---

33 Legrand and Munday (2003), p. 498; Nelken & Feest (2003), pp. 12-14, 21-24.

34 Braudel (1979), p. 13; Braudel (1980), pp. 3-4, 21-33; Braudel (1990), pp. 16-17, 266.

35 Glenn (2010), pp. 79-81.

36 Cotterrell (2006), p. 70.

37 Twining (2001), pp. 139, 172.

This holistic structure is a circle which demonstrates the interconnected life forces. The Indigenous peoples are intertwined in a complex network of relationships.<sup>38</sup> They live in two kinds of environment: some of them have encountered early the European settlers or have lived in a region with good opportunities for settlement and farming, while the other nations have been isolated by sea or arctic climate. The knowledge of place is complimentary to its forces. In Twining's map the indigenous law and law on indigenous peoples can be found from all geographical levels.

A third contextual element is *culture*. The nineteenth century historical school in Germany proclaimed the deep embeddedness of law in culture. For von Savigny law was a summation of prior binding rules or *Volksgeist*. The law was a symbol of cultural inheritance where custom played a significant role in the formation of law. Also in English common law the law was portrayed as dependent on inherited cultural conditions. In modern times, Pierre Legrand has spoken about the importance of legal culture as *mentalité* informing the law, and in which legal practices and doctrines exist and are given meaning.<sup>39</sup>

Culture is a difficult concept to open as it is broad, all-embracing, vague and elusive. Raymond Williams has distinguished the following: a developed state of mind, processes of development, and the means (or outcomes) of these processes. Between the traditional and dominant society there is always some form of cultural asymmetry. Masaji Chiba has criticised the Western legal analysis of overlooking socio-cultural factors in their interaction with law, therefore becoming too legocentric. The whole structure of law as an aspect of culture should include all regulations which the people observe as law in their cultural tradition, including the value systems. The cultural origins of law and its continuing interlinkedness with state may be viewed as another form of reception of law. The social world divides up into particular and distinct cultures. An individual needs cultural meanings to understand choices in the context which to him or her makes sense. Therefore, multiculturalism may open new, creative and alternative ways of thinking. Law is inextricably intertwined in culture, specific to a particular society and interlinked at many levels and most of its concepts are culture-bound. Law lives in plurality which is not completely of its own making - it is about plurality of voices and values, negotiations of difference and diversity. There the comparative law may reduce our ignorance of non-Western legal cultures and traditions.<sup>40</sup>

In another stage, the culture presses its demand for consideration as a concept in political philosophy. There are efforts to consider the implications of multiculturalism for Liberalism. An idea that culture is brought explicitly into legal interpretation is a reversal of the law dominating culture. One dimension of law *vis-à-vis* culture is law's stewardship of culture. Protection of the heritage of a distinctive culture can be considered as a part of the collective cultural wealth of society as a whole. As a matter of tradition the culture is expressed in social relations of community, themselves traditional in character. Culture can also embrace

---

38 Imai & Logan & Sherin (1999), p. 156.

39 Sheleff (2000), p. 4; Cotterrell (2006), p. 103.

40 Williams (1983), pp. 11, 100; Chiba (1986), p. 4; Kymlicka (1996b), pp. 105, 108, 112; Rosen (2006), pp. 6-7, 23; Örüçü & Nelken (2007), pp. 71-72, 194-195; Menski (2009), p. 605; Twining (2009), pp. 483-484. "Culture appears to be a present, ill-defined, all-inclusive system, which may present some advantages over the notion of system, but again appears as a particularly western construction which in no way advances any idea of normativity". Cf. Glenn (2010), p. 163.



an affective bond: a sense of attachment, which is diffused and often evoked symbolically in affective social relations of community. The paradox of culture in relation to law is that it can be in conflict with itself: the different types of social relations of community may conflict with each other.<sup>41</sup>

*Religion and morality* are usually excluded outside the scope of positive law. The Age of Enlightenment brought up modern rationalism, which saw religion as primitive and pre-critical thinking, as a childhood thought. Émile Durkheim, however, argued in *Des formes élémentaires de la vie religieuse* (1912) that religion is too powerful a form of culture to be put beyond the scope of science or to disregard. He explained religion as a real system of power, authority and meaning. He wrote that rituals' collective nature creates a state of consciousness which transcends the bounds of individual and private experience. Ritual time renews the foundations of society and regenerates the life of its beliefs.<sup>42</sup>

Moral precepts find their voice in different legal systems. In some cultures law represents a form of morality, in others it backs up morality or undermines morality. Shared value or belief can create a strong social bond, which provides a basis as an identifier of community. Together with religion they have a strong influence in many non-European legal cultures. Even Western legal theory has never been entirely removed from spiritual and the religious and is culture-specific in its own way. The world is characterised by a diversity of deep-rooted belief systems, where the religious cultures aims to make people good through law. But manifestations of religion may also cause remarkable upsets. Linked to symbolic ethnicity, the symbolic religion has become a political tool which affects the identity construction of the whole community. A group or society in terms of community of belief may resist significant reshaping of law. In indigenous society the sacred as the fundamental core of society guarantees that the existence does not change. Religion is constantly present. All creatures, as part of nature, enjoy its sanctity. The natural world is sacred and, therefore, there is no secular world.<sup>43</sup>

*Language* is an essential part of law. The legal texts differ significantly from general texts. Legal language's most important functions are achieving justice, transmitting of legal messages and reinforcing the authority of law. Written language is the major form of enforcing positive law in society but its use as legal language differs in each country. A good example is case law: in common law countries court decisions are broad, often revealing the background of a decision in detail. French case law is very different: it only lists the legislation referred to and a statement of reason in a fixed form, without forgetting the aesthetic value of the language. The transmitting of legal messages can have interferences: they may be incomplete or closed, may not reach the public, may be misunderstood, or maybe different realities do not meet adequately. Further, a language is not neutral as there are specific hermeneutics. Languages are sign specific and reflect the cultural environment of their birth.<sup>44</sup> Written language is not the only form of legal expression. Although the indigenous oral tradition can be seen as poorer in expression, leaving a gap for understanding, the speech act is often reinforced by a semiotic act where letters, pictures, signs and sounds have legal aspects. The language

---

41 Cotterrell (2006), pp. 99-100, 102, 104.

42 Paden, (1992), pp. 16, 29-34.

43 Rosen (2006), p. 23; Menski (2009), pp. 131, 606; Glenn (2010), pp. 77-78, 82.

44 Mattila, (2006), pp. 31, 33-35, 39-40, 46-48; Pozzo and Jacometti (2006), p. 69.

is often connected to religious and ritual functions. The traditional Indigenous way to use the language is to memorise different rules.<sup>45</sup> This kind of memorising, the oral witness of customary law, has only recently been given value in Western societies.

The two most wide spread legal languages in the world are English and French. Legal English is a global language, which has adopted concepts from numerous languages and cultures. Historically it is a mixture of old Anglo-Saxon, Scandinavian, Latin and French elements in terminology. Connected to common law legal culture, it is not based solely on written statute law and is more open to external influences. Due to global use, the legal English concepts do not always have the same meaning everywhere and for historical reasons, the legal language includes language rituals and repetition. Case law often makes English legal language wordy. French, on the other hand, is based on Latin, which together with Greek has strongly influenced its vocabulary. French has developed through a long struggle as public legal language. As a diplomatic language it has influenced the other legal languages, including English. French legal texts are constructed in a logical and methodical way. They are written to lay down broad maxims of law but include also certain petrified phrases and stylistic measures like the drop of articles and inversion. Modern legal French has aimed to modernise legal language by clarification of texts and the struggle against the anglicisms.<sup>46</sup>

The major challenges between the English and French legal languages are based on different philosophical and conceptual approaches. Common law has an inductive and pragmatic approach, while French civil law derives rules and dogmas from broad principles in an ordered and methodological manner. In court decisions is used indirect speech. Due to the Norman conquest English and French plenty of similar vocabulary, but in legal language the expressions are *faux amis*, not always compatible. They demand contextual and semantic information on legal registers and their places in respective legal cultures. Polysemy means that there are several meanings, and on the other hand, there are concepts which exist only in the other language.<sup>47</sup> Further, there are different types of legal English or French: there are differences between Canada and India, and Canada and France. Also Indigenous languages are increasingly used as legal languages, among them Māori and Inuktitut. Typical to both languages is the ambiguity of words, which stresses the importance of context, history, culture and religion. There is also uncertainty in orthography.

### 1.3. Legal Environment

#### 1.3.1. France: Domain of Civil Law

The royal ordonnances of Louis XIV were the first indications of a centrally directed, national law (*droit commun*) in Europe that was written in a national language. The regional customs were written down. The law expanded to the extent of the creative power. The codification of private law under Napoléon I (1804) was the world's first national, systemic and rational

---

45 Cf. Borrow (2010), pp. 13-15, 24-27.

46 Mattila, (2006), pp. 207-210, 221-238, 244.

47 Montesquieu (1977), book xxix, s. 16; Cairns & McKeon (1998), pp. 192-197. Steiner (2002), p. 16; Legrand & Munday (2003), pp. 158, 164-166; Pozzo & Jacometti (2006), p. 72.

codification of law whose influence has been world-wide. The distinctiveness of French civil law lies in its values, legal procedure, form of legal rules, and attitude to law (*mentalité*). Three distinct features of French law are the importance of codification, the statement of rules in general terms and the relative unimportance of judicial decisions. French law is largely based on legislation which provides a coherent and self-contained framework for the solution of contemporary social problems. On the other hand, French administrative law lacks codification in the sense of a restatement of general principles, and is a case-based system, operating in similar ways to common law.<sup>48</sup>

French law makes a distinction between formal sources and influential sources of law. Formal sources are authorities which a lawyer is obliged to consider as binding statements of law: the Constitution, European Union law, international treaties, legislation, custom and the general principles of law. The non-binding interpretation and statement of law includes case law (*jurisprudence*) and legal writing (*doctrine*). The distinction between these two groups of sources lives in their constitutional status. The legislation is an expression of the general will, because the legal sovereignty resides in the people which have approved by referendum the Constitution and the amendments to the sovereignty of France. Its representatives in Parliament enact laws and ratify treaties. The executive can also enact regulations by the authority of the Constitution or the parliament. Customary law has geographically limited significance while the general principles of law are values which underlie enacted law. Behind the constitutional texts there are conventions - rules of constitutional morality - that establish the rights and duties of political actors. They have often filled the gaps in the written Constitution. Many important constitutional obligations in France are conventional and are enforced by political legal pressures. The provisions on fundamental rights mentioned in the preamble of the Constitution have also a conventional background. All obligatory sources of law have their origin in the direct or indirect decisions of the people, which confer on them a legitimate authority as sources of law. Outside this general will, the non-binding sources of law are merely legal professionals' views, but have still an influential role in shaping the understanding of law.<sup>49</sup>

France has had 15 constitutions since 1791. The Constitution of 1958 was born as an answer to the problems of the Fourth Republic. The principal interest of drafters was to create a workable set of institutions. Before 1958 there were only three levels of constitutional sources: written constitution, laws and administrative texts implementing the acts. The constitutional reform of 1958 created a more complex hierarchy where law lost its primacy and its domain of intervention was reduced drastically. The authority of Constitution was strengthened by the creation of constitutional control. Because France belongs to the European Union, the international treaties and European legislation were later given supremacy over ordinary statutes but the Constitution remained paramount and must be amended if the European law is in contradiction with it. The republic participates in the European Union and exercises its competences according to the treaties which must be ratified by the president or by a law

---

48 Bell & Boyron & Whittaker (1998), pp. 1, 5, 7-8; Glenn (2010), pp. 143-146.

49 Bell & Boyron & Whittaker (1998), p. 13; Bell (2001), pp. 58-61.

of the parliament. The Constitution accepts a limitation of sovereignty but the condition of reciprocity reduces the supremacy of European law *vis-à-vis* municipal law.<sup>50</sup>

The laws are divided into the following: *loi organique*, which supplement the Constitution on matters related to the organisation of public powers; *loi référendaire*, which authorise a referendum; *ordonnance*, which is the executive's regulation; and *loi ordinaire*, an ordinary law. Large parts of French legislation have been codified since 1804. The constitutional reform of 1958 created a permanent divide between the executive domain and the legislative domain. Article 34 enumerates a long list of matters on which Parliament enact laws, amended by decrees (*décret*), but also limits the scope of parliamentary legislation in order to free the government to take charge of the direction of the nation without being bound by detailed instructions from the parliament. As continuation to Third Republic's decree-laws, the Constitution delegates to the executive legislative powers to give *ordonnance*. The government needs the parliament to validate its statutes.<sup>51</sup> New Caledonia and French Polynesia have so-called laws of the country (*loi du pays*), which are approached more in detail later.

In 1977 the Constitutional Council (*Conseil constitutionnel*) defined *bloc de constitutionnalité*, that is, all constitutional norms which the Constitutional Council takes into account when reviewing the constitutionality of laws. *Bloc* includes the Constitution of 1958; the Declaration of the Rights of Man and of the Citizen of 1789 which contain a list of classical liberal principles on the freedom of the individual, property and equality; the Preamble of the 1946 Constitution, which contains social and economic rights; and since 2005, the Charter of the Environment. The *bloc de constitutionnalité* affirms respect for the fundamental principles recognised by the laws of the republic.<sup>52</sup>

In France the power is divided between the President, Prime Minister, bicameral Parliament, courts and Constitutional Council. The French system could be defined as semi-presidential. The presidency has, however, developed the most central political actor in France who guarantees the national interests, supervises that the Constitution is respected, and secures proper operation of the government. The president's duties also include appointments and large emergency powers. Besides the strong President the Prime Minister has a secondary role: he/she directs the operations of the government, is responsible for national defence, ensure execution of laws, and exercises regulatory and appointment powers besides the President. The Government is chosen by the President, who is entitled to preside over its meetings. The

50 Constitution (1958), art. 5, 8, 16, 54-55, 88-1, 88-2.; CE (1998), *Sarran, Levacher et autres*; CC, *Décision no 2004-496 DC* du 10 juin 2004; Bell (2001), pp. 15-16; Hamon & Troper (2007), pp. 448-464, 761, 767-770; Marrani (2013), pp. 75-84; The Fourth Republic's Constitution wanted to prevent the return to the decree-laws of the pre-war period; Conseil Constitutionnel's decision led in 1992 to a change in the Constitution due to the Maastricht Treaty.

51 Constitution (1958), art. 34, 37-38; Cairns & Keon (1998), p. 15; Bell (2001), pp. 16-17; Steiner (2002), p. 11.

52 CC, *Décision no. 77-88 DC* du 23 November 1977. The Constitutional Council has referred since the mid-1970s to principles of constitutional value, which include the values of the republic; the equality of all citizens before law; the right to vote; the right to organise political parties; the right to personal status; and the collective rights of local government. The Declaration of 1789 names as rights of man: liberty, property, security, resistance to oppression and the right of equality. The preamble of 1946 contains provisions on the equality of sexes and equal access to education and training. Cf. *Déclaration des droits de l'homme et du citoyen de 1789* (DDHC), art. 2-3, 6, 13; Constitution (1946), *Préambule*, § 3, 12-13; Constitution (1958), art. 3 al. 4, 4, 72-75

Government is responsible to the Parliament which has two houses, the National Assembly and the Senate. There are 577 deputies elected for a five-year term and 346 senators for a six-year term representing both the Metropolitan and Overseas France.<sup>53</sup>

In France there exists a parallel system of judicial and administrative hierarchies of courts based on the separation of powers. During *ancien régime* there were 15 local *parlements*, which interpreted the local customary law. The revolution introduced the separation of powers and sought to prevent the judiciary being able to obstruct the national parliament. Today, there are judicial bodies with elements of a supreme court: *Cour de cassation*, *Conseil d'Etat* and the Constitutional Council (*Conseil constitutionnelle*). *Cour de cassation* quashes (*casser*) the rulings of the courts of appeal for error of law in private law cases and ensures that the law is interpreted in a uniform way throughout the country. It is a *jurisdiction de renvoi*, which means that it must hear the entire case again both as to the facts and to the law. *Conseil d'Etat* was established as Royal Council in 1319. Being originally a consultative body, it became an administrative court in 1799. Today it is a large administrative organ where the sixth section (*section contentieuse*), forms the proper court and the investigation is made in the subsections. *Conseil d'Etat* has three major functions: to work as a court of first instance when dealing with the decisions of the national government and the conformity of administrative decisions with the Constitution; as a court of appeal for the questions of local elections; and as a court of cassation, which is the most common form of its function. In the most important cases the *Conseil d'Etat* imposes its own decisions or opinions (*régler l'affaire au fond*).<sup>54</sup>

The Constitutional Council was created in 1958 as an additional mechanism to ensure a strong executive by keeping parliament within its constitutional role. Its role has, however, increased significantly. In 1974, 60 deputies or senators were allowed to appeal to the council, but an even more significant change took place in 2008, when the constitutional reform granted the council power to exercise *a posteriori* constitutional review. The council is an election court, returning officer and advisor of the president. It gives opinions on the constitutionality of treaties, examines the constitutionality of organic laws and parliamentary standing orders, and polices the boundaries of the legislative competences of Parliament and executive. It has to decide whether certain freedoms are fundamental in the constitutional sense, the extent of the freedoms, and how far the existence of a freedom or right limits the scope of legislation. A provision declared unconstitutional by the Council cannot be promulgated or implemented.<sup>55</sup>

---

53 Constitution (1958), art. 5, 8, 24, 49; Hamon & Troper (2007), pp. 628-629, 645-647, 665-668; Marrani (2013), pp. 13-24; The government has, however, freedom in weighing its confidence before the parliament (art. 49 al. 1).

54 Constitution de l'An VIII (1799), art. 52; Loi du 27 novembre, 1790; Vernier (1993), pp. 72-73; Cairns & McKeon (1998), pp. 37-41; Bell (2001), pp. 30-32; Le Conseil d'Etat de l'an huit à nos jours (1999), p. 12. *Cour de Cassation* was created as *Tribunal de Cassation* during the revolution. It ensured that the courts did not deviate from the text of the laws.

55 Constitution (1958), art. 34 al. 7, 62; Loi constitutionnelle no. 2008-724 du 23 juillet 2008, art. 29; Bell (2001), pp. 30-32; Vernier (1993), pp. 72-73; Cairns & McKeon (1998), pp. 37-41; Harmon & Troper (2007), pp. 824-862; Fabbri (2008), pp. 1303-1304. The new article 61-1 has created in French constitutional law *exception de inconstitutionnalité*. According to a "double filter mechanism" only *Cour de Cassation* and *Conseil d'Etat* may apply the Constitutional Council on law's constitutionality.

Case law is non-binding but influential source of law. Every decision must be based on legislation: a precedent only has value in the light of the formal source of law. In the absence of clear legislation, a decision may be based on the principles of equity, reason, justice or tradition. The French law reasons from the rights: if there is a right, a remedy can be found. The legal structure is described in terms of concepts and the way fact situations fit into concepts. The Code of Civil Procedure demands that each judgment must have five elements: basic information on the decision, a list of sources, reasons of arguments, actual decision, and executive formula. The decisions are generally short with references to sources used and scarce background information. In terms of procedure the French legal tradition is formalist, but allows a degree of latitude in the characterisation of facts and the interpretation of rules in individual cases. Judges have a significant authority and the highest courts have recently acquired the role of giving advisory rulings and own legal doctrine on points of law to the lower courts. Although there are gaps in the legislation, the law sets limits to the judges by prohibiting them to make regulatory decisions.<sup>56</sup>

On the other hand, since administrative law was neither codified nor legislated, Conseil d'Etat as the supreme administrative court has actively created a backbone for the development of rules governing the action of the administration. The courts' rules and techniques are based on judicial practice, legal writing and customary law. The main form of interpretation is textual. The Constitutional Council determines the correct meaning of the right or liberty in disputed law by using three major techniques of interpretation: a limiting interpretation, where the council removes juridical effect from disputable legislative provisions or exclude from possible interpretations those that would make it contradict the Constitution; a constructive interpretation, where the council adds provisions to the law that are designed to make it consistent with the Constitution or make a legal clause convey more meaning to the text; and a guideline interpretation, where the council defines and specifies the authorities responsible for implementing the law and the modes of application necessary for conformity with the Constitution.<sup>57</sup>

### **1.3.2. *New Zealand: Britain Overseas***

New Zealand is a unitary constitutional monarchy with one of the purest forms of Westminster-style parliamentary sovereignty. It was first established as a political and legal entity in 1840, when the representatives of the British Crown and a number of Māori chiefs signed the Treaty of Waitangi. The treaty gave the British Crown sovereignty over the islands in exchange for certain guarantees. New Zealand was for a long time dependent on Britain:

---

56 Code Civil (2003), art. 5; Code de procedure civile, art. 455. McCormick & Summers (1997), p. 103; Bell & Boyron & Whittaker (1998), pp. 14-15. Les fonctions judiciaires sont distinctes et demeurent toujours séparées des fonctions administratives. Les juges ne pourront, à peine de forfeiture, trouble de quelques manière que ce soit, les operations des corps administratifs, ni citer devant eux les administrateurs à raison de leurs fonctions." Loi des 16-24 août 1790, art. 10. This principle has partly blurred with the constitutional reform of 2008 concerning the Constitutional Council.

57 Dorsen (2003), pp. 153-154; McCormick & Summers (1997), p. 112; Bell & Boyron & Whittaker (1998), pp. 27-31.

only in 1947 did the Legislature adopt the Statute of Westminster (1931), which made of it *de jure* independent to legislate.<sup>58</sup>

New Zealand's common law system has two sources of law: statutes and case law. The British parliamentary system with a common law tradition has influenced greatly New Zealand's legal system and the historical constitutional documents and acts of British Parliament have been incorporated into New Zealand's law. A special feature of New Zealand's constitutional law is the unwritten, evolving and flexible constitution. The Constitution Acts are not formally entrenched, i.e. they have no superior position among the statutes, and there does not exist any list of constitutional documents. The governmental White Paper (1985), based on the Canadian constitutional model, suggested the promotion of the Bill of Rights and the Treaty of Waitangi as supreme law but the parliament was unwilling to give up the tradition of unwritten constitution. The Parliamentary Advisory Panel delivered its report on the constitutional reform on 5 December 2013. The panel does not support enactment of a supreme, written constitution, but wants to promote the Māori rights and to broaden the Bill of Rights Act 1990 to include the economic, social, cultural, property and environmental rights.<sup>59</sup>

The oldest domestic legal document is the Treaty of Waitangi (1840), which was for a long time neglected, but has since the 1970s had an important influence on the Pākehā-Māori relations and modern legislation. The Constitution Act 1852 created the parliamentary system of New Zealand. It was repealed together with the act adopting the Statute of Westminster and other related acts when the parliament enacted the Constitution Act 1986, which encompasses most of the constitutional law of New Zealand but not many constitutional conventions under which power is wielded. It locates a full sovereign authority to New Zealand by declaring that no act of Parliament of the United Kingdom thereafter extends to New Zealand as part of its law.<sup>60</sup> The conventions as rules of the Constitution include relations between the legislature and the executive, the prime ministers' office, the cabinet and the opposition.<sup>61</sup>

Although New Zealand was for a long time more closely connected to the mother country than Australia or Canada, the repatriation of the country's legal system took place at approximately the same time as in Canada. The Constitution Act 1986 was followed by an electoral reform and the Bill of Rights Act 1990, which ensures with some limitations the following rights: freedom of religion, speech and assembly, protects against discrimination,

---

58 Treaty of Waitangi (1840); Statute of Westminster, 1931, Preamble, s. 3; Mulholland (1985), p. 16; Williams (2006), p. 122. Crown is in the Commonwealth countries a synonym for the state or government.

59 Mulholland, (1985), pp. 1, 16; Palmer (2008), pp. 286, 289; A Report on the Conversation (2013). Many feared that a constitutional bill of rights would elevate judicial power over parliamentary power and be thus anti-democratic.

60 Constitution Act 1986, s. 15(2); Mulholland (1985), pp. 16, 20. Pākehā means New Zealander of European descentance. Among other constitutional statutes are the Judicature Act (1908); Imperial Laws Application Act (1988), which incorporates to the New Zealand's constitution a number of British statutes, including Magna Charta (1215), Habeas Corpus Act (1679), Bill of Rights (1689) and Act of Settlement (1701); New Zealand Bill of Rights Act (1990); Electoral Act (1993); and Supreme Court Act (2003). the constitution includes besides the written statutes and treaties orders-in- council (including the Cabinet Manual of 2008), letters patent (including Letters Patent Constituting the Office of Governor-General of New Zealand, 1983) and unwritten constitutional conventions.

61 Mulholland (1985), p. 25; Maddex (2008), p. 316. The conventions are in common law systems not enforceable in the courts.

and extends to persons accused of crimes fundamental rights of due process, including access to legal counsel and a fair trial.<sup>62</sup>

The common law is the traditional source of New Zealand's law although it has gradually lost its primacy to enacted statutes. In its basic structure the common law follows the British example with the importance of precedents. Despite the common law background there has been a move towards the codification of law. The original form of political and administrative system included a bicameral General Assembly and six provincial Legislatures. The General Assembly consisted of the sovereign, a House of Representatives with elected members and the Legislative Council with nominated members. The General Assembly had powers to enact laws for the peace, order and good government of New Zealand. The Upper House was abolished in 1950 and today the parliament consists of the sovereign and the House of Representatives. The term of the parliament is three years and the representatives are elected from two kinds of electoral districts, the general electorate or Māori electorate. Its summoning and dissolution belong to the governor-general. The bill is usually proposed by the cabinet or individual MP. All acts of the House of Representatives follow a same form, including an analysis and interpretation of sections. All bills must receive a royal assent of the sovereign or the governor general. All legislative power is vested in parliament or derived from it. It has delegated legislative powers to associated states and power to make bylaws and statutory regulations to regional and local bodies and authorities. The bylaws can be quashed or amended by the Supreme Court.<sup>63</sup> The customary law has had growing significance mostly through indigenous law, although it has not always been given much weight in the state's legal orders. The most visible part of custom is many legal Māori expressions, used widely in legislation and courts.

New Zealand is a unitary state without strict separation of powers. The powers of the Crown are exercised by the Sovereign in right of New Zealand (Queen Elizabeth II) and by the Governor-General as her representative. The governor-general's powers are in reality attributed to him/her only in the most formal terms and are in substance entirely exercised by the prime minister. The governor-general must be a New Zealander, who is appointed for a 5-year term. He/she has several nominal powers: the right to assent a bill; the right to make regulations in the executive council or alone; the prerogative power of mercy; the power to appoint ministers on the advice of the prime minister; the right to act as commander-in-chief of the armed forces (*Ngāti Tumatauenga*); and the right reserve a bill for royal assent and to dismiss a minister. The sovereign has a formal council, the Executive Council, chaired by the governor-general. The council has the power to make regulations, notices and orders as Orders in Council. It has a formal role: it executes or gives valid legal effect to decisions made elsewhere.<sup>64</sup>

---

62 New Zealand Bill of Rights Act (1990), ss. 8-27; Sharp & McHugh (2001), p. 207.

63 Constitution Act (1986), ss. 14-17; Mulholland (1985), pp. 23-24, 66-67, 76-77, 82-87. The Privy Council has defined that a precedent does not bind, when it is inconsistent with a superior court's decision and when the previous decision is given *per incuriam*. In conflicting decisions there is the possibility of choice. JCPC, *Attorney-General of St. Christoph Nevis & Anguilla v. Reynolds*, [1980] 2 WLR 171; The Parliament got full sovereignty from the British Parliament with the New Zealand Amendment Act (1947) and the New Zealand Constitution Amendment Act (1973).

64 Constitution Act (1986), ss. 2-3; Letters Patent Constituting the Office of Governor-General of New Zealand (1983); Mulholland (1985), pp. 21-23.



The *de facto* executive is the Cabinet and its departments. The Prime Minister forms a Government by nominating ministers. The ministers of the Crown must be members of the legislature. They are responsible collectively for Cabinet decisions and individually for the acts of their respective departments. Otherwise the Prime Minister's Office and the Cabinet rest largely on conventions. The prime minister chairs the cabinet which is the central governing committee of the country. It is supported by several committees who prepare the proposals to the Government. The ministers make all vital policy decisions and their respective departments put up options for the minister to consider in determining the policies.<sup>65</sup>

The Judicial Committee of the Privy Council in London was the court of last appeal for New Zealand until 2004. A law reform began in the 1980s and in 1995 the Court of Appeal became *de jure* the highest court. In 2003 the Parliament officially ended the right of taking legal appeals to the Privy Council and established the Supreme Court of New Zealand. The Supreme Court has the jurisdiction to hear appeals from civil proceedings and certain criminal proceedings, but appeals can be heard only with the court's leave. It consists of a chief justice and 4-5 other judges, appointed by the governor-general. The Court of Appeal has still a remarkable role while only a few cases have so far reached the Supreme Court. All judges of higher courts are appointed by the governor-general. Under its British-style government, New Zealand's Parliament is supreme in its authority to make laws: no true judicial or constitutional review by the courts is possible. Further, nothing stops the legislation from being passed by parliament to abrogate the effect of a court decision.

On the other hand, both Labour and National Cabinets have allowed the Court of Appeal to make definitions, distinctions and predilections. These abilities resemble a law making role. The courts must first interpret literally the words used by legislation. All acts must be given fair, broad and liberal construction and interpretation to best ensure attainment of the objectivity of act, according to its "true intent, meaning and spirit". If a law is ambiguous, the courts must interpret it in a manner consistent with the act, which is subject to change by a simple majority vote in the legislature. Only if there is no clear meaning, may a purposive approach be used.<sup>66</sup> The Supreme Court's and the Appellate Court's decisions now resemble more the Canadian judgments, including the title, background information, a summary of lower courts decisions, a long part of motivation and major aspects and a short final decision. The dissenting opinions are often included to the judgment. A special feature in New Zealand's court system is the courts and a tribunal related to Māori people. They are the Maori Land Court and Maori Appellate Court and the Waitangi Tribunal.

---

65 Constitution Act (1986), s. 6; Mulholland (1985), pp. 27-29.

66 Mulholland (1985), pp. 44-47, 50, 57-58; Christie (1997), p. 48. Spiller & Finn & Boast (2001), pp. 101-102, 200; Maddex (2008), p. 316. The Privy Council, originally evolved from the Committee of Trade and Plantations, is not technically a court. It tenders advice to the Queen in Council, which is referred back to the court where the application came from; The Māori were generally against the change. Their representatives demanded that the Constitution should be first rearranged, including the Treaty of Waitangi, as a prerequisite for the establishment of the Supreme Court; The Acts Interpretation Act (1924), s. 5(j), gave to the courts a rule: "Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit".

### 1.3.3. Canada: A Hybrid System

Canada is a federal constitutional monarchy with a hybrid legal system due to historical reasons. The French law, used in the province of Québec, traces back to the New France period (1608-1763), when Eastern Canada was a French colony. First a profusion of sources prevailed in the new world. There was *mixité* and a lack of formal coordination. Following the royal policy the legal system developed towards a more centralised model. The most important source of law was since 1664 *coutume de Paris*, added by royal ordonnances. A codification of Québec law took place in 1866 with *Code civil du Bas-Canada*, following the model of *Code Napoléon*. The civil law's latest reform took place in 1994. The sources of law in Québec form a bi-systemic legal system: while the property and civil law are based on the French model, public and criminal law are based on British common law. Unlike the common law system, the civil law system has as main sources written law and doctrine.<sup>67</sup>

The predominant system of law in Canada is the common law, due to the long British rule. It has same rules on sources as in New Zealand and it is the main system in all provinces and territories, with the exception of Québec. In federal level both legal systems are used. There is no distinction between federal and provincial common law and, unlike in the United States, although there are differences among the provinces. The conventions and custom have a significant role in constitutional law.<sup>68</sup>

The supreme law in Canada is the Constitution. The Constitutional history of Canada starts with the Royal Proclamation of 1763. The Constitution follows the British model and is an amalgamation of several elements being both written and unwritten. Its backbone is two imperial statutes: the Constitution Act, 1867, establishing the Canadian federation, and the Constitution Act, 1982, which repatriated the Canadian constitution from the Westminster Parliament. They are largely self-sufficient instruments. The first-mentioned is minimal, including only the necessary provisions to accomplish the confederation and its member provinces.<sup>69</sup>

In the 1970s, Prime Minister Pierre Trudeau drove for repatriation of the Canadian Constitution to end the Westminster Parliament's final say. With the Constitution Act, 1982 the constitutional emphasis in Canada has been significantly shifted from the diversity of provinces to the diversity of the nation under pan-Canadianism. It has brought to the Constitution a domestic amending formula and binding human rights instrument. The province of Québec has not ratified the latter Constitution Act. The Supreme Court has, however, stressed in this constitutional *cul-de-sac* the exercise of authority by the British Parliament, so that the refusal of Québec does not render the Constitution ineffective.<sup>70</sup>

The Canadian Bill of Rights (1960) is a simple federal statute, applicable only to federal laws but the Constitution Act, 1982 includes the Charter of Rights and Freedoms which has constitutional status, and the courts require its interpretation generously to give full measure to the rights and freedoms it guarantees. A presumption of constitutional validity for laws is

---

67 Gall (1983), pp. 131-140; Mattila (2006), pp. ix, 194-195. Acadia located in the present Maritime Provinces. Most Acadians live today in New Brunswick.

68 Gall (1983), pp. 26-35.

69 Hogg (1985), p. 3; Maddex (2008), p. 82.

70 Supreme Court of Canada (SCC), *Reference re Secession of Quebec* (1998), s. 32; Hogg (1985), p. 5.

incompatible with the innovative and evolutionary character of the Charter as a constitutional instrument. The fundamental guarantees in the Charter emphasize the rights of individuals, or individuals as a member of a group. The Constitution Act, 1982, includes a non-exhaustive list of other constitutional texts.<sup>71</sup>

The unwritten principles of the Constitution were defined by the Supreme Court of Canada in 1997. They are the conventions, royal prerogatives and unwritten principles of federalism, constitutionalism and the rule of law. Other sources are conventions on responsible government, representation by population, judicial independence, parliamentary supremacy and the implementation of the Bill of Rights.<sup>72</sup>

Following the English example, there is no explicit separation of powers under the Canadian Constitution. The general executive power is vested in the queen and the governor-general representing her. As the monarch's representative, the governor-general formally summons the House of Commons and dissolves it for elections. The functions of the Prime Minister and Government contain both executive and legislative responsibilities. The Prime Minister selects from the members of Parliament the ministers and dismisses them. He/she selects a Cabinet to make Government policy, sets the agenda and presides at Cabinet meetings. The Prime Minister is both the chief executive and the chief legislator. The ministers are individually and collectively responsible to the Parliament.<sup>73</sup>

Both the federal state and provinces have parallel, separate powers to legislate as defined in the Constitution Act, 1867. The federal parliament consists of the queen and two houses: the House of Commons and the Senate. The members of the lower house are elected from 308 ridings with an overrepresentation for the Atlantic Provinces and Québec. The senators are appointed by the governor-general on the advice of the government and hold office until the retirement age of 75. Each province has its legislature. In the case of a conflict between the two legislative branches there will be applied the Supreme Court's doctrine of federal paramountcy. The federal law is accordingly superior in the case of operational incompatibility.<sup>74</sup>

---

71 Constitution Act (1982), s. 52, Appendix; Hogg (1985), p. 7; Maddex (2008), p. 84. The listed constitutional texts are Manitoba Act, 1870; Rupert's Land and North-Western Territory Order, 1870; British Columbia Terms of Union, 1871; the Constitution Acts of 1867, 1871, 1886, 1907, 1915, 1930, 1940, 1960, 1964, 1965, 1974, 1975(1) and 1975(2); Prince Edward Island Terms of Union (1873); Parliament of Canada Act, 1875; Adjacent Territories Order, 1880; Canada (Ontario Boundary) Act, 1889; Alberta Act, 1895; Saskatchewan Act, 1905; Statute of Westminster, 1931; and Newfoundland Act, 1949. The list gives content to the supremacy and entrenchment clauses, which define the Constitution as the supreme law and binds the amendment of the Constitution to its inner authority. Canada has also several constitutional amendments in force: the amendments of 1983, 1985, 1993 (New Brunswick, Prince Edward Island), 1997 (Newfoundland, Quebec), 1998, 1999 and 2001. In the corpus of constitutional texts is also included two English statutes related to the status of the monarchy: the English Bill of Rights, 1689, and the Act of Settlement, 1701. The Constitution Act, 1982 refers also to the Royal Proclamation of 1763 which is important to indigenous people. From the list are excluded all pre-confederation legal instruments; the amendment procedure requires in general amendments the assent of federal parliament and 2/3 of provinces, representing 50% of total population. Cf. Constitution Act, 1982, s. 38.

72 SCC, *Reference re Secession of Quebec* (1998), ss. 49-82.

73 Constitution Act (1867), s. 9; Hogg (1985), pp. 3-4; Maddex (2008), pp. 84-85. The Governor General's office is not mentioned in the Constitution, but is based on royal prerogative.

74 The Constitution Act, 1867, ss. 17, 91-92; SCC, *Smith v. the Queen* (1960), pp. 795-797; Maddex (2008), p. 85

The Constitution Act, 1867, gives scant direction for the court system. It authorises the legislature to “provide for the constitution, maintenance, and organisation of a general court of appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada”. The court system still bears an imprint of the British judicial system. It is hierarchical with three judicial levels: the lower provincial courts; provincial courts; and federal courts. The court system is unitary throughout Canada. The Supreme Court of Canada, established in 1875, is the highest court for Canada, and each province has its superior court. The Privy Council was until 1935 the last instance of criminal appeals and until 1949 for all other appeals. The Supreme Court has a Chief Justice and eight elected Puisne Justices who are appointed by the Prime Minister. Three of the Justices represent the civil law Québec.<sup>75</sup> The court has always accepted the practice of dissent and separate opinions, which are published together with the majority decisions. The court decisions are lengthier than in New Zealand. They have as follows: the title and a short summary of the facts and judgment; the facts; sources and literature; a lengthy and detailed motivation and discussion on major aspects and themes; separate opinions with a similar structure; and a short final decision.

The Canadian courts have a task to interpret the constitutionality of statutes. The question can be raised by individuals, governments, governmental organisations, or any legal person. Their decisions constitute precedents for later cases. They can determine, whether the federal or provincial government has the authority to legislate in certain instances, and they can declare laws unconstitutional if these do not meet the standards of the Charter. The Supreme Court receives appeals from the provincial and territorial superior courts and from the Federal Court of Canada. It has a specialised, limited jurisdiction and ultimate power of judicial review on federal and provincial laws’ constitutional validity. If they are against the division of power provisions of the Constitution Act, 1867, the parliament or provincial legislatures must live with the result, amend the law, or obtain an amendment to the Constitution. If the law is declared to be against the Constitution, the Parliament or Legislature can prepare a temporarily valid act by using an override power related to distribution of powers or Charter grounds. It is called the notwithstanding clause and is based on the s. 33 of the Charter. According to this constitutional compromise the Parliament or Legislature may declare a law or part of a law to apply temporarily “notwithstanding”, i.e., countermanding sections of the Charter, and nullifying any judicial review by overriding the Charter protections for five years. This is done including a section in the law clearly specifying what rights are overridden. They must be fundamental rights, legal rights, or s. 15 equality rights in the Charter. The clause has been used most often by Québec.<sup>76</sup>

---

75 Constitution Act (1867), ss. 96, 101; Hogg (1985), pp. 166- 171.

76 Constitution Act, 1982, s. 33; Strayer (1988), pp. 33; Maddex (2008), p. 86. Notwithstanding Clause of the Constitution. The Federal Court of Canada has only a specialised, limited jurisdiction. It is in no sense superior to the superior courts of the provinces.

## 1.4. The Indigenous Communities

There is no global definition of an Indigenous people. Globally there are a number of different concepts to describe the original peoples. Also in the common law world there various concepts are used of Native, Aboriginal, Indian, First Nation, Indigenous and Chthonic. In the French language the most commonly used term today is *autochtone*, an equal concept to chthonic, although sometimes *indigène* or *amérindien* are also used. In this research I use as the main concept Indigenous as it is the most widely used concept in English language and in international legal instruments. I use also the other expressions in their original contexts.

When describing the Indigenous peoples, the United Nations has used the definition of Special Reporter José Martínez Cobo which is a mixture of objective criteria and subjective factors.<sup>77</sup> The indigenous peoples are descendants of the original inhabitants of territories. They have distinct cultures and a strong sense of self-identity. Land is an essential element of indigenous culture which as a definitive factor distinguishes them from other peoples. Land is inherited and its transmission to future generations is a vital feature of indigenesness. The land rights are an expression of tribal unity and perpetuation. Other distinguishing features of indigenous peoples are possession of common ethnic or cultural characteristics, historic connection to a territory, and being pushed into a non-dominant position by a later-arriving population. There has been for a long time also disagreement as to whether an indigenous group should be called as people or peoples (in French *population* / *peuple*). Many states rejected for a long time their definition as a people due to its implications in international law to the right of peoples to self-determination. The Indigenous peoples, on the other hand, saw the term peoples reflecting the indigenous groups' own, distinct identity.<sup>78</sup>

### 1.4.1. France: Invisible Minorities

Until 1998 the French law did not recognise distinct ethnic groups and even today the only constitutional exception is the Kanak. The Indigenous people live in four territories: New Caledonia, French Polynesia, Wallis and Futuna, and the French Guiana.

*New Caledonia* is both ethnically and historically different from other territories. Its historical population, known collectively as Kanak, are Melanesians whose forefathers arrived 5,000 years ago from Southeast Asia. They speak historically 28 different languages and are divided into 39 different clans with a matrilinear family structure. The basic unit is a clan under the grand chief (*teama*) which possesses the customary land which is still the sacred

---

<sup>77</sup> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." Cf. Cobo (1986). In the early days of the UN Working Group which drafted the Declaration on Indigenous People several countries still denied the existence of Indigenous peoples in their territory.

<sup>78</sup> Summers (2004), p. 5; Eide & Krause & Rosas (2001), p. 103; Knop (2002), p. 239; Castellino & Allen (2003), pp. 200-201.

foundation of Kanak life and society. Previously there was no political unity between the clans. Each hereditary chief, assisted by advisory councils, had absolute power and they were considered as sacred persons. Also the nobility had great influence, acting as chief's vassals ruling the villages, i.e. the political system was feudal. Today the 99,000 Melanesians represent 45 % of the total population. New Caledonia has become a land without majority.<sup>79</sup>

*French Polynesia* consists of approximately 130 islands in seven larger groups. The islands were first populated by Polynesian tribes who are closely related to Māori ethnically and linguistically. The islands were neither historically nor geographically united. The local chiefs were called according to their rank *ari'i*, *raàtira* and *manahune*. Together with *marae* (meeting place), understanding about *tapu* (sacred) and *mana* (power) they show the close relation of Polynesian peoples and their culture in France and New Zealand. The indigenous presence is strong in French Polynesia: in 2007 census 173,000 people, or 67%, were ethnically of Polynesian origin. Some 216,000 people (83%) had at least some degree Polynesian origin.<sup>80</sup>

*Wallis and Futuna* is a geographically isolated territory of two archipelagos 200 km distance from each other. The islands were settled by a Polynesian population arriving from Tonga and Samoa around A.D. 300. Today most of the 13,000 people in the islands belong still to the Polynesian ethnic group. A majority of Wallisians and Futunans (17,000) live, however, in New Caledonia, where they form 9% of the total population. The islands are still formed of three traditional kingdoms Uvéa (the king or queen is called *lavelua*), Sigavé (*tuisigavé*) and Alo (*tuiagaifo*). The elected rulers, chosen by *fono laki* (royal council), have traditionally held the executive and legal power. The royal power has been interpreted as *tapu* (sacred). They have been advised by *fono laki*, whose members belong to *aliki* (noble families).<sup>81</sup>

Besides the three above-mentioned Pacific territories, *French Guiana* is the only other French overseas territory having indigenous people and the European Union's only Indian minority. Before first contact with Europeans in the sixteenth century there lived an estimated 30,000 Indians, but due to the consequences of encounter, their total number dropped to 1,500 by around 1900. Until the 1950s the authorities believed that they would become extinct, but then – due to a better health environment – their communities began to recover again. Even today their connection to settlers, who have overwhelmed them and live on the coastal strip, are limited and sparse. The Indian tribes (*amérindien*), which form the indigenous minority live in the villages of the barely accessible interior and close to the Surinamese border on the coast. Today, there are approximately 7,000 Indians (3-5%) belonging to Arawak, Carib, Emerillon, Kali'na, Palikar, Woyampi and Wayna tribes and three different language families. Kali'na, living on the coast, are more integrated with the main society.<sup>82</sup>

---

79 Ntумы (1993), pp. 616, 620; Faberon & Agniel (2000), p. 158; Rau (2005), pp. 45-51, 60-62.

80 Siikala (1982), pp. 207-209; Recensement 2007 des langues (2008).

81 Ntумы (1993), p. 622; Rohm (2006), pp. 15-19.

82 Arnoux (1996), p. 1616; Préfecture de la région Guyane; Guyane Française: composition ethnolinguistique.

### 1.4.2. New Zealand: Polynesian Presence

There are today six indigenous groups in New Zealand and its associated states and territories. The largest group are the *Māori* - a collective name for 42 groups of Polynesian origin - whose ancestors arrived in New Zealand /Aotēaroa around A.D. 900. They lived in about 600 small basic kinship units (*hapū*), which united under the common *iwi* (people) when waging war or making peace with their respective boundaries (*rohe*) and realms (*takiwa*). The precedence of *iwi* to *hapū* took place only after the mid-nineteenth century. The other units were *whānau* (extended family) and *waka* (canoe / confederation of the *iwi*). The Māori society worked on the balancing of opposites: it recognised both male and female descent lines, and senior and junior family lines. Therefore, an individual could belong to several tribes. The Māori counted their ancestry from the landing places of their canoes where they had arrived for the first time. A chief of *iwi* was called *ariki* (paramount chief). The power of *ariki* was based on chiefly lineage and territorial possession. At the *hapū*-level the chief was called *rangatira* and at the *whānau* as *kaumatua* (male elder) or *kuia* (female elder). A Māori kingdom was created only in 1858. The warfare between the tribes was common and the Māori built many fortifications (*pā*) to defend themselves.<sup>83</sup>

The Māori identity was born during the encounter with the Pākehā, when they needed to show unity. That is why the settlers often understood them as one group. The numbers of Māori have increased from near extinction in 1891 (44,000) to 565,000 New Zealanders (15%) identifying recently as Māori. They call themselves as *tangata whenua*, the people of the land. The most Māori live on North Island, and most of these in the three largest cities. Although there are today over 80 *iwi*, many urban Māori do not identify with any specific *iwi*.<sup>84</sup>

The *Moriori* are a small and ethnically mixed group of Polynesian people on the Chatham Islands, north of North Island. They are related to the Māori and arrived from the northern Pacific region. In isolation the culture developed in a distinct way. Many of them were enslaved and killed by the Taranaki Māori in 1835, who forced those who remained into mixed marriages. Today their identity is recovering: on the Chatham Islands there are about 1,000 descendants.<sup>85</sup>

The Cook Islands and Niue are associated states and Tokelau an associated territory of New Zealand. People in the Cook Islands are ethnically related to both the Māori and the indigenous people in French Polynesia. They call themselves the *Cook Island Māori*. The northern islanders are ethnically a more distant Polynesian group. Before the colonial encounter the southern and northern islands were separate socio-political entities. There were two *ariki*, who had supreme *mana* based on the *tapu* character of their rule. Since the 1820s there were also *waka* (village councils). The Indigenous systems were variations of an Eastern Polynesian regime with hereditary chieftainship loosely based on the principle of matrilinear primogeniture. The titles were similar to Māori: *ariki*, *rangatira*, *mata'iapo*. On the northern islands the focus was on the councils of elders. The islands were divided in three *tapere* (confederations of Takitumu, Te Au-o-Tonga and Puaikura), including a number

---

83 Barlow (1993), pp. 6, 33, 59; Ritchie (1995), pp. 74, 117-118; Belich (1996), p. 95.

84 Durie (1996), pp. 53, 56-57; Havemann (1999), p. 6; 2006 Census Data.

85 Smith (2005), p. 19; Boast (2010), pp. 624-625.

of genealogically related *ngati* (extended family). The land was common and inherited by families. Today 18,000 Cook Islands Māori live on their home islands, and more than 50,000 in New Zealand and 15,000 in Australia.<sup>86</sup>

*The population in Niue and Tokelau* was greatly reduced by the Peruvian and Tahitian slave traders in the mid-nineteenth century. This was partly the reason for why the islands asked British protection from the 1870s onwards. In Tokelau the king of Fakaofu had a paramount position until the late nineteenth century and the ancient order was common for all atolls. Both people have common Samoan descent. On Niue they have further historical connections with the Cook Islands and Tonga and in Tokelau with Tuvalu. Today the population on the island of Niue is 1,700 and on Tokelau 1,500 but there are many more in the New Zealand. The traditional social structure is based on family and tribal structures which are alive also in New Zealand. The supreme chiefs are elected. Also the former *patu-iki* (chief of chiefs, King of Niue) was elected. The elders have in their system an important formal power, which is based predominantly on custom and social respect.<sup>87</sup>

### 1.4.3. Canada: Three Strands of Indigenuity

According to the census of 2006 Canada had 1,138,000 indigenous people (3.6%). They form 85% of population in Nunavut, 50% in the Northwest Territories (NWT), 25% in the Yukon and 15% in Manitoba and Saskatchewan. About 50% of them live in their traditional areas and reserves, but growing numbers live in non-traditional urban surroundings. About 53 % of all indigenous people (625,000) in Canada have an official status as Native people. The largest and the most heterogeneous group of indigenous people in Canada are the *First Nations*, or *Indians*. In 2006 there were 697,000 (2.2 %) First Nations people, of whom 300,000 (43 %) still live on reserves. The largest number of Indians live in Ontario (158,000), British Columbia (130,000) and Manitoba (101,000), and they form a significant minority in NWT (31%), Yukon (21%), Saskatchewan (10%) and Manitoba (9%).<sup>88</sup>

In Canada it is important to distinguish the *status Indians* and *non-status Indians*. The first-mentioned belong to the recognised First Nations. They form a very diverse group, belonging to 52 larger communities and are members of 630 recognised First Nations living on 2,800 reserves and in major urban centres. There are also a significant number of those Indians who have by themselves or through their ancestors have lost their Indian status for various reasons. Another possibility is that their tribes have not made a treaty with the federal government or previously with the British Crown. The geographically most widespread First Nations' group are the Algonquians (including the Cree and Ojibwa), who extend from the Rocky Mountains to the Atlantic. Northern major group is the Athabaskan in western provinces, Yukon and Northwest Territory. In the Westernmost Canada are located Tlingit, Tsimshian, Salishan

---

86 Reforming the Political System of the Cook Islands (1998), p. 55; Gilson (1991), pp. 6-7, 11-13; Siffons (1999), pp. 58-59; Cook Islands Government.

87 Ntuny (1993), 158, 296-297; Smith (1993), pp. 38-39; Angelo (1995), p. 413; Huntsman & Hooper (1996), p. 264; Hoëm (2004), pp. 19, 49, 57.

88 Statistics Canada.



and Kutenai groups. The Siouan tribes live in southern Saskatchewan and Manitoba. A major group in the East are the Iroquois in Ontario and Quebec.<sup>89</sup>

Before the encounter a majority of Indians were hunters and gatherers. The political systems had great differences and some tribes or nations formed leagues. The major farming and sedentary groups were the Iroquois and Huron who lived in palisade villages. The Iroquois had a developed legal and political organisation. Their league was founded by Dekanawida and his disciple, Hiawatha in 1451. The Great League of Peace was governed by a council of 50 chiefs representing participant tribes, with each tribe having one vote. The decisions had to be unanimous. The Great Peace was a jural community, charged with maintaining peace through trade relations, ceremonial words of condolence and ritual gift exchange. Tribes maintained a considerable degree of autonomy in internal affairs. Despite many historical changes the league and its political structure still exist.<sup>90</sup>

The French Crown and the Catholic Church supported mixed marriages with Indigenous people. They believed that it would promote their assimilation with the European population. The outcome was, however, a new mixed people. The first *Métis* were *coureurs du bois*, fur traders and their families. The word *Métis* refers often to the mixed population in Manitoba, Saskatchewan and Alberta due to their distinctive ethnogenesis in the Red River territory, although there are *Métis* organisations all over Canada. In 2006, 390,000 Canadians (1.2 %) identified themselves as *Métis*. A major part of *Métis* live in central and western Canada: 86,000 in Alberta, 74,000 in Ontario, 72,000 in Manitoba, 59,000 in British Columbia, and 48,000 in Saskatchewan. Proportionally their presence is strongest in NWT (9%), but also significant in Manitoba (6%) and Saskatchewan (5%).<sup>91</sup>

The *Métis* were during the nineteenth century permanent wage labourers, small farmers and fur traders. The political history of the *Métis* is connected to Louis Riel. The Colony of Red River and Assiniboia in present day Manitoba, administered by the Hudson Bay Company (HBC), had become a major French-speaking *Métis* settlement before the 1860s. HBC decided in 1869 to cede the *Métis*' area to Canada. Riel became the president of the provisional government of the New Nation until the province of Manitoba was created in 1870 and the Manitoba Act was included in the Canadian Constitution. Many promises were soon broken and many *Métis* moved further. Riel returned to lead a new provisional government in Saskatchewan in 1884-1885 which the Canadian government defeated after a short military campaign, and Riel was hanged. *Métis* were not accepted as Indians in the treaty processes which advanced their impoverishment. The socially oriented governments of Alberta took a specific direction from the 1920s and in 1938 the province of Alberta created for *Métis* farming settlements, most of which still exist. The *Métis* were constitutionally recognised only in 1982.<sup>92</sup>

The *Inuit* form four major groups in the Canadian Arctic, living in Nunavut, Nunavik (Québec), Nunatsiavut (Labrador) and Inuvialut (Northwest Territories). The total number of Inuit was in 2006 approximately 51,000. Of these, 49% (25,000) live in Nunavut, where they form 85% of the population. Other significant concentrations of Inuit live in northern

---

89 Dickason (1994), pp. 63-67; Report of Rodolfo Stavenhagen (2004), p. 3.

90 Snow (1996), pp. 57-65.

91 Statistics Canada (2006); Lawrence (2004), pp. 83-84; McHugh (2004), p. 250.

92 Dickason (1994), pp. 263-264, 268-272; Sealey & Lassier (1997), p. 14; Lawrence (2004), p. 85.

Québec (11,000), Labrador (5,000) and NWT (4,000). Their ancestors arrived to present-day Arctic Canada around 2,000 BC. The cooling of the climate during the thirteenth century drew them to areas where they lived when the Canadian government took interest in them. They adapted a life that suited Arctic conditions, living in delicate balance with the natural world. They were semi-nomadic hunters and maritime people, depending on maritime mammals for food and clothing. The Inuit's basic social unit was a family and the camps consisted of extended and interrelated families led by a leader. The Inuit governed themselves by a flexible system of consensus where the legal system was based on oral tradition of passing on legends, songs, parables and hunting narratives. In their cosmology the world was populated by spirits, which could be influenced only by shamans. The Inuit were recognised in the SCC decision *Re Eskimos* (1939).<sup>93</sup>

## 1.5. Search of Plurality

In this first part I have described the research object, the methodological tools and general state-law contexts. The indigenous peoples have during the last few decades sought a remedy for past grievances. They search for difference, which casts a challenge to unitary states' political and legal systems. Despite different forms of government, the states have the same challenge to solve: how to find a workable structural and legal solution that would satisfy all parties and preserve the state's unity. I have chosen to compare at the macro level three different states, France, New Zealand and Canada. Despite their different state structures, they are historically and geographically intertwined and have the same indigenous question before them. Instead of functional similarity the focus is on the presumption of plurality. It means the study of change, forms and aspects of legal pluralism and its relation to society. Another question is the asymmetry of the legal system: development from Eurocentric systems to plural, asymmetric systems.

The dominant Western legal school has been for a long time legal positivism, which has been a project of "pure law", excluding the customary, traditional and moral factors outside of its scope. The reality is, however, more plural. Globalisation and rediscovery of different legal families and subcultures have asked to revise the total image. The classical taxonomy of Western-dominated family trees and functional comparison based solely on a positivist search for similarities cannot answer the question as to why there is the plurality of legal system and what it means. The approach demands also the use of contextual tools to help this understanding: historical dimension, geography, culture, language and even religious and moral aspects.

Legal culture/legal tradition classification is an approach, which brings forth a more rich and balanced image of law. The indigenous (chtchonic) legal systems have a unique place among the legal families. Despite their oral character, they have still their own role in modern societies. Several scholars have stressed the importance of understanding and co-existing. Instead of one dominant law-making source the different elements, including the positivist,

---

<sup>93</sup> SCC, *Re Eskimos* (1939), 2 D.L.R. 417; Minority Rights Group (1994), pp. 107-109; Statistics Canada. Inuk means "a man". The previously used Eskimo comes from an Algonkian word meaning "he eats it raw".

social/socio-legal, religious/ethical/moral factors, legal transplants and influences form in the complex field of legal pluralism the total image. They give space to different visions and aspects. To achieve deeper, plurally focused understanding one must look at internal structures as a whole and changing place of interaction through time and space in individual situations.

The dominant legal systems in this research represent the two large “legal families” - civil law and common law. France is closer to the classical separation of power with a strong presidency, while the two other countries have, following the British model, no clear division of powers. The Queen is the symbolic head of state, while the Parliament and majority-based executive lead the political life. Basically the French system as a civil law system stresses the centrality of legislation, while the case law is more central in common law systems. In fact, the role of courts’ opinion has increased in France recently due to constitutional reforms and EU law. In New Zealand the direction has been towards a more statute based system and there does not exist true judicial or constitutional review by the courts. Canada, as a hybrid system, has more clearly both elements. The legislation is divided between the federal state and the provinces, but the case law has great importance in determining the content of law. In France and Canada the Constitution is the supreme law. The difference is that Canada follows like New Zealand the British model, where also the unwritten principles have a significant place and there is no single written supreme law. New Zealand is more closely tied to British heritage: there is no written constitution and the unwritten constitution is not a supreme law.

There does not exist one, universally recognised definition of the indigenous peoples. This is evident also at the national level. France does not recognise *de jure* ethnic-based minorities. The only exceptions are the Kanak in New Caledonia, whose *sui generis* status is constitution-based. *De facto* there, however, are indigenous peoples, who belong to Amerindian, Polynesian and Melanesian groups. New Zealand is based on the union of the European and Polynesian population and their existence has been always recognised. Similarly there are a number of Polynesian groups living in the associated states. Canada first recognised the existence of Indians in the Constitution of 1867 as belonging to federal jurisdiction, but the final recognition of indigenous peoples, including the Inuit and Métis, took place only in 1982.

There is some comparative research on the political and legal development of common law countries’ Indigenous peoples (Armitage, Havemann, Karsten, Knefla & Westra, McHugh, Sheleff) but the research between the common law and civil law systems in this sphere is almost non-existent. The structure of this research is based on two fundamental, international legal instruments, which have a special place in describing the important aspects of indigenous life. Both were born in cooperation with the Indigenous organisations and, therefore, reveal their own aspirations. The first of these instruments is the International Labour Organisation’s (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1991, Convention 169), which is the only truly binding international agreement on Indigenous peoples for those countries, who have ratified it. Although none of the three countries to be compared here have ratified the Convention, its themes express well the most important aspects of Indigenous quest world-wide and is therefore useful.

The other international legal instrument – which all three countries have ratified – is the United Nations Declaration on the Rights of the Indigenous Peoples (2007), which was the

result of long process. It has a more advisory character and suggestions to member countries how they should treat their Indigenous peoples. It has similar themes as the ILO Convention: they both express the questions which are globally important to Indigenous communities. It is yet quite early to say how much this non-binding legal instrument has an influence on the countries to be compared. Four common law countries - United States, Canada, Australia and New Zealand - were the most hesitant to ratify the Declaration and also France expressed during the long process its reservations. Nevertheless, all major questions included to in the Declarations are important questions also for the countries compared.

From these two legal instruments I have distinguished more than 100 keywords on specified themes. From them have chosen the following main themes: 1) administration and self-determination (Declaration, Preamble, art. 3-5, 9, 18-20.1., 21, 23, 33.2.-34, 36; ILO 169, Preamble, art. 4.1., 5(b), 6.1.(b)-(c), 7.1., 8.2., 32-33); community (Declaration, Preamble, art. 3, 5, 9, 14, 16, 17.2., 20.1., 21-24, 29.3., 32.3., 35-36, 44; ILO 169, Preamble, art. 1.1.(b), 2.2(b), 7.2., 24-31); land and environment (Declaration, Preamble, art. 5, 8.2.(b), 20.1., 23, 25-29.2., 32, 36; ILO 169, art. 4.1., 7.3.-7.4., 13-19; law and justice (Declaration, art. 5, 27, 34, 40; ILO 169, Preamble, art. 8.1., 9.1.-9.2., 10.1.; and culture (Declaration, Preamble, art. 3, 5, 8.1.-2.(a), 11-15.1, 16, 27, 31, 32.3., 33.1., 34, 36, 40; ILO 169, Preamble, art. 1.1.(b), 2.2.(b), 4.1., 5(a), 7.1., 7.3., 10.1., 30).<sup>94</sup>

In *Chapter Two* I will analyse the background of unitary state and the Indigenous question. I will first characterise the historical development of the unitary state through its basic elements – sovereignty and nation-state. From there I continue to the problematic of the twentieth century state-ideology and devolution: the questions of self-determination, autonomy and the possibility of secession. The second part considers the Indigenous rights, a long road from noble savages and *tabula rasa* through the colonial period to modern aspects of international law concerning the Indigenous peoples. The third part is related to the constitutional principles in the three countries compared. Especially France has a strong state ideology, which has an effect on the Indigenous groups' legal status. The fourth part concerns the opposite force in unitary states: the process of devolution.

*Chapter three* brings forth the first dimension in legal pluralism and the historical change: law and justice. This refers to pluralism in the enactment of laws and bylaws, the existence of customary law, the Indigenous influence on courts' adjudication and case law, the existence of Indigenous courts, alternative dispute resolution and the enforcement of law. These examples show the complexity of all three legal systems when they try to cope with legal pluralism. Beyond the positive law surface can be found a creative although challenging co-existence of legal realities.

*Chapter four* concentrates on administrative law and the question of self-determination. Part of the nation-building has been the strengthening of unitary states through treaty-making but also through subjugation and negligence. Despite this development there has

---

94 United Nations Declaration on the Rights of Indigenous Peoples (2007), Preamble, art. 3-5, 8.1.-2.(a)-(b), 9, 11-15.1., 16, 17.2., 18-20.1., 21-29, 31-36, 40, 44; Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1991), Preamble, art. 1.1.(b), 2.2.(b), 4.1., 5(a)-(b), 6.1.(b)-(c), 7.1.-7.4., 8.1.-8.2., 9.1.-9.2., 10.1., 13-19, 24-33. In 2007, only four countries in the UN General Assembly voted against the adoption of the Declaration on the Rights of Indigenous Peoples: the United States, Canada, Australia and New Zealand. All of them eventually joined the declaration. The last of them was New Zealand.

always existed a parallel, Indigenous way to administrate, which has never completely disappeared. The latter part of the twentieth century forms a different story: the strengthening and recovering of Indigenous presence and self-determination in administrative law. I will consider the modern settlement process, citizenship, electoral rights, taxation and the emerging of new Indigenous structures.

*Chapter five* is related to the questions of Indigenous community. Its central aspect is the family law, including the questions of gender, marriage, inheritance and adoption – one of the traditional strongholds of customary law. Other important questions are the right to education, which was for a long time a tool of assimilation and integration to broader society; Indigenous media as a means of language and information; and the health and social services, where the inequality of society and its legislation has been evident.

*Chapter six* is related to one of the most important features in Indigenous identity – land and environment. The title and right to ancestral land is a complex question of redress of historical grievances, lost promises and attempts to find a balance in modern society with these demands. To the question on land is closely related the question on the use of land – resource management and the care about the environment, which has in the holistic worldview of the Indigenous peoples a profound place. Modern society creates both opportunities and challenges for Indigenous use of land and balancing with traditional values.

Finally, *chapter seven* deals with perhaps the most difficult aspect *vis-à-vis* the Indigenous peoples and law: culture. Culture - covering here the questions of identity, names and symbols, cultural objects, language and religion - has often signified a collision of values and identities, misunderstandings which led to forced cultural harmonisation by law. The redirection and recovery of legal pluralism in the field of culture and Indigenous identity are considered in this chapter, as well. The concluding remarks form the last part of this research.

## 2. Unitary State and the Devolution of Powers

### 2.1. Basic Principles

#### 2.1.1. Sovereignty

The theoretical foundation for the family of states was laid in opposition to the claims of the papacy. A theory of papal supremacy was fully established in canon law during the thirteenth century. The popes fought with the German emperors on earthly power, but also supported each others' claims.<sup>1</sup> The rising French nationalism was the first to challenge this power concentration. Its most renowned representative was lawyer Jean Bodin who formulated his theory of sovereignty in *De Republica* (1576). The central authority was everywhere taking the form of strong personal monarchy over all rival claimants. Bodin based his theory on the idea that the concentration of power with the king is an essential condition of the state: sovereignty is a principle of internal political order. The central manifestation of sovereignty is the power to make the laws and the legislative power is a general power to command the others, comprising both the legislative power and constituent power. Only imperial laws (*leges imperii*) are not made by king but are the fundamental laws of state. Although Bodin believed that a king is bound by customary fundamental law, his scope was in reality extremely narrow. Possible forms of state are monarchy, aristocracy and democracy. The unity of a legal system requires the unification of power in a single ruler or ruling group. Bodin resisted the distribution of powers because all other powers would be in conflict with the power to make law. The sovereignty is indivisible: a truly sovereign authority must have all the power so that a state could legitimately work. Outward uniformity should be enforced wherever possible. Toleration should be, however, granted wherever a religious minority had become too strong to be repressed conveniently.<sup>2</sup>

The Treaty of Westphalia (1648) was an important moment in the creation of nation states. The territorial sovereignty gained strength as the Catholic Church and Holy Roman Empire declined. Hugo Grotius built his theoretical edifice on the foundation of territorial or state sovereignty. He saw it as an effective domestic legal order with the capability to create and enforce normative order within its territory as an essential attribute of internal sovereignty. The external attribute was for him a requirement that the sovereign state can independently conduct its own foreign relations. Emmerich de Vattel developed a theory of nation state, consolidated by monarchical rule and bound by common cultural, sociological and ethnic characteristics. Statehood and nationhood converged as mutually reinforcing concepts

---

1 Khan (1996), pp. 19-21.

2 Brierly (1961), pp. 8-10; Bodin (1992), pp. 1, 18, 27, 103-104, 118; The government is for Bodin a *legitima gubernatio*, where the highest power is derived from and defined by a law superior to itself. Here he followed the medieval tradition of the nature of law. Despite certain limitations to the sovereign's power, Bodin's theory paved the way for absolutism.

and political phenomena, based on the exclusivity of territorial domain and hierarchical, centralised authority. De Vattel used a strict dichotomy individual/state, where the state had precedence. A state includes those political bodies, societies of men who have united together and combined their forces in order to procure their mutual welfare and security.<sup>3</sup>

The road to absolutism reaches its culmination with Thomas Hobbes. He describes a hypothetical state of nature, which would exist if there were no common power able to restrain individuals, no law and no law-enforcement. If all restraint were removed, every man would constantly be open to violent invasion of his life and property. The civilised life would be impossible and risky. The civilised men see the need to get out of this condition: there are natural rights which are man's liberty to use his own power for the preservation of his own nature. Only in the state of nature the right to life entails the right to do anything. But the right to life can be deduced directly from the internal impulsion. The impulsion operates in man as such and the right is natural to man as such. The laws of nature act as prescriptive rules which any reasonable man can see as necessary. If men were in a state of nature, the law of nature would entitle them to use the right of nature to the full, but would also to require them to seek some better means for preserving themselves. The reasonable men see that they have to give up the right. This requires an agreement or contract. As appetitive creatures they have to transfer them to some person or body who can keep the agreement and protect them. The transfer of rights and powers constitute an obligation of the individual to the recipient authority. The sovereign decide how much of men's powers the sovereign needs to have. He determines the public good. Without full obligation the men are in constant danger of relapsing towards a state of nature. They should in their self-interest acknowledge full obligation to the sovereign. Therefore, it is the might that makes the sovereign, and the law is merely what he commands. Since the days of Hobbes, a view of an absolute, indivisible and perpetual power in state served as a vehicle to rule out challenges to the state power. It posited a power that is the source of legal author or external to, above the authority wielded by judges.<sup>4</sup>

John Locke introduced the idea of popular sovereignty, moving the focus onto people as the sovereign. This located the sovereign in the state an not in a single person. John Locke explains, like Hobbes, political society by reference to a state of nature and a social contract. He, however, has a different meaning to the state of nature and political society. The state of nature is subject to a natural moral law. It is a condition in which the executive power of the law of nature remains exclusively in the hands of individuals. People are born totally ignorant

---

3 Anaya (2004), pp. 21-22; Khan (1996), pp. 38-39, 63-64. Grotius followed the ideas of Aristotle in internal sovereignty, who described in Πολιτικά man's natural progression from the individual to the community (πολις), only where he could fulfill the promise of his life.

4 Brierly (1961), p. 12; Hobbes (1974), pp. 189-217; Curry (2004), pp. 51, 66. Patrick Capps sees as two foundational components in the logic of the social contract the conception of the individual which has certain generic interests and an account of problems which occur when social beings are close in proximity to each others. Cf. Tsagourias, (2007), p. 25; A distant echo of the Hobbesian idea of people can be found e.g. in ICJ's case *Nottebohm* (1955), where nationality is defined as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties". Cf. *Nottebohm (Liechtenstein v. Guatemala)*, ICJ Reports 1955, s. 4; In Hobbes' model the moral law leads to obligations in inner forum but does not lead to political stability. In a larger community this leads due to different interpretations to disagreement.

of everything surrounding them and there are no inborn ideas. It is a condition where is freedom but no tolerance. It is ruled by the laws of reasons, according to which the men have the right to keep and defend life, freedom, health and property. Everyone has also a right to punish anyone who has made harm according to the executive right of the law of nature. The dark side of the natural state is the selfishness of the individuals of reason. Men are expected to do their best to replace it and they are able to do so. A state or threat of war is an incident, inseparable from human life: "In the beginning, all the world was America", like the West Indies still living the primitive, Old Testament stage. The state of war leads free men to make an agreement, to protect the community, even those who are not participating in political decisions. The initial step is for individuals to consent to establish civil society: they unite into one political community, a Commonwealth. A second step for the majority is the consent to form a government which is entrusted to use its powers for public good.<sup>5</sup>

For Montesquieu, nature has order in all its parts. In social world is an underlying order paralleling nature. Laws are necessary relations deriving from the nature of things. All beings have their laws. There are some natural laws, but as a result of possessing free will man obeys his laws less unflinchingly than other beings. The true laws are born only in the state as a consequence of the state of war. Montesquieu believes in causation: the legislator's function is to take the pulse of his society to discover which laws will ensure health and stability. There is a need to pay attention to the nature and principle of the established government, the extremes of climate and the quality of the soil, the size of polity, the occupations of the inhabitants of the country, the degree of liberty the constitution will bear and the practiced region. They constitute the spirit of laws. The character of society is its general spirit. This leads to a relativist idea that each people must be different in character. Even the religions are related to the environment. Montesquieu distrusts political change. To guarantee a well-functioning society the three branches of government must be separated from each other.<sup>6</sup>

Jean-Jacques Rousseau had an ideal picture on the original condition of men as survivors, who gradually joined together. They are of nature good. To survive the men have to create a society, an entity created by the total surrender of each person's rights and prerogatives to the whole. A contract establishes the people. Everyone's rights and liberty are surrendered to the collective, and each is protected by the strength of the whole. A man gives up his natural rights in return for social rights. People have a common good, discoverable by reason, expressed by general will which is always right and all residents are bound by it. The sovereign is the republic, the body of persons who are citizens. The sovereignty is indivisible and inalienable. The people or the sovereign pass the laws. The higher order sanctions the making of laws according to interests. On the other hand, the state is a higher entity than the citizens that live in it, with a will of its own. The citizens are citizens only in the act of exercising the sovereign power, but are subjects in private affairs and obey collectively made laws as individuals. A government is established to execute the legislative commands of the people, to apply the law

---

5 Locke (1988), pp. 187, 191, 237, 301, 333; Tsagourias (2007), p. 27. Locke's popular sovereignty was an important model for both the American and French Revolutions.

6 Montesquieu (1977), pp. 98, 101, 103, 289-290, 321. Relativism served Montesquieu also as a means to promote the specificity of the French case.



to individual cases and to see that there is an intermediate body between the sovereign and the subjects.<sup>7</sup>

John Austin wrote in 1832 that no government is both a sovereign and subject at once. He denied the original sovereign status given to tribal societies as he considered them disobedient and “extremely barbarious”. A.V. Dicey developed this further by distinguishing legal and political sovereignty: the legal sovereignty is vested exclusively in the Crown, and the political sovereignty describes the relations between the Crown and its subjects which are consensual in a dynamic sense. The absolute will of the legislator might be tempered by constitutional conventions, non-enforceable principles or rules affecting the exercise of the sovereign power. They serve well where the political actors recognise and act upon a rule that serves a constitutional purpose.<sup>8</sup>

Carl Schmitt approached in the 1920s the role of collective political action through *pouvoir constituant*, by defining it as a political will which determines the form of the political existence as a unity and indicates the existential validity-ground for the Constitution. In his thinking the state creation belongs to the exercise of *pouvoir constituant*. The founding act may involve violence, civil strife, revolution, liberation struggle or armed conflict.<sup>9</sup>

The idea of sovereign people became central to Western liberal theories in the post-World War I period. It describes an aggregate of particular and extensive claims that states habitually make for themselves in their relations with other states. The idea of popular sovereignty is used only in part. A people can be sovereign only when no individual is raised above others. The sovereign power can only be located in the institutions it has established. The sovereignty of people has become the possession of political power by citizens. In modern states the popular sovereignty is practiced through the representative system of legislative power. This part of Rousseau’s vision has endured as useful in providing a democratic corrective to the centralising tendency of the state.<sup>10</sup>

---

7 Décret du 19 novembre 1792; Rousseau (1960), pp. 41-69, 243-256; Curry (2004), pp. 91-93. “Trouver une forme d’association qui défende et protégé de toute force commune la personne et les biens de chaque associé, et par laquelle chacun, s’unissant à tous, n’obéisse pourtant qu’à lui-même, et reste aussi libre qu’auparavant. Tel est le problème fondamental dont le Contrat social donne la solution.” Cf. Rousseau, p. 243; From Rousseau’s ideas the French revolution found mission to spread its message. The Convention declared in 1792 that France would accord “brotherhood and aid to all peoples who wanted to recover their liberty”.

8 McHugh (1991), p. 16; McHugh (2004), pp. 205, 231-232, 356. Dicey’s doctrine can be interpreted so that the indigenous people’s consent is needed today for constitutional conventions concerning them.

9 Schmitt (1928), pp. 75-76; Tsagourias (2007), pp. 215-216. “Verfassungsgebende Gewalt ist der politische Wille, dessen Macht oder Autorität imstande ist, die konkrete Gesamtentscheidung über die Art und Form der eigenen politischen Existenz zu treffen, also die Existenz der politischen Einheit im ganzen zu bestimmen. Aus den Entscheidungen dieses Willens leitet sich die Gültigkeit jeder weiteren verfassungsgesetzlichen Regelung ab...Eine Verfassung...beruht auf einer, aus politischem Sein hervorgegangenen politischen Entscheidung über die Art und Norm des eigenem Seins.” Schmitt (1928), pp. 75-76.

10 Brierly (1961), p. 48; Curry (2004), pp. 94, 96.

### 2.1.2. State

The development of unitary nation states began in Europe with the development of centralised authority. The unity was thought to be organic, based on shared national identity. For John Stuart Mill the modern, liberal and democratic state demanded a common worldview, ideals, goals and language. The democratic institutions could not function in multinational states. Therefore, it was inevitable that lesser nations would disappear. At the same time, these nation states were fictions, built on the conscious process of nation-building. Great founding acts of states were based on the coming together of conglomerates of people, taking the right to form a state and to be its only basis and justification. Stability problems were partly solved by elevating the people over populace and empowering institutions instead of people.<sup>11</sup>

A classical nation-state emerged from an ethnic community that furnished it with distinct identity. As trans-temporal communities, nation-states tended to find their roots in a culturally homogenous community in the past. A nation was a historical entity, having its roots in a founder culture from which the public language and the basic constitutional material are received. Its instruments were citizenship policy, language laws, education policy, public service employment, centralising power, national media, symbols and military service. The settlers took to new continents their nationality and allegiances.<sup>12</sup>

Lassa Oppenheim wrote that “states only and exclusively are subjects of the Law of Nations.” The processes of globalisation have since those days, however, changed fundamentally the significance of national and societal boundaries and generally made them less important. International relations, which traditionally focused on relations between nation states, have expanded to include non-state relations across frontiers and the operation of the global system as a whole. The state competes today with other states and supra-, international and non-state actors which challenge the Westphalian legal order.<sup>13</sup> On the other hand, new nation states are still formed and are not vanishing.

Statehood is a foundation of international law. An international legal personality identifies it as a member of a category of legal persons who share legally-defined qualities. A state is a territory with defined borders and a legal concept that denotes the political society based in the territory. The purpose and role of every state is to control activities within its borders. The sovereignty is related to the formal independence of decision-making and the freedom to exercise independence in practice. The practice is to express the relationship between a state and its territory in terms of the state’s sovereignty over its territory.<sup>14</sup>

According to the doctrine of intertemporal law the legal effect of conduct is to be determined in accordance with the law as it was at the time of conduct. It requires that states keep up with the changing demands of the law. One of the different means to acquire a territory was at first the models of acquisition. They were granted - as by Pope Alexander VI in 1493 -, ceded by one ruler to another, sold, or exchanged. It could also happen by

---

11 Evans (2003), p. 210; Curry (2004), pp. 98, 111, 113; Buchanan (2007), pp. 390-391.

12 Kymlicka (2002), pp. 363-364; Curry (2004), pp. 75-77.

13 Oppenheim (1905), p. 27; Twining (2001), pp. 8-9; Smits (2006), p. 744. The central idea in the Westphalian legal order was the principle of sovereign states in their relation to each others.

14 Evans (2003), p. 206, 218; Lowe (2007), pp. 136-139. The concept of territorial sovereignty has its background in Roman rules for the acquisition of property.

conquest, although the justification of an act contained also a risk of moral objection. They were, however, merely the factual background which ensured that the occupation by the new sovereign was not challenged by the former sovereign, and that it was the assertion of its rights by the new sovereign that was the effective cause of the change of sovereignty.<sup>15</sup>

A territory not already under the sovereignty of some other recognised state (*terra nullius*) could be acquired simply by occupying it, as happened in the case of Australia. States adopted the position that the first state to take the land should have title to it. Effective control means that the area could be controlled from the occupied area. However, much of the process of colonisation was conducted through agreements with the Indigenous populations of the colonised territories. The acquisition of title by occupancy was severely restricted by the English law fiction where all lands in the realm were originally possessed and owned by the crown. The treaties provided a legal basis to obtain the sovereignty. Elaborate legal and theological arguments were developed in an attempt to legitimise the colonial endeavour. Many of the agreements were trade agreements. Over the years the network treaties and contractual agreements became overlain with layers of governmental activity. During the Age of Explorations the discovery was used as a legitimate reason to acquire a title to certain territory. This was often accompanied by symbolic acts. The Permanent Court of Arbitration ruled in 1928 that the discovery alone does not establish sovereignty. Three years later the court held that an effective occupation, to create a title to territory, must be followed by action and exercise of authority. In the exceptional conditions of the arctic and other remote regions have been often used the principles of discovery, symbolic annexation, effective occupation, continuity, contiguity and geographical unity.<sup>16</sup>

There are also other determinants to a state than its territory. The Montevideo Convention on Rights and Duties of States defines the state in article 1 as follows:<sup>17</sup>

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

The convention was a child of its time, but is still a useful framework. First, a state must have a permanent population. There is no definition of how large the population must be: the populations of independent states vary greatly in size. The population must also be relatively stable, although even this principle is flexible (*Western Sahara* case). Population is connected to the question of nationality or citizenship. Citizenship is often either territorially based (*jus soli*), or based on descent (*jus sanguinis*).<sup>18</sup> This question is of vital importance when discussing the Indigenous *locus* and status in society.

---

15 Lowe (2007), pp. 140-142; Briery (1961), p. 155. Later, according to the Stimson Doctrine of Non-Recognition (1932) the states should refuse to recognise those situations, treaties or agreements which may be brought about contrary to the covenants and obligations.

16 PCA, *Island of Palmas* (1928); PCIJ, *Legal Status of Eastern Greenland* (1931); McNeil (1989), p. 11; Evans (2003), p. 128, 139, 142-143; Lowe (2007), pp. 142-144. A more exceptional case was the Clipperton Island case, where Spain had discovered the uninhabited island, but France proclaimed sovereignty on it in 1858. In an arbitration between France and Mexico it was stated that the condition of occupation was an actual taking of possession which consisted in an act or series of acts by which the territory is reduced to possession. France won the case.

17 Montevideo Convention on Rights and Duties of States (1933), art. 1.

18 Lowe (2007), pp. 153-154.

Secondly, there is a defined territory. A new state must demonstrate its title through the claims of a previous sovereign. The borders of state extend around its land, sea, and air territory. The legal principles governing the determination of borders are the same principles that govern title to territory although there are several international disputes on the matter. Coastal states have sovereignty over an area of sea as an automatic adjunct of their sovereignty over their land territory. A twelve-mile territorial sea extends from the coastal State's baselines, and is under the sovereignty of the coastal State.<sup>19</sup>

The third characteristic of state in the Montevideo Convention is the existence of government. This means an effective government in control of the territory and population that form the basis of the state, i.e. the public authorities have the monopoly of legitimate force within the territory. To be a government some degree of constitutional order is necessary.<sup>20</sup>

Finally, the fourth criterion, called the capacity to enter into relations with the other states – the concept of legal personality - can be defined as a condition of state, but also as a consequence of statehood. The position makes more sense when one views this criterion as emphasizing the question of capacity. Article 2 of the Montevideo Convention stipulates that “the federal state shall constitute a sole person in the eyes of international law”. The parts of sovereign states have all the other elements of state, but they are not sovereign states in international law because they lack the capacity to act on the international plane. This, however, is a relative criterion. While states remain the only subjects of general competence, the concept of the subjects of law is dynamic. Even the non-independent territorial entities may have some capacity of relations with the other states. Since World War II there has been two major shifts, which have modified the traditional criteria of statehood: the decolonisation movement and the break-up of several independent states. In most of the cases and in UN's policy they have followed the *uti posseditis* doctrine, according to which the pre-existing boundaries are preserved.<sup>21</sup>

Other criteria for a state are legitimacy and recognition. The main implication of the requirement of legitimacy must have emerged towards statehood in a manner that is consistent with the principle of self-determination. According to the third article of the Montevideo Convention, the state is a fact, and the act of recognition simply recognises the fact of the existence of state. The recognition is a political instrument. There are many examples of *de facto* states which have no *de jure* recognition.<sup>22</sup>

A *jurisdiction* means a state's authority over persons, property, events and circumstances. Municipal law determines the extent of state's jurisdiction. A territorial jurisdiction means a complete and exclusive jurisdiction of a state over its national territory. There are three categories of jurisdiction: 1) jurisdiction to prescribe, or authority of a state to make laws; 2)

---

19 Evans (2003), p. 222; Lowe (2007), pp. 151-152. The first and undisputed occupation of land which is *res nullius*, may give rise to a title (Roman *dominium*). The three-dimensional principle of space came from private law: *cujus est solum est usque ad caelum et ad inferos*.

20 Evans (2003), pp. 222-223; Lowe (2007), p. 156.

21 Montevideo Convention (1933), art. 2; Copter & Delcourt & Klein & Leurat (1999), pp. 414-420; Castellino & Allen (2003), p. 8; Lowe (2007), p. 148, 157-159. The doctrine of *uti posseditis* originates from *ius civile* in Roman law where it was a basic tenet of the praetor for promotion and maintenance of order.

22 Montevideo Convention (1933), art. 3; Lowe (2007), pp. 159-166. Among these one-sidedly proclaimed states can be mentioned Somaliland, Azania, Transdnistria, Abhazia and South Ossetia. An indigenous example could be the Iroquois Confederation or the Māori Kingitanga.

jurisdiction to adjudicate, or state's authority to subject persons or things to the process of courts; and 3) jurisdiction to enforce. According to the nationality principle, a national owes allegiance to his country.<sup>23</sup>

A *Federal state* is a political system which includes a constitutionally entrenched division of powers between the central government and two or more subunits, the constituent territorial units having permanently surrendered the control of foreign affairs and some important powers to the federal government, while authority in internal matters is divided by the constitution between the federal government and the member units of the federation. A federal government possesses a direct authority and jurisdiction over the citizens of units. It is the only unit in international law.<sup>24</sup>

One model for federalism is an American-style territorial federalism, based on regional-based units. There the national minorities, including the indigenous peoples, can achieve self-government only outside the federalism. The original idea of this model of federalism was to prevent factions and to ensure the separation of powers within each level of government. In another model, multination or ethnic federation, some countries embody the desire of national minorities to remain as culturally distinct and politically self-governing societies (nationality-based units).<sup>25</sup>

In a federal system which contains both regional-based and nationality-based units may be demands for some form of asymmetrical federalism, i.e. for a system in which some federal units have greater self-governing powers than others where the national minorities try to build their own societal cultures. Often the Western liberal democracies' nation building makes a sharp division between state and ethnicity. As nationality and identity have different meanings for the existing state and its minorities, the active national minorities want asymmetry for its own sake, as a symbolic recognition that they are a unique nationality-based unit.<sup>26</sup> For the majority the collective goals and the recognition of minority rights may require restrictions on the behaviour of individuals that may violate their rights. The espousing collective goals on behalf of a national group can be thought to be inherently discriminatory.<sup>27</sup>

The stability of a multicultural society is affected by group factors associated with cultural, historical or institutional traditions, that is, a culture of the rule of law, a culture of civic equality, the presence of ethnic nationalism, overarching loyalties and a tradition of elite cooperation. Some constitutional institutions are more readily subject to engineering, including the following: the institutions of devolved power, mechanisms to share equitably executive, legislative, judicial and bureaucratic representation, institutions of cultural promotion and oversight institutions. The ability to operate multinational institutions successfully is dependent on the presence of favourable primary factors. The rule of law is one

---

23 Boczek (2005), pp. 76-78, 80.

24 Kymlicka (2002), p. 94; Boczek (2005), p. 64.

25 Suksi (1998), p. 25; Kymlicka (2002), pp. 98-99, 102. A good example of nationality-based units is the province of Québec.

26 Kymlicka (2001), pp. 23-24, 28-30. There has been also critic against Kymlicka's theory for just duplicating the existing pattern and stressing too much individual rights. Cf. Abelson & James & Luszlig (2002), pp. 220-223, 233.

27 Taylor (1992), pp. 58-59. Taylor also use definitions "first degree diversity" (stressing uniform idea of state) and "second degree diversity" (recognising more plural means of defining the country's identity). Cf. Taylor & Laforest (1993), pp. 181-184.

of the major factors capable of strengthening stability in multicultural states. Such a state also needs civic equality and flexibility. Nationalism can be both a unifying and dividing force.<sup>28</sup>

An *associated state* is in UN terminology a former non-self-governing territory or a former trust territory which has reached a full measure of self-government by a free association with an independent state within the meaning of the General Assembly decolonisation resolution. Association is one example of implementing the right of self-determination. Usually the associated state is granted full independence in domestic affairs, but continues to depend on the metropolitan power in matters of foreign policy and defense. According to UN guidelines, the association had to be freely chosen by the population of the territory, with the people's right of unilateral termination, and must promote the development of the associated state and the well-being of its population. To be legally effective, an association agreement had to be approved by a special GA committee and by the Trusteeship Council. Trusteeship Council's work has been completed, although there are some states of this kind. Typical characteristics of an associated state are a degree of permanence, willingness to observe international law, a certain degree of civilisation, a certain degree of sovereignty and functions as a state.<sup>29</sup>

Another term used is the *non-self-governing territory*, which refers to territories whose peoples have not yet attained a full measure of self-government. The UN Charter calls that the states administering those territories ensure their advancement, develop self-government, take due account of the political aspirations of the people, and assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement. The UN General Assembly has interpreted article 73 of the Charter in an extensive manner in the name of the right of self-determination of peoples, asserting to itself the competence to supervise the implementation of its provisions and to decide, whether a territory has reached the stage of self-government. The General Assembly has defined this kind of territory as "geographically separate and distinct ethnically and/or culturally from the country administering it". The presumption is supported in a situation where the territory has been arbitrarily placed in a position or status of subordination to the metropolitan state. New Caledonia is one of the territories on the UN list. Resolution 1514 opens therefore up an option for independence.<sup>30</sup>

### **2.1.3. Self-Determination, Autonomy and Secession**

The right to self-determination gained prominence in discourse of international politics after World War I. President Wilson linked the principle with Western liberal democratic ideals and the aspirations of European nationalists. The concept was also used in the communist camp, but there it referred to Marxist precepts of class struggle. The protection of minority rights had its high tide in the 1920s and 1930s, when the League of Nations' minority treaties aimed to enable ethnic minorities to maintain the cultural, linguistic, religious and other particularities as group rights that distinguished them from the rest of the state's

---

28 Magnet (2001), pp. 423-428.

29 Magnet (2001), pp. 38-39; Brownlie (2003), pp. 75-76. The Cook Islands and Niue belong to this class.

30 Charter of the United Nations (1945), art. 73; The Declaration on the Granting of Independence to Colonial Countries and Peoples (1960, Resolution 1514); Boczek (2005), p. 93.

population. The self-determination was vaguely implied in the provisions of mandate system. The inherently weak treaties were destabilised by Germany as a pretext for invasion, and after World War II the minority rights were not included in the UN Charter. Instead came contracting for liberal, universal human rights norms focusing on individual rights.<sup>31</sup>

The principle of self-determination of peoples is built on three main structural elements: state, people and self. Statehood as τέλος of self-determination is representative of the era of decolonisation. A people means a group of beneficiaries or right-holders. Self is decisive for the determination of the identity of a people and state. The intertwined elements of process construe together the meaning of self-determination. The self-determination can be divided in two parts: a) internal self-determination, which refers to an internal situation in a state where the population is entitled to enjoy self-determination in its own state; and (b) to external self-determination which refers to the people's relation to other peoples in full self-determination without external interference.<sup>32</sup>

The self-determination of peoples is mentioned twice in the UN Charter.<sup>33</sup> It has led to a number of UN resolutions and court decisions, including the Declaration on the Granting of Independence to Colonial Countries (1960), the two international Covenants on human rights (1966), the decisions on Namibia and Western Sahara by the International Court of Justice, The Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, Declaration of Principles of the Final Act of Helsinki (1975) and the African Charter on Human and People's Rights (1981). The right to self-determination of peoples developed as an international legal right. The International Court of Justice has found that the right of self-determination has an *erga omnes* character as one of the essential principles of contemporary international law. Nevertheless, it is limited in the United Nations practice to colonial and overseas non-self-governing territories and may be exercised by a territory only as a unit, within the administrative boundaries inherited from the colonial power, without disruption of the territorial integrity of the new state (*uti posseditis*). For a long time there so-called blue-water or salt-water thesis has dominated, according to which decolonisation concerns only those peoples separated by sea from their mother country. It has been increasingly replaced by the Belgian thesis, according to which all peoples are entitled to self-determination. In the international law of human rights, the right of self-determination for all peoples can be found from article 1(1) of the two UN Covenants of 1966. It differs from the other rights of the Covenants on account of its collective character. That is why it has been used by the Indigenous peoples in the international forum. The right expressed is interpreted as a collective human right to democratic government, or internal self-determination. The concept of people is used only in the demographic sense of all the population of the self-determination territorial unit as such. The right of self-determination was also incorporated as one of the seven basic principles of international law in the Friendly Relations Declaration. Under Western influence, "the emergence into any other political status freely determined by a people" was declared to be a mode of implementing the right of self-determination. The

---

31 Charter of the United Nations (1945), art. 1-4; Anaya (2004), pp. 98-99; Buchanan (2007), pp. 410-411.

32 E.g. Hannum (1990), p. 49; Suksi (1998), pp. 82-86; Tsagourias (2007), pp. 209-210.

33 Charter of the United Nations (1945), art. 1.2, 55.

Helsinki Final Act and the African Charter have brought forth the concepts of internal self-determination and peoples.<sup>34</sup>

The right of self-determination implies a free determination by the people of the territory of their future political status. There are four possible modes of implementing the right: establishment of a sovereign independent state; free association with another state; integration with another state; and other political status freely determined by the people of the territory. The self-determination as organisation of territorial authority is related to the principle of democratic governance as a fundamental structure for achieving good governance. This is supported also in article 25 of the ICCPR, according to which rights to participate in public affairs, vote and access equally to public services belong to democratic self-determination rights. The modern concept of self-determination means also the right to freely pursue economic, social and cultural development, and the right to free disposition of natural resources.<sup>35</sup>

Self-determination is usually described in broad lines as a right of peoples. When it is an accepted principle, even *jus cogens* of international law, it is restricted in relation to minorities and indigenous peoples. The doctrine of state sovereignty also limits the implementation of self-determination. Some countries, like France, do not even recognise the existence of minorities. When a group entitled in international law to secession opts instead for self-determination, when an appropriate international legal process has determined that the status granted by the state in question has violated the group's right, or when the granting of autonomy is the best prospect for stopping persistent and serious rights violations, a claim to intrastate autonomy should be acknowledged.<sup>36</sup>

In Will Kymlicka's liberal project self-determination is defined as a capacity to maintain a societal culture, to live within it and according to its unique traditions. Societal culture means here a culture which is able to sustain a unique and separate way of life or political entity, being the basis for the public life of a community. Self-determination is the creation of space that can function as a meaningful context of choice for a people to whom the dominant or public culture is too alien to provide meaningful life choices. To Kymlicka persons confined within a larger state have good grounds for demanding regional autonomy and self-government.<sup>37</sup>

*Autonomy* means less than full self-determination but more than mere minority rights. Its subject is a recognised group and its collective rights. It needs a balance between territorial state and legitimate expressions of national or cultural identity on which smaller groups will

34 UN Resolution 1541 (1960); International Covenant on Civil and Political Rights (ICCPR, 1966), art. 1(1); Covenant on Economic, Social, and Cultural Rights (CESCR, 1966), art. 1(1); ICJ, *Case Concerning East Timor (Portugal v. Australia)*, 1995, Rep. 90; Nowak (2005), pp. 6-9, 14; Spiliopoulou-Åkermark (1997), p. 28; Lãm, pp. 116-117. The right to *all people* refers besides the peoples under colonialism or alien subjugation, domination and exploitation to those living in independent states; Resolution 1541 stresses geographical, ethnic and cultural difference from the majority.

35 ICCPR, art. 1; Aikio & Scheinin (2005), p. 14; Nowak (2005), p. 24.

36 Anaya (2004), pp. 13-14; Aikio & Scheinin (2005), p. 15; Buchanan (2007), p. 403.

37 Kymlicka (1996b), pp. 80-87; 104-108. In Kymlicka's model the indigenous claims are limited to defined land space. It preserves the *status quo*. What is outside the reserve land is the settler state unburdened by further claims; Avishai Margalit and Joseph Raz list characteristics relevant to self-determination: a common character, group culture, a definition of membership, importance of membership for one's self-identification, membership as belonging and pervasive culture. Cf. Kymlicka (1996b), pp. 82-85.



continue to insist. An increasing type of autonomy is the territorial autonomy where the autonomy is geographically defined. But the autonomy can also be non-territorial. It can be cultural autonomy, protection of the minority's identity, language and education. In personal autonomy the subjects are members of a group and their rights. In functional autonomy selected state functions and rights are transferred to private minority group organisations. Autonomy may serve to realise the internal self-determination. When the people are granted enough room for preserving their identity the autonomy works as a means to avoid secession.<sup>38</sup>

According to Steve Curry a state needs political unity combined with the ability of the people to re-imagine itself on new terms. A state loses its justification the moment it ceases to be the expression of community interests. The disintegration of a state can in the ultimate sense lead to a secession of the state.<sup>39</sup> The reasons can be various. The secession needs a strong territorial base for a collectivity, a distinct society and a disadvantaged relationship between the centre and the collectivity. There may be quests to preserve a distinct culture, self-defence or rectify past injustices. These interacting variables can make separatism at a certain historical moment a meaningful option. Still, the secession is today an exceptional choice. In international law it is only tolerated as an ultimate remedy in a situation of marked oppression. Norms of interstate conduct are an important barrier against secession. A potential secessionist territory has often historical roots and is viable as an independent state and needs a psychological boundary between itself and outsiders. In international case law the recognition has major importance. Because the self-determination is linked to the fundamental interest of just peace, the exercise of alleged right to self-determination leading to the creation of independent states might gravely endanger international peace. The international community wants to promote the exercise of self-determination under conditions safeguarding the broader interests of the maintenance of global stability and just peace. Recognition of external self-determination depends on the assessment of the prospects of the emerging domestic legal order and of its consistency with the broader values of the international community.<sup>40</sup>

---

38 Suksi (1998), pp. 13-24, 28, 86, 90.

39 Curry (2004), p. 136.

40 Heraclides (1990), pp. 13-14, 16, 19, 29, 32; Kymlicka (1996a), pp. 355, 364, 367; Tsagourias (2007), pp. 220-222, 224. Only three post-war constitutions recognised theoretically a right to secession, in Burma, the Soviet Union and Yugoslavia. An exceptional case was the secession of East Pakistan in 1971, where the departure of a majority from the geographically divided country was recognised as *fait accompli*. In the advisory opinion of the ICJ in *Construction of the Wall* case the recognition of a people as a source of authority is a major moment for the existence of the right of self-determination. ICJ, *Construction of a Wall*, 9 July 2004, s. 118. The Supreme Court of Canada defined in *Reference re Secession of Quebec* (1998) the objectives of stability and integration are as the major factors determining the legal obligations of both parties (s. 96).

## 2.2. Indigenous Rights

### 2.2.1. Noble Savage

The era of explorations forced to define the status and nature of the encountered Indigenous communities. The first question was whether Indigenous people were human. In 1493 Pope Alexander VI defined that Indians are as peaceful people humans and are able to be Christianized.<sup>41</sup> Also Paul III declared (1537) that the Indians ought to be treated as true men, capable of understanding the Catholic faith.<sup>42</sup> Urban VIII (1639) even threatened with excommunication those who would deprive the Indians of their liberty or property.<sup>43</sup> Bishop Bartolomé de Las Casas became the most renowned defender of Indigenous rights in the sixteenth century with his History of Indies, which influenced the Spanish *nuevos leyes*, restricting the slavery in *encomiendas*. Francisco de Vitoria outlined the basic concepts of Indigenous peoples. He saw that state equality was applicable to all states. The Indigenous peoples were in a peaceable possession of their goods and should not be deprived of it under the pretext that they would not be the true proprietors: they were the true owners of their lands with dominion in both public and private matters. However, he accepted, like Thomas Aquinas, a just war when there was a just cause. But if the Indians were innocent, no such cause existed. A just war was more acceptable to Dominican father John Major, according to whom the Christian states could legitimately take to arms in cases of Indigenous resistance to gospel.<sup>44</sup>

The Renaissance image of Indigenous people was mostly negative. Dominican friar Domingo de Betanzos described in the 1530s their idolatry with a view that Indians are brutal animals who cannot learn the mysteries of faith. There were also exceptions, like Michel de Montaigne, who wrote that they have, despite their immaturity, a common trait with the Europeans - the use of reason. The Salamanca Divines and Hugo Grotius confirmed that the legal principles governing the conduct of European princes extended to their activity in non-Christian parts of the world. Grotius, however, saw that all peoples have the ability to enter into treaty relationships. The Indians had a right to their property and possession. He accepted in the footsteps of Vitoria only peaceful conversion by preaching the gospel. Samuel Pufendorf was even more critical of foreign intervention to Indigenous society.<sup>45</sup>

The Indigenous peoples' fate was formed by the "doctrine of three C's": civilisation, Christianisation and commerce. The ages of Absolutism and Enlightenment, brought forth a dual view on Indigenous societies. On the other hand, they lived in pre-social conditions without proper laws. Lacking the political development to qualify as nation, they were incapable of self-government. Thomas Hobbes described them as "savage people... who except the government of small families... have no government at all; and live at this day

---

41 Alexander VI (1493). Alexander VI based his judgment on St. Augustine, who had explained that strangers who have man's external appearance or customs and who know their origin, are without doubt descendants of Adam. Cf. Augustine (1972), pp. 661-664.

42 Paul III (1537).

43 Urban VIII (1639).

44 Morse (1985), pp. 20-22; Rouland & Pierré-Caps & Poumarède (1996), pp. 112, 114; Anaya (2004), pp. 16-18.

45 Montaigne (1965), p. 214; Dickason (1993), pp. 46-47; Morse (1985), pp. 23-24.

in the brutish manner”. To justify the acquirement of new territories there was gradually developed a theory of *terra nullius*, where discovery was employed to uphold colonial claims to indigenous lands. This doctrine underpinned especially the Australian jurisprudence until the 1980s.<sup>46</sup>

On the other hand, indigenous people were noble savages, pure children of nature. The French missionaries in Canada in the early seventeenth century, especially the Jesuits in their influential Jesuit Relations, published mission reports and defended the viable civilisations of Iroquois tribes. In the background was religious motivation, but at the same time they expressed strong cultural relativism.<sup>47</sup> Rousseau described aristocratically the first societies governed: “The savages of North America govern themselves still in that way in our days, and are very well governed”.<sup>48</sup> Neither did Montesquieu support the idea of spreading European ideas and religion to other continents.<sup>49</sup> Locke’s principle of contractual treaty of commonwealth recognised the existing rights of the Native government. Those who have the supreme power to make laws in European countries can have no more power than what every man naturally may have over another. When Indians signed treaties with non-Indians the bonds they established were for specific purposes. Locke also recognised Indians’ proprietary rights, although he saw that they could lose the right due to their inefficient use of land: a right to own property demanded work to make the land profitable.<sup>50</sup>

Emmerich de Vattel defined the law of nations where the discrete body of law dealt exclusively with states. For him the nation and state became interchangeable terms. Among the free and independent nations, each nation should be left alone to judge its own obligations, including its citizenry. Vattel articulated the doctrine of state sovereignty which was later employed in justifying an unequal power relationship between Indigenous peoples and colonial/settler states. The establishment of European colonies in North America was in just limits entirely lawful, and once under the rule of another, it was no longer a state, or under the law of nations. The establishment of colonial administrations necessitated a conscious effort to reproduce the conditions for the centralised states they represented back home. One of the conditions was cultural uniformity. Popular sovereignty became a vehicle to transmit European cultures to indigenous peoples. That led to “white man’s burden”. Popular sovereignty as a unifying concept brought with it cultural imperialism. The nation-building dealt often with national chauvinism, which implied a process of national integration, an amalgamation or a melting-pot of peoples. Assimilation and protection went hand in hand. On the other hand, the sovereignty was distinguished in European legal systems from property rights. The acquisition by a colonising European power did not necessarily entail acquisition of proprietary land. According to the principles of British colonial and international law, the local peoples land rights continued under their own systems of law after the acquisition

---

46 Kymlicka (1996b), p. 22; Castellino & Allen (2003), pp. 199, 202; Anaya (2004), pp. 22, 29. The notion of *terra nullius* was finally overruled in *Mabo (2) v. Queensland* (1988), where the Native title was recognised. Also ICJ took opinion in the *Western Sahara* case on the question. There must be taken into regard the freely expressed wishes of the people of the territory notwithstanding their character or political status immediately before the colonisation. ICJ, *Western Sahara*.

47 Thwaites (1897), Vol. XXI, p. 55; Vol. L. p. 171.

48 Rousseau (1960), p.282.

49 Montesquieu (1977), pp. 289-290, 337.

50 Locke (1988), pp. 273, 287, 298.

of sovereignty by the British Crown and became enforceable in common law courts. This is called the doctrine of continuity.<sup>51</sup>

### 2.2.2. *Marshall Trilogy and the Colonial Policy*

The so-called Marshall trilogy of the United States Supreme Court decisions, named after Chief Justice John Marshall, has been important for common law countries. The cases defined the status of Indian nations. In *Johnson v. McIntosh* (1823) the court heard an appeal where two parties had a claim to same piece of land. Marshall CJ ruled that the law of land was settled by the principle of the acquisition of sovereignty through discovery and subsequent conquest. Such law served as the basis of the sovereignty from which the court held its authority. A purchase from Indians on behalf of the federal state at best amounted to a purchase of, or negotiation of compensation for the loss of, the Indians' right of usage which the government could terminate at will. This position continued the doctrine of classical sovereignty where the sovereign is the ultimate source of law within the state. Marshall approached the act of state doctrine, developed in common law countries, to deal with issues raised by the relationship between sovereign nation-states. Sovereignty of the United States was transferred by a treaty and by the rights of war from the sovereignty of Great Britain in North America. The discoverer asserted a sole right to settle or acquire non-European lands. The Crown placed itself into a relationship of superiority over Indigenous peoples. The Indians had established a prior possession, having rights of occupancy, subject only to remaining in peace with the sovereign and an exclusive right of the federal state to extinguish their title. Marshall's doctrine was used as a guide to the proper legal procedure for dispossession.<sup>52</sup>

In 1831 the Cherokee Indians fought for recognition of their status as a sovereign and independent nation, having ultimate and original jurisdiction on and in lands recognised as their sovereign territory in a succession of treaties made with the United States. The laws of the state of Georgia purported to seize the land still occupied by the Cherokee and to extend the operation of all its laws to Indigenous territory. On the basis of the United States' sovereignty, Marshall had to develop a new principle based on the act of state doctrine which would be consistent with recognition of Indian jurisdictions, rights to land, autonomy and governments. He forged a doctrine of domestic dependent nations. The tribes had by making treaties placed themselves under the United States protection and were part of the territory. Also in *Worcester v. Georgia* (1832) the court recognised that the Cherokee were as a nation in possession of usufructuary title. The decision validated their claim to autonomy and recognised their right to make treaties, freely entered into by both parties and binding in law. The pre-contract rights to land, resources and self-government became a burden to the title and acts of the federal state which could be annulled by any act explicitly abrogating the treaties on

---

51 Eide & Krause & Rosas (2001), p. 96; Anaya (2004), pp. 21, 23; Curry (2004), pp. 89, 98-99; McHugh (2004), p. 216; Richardson & Imai & McNeil (2009), pp. 258-260.

52 USSC, *Johnson and Graham's Lessee v. William McIntosh* (1823); Curry (2004), pp. 55, 60-62. The same reasoning can be found in Brennan J's ruling in *Mabo v. Queensland* (1988). Both acknowledge the indigenous title, but limit the extent of rights because the settle state's inherent sovereignty is incompatible with their holding of title or enforceable rights.

the part of the United States.<sup>53</sup> The doctrine of domestic dependent nations recognised the independent existence of indigenous nations, their government and laws before discovery, and a non-unitary relationship that was akin to protectorates in international law.

The nineteenth century positivist international law continued the early modern age's legocentric doctrine where Indigenous peoples were closed outside the political community. The international law treated Natives as uncivilised and therefore, outside of its scope. The law of nations did not apply to "organized wandering tribes". The social evolutionism and legal positivism's assertion of law's capacity to shape and regulate conduct favoured the policy of assimilation which became a self-serving justification for more pragmatic ends. It aimed at a culturally undifferentiated population where the Indigenous people would disappear as distinct communities. The Indigenous law was treated as subordinate to the official law of the state. The Indigenous people were to walk the path to maturity and become part of the European story. The policy of assimilation was tied to the settler-state's own image. The law became a means of dissolving tribalism and opening access to indigenous land. There was interplay between law as an instrument of cultural transformation and Indigenous resistance to change.<sup>54</sup>

During the nineteenth century the colonial countries adopted a policy of guardianship over Indigenous peoples. The British and French colonial powers had a different policy, though: while the English common law developed a pattern of administration along the lines of a simple protectorate and the system of indirect rule, the French civil law principle preferred the direct control of the mother country. The British system of indirect rule was content to prohibit repugnant customs opposed to justice, equity and good conscience, while the French colonial legal regulation limited the customary rule to private rights and duties. Where custom had been retained, it could be replaced if people themselves chose to accept European law by opting for it through some form of registration. France needed the colonies to spread its civilising mission but also for economic and demographic reasons. The colonies became *laboratoires de modernité*. The British jurisdiction recognised the capacity of non-Christian rulers to grant the Crown an imperium or jurisdiction in certain territory. There were two kinds of *imperium*: territorial sovereignty and extra-territorial jurisdiction. Many cases of the late nineteenth and early twentieth centuries recognised that the treaties of cession between the Crown and "uncivilised" polities were arrangements concluded between two sovereign powers, and some of the indigenous peoples had even a structure which reminded of European structures. Despite the recognition of original tribal sovereignty it had in common law interpretation disappeared in the Crown's acquisition of sovereignty. The

---

53 USSC, *The Cherokee Nation vs. The State of Georgia* (1831); USSC, *Samuel A. Worcester, in error, vs. The State of Georgia* (1832); Curry (2004), pp. 62-64. Despite the Supreme Court's doctrine the Cherokee were forcibly relocated from their traditional areas in 1838. This process is known as "the Trail of Tears". Some later Supreme Court decision, like *Tee-Hit-Ton* (1954), neglected the existence of an Indigenous settled system of law. In the 1970s, the politics began to turn again. In 1972, President Nixon spoke of Indian self-determination as the basic principle for United States Indian Policy. The new legislation, including the Self-Determination and Education Act (1975) and Indian Child Welfare Act (1978) reflected this policy. The residual tribal sovereignty was reconfirmed in the USSC case *Martinez* (1978).

54 Roberts (1963), pp. 67; Anaya (2004), p. 29; McHugh (2004), pp. 217-218; Branting & Kymlicka (2006), p. 61.

Crown's *de jure* sovereignty was regarded as absolute. A retroactive reversal and adoption of a divided sovereignty model was not feasible.<sup>55</sup>

During the 1870s was developed the trusteeship doctrine as part of the civilising mission. In Britain the doctrine signified that the Crown could unilaterally establish jurisdiction over the natives and its own subjects inhabiting in uncivilised territories. Towards the end of the nineteenth century the Crown could erect jurisdiction over its subjects unilaterally where no stable native polity existed in uncivilised territory. This doctrine led to special legislation, like the Pacific Islanders Protection Act (1875). Despite the stand of the common law courts that the government's formal relations with non-Christian people were non-justiciable, the Crown was gradually ready to recognise in protectorates the division of sovereignty over territory. The external sovereignty belonged to Crown, while the Indigenous peoples could preserve the internal sovereignty. The Indigenous political forms were, however, subordinated and marginalised. Where a European country had assumed the sovereignty, the indigenous people were a legal unit only – if so recognised - within the municipal law. Also France moved from assimilation towards this kind of association at the turn of the twentieth century. The protective role of the international community was continued during the League of Nations with the “sacred trust of civilisation”.<sup>56</sup>

After the World War II the social scientists believed in the end of ethnicity as a primordial form of group organisation, rooted in history, fixed in content and pre-modern in form. The constructivist model explained that the ethnic identity could be chosen, changed or maintained. The ethnic groups were constantly recreating themselves in a process of construction or invention. Also the legal liberalism challenged the indigenous particularism in the 1960s, treating all citizens as equal and focusing on the welfare state and civil and political rights. Many governments proposed to remove the special legal rights and status of Indigenous peoples. These theories were challenged in the era of self-determination.<sup>57</sup>

---

55 Curry (2004), pp. 77-78; McHugh (2004), pp. 203, 205, 293; Daughton (2006), pp. 5, 10, 13; Menski (2009), pp. 448, 454-456. Two examples of this interpretation in Privy Council's case law are *Re Southern Rhodesia* (1919), where was recognised king Lobengula's sovereignty over the Mashona and Matabele tribes, and *Hoani Te Heu Heu Tukino v. Aotea District Maori Land Board* (1941), which recognised the original sovereignty of Māori Tribes.

56 Covenant of the League of Nations (1919), art. 22; Roberts (1963), pp. 30-32; Anaya (2004), pp. 31-33; McHugh (2004), pp. 209-210, 212, 214, 295. From 1891 the British Protectorates became an arrangement between personal *imperium* of extraterritorial jurisdiction and a full authority of territorial sovereignty. In the background was the Berlin African Conference, which declared the obligation of colonial powers to watch over the preservation of native tribes, and to care for the improvement of the conditions of their moral and material well-being. Cf. Final Act of the Berlin Africa Conference (1885), art. 6; In the *Island of Palma* Case the Permanent Court of International Justice denied the validity of the treaty making power of indigenous peoples. Cf. PCIJ, *Island of Palma* (1928), s. 831, 856.

57 McHugh (2004), pp. 220-224, 354.

### 2.2.3. *Modern Developments and Discussion*

By the mid-1970s the nation-states were abandoning the policy of assimilation. The movement of self-determination reflected both international and domestic pressure. The international community increasingly learned to value and promote the integrity of diverse cultures within existing state units. The ethnically homogenous nation-state was giving way to the model of a plurinational or pluricultural state. The Indigenous peoples demanded respect for their presence and claims, including the recognition of their status. The Treaty negotiations with themes of inner self-determination and self-government, and the claim processes with rehabilitation of past grievances appeared on stage. The claims placed historical emphasis on the validation of authority of the traditional territory-based aboriginal polities. Many cases opened the door to doctrinal development, articulating principles for the conduct of the relations between governments and Indigenous peoples. In the 1980s and 1990s in the politics of many countries' a dramatic change took place. It has led to a legal recognition of Indigenous rights and self-determination, although there have also been setbacks. The process has been demanding; it has asked the governments to adopt a new cultural orientation. The Indigenous governance has become a subject to ongoing constitutional audit by settler-states. The post-recognition period, started in the 1990s with the policy of reconciliation, has been characterised by mutual dialogues and agreements. The Indigenous groups have placed new demands on their outmoded structures and processes. On the other hand, they have been required to adopt constitutionalised forms and find means to resolve their internal disputes. The Indigenous affairs are increasingly legalised. The international law has recognised the rights of Indigenous groups and individuals premised on their self-identification practices as groups and individuals within the groups. This self-identifying status is also strongly present in the Declaration on the Rights of Indigenous Peoples.<sup>58</sup>

The only binding international legal instrument referring specifically and collectively to indigenous peoples is the ILO Convention No. 169. It could be a unique universally binding standard on Indigenous land rights if it would be more commonly ratified. It combines rights as enforceable minima with social goals as aspirational maxima. The Indigenous peoples' relation to land has collective character, including the spiritual and cultural dimensions. The Convention declares that "indigenous peoples have the right to retain their own customs and institutions where they are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights." James Anaya estimates that a large majority of the norms contained in the convention are an expression of customary international law. Other important forums for indigenous issues have been the UN Working Group on Indigenous Peoples (WGIP) which prepared the Declaration on the Rights of Indigenous Peoples (2007), The Committee on the Elimination of Racial Discrimination (CERD), the Permanent Forum on Indigenous Issues as the subsidiary organ of ECOSOC – one of the principle organs of the UN, and the Organisation of American States and its Human Rights Court and Interamerican Declaration on the Rights of Indigenous Peoples

---

58 Declaration on the Rights of the Indigenous Peoples (2007); McHugh (2004), pp, 308, 315-316, 321, 355-360, 363.

(draft). The United Nations declared the years 1994-2004 as Decade of Indigenous Peoples and again since 2005.<sup>59</sup>

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities protects the existence and identity of minority members. It asks the states to adapt their legislation and make it effective concerning the protection and support of minorities. The minorities have a right to effective participation in cultural, religious, social, economic and public life.<sup>60</sup> As most international legal instruments, it however, recognises only the individual rights of cultural minorities.

There are several modern definitions on Indigenous rights. Benedict Kingsbury has identified five grounds for the recognition of indigenous peoples' rights. They are human rights and non-discrimination claims, minority claims, self-determination claims and claims as Indigenous peoples, including those based on treaties or other agreements between indigenous peoples and states.<sup>61</sup> In relation to self-determination claims, the Harvard Project on American Indian Economic Development (1992) has identified as denominators for effective governance stable institutions and policies, fair and effective dispute resolution, separation of politics from business management, competent bureaucracy and cultural match. Self-government is an overarching political dimension of ongoing self-determination while self-determination and economic prosperity are inextricably linked. The core idea is that government functions according to the will of the people which is governed. With greater self-government leaders are more accountable to the members of the community and their decisions are more likely to be in tune with the cultural values of the community.<sup>62</sup>

Angus Fleras and Yale Belanger have defined different models of indigenous self-government. Fleras classifies them as statehood, nationhood, community, and institution models. 1) The statehood may strive for absolute sovereignty, which means complete independence and territorial autonomy with internal and external autonomy, and without external interference. 2) In the nationhood model the sovereignty is shared and the independence is partial with internal autonomy. 3) Municipal or community self-government is functional. It follows the model of communal administration and is limited to internal jurisdiction. 4) The institutional model is the weakest form of self-government, which Fleras connects to urban Indigenous people. It can reach a nominal sovereignty, which has participation and representation rights. It participates in the decision making and the institutional accommodation.<sup>63</sup> Belanger's four pathways to Indigenous self-government are mini-municipality with delegated, limited bylaws mainly over local concern; adapted federalism as a negotiated mix of jurisdictions

---

59 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1991), art. 8(2), 13(1); UN Resolution A/Res/59/174 (2004); Knopp (2002), pp. 242, 255-256; Castellino & Allen (2003), pp. 206, 215; Anaya (2004), pp. 61-62. WGIP has been replaced by an expert mechanism.

60 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), art. 1, 1(2), 2(1)-(3). The Declaration was influenced by the Copenhagen Document of CSCE (1990) and the European Charter for Regional or Minority Languages of the Council of Europe (1992). "Persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination. Cf. art. 2(1).

61 Kingsbury (2001), 189.

62 The State of Native Nations (2008), pp. 20-21, 70.

63 Macka & Fleras (2005), pp. 52-55.



and authorities over internal, cultural and external matters; third order of government as a negotiated mix of jurisdictions and authorities over internal, cultural and external matters; and nation-to-nation model with inherent and negotiated comprehensive separate and shared powers.<sup>64</sup> Still, many of these determinants are today weak or lacking. Many Indigenous groups are institutionally hollowed out. Their languages have fallen into near distinction, they have limited land space left and their culture is mixed. In this light Jacob Levy views the rights to self-determination and self-government as being at best instrumentally justified.<sup>65</sup>

Curry abandons the mere self-determination model. He demands for indigenous peoples the right to exercise sovereignty as a people, as a sovereign nation. This right would be limited by competing interests that morally burden the exercise of the sovereign rights. The exercise of sovereignty affects the law and other constitutive matters of society. It involves a retrospective re-imagining of the terms of engagement. Non-Indigenous citizens of settler states have to accept alteration to their ways of doing things to give way in some measure to Indigenous people's ways of doing things. The exercise of indigenous sovereignty must include the right to reserve consent until terms of engagement are agreed, and to reserve the right to lay claim to land and resources. There must be also a presumptive right to secession. Curry estimates that the three major questions which limit this process are the existing property rights of non-Indigenous individuals and communities, the positive law and the Indigenous challenge to Western democratic liberty. He admits that an idea about Indigenous sovereignty emerges as a complex arrangement of self-government alongside constitutional recognition, legal integration and negotiation. Its starting point is the recognition of sovereign right.<sup>66</sup>

A new specific problem emerged with the urban indigenous groups whose weight has increased significantly. Their fluidity forms a major challenge to governments. The territorial orthodoxy still holds that the control of a geometrically delimited space is the necessary and sufficient condition of power and legal order. Another model is the personality of laws. The basis is in personal membership in an ethnocultural or national group. The communalised or ethnicised law can translate into personal or cultural autonomy for a non-territorial ethnic group. This is a considerable choice for those people, whose connection to tribal membership is often weak but who still identify themselves as being Indigenous. They argue that their situation is a direct outcome of colonialism. They want to partake in indigenous self-governance. Still, the response of national governments has been often that of neglect. Since the 1980s the situation has been gradually changing. The question about the juridical origins of the government's constitutional relationship with the tribal nations has shown on the other hand that the justification is not only historical and political association, but also a dynamic process. Many groups have become involved with service delivery, establishing contractual relations with governments and municipalities in welfare-related matters.<sup>67</sup>

---

64 Belanger (2008), p. 160.

65 Macedo & Buchanan, pp. 120-123.

66 Curry (2004), pp. 149-154, 157.

67 McHugh (2004), pp. 439-441; Indigenous Legal Traditions (2007), pp. 137-139. *Vice versa*, there are also some cases, where non-indigenous people live in territories which are handed over to indigenous people and are partly under the latter's jurisdiction. Cf. Sechelt and Westbank First Nations in Canada.

## 2.3. The Constitutional Principles

The constitutional principles have different significance in the compared countries. In France these principles have had since the revolution great importance and constitutional law, case law and legal science have all developed them further. New Zealand and Canada have their background in unwritten principles of the English Constitution. Canada has later developed domestic doctrine through the Constitution Act, 1982, and case law, while New Zealand still follows the English doctrines refined during the nineteenth century. Therefore, the focus in this subsection is on France and Canada.

### 2.3.1. France

The French Revolution wanted to take distance to the disunion of *ancien régime*. The creation of new, centralised system of administration and the promotion of the French language were among the means to reform the state. Although the development towards a more centralised state had begun since the sixteenth century, the revolution was a great turning point: an amalgam of expressions of national fervour and commitment to democratic ideals. The constitutional law was introduced as the regulator of public power. The concern was predominantly with the division of institutional competence. Today *bloc de constitutionnalité* (cf. section 1.3.1) includes many expressions of French constitutional principles. These principles are due to historical reasons and based on revolutionary idealism more dominant in France than in the common law countries (with the exception of the United States).<sup>68</sup>

#### 2.3.1.1. Une république indivisible

The unitary state of France does not formally recognise the existence of ethnically distinct minorities. The preservation of unity, a nation one and indivisible, has been central to its “Jacobin” tradition.<sup>69</sup> Bodin used for the first time the notion of sovereignty which integrated the country as a centralised territorial state under an absolutist king who was above the law, yielding unlimited and undivided authority over his subjects. The king had all the power that a government could legitimately exercise and restraints on his power were mere recommendations of prudence and good government. The monarchy tried to unite the heterogeneous kingdom.<sup>70</sup> Rousseau defined the sovereignty as inalienable and indivisible. But unlike the predecessors and successors, he and Montesquieu did not exclude the possibility

---

68 Sheff (2000), p. 57; Bell (2001), p. 9; Dorcen (2003), p. 387. Similarities between France and the United States in this question can be explained due to a similar revolutionary background and strong reciprocal overseas influence during the late eighteenth century. “La France est une République indivisible, laïque, démocratique et sociale. Elle assure l’égalité devant la loi de tous les citoyens sans distinction d’origine, de race ou de religion”, cf. Constitution (1958), art. 1.

69 Debbasch (1996), pp. 360, 362; UNHRC, Mission to France (2008), p. 7.

70 Bodin (1991), pp. 56-57, 100-102. Bodin created the notion competences of the Crown (*competences régaliennes*), which has become current again in New Caledonia and French Polynesia when defining the share of competences.

of a federal republic as a form of constitutional structure.<sup>71</sup> With the revolution, a more rigid form of indivisibility was included to the early constitutions.<sup>72</sup> The later constitutions have repeated the theme that only the people may decide to cede a territory.<sup>73</sup>

According to Hannah Arendt, in the French Revolution the power belonged to the people, which was the source for the legitimacy of power. The fathers of the revolution sought for laws absolute legitimation from transcendent source. The general will became a substitute to the king's will, a source for power and authority. The people's power was understood as an irresistible landslide power of nature. The danger in this ideology was that the people's will aimed at forming a unity which would level down the differences of opinion.<sup>74</sup>

Tzvetan Todorov speaks about French exceptionalism. Legacies of 1789 are the belief in distinct history, culture and society. Ethnocentrism is seen in this ideology as a mission and the nation as a distinguishable whole. The principle of all sovereignty rests essentially in the nation. While the Western model of nation-state is not pure, the solidarity of nation goes deeper - it is sustained by a legal framework. The French nationhood was born artificially from two different geographical areas and several distinct provinces, based on the people. Consciousness of being France was a child of growing central authority. There was born the nation as an imagined landscape, an identity based on myth. The nation was an artefact of the state. Therefore, the commitment to an imagined community must be renewed constantly.<sup>75</sup>

The indivisible republic assures equality of all citizens before the law without distinction of origine, race or religion. The Constitutional Council has referred to the preamble of the 1946 Constitution which allows only those restrictions to sovereignty which are necessary to the organisation and defence of peace. The indivisibility means that the people itself is indivisible. The Constitution recognises only the French people, composed of all French citizens without distinction of origin, race or religion. The Constitution also prohibits advantaged collective rights to a distinct group defined by origin, culture, language or belief. The state has the monopoly on legislative, governmental and administrative powers. In principle, all delegation of legislative power is forbidden, but the state has the power to define and change the limits of its competence.<sup>76</sup> Therefore, both the powers of the European Union and New Caledonia are included in the Constitution which is the supreme law.

A logical consequence of this ideology is that France has no national minorities in the legal sense. The French policy has stressed integration on a voluntary basis, creating a common identity, an integration of all individuals who share a common cultural and historical legacy - a process of long acculturation. According to Pierre Bourdieu, the identity is determined by

---

71 Rousseau (1960), p. 243-253.

72 Constitution de l'an I (1793), art. 7-8; Constitution de l'an VIII (1799), art. 1. A Girondin view from the early days of the revolution: "le gouvernement fédératif ne convient pas à un grand peuple, à cause de la lenteur des opérations exécutives, de la multiplication et de l'embarras des rouages". Cf. Debbasch (1996), p. 362.

73 Constitution (1946), art. 27; Constitution (1958), art. 53.

74 Arendt (1963), pp. 156, 179.

75 DDHC (1789), art. 3; Todorov, (1993), p. 1-3, 240-246; Sheleff (2000), pp. 65-67.

76 Constitution (1946), Préambule; Constitution (1958), art. 1, 3; Malberg (1930), pp. 260-262; CC, *Décision no. 76-71 DC* du 30 décembre 1976; *Décision no. 91-290 DC* du 9 mai 1991, ss. 10-13. The controversial sentence in the bill was "...le peuple corse composante du peuple français."

legitimate authority, which imposes the proper definitions to all in society. These definitions of identity work as a system of classification for all groups.<sup>77</sup>

### 2.3.1.2. *Secularism*

One distinct feature in French constitutional law is *laïcité*, which is secularism that means a strict *de jure* separation of the state and religion. During *ancien régime* the Catholic Church had the monopoly on public worship, instruction, poor relief and hospitals and all the King's subjects were legally Catholics. During the revolution the tide turned: in a few years all the privileges of the church were abolished. A new turn took place when Napoléon I made a concordat with the church in 1801. The catholic faith became "the religion of a great majority of the Frenchmen". This policy continued until the third republic, where began a continuous struggle between the church' supporters and secularists. The school laws (1882) had the objective to create a secular primary education for all while the law on associations (1901) laid down a general principle of freedom of association. The religious congregations could only be formed when specifically authorised by the law.<sup>78</sup>

In the turn of the twentieth century the republican supporters of *laïcité* gained power. Combes' government introduced the separation of the church and state. The law came into force in 1905. Although it ended the privileges of the church, the outcome was more a compromise. The parishes became cult associations. They could use freely their churches but they transferred to departments' and municipalities' ownership. The state funding was restricted for special purposes and the religious education in public schools was abolished. With time there came several easements to the strict letter of the law. There were also some exceptions to the general rule: in former Italian territories the church buildings as well as those built after 1905 stayed the cult associations' property. In Alsace and Lorraine, former Germany territory, the Concordat is still in force with public funding and public religious education. A third exception are French Guiana, Mayotte, and Wallis and Futuna. In the 1920s the French legislature allowed diocesan associations, which made the law more acceptable to the Holy See. In 1958 secularism was included to the Constitution but the private religious schools were allowed public funding with the condition that they accepted the national curriculum.<sup>79</sup>

---

77 Hargreaves (1995), p. 162; Kuche (2004), p. 87. When accessing to ICCPR Convention in 1980 France gave a declaration: "In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned"; UN Special Rapporteur Capotorti has emphasised that "international protection of minorities does not depend on official recognition of their existence". Anaya, pp. 136-137.

78 Constitution de 1814, art. 5-6; Loi du 1 juillet 1901, titre III; Concordat de 1801, préambule; Lacouture (1940), pp. 3-6, 25-26; Miquel (1976), pp. 407-416; Doyle (1992), pp. 136-146.

79 Constitution (1958), art. 1; Loi du 9 décembre 1905, art. 2; Loi no. 59-1557 du 31 décembre 1959, art. 4-5; Ordonnance no. 2000-549 du 15 juin 2000, art. 7; Proclamation relative aux cultes du 27 germinal, l'an X de la République une et indivisible; Briand (1905); Bell (2001), pp. 149-150; Levêques (2005); Kedward (2006), pp. 3-11, 26, 28-29. The religious orders were authorised only in 1942, when a law of the Vichy regime imposed on them substantially the same requirements for formation as other associations; at the beginning, the law of 1905 broke off the diplomatic relations between France and the Holy See, but during the 1930s began a slow recovery.

In France the state is neutral in relation to all creeds but their rights are respected. During Mitterrand's presidency there was, however, a bitter struggle over confessional, private education. Mitterrand's administration had to finally move towards a politics of consensus and since 2000 it has been possible to arrange religious education during the school hours. Another challenge to the policy has been the Muslim student's use of headscarfs. The French legislator has forbidden the openly religious symbols in public spaces (2004) and the hiding of faces on public places (2010).<sup>80</sup>

### 2.3.1.3. *Democratic and Social Republic*

In the post-war left-dominance in politics the Fourth Republic brought to French constitutional law a strong social aspect. The list of fundamental principles in its Preamble is a rather vague category but is often referred to by the courts. The present Constitution asserts the democratic nature of its institutions: France is a democratic republic and the authorities must respect the principle. The people is a constitutional organ which appoints the holders of political authority, participates directly in certain political decisions and takes part in political life. The Constitutional Council has decided that the state has an exclusive and hierarchically superior competence to define and set the conditions for the exercise of fundamental freedoms, which are the same for all the territory of the republic. That competence cannot be transferred to territorial collectivities.<sup>81</sup>

*The fundamental freedoms* guarantee the integrity of a citizen's physical person. The Declaration of 1789 is an important constitutional document that defines their legal and philosophical basis. It also set the necessary limits on expressions of individual autonomy. The citizens have an inseparable, sacred and natural right to participate in public affairs; freedom to do everything which does not disturb the others; freedom of thinking and consciousness; inviolability of the home; equality before the law; and the right to ownership, security and non-discrimination. *The internal freedoms* enable the citizens to acquire and develop their knowledge, beliefs, and fundamental philosophical and religious attitudes, including especially the freedom of thought and education. *The external freedoms* enable the individual to act and to give practical expression to his/her fundamental freedoms and freedoms of thought through the freedom of association and press. *The social and economic freedoms* are included in the Preamble of 1946. They are related to worker's status (freedom and equality of workers before employers, freedom to belong to trade unions, right to strike, right to codetermination on working conditions, right to take part in the management of the firm, and right to professional training); economic rights (management of firm, nationalisation); and social

---

80 Loi no. 2004-228 du 15 mars 2004; La rapport de la Commission Stasi sur la laïcité (2003); Loi no. 2010-1192 du 11 octobre 2010; Kedward (2005), pp. 496-497, 556-557.

81 CC, *Décision 84-185 DC* du 18 janvier 1985; Cairns & McKeon (1998), p. 106; Steiner (2002), p. 8.

rights (state's active role, guarantees for families, social insurance, equal responsibility for burdens, equal access to education, professional training and culture).<sup>82</sup>

#### 2.3.1.4. Equality and Education

The Constitution preserves the revolutionary motto: liberty, equality and brotherhood. The republican tradition, which unites the various legal and political sources of the present Constitution, encompasses both formal and substantive equality. Privilege as such is outlawed, but the affirmative action created by law is not. The concept is used to designate prohibited grounds for differentiating between citizens with regards to the provisions of the law.<sup>83</sup>

Equality has been frequently invoked before the Constitutional Council although it is mainly concerned with non-discrimination in relation to specific constitutional values. The council wants to ensure a rational relationship between the provisions of law and the constitutional or legislative objectives that they are intended to achieve. The conception of equality is limited and essentially formal. Equality before the law is concerned with the differences in the categories in which the law places citizens and in the rules that it applies to them.<sup>84</sup>

The Constitution treats equality in a fragmented way due to the tension between conflicting values within the republican tradition which is a series of texts. Equality before law and equality in voting are the only directly relevant provisions on the matter. The principal text invoked in recent years is the Declaration of 1789 which mentions equal rights in birth, equal treatment by law, equal access to public offices and equality before public burdens. The preamble of 1946 lists especially racial and religious equality, equality between the sexes, equality before public burdens and national disasters, and equal access to education and culture. The Constitutional Council has since 1973 built these fragmentary texts into a pattern. On the other hand, some scholars consider that equality is not a general constitutional value in a strict sense, but it creates specific constitutional and paraconstitutional principles binding the legislator to a greater or less extent.<sup>85</sup>

*Education* has since *ancien régime* promoted the nationhood. The Ferry laws (1881-1882) made of public and secular primary schools both free and compulsory. On the other hand, the freedom to open private educational establishments was recognised in several phases.

---

82 DDHC (1789), art. 2, 4, 6, 10-11; Constitution (1946), Préambule, § 5, 8-13; Morange (1988), pp. 40-41, 86-87; Roche & Pouille (1993), p. 6; Cairns & McKeon (1998), pp. 115-120; Van Caenegem (2000), p. 182. DDHC was influenced by the Enlightenment and the Virginia Declaration of Rights (1776); The rights in the Preamble of the Constitution of 1946 are as follows: "...le peuple proclame à nouveau que tout être humain, sans distinction de race, de religion ni de croyance, possède des droits inaliénable et sacrés..." (§ 1), "La loi garantit à la femme, dans tout les domaines, des droits égaux à ceux de l'homme" (§ 3), "La nation garantit l'égal accès de l'enfant et de l'adulte à l'instruction, à la formation professionnelle et à la culture. L'organisation de l'enseignement public, gratuit et laïque est un devoir de l'Etat (§ 13).

83 Bell (2001), pp. 200-201. The legislator is free to identify factual differences for introducing discrimination to legislation when they are rationally related to the purposes of legislation. This is called equality through differentiation.

84 Bell (2001), pp. 199-200.

85 DDHC (1789), art. 1, 6, 13; Préambule (1946), § 1, 3, 12-13; Constitution (1958), art. 2-3; Luchaire (1986), p. 1229; Bell (2001), p.202.

More contentious was the right of private educational establishments to obtain contracts of association with the state. Debré law (1959) finally ensured that many private schools could enjoy state subsidies, at the cost of some limits to their independence.<sup>86</sup>

Freedom of education has been a notorious battleground due to the secular character of France. The preamble of 1946 defines the free and secular public education in all levels as a duty of the state and guarantees an equal access for children and adults to instruction, to professional training, and to the culture. Debré law provides that the state respects the freedom of education, and guarantees its exercise to lawfully opened private establishments. According to the Constitutional Council the freedom of education is a constitutional value: the preamble of 1946 does not exclude the existence of private education, nor the granting of state aid which is permitted by the Constitution. Legal changes have reaffirmed the dominance of the state in the educational sector, which is upheld in the decisions of the Constitutional Council. The school reforms were not allowed to be interpreted as infringing upon the specific character of private establishments or their public funding.<sup>87</sup>

### 2.3.1.5. Language Rights

In France there is an exceptionally strong bond between the language and state but the predominance of the French language has a short history. In the beginning of the Modern Age it was spoken predominantly in the province of Île-de-France and a variety of regional languages dominated elsewhere. The promotion of the French language began together with the birth of the nation-state. Bodin wrote that compelling subjects to change their language is a mark of sovereignty. The ideals of revolution associated for the first time the language and nation together. The regional languages belonged to the past heritage of *ancien régime*. The united and indivisible republic needed symbols of unity - the linguistic diversity was an obstacle to national unity and the reach of satisfaction.<sup>88</sup>

The French Revolution was characterised as struggle between the Monarchist, rural, Catholic France of regional languages and the Republican, urban, secular France promoting the French language but it took a long time before the French language obtained a dominant position in society. Four major reasons for the decline of regional languages were the

---

86 Sheleff (2000), p. 66; Bell (2001), p. 152; Histoire du français.

87 Constitution (1946), Préambule, § 13; Loi du 31 décembre 1959, art. 1; Loi no. 85-97 du 25 janvier 1985; CC, *Décision no. 84-185 DC* de 18 janvier 1985; *Décision no. 94-329 DC* du 13 janvier 1994; *Décision no. 77-87 DC*, 23 November 1977; Favoreau (1981), p. 597; Favoreau & Philip (1991), pp. 374-375. Cf. reference 260.

88 Bodin (1991), p. 86; Sibille (2000), p. 15-16; The European Charter for Regional or Minority Languages and the French Dilemma (2002), p. 25; Hobsbawm (1990), p. 21. In 1789, only 12-13% of Frenchmen spoke the French fluently. Another 50% did not speak it at all; Hobsbawm has indicated that the combination of language and nationalism was only a nineteenth century invention. Here France forms a clear exception. The Jacobin wing of revolution needed strong symbols for centralisation; France has 75 different languages. 55 of these are spoken in the overseas territories.

establishment of general public education in French (1882), the prohibition to use *patois* in public life (1902), the end of religious education in public schools (1905) and the army.<sup>89</sup>

A new phase in the promotion of the French language began in the 1970s. In the background was the concern of the advancement of the English language. French was made a compulsory language in all advertising and for commercial purposes and the use of foreign expressions was prohibited when possible (1975), and for all musical works performed in France was created a French language quota (1986). The ratification process of the Maastricht Treaty hastened the process nationally and the Constitution was amended in 1992: “The language of the Republic is French” (art. 2). The consequent legislation (1994) proclaims that “French language is the fundamental element of the personality and heritage of France. It is the language of education, work, trade and public services, and the privileged link of states which form the Francophone community”. All foreign and regional language texts must include a translation in French. The Constitutional Council ruled that French, as the official national language, had to be regarded as the language of the public services.<sup>90</sup>

The Constitutional status of the French language has prevented the ratification of the European Charter for Regional Languages, which promotes the protection of languages, maintenance and development of cultural wealth and traditions, right to use regional and minority languages in private and public life, interculturalism and multiculturalism, and the principles of democracy and cultural diversity within the framework of national sovereignty and territorial integrity. In 1996 Conseil d’Etat ruled that the Charter’s articles related to media and cultural activities and facilities were in line with the Constitution. Education in regional and minority languages was defined as voluntary. On the other hand, the articles on judicial and administrative authorities and public services were seen as problematic in the light of the Constitution due to their public and binding character. The Council saw that the regional and minority languages’ status was largely assured by the internal law. The French government signed the Charter in 1999 but the Constitutional Council found it incompatible with the Constitution on the ground that its provisions recognised an inalienable right to practice a language other than French in both private and public law.<sup>91</sup>

A modest recognition of regional languages began during the Vichy regime in 1940, but only Deixonne law (1951) opened the public schools for regional languages on a voluntary basis. In 1975 the instruction of regional languages was extended to all levels of the school

---

89 Loi no. 11696 du 8 mars 1882; Loi du 1 mai 1902; Loi du 9 décembre 1905; Sibille (2000), pp. 18, 25; The European Charter for Regional or Minority Languages and the French Dilemma (2002), p. 31; Kedward (2006), pp. 14, 22-23; Debène (2011), p. 307. Bernard Barère, member of the Committee of Public Salvation compared the multilingualism to the tower of Babel: “La monarchie avait des raisons de rasssembler à la tour de Babel; dans la démocratie, laisser les citoyens ignorant de la langue nationale, incapables de contrôler les pouvoirs, c’est trahir la patrie... Chez un peuple libre, la langue doit être une et même pour tous.” Cf. Leclerc (2007), s. 8.1.1.

90 Constitution (1958), art. 2; Loi no. 75-1349 du 31 décembre 1975; Loi no. 86-1067 du 30 septembre 1986; Loi no. 94-665 du 4 août 1994, art. 1; CC, *décision no. 94-345 DC* du 29 juillet 1994, s. 29; Johansson & Pyykkö (2005), pp. 173-174. “La langue de la République est le Français”, cf. Constitution (1958), art. 2; France has three national organs to control the application of language legislation: DGLFLF (general control), Office for Checking the Advertisements, and CSA (communication and media).

91 European Charter for Regional or Minority Languages (1992), Preamble; CE, *Avis no. 359461* du septembre 1996, s. 3-4; CC, *Décision no. 99-412 DC* du 15 juin 1999, s. 5, 7-8; Benoît-Rohmer (2001), p. 3; Judge (2007), p. 141.



system. In the French case law Conseil d'Etat has ruled that applications to the courts could not be drafted in a regional language. Later it ruled that letters could not be addressed and notices or formal administrative documents not produced in a regional language. The Constitutional Council has held that the teachers cannot be required to teach in a language not compulsory elsewhere according to the principle equality.<sup>92</sup>

The main point in official French language policy is that there should be no discrimination between different languages. Freedom of communication rules out the use of other languages in dealings with the administration and public services. The concern is to protect the freedom of everyone involved in public communication. In 1981 President Mitterrand gave a political promise to promote the use of regional languages. President Sarkozy finally returned the to theme over 20 years later. The Academy of France and the Senate were against the proposed constitutional reform, but it was amended in 2008 with the new article 75-1 which recognises the regional languages as a part of the French heritage.<sup>93</sup> The article has symbolic and cultural value but it improves the image of France before the European and international community.

### 2.3.2. New Zealand: Unwritten Principles

New Zealand's identity as a nation state is based on the agreement of two peoples, Pākehā and Māori. Symbolism of this agreement, based on the *Treaty of Waitangi*, is shown on New Zealand's coat of arms, where a Pākehā woman with the country's flag and a Māori warrior are placed around the symbols in the heraldic field, including the four stars of the United Māori Tribes from 1835. Above is the true ruler of the country, the British Crown.<sup>94</sup> Despite the stress on mutual agreement, the Treaty of Waitangi was widely forgotten until the 1970s. Unlike France or Canada, New Zealand has no written constitutional principles and the unwritten principles are based on classical English values and conventions.

The two classical unwritten constitutional principles of English law, which have influenced also both New Zealand's and Canada's legal system, are the popular sovereignty and the rule of law. The popular sovereignty was based on the Magna Charta (1215) and the division of royal and parliamentary power. In the modern sense the popular sovereignty began to develop after the Glorious Revolution (1688). The principle means the supremacy of the law making body: the parliament may enact all laws. The English constitution has weak separation of powers but there exists a checks and balances system of constitutional control. A special character is the "fusion of powers", i.e., the executive and legal branches are intermingled. The constitutional system of the queen has a formal role. She is only "head of dignified part of the constitution" and has a right to be consulted, to encourage and warn. The other principle, the rule of law, refers to all laws and governmental acts conforming to the principle. It means

---

92 Loi no. 51-46 du 11 janvier 1951; Loi no. 75-620 du 11 juillet 1975, art. 12. Cf. CE, *Quillevère*, Novembre 1985; *Kerrain*, 10 juin 1991; *Le Duigou*, 15 avril 1992; CC, *Décision no. 2001-454 DC* de 17 janvier 2002.

93 Constitution (1958), art. 75-1; CC, *Décision no. 2001-452 DC* du 6 décembre 2001; Leclerc (2007), s. 9.2.1.; Debène (2011), p.312.

94 Smith & Neubecker (1981), p. 157.

also equal application of law. No person is punishable in regard to body or goods without a breach of law.<sup>95</sup>

In New Zealand's law the Constitution Act 1986 refers to *sovereignty*. The Queen in Right of New Zealand is the head of state, represented by the governor-general while she together with the House of Representatives forms the parliament. The parliament has full power to make laws and has parliamentary control of public finance. There are two opposing views: the continuing view sees the power of parliament as unabridgable, while the self-embracing view sees the parliamentary omnipotence as momentary – in a self-contained state the parliament can redefine itself for the future. The Bill of Rights Act 1990 has directed political sovereignty in the latter direction. It gives judicial enforceability by protecting individual rights and liberties against interference by the parliament or the executive. Power of the parliament is also restricted by substance, manner and form, which affect the procedure and format of statutes. Local circumstances have tended to be against the importation of rule of unqualified parliamentary supremacy. To the sovereignty is related also the challenge of how to guarantee the Māori rights. Because New Zealand's sovereignty is based on historical agreement between the two peoples, the Treaty is the only basis by which the British sovereignty on the islands may be justified. The Waitangi Tribunal has held that the cession of Māori sovereignty was conditional and qualified by the retention of *tino rangatiratanga* (sovereignty). The Crown must - when exercising the sovereignty - respect and guarantee that principle.<sup>96</sup>

*The Representative democracy* means that while the sovereign reigns and has nominal powers, the government rules, but only as long as it has support of the democratically elected parliament. The principle includes also the Māori political representation, cemented as a general norm by the cultural value of egalitarianism. The principle of the *rule of law* is as well inherited from Britain. It means that no citizen is above the law and that government should be conducted according to legal authority. In the British system – and also in New Zealand – the doctrine is closely connected to the sovereignty of the parliament and the *independence of judiciary*. Both the courts and parliament act as a check on potential abuses of executive power, and they both derive their authority from the rule of law.<sup>97</sup> The courts' status has been, however, weaker in New Zealand than in the other common law countries, which lessens the possibilities to check the government's actions.

### 2.3.3. Canada

The Confederation of Canada was born in 1867 when the loyalist British colonies sought closer co-operation, and reached the present limits in 1949, when Newfoundland joined it. The federal state was a compromise between federal and provincial needs, and despite the

---

95 Bagehot (2004), pp. xi, 4, 9, 11; Dicey (2010), pp. 3-35, 107-122.

96 McHugh (1999), pp. 54-55, 59; Keith (2008); Palmer (2008), pp. 283-285; WT, *Ngai Tahu Report* (2001), pp. 236-237; The continuing view can refer to the doctrine of implied repeal, which reduces the human rights legislation as an interpretative guide for courts. The basic and human rights legislation has in New Zealand no constitutional status.

97 Keith (2008); Palmer (2008), p. 282-285; Webb (2009), p. 446. In the case when the government has no parliamentary support, the governor-general's role increases. He/she must rely on the parliament instead of the government.

early emphasis on strong federation, the identity of Canadian mosaic, based on the union of British and French Canadians is uncertain, not only due to Québec's separatism, but also because of growing demands in other provinces and among the Indigenous peoples. The vast geography has shaped strongly the Canadian identity.<sup>98</sup>

### 2.3.3.1. *Fundamental Principles*

In *Reference Re Secession of Quebec* (1998), the Supreme Court of Canada defined the five fundamental constitutional principles: federalism, constitutionalism, rule of law, democracy and protection of minorities. They are all intertwined and have their roots in the birth of Canadian Confederacy. Canada is a *federal* and multicultural state which is asymmetrical. Its idea is to acknowledge, protect and develop territorial diversity. It makes possible asymmetric rights for different entities and means legal respect for underlying political and cultural realities. Nevertheless, Canada confronts the tensions between distributive and identity-based objectives. For the Anglo-Canadians the national identity resides at the federal level, being regulative and distributive. On the other hand, for Québécois the collective identity as a distinct national group operates at the provincial level and to be a Canadian is primarily a matter of secondary identity. Therefore, the federal level stands in Canada for balance of political, cultural and economic advantages.<sup>99</sup>

The gaining of full sovereignty has been in Canada a slow and gradual process. The British North America Act (1867) created "one Dominion under the name of Canada". The residue power was left to the federal Parliament. In many ways the original federation was more centralised than in the United States, and the parliamentary sovereignty has remained an important factor in Canadian constitutional theory. The Statute of Westminster (1931) rendered the dominions *de facto* independent. It retained only two controls over Canada: the power to amend certain provisions of its constitution and to keep its final court of appeals in Britain. The latter control was abolished in 1949. Prime Minister Trudeau wanted to gain for Canada full sovereignty. He saw the new constitution as a means of national unity and as a way to formally bind French and British Canada as single political unity and to advance the national unity by the equality of the two founding peoples. In 1982 the British Parliament passed the Canada Act which gave Canada the right to internally amend its own

---

98 Henriksson (2006), pp. 275, 333-334. Confederation is somehow a misleading concept, while it usually signifies a union between independent states; The expression "mosaic of Canada" derives from the American author Victoria Hayward (1922); Original purpose of Canada is expressed in the preamble of Constitution Act, 1967: "such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire".

99 SCC, *Reference Re Secession of Quebec* (1998), ss. 49-82; Simpson (1994), p. 88; Croisat (1999), p. 2; Christie (2000); Dorsen (2003), pp. 375-376. "It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after the passing of this Act, the Provinces of Canada, Nova Scotia and New Brunswick shall form and be One Dominion under the name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that name accordingly". Cf. Constitution Act, 1867, s. 3.

constitution, abolished the remaining ties with the Westminster Parliament and repatriated the Constitution.<sup>100</sup>

The province of Québec did not ratify the new Constitution Act. Its representatives saw that the new Constitution included amendment formulas, which reduced the powers and rights of Québec and its National Assembly without the province's consent. Québec resisted the majority rule and demanded a veto right in respect of constitutional changes. The Supreme Court, however, ruled that unanimous consent of provinces was not needed. The Constitutional crisis was tried to solve two times. Closer to success was the draft Meech Lake Accord (1987), which included provisions on the recognition of Québec as a distinct society; provincial role in immigration and in appointments to the Supreme Court; limitation of the federal spending power; and extended the right to compensation for amendments that would centralise powers. Accord was carefully drafted to give the provincial powers to all provinces. It included a veto over constitutional amendments in a form of unanimity requirement, conferring a veto on all provinces. The First Nations, who felt that they had been passed over, were in the key role in upsetting the planned accord. A new attempt was made after a thorough preparation in 1992. The draft Charlottetown Accord would have created three poles of Canada increasing substantially the rights of Francophones and Indigenous peoples. In the final referendum the unity and equality were raised against the asymmetric rights of linguistic and ethnic minorities. On 26 October 1992 the Accord was defeated.<sup>101</sup>

The Canadian constitution includes, like in France and New Zealand, the doctrine of parliamentary sovereignty. A statute can be in violation with the Constitution Act, 1982, if it is rational, non-disproportionate, minimally intrusive means of achieving a pressing and substantial state objective. Section 33 allows the federal parliament and the provincial legislatures to enact legislation which operates notwithstanding ss. 2 and 7-15 of the Constitution Act, 1982. The Supreme Court has accepted limit on these constitutional rights if it deals with a pressing and substantial social problem and the government's response to the problem is reasonable and demonstrably justified.<sup>102</sup>

The integrity of Canada has been challenged several times since the 1960s by Québec's separatism and demand for distinct society. The federal government met the most difficult challenge in 1995, when the referendum of Québec on sovereignty was defeated narrowly by 54,000 votes. In 1997 the Prime Minister of Canada and the provincial Premiers gave the Calgary Declaration, which reaffirmed the Canadian identity. The resolution of the House of Commons (2006) speaks of Québec as "a nation within united Canada". The Supreme Court defined in 1998 its negative stand on the unilateral secession of Québec from Canada. In Reference re Secession of Québec, the court stressed the need for bilateral negotiations and the common opinion of federation, although it expressed the respect for the will of the majority

---

100 Union Act (1840), art. 3, 12; Constitution Act (1867). s. 3; McInnis (1969), pp. 253-258, 263-269; Hogg (1985), pp. 86-87, 190, 258; Beatty (1994), pp. 94-96.

101 Constitution Act (1982), s. 38(1)(b); Meech Lake Accord (1982), s. 2(1)(b); Charlottetown Accord (1992); SCC, *Re: Objection by Quebec to the Resolution to Amend the Constitution* (1982), p. 794; Metcalfe (1982), pp. 109-112; Maddex (2008), p. 82. Section 38 of the 1982 Constitution defines the majority when amending the Constitution as 2/3 of the provinces and at least 50 % of the population; Elijah Harper, a Cree Chief from the Legislature of Manitoba, was with his delaying tactics a key figure in the fall of the Meech Lake Accord.

102 Constitution Act, 1982, ss. 1, 33; SCC, *R. v. Oakes* (1986), ss. 62-79.

of the territory's population. The consequent Clarity Act (2000) defined the procedure for secession. A referendum must be arranged when a majority gives a clear expression of will. If the result is clearly pro-secession, the House of Commons will study the case. Secession is possible only through negotiations with federal and all provincial governments and it demands a constitutional amendment. The national government must take account of the charges of borders and the protection of Indigenous and minority rights.<sup>103</sup>

The Canadian constitutional law makes a clear distinction between the federal paramountcy in the cases of controversy and the *constitutional supremacy*. The Constitution of Canada is the supreme law of Canada. Laws inconsistent with the Constitution are expressly invalid. The Constitution is a safeguard for fundamental human rights and individual freedoms. It facilitates a democratic political system by creating an orderly framework within which people may make political decisions. *Democracy*, having both institutional and individual aspects, is a fundamental value, which expresses the supremacy of the sovereign will of the people. Its most visible, substantive goal is the promotion of self-government by exercising the right through the democratic process. Democracy is a baseline against which the framers of the Constitution and later elected representatives have always operated. It reflects ideas of the majority rule, promotion of self-government and the accommodation of cultural and group identities, the popular franchise and the consent of the governed. *The rule of law* provides that the law is supreme over the acts of the government and private persons. That is, there is one law for all. It also requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order, and that the relationship between the state and the individual must be regulated by law.<sup>104</sup>

*The protection of minorities* means in the Canadian constitution the protection of religious and linguistic minorities. After an unsuccessful attempt to assimilate the French population the British Crown published in 1774 the Quebec Act, which did not mention directly the French language, but *de facto* recognised the French language rights in public life and was published both in English and French. Although the English language became at the end of the eighteenth century the language of the majority, strong regional presence of the French language especially in Québec guaranteed the bilingual ideology of the country. The Constitution Act, 1867, confers to provinces a right to legislate on education, but exercise of that competence should be made by respecting the rights of the Protestant and Catholic minorities' denominational schools in Ontario and Québec. The Constitution Act also guarantees bilingualism and translation of legislation in federal parliament, and before the courts in Québec. The Manitoba Act, 1870, has guarantees for Francophones in the province. The Constitution Act, 1867, included also a provision, which conferred the right to legislate

---

103 Clarity Act, 2000, s. 1(3), 1(6), 2(3), 3(1), 3(2); Calgary Declaration (1997); SCC, *Reference re Secession of Quebec* (1998), ss. 2, 111.

104 The Constitution Act, 1982, s. 52(1); SCC, *Reference re Secession of Quebec* (1998), ss. 61-78; Venter (2000), pp. 59-60; Borrows (2002), p. 128. "Whereas Canada is founded on the principles that recognise...rule of law"; "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of Constitution is, to the extent of inconsistency, of no force or effect." Cf. Constitution Act, 1982, Preamble, s. 52(1).

on Indians and their lands.<sup>105</sup> The difference for the French minority was that the relationship was less equal. They became Crown wards.

English and French may be used equally in parliamentary debates. The records and journals of the federal parliament and the official documents of federal and Québec courts are held in both languages, and both language versions have an equal standing. Nevertheless, the supremacy of the English language became apparent by the fact that the official languages of the nation were defined only in 1969, when Pierre Trudeau's government introduced the Official Language of Canada Act. Trudeau was a fierce defender of federalism. The language policy was one the means to fight against the disintegrative elements in society. The federal legislation gives the English and French an equal and preferred status. The rights include a right to receive services in both languages in all federal offices and be heard in federal courts. The federal language of work is in geographically defined areas (Ottawa, Montréal) English and French, elsewhere either of the languages. The Governor in Council may regulate on the scope of bilingual public services. The discrimination based on language is prohibited and the officials are required to promote the bilingualism. The Commissioner of Official Languages supervises the policy and the federal courts have responsibility to correct the defects in national language policy.<sup>106</sup>

Bilingualism gained finally in 1982 a constitutional status in the Constitution Act, 1982. It recognised a full federal bilingualism. Both languages are equal in legislation. The legal and official documents are equally authoritative in both languages. All courts established by the Parliament may use either English or French. There is a right to receive service in all federal offices in both official languages. The Constitution Act, 1982 does not abrogate or derogate any other rights, privileges or obligations with respect to the official languages or any other languages in Canada. The minority language (English or French) educational rights are recognised.<sup>107</sup>

Each province and territory defines their language policy independently. British Columbia, Alberta, Saskatchewan, Ontario, Nova Scotia, Prince Edward Island and Newfoundland have English as their official language; Québec is unilingually French; Manitoba is predominantly English-speaking, but the French has an official status in provincial Legislature; New Brunswick and Yukon are officially bilingual; and Northwest Territory and Nunavut multilingual.<sup>108</sup> Québec has the strongest protection of official language. L'Office québécois de la langue française is the watchdog of the provincial government in linguistic affairs with wide powers to supervise the respect of language legislation. The main legal instrument in defining the position of the French language is *Charte de la langue française* (CLF).<sup>109</sup>

---

105 Constitution Act, 1867, ss. 91(24), 93, 133; Quebec Act, 1774 (UK); Manitoba Act, 1867, s. 133. "English and French are the official languages and have equal rights and privileges as to their use in all institutions of the Parliament and government of Canada." Cf. Constitution Act, 1982, s. 16(1).

106 Official Languages Act (1988), s. 14, 43, 49-70, 76; Maddex (2008), p. 83.

107 Constitution Act, 1982, s. 16, 16(3), 18(1), 19(1), 20(1), 21-23.

108 Constitution Act, 1982, s. 16(1)-(2), 18(2), 19(2), 20(2); Manitoba Act, 1870, s. 23.

109 *Charte de la langue française* (CLF, 1977), s. 157-184.

### 2.3.3.2. *Rights in the Constitution Act, 1982*

The Constitution Act, 1982, including the Canadian Charter of Rights and Freedoms, is similar in principle and content to the American Bill of Rights but there is a crucial difference based on the parliamentary sovereignty. Section 33 enables the Parliament and the Legislatures to override certain provisions. After the declaration is included, a statute will operate free of the invalidating effect of the Constitution's provisions. They apply to governments and their institutions in relationship with individuals. It provides individual rights, including the freedom of association, religion, against discrimination of historically disadvantaged groups. The provisions apply to the relationship between an individual bearer of a right and the legislative and governmental institutions. Since 1972 the provinces and since 1977 the federal state have Human Rights Codes, administered by Human Rights Commissions, to address other fields of discrimination.<sup>110</sup>

The rights in the Constitution Act, 1982, partly overlap the constitutional rights mentioned above.<sup>111</sup> The Constitution Act, 1982, applies to the parliament and government, the territories and governments of the provinces. The courts have explicit remedial powers to strike down laws inconsistent with it. A court must be guided by the values and principles essential to free and democratic society, which embody respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Constitution Act, 1982, and the ultimate standard against which a limit or freedom must be shown reasonable and demonstrably justified.<sup>112</sup>

---

110 Constitution Act, 1982, ss. 2, 15; Hogg (1985), p. 259; Venter (2000), p. 139.

111 Constitution Act, 1982, ss. 2-23, 35-36; Gall (1983), pp. 56-60; Beatty (1994), pp. 96-97, 121. "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability." Cf. Constitution Act, 1982, s. 15(1); Six broad categories of rights are: the fundamental freedoms: of conscience, religion, thought, belief, opinion, expression, peaceful assembly and association; democratic rights: election and decision-making; mobility rights: to leave and enter the country, and to reside and to gain a livelihood in any province; legal rights: right to individual life, liberty and security; equality rights: equality before the law, protection, equal benefit of the law and affirmative action; and the language rights of English and French languages. Part II includes the rights of Aboriginal peoples, where will be returned later, and Part III on equalisation and regional disparities, including promotion of equal opportunities for the well-being, furthering economic development and providing essential public services of reasonable quality.

112 SCC, *R. v. Oakes*, 1986, ss. 62-79.

## 2.4. Decentralisation / Devolution

### 2.4.1. France: From Centralisation to Decentralisation

There is a paradox in French identity - unity in diversity. Even *Héxagone*, or Metropolitan France, is historically divided. In the Middle Ages France was divided into feudal seigneuries. Since the reign of François I the direction was towards the centralisation of the state. The most ancient division of France was into provinces. The revolution swept away the old structures which were replaced by departments in 1790. Uniformity and decentralisation were the keynotes of the administrative organisation. The old administrative units were replaced by 83 departments in 1790.<sup>113</sup>

The geographical structures of territorial administration have preserved the late 18<sup>th</sup> century structure. Since the early 19<sup>th</sup> century there were attempts to solve the weaknesses in French centralism. The building of modern regions began in 1919, and was continued by the Vichy regime. Weakening of France's hold on colonies during the war and the international development strengthened the forces of self-government. De Gaulle had promised in the second conference of Brazzaville (1944) more autonomy to overseas colonies. Despite its careful wording the conference was a turning point in policy. The Fourth Republic (1946-1958) created in French unitary state a federal dimension. Its constitution formulated the relationship between France and its colonies in a new way – as an equal union of peoples. The administrative division of overseas colonies was reformed: some old colonies (Guadeloupe, Martinique, French Guiana and Réunion) became as overseas departments (*départements d'outre-mer*, DOM) integral parts of France. Their administrative structure was similar with the departments of Metropolitan France. The Pacific colonies became overseas territories (*territoires d'outre-mer*, TOM). Even their administrative structure was similar with departments, but unlike DOM, they were not part of Metropolitan France. They followed Metropolitan France in criminal law, public liberties, political organisation and administration. In 1946 their inhabitants also gained French citizenship.<sup>114</sup>

Metropolitan France and all its former colonies formed the French Union, which lasted until 1958. It included Metropolitan France, associated states, associated territories and DOM/TOM. The President of the Republic was also the President of the French Union and the chairman of the High Council. The Union had its own Assembly, but all the essential decisions were made in the National Assembly in Paris. French Indochina was the first dependency to withdraw from the union in 1954, followed soon by others. The door for independence was open even for TOMs for a short while in 1958, but not for DOM. The dissolution of the union, the military catastrophe in Dien Bien Phu, the Algerian War and the crisis of democracy prepared the way to a profound constitutional reform. General de Gaulle

---

113 Loi des 26 février-4 mars 1790; Miquel (1976), pp. 74-85, 142-143; Braudel (1990), pp. 61, 80; Doyle (1992), pp. 2, 4, 125. The two major cultural, linguistic and political areas of France have been *pays d'oc* and *pays d'oïl*; in 1776 France included 39 provinces and 15 jurisdictional areas of *parlements*, which were replaced by 83 *départements*.

114 Constitution (1946), art. 73-82; Loi du 19 avril 1941; Ordonnance du 10 janvier 1944; Betts (1991), p. 59-61; Aubry (1992), p. 22; Moreau (1995), p. 1; Kedward (2005), p.196-198; Les régions de France. "La France forme avec les peuples d'outre-mer une Union fondée sur l'égalité des droits et des devoirs, sans distinction de race ni de religion." Cf. Constitution (1946), art. 73.



was called back onto the stage. His proposal for a state with strong presidency received wide support in the referendum of 1958. The Fifth Republic was born.<sup>115</sup>

The new constitution followed the ideas of the revolution. The republic was indivisible, secular and equal. But something was changing at the same time. The decolonisation reached its final stage when Algeria gained its independence in 1962. The French Union was replaced by a looser French Community, where France took care of currency, defence, foreign policy and national security. The territories were promised the independence if they so chose and in 1960 all territories of Sub-Saharan Africa gained independence and the French Community lost its impetus. After that date all territories which chose to stay under France were regarded as an integral part of the republic.<sup>116</sup>

The first efforts to reform the national administration were made during the Fourth Republic (1946-1958). Also de Gaulle realised - despite the strong stress on national unity and the indivisible character of France - that the highly centralised administration with departments, districts and communes needed reform. The firm intention was "to nationalise the regions, not to regionalise the nation". Prime Minister Georges Pompidou introduced in 1964 prefects for each region with power in economic planning. The next step, however, failed. President de Gaulle ordered in 1969 a referendum on the creation of regional councils. In the inner political *cul-de-sac* the proposal was deemed to fail. The proposal returned, however, only three years later when the regions were created as economic units.<sup>117</sup>

In the early 1980s a new phase began in the debate on national identity. The social problems, the growing identity of different ethnical groups both in Metropolitan France and in overseas areas, and increasing support for regionalism all reflected the need to check again the direction at a national level. The ascendancy to power of François Mitterrand signified a visible change in policy. He used a definition *droit à la différence* (right to difference), which became a slogan for the new era of decentralisation in France. President Mitterrand's major objective was to create territorial units, to spread the principle of the executive's election to the departments and regions, and to remove the supervision. Decentralisation expressed relations existing between the central power and the local units. The definition of decentralisation rested on three elements: independent, elected local authorities; local, specific competencies; and mechanism of regulation to assure the prevalence of general interests and the co-ordination between several centres of decision. The reform of 1982 has preserved the legal personality of local and territorial administration. It has also confirmed a system where each territorial collectivity has proper, elected assemblies and executives. The duality allows the legislator to establish in regional and local levels other elected organs. The direct supervision of state has been replaced by administrative and budget control. This model of administration has three sectors: state's proper responsibilities, common responsibilities and local responsibilities.

---

115 Constitution (1946), art. 60, 63-64; Betts (1991), pp. 90-91, 97-102, 106-115; Lampué, p. 14; Gründler (2007), p. 451. The French Union followed the model of the British Commonwealth; The doctrine of (René) Capitant neglected the right of DOM to express their attitude to sovereignty.

116 Miquel (1976), pp. 585, 588.

117 Loi no. 64-707 du 10 juillet 1964, art. 1, 22; Loi no. 72-619 du 5 juillet 1972; Décret no. 64-250 du 14 mars 1964; Gaulle (1970), pp. 321-324; Miquel 1976, p. 594. The political left identified the regionalism with Vichy ideology, but neither the right was willing to decentralise the state; Reform in Metropolitan Paris (1964) was a model for later economic decentralisation.

Only responsibilities of national character or those defined by law can not be delegated. Despite the reform the regional and local administration operate under narrow constraints: their powers are limited by the principle of the indivisibility of the republic. On the other hand, the competencies are often tailored.<sup>118</sup>

All units of local and regional administration are called territorial collectivities (*collectivités territoriales*). They are legal persons who have constitutional status, based on titles XII and XIII of the Constitution and further defined in the General Code of the Territorial Collectivities. The citizens participate democratically in the management of local affairs. The territorial collectivities can submit to referendum projects which belong to their competence or to ask consultation from the electors.<sup>119</sup>

France is not a federal state, although the French Union had certain features of asymmetric federalism. The territorial collectivities are subordinated to the state: decentralisation must be in harmony with the unitary character of the state. They personify general interests in a given geographical area of national territory and they have representation in the national parliament. With the exception of New Caledonia and French Polynesia, they have no legislative powers, except for a limited period. As legal persons they can, however, make other regulations. The collectivities' jurisdictions are strictly separate: they have jurisdiction over territorial organs, supervised by the representative of the state, who exercises administrative and legislative control. The local administrative collectivity can manage all proper interests, which are common to people, whose solidarity renders them legitimate. They have a limited budget of their own and they can raise taxes specifically pointed to them. If some competencies are transferred from the state to the collectives, also their costs will be transferred. The state can also use compensation to support equality between them. Conseil d'Etat has, however, stressed that the territorial units have no competence of competence. The legislation has aimed at developing the local democracy, to promote the new forms of co-operation between collectivities, and to reform the state in the new task created by the decentralisation. Since 2004 the legislation has allowed a 5-year experimentation which has broadened the regions' planning powers, including the co-operation between the territorial collectivities.<sup>120</sup>

The Constitution enumerates as territorial collectivities the municipalities, departments and overseas collectivities (*collectivité outre-mer*, COM). They can be also classified as collectivities of Metropolitan France, overseas collectivities and New Caledonia. All territorial collectivities and their competences are created by law. The legislation sets the rules of local assemblies' electoral systems and the fundamental principles of the free administration of local units, their competences and their resources. This principle, which has created a counter-balance to the powers of the centre, has constitutional value. It has been also expanded in order to ensure that local authorities are genuinely independent, being administered by elected bodies, and possessing their own powers. All changes to territorial collectivities' status

---

118 Loi no. 92-125 du 6 février 1992, art. 2; Payé (1993), p. 269; Moreau (1995), pp. 2-4, 8-10, 14; Dorsen (2003), p. 387; Kedward (2005), 487.

119 Constitution (1958), art. 72-75.1 ; Loi no. 82-213 du 2 mars 1982; Loi constitutionnelle du 28 mars 2003; Code général des collectivités territoriales (1996), art. L.O. 1112-1, 1112-15; Rouault (2007), p. 218.

120 Constitution (1958), art.72-1, 72-2; Loi no. 82-213 du 2 mars 1982; Loi no. 92-125 du 6 février 1992; Code général des collectivités territoriales, art. L.O. 1113-1; CE, *Imbert*, 25 January 1978; Favoreau & Philip (1991), pp. 524, 530; Moreau (1995), p. 2; Michalon, pp. 670-672; Rouault (2007), p. 222.

have to be based on the consent of the electors in question. Powers delegated to them by law can be returned only by an organic law after the Constitutional Council's review and after consulting the respective territorial assembly. The president of the republic has powers, by the proposal of government, or by both chambers of National Assembly to consult the electors of an overseas collectivity on the questions of organisation, competence or regulatory powers. The particular characteristics of overseas territorial collectivities are defined by organic law. The Constitutional Council controls the constitutionality of their status. The ordinances of overseas units must be submitted to the review of Conseil d'Etat, and to the ratification of National Assembly in 18 months' period.<sup>121</sup>

The republic recognises within the French people (*au sein du peuple français*) the populations of overseas in a common ideal of liberty, equality and brotherhood. There is a clear reference to the ideals of 1789 – the indivisible state, one people and the slogan of the revolution. The overseas collectivities, governed by articles 73-74, have been since 1982 the laboratories of new decentralisation. They have a particular organisation, recognised proper interests, organisation based on specific status, defined by organic law. They are also mentioned in the Constitution and the Treaty on European Union, which confirms their special status in association with the European Union. The status of New Caledonia is based on Title XIII of the Constitution. Overseas collectivities (*collectivité d'outre-mer*, COM) have three major categories. The first category is the four Overseas Regions (*région d'outre-mer*, ROM) of Guadeloupe, French Guiana, Martinique and Réunion and the DOM of Mayotte which follow the legislation of Metropolitan France and belong to European Union. They are *régions monodépartementales*, i.e. they have only one department. The ROMs were created on the basis of DOMs in 1982. They have a prefect but two councils: the General Council and the Regional Council. The Regional Council may participate in international relations; it may be heard by the government on regional co-operational projects; and it has power to make initiatives to prime minister on legislation and regulations. The Regional Council has two consultative organs: the Economic and Social Committee and the Committee of Culture, Education and Environment. The Constitution has since 2003 allowed by a delegation of organic law the ROMs a right to modify regulations in limited subjects concerning their territories. All delegated powers are under the supervision of the administrative courts.<sup>122</sup>

The second category of COMs is mentioned in the article 74 al. 3. They are also called *collectivités ultraphériques* (Outermost Regions in European Union's terminology). They are the COMs of Saint-Pierre-et-Miquelon, Wallis and Futuna, Saint-Barthélemy and Saint-Martin. Each of them has its proper status, fixed by an organic law. Their normative competences are much wider than in the first category. A common determinant for these competences is a right to positive discrimination *vis-à-vis* the principle of equality in the republic. They do not belong to the European Union, but are in association with it.<sup>123</sup> The

---

121 Constitution (1958), art. 24 al. 3, 34, 72, 72 al. 4, 73-74 al.1; CC, *Décision no. 79-104 DC* du 23 mai 1979; *Décision no. 82-149 DC* du 28 décembre 1982; *Décision no. 85-119 L* du 8 août 1985; Moreau (1995), p. 9; Hamon & Troper (2007), p. 492. In 2008 Metropolitan France had 22 regions, 96 departments, 329 districts, 3,883 cantons and 36,689 municipalities. Cf. *Les collectivités locales en chiffres 2008*.

122 Constitution (1958), art. 72-74, 76-66; Loi no. 82-1169 du 31 décembre 1982; Loi no. 84-747 du 2 août 1984; Fourrat (2006), p. 10; Rouault (2007), pp. 240-241, 247.

123 Constitution (1958), art. 74 al. 3; Rouault (2007), pp. 240-241.

third category includes the Overseas Land (*pays d'outre-mer*, POM) of French Polynesia and the *sui generis* collectivity of New Caledonia. New Caledonia's status is based on title XIII of the Constitution and the Accord of Nouméa.

## **2.4.2. New Zealand**

### **2.4.2.1. Realm of New Zealand**

New Zealand was under Australian administration until 1840. In the turn of the twentieth century there was again some serious discussion about amalgamation to the Australian Commonwealth, but since 1901 New Zealand consciously built a separate identity with Prime Minister Seddon's extension policy. The Realm of New Zealand is a wider term than the state of New Zealand. It is essentially centred around the person of the sovereign, who is the Queen in the right of New Zealand. The Realm of New Zealand includes New Zealand, the Cook Islands, Niue, Tokelau, the Chatham, Bounty, Antipodes, Auckland and Campbell Islands, and the Ross Dependency in Antarctica (also West Samoa until 1961). It means that all political entities within the realm have a common head of state. The governor general represents the queen in all realms but the sovereign states have also a parallel Queen's Representative (High Commissioner) which means that there are in fact two Queens' Representatives – one directly and the other through New Zealand. The common head of state means also shared values. This is expressly mentioned in the Joint Centenary Declaration between New Zealand and the Cook Islands, which speaks about ongoing commitment.<sup>124</sup> Because the realm is so strongly centred around the sovereign's personality, the possible constitutional change in the future for the republic would demand change to this personal and historical structure.

### **2.4.2.2. Local Government**

New Zealand was originally a federal state, divided into provinces. The Constitution Act 1846 created the provinces of New Ulster and New Munster to meet better the settlers' local needs. In 1852 the colony was divided into six provinces. Instead of representative assemblies the provinces received in 1851 only nominated councils but due to growing settler pressure the British Parliament established one year later a representative central government. When the central administration developed, the provinces were abolished in 1876 and there was established a local government system after the English model where the real control was exercised by the central government. In 1974 Local Government Commissions were established to oversee the efficient administration of local government. The large number of municipalities (over 800) was seen as a problem. In 1988 the local administration was reformed as part of the larger devolution process. Today there are 12 regional councils and 74 territorial authorities.

---

<sup>124</sup> Cook Islands Constitution Act 1964, ss. 4-5, 12; Grimes & Waers & Sullivan (2002), p. 17; Townend (2003).

The territorial authorities carry out some aspects of government in a limited, defined geographical area. Territorial bodies are either City Councils or District Councils. The Chatham Islands are excluded as *sui generis* case, due to their geographical isolation. It has a Territorial Council as its administrative body and the main officials are a mayor and chief executive. All their powers of the regional councils and territorial authorities are delegated by parliament and operate under the provisions of a statute. The territorial authorities' work is based on regional schemes. The regional authorities can take over functions belonging to existing authorities. The Act makes also possible the establishment of community councils with comprehensive code for running the affairs. The regional and local government level is separated in legislation from the Crown. The legislation recognises therefore the existence of different communities and their identities, values, rights, and different solutions in services. The local authorities have powers in nuisance control, community activities, planning, community development, limited social welfare responsibilities and commercial trading activities. They have also the right to raise taxes to cover these obligations.<sup>125</sup>

### 2.4.3. *The Provinces and Territories in Canada*

Unlike France, Canada has been built since the beginning on plurality. Its touchstone has been the idea of two founding nations: the Anglo- and Franco-Canadians. This bipolarity broadened in the 1970s as multiculturalism. Canada began as a strongly centralised federation, but has gradually become one of the most decentralised. The Privy Council, "the wicked stepfather of Confederation", promoted in its case law the coordinate status of provinces. The federal power had also with time given up its power to disallow provincial statutes, enact remedial laws to correct provincial incursions on minority educational rights, or to bring local work within federal jurisdiction. Also the appointment of lieutenant governors and judges for provinces has become more formal. The Franco-Canadians have always been more doubtful towards the central government, even as a threat to their distinct culture, and the indigenous peoples have shared similar views. For the majority an acceptable federalism is a compact between equal territorial units, while for the Québécois and the Indigenous peoples it is a compact between peoples, which requires asymmetry between nationality-based units and regional-based units. There have been also voices to create an across-the-board decentralisation in Canada, or a looser confederation. This reflects the ideology behind the unsuccessful Charlottetown Accord, which would have created a three-dimensional government for Canada. In Canada a constitutional amendment requires the consent of both federal houses and either seven provinces containing 50 % of the population, or all ten provinces. The examples of Meech Lake and Charlottetown processes show that this is very difficult to achieve.<sup>126</sup>

---

125 Constitution Act 1852 (UK), s. 2; Local Government Act 1974, s.87; Chatham Islands Council Act 1995, ss. 2, 6; Local Government Act 2002, s. 23; Potaka (1999); Mulholland (1985), pp. 32-33; Havemann (1999), pp. 381-382; Spiller & Finn & Boast (2001), p. 66.

126 Hogg (1985), pp. 89-92; Kymlicka (2002), pp. 103-110. In *Hodge v. the Queen* (1883), the Privy Council ruled that the provincial legislative power was "as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow". The development in the United States has been exactly the opposite. None of the 50 states in the United States are nationality-based and the centralisation has not been seen as a threat to national identity.

In the beginning the Dominion included only the newly re-established colonies of Ontario and Québec, New Brunswick and Nova Scotia. They were followed by Manitoba (1870), British Columbia (1871), Prince Edward Island (1873), Alberta and Saskatchewan (both in 1905). Canada reached its present form in 1949, when Newfoundland joined the federation. Canada has one -although hybrid - legal system, but 14 major legislative bodies and 11 jurisdictions. The Constitution Act, 1867, defines in ss. 92, 92A, 93 and 95 the scope of provincial powers. There are also special provisions for the original four provinces. When the other provinces joined the federation, their founding statutes were included to the constitutional law.<sup>127</sup>

The Lieutenant Governor is the Queen's representative in each province with similar functions as Governor-General, but the true executive power rests on provincial governments, led by the premiers. Each province has either unicameral legislature. Each Legislature may exclusively make laws in relation to matters belonging to their competence. In Québec the legislature is named after the French model *Assemblée nationale* (National Assembly). The provinces and territories are represented in the federal Parliament, all having its own quota of MPs in the House of Commons. In the Senate the provinces belong to four geographical divisions where only Ontario, Québec and the territories have individual quotas. The provinces have their own legislation and court structure.<sup>128</sup>

To Canada belong three geographical entities, which are not provinces. Northwest Territories (1870), Yukon (1898) and Nunavut (1993) are called territories which were born for strategic, resource management and/or ethnic reasons. They have similar features with provinces, like Premier, Legislature, legislation and court system, but the major difference is in legal status. They are under Federal government and they have no inherent jurisdiction. They have only delegated powers based on three federal territorial laws. Only federal Parliament can amend or change their status. They cover 61% of Canada's land space but have together only 100,000 inhabitants. The Crown's representative is called commissioner (equal to lieutenant governors in the provinces). Each territory has one member in both houses of the federal parliament.<sup>129</sup>

## 2.5. Conclusions

Most Western countries have a common historical determinant in Christianity and medieval feudalism. The nation-states were born through power struggle between papacy, kings and their subjects. The early legal and political theorists of sovereignty built on need for unity.

---

127 Constitution Act (1867), ss. 9, 17-18, 92-93. The exclusive powers of provincial legislatures are the direct provincial taxation; borrowing of money; provincial offices and officers; management and sale of public lands; timber and wood; public prisons; hospitals and other respective institutions; municipal institutions; licenses to the raising of revenues; communications undertakings wholly within a province; provincial companies; celebration of marriage; property; civil rights; administration of justice; punishment; exploration for non-renewable natural and forestry resources; electrical energy; and education. Cf. Constitution Act (1876), ss. 92-93.

128 Constitution Act, 1867, ss. 12, 22, 37, 58, 92, 96; Difference Between Canadian Provinces and Territories. Only Québec had a bicameral Legislature. Its upper house was abolished in 1968; Most adjudication occurs before provincial courts, where the judges are appointed by the provinces.

129 A Comparison of Provincial and Territorial Governments; Difference Between Provinces and Territories.

After centuries of dissolution there was social a need for stronger monarch and state. Bodin was an advocate for Absolutism, and Hobbes refined the theory by defining the hypothetical state of nature in negative means. There was need for social agreement to avoid everyone's war against each other. The prescriptive laws of nature were replaced by laws as commands. The sovereign determined the public good.

With Locke and Rousseau the character of sovereign changed. The people became the sovereign. Montesquieu and Rousseau did not see the state of nature anymore in negative means, but still the true law was possible only in organised society. Montesquieu developed an idea of nation-based special features which he called the spirit of laws. Rousseau created a transcendental general will, which was an important ideological background for the French revolution. The British legal theorists distinguished similarly the sovereign and subject, legal and political sovereignty.

The development of the unitary nation state was related to the development of central authority. It was based on shared national identity – which was in many cases a philosophical and legal fiction. The Westphalian and successive international law recognised only states as subjects of the law of nations. The sovereignty was classically obtained by different forms of acquisition, while the English common law was at least from the sixteenth century based on presupposition that all lands belong to the Crown, which obtained by treaties a legal basis for sovereignty. This is still true in New Zealand. The later international case law demanded besides the symbolic acquisition also the exercise of authority.

The Western nation-states faced from the fifteenth century the need to define “the Other”, which in many cases was the Indigenous people. They were in European eyes either noble savages or ignorant people. The early justification to acquisition was sought from Christian teaching, which defended Indigenous people's humanity and demanded justification for wars. Also later doctrines were based on Euro-centric views where major motives were civilisation, commerce and Christianisation. Essential for these new encounters was the question of whether Indigenous people were capable of making treaties and whether had they developed society and political structures. In most cases the acquisition was justified by treaties or war after which the pre-existent rights were extinguished. In some cases, however, the doctrine of *tabula rasa* was developed: there was no organised society or law, and therefore, no need to negotiate. Important in the United States was the Marshall-trilogy, which recognised the indigenous peoples as sovereign dependent nations, but at the same time justified the process of dispossession. The indigenous peoples were isolated both in municipal and international law. The British and French policy was similar: both aimed first at assimilation, while the common law system was generally more flexible towards the existence of previous customary law. The nineteenth century brought the ideas of progress and social evolutionism but towards the turn of the century the focus changed to more protective and associate models. This protective role continued until the World War II. In the post-war situation the collective and ethnic rights were not popular and it was attempted to integrate the Indigenous peoples to larger society. This changed only from the 1970s with international development and awakening of indigenous peoples themselves. The 1980s and 1990s meant dramatic change in Indigenous peoples' development and the general atmosphere. The post-recognition period has been globally a period of increased legalisation of rights but also the setting of limits to

change. Many Western legal and political theories also focus the newly defined *status quo* instead of legal change.

France, New Zealand and Canada have all their own constitutional narratives to justify the unitary state: the change through revolution, creation of a new nation between the Pākehā and Māori and the English- and French-speaking Canadians. The French constitutional ideology has several specific features: the unitary state was created as a counterbalance to the disintegration of *ancien régime*, whose features of linguistic pluralism, the strong position of established religion and privileges were denied. The indivisibility, monolingualism and secularism are exceptionally central in themes in French constitutional law while Canada has recognised since the beginning its role as a mosaic. Its vast geography and two strong ethnical groups have influenced the constitutional law. New Zealand has no written constitution which offers its system more flexibility but at the same time creates problems: the only justification for New Zealand's existence is the agreement with the Māori people, but the treaty has no constitutional status. All three countries have as a common feature strong focus on the rule of law and parliamentary sovereignty and a strong emphasis on human rights. The main difference lies in New Zealand, where the human rights have no constitutional status. There is, however some political pressure to change the situation.<sup>130</sup>

In the French constitutional law there is only one people, no recognised minorities and no unequal differences. The paradox is however, that France is an artificial structure: it is plural and divided. This was recognised gradually from the nineteenth century in modest attempts to decentralise the administration. The Fourth Republic even had structures which reminded federal states. In Canada the starting point has been different. The bipolarity has developed into multiculturalism, finally recognising more openly also the existence of the indigenous peoples. New Zealand separated early from Australia and was like Canada, originally a federal state, but later the central power strengthened its positions.

Mitterrand's presidency started the new decentralisation – administrative but not political decentrisation. In this more flexible model the overseas territories were offered the role of “laboratories” for careful legal change. Despite unitary state they have always been a different category in relation to Metropolitan France. Canada has gone through difficult identity crisis. Established as a strong federation to the basement of British loyalist colonies, its power has moved gradually in the direction of provinces, which have their proper jurisdictions. After the repatriation of the Constitution, the federal Government has fought against the disintegrative forces in Québec and failed twice to negotiate a constitutional agreement on the nation's future. Unlike France, the devolution of powers is inherent in Canada, part of its constitutional ideology, but at the same time also its paradox and challenge. The realm of New Zealand has in the unitary state features of a loose federation, where the sovereign's role is more marked.

---

130 Both France and Canada have been influenced by the United States in their human rights documents, while New Zealand's direct model has been Canada. And many of the ideas which gave birth to the United States, came from England and France.



## 3. Law and Justice

### 3.1. France

#### 3.1.1. *Spécialité législative*

During *ancien régime* France had several provincial legislatures, although *droit commun* already existed. After the revolution the delegation of legislative power was prohibited, based on the principles of indivisible sovereignty and general will. This concentration of legislative power has been later confirmed by the Constitutional Council, which has e.g. denied a right for Corsica to have own statutory powers without explicit constitutional authorisation. The total picture is not, however, as monolithic as it looks like in the first sight. Even in Metropolitan France there exist certain particularisms in legislation, as for example the exceptions in Paris, Alsace-Moselle and Corsica indicate. In fact the French legal system has always made a distinction between Metropolitan France and the overseas territories. Inside of the latter-mentioned category there is a fundamental distinction between overseas departments and overseas territories.<sup>1</sup>

The oldest French legal document dealing with *spécialité législative* was *Code Noir* justifying forced labour in the Caribbean colonies (1685-1946). Properly speaking, the practice was consolidated by Louis XV and continued by the drafters of the revolution's constitutions and other legal documents. The geographical, economic and ethnic particularities led to different legal treatment of overseas colonies. *Sénatus-consulte* of 3 May 1854 confined to the emperor a competence to take by a decree legislative command in colonies, excluding Martinique, Guadeloupe and Réunion. In reality, the local executives (the governors and council) were the true legislators of the colonies. This system of legal pluralism lasted until the Constitution of 1946. It signified that the French laws and regulations were applicable in overseas colonies only when specially mentioned in statute. This gave the local governors broad regulatory powers. Although the Constitution of 1946 repealed the colonial system, the legal pluralism continued. According to article 72 "The French law is only applicable in the overseas territories by express dispositions." The original wording of the Constitution of 1958 mentioned in article 76 that TOM preserved their status within the republic. This was later repealed and

---

1 CC, *Décision no. 91-290 DC* du 9 mai 1991; Rouland & Pierré-Caps & Poumarède (1996), pp. 320-326. The name Lorraine (Lothringen) was replaced since the First World War in French administrative division by Moselle.

the present article 74 says indirectly that TOMs have “a particular organisation considering their proper interests on the whole of interests of the Republic.”<sup>2</sup>

After World War II the French government tempted to align the colonial rules to general legislation. Since 1946 the French legislation has applied in DOM/ROMs with full force (legislative assimilation) with a possibility offered in the article 73 of the Constitution that takes into consideration their particular situation. The particular statutes and restrictions *ante*-1946 are, however, in force, if not repealed or changed. In all other overseas collectivities is applied the principle of legal particularism for which the Constitutional Council has given a broad interpretation. The only statutes which must be uniform in the republic are the laws of sovereignty, including the constitutional block, organic laws, international conventions and the texts related to high jurisdiction; general principles of law, including the fundamental freedoms; and the laws which have no direct relationship to territorial organisation, including the criminal law. This interpretation, however, excludes the DOMs/ROMs, where the exceptions to general legislation are limited. The Constitutional Council has interpreted the legal particularism of overseas collectivities related to various domains. They include criminal law jurisdiction and process, mineral resources, elections, higher education, enterprises, public health, audiovisual communication and nationality. The constitution's present wording since 2003 specifies that in principle the laws and regulations are fully applicable in DOM/ROM, but they may have differences due to their characters and particularities.<sup>3</sup>

All this does not mean that France has several legal systems. Between 1789-1998 there was only one legislature which could take into consideration the local special features in the limits of the Constitution. After the Accord of Nouméa the Congress of New Caledonia has been granted legislative powers to enact *lois du pays* (since 2004 also to the Assembly of French Polynesia), but even their limited competence is submitted to the French Constitution and judicial review of Conseil d'Etat.<sup>4</sup>

The national government has to consult with the territorial assemblies before their status can be changed. Often the initiative has come from the territorial assemblies. Until the constitutional reform of 1992 the national legislator and Conseil d'Etat had the right to intervene in all matters delegated to territorial assemblies. This reduced their scope of consideration to administrative actions. Today the legal particularism protects the difference of overseas collectivities of automatic application of French and EU statutes in the limits of national Constitution. Further, the Constitutional Council practices an effective control over the organic laws which deal with the changes in the respective collectivity's status.<sup>5</sup>

---

2 DDHC (1789), art. 3; Constitution de 1791; Constitution de l'an I (1793); Constitution (1946), art. 72; Constitution (1958), art. 3, 73-74, 76; Décret du 8 mars 1790; Décret du 10 mars 1790; Sénatus-consulte du 3 mai 1854, art. 18; CC, *Décision no. 71-46 DC* du 20 janvier 1972; *Décision no. 82-137 DC* du 25 février 1982; *Décision no. 2001-454 DC* du 17 janvier 2002; Aubry (1992), p. 9; Michalon, p. 631; Sem (1996), pp. 125-126; Rouland & Pierré-Caps & Poumarède (1996), pp. 320-326; Peres (2002). Actually two of these statutes related to slavery: the Degree of 10 March 1790 confirmed it, while *Sénatus-consulte* of 3 May 1854 prohibited it in three colonies.

3 Constitution (1958), art. 73; CC, *Décision no. 85-205 DC* du 28 décembre 1985; Luchaire (1995), p. 1628; Matutano (2005), p. 520.

4 Rouault (2007), p. 238.

5 Constitution (1958), art. 34, 37, 74; CE, *Saïd Ali Tourqui*, 27 février 1970.

In the Pacific region, the British missionaries attempted to develop a Western, codified legislation in Polynesia. Therefore, the Kingdom of Tahiti developed a system of statutory laws before annexation to France. Essential were the royal regulations (*te parau taroa*). The Pomare Code (1819-1880) was a collection of statutes which all chiefs and sub-chiefs under his sovereignty had to apply. It remained in force during the protectorate and was even revised and extended in relation to local administration. More than 50% of the code's statutes dealt with the private sphere of law with a strong moral overtone. Several customary practices were prohibited. The code ordered the death penalty on infanticide, abortion and voluntary homicide. Sodomy led to life-long exile or forced labour. The code included also provisions on sexual aggression, drunkenness, tattoos, rebellion and conspiracy.<sup>6</sup>

All Tahitian statutes had to be confirmed by the governor and his council. Among them were statutes against compulsory education, breaking of Sabbath, damage of property and intermarriages. The Protestant missionaries continued to have strong moral influence on the content of the statutes. During the protectorate the French civil law began soon to replace the customary law in Tahiti. Since 1866 the French Civil Code replaced the Tahitian legislation in all questions except in land property and related questions, like succession. From 1843 there were created the War Council as criminal court and Justice of Peace, and Tribunal of First Instance and the Council of Appeal for civil law cases. The court system developed during the subsequent decades: the office of procurer was created in 1847 and a professional judge was introduced in 1865. The decree of 1868 reorganised the administration of justice, including the Tribunal of Peace, the Tribunal of First Instance, the Tribunal of Commerce and the Superior Tribunal. The reform of 1933 preserved the system's basic structure. An office of market judge was created in 1890 to the Tribunal of First Instance. In 1981 the Superior Tribunal (of Appeal) was renamed the Court of Appeal and the last Justices of Peace were annexed to its system. The Criminal Court was reformed the next year and a Children's Court was created in 1984.<sup>7</sup>

In Wallis and Futuna the earliest statute was the code of Monseigneur Bataillon (1870), which was written by the head of Catholic missions on the islands, was a mixture of customary law and religious rules. According to it, the village laws were in force only by governmental consent. The main functionaries were the judges who could not judge their relatives. All residents of Uvéa were subject to customary law. The code was partly replaced in 1933 by a decree which brought the islands the French legal system. Already the treaty of 1887 recognised *de facto* legal pluralism: the French citizens and the indigenous population followed different laws. This was continued by the decree of 8 August 1933, which organised officially the French law on Wallis and Futuna. The Justice of Peace dealt with the French subjects. When Indigenous people committed crimes against the French citizens they were also under the jurisdiction of the Justice of Peace. In the last-mentioned case the justice was consulted by an Indigenous assistant. The law of 1961 repealed a major part of the decree,

---

6 Pomare Code (1819, Tahiti), laws I-XV, XIX; Boage (1952), pp. 6-7, 12. "The missionaries thought it proper from a consideration of the state of affairs in the islands, to recommend it to the king to call a meeting of chiefs of several Districts, that he might propose, and in conjunction with them, after consultation and agreement, settle certain laws and regulations, for the good of the people, and the better ordering of their civil affairs." op.cit. Siikala (1982), p. 231.

7 Newbury (1980), pp. 90, 109, 127-129; Un peu d'histoire.

but continued the double legal system. The laws and statutes concerning New Caledonia, if they were extended by degrees to the islands before 1961, are still in force. The two systems coexist. There is, however, one exception: the criminal law follows the civil law system. The civil law system's Court of First Instance, Children's Tribunal and Work Tribunal are located in Mata Utu (Wallis). Their creation has been a result of the self-determination process in New Caledonia and negotiations between the two territories. The court of appeal is the Court of Appeal of Nouméa in New Caledonia but the final court for criminal law cases is today the Criminal Court of Mata Utu. The local judge may arrest a person for seven days' examination before transfer for imprisonment to New Caledonia.<sup>8</sup>

### 3.1.2. *Loi du pays*

The domain of law is reserved in the Constitution to national parliament. The general rule is that the regulations of territorial collectivities are administrative statutes lower in hierarchy to laws and are therefore submitted to control of administrative jurisdiction. Both New Caledonia (1998) and French Polynesia (2004) have statutes called *lois du pays* (laws of the country). Agreement of Nouméa created for the first time a crack to the principle of normative unity. It gave for the Congress of New Caledonia an equal legislative power with the parliament of France. *Lois du pays* of New Caledonia and French Polynesia are, however, limited geographically to their respective territories and to defined subjects which do not belong to the state's competence.<sup>9</sup>

According to the Agreement of Nouméa, some of the deliberations of Congress have legislative value which the executive prepares and executes. The government of New Caledonia and the members of the Congress may introduce *lois du pays*. The parliament cannot restrict New Caledonia's Constitution-based legislative power. Unlike in the case of national laws, Conseil d'Etat has a role to check in one month's delay all legal initiatives and bills related to *lois du pays* and if needed, to invalidate them. Thereafter they are transferred to the President of Congress, Government and High Commissioner. The Constitutional Council may check the constitutionality of *lois du pays* which refer to *bloc de constitutionnalité*, but only if a provision has been taken to a second reading. They are finally submitted to the Congress for deliberation. The Economic and Social Council and the Customary Senate must be consulted on the bills concerning their respective areas of competence. *Lois du pays* are adopted in public scrutiny by a simple majority of the Congress. A new deliberation may be demanded within 15 days after the adoption of the text by the high commissioner, government of New Caledonia, the President of Provincial Assembly or at least 55 members of the Congress. The

---

8 Code du procédure penal (1958), art. 823 al. 1; Loi no. 61-814 du 29 juillet 1961, art. 2, 5; Décret du 8 août 1933, art. 4-5, 7-8; Décret du 19 février 1962; Décret du 26 décembre 1983; Décret du 27 décembre 1983; Arrêté du 2 décembre 1968; Ntomy (1993), p. 624; Payé (2001), pp. 231-232; L'histoire des institutions à Wallis et Futuna.

9 Constitution (1958), art. 34; Bausinger-Garnier (2001), p. 15; Payé (2001), pp. 362-363. *Pays* means historically rather a province and dates from the medieval France, when there was not yet a nation state but *pays* was one's own "country".

Constitutional Council may intervene to invalidate legislation when the limits to legitimate discrimination have been exceeded.<sup>10</sup>

The organic law of 27 February 2004 recognises for the first time a limited right for Polynesian Assembly to give statutes which are called, similarly to New Caledonia, *lois du pays*. Their scope is related to the domain of French Polynesia or to the participation of the territory to national competence, submitted to the judicial review of Conseil d'Etat. The Territorial Assembly may enact *lois du pays*. They may be challenged for a maximum of eight days after their adoption or day after voting on the second reading to Conseil d'Etat in delay of 15 days by the High Commissioner, the President of Assembly, six MPs or physical or artificial person with an interest, in delay of one month after the publication of law in the official journal of French Polynesia. Conseil d'Etat delivers in three months time a ruling on the conformity of *lois du pays* with the Constitution, organic laws, international engagements and general principles of law. Conseil d'Etat has also power to use exceptional means of control. *Lois du pays* may be submitted to a referendum by territorial government or Territorial Assembly. The High Commissioner oversees the legality.<sup>11</sup>

---

10 Accords de Nouméa (1998), ss. 2.1.3.-2.1.4.; Loi organique no. 2004-192 du 27 février 2004, art. 32, 35, 140; CC, *Décision no. 2000-1 LP du 27 janvier 2000*; Bausinger-Garnier (2001), pp. 58-60; Rouault (2007), pp. 246-247. The possibility to refer to Constitutional Council has been used only rarely. In 1996 the Administrative Tribunal of Nouméa declared itself disqualified to give opinion on the bills of *loi du pays* based on its double role in consultation and jurisdiction and the ECJ's decision in *Procola v. Luxemburg* (1995). The Appellate Administrative Court of Paris rejected later the tribunal's reasoning. Tribunal administrative de Nouméa, *Sarran*, 28 novembre 1996; CAA, *Sarran*, 23 mars 1999; In New Caledonia there were passed in 1999-2011 altogether 100 *lois du pays*. Many of them deal with local taxation and customs (in 50 *lois du pays*). The other deal with working conditions (14), social affairs and social order (11), public services and administration (5), wages (4), professions (3), accommodation (3), culture (3), traffic (3), health (2), education (2), investments (2), mining (1), meat products (1), and customary decisions (1); The competences of the Economic and Social Council and the Customary Senate include signs of identity; territory's name; rules on assessment; collecting of taxes; fundamental principles of labour, trade unions and social security; rules on access of foreign workers to market; customary status, regime of customary lands, customary negotiations, limits of customary areas, terms of designation to Customary Senate and Customary Committees; rules on hydrocarbon, nickel, chrome and cobalt; rules of provincial laws; rules on access to employment; rules on status and capacity of persons, matrimony, succession and gifts; fundamental principles on rules of property, real estates, civil and commercial obligations and distribution between the provinces of the functions and facilities created by the territory.

11 Loi organique no. 2004-192 du 27 février 2004, art. 14, 18-19, 39, 140, 151, 166-167, 179; Rouault (2007), p. 244; Magnon (2008), pp. 301-302. *Loi du pays* may be passed on civil law, the principles of commercial obligations, certain taxes, trade unions and social security, immigrants' work permits, public health, social action and families; fundamental guarantees of public functionaries; development and town planning; environment; property; mining; local employment (in relation to art. 18 of the organic law); transfer of real estates; right of pre-emption; relations between the territory and the municipalities; agreements; publication of institutional documents; and matters listed in art. 39. The institutions of French Polynesia may participate to the exercise of legal and regulatory competences in application of art. 14: status and capacity of persons; parental authority; matrimony; succession; gifts; research; breach of law; gambling; immigration (excluding the asylum, expulsion and EU citizens); audiovisual communication; and the financial services of post offices.

### 3.1.3. Indigenous Courts and Institutions

The establishing of customary organs was first suggested for New Caledonia in the bill of 1984. The next year was created eight customary areas (*aire coutumière*): Hoot Ma Whaap, Paici-Cèmuhi, Ajië Ara, Xârâcùù, Drubea-Kapumë, Nengone, Drehu and Iaai. They are further divided to 57 customary chefferies, 341 tribes and approximately 5,000 extended families. The customary areas have respective customary councils, which could consult the Regional Councils (today Provincial Councils) in customary questions. They formed a Consultive Customary Council of the Territory with the same functions. In 1988 was created the Customary Chamber whose domain was related to municipal and economic questions. The Consultive Customary Council became with the Accord of Nouméa the Customary Senate. Its present status is based on the organic law of 1999. The Senate has 16 members representing each customary area. It is represented in several Caledonian organisations as the expert of customary affairs. The senate must be consulted on the bills of *loi du pays* dealing with Kanak identity, identity signs and custom. It may also be consulted on questions related especially to the competence of state. The Customary Senate must answer in two months' delay. It may also make initiatives on Kanak identity, customary areas and its own regulations; is responsible on the role of customary affairs; gives legal definition to the Customary Councils and defines their form and legal force; and specifies the status of customary authorities and their role in social security and criminal mediation. The last-mentioned makes possible social control of customary authorities. The Congress has powers to regulate the mediation by *loi du pays*. The Customary Senate may itself ask the local Customary Councils to give opinion in one month's time. They may be asked to convene by the High Commissioner, Government, President of the Assembly of Province or by a mayor. The officials of administration may ask interpretation on customary rules and minutes.<sup>12</sup>

In 1982 to Caledonian civil law courts was created a system of Customary Assessors who have deliberate voice when dealing with questions of customary status or customary lands. Each customary area appoints five assessors to the courts. There are always a minimum of two assessors to guarantee both parties customary representation. The assessors' main duty is to give a declaration for the proof of customary law.<sup>13</sup>

The Pomare Code implemented on Tahiti and Moorea a network of 700 Indigenous judges and a British-style jury and magistrate. In 1824 appeared the Court of Appeal (*Toòhitsu*). Seven of the district chiefs, who had become district judges, formed *Toòhitsu*. With the protectorate the Indigenous judges' jurisdiction was limited from 1865 to their own communities' customary law. The Tahitian Assembly acted as the kingdom's legislature (1843-1866) but was increasingly under French supervision. From 1847 the District Judges were appointed jointly by the Queen and the French Commissar, and their number was strongly reduced. In 1855 the District Councils were created which acted among other things as first instance civil courts and land courts. *Toòhitsu* continued as a court of appeal of second degree (High Court of Tahiti). The decisions of both courts could be quashed by the French courts. In

12 Accords de Nouméa (1998), préambule; Loi no. 84-821 du 6 septembre 1984; Loi no. 85-872 du 23 août 1985; Loi no. 88-1028 du 9 novembre 1988; Loi organique no. 99-209 du 19 mars 1999, art. 137, 144, 149-150, 152; Payé (2001), p. 208; Bechtel (2002), p. 102.

13 Ordonnance no. 82-877 du 15 octobre 1982, art. 2-5; Bechtel (2002), p. 105.

1866 the Tahitian Assembly was forced to pass a law which ordered all cases to be judged according to French law. The Assembly was still able to hold the land question's litigation partly under District Councils. The annexation of Tahiti to France in 1880 led to the gradual disappearance of Indigenous jurisdiction. From 1882 the civil law courts consulted indigenous assessors when the cases deal with the diminishing customary law questions. *Toòhitsu* ceased to function in 1933. The last remnant of Indigenous courts is the possibility of using *mūtoi* (customary official) for defence in remote islands' trials.<sup>14</sup>

### 3.1.4. Customary Law

During the *ancien régime* France had 65 general and 300 local customs. In 1804, when the Civil Code was passed, the customary law lost in France officially all force as a legal source although much of it was injected into the new code. Further, the custom did not disappear totally from the colonies. The customary law is recognised by legislation on New Caledonia and Wallis and Futuna. The Accord of Nouméa and the law of 1961 on Wallis and Futuna recognise the validity of customary law in civil status, property and landowning besides the French law. The customary law varies in different customary areas. New Caledonia and Wallis and Futuna have parallel legal systems but in the courts at the territorial level the customary law has a subordinate position in relation to statutory law, as shows the consultative nature of its use. In its proper sphere of influence the customary law is, however, still dominant in Loyalty Islands, in Wallis and Futuna, and among the Indian communities of French Guiana, in certain sectors of life in Grande Terre, and it is alive in the family law of French Polynesia. The personal customary status of New Caledonia and Wallis and Futuna has legal effects in the whole territory of the republic.<sup>15</sup>

The Kanak have been exempted from the provisions of personal status in the Civil Code since 1866. The Court of Appeal of Nouméa has allowed references to customary law since 1920 and the government recognised the existence of parallel customary law system in 1934. Nevertheless, the customary law's domain was restricted until 1998 and there lacked a valid structure to apprehend the oral customary law. There were unsuccessful attempts in 1953 and 1971 to codify the customary law. Due to a lack of clear rules the courts used civil law to interpretate the custom. Only the judicial reforms of 1982 and 1989 created a real possibility to use customary law in civil law courts, thanks to customary assessors and more flexible rules

---

14 Newbury (1980), pp. 183-184, 188, 190; Siikala (1982), p. 231; Rayboud (2001); Un peu d'histoire. In *Hopu & Bessert v. France* (1997), the litigants complained that they had no possibility to apply to Indigenous courts. UNHRC saw that France never abolished the Indigenous courts, including *Toòhitsu*, but they ceased to function. Cf. *Hopu & Bessert*, s. 3.1. In the 1930s, the registration of customary land to individual lots was in final phase which diminished *Toòhitsu's* role.

15 Accords de Nouméa (1998), art. 1.4.; Loi organique no. 99-209 du 19 mars 1999, art. 7-19, 22; Ordonnance no. 82-877 du 15 octobre 1982; Rouland & Pierré-Caps & Poumarède (1996), p. 463; Payé (2001), pp. 416, 426-427; Cour d'appel de Besançon, *Mlles Narnada et Radjaswari c. M.P.*, 13 juin 1995. In Mayotte the Islamic law had before 2010 competence related to an individual's legal capacity, matrimony, succession and gifts. The change of territorial status to DOM and as an integral part of EU has led to the repealing of an independent mixed religious and customary system, including the polygamy. The Islamic courts' role has been reduced to mediation and interpretation of religious law.

which allowed the courts to make decisions on customary civil status (*statut civil coutumier*) and customary land. Although the Constitution limits the customary status to private law and even there only a dispute between two or more persons having customary status may be resolved by the customary authorities, the Agreement of Nouméa has a broader definition, including some rules on property and succession. In the organic law of 1999 those who do not have civil law status, preserve their personal status if they have not renounced it. New Caledonia has competence on customary status and its rules, title, institutions and the limits of customary areas. The children to customary parents acquire customary status law at birth. The customary status is possible to change to civil law status and also to reacquire if one's ancestors had the status.<sup>16</sup>

The decisions (*palabre*) of Clan Councils, which acquired recognised status with the Accord of Nouméa, are called in New Caledonia *procès-verbal*. The decisions vary geographically, and their content was defined by the Congress in 2007. A customary decision has to be published in written form in French. The clan chiefs' status in the decision process is recognised and there are rules on decisions concerning the utilisation and exploitation of customary land. A customary decision has a quality of administrative decision, which creates rights for individual and community. A customary public officer, working for the Customary Area, executes the decisions and receives appeals against a decision, and has also a role in prevention of crimes and in their mediation. The Customary Councils clarify and interpret customary rules.<sup>17</sup>

French Polynesia forms an interesting exception in the Pacific region. After the conversion of Pomare II to Christianity in 1812, the king allowed the missionaries' "civilisation work", of which an essential part was the drawing up of laws following the Western model. The result, Code of Pomare, was introduced in the meeting of chiefs in 1819. In 1840 the royal house made an unsuccessful attempt to codify also the existing customary law and the customary law was soon limited to civil and criminal processes among the indigenous people. A new limitation took place in 1865 when the customary law's scope was reduced to land questions, and the following year the French Civil Code became in force. King Pomare V promised in 1880 that France would respect the existing Tahitian laws and customs and leave to indigenous jurisdiction the basic litigation. The law of 30 December 1880 did not, however, mention this promise. The law of 10 March 1891 made a reference to them only in a negative light. Loosing ground gradually the indigenous jurisdiction finally survived only in Rurutu, Rimatara and the Leeward Islands where it was officially repealed in 1945. Thereafter the whole of French Polynesia was integrated into French civil law system. The customary law has persisted only in family law, but has gained only limited recognition by the territorial courts.<sup>18</sup>

On Wallis and Futuna the customary law was *de facto* the only system of law until 1933, when the French civil law was introduced. Even then the indigenous communities' inner

16 Constitution (1958), art. 75; Loi organique no. 99-209 du 19 mars 1999, art. 8-19, 34; Loi no. 89-378 du 13 juin 1989; Accord de Nouméa (1998), s. 1.1; Ordonnance du 15 décembre 1982; Cour d'appel de Nouméa, Arrêté du 20 février 1920; Arrêté no. 631 du 21 juin 1934; Ntumu (1993), pp. 619-620; Lafargue (2003), pp. 36-38, 43, 48; Agniel (2008), p. 84.

17 Accord de Nouméa, art. 1.2.1-1.2.2., 1.2.4; Loi du Pays du 15 janvier 2007, ss. 3-5, 8, 19, 28.

18 Loi du 30 décembre 1880; Loi du 10 mars 1891; Newbury (1980), p. 127; Siikala (1982), pp. 231-232; Ntumu (1993), p. 639; Bechtel (2002), p. 107; Un Peu d'histoire.



affairs and criminal law stayed in the scope of customary law. The law of 1961 names as sources of law both the civil law (*droit commun*) and the customary law (*droit local*). The law mentions specially litigation between the citizens following the customary law and the customary property. It gives an opportunity for the parties of customary law cases to submit collectively to civil law jurisdiction. The customary law decisions can be challenged in *chambre d'annulation* of the Court of Appeal of Nouméa as the last resort, when there is a question of incompetence, excess of powers or other violation of law. The regulation of 20 September 1978 created officially a customary jurisdiction to Wallis and Futuna, but its statutory form has remained a dead letter. It is much alive but outside the scope of official judicial control. The courts have also recognised the validity of Wallisian and Futunian customary law in New Caledonia. In the litigation between two customs the civil law prevails, if the parties have not agreed to refer to either of the customary systems.<sup>19</sup>

The Indians of French Guiana were outside of French legislation until 1969 and the only known legal system there was that of customary law. Despite their integration to the civil law system, they continue to live under unrecognised customary law, which especially dominates the family, property and criminal law in the indigenous villages. The hereditary chiefs act as arbitrators. There have been intergenerational conflicts of values when the young people want to leave the traditional community.<sup>20</sup>

### 3.1.5. *Indigénat and Customary Enforcement of Law*

In New Caledonia the Kanak chiefs had during *indigénat* (1898-1946) a responsibility to keep order in tribal reserves with the help of Indigenous police. The Governor's civil servants could also arrest and punish the indigenous people with fines or sequestration of goods without trial or a judge's decision and Indigenous people could be taken to public work projects when needed. In Tahiti, the Pomare Code created since 1819 a system of policing and on the Palmerston Island was created a penitentiary. In French Polynesia the indigenous people were from 1880 French citizens and therefore under French laws. The law enforcement belonged to French police forces and the *gendarmerie*. In 1877, at the local level was created in a system of Indigenous police (*mutoi*), which helped *gendarmerie* in supervising road maintenance, tax collection and registration of statistics and land transfers. In 1969, on both Wallis and Futuna and in the southern parts of French Guiana the customary enforcement of law has remained important. Wallis and Futuna has a customary police (*pulu*) especially for land questions. In French Guiana the chiefs still have the main role in keeping the order in communities and they cooperate with *gendarmerie*.<sup>21</sup>

---

19 Loi no. 61-814 du 29 juillet 1961, art. 5; Décret du 8 août 1933, art. 7; Arrêté du 20 septembre 1978; Cour d'appel de Nouméa, *arrêté no. 121 du 8 juin 1998; arrêté no. 28 du 12 avril 1999*; Bechtel (2002), p. 105, Rohm (2006), p. xxvi; L'histoire des institutions à Wallis et Futuna.

20 Arnoux (1996), pp. 1624, 1627; Peyrat & Gougis & Chine (1998), p. 79.

21 Décision du 9 août 1898 (New Caledonia), ss. 22-24; Arnoux (1996), p. 1608; Aldrich (1993), pp. 73-74; Rayboud (2001); Rau (2005), p. 71; Aimot & Tamole (2007), p. 52.

## 3.2. New Zealand

### 3.2.1. Legislation and Bylaws

The District Circuit Courts Act 1858 allowed *rūnanga* (indigenous councils) limited power to make bylaws to regulate civil injuries and lesser criminal offences which were enforceable in the Circuit Courts, presided by Resident Magistrates and assisted by Māori Assessors. The courts' Māori Assessors had the authority to enforce bylaws in lesser matters and the resident magistrate in broader matters. In the late nineteenth century *kingitanga* (Māori kingdom) acted as parallel, alternative legal system. In 1894 it enacted a Constitution, which defined the governmental and administrative structure of King Country and set out conditions by which Pākehā might secure lease of Māori lands. The bylaws-making power was returned in 1945 with the Maori Social and Economic Advancement Act. The tribal Executive Committees were able to make bylaws on health, sanitation, control of animals, protection of meeting houses and burial grounds, meetings, tradition and general discipline in villages. A *tangata kaitiaki/tiaki* (official for customary fishing) has the power to make bylaws on non-commercial customary fisheries.<sup>22</sup>

The first statute to mention the Treaty of Waitangi - the founding document of New Zealand - was the Treaty of Waitangi Act 1975. In 1986 the Labour Government asked all departments to give recognition to the treaty in all aspects of their administration and in the preparation of legislation as part of the domestic law and applicable to all policies. The consultation with Māori was needed in all matters relating to the application of the treaty. Due to resistance of departments the government had to drop later the reference to treaty as domestic law, adding principles of treaty, requiring the inclusion of estimated financial implications to treaty recommendations and limiting the consultation only to appropriate Māori on significant matters. The later government guidelines were more reserved, maintaining a possibility of general reference to the treaty and a case-by-case approach and variety of legislative provisions elaborated on the meaning of the treaty generally or extensively.<sup>23</sup>

In common law doctrine on parliamentary sovereignty the legislation is the paramount and unimpugnable expression of absolute sovereignty without limitations. Only in the 1980s did there appear a constitutional convention of legislative restraint. As a rule, consultation and agreement with Māori must accompany major statutory initiatives in treaty-related fields. This is visible in legislation. A significant period of treaty legislating was 1986-1993, concentrating on land, language and fisheries. The State-Owned Enterprises Act 1986 was followed by the Environmental Act 1986 and the Conservation Act 1987. All subsequent acts referring to the treaty have followed the same formula, including management, use, development and protection of resources, conservation, energy, ownership, protection of treaty claims, education and human rights. Several statutes characterise the treaty as a relationship or partnership between two founding nations. This active period ended with the Te Ture Whenua Maori Act 1993 which acknowledges the importance of land relationship to

---

22 Maori Social and Economic Advancement Act (1945), ss. 34-35; A Guide to the Fisheries (Kaimoana Customary Fishing Regulations 1998 (2003), p. 13; Havemann (1999), pp. 384, 389. Māori kingdom and King Country are located in central North Island. Cf. section 4.2.4.

23 Māori Custom and Values in New Zealand law (2001), p. 83; Palmer (2008), p. 96.

Māori and promotes land retention. The post-1975 legislation has recognised that the treaty establishes a special relationship, embodies spirit of exchange of *kāwanatanga* (governance) to the protection of *rangatiratanga* (exercise of power), envisages spirit of partnership and goodwill, obliges the Crown to protect actively Māori interests, and confirms and guarantees all their *taonga* (treasure).<sup>24</sup>

Like in Tahiti, the missionaries of LMS were active on the Cook Islands to creating a Christian and Western society. The resident and the General Council promulgated statutes which covered most aspects of public and private law. The federal parliament moved to majority rule in 1893. In 1899 it passed a criminal code for Cook Islands (Offenders' Punishment Act). The Ariki Council replaced with regulatory powers the parliament after 1901, when the islands were annexed to New Zealand. In the aftermath of World War II the Legislative Council (1946) was established to make ordinances in accordance with New Zealand's legislation for peace, order and good government of all islands, and to impose taxes. In 1965 the New Zealand's parliament enacted a Constitution for Cook Islands. The islands were granted legislative powers after 64 years' interruption. Unlike in New Zealand, the Cook Islands and Niue have a constitution as the supreme law, whose change demands a 2/3 majority in local parliaments. The laws of New Zealand are not directly applicable, but must be implemented by the Cook Islands Legislature. The Governor General in Council was able to legislate for the territory when requested by the Legislature until 1981. Most articles in the Constitution may be amended by the local parliament. An amendment must be voted for twice in 90 days interval and receive a 2/3 majority. A major part of legislation is today enacted by the local parliament. It can also declare acts of the New Zealand's parliament applicable in the Cook Islands or ask the New Zealand parliament to legislate for the islands. The local parliament has the right to delegate powers to pass bylaws, regulations or rules. The United Kingdom's statutes which define privileges, immunities or powers of the members of the House of Commons, are applicable.<sup>25</sup>

The Constitution of Niue is the supreme law of the island. The Constitution of Niue Act 1974 has a similar status. A bill to change the Constitution or Niue Constitution Act 1974 need a 2/3 majority in second and third readings. The interval for two readings is 13 weeks. Depending on the Constitution's provision, there is a further requirement of referendum with a simple or 2/3 majority for the change. Statutes inconsistent with the Constitution are invalid. Like on the Cook Islands, the New Zealand's statutes came part of Niue only by the consent of local parliament. Unlike on the Cook Island, the Governor General has still legislative powers when requested by the Assembly. the island's statute law includes the consistent law of England as force since 14 January 1840, some British and imperial statutes in force since 1 January 1967, pre-1974 New Zealand's acts, which have not been repealed by the Assembly and Niue

---

24 Treaty of Waitangi Act 1975, s. 4(2A); Te Ture Whenua Act 1993, Preamble; Public Records Act 2005, s. 3; McHugh (2004), p. 417; Palmer (2008), pp. 95, 102-103. The preamble of Te Ture Whenua Maori Act 1993 follows the wording of Waitangi Tribunal's Te Ariawa Report (1983).

25 Constitution of the Cook Islands 1965, art. 39, 46; Cook Islands Constitution Act 1964, ss. 4, 41; Legislative Assembly Powers and Privileges Amendment Act 1979 (Cook Islands); New Zealand Laws Act 1979 (Cook Islands); Gilson (1991), pp. 65, 91, 200; Ntummy (1993), pp. 3-5. Certain amendments for the Constitution of the Cook Islands need collaboration with New Zealand's parliament. A good example is art. 2, which declares the Queen of England as the Head of State. A change needs in New Zealand's parliament a 2/3 assent in two votes and a further 2/3 assent from the electorate of the Cook Islands; *Ariki* are paramount chiefs.

acts and ordinances since 1974. The Niue Act 1966, enacted by the New Zealand's parliament, created the base for the island's statutes, including general legislation not included in the Constitution. New bills must go through three separate readings. Delegation of regulatory powers is based on statutes. Most regulations are made by the cabinet. The Village Councils have a right to make bylaws. All regulations and bylaws must be submitted to the Assembly's confirmation within 28 days after the promulgation.<sup>26</sup>

The sources of law in Tokelau are expressed in the Tokelau Act 1948. There are acts and regulations of the New Zealand Parliament, which are specifically made for Tokelau and those, which are extended to the islands, and are not inconsistent with other acts of New Zealand. Since 1969 the laws of England as in force in New Zealand in 1840 became in force in Tokelau. *General Fono* (chiefs' meeting) has legislative power in Tokelau since 1996 in questions dealing with tolls, rates, dues, fines, taxes and public holidays. It can also prescribe criminal offences and penalties. Both *General Fono* and Governor General in Council can make regulations necessary for peace, order and good government of Tokelau. *General Fono*'s regulations must be published both in Tokelauan and English. The Village Councils have been able since 1986 to make their own village rules.<sup>27</sup>

### 3.2.2. *Tikanga Māori*

The Māori customary law (*tikanga Māori*) is based on a continuing review of fundamental principles in a dialogue between the past and the present. It has the capacity adapt to new circumstances while maintaining conformity with basic beliefs. There are variations between the *iwi* but common is that more than one distinct cultural group can be acknowledged and accommodated within a society. The values inform the whole range of law and provide the primary guide of behaviour.<sup>28</sup>

The first charter of the colony (1840) established courts with jurisdiction over all inhabitants of the country. At the same time, the principle of continuity in English common law recognised certain degree of validity for pre-colonial laws. The Māori customary laws were well-established in their territories and even extended to Pākehā. George Clarke, the head of New Zealand's Protectorate Department, recommended a separate Māori system of law and the recognition of their customs and laws. Also the colonial secretary in London asked the governor of New Zealand to uphold Māori customary law and to incorporate some Māori institutions as *tapu* to the legal system. In some regions with a strong Māori presence, the British authorities showed pragmatism with Maori customary law, using two legal systems side by side. The Colonial Office in London allowed the custom to prevail in

---

26 Niue Act 1966, ss. 51, 672, 706; Constitution of Niue (1974), art. 28, 35-36; Ntuny (1993), pp. 159, 163; Townend (2003). The Niue Act included also provisions on the High Court and references to over 30 of New Zealand's statutes, which have an equal status with later statutes (s. 677).

27 Tokelau Act 1948, ss. 3A, 3D, 4, 6; Tokelau Amendment Act 1969, s. 3; Tokelau Amendment Act 1996, ss. 8-9; Tokelau Village Incorporation Regulation 1986, s. 18.

28 NZCA, *Hineiti Rirerire Arani v. Public Trustee of New Zealand* (1920); Māori Custom and Values in New Zealand Law (2001), pp. 3-5, 17. *Tikanga* comes from *tika*, right, correct, just, fair.

dealings which involved only Māori. In criminal law the legislation met to some extent the indigenous reality.<sup>29</sup>

In 1844 Governor FitzRoy issued the Native Exemption Ordinance which applied to Māori offences outside the town limits and was intended to be a transitional measure. A Māori could only be punished according to the *murū* (forgiveness) principle and they were generally exempted from the imprisonment which was against their customary practice. Governor Gray repealed both the protectorate department and Native Exemption Ordinance in 1846, but the Māori customary law was used in Resident Magistrate Court until 1893 and was even otherwise dominant until the 1860s. The Clarke's and Swanson's idea about separate pockets of customary law was included to the s. 71 of the Constitution Act 1852, which offered a possibility to create native districts with customary law jurisdiction. The promise remained a dead letter and was finally repealed with the enactment of the Constitution Act 1986. In more isolated parts of King Country the customary law prevailed until World War II. Elsewhere, the increasing Pākehā population had less need to respect the Māori customary law but even despite the war, confiscations and new legislation New Zealand's legislation preserved the *sui generis* status of Māori customary law in registration of births and deaths, education, qualification as electors, jury service, matrimony and property assessment. As a throwback to legal plurality, judges' oath demanded that they do right to all people after the law and usages of New Zealand. A similar wording is included in the Supreme Court Act 2003.<sup>30</sup>

Despite the parallel existence of two legal systems in early New Zealand, the colonial society expected that to be only a transitional stage. Governor Fitzgerald hoped that the customary law would be abandoned in time. The collective security would be obtained by a common legal system. In 1845 Martin CJ published *Ko Nga Tikanga A Te Pākehā*, which was aimed at the Māori as an introduction to the basic principles of the English law. Due to the ideology of gradual civilisation was established a council to advise the governor on indigenous policy (1863).<sup>31</sup>

The establishment of Waitangi Tribunal (1975) has increased the importance of Māori customary law as the secondary source of treaty. The treaty itself promises to protect the Māori custom and cultural values. The case law of Waitangi Tribunal, Maori Land Court and Maori Appellate Court shows that the customary law is alive and well in the Māori communities. The Waitangi Tribunal proceeds in *marae* oral hearings and recognises the expertise of elders and learned tribe members and the Waikato University Law School has

29 McHugh (1991), pp. 90-91; Karsten (2002), p. 83; Joseph (2009), p. 75.

30 Native Exemption Ordinance (1844), ss. 2, 6; Constitution Act (1852), s. 71; Native Council Act (1863), s. 12(2); Oaths and Declarations Act 1957, s. 18; Supreme Court Act 2003, s. 3; Karsten (2002), pp. 83-84; McHugh (1991), p. 274; Elias (2005), p. 6; Joseph (2009), p. 77. Māori Custom and Values in New Zealand Law, pp. 19-20. The presumption of continuity can be found from early English case law. In *Case of Tanistry* (1608) the indigenous laws survived British sovereignty as long as they met the requirements of reasonableness, certainty, immemorial usage and compatibility with the prerogative of the Crown. In *Campbell v. Hall* (1774), Lord Mansfield held, among other options, that the laws of the newly-acquired territories remain in force until altered by the Crown. On the other hand, Mansfield also said that articles of a treaty or capitulation of cession are sacred and inviolable; The early settlers were in many regions more dependent on the Māori customary law than their own common law.

31 Elias (2005), p. 6; Joseph (2009), p. 79.

created several projects on *tikanga Māori*. In 1988-1990 the Māori activists campaigned for a separate Māori legal system, including a separate criminal justice system. They did not recognise the cession of sovereignty in the legal sense: for them the indigenous sovereignty existed in a separate jurisdictional realm.<sup>32</sup>

In 1986 the High Court recognised in the *Te Weehi* case the existence of customary law in customary fishing. The decision brought legal pluralism to local courts when they had to investigate and enforce the customary law. The local laws and property rights of peoples had continued after the establishment of British sovereignty. One year later the Court of Appeal confirmed that the customs and practices which include spiritual elements are cognisable in a court of law provided they are properly extinguished by evidence. The court has also stressed that the existing indigenous rights can only be extinguished by the free consent of their occupiers.<sup>33</sup>

In the associated states and territories custom is defined narrowly. The Cook Islands Act 1915 defined custom as “the ancient custom and usages of the Natives of the Cook Islands”. This precluded the courts from recognising new or changed custom. The scope of customary law covers interests in customary land and the conferring of chiefly titles. The local Island Councils have power to make, alter or revoke bylaws, which reflect the island’s customary law. They must be approved by the territory’s cabinet. The offences against bylaws are resolved by local justices of peace or by the High Court.<sup>34</sup> In Niue juridical notice is to be taken of Niuean custom so far as it has the force of law under the Niue Act. Much of everyday life is governed by the custom but very little of it is formally recognised by law. When a custom contradicts with statute or common law, the latter prevails. Since 1968 the customary rules and governance of land system have been included in the legislation. There is no explicit mention about custom as a source of law for Tokelau, but the islands’ daily life is based largely on custom, especially in family relations, landholding, public order and village organisation. These areas are referred in regulations. The village elders make rules for their respective villages based on Tokelau Village Incorporation Regulation.<sup>35</sup>

### 3.2.3. *Waitangi Tribunal and the Indigenous Courts*

In early New Zealand, the Māori retained their own tribal *rūnanga* courts, which were chief-led dispute settlement forums. They used *utu* (retaliatory measures) to solve disputes, often related to land. In 1846 were established the Resident Magistrate Courts with summary jurisdiction over disputes between Māori and Pākehā. In cases involving only Māori, the Resident Magistrate was assisted by two *rangatira* (chief) who acted as Native Assessors. The assessors had an equal position in decision-making with the Resident Magistrate: the cases

---

32 Māori Custom and Values in New Zealand Law (2001), p. 69; McHugh (2004), p. 505.

33 NZHC, *Te Weehi v. Regional Fisheries Officer* (1986), s. 121; NZCA, *Huakina Development Trust v. Waikato Valley Authority* (1987), s. 215; *Te Runanganui o te Ika Whenua Inc Society v. Attorney- General* (1994), s. 24; McHugh (1991), p. 125.

34 Cook Islands Act (1915), s. 422; Outer Islands Local Government Act (Cook Islands, 1988); Ntummy (1993), p. 5.

35 Niue Act (1966), s. 672; Tokelau Village Incorporation Regulation 1986; Ntummy (1993), pp. 162, 299.

had to be determined unanimously, according to equity and good conscience, and taking into consideration Māori customs, norms and institutions. *Rangatira* controlled their own people and decided whether they could be given up to British courts in the case of more serious crimes dealing with the Pākehā settlement. The Native Circuit Courts Act 1858 created 20 Circuit Courts with respective judges. These courts used similarly Māori Assessors and Indigenous juries. The courts enforced the bylaws made by the village *rūnanga*. The Māori officials had a limited right to hear cases, whose compensation was at maximum worth £5. These systems were later abolished by the Magistrates Court Act 1893 and replaced by the Stipendiary Magistrate excluding the Māori customary law.<sup>36</sup>

During the Māori wars, the Native Land Act 1862 contained provisions to establish a Native Land Court (NLC) to create a proper forum for Māori title cases. The court, created in 1865, was modelled on the conventions of British Courts of Law and Compensation Court whose judge Francis Fenton became the new court's chief judge. The North Island was divided into five court districts. In 1865-1909 its main judicial tasks were to determine ownership of land and to facilitate individualisation of title, which *de facto* prepared the transfer of land to court and generated considerable litigation in the superior courts in succeeding years. On the other hand, the court also showed independence in relation to the Native Department and other courts. Any Māori with a claim could initiate investigation of title before the court. More than ten persons could be issued a certificate of title and the registration of names became possible two years later. A tribe could only receive a certificate to a block of more than 5,000 acres. The Governor in Council had the power to order a rehearing. This was modified in 1880 to include all Māori. A rehearing court could change the former decision, to limit its scope (since 1886), and its ruling was final. The Supreme Court could refer questions of custom to NLC for determination. In 1868 the judges received wide powers to correct both written and unwritten defects and errors. From 1873 the court could send any question of law to be sent to the Supreme Court for binding determination.<sup>37</sup>

Later the Supreme Court was also allowed to send the determination back to NLC (from 1880). Superior courts were first reluctant to review the decisions of the land courts but when the twentieth century approached, they began to hear submissions in the form of applications for writs of *certiorari* or prohibition. The basic structure of NLC remained in subsequent legislation. The Native Land Court Act 1894 created the Native Appellate Court, constituted of two judges of the NLC, in order to hear appeals from the NLC and make binding decisions. An appeal was to be submitted to a district registrar. Like NLC it could ask for the Supreme Court's decision. The Native Land Act 1909 excluded the NLC from the process of investigation of title. The most Māori customary land had already been investigated and the function of the court moved in a more protective direction by exercising a quasi-parental jurisdiction and taking part in the Crown's duties. The court developed a system of land title registry and from the late 1920s its duties were increased by the legislation. Judges and registrars ran Maori Land Boards and were, therefore, able to promote economic development projects. This active period ended with the Maori Affairs Amendment Act 1967 which attempted to

36 Resident Magistrates Courts Ordinance 1846, ss. 7-10, 13, 19-20; Native Circuit Courts Act 1858, s. 2; Māori Custom and Values in New Zealand Law, p. 20; Karsten (2002), pp. 83-84; Cox (1993), p. 80; Joseph (2009), p. 78.

37 Spiller (2001), pp. 148, 157; McHugh (2004), pp. 186-187; Young & Belgrave & Bennion (2005), pp. 12-13.

abolish the Māori land question and reduced the land court to a formal court of record. In 1953 the courts were renamed as the the Maori Land Court (MLC) and Maori Appellate Court (MAC).<sup>38</sup>

During the late nineteenth and early twentieth centuries the the Māori had in several petitions demanded the court's reform or abolishment. The real reform took place, however, only from the 1970s. The court began to improvise Māori custom in some areas and promoted *mana* with the "1840 rule", according to which a Māori customary title was to be ascertained from the date of Crown sovereignty. E.T.J. Durie CJ reformed during the late 1970s the MLC's role: it became an active agent in tenurial reform, which used its statutory jurisdiction creatively and at the extremity of allowance. The court began to use s. 438 of the Maori Affairs Act 1953, originally intended as a device to alienate land, to constitute special trusts to prevent the alienation and to maintain Māori ownership. Although a royal commission report (1980) suggested the repeal of the land courts, their role was recognised and reformed in Te Ture Whenua Maori Act 1993. According to the law, a process in MLC ensures that the affected individual has an opportunity to appeal. The court does the following: it investigates titles to customary land and transfer of land to Māori freehold land by issue of Māori freehold orders; makes orders for convention of general land and Māori freehold land; makes partition of Māori freehold land for owners in common; changes status of Māori land to general land; sanctions exchange of Māori land; grants succession orders; appoints trustees to Māori land if they are minors; confirms land alienations; enforces or administers trust of Māori land; and vests Māori land in trustees. The Chief Judge has the power to consider written applications from aggrieved individuals if he/she believes that it is counteraffected by an order erroneous in fact, mistaken in law, or an omission has taken place by the court. He/she can state the case to the judicial review of the High Court, counsel or add an order of the court.<sup>39</sup>

The Minister of Maori Affairs, the Chief Executive of *Te Puni Kōkiri* (Ministry of Maori Affairs) or the Chief Judge of the court may refer any matter for inquiry to the court. Lay members may be appointed to the MLC and MAC in cases relating to *tikanga Māori*. Since 1975 it has had a right to resolve questions of fact relating to customary law principles of *take* (land). MLC has constituted, based on the present legislation, tailor-made trust instruments. It may, by request of the chief executive of *Te Puni Kōkiri* or the chief justice to determine the Māori bodies' representation. The court used this mandate in the early years very carefully as it saw it as a remedy to previous, unsuccessful attempts. Later most of the judges have been Māori and they refer widely to *tikanga Māori*. The court's success in tenurial reform brought to it *mana* (here: respect) in the eyes of the Māori public.<sup>40</sup>

The Maori Appellate Court (MAC), consisting of the MLC's judges and additional experts of *tikanga Māori*, may rehear and determine applications from all final orders of MLC. MAC

38 Native Lands Act 1865, ss. 23, 40, 81; Native Lands Act 1867, s. 17; Native Lands Act Amendment Act 1868, s. 3; Native Land Act 1873, s. 103; Native Land Court Act 1880, ss. 47, 67; Native Land Court Act 1886, s. 76; Native Land Act 1894, ss. 79, 86, 88, 92-93, 99; Native Land Act 1909, s. 84; Maori Affairs Act 1953; Young & Belgrave & Bennion (2005), p. 24. NLC used its right to ask the opinion of superior courts actively since the 1890s. One reason was the criticism against its past actions in land ownership cases.

39 Te Ture Whenua Maori Act 1993, ss. 6, 18, 29-30, 32, 44, 49, 61, 132-133, 135, 222, 310-312, IV-V, XII, XIV; The Maori Land Courts (1980), pp. 127-128; McGuire (1993), pp. 125-127; O'Malley (1998), pp. 213, 246.

40 The Maori Land Courts (1980), pp. 127-128; McGuire (1993), pp. 125-127.



has the power to determine provisional or preliminary decisions of the MLC, and sanction them, if needed. It has also equal discretionary powers. It may revise or set aside an act of MLC which has usurped, exceeded or abused powers, failed to apply with public duties, failed to account or give due weight to relevant matters. Since 1988 the the MAC has received applications from the Waitangi Tribunal on *tikanga Māori*, *take* and determination of *rohe*. Also the High Court may state a case to MAC on *tikanga*. An order made by the Chief Judge may be submitted to the MAC when the decision is final. Also the Waitangi Tribunal may state a case to the MAC when it is related to Māori custom or usage, right of Māori ownership, occupation of portioned lands and determination of tribal boundaries. The decision of the MAC is binding on the tribunal. A party may appeal to the Court of Appeal against the determination of the MAC, unless the Supreme Court is satisfied that there are exceptional circumstances that justify taking the appeal directly to the Supreme Court.<sup>41</sup>

The Waitangi Tribunal (WT) was established by the Treaty of Waitangi Act 1975. The early cases related to local land administration, environmental pollution and to use of natural resources. The tribunal was largely neglected until 1983, when Eddie Durie, its first Māori Chief Judge, supported by the Trials Division of the Department of Justice, started a procedural reform with Motanui Report. The appeal was heard in *marae* and tribunal used oral evidence of *kaumatua* (elder) in Māori. It used for the first time Māori legal terminology, focused the spirit of the treaty and began to develop Māori *kawa* (procedure) to interpret the concepts of justice, fairness and ownership from Māori perspectives. An important change took place in 1985, when the Treaty of Waitangi Act was amended to extend the tribunal's jurisdiction to all grievances dating retrospectively to 1840. As result, the number of claims and subsequent reports exploded. The claimants could initiate claims in their natural environment - *marae*. The fundamental principle is that the cession of Māori sovereignty to the Crown in exchange for the protection of *tino rangatiratanga* (paramount authority). WT recognises the central importance of negotiated settlement as an expression of *mana*. The WT has been able to conceptualise Māori positions in terms of Western law and history and has contributed to New Zealand's understanding of its heritage. Unlike other courts, it does not pay much attention to precedents. Principles are used as living and dynamic instrument and interpretative tools to see the past actions in a contemporary light.<sup>42</sup>

Also the influence of international law and politics has been important in its case law. Until 1988 it appeared mostly in rules of treaty status and interpretation and territorial boundary delimitation. In the *Muriwhenua Fishing Report* (1988) the WT broadened the scope by discussing on the emerging rights in international and comparative law, and used them to support its findings in respect of the development of fishing rights. The WT returned to same theme in the *Ngāi Tahu Sea Fisheries Resource Report* in 1992. The government hurried up the settlement process so that it could be resolved before 2020. The problem is that the

---

41 Treaty of Waitangi Act 1975, s. 6A; Te Ture Whenua Act 1993, ss. 50-51, 55-56, 58-61; Supreme Court Act 2003, s. 46; McGuire (1993), pp. 128-131.

42 Havemann (1999), p. 280; Hayward (2003), p. 59; McHugh (2004), pp. 572-573, 576.

process has become slow due to the large number of claims and the limited resources of the tribunal.<sup>43</sup>

The WT is uniquely bicultural in its composition and *modus operandi*. Its hearings can be classified as historical, contemporary or conceptual: the historic claims relate to the actions of the Crown in the past, mostly about the way in which land was acquired from the Māori owners; to the contemporary claims that cover social and cultural issues and the processes used by the government; and to conceptual claims concerning Māori interest in use and development of rivers, lakes, foreshores, minerals and geothermal resources or outputs from the development of those resources. The important treaty principles are protection and preservation of Māori property and *taonga*; protection of Māori custom and cultural values; partnership; recognition of Māori worldview, value system, law and politics; active protection of treaty interests; Māori autonomy; development; good faith; and economic protection. On the basis of its decisions the tribunal can propose redress when the Crown is found in default of its duties and obligations.<sup>44</sup>

The WT operates as a commission of inquiry in search of information to help resolve specific claims that are likely to be prejudicially affected by a government act or omission alleged to be inconsistent with the principles of the treaty and to issue reports and recommendations to the Crown. Its reports are also admissible as evidence in High Court proceedings. The tribunal has established the Ranganui Whānui project in 15 districts which enables equal weighting to all historic claims, reduces duplication, foster national overview and inform the tribunal about the relative impacts of specific claims. In the evaluation has been used the criteria of Crown acts of commission, omission, demography and the quantity and value of the resource lost. A full hearing is given to claims against the Crown for redress from loss of language, culture, land or resources as articulated in article 2 of the Treaty of Waitangi. The restorative approach aims at the rehabilitation of *mana*. The WT's recommendations are generally non-binding, although it has authority since 1988 to make binding recommendations in relation to the return of specified lands to Māori ownership. The tribunal has used this option only in 1998, when it ordered the government to return land and pay compensation at Tūrangi Township. The WT can examine proposed legislation referred to it by the House of Representatives or a minister of the Crown for its opinion on whether the legislation would conform to the principles of the treaty. The WT has also power to refer parties to mediation at any time. The hearings have two stages: it investigates first the validity of the Maori claim. If valid, The WT holds a hearing and issues recommendations on appropriate remedies for the claim. WT aims to group and investigate claims on a systematic basis, often reviewing similar claims together and grouping claims geographically. Current government policy is that all claims must be registered initially with the WT before direct negotiations with the Crown can begin.

---

43 Treaty of Waitangi Act 1988, ss. 4-6; WT, *Muriwhenua Fishing Report* (1988), s. 9; *Ngai Tahu Sea Fisheries Resource Report* (1992), s. 11; Palmer (2008), p. 113; Anaya (2011), pp. 24-28. Government's announcement led in 2008 to 1,834 new claims (cf. 1,579 in previous 32 years. In 2010 there were laid altogether 3,490 claims.

44 Treaty of Waitangi Act 1975, ss. 6(1), 6AA; Durie (1998), pp. 184-185; Māori Customary Law and the Treaty of Waitangi (2001), pp. 75-76, 79-82. In 1975-1986 there were only 36 enquiries, but in a single year 1987 already 88.

Negotiated claims go first through a tribunal hearing and report, serving as the background for negotiations with the Crown.<sup>45</sup>

Among the WT's outcomes are allocation of a significant portion of New Zealand's commercial fisheries quota, recognition of Māori as an official language, return of tribal lands, recognition of continuing Maori resource management rights and payment of compensation for historical land losses and Crown apologies for past conduct. A major problem of the tribunal is, however, its large workload and limited resources. A major part of all claims are still to be cleared. There is also a tendency from the governments' side to pass the tribunal in negotiations with distinct *iwi*.<sup>46</sup>

On the Cook Islands there existed during the protectorate (1888-1901) a district judge system. The British resident established a Supreme Court in 1888, which was reorganised in 1898 as a Federal High Court. The criminal cases were removed to the High Community Court. Since 1915 the Supreme Court of New Zealand became the Court of Appeal, which was soon annexed to New Zealand's legal system. The Ariki Court was established to hear cases dealing with violation of island or district laws passed before 1898, and the Rarotonga Land Court land questions (since 1902 Land Titles Court). Resident Gudgeon became its Chief Justice. The Ariki Court was abolished only after six years. After World War II the Native Appellate Court was established. The judicial system was reconstructed in 1965 by the Constitution and was closely connected to New Zealand's system. All judges are appointed and removed by the Queen's Representative. They must be former New Zealand or Commonwealth judges or barristers. The lower courts are chaired by Justices of Peace. The High Court has jurisdiction over all civil, criminal and land matters and appellate jurisdiction over lesser courts. The Court of Appeal was recreated in 1981. At least one of its judges must be a former New Zealand's judge. It is the final court except in certain matters which may be appealed to the Privy Council. Both the High Court and the Court of Appeal have the power to interpret the Constitution and to determine the application and effect of its provisions. They have – unlike in New Zealand – the power to strike down legislation that fails to comply with the Constitution. For land questions there are the Land Court of the Cook Islands and the Land Appellate Court. The court of last instance is the Privy Council. The courts apply the rules of common law and equity and have relied mostly on the case law of New Zealand, Australia and England. In the cases of conflict between the common law and equity, equity prevails.<sup>47</sup>

The High Court, divided into civil, criminal and land divisions, is the court of general jurisdiction for Niue. The commissioners of the High Court are local lay judges. Justices of peace work at the local level. In a decision two of them are equal to one commissioner of the High Court. The Court of Appeal was established in 2009. The judges are appointed and removed (in accordance with the assembly) by the governor general of New Zealand. The

---

45 Treaty of Waitangi Act 1975, ss. 5, 8, 9A-D; State-Owned Enterprises Act 1986, s. 27B; Crown Forest Assets Act 1989, s. 36; Durie (1998), p. 185; Richardson & Imai & McNeil (2009), pp. 386, 393; Mutu (2011), p. 83. The courts have been reluctant to rule settlement disputes which are not reported by the tribunal; the government threatened several times to limit the tribunal's powers, if it uses binding recommendation, as happened in 1998.

46 Havemann (1999), p. 211.

47 Constitution of the Cook Islands (1965), art. 47, 56, 59-60; Cook Islands Constitution Act 1964, ss. 47, 52, 55, 61; Cook Islands Act 1915, ss. 153, 155; Cook Islands Amendment Act 1946, s. 19; Gilson (1991), pp. 90, 105, 113, 120, 131; Ntuny (1993), p. 4; Sissons (1999), p. 13; Judicial Committee of the Privy Council.

Land Court of Niue has exclusive jurisdiction in all matters relating to Niuean land. There exists also the Land Appellate Court of Niue which is formed of the judges of the Land Court and the MLC (New Zealand). Like on the Cook Islands, the court of last instant for Niue is still the Privy Council in London.<sup>48</sup>

In Tokelau the basic level of justice are the Village Courts presided normally by *faipule* (village council's chairman). The punishments are ordered by the commissioner. The Village Courts represent the practical and customary level justice with petty crimes and land dispute cases. The cases concerning matrimony, adoption and divorce are dealt with either by the commissioner or the elders. More serious crimes and more difficult cases were applied to the High Court of Niue (1970-1986) and thereafter to the High Court of New Zealand. The court of final appeal is the New Zealand Court of Appeal.<sup>49</sup>

### 3.2.4. Customary Dispute Resolution

The judging of minor disputes according to Māori custom began with the Maori Social and Economic Advancement Act 1945, and was developed in the Maori Welfare Act 1962 and the Maori Community Development Act 1977. The “*marae* courts” have been used from 1962. The Waitangi Tribunal developed further this procedure by incorporating Māori practices. The hearings are held on Māori territory - often in *marae* -, the Māori language is partly used in proceedings and Māori protocols are followed. Even elsewhere new concepts have been created that are familiar to Māori. The traditional *whanau* involved motions of shame and reconciliation, wanting to heal a rift between offenders, victims, individuals and collective. The *rohe* of family is an important element. It is based on the model of a Māori extended family. This kind of decision-making recognises New Zealand's cultural plurality. New legislation has answered this challenge by providing services to culturally sensitive and appropriate processes.<sup>50</sup>

The Criminal Justice Act 1985 allowed the imposing of a penalty without conviction. The Māori customary approach of *utu* could be used in dispute resolution. It is an ongoing process of restoring balance. This kind of process is open to all first-time minor offenders. The process begins with the offender's arrest. The police officer inquires if the offender identifies himself as a Māori because the process is mandatory to such a person. A Māori representative is called to join the first negotiations where the offender becomes part of the program. The community is addressed during the process which integrates all participants. The offender is evaluated in a local *marae* forum. It is basically a *kanohi ki te kanohi* (“face-to-face”) session. Relying on the basic philosophy of a first intervention step, some major ideas in these Māori dispute resolution programs are direct intervention, administration of *tikanga Māori* and care-taking of a Māori by another Māori. The process is tailor-made for the offender. The programs allow involvement of *whanau* and they make it possible for a judge to use an early treatment or intervention model which can prevent further crimes by

48 Constitution of Niue (1974), art. 37-43, 46, 51-53; Niue Amendment Act (No. 2) (1968), ss. 47-48; Ntummy (1993), pp. 160, 164-165; Niue Government; Judicial Committee of the Privy Council.

49 Tokelau Amendment Act 1970, s. 4-5; Tokelau Amendment Act 1986, s. 4; Ntummy (1993), p. 301.

50 Sheleff (2000), p. 315; Elias (2005), p. 5; Richardson & Imai & McNeil (2006), p. 333.

using the possibilities offered by *tikanga Māori*. An offender can alternatively be sentenced to house detention. Also the Law Commission has supported that there should be paid closer attention to alternative dispute resolution in treaty settlements. The same kind of process is used in juvenile cases. Te Whanau Awhina Program utilises an existing youth program. The Maori Congress established in the early 1990s an unofficial body *te whare ahupiri*, the justice arm of, and established by the Confederation of Chiefs of the United Tribes of Ko Huiarau but it had a limited support among the *iwi*. It represented a source of authority, using Māori concepts of justice and *tikanga*.<sup>51</sup>

In Tokelau the major form of judicial procedure is still customary procedure following the oral tradition. There is no court documentation, the offender appears on request and pays a penalty without proper execution. Since 1985 New Zealand has introduced to the islands gradually the crime procedure with an inquisitorial form of court procedure.<sup>52</sup>

### 3.2.5. *Māori Wardens*

In the 1840s the Māori had their own police force (*karere*) which existed the longest in King Country. On the Cook Islands the British missionaries introduced a similar police, appointed by local *ariki*. A local police force was re-established in 1888. In the reform of 1898 it was submitted to the control of the federal government and was later incorporated into the New Zealand Police. In New Zealand the Maori Social and Economic Advancement Act 1945 created the Māori wardens as officers with authority over Māori individuals. The wardens' duty is to prevent unruly and riotous behaviour and drunkenness. A warden can enter licenced premises, hotels and Māori gatherings and order an intoxicated, violent, quarrelsome or disorderly Māori to leave the premises. He can seize and remove liquor and forbid a Māori to drive, require the keys and render a motor vehicle immobile and remove it to a place of safety. The local Maori Council has a right to fine a Māori for \$20. The associated states have their own police services and penitentiaries, while they maintain close operation with the mother country's enforcement authorities.<sup>53</sup>

## 3.3. Canada

### 3.3.1. *Application of General Legislation*

In 1541 King Francis I of France gave his representatives a right to “exercise [in the lands of Canada] the powers to make laws, edicts, statutes and political ordinances.” During the New France period the French criminal law was expressly declared applicable to Indigenous people but the Crown had difficulties in implementing it and the application of French civil law

---

51 Criminal Justice Act 1985, ss. 16, 19; Durie (1998), p. 197; Havemann (1999), p. 311; McHugh (2004), p. 524; Toki (2005), pp. 177, 185-186.

52 Ntummy (1993), p. 307.

53 Cook Islands Act 1915, ss. 44-50; Maori Social And Economic Advancement Act 1945, s. 11; Maori Community Development Act 1962, ss. 30-36; Niue Act 1966, ss. 26-29; Gilson (1991), p. 91; McHugh (2004), p. 273; Cook Islands Government.

could be based only on the implicit principle of general and absolute territorial application of French law.<sup>54</sup>

The Indians have been since 1867 - and the Inuit in 1939-1950 and partly afterwards - under the federal legislation. The constitutional protection has to reconcile with the affirmation of the Crown sovereignty. The Crown can develop the territories under its control and apply there its laws if they respect the rights of the indigenous peoples. The Crown must follow the Supreme Court's Sparrow and Van der Peet justification tests (cf. section 6.3.2) which apply both to ancestral and treaty rights, and both the federal and provincial laws.<sup>55</sup>

Since 1922 the provincial laws of general application have been in force on reserves. This was confirmed in the revision of Indian Act in 1951. Section 88 of the Indian Act, 1985, defines that all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province. The Supreme Court has confirmed that all laws of general application in any province are applicable to and in respect of Indians in provinces, except when the law is inconsistent with the Indian Act: "Section is a referential incorporation of provincial legislation which takes effect under the section as federal legislation." The provincial laws may take into consideration indigenous rights also in a more particular manner. When this happens, they can be integrated to provincial legislation. The federal and provincial governments have also the right to restrict those rights which are not expressly mentioned in the Constitution. For instance, the Québec Court of Appeal has interpreted that the adoption of special clauses for the indigenous peoples in provincial law could be justified both in the context of s. 35 of the Constitution Act and s. 88 of the Indian Act. In conflict situations the federal legislation has always prevalence over provincial legislation. A provincial law is inapplicable where it is inconsistent with the Indian Act or any order, rule, regulation or bylaw made thereunder. Outside is also left the essence of indianness: the provinces cannot impair the Indigenous people in what makes them Indigenous.<sup>56</sup>

In 1964 the British Columbia Court of Appeal ruled in *R. v. White and Bob* that the provincial laws only applied by virtue of section 88 of the Indian Act. The other provinces followed the example with exception of Québec, which has historically been outside the treaties. In *Sioui* (1990) the Supreme Court ruled that the original treaty takes precedence over post-1982 laws by the virtue of section 35 of the Constitution Act, 1982. Together with Sparrow it dealt with First Nations' self-government. According to Wilson J the self-government deals with a question about the Indians' historic occupation and possession of their tribal lands.<sup>57</sup>

---

54 Öricü (1996), p. 4; Rouland & Pierré-Caps & Poumarède (1996), p. 367.

55 SCC, *Sparrow* (1990); *Van der Peet* (1996), s. 43.

56 Indian Act (1951), s. 87; Indian Act, 1985, s. 88; SCC, *Cardinal v. Attorney-General of Alberta* (1974); *Kruger et al. v. the Queen* (1978), s. 116; *Derrickson v. Derrickson* (1986), ss. 51-59; Côté (1996), s. 83; CAQ, *Québec (Procureur général) c. Savard* (2002), ss. 28-41; Tobias (1976), p. 21; Hogg (1985), p. 561; Otis (2005), pp. 107-109, 113.

57 SCC, *Sioui* (1990); BCCA, *R. v. White and Bob* (1964); Dickason (1994), p. 354; McHugh (2004), p. 348

### 3.3.2. *Indigenous Legislation*

After the colonial wars the Indian tribes realised that their status had changed. The Six Nations demanded in 1839 and 1942 that they want to be governed according to their own laws but the Canadian officials refused to consider the pleas. When the Indian Act was revised in 1951, they protested the reform by claiming that it was dictatorial and would retard their progress as a nation.<sup>58</sup>

The James Bay and Northern Quebec Agreement (1975) began the process of negotiated self-government powers. This policy has been later followed in different parts of Canada. Major examples are the Sechelt First Nation's Constitution (1986)<sup>59</sup>; Nisga'a Lisims Government and village governments, Tsawassen government and Maa'nulth First Nations in British Columbia, who have made separate agreements, including own constitutions and legislation<sup>60</sup>; and the Umbrella Agreement (UFA, 1993) of the Yukon First Nations, each having a constitution.<sup>61</sup>

Several other First Nations have today legislative powers in their inner affairs. Generally they have also jurisdiction to enact laws affecting all people on settlement lands. In most cases their laws prevail, except when they touch the doctrine of federal paramountcy. Also the Bill C-7 (2002) would have extended the Indian bands legislative powers in local and

---

58 Dickason (1994), p. 356.

59 The Sechelt First Nation's Constitution has provisions on the composition of band council and its procedures and legislative powers; system of financial accountability; membership code; referendum; and the rights and interests in land. The council may legislate on zoning and land use planning; expropriation of interests in Sechelt land; infrastructure; taxation; property; education; social and welfare services; health services; preservation and management of natural resources; preservation, protection and management of fur-bearing animals, fish and game; public order and safety; business, professions and trade; intoxicants; fines and imprisonment; succession; financial administration; elections and referenda; administrative bodies; and good government. Cf. Sechelt Indian Band Self-Government Act, 1986, ss. 10, 14.

60 Nisga'a can legislate beyond local boundaries on all Nisga'a lands. The criminal law is however, excluded from all agreements in British Columbia, as it belongs to federal and provincial core area. The First Nations' Constitutions include provisions on democratic government; traditional elements of government; membership; elections; role of administrative bodies; removals from office; law-making powers and process to enact and check them; amend the constitution; financial administration; conflict of interest regulations; and protection of rights. They may legislate on administration; finance; management and operation of local government; assets (Maanulth); elections; membership/citizenship; rights, duties and obligations; business; land use and management and forest resources; infrastructure; public works; traffic and transportation; public order, peace and safety, including enforcement officers; health and social services; liquor; marriage; succession; child services; family development services; adoption; Aboriginal healers; kindergarten, school and higher education; education of culture and Indigenous language; First Nations' and village lands; assets; designation of harvest; hunting and fishing; intoxicants; and arctic plants and their distribution. Cf. Nisga'a Final Agreement Act, 1999, ss. 5, 8- 9, 11; Maa'nulth First Nations Final Agreement Act, 2007 (British Columbia), ss. 10, 13; Tsawassen First Nation Final Agreement Act, 2007 (British Columbia), ss. 9, 12, 16.

61 The Yukon First Nations' constitutions include provisions on citizenship code; governing bodies; system of reporting; rights and freedoms; check of laws; amending of constitution; legislation on land; resource management; fishing and hunting; planning; environmental quality; health; and the administration of justice. The laws of general application are in force. Cf. Yukon First Nations Self-Government Act, 1994 (Yukon), ss. 8, 16-20.

band purposes and governance. The ministerial approval would have been closed. Instead, a contrary provincial or federal statute would have overridden a band law.<sup>62</sup>

In the interim period, before the federal authorities were able to consolidate their power, the Métis twice created legislative authority of their own - in 1869-1870 and 1873-1877. In St. Laurent's settlement the governing body enacted 28 basic laws on buffalo hunting and taxation. There were also regulations on the work and employment conditions. Some modern Métis groups have created their own, unofficial legislation. In Saskatchewan the provincial Métis organisation has created a Constitution which defines the provincial Métis organisations, including the Legislative Assembly, which enacts Métis legislation and regulations.<sup>63</sup>

In Nunavut there are no separate Inuit laws, although majority of legislators are Inuit. The Inuvialuit Agreement-in-Principle (2003) would give the Inuvialuit Council the powers to make laws on internal matters, including the culture and language. The will prevail in the event of conflict with federal or territorial laws. Labrador Inuit Land Claims Agreement (LILCA) has created to Nunatsiavut an assembly, with law-making powers. The Labrador Inuit Constitution includes provisions on political structures; civil service; taxation and revenues; justice system; legislation and customary rules; law enforcement; local administration and a unique Labrador Inuit Charter of Rights and Principles, including language, culture, relationship to environment, equality and democracy.<sup>64</sup>

### **3.3.3. Bylaws**

Bylaws for reserves were introduced for the first time in 1869. This authority was largely reduced in the years to come. Only in 1951 was the Indian Act amended to allow the band councils anew to pass bylaws. At first the councils were slow to take advantage of this possibility. Still in 1966 the Hawthorne Report found that only 23% of all bands in Canada had passed a bylaw. The fact that the Governor in Council could use veto over each decision made by a band discouraged the bylaw-making. They are still rather rarely used for the same reasons. After been passed a majority vote by the band council, they have to be mailed to the minister within four days. He/she can disallow it within 40 days, otherwise it is effective. The Indian Act, 1985, defines as the scope of bylaws in the First Nations' reserves.<sup>65</sup> There are also band council resolutions. The Indian Band Council Procedure Regulations apply to determine procedures for council meetings.<sup>66</sup>

---

62 McHugh (2004), p. 476.

63 Dickason (1994), p. 294; Wilson & Mullet (2008), p. 347.

64 Nunavut Act, 1993, ss. 23-28; Labrador Inuit Constitution (2002), ss. 2-7, 9-12; IFA (2003), s. 18; LILCA (2005), ss. 17, 21; Borrows (2010), p. 53.

65 Gradual Enfranchisement Act, 1869, s. 12; Indian Act, 1985, ss. 81, 83, 85.1. The bylaws are related to health; traffic; law and order; trespass; infrastructure; zoning; construction; surveying and allotting reserve lands to individuals; control of noxious weeds; bee-keeping and poultry raising; alcohol; public games and amusements; regulation of salesmen; game and fishing; residence; citizenship and membership codes; and taxation.

66 Indian Act, 1985, s. 85.1; Dickason (1994), p. 333.



Some First Nations which are by agreement are excluded from the Indian Act, like Tâichô<sup>67</sup> and the Cree and Naskapi of Northern Québec<sup>68</sup> have preserved their right to make bylaws. Similarly, the Metis Settlement Act, 1990, permits the Métis Settlement Councils in Alberta to make bylaws.<sup>69</sup> The last-mentioned must be given three separate readings at the meeting of Settlement Council and after the second reading must be presented at a public meeting and approved by a majority vote of the settlement members present at the meeting. All Métis bylaws and regulation must be consistent with provincial legislation, except those relating to hunting, trapping and gathering, which are approved by the Lieutenant Governor in Council.<sup>70</sup>

### 3.3.4. *Indigenous Courts*

The First Nations were submitted during the late nineteenth century to the Indian Department's jurisdiction. The Indian agents became justices of peace in 1881 and three years later their powers were extended significantly as they conducted legal proceedings on reserves. They could handle all cases breaching the peace and prohibit Indigenous ceremonies. From 1936 they had also the administrative control over the Band Council meetings. In 1867 the British Columbia Indians were granted a right to give unsworn testimony in civil court actions, inquests and official inquiries. This was extended with a federal act (1876) to all Indians in criminal cases. These provisions were later dropped from the Indian Act, when the right to testify by affirmation became general.<sup>71</sup>

The James Bay and Northern Québec Agreement (1975, JBNQA) made it first possible to administrate the local justice, but the real change in the First Nations' jurisprudence began with the Constitution Act, 1982. UFA and the Nisga'a Final Agreement include a possibility to create a parallel justice system. The governments have sponsored a national Native Courtworker Program, which has been administered through Friendship Centres. The Native courtworkers are available in the courts to help the Indigenous defendants. Some jurisdictions have also established community legal clinics, which provide services to Indigenous peoples. The lawyers develop their expertise in Indigenous law. The Native Law Centre in Saskatoon and many law schools have attempted to address the shortage of indigenous lawyers in

---

67 Tâichô Council may make bylaws on inner procedural rules; employees; work conditions; infrastructure and payments. Cf. Tâichô Community Government Act, 2004 (NWT), ss. 28, 82.

68 The Cree and Naskapi can make bylaws on administration; regulation of buildings; health and hygiene; public order and safety; protection of environment; prevention of pollution; nuisances; taxation; roads, traffic and transportation; business; and parks and recreation. Cf. Cree-Naskapi (of Québec) Act, 1984, s. 45(1).

69 The bylaws are related to internal management; health, safety; welfare; public order; safety; fire protection; nuisance; pests; animals; airports; advertising; refuse disposal; parks; recreation; control of business; installation of water; sewage connections; sewage fees; development levies; land use planning; and development. The Settlement Councils may also make decisions on membership and land allocation. All bylaws and decisions must conform to provincial legislation and General Council policy. The General Council has right to make regulations on membership; land development; finance; and hunting, fishing and trapping. Cf. Metis Settlements Act, 1990 (Alberta), ss. 51-52, Schedule 1, ss. 1-18.

70 Metis Settlements Act, 1990 (Alberta), ss. 51-52, Schedule 1, ss. 1-18; Bell (1994), p. 16.

71 Dickason (1994), pp. 261-262; McHugh (2004), p. 260.

Canada. The First Nations Land Management Act and other statutes allow the First Nations a power to appoint justices of peace in accordance with federal agreements. Ontario created in 1984 a Native Justices of the Peace Program to promote indigenous participation in the administration of justice by recruiting and appointing indigenous people as Justices of the Peace.<sup>72</sup>

The Royal Commission on Aboriginal Peoples (RCAP) suggested in 1996 that the indigenous peoples' justice systems should be given recognition and that the different levels of government should begin to collaborate with the First Nations to achieve this end. It estimated that there are no legislative barriers to establish separate justice systems. The federal Criminal Code was amended in 1996 to offer an alternative to incarceration for all offenders. This policy's practical consequence was the 1999 Supreme Court's *Gladue* case, where the court stressed a need to reduce the country's overreliance on incarceration for Indigenous peoples. Consequently, in Toronto was established in 2000 the Gladue (Aboriginal Persons) Court whose objective is to establish the criminal trial court's response to Gladue case and the sentencing amendments of the Criminal Code and the consideration of the circumstances of indigenous accused and offenders. The model has been followed elsewhere in Canada. The Commission on First Nations and Métis Peoples and Justice Reform of Saskatchewan have made a large number of recommendations on remedies, including training programs for offenders. Some indigenous communities have started to manage their own justice systems. The Mohawk Nation has established the Akwesasne Department of Justice.<sup>73</sup>

UFA allows the Yukon First Nations to negotiate an agreement on the administration of justice. The territorial courts have jurisdiction in respect to the First Nations laws and the court of appeal is the Supreme Court of Yukon. The first indigenous court in Canada was, however, established in 2004 for Tsuu T'ina First Nation in British Columbia. Also Nisga'a Lisims government may create a Nisga'a Court with civil and some criminal jurisdiction. It will resemble the Provincial Court of British Columbia and be appointed by the Nisga'a government.<sup>74</sup>

Negotiations on the control of Métis justice system in Alberta started in the late 1980s. The Métis Settlement Accord (1989) established the Metis Settlements Appeal Tribunal to hear appeals and references on local matters. The tribunal follows an informal and flexible procedure suited to the need of particular parties and the broad scope of the tribunal's fact finding and remedial powers. Most of the cases have dealt with land ownership, but also questions on forest resources, subsurface access and disposition, membership, marriage and divorce, property and other Métis rights. Its first order was issued in 1991. The tribunal is

---

72 First Nations Land Management Act, 1999, s. 35; Décret concernant la publication de l'entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec, 2007 (Québec), Préambule, s. 2.8; JBNQA (1975), ss. 18-20; McHugh (2004), p. 482; Olthuis & Kleer & Townshend (2008), pp. 599-600; Richardson & Imai & McNeil (2009), p. 36.

73 Kanesatake Interim Land Base Governance Act, 2001, s. 16; RCAP (1996); SCC, *R. v. Gladue* [1999]; Report of Rodolfo Stavenhagen (2004), pp. 55, 58; Olthuis & Kleer & Townshend (2008), pp. 600-601.

74 Yukon First Nations Self-Government Act, 1994 (Yukon), s. 14; Nisga'a Final Agreement Act, 1999, s. 11.17; Maanulth First Nations Final Agreement Act, 2007 (British Columbia), ss. 13.37; Tsuwassen First Nation Final Agreement Act, 2007 (British Columbia), ss. 16.8, 16.147; UFA (1993), s. 26; Elliott (2005), p. 174. Most First Nations' matters are dealt with by the ordinary courts and are appealed in the ordinary manner to the various courts with appellate jurisdiction.

a quasi-judicial body established to settle disputes on membership, land dealings, surface rights and other matters that the parties agree to submit to its jurisdiction. To the tribunal's remedial powers belong the power to amend or repeal settlement bylaws, refer decisions back to the settlement council to be reconsidered, direct the Registrar of the Metis Settlement Land Registry to correct errors and omission, confirm the substance of an agreement under an order of the Tribunal and other remedies. Decisions of the tribunal may be enforced as in regular court. As an appellate court functions the Alberta Court of Appeal. The tribunal has a Chairperson appointed by the Minister, three members appointed each by the Minister and the General Council each, and the remainder by agreement. The Chairperson can establish panels of three or more members of the Tribunal. The majority of panel must be appointed by the minister, except when there is a question about land allocation. The four established panels are the the Land Access Panel (LAP), the Existing Leases Land Access Panel (ELLAP), the Membership Panel and the Land Panel. The ELLAP deals exclusively with companies which held mineral leases before 1 November 1991. The LAP has jurisdiction to review and amend all right of entry and compensation orders, review rates of compensation. The office of the Métis Settlement Ombudsman was created in 2003. The ombudsman is accountable to the Minister of Aboriginal and Northern Affairs of Alberta and has heard complaints on housing, employment, professional conduct, nepotism, administrative fairness and conflict of interests.<sup>75</sup>

Nunavut has no proper indigenous courts. The administration of justice was first given to Magistrates as Justices of Peace (1873). In 1955 was created the Superior Court of Record to Yellowknife (since 1972 The Supreme Court of NWT) and the Nunavut Court of Justice (NCJ) and the Nunavut Court of Appeal (NCA) were created in 1999. NCJ is a single level court with powers of superior court and territorial court. Its judges, appointed by the Governor in Council, have the status of superior court judges. There are yet very few Inuit judges but the deficiency is compensated by Inuit lay justices of the peace (*nunalingni iqqaqtuijit*). In 2003 the first lay judge was appointed to the NCJ. The NCJ functions also as a circuit fly-in court delivering justice at the local level. The NCA as an appellate court is composed of justices from other territories and provinces. Nunatsiavut has a Judicial Council and own court, which may apply both written and customary law.<sup>76</sup>

### 3.3.5. Customary Law

The Indigenous people were not without law before the arrival of the European settlers. The most sophisticated example of law in North America was the Great Law of Peace (*Gayanashagowa*) of the Iroquois Confederacy, which the Peacemaker brought according to the Iroquois legend to Hiawatha during the sixteenth century. It is the first North American

---

75 Metis Settlements Act, 1990 (Alberta), ss. 118, 175, 180-187; Metis Settlements Ombudsman Regulation, 2007, ss. 3-5, 13; Bell (1994), pp. 22-24, 67-68; Bell (1999), pp. 59-87. Also in Yukon the ombudsman system can be used in similar way by the First Nations.

76 Nunavut Act, 1993, ss. 31, 35-36; Labrador Inuit Constitution, 2002, s. 9; Loukacheva (2007), pp. 89-90, 93.

constitution, which has influenced also the United States' early constitutional law.<sup>77</sup> As early as 1839 the Iroquois chiefs had asked to be governed according to their own laws, but it was rejected. In 1890 they renewed their effort in asking an exemption from the Indian Act. In 1942 the Reserve of Lac des Deux Montagnes in Québec applied to the Federal Government asking that their customary law would replace the Indian Act. Even these attempts were without any success.<sup>78</sup>

Another example of developed customary law is from British Columbia. The Gitksan people's *Kungax* (own spiritual power) regulated the behaviour and outlining remedies for breaches of social order; *adaawk* regulated the territorial and property rights, *potlatch* the gift-giving and *ayuukhl* the social, economic and political relations by line of memory. Many Indigenous peoples have preserved in their customary law a close relation with the spiritual and ecological aspects of life. In the Mi'kmaq's *sukumowati* the law is formulated by experiencing and empirically identifying in relation to the surrounding ecosystem. The customary law also includes a sacred vision on the past and the world. The spoken version has, unlike in Western understanding, the primary authority.<sup>79</sup>

In the mid-nineteenth century large areas of present Canada were still under customary law. As late as 1867 Monk J of Québec Superior Court held that the Indigenous law was continued in tribes' domestic affairs. Unlike the US Supreme Court, he based his judgement on factual integrity of customary law after the ascendancy of Crown sovereignty. About the same time in the mixture of cultures of the early nineteenth century Manitoba, there existed both the common law and customary legal systems.<sup>80</sup>

The co-existence was followed by a period of long neglect. As late as 1984, Steele J estimated in *Bear Island Foundation* that due to the primitive level of Indian social organisation they have no true law. The only law is a statutory law, legislated by an organised state. He held that the band's understanding of history was influenced by a small, dedicated and well-meaning group of white people who pieced together limited pieces of oral tradition. But the change was under way. Since the 1970s various initiatives began of Aboriginal justice by the Ministry of Solicitor General, and later by the Aboriginal Justice Directorate of the Department of Justice and its Aboriginal Justice Strategy. The new Constitution Act, 1982 recognises the continuity of Indigenous society. The relevance of customary law has been recognised variously in marriage, adoption and the legal capacity of bands. In Toronto has

---

77 The Great Law of Peace is divided in three parts: the story of Peacemaker and conversion of Thadodaho; conversion of nations and their coming together as the League of the Iroquois; and a recitation of the principles or laws of the League. The 171 articles of *Gayanashagowa* include provisions on rights and duties of chiefs; clans and consanguinity; symbols, adoption, emigration; rights of foreign nations; rights and powers of war; treason; secession of a nation; rights of the people of the Six Nations; protected religious ceremonies; installation songs; protection of the longhouse; and funeral addresses.

78 Constitution of the Five Nations (1916); Dickason (1994), pp. 241-242, 356-359; Horn (1994), pp. 102-103; Snow (1994), pp. 60, 158-162, 187. In 1900 the Iroquois traditional chiefs accepted the official version of the Great Law of Peace; *Gayanashagowa* influenced the framers of the United States' Constitution, especially Benjamin Franklin and James Madison. The influence of the Great Law of Peace to the US Constitution and Bill of Rights was recognised in 1988 by the Concurrent Resolution 331 of the United States' Congress; Thadodaho was in the legend a malevolent Onondaga shaman with snakes in his hair.

79 Borrows (2010), pp. 61-63, 92-98.

80 CSQ, *Connolly v. Woolrich* (1867), ss. 79-81. Only 14 years later the same Québec court came to exactly opposite conclusion in *Fraser v. Pouliot*: there was no valid customary law or marriage.

been established an Aboriginal legal services unit. Some First Nations have proclaimed that their own laws are in effect. Their general recognition depends much on the claims' legal basis and the political willingness of the federal and provincial governments. Generally, they live their own life – non-recognised by the government, but inside the community having a force of law. In some modern agreements the customary law and oral history have been given a visible role. The Tliche Agreement recognises the customary law in some precise matters. It deals with the following: personal status of the Tliche people; family law; culture; and offences. But as in Nisga'a legal system, where the customary law is not a formal source of law, the custom has a supportive role for courts.<sup>81</sup>

The Inuit had before the integration into Canadian society a complex and holistic system of law and justice based on oral traditions, which did not make a clear distinction between the law and custom. The spiritual beliefs and rituals formed the basis of their moral code. There were no equivalents to Western words like crime, justice and law. The animism held the human beings and animals as equal creatures and there were taboos which were to be respected. *Piqujag* as law signified “what is asked to be done” and recognised the role of elders and leaders in maintaining order in the community. *Tirigiisuusit* were prohibitions and obligations. There was however little formal mechanisms to sanction them. *Akitsiraqvik* were places where the great councils delivered justice until 1924. They relied flexibly on customary precedents and had to find consensus. There was a remarkable degree of forgiveness, but the death sentence was possible. It was important to preserve the social harmony. *Angakkuq's* (shaman) functions were a combination of a law officer, priest, doctor and inquisitor. The family disputes were settled by the family, group disputes by *umialik*. A special form of remedy was the song duel which functioned as a kind of communal psychotherapy. The Christianity replaced the traditional beliefs, but to some extent the oral traditions have preserved alive some elements of Shamanism. The customary features are better served at the local level where the justices of peace are mostly Inuit. The establishment of the Akitsiraq Law School program gives promise that *Inuit qaujimajatuqangit* will be better taken into consideration. The law school's program is based on legal pluralism. The expertise of Inuit elders is used outside the official legal system in minor criminal law resolution.<sup>82</sup>

Although the Canadian authorities tried since the early nineteenth century to assimilate the Inuit into the Western legal system, the indigenous people relied on Inuit customary law on property, territory and family matters. Jack Sissons, the judge of the Supreme Court of NWT was the first to use Inuit concepts of right and justice in the Canadian system in the 1960s. He tried to integrate the two systems of law. The problem of modern Nunavut courts is the language barrier and lack of information on Inuit customary law. The only lasting result has been the recognition of Inuit customary adoptions. He registered them

---

81 Amendment of Champaigne and Aishihik First Nations Final Agreement, 2006 (Yukon), s. 1.1; ONCA, *Attorney-General of Ontario v. Bear Island Foundation*, (1984), ss. 353, 370-372; Indigenous Legal Traditions (2007), p. 14; Otis (2009), p. 243. Borrows (2010), p. 39.

82 Loukacheva (2007), pp. 80-96, 101-102; Groarke (2009), pp. 788, 790, 792-793; Borrows (2010), pp. 103, 145. In the first Inuit murder trial (1917) the judge said: “These remote savages, really cannibals... have got to be taught to recognize the authority of the British Crown... for the first time in history... people who are as nearly as possibly living to-day in the Stone Age, will be brought in contact with and will be taught what is the white-man's justice.”

systematically them without any precedent or legal theory in court circuits. Later the Court of Appeal stressed that custom had always been regarded as a source of law in the British common law tradition. Gradually the child welfare authorities of the NWT accepted the practice. Nunatsiavut the customary law is the underlying Inuit law, which is applied besides the statutory law and common law. The Inuit legal principles are referred widely in Nunavut's legislation. The Legislative Assembly and Executive Council may take into consideration the *Inuit qaujimagatuqangit* in their work. Nunatsiavut in Labrador forms an exception: the Labrador Inuit Constitution recognises to customary law precedence, if there is a conflict with the written law. The Constitution also makes it possible to codify the customary law. The Nunatsiavut Assembly and the local court may also apply the customary law but there must be proof of the existence of customary practice.<sup>83</sup>

The Supreme Court has been more understanding than the legislator towards indigenous law. In *Sparrow* Dickson CJ held that it is crucial to be sensitive to the aboriginal perspective on the meaning of the rights at stake. In *Van der Peet* the court warned about undervaluing and narrowing the Indigenous oral history's reach. McLachlin J said in her dissenting view that the golden thread of British legal history was the recognition by common law of the ancestral laws and customs of the Aboriginal peoples who occupied the land prior to European settlement. In *Delgamuukw*, Lamer CJ took stand to hearsay rules which are difficult to test directly in courts. Their exceptions and relaxation are subject to the guiding principles of necessity and reliability. He held that the courts must come to terms with the oral histories of Indigenous societies by placing them on an equal footing with the types of historical evidence that courts are familiar with. He said that requiring general knowledge of Indigenous oral histories ignores their local nature. The oral personal and family histories are admissible as proof of Aboriginal rights claims. The approach was necessary because the treatment of evidence in aboriginal rights cases must accord due weight to the perspective of Indigenous peoples and due to special evidentiary difficulties involved in proving rights that pre-date written records.<sup>84</sup>

Despite this turn, all Supreme Court cases have not supported the significance of oral evidence. In *Marshall/Bernard* McLachlin CJ held that the use of oral traditions could not be properly trusted because of feedback affect from the ideas generated outside one's own culture and a product of one's own literacy. LeBel J (dissent), however, defended the *sui generis* characterisation of Aboriginal rights. It should be understood as a concept that enables and requires Canadian law to recognise rights that are not grounded in Euro-derived law. Similarly, in *Mitchell v. MNR* the court estimated Chief Mitchell's oral evidence as sparse, doubtful and equivocal, and without much weight. Binnie J (dissent) argued that Aboriginal rights derive and are limited by Canadian sovereignty. The Constitution Act, 1982, is the exclusive source of s. 35 rights. However, in the majority decision McLachlin CJ defined an absorption model, according to which the Aboriginal interests and customary laws survived the assertion of sovereignty, but were absorbed into the common law rights, unless incompatible with the

---

83 Legislative Assembly and Executive Council Act, 2002 (Nunavut), s. 2(3); Labrador Inuit Constitution (2005), s. 9; NWTTC, *Katie* (1961); NWRCA, *Re Deborah* (1972); Otis (2009), p. 245; Borrows (2010), p. 53.

84 SCC, *Sparrow* (1990); *Van der Peet* (1996), ss. 68, 263; *Delgamuukw* (1997), ss. 82-87.

Crown's assertion of sovereignty, surrendered voluntarily by treaty process, or extinguished by the government. Otherwise they continued as part of the law of Canada.<sup>85</sup>

### 3.3.6. *Alternative Dispute Resolution*

In the the 1970s in the United States started a number of Indigenous peoples' alternative dispute resolution (ADR) projects which offered a more flexible and selective process, appropriate to individual situations. The indigenous peoples began to demand similar projects in Canada. An ADR process based on traditional concepts was used for the first time in Canada in 1986, where a judge of first instance court invited a council of elders to give evidence on the traditional treatment of offenders. The judge took into account common sentiment as expressed by the elders. This indicated willingness to return the offenders back to the community in the spirit of forgiveness. To the hearing of 12 hours there participated plenty of community members. There was an idea of seeking payment of restitution in a process of effecting reconciliation. In 1988 the Province of Manitoba established the Public Enquiry to the Administration of Justice and Aboriginal People. The inquiry process took into consideration indigenous and cultural views. Consultations were also held in indigenous communities. The RCAP stressed the legitimation of an Indigenous alternative criminal justice system. The federal Department of Justice has similarly considered a restorative approach to juvenile offending after New Zealand's example. The Arbitration Act allows the ADR being set up in family and civil law cases. A challenge in these processes is to prevent them coming to simplified images of traditional culture and society.<sup>86</sup> Ontario has offered advocates for children and youth to give them an independent voice.<sup>87</sup> In New Brunswick the authorities have to take into consideration when dealing with young offenders their gender, ethnicity, culture, language, difference and Aboriginal status. The Aboriginal communities must be included in the hearing and planning.<sup>88</sup>

The Yukon Territorial Court allowed in 1992 the use of sentencing circles when it was necessary to deal with the surrounding factors. Later the territory has entered into agreements with individual bands. A precondition is common preparation and willingness of all parties in the process. In the sentencing circle the accused sits in a circle with the victim, relatives, the judge, the Crown attorney, the defence lawyer and other community members. The circle will make a recommendation to the Crown about the appropriate sentence. The model is a limited accommodation strategy which reserves all effective power to the Canadian justice system.<sup>89</sup> A collective sentencing circle, the community holistic circle healing, has been also practiced in the Hollow Water First Nation. A group of residents developed an approach where, after the offender had acknowledged his responsibility and was accepted by the group,

---

85 SCC, *Marshall/Bernard* (2005), ss. 62-65; *Mitchell v. MNR* (2001), s. 51.

86 NWTCA, *R. v. Naqitarvik* (1986); RCAP (1996), Vol. 2, Part 1; Miller (2000), pp. 12, 15, 29; Sheleff (2000), pp. 313-315; Havemann (1999), pp. 307-311.

87 Provincial Advocate for Children and Youth Act, 2007 (Ontario), s. 1.

88 Custody and Delection of Young Persons Act, 2011 (New Brunswick), ss. 2, 4.

89 Victims of Crime Act, 2010 (Yukon), s. 13; YTC, *R. v. Moses* (1992).

he was allowed to stay in the community but was subject to a 13-step process that takes five years. Similar circles have been used e.g. in Nunavut and Saskatchewan.<sup>90</sup>

The Coast Salish people live in both sides of the US-Canadian border. In 1974, in the state of Washington, was established the Upper Skagit Tribal Court as a part of the nationwide ADR programs. One of the aims was to restore the community order. In British Columbia, the Stó:lō Nation was included in the South Island Justice Project, which was a pilot project for the federal Department of Justice on Vancouver Island. In the 1980s the mainstream legal personnel was educated in Coast Salish practices and concepts, and the provincial courts were allowed to delegate minor cases to the Coast Salish people. The Stó:lō First Nation's House of Justice (*Lálém Te Stó:lō Sí:yá:m*) was created in British Columbia in 1993. It included two leaders, two chiefs and one elder. The house was empowered with the mandate to develop and implement alternative justice programs to help the nation to re-establish healthy communities and achieve full potential of all of its citizens. In the late 1990s the nation began to develop and implement an alternative justice program. It first tried New Zealand's family counselling model, but then developed instead its own system. They decided to involve in the training for peacemaking circles, based on a Yukon model. The process of rediscovery was based on Stó:lō culture, customs and traditions and the support of indigenous communities. The aim was to be self-determining and responsible, and to bring the justice back to people by giving them an opportunity to play meaningful roles in problem solution.<sup>91</sup>

The language has central importance in this process. The nation's elders were asked to create an Indigenous expression to Stó:lō justice. The program is called *Qwi:qwelstóm kwelam t'ey* ("They are teaching you, moving you towards the good"). It incorporates balance and harmony to help one another to survive and to care all people. It focuses relationship and interconnectedness of all life. The justice is centered on family. The key elements are the role of family, family ties, community connections, teachings and spirituality. The process of *qwi:qwelstóm* aims to resolve the conflicts "in a good way" and respectfully, focusing on the person, and to reconnect the extended family members and to increase the reporting rates of family violence and sexual assaults within the communities by providing an alternative to the punitive and adversarial criminal justice system. The system encourages families to begin a healing process to end the cycle of abuse. The circles create space and place for meaningful discussion, profound interaction and better understanding. All participants are required to share all sacred parts of being (physical, mental, emotional and spiritual) and to come physically and mentally prepared. The process is verbal and open: each participant is equally vulnerable. In criminal justice a circle can be arranged to replace the trial process, make a sentencing recommendation, assist in reintegration to community, and to develop a healing plan. Most of circles are healing circles. Peace circles are used to assist with family disputes, community relationships, custody concerns and divorce settlements. Their object is to restore balance in family and community. At least one elder must be present in a circle. They have natural authority and knowledge to re-establish broken connections.<sup>92</sup>

The tribal members are tied in many ways to families and ancestors. A special feature in circles is the use of traditional teaching and spirituality. A Stó:lō circle ends with an

---

90 RCAP, Vol. 3, pp. 159-169; Richardson & Imai & McNeil (2006), p. 333.

91 Miller (2000), pp. 4-10.

92 Miller (2000), pp. 126-127; Indigenous Legal Traditions (2007), pp. 18-26.



elder's prayer and is enclosed by a shared meal. The program is accountable to the House of Justice and the Elders Council. The latter has a supervisory role. The referrals to House of Justice come from the RCMP, Crown counsel, probation officers, community members, self referrals and Crown departments. *Smómíyelhtel* (justice assistants) have been trained in monthly meetings. They inform the sentencing circle on the process. The Stó:lō officials have protocol agreements with the RCMP and police representatives. Upon receiving a referral to *qwi:qwelstóm*, a justice worker must ensure that the wrongdoer takes responsibility for his/her behaviour, and all persons concerned are fully informed of the process and offered an opportunity to participate. Crown representatives consider on case-by-case basis what type of cases they will send to Stó:lō justice.<sup>93</sup>

Since 2003 the federal Ministry of Justice started 12 ADR pilot projects based on the Residential School remedy process. The program was based on a tort-law model in conjunction with health support program administered through Health Canada and a commemoration program. The reconciliation, including relationship- and trustbuilding, authenticity, humility and community engagement, has all been an essential element in these processes. The cultural loss is connected to powerful reclaiming of culture, family, community and nation. The federal Criminal Code encourages the judges to use different methods of analysis in determining a fit sentence for Indigenous offenders. The code and the later case law also stress the amelioration of imprisoned Indigenous persons' services. The disparity between sanctions to different offenders needs to be justified. The judges have a duty to consider unique circles of Indigenous offenders. The application of this Gladue principle is required in all cases involving an Indigenous offender. A failure to meet it constitutes an error justifying an applied intervention.<sup>94</sup>

The Nisga'a Lisims government may establish a Nisga'a Court for better administration of Nisga'a laws. It can review administrative decisions of Nisga'a Public Institutions, adjudicate prosecutions, adjudicate disputes on Nisga'a lands, and to impose penalties and other remedies according to Nisga'a laws. The court will apply traditional Nisga'a methods and values, including the use of elders in adjudication and sentencing and emphasis on restitution. The Agreement introduces a three-stage dispute resolution mechanism: the collaborative negotiation, mediation, a technical advisory panel, neutral evaluation and the Elders Advisory Council, binding arbitration or judicial proceedings. The First Nations Governance Act would have offered an appointment of an impartial person to deal with internal band disputes, but would have placed the third party disputes to court. There has also been a Nisga'a Youth Justice Initiative to replace as an alternative to federal system.<sup>95</sup>

In 1873-1877 the St. Laurent' Métis settlement had an early arbitration system. The governing body convened once a month to settle failures to meet obligations or follow regulations. All contracts made on Sundays were estimated as null and void. Also the Metis Settlements Appeal Tribunal had wanted to provide a nonadversarial alternative. It can act as an arbitrator, to appoint an arbitrator or to refer the dispute to a mediator.<sup>96</sup> In Nunavut,

---

93 Miller (2000), pp. 126-127; Indigenous Legal Traditions (2007), pp. 26-34.

94 Criminal Code, 1985, s. 718.2; SCC, *Gladue* (1999), ss. 93-98; *R. v. Ipeelee* (2012), ss. 80-87; Indigenous Legal Traditions (2007), pp. 41-43, 62, 64.

95 Nisga'a Final Agreement Act, 1999, ss. 12.33-48; McHugh (2004), p. 438.

96 Bell (1994), p. 22.

the victims of crime can seek justice from the elders. The elders make collaboration with professional mediators in the Iqaluit Restorative Justice Society to resolve lesser crimes as vandalism and minor theft or assaults. The elders ask the perpetrators questions about the crime committed and give them advice. The mediation sessions help the victim and the offender agree on some form of conflict resolution. In 2007 the Qikiqtani Truth Commission was established to investigate injustices that took place in the 1950s and 1960s.<sup>97</sup>

### **3.3.7. Enforcement of Law**

The colonial legislation gave the chiefs in reserves some powers to arrange law enforcement in the reserves. Also Treaties 2-3 mentioned the enforcement and guaranteed the later the Ontario First Nations a police force. The Indian Advancement Act, 1884 granted to the tribal councils a power to punish transgressions by by-laws. Otherwise, the RCMP took the main tasks on policing the Indigenous communities.<sup>98</sup>

According to the Indian Act the observance of law and order, and prevention of disorderly conduct and nuisances belongs to band councils. The federal First Nations Policing Policy gives the First Nations communities an opportunity to participate with provincial and federal governments in the development of police services in their communities. There are two options: the communities may develop and administer their own police service or choose a police service with First Nations officers working within an existing structure. The First Nations police services may also patrol for road control outside the reserves. The RCMP's role is governed by federal and provincial tripartite agreements. The Bill C-7 (2002) would have strengthened the enforcement powers of bands, enabling them to enforce directly and to appoint band enforcement officers with powers of search and seizure. In Nunavut, the federal government has established Inuit ranger patrols to each Inuit community. They make co-operation with the military in reporting. Nunatsiavut and Nunavik have their respective police services.<sup>99</sup>

The federal state and provinces have agreed since the 1990s about the geographically limited First Nations Police Services in reserves. The First Nations' constables have in reserves the powers of a police officer. They are usually based on tripartite agreements and directed by boards. In Manitoba, the provincial police services must recognise the plural and multicultural character of the Manitoban society.<sup>100</sup> The provincial police of Alberta takes, however, care of the Métis settlement's police services.<sup>101</sup> In British Columbia the settlement First Nations may create community correction services and declare a state of local emergency and have a limited jurisdiction over public order, peace or safety, power to impose fines, restitution, imprisonment or other penalties for violation of indigenous laws. The Nisga'a

---

97 Loukacheva (2007), pp. 101-102; IWGIA (2010), p. 52.

98 Treaty 2 (1871); Treaty 3 (1873); Indian Advancement Act, 1884, s. 13; Olthuis & Kleer & Townshend (2008), 602.

99 Indian Act, 1985, s. 81(3)(c)-(d); Labrador Inuit Constitution, 2002, s. 9.4; SCC, *R. v. Decorte* (2005), s.28; McHugh (2004), p. 477; Loukacheva (2007), p. 139; Olthuis & Kleer & Townshend (2008), pp. 601-602.

100 Police Act, 1990 (Saskatchewan), s. 16(1); Police Services Act, 1990 (Ontario), s. 54; Police Services Act, 2012 (Manitoba), ss. 9, 45-46; Police Act, 2004 (Nova Scotia), s. 87.

101 Police Act, 2000 (Alberta), s. 4(1).

Police Service officers have powers, duties, privileges, liabilities and responsibilities of a peace officer. Nisga'a Nation has won community correction service. The services are directed by the Nisga'a Police Board.<sup>102</sup> The transfer to Indigenous enforcement of law has been generally successful. However, there have been also grave challenges. The deteriorating relationship of the Iroquois with the Québec government led to the establishment of their proper police force called the Peacekeepers which became a recognised enforcement agency on the reserve. It has been, however, challenged by unrecognised, paramilitary enforcement group called the Warrior Movement.<sup>103</sup>

### 3.4. Conclusions

Legal pluralism exists and is more or less recognised in all compared countries. The geographical separateness and historical continuity have been in this a significant factor. In the beginning it was an expression of imported, Western legal systems' incapability to absorb the customary communities to dominant order of the society. When the settler societies strengthened, they believed until the 1970s that the custom would give way to the norms of Western law.

There were, however, certain differences between the compared countries. In France the principle of *spécialité législative* has signified since the seventeenth century a different treatment for the overseas areas, recognised recently also in EU law. A significant change took place in 1946, when the overseas areas were divided into overseas departments, which were integrated into the French legal system, but preserved a right to limited differences, based on historical, geographical and economic special conditions. In the overseas territories continued the principle, according to which the statutes of Metropolitan France would be in force only when expressly extended there. The laws of sovereignty, general principles of law and general laws form an exception to this rule as they apply in all the republic's territory. In New Zealand the legal pluralism was recognised from the 1840s as a fact and there has existed also parallel, non-recognised Māori law since the 1860s, which was an expression of the relative strength of the Māori population. Māori never completely disappeared from legislation as an "exception", but has returned as being more widely accepted since the 1970s. In Canada the legal pluralism has been part of the recognised legal system through the country's legal hybridity. However, the inclusion of the Indigenous peoples to this definition has taken place only since the 1980s, while the Indigenous law has developed strongly in the last few decades.

In France there is officially a unitary legal system. In Canada the legislative power has been constitutionally divided between the provinces since 1867. Since 1986 also several First

---

102 Sechelt Indian Band Self-Government Act, 1986, s. 14(2); Nisga'a Final Agreement, 1999, s. 12; Maanulth First Nations Final Agreement, 2007, ss. 13.26, 13.34; Tsawwassen First Nation Final Agreement, 2007, s. 16.

103 Dickason (1994), pp. 358-359. In 1988 the first armed conflict in modern times took place between the Canadian authorities and the Iroquois, when the Royal Mounted Police raided the Kahnawaké reserve's stores. The armed Warriors blocked the bridge to Montréal for 27 hours. Two years later the Warriors supported the uprising in Oka.

Nations have obtained a right to legislate in geographically and by content limited frames. In France the republican principles prohibited the division or delegation of this power. The Accord of Nouméa signified, however, in this sense a radical change. Since 1998 New Caledonia and since 2004 French Polynesia had a geographically and by content limited right to legislate equally with the French Parliament. In New Zealand the legal unity changed in 1965, when the Cook Islands (followed by Niue in 1974) was granted an independent legal system, which was only loosely connected to the mother country. Similarly the legislatures in associated states and territories are separate, independent bodies. In all three countries the development has gone towards more plural, disintegrated and asymmetric legislative power, although only in New Zealand has this development led to a model of three parallel legal systems, which are loosely connected to each other.

The customary law was dominant in France until the Civil Code of 1804, and even thereafter it did not completely vanish. In New Caledonia and Wallis and Futuna the geographically restricted legal duality was an early recognised fact. The Accord of Nouméa and changes in legislation reinforced the status of customary law as recognised personal law and the construction of new customary institutions has been a unique phenomenon. While Wallis and Futuna has been characterised by continued customary dominance, French Polynesia has developed in the opposite direction. The royal house of Tahiti and the Protestant missionaries paved the way for the codification of law and later the pushing aside of customary law to family circles. Also the Indigenous legal institutions have faded out together with the decline of recognised customary law. The British missionaries' influence on legal change was similarly visible in the Cook Islands as part of the "civilisation process", while on Wallis and Futuna the Catholic policy was more protective. In New Zealand and Canada the customary law was first recognised, but the strengthening of settler society gradually restricted its scope. Unlike in France, the customary family law lost ground both in New Zealand and Canada. The partial recognition of customary law began only in the 1960s in Canada and the 1970s in New Zealand. In both countries the developed case law, in New Zealand also the existence of a growingly Indigenous tribunal/court system which has been essential to change, which has been followed by the legislature and (in Canada) by the creation of new indigenous legal bodies. In all countries the active period concentrates in the 1980s and 1990s, when the global attitude to Indigenous peoples changed remarkably.

The participation of the Indigenous people in the enforcement of law and alternative dispute resolution has been strongest in Canada. In New Zealand the Māori Wardens have similar – although more patronising features. The customary dispute resolution has developed in the same direction as Canada, reflecting change towards increased responsibility of Indigenous peoples in arrangements of law and order. Here France forms a different model. Its' legislator has created less opportunities for differential arrangements in this sector, with the exception of New Caledonia, where the customary assessors and officials have strengthened the Indigenous role. Elsewhere the recognition of customary law keeping and mediation is more indirect.

## 4. Administration and Self-Determination

### 4.1. France

#### 4.1.1. *New Caledonia: Sui Generis Collectivity*

##### 4.1.1.1. *Heavy Burden of the Past*

New Caledonia was discovered and named by James Cook in 1774. The Protestant missionaries arrived on the islands in 1840, followed only three years later by the French Catholic missionaries. In 1844 Admiral La Ferrière made 14 official treaties with the local chiefs in New Caledonia, which recognised the French protection. The formal annexation took place nine years later (on Loyalty Islands in 1862), and there was no more need for further negotiations, except in Isle of Pines, where was obtained the formal consent of the local chief. The islands were until 1860 under the general supervision of the French Naval Governor in Tahiti, and thereafter part of the French Establishments of Oceania (*Établissements Français d'Océanie*, EFO). Its governor, assisted by a Consultative Council, had until 1885 wide powers. Outside the European settlements were created Municipal Commissions. In 1868 the governor created the concept of *tribu* (tribe): 254 tribes replaced the 39 traditional clans as basic units. The tribes became legal persons to practice internal discipline and since 1868 the Indigenous people were relocated to reserves. The colonial administration created a variant of traditional chiefdom. The Great Chiefs (*grand-chef*) were appointed to manage local tribes, and since 1877 also to keep order in districts including several tribes. Those who did not obey the colonial authority were dismissed or deported to Tahiti. The small chiefs (*petit-chef*) were responsible for local communities. The governor was alone able to decide on reserves' and chiefs' fate.<sup>1</sup>

In 1887 the French Government introduced *Code de l'Indigénat*, which submitted Indigenous people to forced labour, nighttime curfews, requisition and taxation. The code created two classes: the French citizens and the French subjects. The latter preserved only their religious and customary personal status. The Kanak revolted several times but were suppressed by the army. In 1903-1942 the territory suffered from economic crisis, inactivity and isolation. The World War II changed this state of affairs: the opening of the French Pacific colonies began in 1942, when the American troops arrived on the islands. Despite

---

1 Arrêté du 22 janvier 1868 (EFO); Ntumy (1993), pp. 596-597; Vigne (2000), pp. 2-3.

the Treaty of Geneva (1938) the forced labour continued until 1946, when the code and its restrictions were repealed.<sup>2</sup>

The transportation of prisoners into forced labour began in 1854. Ten years later Emperor Napoléon III decided to create a penal colony in New Caledonia. It existed for 23 years, and more than 20,000 prisoners were brought to the islands. Many of them were persuaded to stay in New Caledonia even after their release. The discovery of gold (1863) and nickel (1875) hastened the transformation of the islands into a civil colony. The active colonisation policy started massive immigration and transformed the islands into a multicultural society. The Melanesian population dropped from 100,000 (1853) to 20,000 (1921) but began again to recover later. The active intervention of the state with a policy of industrial expansion from 1945 brought to the main island a great number of new immigrants. The French settlers were joined by *pieds-noirs* of Algeria and immigrants from other overseas territories. Together with the nickel boom of 1969-1972 the Kanak became a minority. As late as 1972 Prime Minister Mesmer expressed the need to arrange massive immigration from Metropolitan France and overseas departments to prevent the nationalist claims of the Indigenous population. As a consequence, about 20,000 new immigrants arrived on the island.<sup>3</sup> For these reasons the 1970s and 1980s became decades of deepening ethnic polarisation.

The legal status of New Caledonia has been exceptionally turbulent. Between 1946 and 1998 it had seven different administrative statutes. The first statute (1946) created the overseas territory. The Representative Territorial Assembly included 20 members and was in charge of the proper interests of the territory. Outside the sessions a Permanent Commission took care on the administration, while the Governor preserved his central position as executive. In 1956 the French Government checked its stand on overseas territories in Defferre law, which “associated the populations more closely to the management of their proper interests”. It suggested reorganisation of General Governments, the creation of the Councils of the Government and the extension of the competencies of the local Elected Assemblies. In 1957 the Council of the Government was established, having 6-8 members elected by the Territorial Assembly. A setback came only one year later with the Fifth Republic’s new policy. When the other territories gained independence and New Zealand promoted the self-government of its remaining possessions, France tightened its grip on the Pacific territories. Possible reasons for this policy were that the decree of 1957 was originally designed for the large TOMs of Africa, the threat of indigenous movements to unitary state, and the need to centralise the administration for strategic reasons.<sup>4</sup>

---

2 Loi no. 69-5 du 3 janvier 1969; Aldrich (1993), pp. 17-18, 35; Ntummy (1993), p. 597; Pastorel (2011), p. 610. It has been estimated that 5% of Caledonians died in Kanak insurrections and their subjugation; the struggle between Vichy and Free France governments in Pacific and the new influences brought by the American troops weakened the French influence in the area. The pro-Vichy administration proclaimed New Caledonia autonomous in 1940 and individual American officers tried in 1942 to annex Wallis and Futuna under their own flag.

3 Loi du 30 mai 1854, s. 1; Roberts (1963), pp. 518-524; Aubry (1992), p. 139; Aldrich (1993), p. xi, xviii, 127; Ntummy (1993), p. 597; New Caledonia, pp. 258-277; Nouvelle-Calédonie. Especially smallpox and measles were destructive to the Melanesian population.

4 Aldrich (1993), pp. 63-64, 67.

New Caledonia's powers were reduced several times (1958, 1963, 1965 and 1969) and the Council became a mere advisor of the Governor. On the other hand, the Territorial Assembly was given powers to expel the councillors and to the territory was created the Office of the General Secretary and the municipalities. The restoration of territorial status began in the 1970s in the aftermath of the independence of the Comores. The Governor was replaced by a High Commissioner in 1976 and the post of Vice-President of the Council was recreated. To the Council were returned its collegial competences in charge of the administration of territorial interests. The Territorial Assembly was given the general competence on the affairs of the territory. New Caledonia was the first overseas territory to obtain a new form of territorial competency. The period ended in the independence of New Hebrides (Vanuatu), which had deep psychological effects on New Caledonia.<sup>5</sup>

##### 4.1.1.2. *Turbulent Period of Transformation*

The electoral programme of François Mitterrand promised change to the status of the Overseas Territories. In the beginning of the new decentralisation were passed several statutes to reform the planning, media and taxation. In 1982-1983 a pro-independence party formed for the first time a majority in the government of New Caledonia and the Kanak politicians proclaimed the territory independent (without real effect). The overseas Minister introduced after negotiations the draft Lemoine law (1984), which offered internal autonomy for New Caledonia. In the National Assembly it was supported only by the Socialists and Communists. It would have transferred the executive power to the Territorial Government and there was a promise to arrange a referendum on the future in five years' time. Due to raising tensions the bill was not ratified and in January 1985 New Caledonia was proclaimed as being in a state of alert. In the meanwhile, President Mitterrand had appointed Edgard Pisani as high commissioner to resolve the crisis. Based on his plan, Fabius-Pisani law (1985) sought in the violent situation new solutions. It took into use article 88 of the Constitution, which had been until then a dead letter. The law opened up the possibility for independence in association with France. This was challenged by several parliamentarians who saw it possible only between two independent states and being against the UN Resolution 1514 which prohibited all conditions or reservations to independence. Nevertheless, the Constitutional Council held it merely as a declaration of intention without normative content.<sup>6</sup>

The law of 17 July 1986 ordered an arrangement of consultation within 12 months' time. The alternatives were independence or autonomy within France. The consultation was boycotted by the Kanak, whose politicians drafted a Constitution for "the Republic of Kanaky" with a bicameral parliament and classical division of power. Nevertheless, the consultation

---

5 Loi du 28 décembre 1976, art. 48; Loi-cadre du 23 juin 1956, art. 1; Décret du 21 juillet 1957; Aubry (1992), pp. 138-139; New Hebrides was an Anglo-French condominium. The population is Melanesian and related to Kanak.

6 Constitution (1958), art. 88; Loi du 6 septembre 1984; Loi no. 85-872 du 23 août 1985, art. 1; CC, *Décision no. 85-196 DC* du 8 août 1985; New Caledonia, pp. 299, 315, 335-340. "La République peut conclure des accords avec des États qui désirent s'associer à elle pour développer leurs civilisations" (art. 88); The question in referendum on Algeria (1962) suggested a similar arrangement; In state of alert the government used the law of 7 August 1955, originally created for Algeria.

was arranged. In September 1987 98% of voters supported the pro-France alternative. The Territorial Assembly was replaced by the Congress with 54 elected members, based on a regional quota. The autonomy was expressed through a 10-member Executive Council, including four regional presidents and five members elected by the Congress. The President of the Council was the President of the Congress with a purely consultative role, while the High Commissioner regained his position as the executive. The islands were divided into four territorial collectivities, creating within France a unique federal structure. The Territorial Government was able to delegate by ordinance competences to Regional Councils.<sup>7</sup>

The United Nations urged France to take positive steps in relation to the self-determination of New Caledonia. After the demand by the heads of government of the South Pacific Forum and the Conference of Non-Aligned Countries, the UN General Assembly decided on 2 December 1986 that New Caledonia is in the meaning of the UN Charter a non-independent territory. According to the resolution, the people of New Caledonia has an inalienable right to self-determination and independence in conformity with the dispositions of the resolution 1514(XV).<sup>8</sup>

The subsequent changes in legislation indicated that the French politicians were willing to resolve fundamentally the prolonged crisis. In 1988 the Parliament passed three new laws on New Caledonia: on the status of the territory, administration and referendum. The first law (22 January) gave to the territory extended autonomy, but the second (12 July) reconcentrated the powers to the High Commissioner and Consultative Committee as an interim arrangement. The law of 9 November 1988 was the first statute based on political agreement and not granted directly from Paris which pacified the situation. It allowed a referendum on self-determination which would take place after ten years. The electorate for 1998 referendum was limited. However, the law did not promise a referendum to the Kanak but to the populations of interest, including also the long-established French population. The state preserved its competence in the following: external affairs; defence; justice; maintenance of order; customs; money; nationality; civil status; and penal procedure. The territory obtained powers in external commerce; regulation and exploitation of mining resources; access of foreigners to work markets; principles of work and formation; and a majority in electrical company. The territorial competences were later extended with the organic laws of 1995 and 1999. The law did not create an elected executive to New Caledonia but recognised the Congress and Provincial Assemblies (former Regional Councils) joint participation with the state in the exercise of external relations. They could propose to the national government opening of negotiations in order to conclude agreements with one or several states or territories in Pacific region. A representative of the Congress or Provincial Assembly could take part in the negotiations. The French Government could also allow the bodies' presidents to participate in the work of international organisations in the region. The Congress was granted consultative competence to the bills which authorised the ratification of international conventions dealing with the

---

7 Loi du 17 juillet 1986. Regnault (2003), pp. 289-298. The Congress has 32 members from South Province, 15 from the North and seven from the islands; The unofficial Constitution of Kanaky was based on French model, including the idea that "national sovereignty belongs to the people".

8 UN, Resolution 41/41A (1986). France had not reported on its overseas territories to UN after 1946; Since the Accord of Nouméa the relationship between France and the region's countries has normalised. Australia has entered into a strategic partnership with France.



competences of the territory or the provinces. It was assisted by the consultative Permanent Commission, which was elected on an annual basis by the Congress to work in the meantime of congressional sessions. The law created also an Economic and Social Council which had 39 members with a five-year mandate representing the provinces and the Customary Senate. It is consulted on all bills of *loi du pays* and decisions of the Congress dealing with economic or social affairs. It has also an important consultation role in its own sphere.<sup>9</sup>

The bill of 1984 had suggested for the first time the division of New Caledonia into six provinces with Provincial Councils, elected from a customary base and having a consultative role. In the background were the geographical and ethnic differences between different parts of the territory. Based on the plan of the Prime Minister Fabius and being a modified version of the earlier drafts, the law of 1985 created four regions with Regional Councils, having modest competences in regional affairs. The French population feared that its position would weaken and the law of 1988 checked again the system. New Caledonia had on two occasions rejected the departementalisation. Instead, the new accords and legislation confirmed a federal structure of four levels: state, territory, three provinces and 33 municipalities. This structure was made possible by article 72 al. 1 of the Constitution, according to which all other territorial collectivities are created by law. There were created three provinces: the South Province was predominantly French, while the North and Islands Provinces were overwhelmingly Melanesian. The regional councils were also renamed as Provincial Assemblies, having respectively 7, 15 and 32 members, being also members of the Congress. They are elected by universal suffrage for five years with proportional majority representation. The provinces are competent in all matters not reserved by the law to the state, territory or municipalities. The provinces have also direct access to economic and cultural exchange with the states and territories of the Pacific region.<sup>10</sup>

The first municipality was created to Nouméa in 1879. In 1947, there were created Regional Commissions elsewhere under territorial supervision. The new structure did not cope well with Kanak traditional structures. The differences between municipal

---

9 Accord de Nouméa (1998), s. 2.1.4.b, art. 2.1.4.b; Loi no. 84-820 du 6 septembre 1984; Loi référendaire no. 88-1028 du 9 novembre 1988, art. 2, 57-2, 85-8, 88; Hamon & Troper (2007), p. 498; Rouault (2007), p. 153; The French Pacific territories were able to join the Council of the South Pacific in 1983. The South Pacific Forum is closed for them because it allows only the independent states to be members.

10 Accord de Nouméa (1998), s. 2.1.1; art. 2.1; Loi no. 85-872 du 23 août 1985; Loi référendaire du 9 novembre 1988, art. 7; Loi organique no. 99-209 du 19 mars 1999, art. 1, 40, 46, 50, 157, 161, 173, 197; New Caledonia, pp. 349-351; Payé (2001), p. 201; Rouault (2007), p. 247. The departementalisation was offered in 1958 and again in the 1970s, when Saint-Pierre-et-Miquelon changed its status; the predominantly French South Province has a majority in the Congress, based on population; Legislator has created several new collectivities based on art. 72 al. 1: the City of Paris (1964), Mayotte (1976, 2010), Saint-Pierre-et-Miquelon (1985), Corsica (1991) and the monodepartemental regions; The French politicians in New Caledonia presented in 1985 an alternative “Swiss solution” – a federation of two regions, with respective assemblies responsible for economic development, environmental management and social welfare; To provincial competence belong the cultural and linguistic programs in elementary schools; maintaining of certain secondary schools and their residential homes; provincial boards for social and health affairs; establishments of care and training and recruiting of their personnel; provincial road network; provincial airports and ports; tourism; sport and culture; economic development; authorisation of minor foreign investments; town planning; land rights; vocational training; agriculture, hunting and fishing; exploitation of economic sea zone’s resources; regulation of internal commerce; and customary law.

structures were repealed in 1961 and eight years later was a system established, consisting of 33 municipalities, covering all the territory. They were integrated in 1977 to the general French legislation with some local particularities dealing with the funds of intermunicipal fiscal compensation and the lack of the mayors' right to keep public order (since 1884). The municipalities were a forgotten part of the administrative reforms in New Caledonia while no statute before 1990 expressly mentioned them. In 1990 the municipal powers were limited to economic and social policy and town planning. The mayors lost the right to grant building licences. This reduction of powers was corrected in 1995, when the municipalities' rights in town planning, taxation and distribution of electricity were again increased. The Code of the Municipalities of New Caledonia was created by the law of 19 March 1999. It is a modified version of the provisions in the General Code of Territorial Collectivities. The municipalities are created by the Congress which decides on the following: their public function; local taxes; and the delegation of regulative powers. In addition, the provincial assemblies may delegate them competences in instruction and licenced premises. The municipalities are represented in the Consultative Committee of Mines and Special Administrative Commission; they may form public collectivities or establishments; and their representatives can ask corrections to territorial, provincial and municipal provisions. They can make development contracts compatible with the territorial development schemes. The French legislation is applicable to town planning and delivery of electricity only when approved by a Provincial Assembly. In defining the limits of municipalities there should be taken into consideration the customary areas.<sup>11</sup>

After a violent drama in Ouvéa and the threat of full civil war, President Mitterrand and Prime Minister Rocard sought an urgent compromise with the conflicting parties. On 26 June 1988 the parties signed the Accords of Matignon (*Accords de Matignon*), which was submitted to national referendum. It described the necessity to re-establish the social peace and to create conditions in which people could choose their destiny. The document emphasised the importance of coexistence and dialogue. The administration and development of the federal territory of New Caledonia was organised within the three provinces of Loyalty Islands, South and North, which became legal persons. Some 400 young Kanak would be educated to leading positions, including the resource sector. Conseil d'Etat gave several rulings where it restricted the application of territorial and provincial powers: the secondary education's supervision belonged to the state; the state had a right to intervene in rural development in the provinces; the external communication belonged to the state; there could be parallel state services in the domain of the territory; and the provinces had no competence on public sea resources. Neither could the provinces take measures which would affect the essential

---

11 Accord der Nouméa (1998), art. 1.2.2.; Code des communes de la Nouvelle-Calédonie (1999), art. L-111-1; Loi organique du 20 février 1995, art. 41, 47, 54, 86, 189, 211; Loi organique no. 99-209 du 19 mars 1999, art. 4, 52; Loi no. 77-44 du 8 juillet 1977; Loi no. 69-5 du 3 janvier 1969; Loi no 90-1247 du 29 décembre 1990, art. 7; Décret no. 76-1301 du 28 décembre 1976; Arrêté no.1288 du 18 octobre 1947; Arrêté 61/036 CG du 31 janvier 1961; Luchaire (2000), pp. 18-20; Payé (2001), p. 217; Pastorel (2011), p. 615. In New Caledonia the maintenance of public order belongs to High Commissioner.

conditions in the exercise of fundamental principles recognised by the laws of the republic and reaffirmed by the preamble of the Constitution.<sup>12</sup>

#### 4.1.1.3. *Accord of Nouméa and the Process of Reconciliation*

In the subsequent decade the different parties of New Caledonia and the state of France recognised the need to have a period of transition, now extending 15-20 years ahead. The Accord of Nouméa (*Accord de Nouméa*), signed on 5 May 1998, created a new relationship between France and New Caledonia. Based on the agreement, the Parliament enacted the organic law of 19 March 1999 which established a *sui generis* collectivity. The Constitution had to be amended due to the New Caledonian process by the constitutional law of 20 July 1998. The new title XIII includes the articles 77-78 of the Constitution, which give the agreement a constitutional status. It opens to territory an option to access full sovereignty after a transitory period. The consultations will be arranged in the period 2014-2018. If there will be a negative answer, there will be arranged a second consultation if 1/3 of the Congress members request it in writing. There is no statutory guidance about possible third round but the Constitutional Council has held it possible. If no solution is found, a political reunion must be arranged to solve the deadlock. The Congress has in its recent Declaration of General Policy stressed the need to engage in the process and to renew the political, economic, social, industrial and provincial balancing.<sup>13</sup>

The Accord of Nouméa is an epoch-making document in unitary France. It has rendered the purely social, cultural and administrative autonomy to the political process of gradually extending self-determination. Its four major principles are the: recognition of the Kanak identity; recognition of the merits of other people; community of common destiny and citizenship; and the principle of progressiveness through dialogue. The Accord recognises both the past grievances and need for remedy, and the worth of scientific and technical advancement brought by the settlers. The purpose of the Accord is to support the two major ethnic groups to live together and to develop a common destiny. The common past and will to live together are the touchstones of the community. Therefore, the Accord recognises constitutionally the existence of multicultural society in New Caledonia. It includes a local social contract between all ethnic communities of the islands. The local citizenship is an important expression of it. The open dialogue is a living condition to the progress of New Caledonia's political and legal status. The accord's innovations are the divided sovereignty

---

12 Accords de Matignon (1988), Préambule, Texte no. 1; CE, *Bouquillard*, 31 juillet 1992; *Province Sud de Nouvelle-Calédonie*, 31 juillet 1992; *Territoire de la Nouvelle-Calédonie*, 11 décembre 1992; *Syndicat des fonctionnaires, agents et ouvriers de la météorologie et de l'aviation civile*, 11 mars 1994; *Haut-Commissaire de la République en Nouvelle-Calédonie*, 18 novembre 1994; Auby (1992), p. 143. In Ouvéa, a number of *gendarme* were killed or kidnapped by the Kanak Liberation Front. In the release of hostages the French troops killed a large number of Kanak guerrillas.

13 Constitution (1958), art. 77; Accord de Nouméa (1998), art. 216-221; Loi du 19 mars 1999, art. 217; Déclaration politique générale (2011); Luchaire (2000), pp. 8-10; Bechtel (2002), p. 39.

(*souveraineté partagée*), which is an irreversible process; the division of legislative powers for the first time in French history; and the creation of double citizenship.<sup>14</sup>

The competences are divided to the state's core competences and transferable competences. As territorial collectivity, New Caledonia has representation in the French Parliament and national Economic and Social Council. The territory, provinces, and municipalities are territorial collectivities of New Caledonia. The institutions of the two first-mentioned are under the High Commissioners' supervision. He/she is no longer the head of the territory but has, nevertheless, an important role in the process as the director of the administration of the state. He/she does to following: executes the national laws and decrees; guarantees the public order; may call public forces in the case of necessity; guarantees the proper functioning of the New Caledonian institutions and supervises their functioning through the territorial organs; exercises the control of legality on the regulations of the territorial authorities; is associated with the functioning of institutions; and is informed on the reunions of the government. The projects of decisions are transmitted to the High Commissioner before their publication and he/she can demand their second deliberation. The mines are administered by the Council of Mines, which is headed by the High Commissioner.<sup>15</sup>

The structure of the 54-member Congress has been preserved but the mandate of the Congress and Provincial Assemblies has been reduced to five years. The President of the Congress has replaced the High Commissioner as the head of the territorial administration. An important change is also that the Congress has become besides its control function a legislature. Article 99 of the organic law defines the scope of *lois du pays* (laws of the country). They are submitted to the control of Conseil d'Etat. All high officials and 18 members of the Congress can also apply to the Constitutional Council. The Customary Senate must be consulted about the bills, when they deal with the Kanak identity.<sup>16</sup>

The collegial Government, having 5-11 members, is elected by the Congress and is responsible to it. The Government is, based on the ideology of the accord, a coalition government, representing both population groups. A consultative committee includes representatives both from the state and local government. The Government has an important preparatory and executive role concerning *lois du pays*. The High Commissioner must inform the government and its president on the questions belonging to the state competence, including education and monetary questions.<sup>17</sup>

The Accord has significantly increased the competences of the territory. The competences can be divided as follows: to those transferred to territory in stages; belonging jointly to the state

---

14 Accords de Nouméa (1998), Préambule, ss. 1-2; Bechtel (2002), pp. 40-43. The accord mentions several times the Kanak people. The Constitutional Council repealed only three years earlier a provision mentioning "the people of Corsica within the French people".

15 Constitution (1958), art. 72; Loi organique no. 99-209 du 19 mars 1999, art. 2-5; Rouault (2007), p. 246.

16 Loi organique no. 99-209 du 19 mars 1999, art. 34-38, 42, 62-63, 99-100, 104, 108, 127; Accords de Nouméa, art. 1.2., 2.1.4.a; Luchaire (2000), pp. 52-53.

17 Loi organique no. 99-209 du 19 mars 1999, art.26, 127-128, 132-133, 135, 181; Accords de Nouméa (1998). The Government decides on tariffs and prices; organisation of public employment; organisation of services; tariffs and rental charges of post and telecommunications; tariffs of public services; nomination of public officers; management of territorial property; nominations; the gifts to territory; administrative constraints on published works; loans; placing of free funds; and gambling.

and the territory; and the central Government's competences, which cannot be transferred. The transfers of competences are in theory irreversible, based on the moral engagement of the state to Accord. The Accord includes a plan about the transfer of competences to New Caledonia in two stages, which has been followed. New Caledonia has the right to represent and be a member of international organisations. The Congress has a right to authorise the president of the government to negotiate and sign international agreements in the name of the republic. The state authorities must be informed.<sup>18</sup>

#### 4.1.2. French Polynesia: Overseas Country

Captain Samuel Wallis discovered Tahiti in 1767 and English Protestant missionaries gained ground in the islands from 1796. The Pomare family used the European aid to gain political control over Society Islands. Pomare II also converted to Christianity to advance his personal political aims and to consolidate his power. While the British missionaries did not support all the royal house's claims, the French representatives (since 1831) offered an alternative choice. After losing the competition on New Zealand, France offered support to the close circles of Queen Pomare IV. The Frenchmen were finally able to take control of Polynesia by gunboat diplomacy (military presence). In 1842 the chiefs asked in the queen's name for French protection. In other islands the French authorities took from chiefs formal signatures. In return to protection France promised to guarantee the royal house, customary lands and religious freedom. In 1843 was created the French Establishments of Oceania with *de facto* military occupation. All Tahitian resistance was suppressed. Otherwise the French authorities were generous: they paid life annuity to the queen and her court, and supported her land policy. In the territory prevailed for decades a double administration of royal house, Tahitian Assembly with a Western form of procedure, two separate treasuries and a French Governor with his council. The third remarkable power was the Protestant Church although its connections to Britain were cut off. The Governor relied on customary district chiefs at the local level. Gradually the French authorities tightened up their control. In 1865 the French civil law extended to all spheres except land law and the next year the Tahitian Assembly was

---

18 Loi organique no. 99-209 du 19 mars 1999, art. 21-22, 29; Accord de Nouméa (1998), art.; 2.3, 2.8, 3.1-3.3; Payé (1993), p. 343. The Declaration of 1789 gives, however, the people (sovereign) a right to review, reform and to change its constitution, which has taken place several times; First have been transferred the employment questions, foreign trade, postal services, navigation, air traffic, natural resources, the principles of formation, customary penalties, the rules of provincial administration, the programs of primary education, the formation of teachers and the control of instruction. In the second stage have been transferred the regulations of police and security, the financial establishments, civil and commercial law, real estate, communal administration, public establishments, secondary education, children's protection and private education. The joint competences are international and regional relations, immigrants, media, order, mines, international aviation, higher education and scientific research. The public sectors, which in New Caledonia still belong to the competence of the metropolitan state, are the judicial system; public order; nationality; guarantees of public liberties, civic rights and elections; defence and war materials; monetary system; external transport; public functions of state; public markets; delegation of state's services; rules on the administration of provinces and municipalities and budgetary control over them; resources of exclusive economic zone; and foreign policy. The other divided competences are immigration, audiovisual communications, the maintenance of order, the mining, the international aviation and the higher education and research.

no longer convened. The Tahitian treasury was absorbed into its French counterpart in 1876. The following year the Tahitian Assembly – now a mere rubber stamp – was convened to discharge the old queen. The road was open for full annexation to France.<sup>19</sup>

In 1880 King Pomare V declared that he would cede the sovereignty of his kingdom and its dependencies to France. The French Parliament ratified the annexation in January 1881. The Kingdom of Tahiti became a French colony and all its inhabitants became French citizens. In 1891, after the death of the nominal king, the Tahitian royal house was abolished. France obtained a series of agreements with the local chiefs who were not dependent on the kingdom and the different Polynesian archipelagos were annexed by 1900 to EFO. All Tahitian political institutions except District Councils, with diminished powers, were abolished. The colonial administration was first under the charge of the naval governor, and later under the civilian governors. The true center of decision was, however, in the French colonial ministry, and EFO had 34 governors in a 44 years period. The governor was assisted by the purely consultative General Council (1885-1903), including 18 members who discussed on transactions, charities, pensions, taxation and budget. After conflict with the Catholic Church, Governor Gallet reduced the number of seats to 11 and abolished the council's budgetary powers in 1899. Governor Petit replaced it with the Council of Administration (1903-1932), having only two elected members, while the rest were administrators. This body was in turn replaced by the Economic and Financial Delegations (1932-1945). Despite the growing demands the last-mentioned body was only slightly modified and represented the French minority. The only sector where indigenous people had some possibility of participation was the five District Councils, having a president and 7-11 members. The chairman (*tavana*) was a traditional chief. These councils were later replaced by more centralised municipal commissions.<sup>20</sup>

Unlike in New Caledonia or Wallis and Futuna, the Free France took an early hold on Polynesia and American troops arrived in 1943. In 1944, The French Provisional National Committee gave promises that the powers would be decentralised to local government, and created local elected assemblies. Tahitians were recruited to administrative posts. In 1946 was established the overseas territory of French Polynesia (*Pōrīnetia Farāni*). The reform was similar to New Caledonia with a Territorial Assembly and strong governor. The indigenous movement for autonomy began in 1946 and the first indigenous political party was created, which was led by Pouvana'a Opa'a, who was elected to the French parliament in 1951. In 1957 the powers of the Territorial Assembly (now 30 members) were extended in economic and fiscal matters. The assembly chose 6-8 ministers to the Council of Government where one of them functioned as vice-chairman. Although the governor remained sole representative of the state, the chief of administration and the chairman of the council, the statute created a political dimension to the decentralisation.<sup>21</sup>

---

19 Siikala (1982), pp. 228-234.

20 Décret du 28 décembre 1885, art. 130-131; Cadoux (1989), pp. 351-355; Newbury (2000), p. 1, 26-27, 60-61, 92; 103-107, 111, 115-122, 129, 179, 182, 188, 208; Aldrich (1993), p. xxi; Pastorel (2011), p. 610.

21 Décret no. 46-2397 du 25 octobre 1946, art. 34; Décret 57-812 du 22 juillet 1957; Cadoux (1989), pp. 357-361; Newbury (1980), p. 310; Aldrich (1993), p. 37; Sem, pp. 102-103; The party was Rassemblement Démocratique des Populations Tahitiennes (1947-1963).

Like in New Caledonia, the Fifth Republic reduced considerably the local powers of deliberation. The ministers lost their independent position and became mere advisors. The office of vice-chairman was abolished and the governor was able to discharge independently the council. The new concentration of powers led to explosion of political activity among the indigenous population. Finally in 1967 the autonomists gained a majority in the Territorial Assembly. They demanded a return to the degree of 1957 and formed a coalition to obtain inner autonomy. The growing demands inside Polynesia, the international pressure and changes in political climate in Paris finally led to the reform of legislation in 1977, which gave French Polynesia administrative and financial autonomy. It was the first negotiated statute. The governor was replaced by the high commissioner of the republic. The local institutions were reinforced: the Territorial Assembly received regulatory powers; the Council of Government was recreated and amended with a vice-chairman as the chief executive; and there was the consultative Economic and Social Committee and a procedure for financial conventions between the state and the territory. All these reforms signified return to the 1957 situation with some new innovations. A major problem was, however, the total exclusion of local politicians from external and internal matters. The High Commissioner was still the chairman of the council and the chief of the territorial administration who decided on the territorial budget.<sup>22</sup>

In the late 1970s the local politicians strived to further develop the autonomy. In 1984, the socialist government introduced a new law on internal autonomy of French Polynesia which created a distinction between the competences of state and territory. The state's role became complementary and the territory gained an internal autonomy with a particular and developing organisation. A limited delegation of the state's powers became also possible. The High Commissioner's powers were reduced. He/she did not lead anymore the council or administration, but was the delegate of the French government, in charge of national interests in the territory. He/she took care of the following: promulgated the applicable statutes in the local *Journal Officiel*; controled the use of state subsidies and finance; national defence; public order; and liberties and rights. The high commissioner could also proclaim a state of alert. The internal organisation and functioning of the Territorial Assembly were reformed. The number of seats was increased to 41, better representing the weight of different electoral districts. It had competence for internal financial and social affairs and it had to be consulted on the ratification of international agreements dealing with the competence of the territory. The council was renamed as the Territorial Council of Ministers. Its president was elected by the Territorial Assembly. He/she had a number of roles: to direct the government and territorial administration; to coordinate with the high commissioner; and to represent with the Government of the republic.<sup>23</sup>

The President of the Territorial Government could propose to the French government the opening of negotiations on international regional agreements. He could also represent the republic in regional organisation with the high commissar when delegated by the national Government. The President chose 6-10 ministers either from the Territorial Assembly or

---

22 Loi no. 77-772 du 12 juillet 1977; Ordonnance no. 58-1337 du 23 décembre 1958; Cadoux (1989), pp. 362-363, 365-366; Sem (1996), p. 104. The major strategic reason in French Polynesia was the nuclear testing site; the elections of 1967 were participated by 59 different political groupings.

23 Cadoux (1989), pp. 367-370, 376-377; Regnault (2003), p. 23.

outside of it. The ministerial list was submitted for the assembly's acceptance. A minister had to be a minimum of 23 years old and a resident of Polynesia for at least five years. The Government worked collegially either in the form of the project of deliberation or reglementary domain. It directed collegially all territorial administrative services and all foreign investments. In fiscal questions it was assisted by the Consultative Credit Committee and the minister of DOM/TOM had an obligation to consult the Territorial Government on certain questions. All the government's initiatives were submitted to the High Commissioner who could take them to examination. The rules for the Economic and Social Committee were specified and the Administrative Court was given financial control of the territory. The national *Cour de Comptes* was represented by its delegated magistrates.<sup>24</sup>

The presidency of Jacques Chirac led in 1996 to the enactment of a new statute on French Polynesia. In the background was the close co-operation between Gaston Flosse, the head of the Polynesian Government and the President. Flosse was a pro-French politician and the aim was with strengthened autonomy to prevent the advance of independence movement. The new statute dropped the notion territory from the legislation. The republic guaranteed Polynesia's autonomy by favouring economic, social and cultural development, and respecting its proper interests, geographical specificity and identity. Nevertheless, the autonomy was administrative, economic, social and cultural – not political or legislative. In external affairs the President of the Government was given powers to negotiate and sign administrative agreements with states and regional organisations and the territory to participate in international negotiations. Another minor reform was that the law did not anymore limit the number of ministers in Government. The Constitutional Council corrected the new statute concerning the guarantees of public liberties, which belong to the indivisible competence of the state.<sup>25</sup>

The Accord of Nouméa had direct consequences to Polynesia. Like in New Caledonia, there is a strong pro-independence opposition. French Government, supported by the Territorial Government, considered in 1999-2000 giving French Polynesia a special constitutional status with legislative powers similar to New Caledonia, a limited citizenship and extended participation in international stage, included to a new title XIV in the Constitution. The process, however, halted to constitutional conference which did not warm to a constitutional revision. The territory remained in article 74 of the Constitution. As a response to the frustration, the autonomists hurried to suggest a statute-based, extended self-government for the territory. Based on the Accord of Tahiti Nui, the Parliament enacted the organic law of 27 February 2004 which recognised for Polynesia, now an Overseas Country within the Republic (*pays d'outre-mer au sein de la République*, POM), wide normative powers in all matters which are not specifically the state's domain. The republic guaranties its autonomy

---

24 Loi no 84-821 du 6 septembre 1984, art. 1-3, 5, 8-9, 24, 27-31, 35, 37-40, 42-43, 62, 68, 82-83, 91-97, 103-104;

25 Loi organique no. 96-312 du 12 avril 1996, art. 1, 40-41; CC, *Décision no. 96-373 DC* du 9 avril 1996.



and favours economic, social and cultural development by considering its geographical specificity and the population's identity.<sup>26</sup>

The institutions and high officials of French Polynesia are the High Commissioner, President of French Polynesia, Government of French Polynesia, Polynesian Assembly and the Economic, Social and Cultural Council. The president of French Polynesia is elected by the Polynesian Assembly among its members. He/she undertakes the following: leads the work of local government and administration; represents the collectivity; promulgates the *loi du pays* and takes care of their execution; directs the preparation of annual budget; and appoints the government, which prepares the ordinances and defines the rules not belonging to the state.<sup>27</sup>

The High Commissioner who presides over the High Council of Polynesia (*Haut conseil de la Polynésie*) has numerous duties, He or she: guarantees public order; respects public liberties; guarantees individual and collective rights in Polynesia; directs the services of the state, excluding the judiciary; assures on behalf of the state the control of public or private organisms or persons who benefit on subventions or attributions of the state; gives regulations belonging to his/her competence; acts as the supervisor of incomes and expenditures; has responsibilities for territorial defence; can proclaim a state of alert; represents the state before different levels of administration in French Polynesia; signs on behalf of the state the agreements between the state and Polynesia; supervises the functioning of municipal authorities; coordinates internal security and prevention of criminality; and directs the national police and the units of the *gendarmerie* in matters of public order and administrative policy.<sup>28</sup>

The President of French Polynesia, who is elected by the assembly from the ranks of its members in a secret ballot for the electoral period, represents the territory and leads its government and administration. He/she appoints the most public employee; signs the local regulations and contracts; organises the territorial budget; executes *lois du pays*; and exercises reglementary powers. The President is informed by the High Commissioner on matters related to order and inner security.<sup>29</sup>

The Government is the executive of Polynesia, which leads the politics and arranges the administration. It is collegially responsible before the assembly. The Government is composed of Vice President and Ministers, appointed by the President who chairs its meetings. The electors can make a petition to convene the assembly on all matters belonging to its competence. The government is consulted by the Minister of Overseas or High Commissioner on matters listed in art. 97. The Government can also make initiatives on the questions belonging to the competence of the state. It is informed about international projects, questions of immigration and monetary questions and has to be consulted on draft regulations and treaties on French

---

26 Loi organique du 27 février 2004, art. 1; CC, *Décision no. 2004-490 DC* du 12 février 2004, 13; Faberon (2001), pp. 382-388; Faberon (2006b), pp. 693-694; AlWardi (2008), pp. 187-237. Regnault & Fayaud (2008), p. 155; The Constitutional Council answered on 12 February 2004 that the overseas land is an acceptable notion when it has no legal effects: "s'il désigne cette dernière comme << pays d'outre-mer >>, cette dénomination n'emporte aucun effet de droit; que, dans ces conditions, l'article 1er n'est pas contraire à la Constitution."

27 Loi organique no. 2004-192 du 27 février 2004, art. 64, 69, 73, 89-90.

28 Rouault (2007), pp. 245-246.

29 Loi organique no. 2004-192 du 27 février 2004, art. 64, 69.

Polynesia, which it can modify or suppress before their implementation. The budget is sent from each municipality to the territorial government to be approved. It may delegate to the president or minister in 11 domains listed in article 92. The government may submit after the assembly's authorisation for a local referendum all draft regulations relevant to its attributions.<sup>30</sup>

The Assembly of French Polynesia has 57 members elected for five years. The reform of 2004 has given it a stronger role. It decides on the territorial budget and counts and controls the actions of the president and government. It is consulted by the national parliament on bills, draft regulations and international engagements concerning the territory. It can also modify or reject provisions. Since 2004 the assembly has had a limited power to make regulations called *lois du pays*. They are submitted to Conseil d'Etat and the High Council of French Polynesia, which has an advisory role besides the territorial government. The assembly has its own president of as chairman. The assembly may submit to local referendum all projects or propositions of *loi du pays* or deliberations to regulate matters belonging to its competence.<sup>31</sup>

French Polynesia may participate in the competence of the state related to civic rights; research; penal law; arrival and sojourn of foreigners; audiovisual communication; and postal services. These joint competences are submitted to the control of the high commissioner. The authorities of the republic may delegate to the President of French Polynesia a right to negotiate international engagements. He/she may also be allowed to undersign the agreements in the name of the republic. The territory may participate together with the state to the work of international organisations. These competences are not independent: they mean participation in the state's competence and are submitted to the conditions of the Constitution. The competences of the state are in French Polynesia nationality; guarantees of public liberties; foreign policy; defence; immigration; security; money; international transport; municipal administration; military; audio-visual communication; and the higher education. The respective laws are directly applicable in French Polynesia.<sup>32</sup>

The Economic, Cultural and Social Council is an advisory body composed of the representatives of professional groups, syndicats, organisms and associations which work in

---

30 Loi organique no. 2004-192 du 27 février 2004, art. 10, 15-30, 90-91, 159; Rouault (2007), pp. 242-243. The Government may introduce *lois du pays*; set rules on creation and organisation of services; public establishments and groupings of public interest; instruction in schools under territorial competence; instruction of local languages in all schools; grants, subventions, allowances and prices; assistances and allowances of education; general organisation of fairs and markets; internal prices, tariffs and commerce; tariffs and rules of assessment; collection of licence fees for services; quantitative restrictions of import; conditions of approval for private airports; assistance programmes for access to public works; modalities of application to remunerate the personnel of public sector and ministries; security of traffic and navigation inside the territorial water zone; vessels and their registration and conduct; timezone; road traffic; codification of Polynesian regulations; ceiling of remunerations submitted to contribution and financing of the regimes of social protection; allocations of social protection; and other competencies listed in articles 93-94.

31 Loi organique no. 2004-192 du 27 février 2004, art. 9, 102-104, 140; Loi organique no. 2011-918 du 1 août 2011, s. 104; Rouault (2007), p. 245.

32 Constitution (1958), art. 52-53; Loi organique no. 2004-192 du 27 février 2004, art. 7, 14, 31-42; CC, *Décision no. 96-373 DC* du 9 avril 1996.

the respective sectors of Polynesian society. It is consulted on the projects and bills of *loi du pays* of an economic or social character.<sup>33</sup>

At the local level the territory was divided by the Tahitian Assembly into five districts in 1855. The District Councils included the chiefs, district judges, senior *mutoi* and two *ra'atira* elected by local landowners. Their role was to oversee the district's property; supervise feasts; and act as the preliminary court in minor political matters and land questions. Since 1877 *gendarmérie* replaced the district chiefs in administration except in questions of land registration, agriculture and public works. Ten years later there were established rural municipal communities with 4-member councils. However, in 1890-1965 only four municipalities were created. The governor was able to approve or suspend all district chiefs. The system was reformed in 1971, when 44 new municipalities became under the chiefs of subdivision (later mayors). In 1984 the state's role at the local level was limited to the proper competences of the state and the next year the Territorial Assembly decided to create the Service of Administration of the Archipelagos in French Polynesia and four districts, directed by territorial administrators. In 1990 the Council of Archipelago was created, which includes the assembly members and mayors from more isolated communities. The council has a consultative function in local affairs.

The municipalities of French Polynesia are territorial collectivities of the republic but they have only minor competences related to municipal police; municipal roads; cemeteries; municipal transportation; construction; elementary schools; drinking water; household refuse and biodegradable waste; and sewage. The French provisions on municipal councils are not applicable in the territory. The municipalities can participate in their competence in economic and social aid and intervention, town planning, culture and local heritage. To the mayors can be delegated competences to apply *lois du pays* and regulations. Also competences in economic aid and intervention, social aid, town planning, culture, local heritage and local production and distribution of electricity may be delegated to municipalities. In 2007 parts 1-2 and 5 of the General Code of Territorial Collectivities were extended to apply in the municipalities of French Polynesia, which has stringed their juridical regime together with the municipalities of Metropolitan France.<sup>34</sup>

#### 4.1.3. *Wallis and Futuna: the Republican Kingdoms*

The island of Futuna was first visited by Jacques Le Maire and Wilhelm Schouten in 1616 and Wallis by Samuel Wallis in 1767. The islands became a Catholic mission of the French Marist Fathers in 1837 and only five years later the *lavelua* of Uvéa, under the influence of Monseigneur Bataillon, the head of the Marist mission, requested French protection which was granted in principle. The request was renewed by Queen Amélia in 1886. Based on the following treaty (1887), France appointed a resident (in the beginning a Catholic priest) to

---

<sup>33</sup> Rouault (2007), p. 243.

<sup>34</sup> Loi organique no. 2004-192 du 27 février 2004, art. 43; Loi du 24 décembre 1971; Loi du 12 juillet 1990; Décret no 72-408 du 17 mai 1972; Ordonnance no. 2007-1434 du 5 octobre 2007; Délibération du 23 mai 1985; Aubry (1992), p. 132; Cadoux (1989), pp. 379-381; Newbury (1980), pp. 183-184, 213-214; Rouault (2007), pp. 244-245; Magnon (2008), p. 300; Pastorel (2011), pp. 611, 615.

the islands to take charge of external affairs and the European population, while the Queen would preserve all her independence and authority over her subjects. A similar treaty was made with the two kingdoms of Futuna in 1888. In 1910 French administration was formally established on the islands and the original treaty was revised (1911) so that only the French Government could appoint a General Commissioner, who had to be a civil servant. In 1913 the King of Uv ea requested again that his kingdom be attached to France. It took, however, 46 years before France arranged a referendum on the status of the remote islands which became an overseas territory (1961).<sup>35</sup>

The law of 1961, which is still in force, defines the status of the territory, which has only lately been redefined as an overseas collectivity. The islanders have the same rights and obligations as all French citizens. Unlike in New Caledonia and French Polynesia, the status of Wallis and Futuna has remained very stable, avoiding the high surges of decentralisation elsewhere. The territory is ethnically homogenous and it has little mineral or strategic worth to France, while the Wallisian and Futunians have seen more advantages in belonging to France. The state administration of the islands is direct, but leaves most internal affairs intact. The state has in principle the competence to intervene. It has a double representation through the High Commissioner of the Republic in Pacific Ocean (New Caledonia) and the supreme administrator of the territory (*kovana*; today also prefect). Their joint responsibility is to take care of national interests, administrative control and the respect of laws. In practice, the supreme administrator takes care of these functions locally, assisted by a delegate in Futuna. To his/her competences belong: citizenship; foreigners' stay in the territory; control of institutions; general organisation of defence; transfer of property; measures of health and protection; state of alarm; and promulgation of all statutes dealing with the territory. He/she has also customary ceremonial duties which rank him/her in a hierarchy between the king and the bishop. The High Commissioners' position is more nominal, having few defined regulatory responsibilities: the French armed forces are submitted to him/her in New Caledonia and Wallis and Futuna.<sup>36</sup>

The competences of the state are as follows: defence; maintenance of public security; respect of statutes and court decisions; external relations and communications; education; administrative and financial control; customs; economic development; and the administration of justice. Since 1971 the state has been also in charge of health and medical services. The state's services are partially common with New Caledonia. Due to the Accord of Noum ea, New Caledonia and Wallis and Futuna made in 2003 a separate accord to redefine their relationship. The state guarantees the economic, social and cultural development of Wallis and Futuna while New Caledonia's role is central in employment and in creation of harmonious economic development to help Wallis and Futuna in access to work, social coverage and health care.<sup>37</sup>

Despite the state's central statutory responsibilities, the public life on the islands is based on coexistence between the republic, the three royal houses and the Catholic Church. The

---

35 Ntummy (1993), pp. 622-623; Rohm (2006), pp. 7-8; *L'histoire des institutions   Wallis et Futuna*.

36 Constitution (1958), art. 72; Loi no. 61-814 du 29 juillet 1961, art. 1, 4, 7-8; Pay  (2001), pp. 221-228; *L'histoire des institutions   Wallis et Futuna*.

37 Loi no. 61-814 du 29 juillet 1961, art. 7; Loi no. 71-1061 du 29 d cembre 1971; Accord particulier Nouvelle-Cal donie/Wallis et Futuna (2003), art. 3-5; Pay  (2001), pp. 229-231.

Supreme Administrator functions as the chief of the territory. He/she chairs the Territorial Council and has the decisive vote, while the three kings/queens act as Vice Presidents. This formalises the last-mentioned's visible authority on the islands. To the Council belong also three French citizens appointed by the Supreme Administrator. The council examines all the documents and projects, which are related to territorial interest, administration of patrimonial interests and territorial public works. It then transfer them for the decision of the Territorial Assembly; and decides independently on the regulation of domestic markets, rents, organisation of chiefdoms, and fairs. The Supreme Administrator has also the right to introduce to the council directly applicable regulations, which change fiscal rules on production, circulation and consumption. They are promulgated by the Territorial Assembly. In practice, the Council's role has been weak and it has met seldom.<sup>38</sup>

The transformation to an Overseas Territory made the islands formally under the influence of French constitutional law. This led to the establishment of Territorial Assembly, which has 20 members from five electoral districts. The custom is strongly present in elections: an unwritten rule is that the members of assembly belong to *aliki*, noble families. Therefore, the pedigree is more important in the elections than the political programme. The French state pays life annuity to the kings and chiefs according to their rank. The assembly is assisted by the Permanent Commission, whose membership criteria are fluency in reading, writing and speaking French. The commission prepares the topics which are returned from the assembly. In a case of urgency it may give opinions on the competence of the assembly, which is temporarily submitted to it by the supreme administrator. The legislation does not list the competences of the Territorial Assembly but the administrative practice is to relay to a degree from 1957, made for New Caledonia and which is limited by nature. The competence of Territorial Assembly is therefore limited to the status of the state's civil servants; regulation of customary status; territorial property; development of land property and rights; social security; agriculture; breeding; fishing and forests; territorial transportation; town planning; living; tourism; public markets; taxation; creation and suppression of public services; and the granting of minor mineral rights.<sup>39</sup>

Wallis and Futuna have no municipalities. The local division is based on the three customary kingdoms of Uvéa, Sigavé and Alo. They are legal persons - although not territorial collectivities - led and represented by kings or queens, who are elected by the local noble families with great local influence. The kingdoms local administration is customary. Each kingdom has a *fono*, consisting of *kivalu* (prime minister) and 5-6 ministers, all *aliki*. The Kingdom of Uvéa is further divided into three districts, led by *matapule*, whom *lavelua* appoints on the proposition of the people. Each district has a number of villages with a chief, chosen by the people. In two smaller kingdoms a minister of *fono* acts also as a village chief.

---

38 Loi no. 61-814 du 29 juillet 1961, art. 10; Décret no. 62-288 du 19 février 1962, art. 5, 7, 9; Payé (2001), p. 237.

39 Loi no. 61-814 du 29 juillet 1961, art. 11-12; Décret no 57-812 du 22 juillet 1957; Décret no. 96-1007 du 22 novembre 1996, art. 2; Payé (2001), pp. 237-238.

They organise farming and fishing, and are in charge of rural police, medical services and roads, and inform the ruler on maintenance of order, security and health situation.<sup>40</sup>

#### 4.1.3. French Guiana: Long Time Forgotten

French Guiana in South America is one of the most sparsely populated territories of France. It was discovered by Christopher Columbus in 1498, but only the expedition of Sieur de Revardière led to the establishment of the Colony of French Guiana. When Cardinal Richelieu authorised the territory's colonisation there was established the town of Cayenne in 1637. In 1673-1798 French Guiana was an important destination for the slave trade and later, in 1852-1945, was a penitentiary colony with an archipelago of prison camps. As one of the old colonies it became in the constitutional reform of 1946 an overseas department, and therefore, an integral part of France. French law was extended there with full force and the governor was replaced by a prefect and General Council. In the administrative reform of 1972 its status was promoted to one of a monodepartemental region and the system of parallel councils was abolished ten years later. Following the aspirations in the Pacific region and Corsica, the presidents of the Regional Councils in Guiana, Guadeloupe and Martinique delivered in 1999 the Declaration of Basse-Terre, which suggested increased autonomy and also integration between the three territorial collectivities. In January 2010 a referendum was arranged on the status of French Guiana which offered it a status of overseas collectivity, loosing its ties with Metropolitan France, and giving it increased autonomy. However, 70% of voters rejected the offer and French Guiana remains an overseas region.<sup>41</sup> The economic dependence and the advantage in belonging to the EU influenced the outcome.

Although French Guiana is divided into municipalities, the well-organised society is limited to the coastal strip. The communities of the interior are difficult to reach and due to their poverty they are dependant on the subsidies of state and region. The Indian minority living in the sparsely populated interior of the territory and close to Surinam's border together with other ethnic minorities has been totally neglected for a long time. Following the constitutional principle of indivisibility they were completely non-existent "free people" and forgotten even in administrative law. The French Governor had occasional contacts with their chiefs, but otherwise they were left in peace. In 1930, however, the Territory of Inini was established in the interior as a response to the administrators' demands for a more organised society. The territory and its Indigenous people were under the protection of the Governor and his Administrative Council. There were no municipalities and the grass-root administration was carried out by *gendarmerie* while the villages continued to be under the hereditary chiefs. The situation changed only in 1951, when the territory was transformed into a unique structure called a district outside the municipality (*arrondissement hors du*

---

40 Loi no. 61-814 du 29 juillet 1961, art. 9; Paye (2001), pp. 235, 243; Bechtel (2002), p. 59; Aimot & Tamole (2007), s. 56; Pastorel (2011), p. 612. The rulers' position is not always secure: in 2005 *lavelua* Tomaki Kulimoetoke II was deposed after having protected his relative over murder charges. The island divided as consequence to two clans: the "Royalists" and "Renovators".

41 Loi no. 72-619 du 5 juillet 1972; Loi du 2 mars 1982; Aubry (1992), pp. 71, 77, 83; Peyrat & Gougis & Chine (1998), pp. 55, 60, 64; Bechtel (2002), p. 25; Guyane Française: composition ethnolinguistique.

*commun*). The district became a legal person with its own budget and a civil servant assisted by the District Council. The district was divided into municipal centers that were created by Conseil d'Etat after the advice of the District Council and General Council, and administered by Municipal Assemblies and Municipal Circles. They were established by the prefect's regulations but lacking proper organs. The civil servant acted as the mayor of the district. Finally there were only nine Municipal Circles that were administered by local commandants of *gendarmerie*. In reality, the representatives of the republic had to divide their power with customary chiefs.<sup>42</sup>

After the efficient integration process of 1965-1969 the district was abolished and the period of special Indian Territory ended. DOM of French Guiana was divided in two districts of Cayenne and Saint-Laurent-du-Maroni and 20 municipalities. Only in the Municipality of Camopi were the residents exclusively Indians. Since 1970 access to the southern part of region has been submitted to the authorisation by the prefect to protect the Indians' health and culture. There have been also some attempts to pass protective legislation on the Indigenous people of Guiana (1972, 1984) but they have not proceeded to the stage of a bill. The Indian's organisations have been active in demands for recognition and self-government since the 1990s: in 1996 an international conference of Indigenous peoples delivered a message to the French Government but the changes have been modest. In response, the Consultive Council of Indian and Bushinenge People has been established, and its 20 members are nominated for six-year terms. Of these, 16 represent Indian or Bushinenge organisations and associations. It gives opinions on the Regional Council's projects which are related to the environment and the life and culture of Indians or Bushinenge. The council can also have a reunion with the regional Economic, Social and Environmental Council on common questions.<sup>43</sup>

In 1979 the General Council tried to abolish the system of hereditary chiefs. Instead, they have since then been formally appointed by the council's president and their role has remained important. They act as mediators between the organised and customary world; agents of police in their communities in cooperation with *gendarmerie*; administrators who register their people; guarantors of ethnic culture; and as organisers of ritual and spiritual ceremonies. They receive a monthly compensation from the region. The traditional structures coexist with the municipal administration.<sup>44</sup> While the municipal structure has remained weak, they have a primary role in community.

---

42 Loi no. 51-1098 du 14 septembre 1951; Loi no. 69-1263 du 31 décembre 1969; Décret du 6 juin 1930; Aubry (1992), p. 82; Arnoux (1996), pp. 1620-1625; Peyrat & Gougis & Chine (1998), pp. 65-66; Émeri (2000); Bechtel (2002), pp. 25-26, 28.

43 Code général des collectivités territoriales, art. L 4436-1-6, D 4436-1-2; Décret du 17 mars 1969; Arrêté du 14 septembre 1970 (French Guiana); Arnoux (1996), pp. 1624-1625, 1629-1630; Miéville (2002), pp. 284-286. The Indian's have supported the prefect's limitation policy but many municipal councillors have been against it, because it reduces the number of tourists and income; Bushinenge are descendants of escaped slaves.

44 Arnoux (1996), pp. 1625-1628.

#### 4.1.5. *The Caledonian Citizenship and Electoral Rights*

Common citizenship has been one of the means by which to integrate with the unitary state. In the French colonial system there was in use a two-level system of citizens and subjects. People in the old colonies obtained citizenship during the revolution. The same rights were granted to Tahitians by agreement in 1880, but the Kanak were submitted to *Code de l'Indigénat* and became citizens only in 1945. In the same year was created also the shortlived citizenship of the French Union (1946-1958; of the French Community in 1958-1960). Further, the electoral rights were in New Caledonia first limited to war veterans, customary chiefs, farmers and teachers. The Constitution of 1946 gave an opportunity to continue this restriction. The category of Kanak voters was extended in 1951 and only in 1957 did all New Caledonians have electoral rights. The Indians of French Guiana had the worst situation. They had to - despite the legislation - apply for the French citizenship, which very few actually did before 1965-1969 when they were actively encouraged to become "French". Only the isolated Wayampi and Palikur peoples, who have a strong connection to their kin in Brazil, rejected for a long time the offer.<sup>45</sup>

The electoral rights were planned to be restricted again in New Caledonia from the 1980s, this time to meet the Kanak's demands. The Pisani Plan (1984) included restriction of electoral rights to those people who had lived on the islands for at least three years. The Accord of Matignon limited the electorate in the elections of the Congress and the Assemblies of the Provinces. Consequently, the law of 9 November 1988 limited the electorate for the 1998 referendum. According to UN practice the subject group to self-determination is the colonised population. Therefore, the recent immigrants were excluded from decision-making related to self-determination. France guaranteed a minimum solution to which both parties were able to agree. The Accord of Nouméa created the parallel citizenship of New Caledonia. It connects this citizenship as one of the principles of political agreement to the construction of the community of common destiny. The citizenship creates a Caledonian identity and confers to its people particular rights. The organic law of 1999 defines that the French nationals, who fulfil the conditions in article 188, may benefit from New Caledonian citizenship. The electorate is based on the electoral list of 8 November 1998. It follows the conditions expressed in the law of 9 November 1988, i.e. people who have lived in the territory since 6 November 1988. There are added those children born after the date whose parents satisfied the conditions. As consequence, all persons are accepted as electors if they have lived in the territory at least 10 years before 31 December 2014; were born in the territory and are living there permanently; or have a customary status. According to the Constitution, New Caledonia may take measures of positive discrimination in favour of its population. This means in New Caledonia a guarantee of protection for its indigenous population. It is specially connected to the vote in local elections and to protect the local work force. Conseil Constitutionnel has ruled that exemptions to the principle of equality acquire explicit constitutional mention.

---

45 Constitution (1946), Préambule, art. 80; Loi du 30 décembre 1880; Loi du 7 mai 1946; Loi du 23 mai 1951; Loi du 26 juillet 1957; Ordonnance du 24 mars 1945; Ordonnance du 22 août 1945; Arnoux (1996), pp. 1624-1625, 1629, 1631-1632; Payé (2001), p. 433; Bechtel (2002), pp. 72-75; Pastorel (2011), p. 606.



In this light the positive discrimination in favour of permanently settled persons is not unconstitutional. In municipal elections there are no restrictions to vote.<sup>46</sup>

Several individuals have applied to domestic and international courts against New Caledonia's electoral rules which have excluded them from voting due to living in the territory for not enough time. The courts have ruled that the specific voting right is related to the process of New Caledonia's self-determination, and only those individuals with a substantial connection to the territory should be allowed to vote. The restrictions are justified when there are compelling local requirements. They are more important to the long-term residents of New Caledonia, who are a minority in relation to the population of France and entitled to a special means of protection. The contracting states of international conventions have a large margin of appreciation.<sup>47</sup>

The demographic changes in French Polynesia have led to reform of electoral districts. In 2002, 87% of Polynesians lived in the central Society Islands. The electoral law was reformed in 2007. Accordingly, French Polynesia became a unique electoral district with eight sections. In all, 37 MPs are elected from the Society Islands and 20 from the other islands. To be elected in the first round, a candidate has to obtain more than 50% of the votes in the constituency and at least 12.5% to be able to participate in the second round. There has been also an attempt to create a parallel citizenship, similar to New Caledonia, which would have been based on identity and to attribution of positive discrimination in rights and liberties, giving specific rights to the work force and land owning. A constitutional congress (2000), however, buried the initiative to an unseen future.<sup>48</sup>

#### 4.1.6. *Pacific Tax Haven?*

The Declaration of 1789 demands equal treatment of all citizens in relation to taxation. Nevertheless, this has been interpreted broadly, based on the legal particularism of overseas collectivities. *Sénatus-consulte* of 4 July 1866 granted the colonies' local assemblies a limited right to define their own tariffs. In New Caledonia the taxation of the Melanesian population was in charge of the chiefs who collected head tax from their tribal members. The Constitution

---

46 Constitution (1958), art. 74 al. 3; Accord de Matignon (1988), Texte no. 2; Accord de Nouméa, s. 2.2.1; Loi référendaire no. 88-1028 du 9 novembre 1988; Loi organique no. 99-209 du 19 mars 1999, art. 2, 5, 24; CC, *Décision no 99-410 DC* du 15 mars 1999; Luchaire (2000), pp. 8-9, 25; Payé (2001), p. 434; New Caledonia, p. 338. France accepted for the first time the principle to restrict the electorate after World War II in its litigation with Italy on Alpine valleys; In 1985 the Constitutional Council ruled that the law cannot give preferential treatment to the Kanak section of the population. Nevertheless, the council later partly reversed its opinion while accepting the protection of indigenous population. The citizenship is not specifically for Kanak only but for all New Caledonians who fulfil the conditions. The Congress of New Caledonia proposed in 2011 the passing of the Code of Citizenship.

47 UNHRC, *Gillot v. France* (2002); CAA, *Mme. Demaret*, 8 octobre 2003; ECtHR, *Py v. France* (2005), ss. 26, 46.

48 Loi no. 2007-1774 du 17 décembre 2007, art. 3; Loi organique no. 2004-192 du 27 février 2004, art. 102; Payé (2001), p. 448; Bechtel (2002), p. 73; Guiselin (2004); Sage (2008), pp. 384-385. Relations between the parties are often based more on personal relations than political programmes. The parties led by Oscar Temaru (for larger autonomy/independence) and Gaston Flosse (autonomist) have been in coalition against other autonomists.

of 1958 describes the taxation as one of the basic attributions of the state and the rules of taxation must be based on law. In 1965 the Constitutional Council admitted the legislator a right to transfer competences to overseas territories in constitutional matters. Further, the state cannot raise taxes or customs from overseas collectivities: they belong fully to the competence of the Congress/territorial assemblies.<sup>49</sup>

In the Pacific region there are several statute-based exceptions to the taxation of Metropolitan France: Wallis and Futuna has no income tax and in New Caledonia it was introduced for the first time in 1982 as part of the decentralisation legislation. The value-added tax was similarly introduced to French Polynesia only in the 1990s, but does not exist in New Caledonia or Wallis and Futuna. In high taxation France the three collectivities are like tax havens. Before 1969 the Indians of French Guiana payed no taxes to the French state or DOM but the intensification of administration has changed the situation. The Indians have no more fiscal advantage, as the territory forms an integral part of Metropolitan France. The residents of the Pacific territories are treated similarly to taxpayers living abroad, even if they had a residence in Metropolitan France and Pacific collectivities are treated in fiscal means like foreign countries. Therefore, the General Tax Code is not fully applicable in the overseas collectivities. Nevertheless, all the state's fiscal agreements with the territorial collectivities have the quality of domestic law. Based on the Constitution, all fiscal particularism is based on the state's legal delegation. The delegation of powers creates, however, a fiscal quasi-sovereignty. It gives a territorial collectivity full fiscal power within the limits of the national legislation (in New Caledonia also under territorial legislation). The principle of exclusivity means that the delegated legislation excludes the Metropolitan fiscal legislation belonging to the scope of territorial competence. And finally, the principle of autonomy stresses the triple power to tax, control and sanction. In New Caledonia, the territorial authorities have used their fiscal powers to redirect the allowances to favour the Indigenous provinces.<sup>50</sup>

#### *4.1.7. European Dimension*

French Guiana belongs as an overseas region to the European Union. It means that the EU legislation is there in full force. The Treaty of Rome (TEEC; integrated as the Treaty on the Functioning of the European Union, TFEU) included as a political compromise a special provision for DOM. The European Court of Justice ruled in 1978 that they are an integral part of the European Communities, but that there may be applied particular provisions which take into consideration the particular geographical, economic and social conditions. Their status in the EU is primarily defined by reference to the Constitution. The article was reformed in 1992 with the Maastricht Treaty which mentions as the criteria of particular status the isolation, insularity, topography, small area, difficult climate and economic dependency. In

---

49 DDHC (1789), art. 13; Constitution (1958), art. 34; Sénatus-consulte du 4 juillet 1866; CC, Décision no. 65-34 L du 2 juillet 1965; Aldrich (1993), p. 73; Payé (2001), p. 282.

50 Loi no. 82-1152 du 30 décembre 1982; Loi référendaire no. 88-1028 du 9 novembre 1988, art. 33, 35; CC, *Décision no. 83-161 DC* du 19 juillet 1983; Cour administrative d'appel de Nancy, *Bonnard*, 26 juin 1991; Aubry (1992), p. 140; Arnoux (1996), p. 1624; Payé (2001), pp. 278-285.

The Court of the European Communities ruled in 1991 that according to article 169 of the Maastricht Treaty the state is alone responsible *vis-à-vis* the community law.<sup>51</sup>

Those territories which do not belong to the EU are called Overseas Territories. They include all French Pacific territories. According to the EU's new rules their status can be changed more easily. The European Council can on the initiative of a member state change the status of overseas territories to the outermost region, or *vice versa*. According to the French Constitution the overseas countries and territories are subject to a regime of special association. In article 198 of TFEU is defined the overseas territories position: they are invited to form association agreements with the EU. According to other provisions they can opt for the EU's freedoms, but can claim customs on goods imported by the EU on non-discriminative basis. The EU legislation applies to Overseas Territories only in so far as included to the association agreements. The aim of association is to develop the regions economically, socially and culturally and to favour the interests of their residents. The decisions on association are made by the EU commission. First they were made every five years (1964-1991), but since 1991 the interval has been lengthened to 10 years. The association decisions include cooperation in varying sectors. In the treaty the competent authorities of the overseas establish and submit to the EU a project of indicative programme, which is a common agreement between the union and those authorities. The French Overseas Countries and Territories (PTOM) have an associated, mostly economic bond with the European Union. They are members in ACP agreements. PTOM have the advantage of European common markets with some quantitative restrictions. These tariff restrictions protect the local production from international competition.

The three Polynesian entities are also outside the monetary union. They have since 1946 used the Pacific Franc, which is tied to the value of the euro. The territories also take advantage of European stabilising mechanisms. They may limit the free circulation of persons. They may adopt specific systems of education, which are mutually recognised in the EU. The principle of non-discrimination means prohibition against the discrimination based on services and trade. An exception is the citizenship of New Caledonia, which belongs to the domestic law of France. As French citizens the New Caledonians, Polynesians and Wallisians/Futunians have also the European citizenship. Therefore, the majority of New Caledonians have in fact a triple citizenship. The residents of the Pacific territories have also right to vote in EU countries' municipal elections.<sup>52</sup>

---

51 TEEC (1957), art. 131-136, 227 § 2; Treaty of Maastricht (1992), art. 169; EEC Council, Decision 91/482/EEC, 25 July 1991, Annex 1; ECJ, *Hansen*, 10 October 1978; *Commission v. Italian Republic*, 13 December 1991; Bechtel (2002), pp. 116-117, 121-122.

52 TFEU (2007), art. 113, 198-199, 200, 202; Treaty of Maastricht (1992), art. 8-8E, 182-188; Treaty of Amsterdam, art. 299-2, Annex II; Constitution (1958), art. 72; Sem (1996), pp. 250-282; Bernardi (1998), pp. 165; Bechtel (2002), pp. 131-135; André (2004).

## 4.2. New Zealand

### 4.2.1. Treaty of Waitangi

The Māori see themselves as *tangata whenua* (people of land). The Treaty of Waitangi defines in two different versions their rights and relation to the British Crown. According to Waitangi ideology, in 1840 a new nation was created of two elements - Pākehā and Māori - the New Zealanders. Much of British policy in acquiring sovereignty over New Zealand was based on the Māori's nature as a sedentary agricultural and self-governing people. Before Waitangi, the Pākehā were loosely governed from New South Wales and the first Protestant missionaries arrived on the islands in 1814. The British authorities were first reluctant to take responsibility for the territory, but the attitude changed from the 1830s due to the competition in the South Pacific. In 1838 New Zealand had already a French colony with a Catholic bishop. Also the American whalers' activity increased. The British representatives and missioners encouraged the Māori chiefs to proclaim New Zealand independent under British protection (1835). This act united for the first time the rival Māori groups together. The British Crown recognised the Māori sovereignty and prepared mechanism to justify imposing its own will on the Māori and assuming governance. Since 1839 the Colonial Office saw that the time had come to instigate the British rule and rationalise the land purchases. The Treaty of Waitangi had three objectives: protection of Māori interests, promotion of settler interests, and securing of the strategic advantages for the Crown. Captain Hobson was given the task to implement the Colonial Office's plans for formal arrangement with Māori, which took place in haste.<sup>53</sup>

The missionaries drafted two different versions of the treaty in English and Māori which are today equally authoritative. They have some vital differences: in the English version the Māori cede their sovereignty to the Crown in exchange for a guarantee of continued enjoyment of property, land, fishing and hunting rights, and sale of property exclusively to the Crown. The Māori are promised equal citizenship rights as British subjects. However, in the Māori version the chiefs cede *kāwanatanga* (governance) to make laws for the good order and security of the land, but retain *tinō rangatiratanga*, or authority over their lands, homes, estates, *taonga* (valued possessions) and institutions. Both versions guarantee the Māori property rights. The Māori participants hardly understood the true significance of the treaty. They later regarded it as an instrument of sacred proportions, and since the Kohimarama Conference (1860) they have recognised it as their source of rights. They argue that the treaty affirmed *tinō rangatiratanga*. For them it established a unique relationship between the Māori

---

53 Orange (1993), pp. 1-36; Durie (1998), p. 176.

and Crown, where the sovereignty was exchanged for protection of *rangatiratanga* over the full, exclusive and undisturbed possession of properties.<sup>54</sup>

According to Sian Elias CJ the treaty contained four promises for the Māori: a guarantee of existing rights of property; the promise of authority; the promise of equal treatment and the acknowledgement of relativity. Despite the solemn promises, the treaty was widely disregarded in New Zealand between the 1840 and the 1970s. A long-term policy of the Crown was to amalgamate the Māori to the settlers' framework and governmental institutions. New Zealand's Government never recognised the Maori self-determination along the lines of the Marshall doctrine, and the worst setback took place in 1877, when James Prendergast CJ of the Supreme Court ruled that the Treaty of Waitangi was a simple nullity. Following a minority ideology that denied all legal status of Māori forms of collective political organisation, he reinforced the Crown's sovereignty over the islands. Even the rights vested by the Native rights legislation were illusory. The Māori were only individuals, British subjects. However, when speaking about Crown-Māori relations as acts of state and therefore not examinable by the courts, he was controversial: the nineteenth century practice was that the state could not act by the Crown against its own subjects. The consequence of the decision was that it established the absolute sovereignty of the Crown, where the Treaty of Waitangi showed incapacity to act as qualification to sovereignty. The decision defined New Zealand's official policy for almost 100 years. In 1941 the Privy Council specified the status of the treaty by rejecting the Prendergast CJ's judgment about the treaty as simple nullity. On the contrary, it was a valid treaty of cession but as such it had no enforceable status in municipal law until recognised in statute.<sup>55</sup>

In 1971 the Ministers of Justice and Māori Affairs prepared and submitted to the National Government a paper with the purpose of clarifying the status of the treaty. The paper recommended instead of ratification or the incorporation of treaty to the municipal

54 Treaty of Waitangi (1840); Havemann (1999), p. 207; Anaya (2004), p. 188; Palmer (2008), pp. 62-63. "Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Land and Estates Forest Fisheries and other Properties which they may collectively or individually possess so land as it is their wish and desire to retain the same in their possession... Her Majesty the Queen of England extends to the Natives of New Zealand Her Royal protection and imparts to them all the Rights and Privileges of British subjects. / Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirenī te tino rangatiratanga o ratou wenua o ratou kainga me o taonga katoa.... Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani. Cf. Treaty of Waitangi, art. 2-3. In Māori *kāwanatanga*, a biblical word, has lesser meaning than in English equivalent being a mere vehicle of sovereign authority. In 1840 the Māori had no experience about the meaning of central government. *Mana*, used in the Declaration of Independence (1835), would have opened better to Māori experience. *Mana* can be divided to *mana atua* (sacred power of gods), *mana tūpuna* (power handed down through chiefly lineage) and *mana whenua* (power associated with the possession of lands). Also *rangatiratanga* is borrowed from the Bible, originally used in the Lord's Prayer in the meaning "thy kingdom come"; Significant in defining the treaty policy was also the Orakei Māori Conference (1879), which stressed the treaty as a covenant of peace and unity.

55 NZSC, *Wi Parata v. Bishop of Wellington* (1877), p. 78; JCPC, *Hoani Te Heu Heu Tukino v. Aotea District Maori Land Board* (1941), p. 338; Havemann (1999), pp. 450-451, 456; Sharp & McHugh (2001), p. 209. Paul McHugh describes the *Wi Parata* case as a precarious aftermath of the Māori wars. A similar discussion on indigenous rights was actively debated in North America at the same time. He estimates that Prendergast took a deliberately different direction than the United States Supreme Court.

law consultation with the Māori Council and promotion of special Waitangi Day. This was not enough for the Māori. Matiu Rata, the Minister of Māori affairs (1972-1975) was a driving force in the Labour government to give the treaty a statutory basis. The Government established in 1975 the Waitangi Tribunal (WT), deligated the treaty's interpretation to it and incorporated the treaty into law. Despite this, New Zealand's courts have been unwilling to enforce the treaty as a freestanding source of rights. It is only enforceable in the courts when incorporated by statute. A real change took place in 1985 when WT's jurisdiction was retrospectively extended. Thereafter most of the Māori litigation in New Zealand has been based on treaty rights. The first statute to uphold the treaty was the Treaty of Waitangi Act 1975. During the last quarter of the twentieth century a reference to the treaty was included in 14 statutes.<sup>56</sup>

In 1985, the governmental White Paper proposed, following Canadian legal development, to render the Treaty of Waitangi part of the country's supreme law and to incorporate the treaty as a schedule to the new Bill of Rights. This would have made the treaty rights enforceable by the courts with a promoted significance among the human rights. The Māori felt, however, that if the treaty was included to general law it would loose its *mana* and finally the suggestion was dropped from the final version of the Human Rights Act.<sup>57</sup>

A remarkable breakthrough took place in case law from 1986 when the High Court in *Te Weehi* recognised the Native title. The treaty was even interpreted to be generally relevant to the exercise of statutory discretions. In *Huakina Development Trust v. Waikato Valley Authority* (1987), the Court of Appeal held that the consistent recognition of treaty by parliament has made it part of the fabric against which public officials make decisions and exercise their discretion. The principles are part of law and it is the courts' task to determine the scope of a particular law. In the Maori Council trilogy (1987-1990) the court admitted the continued reality of Māori tribalism and overturned part of *Wi Parata* – doctrine. The court ruled that the treaty is founded upon the Crown's protection of *rangatiratanga* in exchange for the acquisition of sovereignty over their territory. The most important treaty principle is partnership which requires both parties to act reasonably and on the basis of good faith and ongoing negotiation. The parties have mutual duty on reasonable co-operation. Other principles are active protection of *taonga* and redress of grievances. There is a profound moral obligation to protect Māori rights and to preserve their culture which flows from the treaty. These responsibilities are analogous to fiduciary duties.<sup>58</sup>

The Labour Government answered in 1989 to the challenge of case law by releasing its treaty principles: 1) *kāwanatanga* principle: the Government has the right to govern and to make laws; 2) *rangatiratanga* principle: *iwi* should have the right to organise as *iwi* and the control under the law their own resources; 3) principle of equality: all New Zealanders

---

56 Healing the Past, Building a Future (2002), s. 56; Havemann (1999), pp. 259-261; Spiller (2001), p. 181; Palmer (2008), p. 179; Richardson & Imai & McNeil (2009), p. 288. There has been also criticism against the inclusion of the treaty in legislation. In 2006 a single MP introduced the Principles of the Treaty of Waitangi Deletion Bill.

57 Havemann (1999), p. 259. The White Paper was influenced by the constitutional reforms of Canada three years earlier.

58 NZCA, *Huakina Development Trust v. Waikato Valley Authority* (1987); *New Zealand Maori Council v. Attorney General* (1987). Partnership replaces in court's language sovereignty and respective notions.

are equal before the law; 4) principle of reasonable cooperation: the government and *iwi* are obliged to accord each other cooperation on major issues of common concern; and 5) principle of redress: government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation could occur. In 1990 the National government amended the *kāwatanga* principle to indicate that the Government should govern for the common good. The principle of *rangatiratanga* was extended to reflect self-management within the scope of law. In 1993 the same Government published a strategic objectives document Path to 2010, which promised to continue working towards an agreed understanding of the place of the treaty in New Zealand society.<sup>59</sup>

Although the Court of Appeal preserved the doctrine of Crown sovereignty, its new case law gave impetus to governments. The golden age of Māori legislation was in 1985-1993, and was initiated by both the Labour and National governments in response to the changes in WT and in society in general. The Crown recognised in legislation the significance of treaty to public life. Statutory schemes have been expressly subjected to the principles of the treaty. The treaty considerations have, therefore, influenced both the legislative process and the content of statutes. The subsequent case law has shaped executive and administrative authority. Māori consultation and the element of consent have been woven into the fabric of public decision-making. Also the passing of Bill of Rights Act 1990 and Human Rights Act 1993 made a number of human rights observable even with direct reference to the treaty. The acts are enforceable in the courts against actions by the government. Even later the status of the treaty has been in focus. In 2004 Prime Minister Clark appointed a Royal Commission on the New Zealand Constitution which included in its items the status of the Treaty of Waitangi.<sup>60</sup>

The courts have developed common law principles that synthesise the treaty and Indigenous rights elements. In the decision of *R. v. Symonds* (1847), the Court of Appeal ruled that the treaty is binding on the Crown. In *Huakina Development Trust v. Waikato Valley Authority* (1987) the same court used the treaty as an aid to interpret the law. Also the Waitangi Tribunal's definition of treaty principles has been of major importance. Its recommendation in the *State-Owned Enterprises* case (1986) led the parliament to amend the State Owned Enterprises Act 1986 to include the ss. 9 and 27. According to s. 9 the Crown has to act in a manner consistent with the treaty principles. Section 27 guarantees the land rights under transfers to SOE. The Maori Council made application to the High Court by saying that the SOE Act needed clarification: the ss. 9 and 27 were contradictory and the breach of provisions was still evident. Later the Court of Appeal gave a direction that within 21 days the Crown was to prepare a scheme of safeguards that pre- or post-Act Māori claims to the tribunal would not be prejudiced. The scheme was to be submitted to the New Zealand Māori Council for agreement or comment within a further 21 days. The conclusion of the court was that the principles of the treaty were to override everything else in the SOE Act and the treaty partners were to act towards each other reasonably and with the utmost good faith. The consequent negotiations led to the Treaty of Waitangi (State Enterprises) Act 1988 with safeguards and new arrangements.

---

59 Durie (1998), pp. 204-206; Havemann (1999), p. 209.

60 Spiller (2001), p. 180; McHugh (2004), pp. 417-422, 508.

In *Ngai Tahu Reports* (1991-1992) WT has stressed the overarching principle of exchange with inherent reciprocity to have paramount importance. The principles of active protection, right of redress for past breaches and duty to consult are subordinate within it. The *Napier Hospital Report* (2001) has identified the relevant principles of active protection, partnership, equity and options, and the duties of good faith and consultation. The courts have adopted a view according to which the treaty's history, form and place in social order require its broad, unquibbling and practical interpretation. The treaty has created an obligation for the Crown: the relationship should be founded on mutual and reasonable cooperation in the utmost good faith and trust. The wording of detailed and specific provisions of acts must be interpreted, applied and enforced in the light of what they have determined the treaty means generally. In cases of ambiguity the courts may consider the application of general meaning of the treaty to the case before choosing the meaning consistent with the legislator's purpose.<sup>61</sup>

Paul McHugh has named three areas of common law rules by which the treaty may receive recognition. Common law principles of aboriginal rights affect the status of tribal societies upon the Crown's acquisition of the sovereignty of their territory. The Crown claims sovereign title and exercises a constituent power in a given territory. The statutes have an ultimate and overriding effect. This approach gives the treaty an incidental value. A treaty-driven approach aims to find ways in which treaty rights are incorporated into the legal fabric of the country. It gives more central weight to treaty *mana* and wants to promote its legal status. The conventions and *jus cogens* of the international law have also influenced New Zealand's legislator. Especially the solutions in other common law countries have been taken into account.<sup>62</sup>

The treaty establishes a quasi-legal framework whose political frame of reference is invoked to challenge existing practices, encourage Māori perspectives in policy and administration, facilitate expression of *tino rangatiratanga* and the Māori share of national resources, and foster the principle of bilateral input for post-colonial Aotearoa identity formation. The Crown acknowledges that it is formally bound by the Treaty's partnership principle to acknowledge the collective and inherent rights of the Māori for self-determining control over *taonga*. Reference to *tino rangatiratanga* defines what rightfully belongs to the Māori as the original occupants and treaty signatories. With *tino rangatiratanga* as a legitimating principle, the different *iwi* are seeking control over the decision-making process in conjunction with the power and resources to implement decisions in a way that fosters positive outcomes. There are, however, different readings of the notion focusing on the empowerment, self-determination, territorial and cultural aspects. Mason Durie has stressed it as the development of Māori policy by the Māori as part of the special covenant with the Crown and the responsibility of the Māori over their own affairs at *iwi* and national levels. The scope of *rangatiratanga* is

---

61 State Owned Enterprises Act 1986, ss. 9, 27; JCPC, *Hoani Te Heu Heu Tukino v. Aotea District Maori Land Board* (1941), p. 322; NZCA, *R. v. Symonds* (1847); *Huakina Development Trust v. Waikato Valley Authority* (1987); WT, *State Owned Enterprises Report* (1986); *Ngai Tahu Report* (1991); *Ngai Tahu Sea Fisheries Resource Report* (1992); *Napier Hospital Report* (2001); Durie (1998), p. 183-184; Alves (1999), pp. 75-76; Palmer (2008), pp. 127-128, 182.

62 McHugh (1991), pp. 69-71. The Canadian and Australian case law has been referred several times during the last few decades in indigenous questions, but the reasoning in New Zealand's courts has a strong domestic flavour.



expansive. It prevails at the level of *mana whenua* with implication of *iwi* control of resources and rights to negotiate directly with the Crown for grievance resolution. It must also prevail at the *mana tangata* level with recognition of Māori rights to organise according to a range of social and political groupings.<sup>63</sup>

#### 4.2.2. *Tino Rangatiratanga*

*Tino Rangatiratanga*, which means exercise of paramount authority, power, sovereignty and autonomy, is an important expression for Māori self-esteem. Nevertheless, the Māori as a collective group is a relatively young definition, born out of encounter with the Pākehā. In legislation Māori was defined in the Electoral Act 1893 as follows: “an aboriginal inhabitant of New Zealand, and includes half-castes and their descendants by Natives”.<sup>64</sup> In the Maori Housing Act 1935 the definition was “a person belonging to the Aboriginal race of New Zealand, and includes a person descended from Native”.<sup>65</sup> In legislation the blood and lifestyle were usually set as the basis for status. In New Zealand a “half-caste Māori” was included in the statutory definition of a Native. They were able to hold the status if living as members of some Māori tribe or community. The Native Land Act 1909 eliminated the lifestyle definition and introduced a 50% blood quantum. The quota limited the Māori status in law but did not influence the freehold ownership to land. The Native Land Court was given powers to determine whether a person was a Māori. The Native Land Amendment Act 1912 allowed a Māori to be declared European by the Order in Council. The quantum was still included in Birth and Deaths Regulation Act 1951 and Electoral Act 1956 which included three categories: more than 50% Māori required enrollment to the Māori electorate, under 50% Māori to the European electorate and half-castes who were able to choose their category. The Hunn Report (1960) recommended the retaining of the quantum, possibly raised to 75% to limit the government’s responsibility to the Māori. It was ultimately believed that the Māori would assimilate with the ethnic majority but the times were changing and the quantum was finally abolished from the legislation in 1993.<sup>66</sup>

After the Treaty of Waitangi the British authorities extended some legal recognition to the pre-existing Māori system of government and law, i.e. there was presumption of continuity. Attorney General Swainson argued in the 1840s that the tribes, which had not signed the treaty, were independent *vis-à-vis* the Crown. He wanted to define the limits where sovereign power and authority could be justly and effectively exercised, and suggested as a transitional measure Native Districts where Māori custom would prevail. The idea was transferred to British legislation in s. 71 of the Constitution Act 1852. It was born in a situation where the Māori were still dominant in society. Nevertheless, the prevailing feature of Māori policy was from the late 1840s assimilation. Settlers believed that Māori would soon disappear as their

---

63 Havemann (1999), pp. 207-208. The major courts have recognised the treaty’s constitutional value: the Court of Appeal in 1987, the Waitangi Tribunal in 1991 and the Privy Council in 1993.

64 Electoral Act 1893, s. 148.

65 Maori Housing Act 1935, s. 2.

66 Native Land Act 1909, s. 24(2); Havemann (1999), p. 204; McHugh (2004), pp. 217, 275-276. In 1912-1931 only 76 Māori changed their status; in 1961, 51.5 % of Māori declared themselves as full-blooded.

numbers diminished and the Native Districts were never realised. In 1861 Governor Gray tried to slow down the advance of the Māori King Movement through several measures. The Native Affairs Department was established to displace the independent Māori management of their own affairs. At the local level village *rūnanga* (council) under resident magistrates and district *rūnanga* under civil commissioners were created with limited powers to make bylaws. Their funding and administrative support was increased. In some districts they were used as a means to connect the local tribes to the official administration and to advance the sale and lease of Māori lands. The experiment did not last long: the councils were neglected in the midst of Māori wars when it became obvious that the Māori were not willing to abandon their traditional structures.<sup>67</sup> The Native Territorial Rights Act 1858 recognised for a while the existence of tribes but the Native Land Acts of 1865 and 1873 following the war had already strong de-tribalising features.<sup>68</sup>

In a meeting at Waitangi in 1881 the government expressed a demographic message: the Māori were too few to obtain separate rights. The Native Department was temporarily abolished in 1892. Despite this, the Māori recognised the queen's authority but wanted more self-determination. They sent several petitions that the Native districts would be established, and visited in Britain in 1882-1883 and 1913 to meet Queen Victoria and King George V. The Imperial Government, however, returned the petitions to the dominion's government as internal matters. Despite the neglecting reception the Rātana Church sent in 1924 a petition to King George V asking that the Treaty of Waitangi should be ratified as a constitutional document. In 1883 total of 12 *hapū*-level Māori committees were created to answer the Māori demands but they had little meaningful powers. The situation improved at the turn of the century during James Carroll's ministry in the reestablished Native Department. New legislation (1900) gave more local authority to tribes in questions of land, health, sanitation and the consumption of alcohol. The beginning was promising. Even *kingitanga* (Māori king movement) accepted the local councils when King Mahuta was granted a seat in the national Parliament. Pākeha were still annoyed by the slow development of land sales and soon the Maori Land Councils were striped of their powers, the Māori were left outside the councils, and in 1905 they became Maori Land Boards with powers in questions of health and sanitation.<sup>69</sup>

From the 1920s the Native Department adopted a more social role. In the same decade Maori Trust Boards were created, based on specific land and resource issues to administer the money which was awarded in settlement of *raupatu* (confiscation) claims. The Maori Trusts Board Act (1955) unified their governing pattern. The trust boards became subject to ministerial oversight and audit, and existed alongside the customary political structures.<sup>70</sup>

---

67 Constitution Act 1852 (UK), s. 71; Native Circuit Court Act 1858, s. 1; Native Districts Regulation Act 1858, s. 1; Native Council Act 1860, ss. 2-3; Orange (1993), pp. 110-111, 162; O'Malley (1998), p. 22-25; Havemann (1999), pp. 383-385.

68 Native Territorial Rights Act 1858, s. 1; Native Lands Act 1865, ss. 21-54, 67-71; Native Land Act 1873, ss. 21-33.

69 Native Committees Act 1883, ss. 3-4; Maori Councils Act 1900, ss. 6-15; Maori Lands Administration Act 1900, Preamble, ss. 4-7; Orange (1993), pp. 199-202, 205-206, 212, 228; Havemann (1999), pp. 390-391; Hill (2004), pp. 32-33, 38; Williams (2006), p. 123; James Carroll was himself half-Māori.

70 Armitage (1995), p. 158; McHugh (2004), pp. 272, 347, 423, 516.

World War II gave the Māori a more prominent role in public life. Sir Apirana Ngata suggested establishing a Māori military unit and in 1939 the 28<sup>th</sup> Maori Battalion was created on a tribal base. Two years later Parere Paikea initiated the organising of the Maori War Effort Organisation which offered a unique opportunity to show the Māori capacity in leadership and planning. Its committees were in Māori hands and applied Māori values. Although they were not financed by the government, they gave the indigenous community an important public role and showed their capability to arrange local administration.<sup>71</sup>

The reforms did not completely disappear with the end of the war. Prime Minister Fraser supported moderate Māori aspirations to prevent the rise of a more large-scale Māori nationalism. The Native Department was central to his plans. It was renamed in 1945 as the Department of Maori Affairs. Under the government's control were established elective local committees and executive committees as part of the Department's organisation, taking advantage of wartime experience of tribal structures. The executive committees were given powers to promote self-dependence, thrift, pride of race and conduct conducive to their well-being. The Māori villages, registered in the Maori Land Court were designated as basic units. Within three years 85% of Māori organisation were under the system which was based on rural population.<sup>72</sup>

The changing environment and urbanisation challenged, however, the existing system. The Hunn Report (1960) showed that there was no return to the old. It suggested instead an integration policy which would combine Māori and Pākehā elements to form one nation with distinct cultures. The differentiation in statutory law should be gradually eliminated. The Department's role should be in the future in the field of interdepartmental policy and new structures would facilitate Māori contributions to this policy. The National government introduced in 1962 a nationwide New Zealand Maori Council (NZMC), to advise the government on Māori policy. Under its control is a hierarchy of regional and local Māori committees: the Maori District Committees, Maori Executive Committees and Maori Committees with respective geographical areas. They do not follow the tribal *rohe* but activate Māori participation as a formal network of representation. NZMC was intended to operate in the extra-parliamentary sphere "to consider and discuss measures which shall consult and promote harmonious and friendly relationship between the Maori race and the other members of community", but it became an active force in national Māori policy in defending their rights in settlements and litigation. It has been able to influence the appointments of Māoris on government-appointed committees and the Waitangi Tribunal and the modification of the legislation to consider Indigenous aspects. In 1979 the government allowed it to prepare a draft of the Maori Affairs Bill and four years later the council published a programme, which based all land and cultural legislation on Māori philosophy.<sup>73</sup>

In the early 1970s the Labour government included the Māori self-government to its official policy, based on *tino rangatiratanga*. The Department of Maori Affairs was restructured in

---

71 Havemann (1999), p. 392; Crawford (2008), pp. 4, 238. During the wartime the Maori War Effort Organisation had 315 tribal committees in 21 zones and 41 tribal executive committees.

72 Maori Social and Economic Advancement Act 1945, s. 12 (a)(ii); McHugh (2004), pp. 272-273; Crawford (2008), p. 244.

73 Maori Community Development Act 1962, ss. 8-18; Walker (1984), p. 9; Armitage (1995), pp. 145-146; McHugh (2004), pp. 347-349.

1975: it no longer governed the Māori but became a Māori-run unit to assert Indigenous presence within New Zealand's Government. In the late 1970s Kara Puketapu, the Secretary for Maori Affairs, developed *tū tangata* – policy, a community based philosophy to encourage the planning and implementation of policy and programmes for Māori at the local level. This policy of Māori autonomy was part of the state's devolution policy. The Labour Government's policy statement Te Urapare Rangapū prescribed the role of *iwi* in policy advice and the delivery of Government programmes. The Government agencies were required to consult with *iwi*, to form partnership with them and devolve them resources. There were established different *kōkiri* units or building blocks. The Department's top-down policy was shifted to a bottom-up philosophy. The assimilation policy had ended and had been replaced by recognition of diversity in society.<sup>74</sup>

In 1984 the Labour Party started a free market economy and privatisation programme which signified to the Māori a growing tribal responsibility in health, education, welfare, economic progress and greater autonomy. This was for them both a challenge and possibility. The country was moving beyond multiculturalism while the government cautiously recognised the Māori quest for political and cultural self-determination. In 1988 the Minister of Maori Affairs released a policy document, He Tirohanga Rangapū which contained a vision and strategy to guide Māori towards greater independence at the tribal level with reduced dependency on the state. The Ministry of Maori Affairs was restructured and the Iwi Transition Authority was set up to oversee the formation of *rūnanga iwi*, which were established in 1990.<sup>75</sup>

The Waitangi Tribunal had showed that *tino rangatiratanga* refers to tribal self-management as local government. The question of *iwi* authorities was vital when dealing with the distribution of the pre-settlement fisheries assets and the settlements. The tribes had to show that they had an appropriate infrastructure to manage settlement packages. Three first settlements were negotiated by tribal trust boards but more was needed. The Runanga Iwi Act 1990 was a short-lived child of the Government's privatisation policy which wanted to strengthen the *rūnanga* as legal person to work as an authoritative voice of *iwi* in their dealings *vis-à-vis* the Crown. The act included objection procedures and resolution mechanisms and the Maori Land Court was given a facilitative and interpretative role. The act was unpopular among the Māori as an attempt to force a customary structure to statute form and as failure to recognise the *hapū* and *whānau* levels of traditional Māori governance. The Act survived for only one year as the new parliament repealed it. The Resource Management Act 1991 inherited a number of *tangata whenua* provisions from the repealed statute, including references to *iwi* authorities and *rūnanga*. Several *iwi* have returned the *rūnanga* structure in another form, as trust boards or instead of them. They represent *iwi* in its dealings with the Crown and local government.<sup>76</sup>

74 Armitage (1995), pp. 147-148, 158; Havemann (1999), p. 394.

75 He Tirohanga Rangapū (1988), p. 13; O'Sullivan (2007), pp. 2-3.

76 WT, *Muriwhenua Fishing Claim Report* (1988), p. 187; Durie (1998), pp. 225-226; McHugh (1991), pp. 52-53. Cf. Te Runanga o Ngati Porou Act 1987, ss. 3-4; Te Runanga o Ngati Whatua Act 1988, s. 4; Te Runanga o Ngai Tahu Act 1996, Preamble, ss. 6-7, 19, 29; Ngati Awa Claims Settlement Act 2005, Preamble, (6); Te Runanga o Ngati Awa Act 2005, ss.5-6. Ngāi Tahu and Ngati Awa have abolished their trust boards and have statute based *rūnanga* structure.

The Labour government established a Māori Economic Development Commission to create a research and policy unit, an Economic development programme and transfer responsibilities to tribal groups. Later the commission suggested loans and training for Māori small businesses. The subsequent Mana Enterprises Scheme (1985) was the first real test of a delivery system for government programmes. It was created to facilitate the entry of Māori into business and to reduce their unemployment. Loans were distributed to potential business through *iwi*, urban Māori organisations, the Māori Women's Welfare League and the Rātana Church. Funds were allocated to various Māori projects by the Department, which encouraged the Māori to enter the commercial world. Another similar governmental initiative was the Maori Development Corporation (1987), which offered support also to medium size Māori businesses. At the national *hui* (meeting) of Taumata were defined six major themes for the decade. They were the Treaty of Waitangi; *tino rangatiratanga*; *iwi* development; economic self-reliance; social equity; and cultural advancement. The Labour Government raised the *iwi* development as the preferred focus for Māori development. Several Government functions were devolved to tribal authorities.<sup>77</sup>

In 1991 the National Government published its own programme *Ka Awatea*, which redirected the strategy for Māori development. The new document turned the direction again back towards governmental responsibility, stressing education, training, health and economic resource development. It stressed a greater enhancement to meet Māori aspirations, reduced substantive programme delivery and a stronger policy and monitoring role of the Ministry. The *iwi* principle was maintained. The most visible result of *Ka Awatea* was that both the Ministry of Maori Affairs and Iwi Transition Agency were abolished in 1992 and replaced in 1994 by *Te Puni Kōkiri* (Ministry of Māori Development) whose core areas are education, training and employment, health and economic resource development. Since restructuring its prime task is to function as a policy advisor to the government. It monitors mainstream departments' provision of services to Māori and develops ethnicity data. It has regional offices with knowledge of local communities which strengthen the Crown relationship at the *iwi* and *hapū* level.<sup>78</sup>

Based on treaty policy, Mason Durie has divided the modern goals of Māori self-determination into a commitment to strengthen economic standing, social well-being and cultural identity; enhance dimensions of power and control in better self-management of natural resources, encourage greater productivity of Māori land, promote of good health, promote sound education, promote the use of Māori language and decision-making that reflect Māori realities and aspirations; and promote change. To the wider context belong the aspects of Māori history, demography, the national economic reform, state restructuring and indigenous development in general.<sup>79</sup>

At the local level the Local Government Act 1974 compelled the Regional Councils to acknowledge the Māori values. The Māori Local Government Reference Consultation Group was established to promote Māori perspectives. The Local Government Act 2002 includes a reference to the Treaty of Waitangi and conceives its principles in more specific terms and

---

77 Ritchie (1995), pp. 125-126; Durie (1998), pp. 10-12.

78 Ministry of Maori Development Act 1991, ss. 5, 8; *Ka Awatea* (1991); Durie (1998), p. 9, 11; Alves (1999), p. 80.

79 Durie (1998), pp. 5, 13.

Māori participation in decision-making processes and fosters the development of Māori capacities to make contributions. The Māori participation is, however, left to the consideration of local authorities. The Auckland (1986-1992) and Bay of Plenty (2001-) regions have proved the Māori mandates in City/Regional Councils, but only the latter experiment has been lasting. To Auckland was instead, after the Royal Commission's recommendation, established the Maori Advisory Board, which has a non-binding consultative role before the city council. It promotes cultural, economic, environmental and social issues of significance for *mana whenua*. The Local Government Act 2002 recognises the urban Māori groups as it refers to both *kaupapa* (purpose-based) and *whakapapa* (genealogical) groups. The governmental reports on local government issues recognised many challenges with local governance of Māori affairs, including a lack of information and uncertainty. A major part of this process was the implementation of the reforms brought by the Resource Management Act 1991.<sup>80</sup>

The New Zealand Law Commission has in its report (2006) defined *hapū* and *iwi* as the main Māori political units. A challenge are the urban Māori who do not identify with any particular *iwi*. Different Maori collectivities like corporations and trusts do not always fit well into the mainstream legal system. The Commission recommended creating a special corporate vehicle *waka umanga* with some characteristics of a corporation but leaving most of the internal arrangements to a charter developed by the Maori collectivity. *Waka umanga's* basic unit would be *hapū*. It was designed to meet the organisational needs of tribes and other Māori groups who manage community-held assets. A viable group should have had at least 50 members. Fifteen people were needed to propose or oppose the creation of *waka umanga* and the disputes would be brought to the Maori Land Court. Besides the minimum size of *hapū* there are no other imposed criteria. The proposal allowed the tribes to form their own *waka umanga* by developing a model which best suits their own culture, tradition and requirements. The critics of the plan were, however, afraid that it would restrict *mana motuhake* (self-determination) with criteria which are a prerequisite to settlement of claims. One idea behind *waka umanga* was to speed up the resolution of treaty claims. In 2008, the process to the law of the Waka Umanga Bill 2007 was stopped due to the Conservative opposition's and the *iwi* and *hapū* organisations' will to preserve the self-determination of traditional structures and make essential changes to the draft.<sup>81</sup>

#### 4.2.3. Settlement Policy

There are three ways by which to make treaty claims: through litigation, by formal inquiry of the Waitangi Tribunal and its mediation or by direct negotiation with the government. The litigation has been a costly and limited way to lay pressure on the Crown. The courts follow the reasoning of the Privy Council in *Hoani Te Heuheu Tukino* (1941), according to which they can only make findings on the treaty if expressly mentioned in legislation. The governments have preferred an *iwi*-based negotiation process with larger units. This has been

80 Local Government Act 1974; Local Government Act 2002, ss. 7, 40, 67, 108; Local Government (Auckland Council) Act 2009, s. 81; Hayward (2003), pp. 5-6, 104-110; McHugh (2004), p. 507; Anaya (2011), pp. 16-18.

81 Waka Umanga (2006), pp. 150-152; Aho (2006), pp. 117-118; McKay (2011), pp. 68-69, 71, 91, 94.

also the basis for the advisory work of *Te Puni Kōkiri's* regional offices. The Labour government published in 1989 the Principles for Crown Action which defined the settlement principles: the Crown acknowledges explicitly historical grievance; the resolution of outstanding claims should not create further injustices; the Crown has a duty to act in the best interest of all New Zealanders; the settlements must be durable, fair, sustainable and remove the sense of grievance; the resolution process is consistent and equitable between the parties; nothing in the settlements will remove, restrict or replace Māori rights under the article 3 of the treaty; and the settlements will take into account fiscal and economic constraints and the ability of the Crown to pay compensation.<sup>82</sup>

The following National Government established in 1989 a Crown task force and the Treaty of Waitangi Policy Unit (since 1995 the Office of Treaty Settlements, OTS) under the Ministry of Justice to oversee and manage negotiations, implementation and the acquisition and disposition of Crown-owned property for settlements. Its requirements ask the claimants to produce a deed of mandate identifying those authorised to negotiate. Direct negotiations include negotiations with groups representing all Māori (comprehensive negotiation), with tribes for tribal interests (tribal negotiation) and with particular Māori leaders (leadership summits). The form of governance entity is left to the Māori with the condition of adequate representation, full accountability, transparent decision-making and dispute-resolution procedure. In OTS policy the settlements have three aspects of redress: the settlement addresses the claimants' *mana* by giving an agreed historical account of injustice and apology; financial and commercial redress so that claimants could build an economic base; and cultural redress to protect *wāhi tapu* and *wāhi whakahirahira* (sacred and significant sites) through ownership or *kaitiātanga* (guardianship). The special relationship of Māori in *rohe* is recognised. A governance entity is in charge of settlement assets. It must be approved by the claimant group and to represent them.<sup>83</sup>

In 2000 the settlement policies and processes were reviewed. The Crown was to be guided following the key principles: good faith; restoring and strengthening the treaty relationship; redress relating to treaty breaches; fair and consistent treatment of claims; transparent information for claimants; the promotion of greater understanding of treaty settlements for the public; and the principle that settlements can be negotiated only between the claimants and government. In 2002 the Law Commission recommended a new statute-based model settlement entity to be created by which a settlement group could receive and administer the transferred assets and to handle also wider matters. It would be founded on stewardship, transparency, accountability to membership and internal dispute resolution.<sup>84</sup>

Before the beginning of the negotiation the claimants have to identify their interests in a negotiation brief which clarify the grievances, identify the affected area, included commercial Crown assets, culturally important sites and interests. An agreement in principle, earlier also heads of agreement, are steps leading to a deed of settlement. They are formal documents which state the nature of a settlement in detail. An agreement in principle is outlined in a

---

82 JCPC, *Hoani Te Heuheu Tukino* (1941), p. 322; Principles for Crown Action (1989); A Guide for Departments on Consulting with Iwi (2003), pp. 6, 19.

83 Durie (1998), pp. 188-189; *Healing the Past* (2002), p. 84; Treaty Negotiations (2003), p. 17; McHugh (2004), p. 515; The OTS' role has increased with the growth of direct negotiations.

84 Treaty Negotiations (2003), p. 7; McHugh (2004), p. 517.

letter from the responsible minister to the claimant representatives, covering the main parts of the proposed settlement. The next step is a draft deed of settlement which as a detailed document states the terms of the comprehensive and final settlement between the Crown and the claimant group, the Crown's acknowledgement and apologies, and final and cultural redress. If a clear majority of *iwi* members support the deed of settlement by a postal ballot, the parties may sign it. A deed of settlement demands a final stage which is a statute enacted by the parliament and confirmed by governor general's royal assent.<sup>85</sup>

The process has taken place in a twin-track claims-settlement process of direct negotiation and WT hearing. The SOE property, the mineral, geothermal and hydroelectric resources are usually excluded from the settlement packages. The Government has reached 22 historical settlements between the Crown and different Māori groups, providing for compensation payments totaling about \$ 1 billion. The New Zealand Government has set as a goal the end of the treaty claims before 2020. Each settlement has been different: they have demanded plenty of groundwork of definition, hearing and negotiation. Particularly difficult have been the negotiations on conservation estates of common interests to all.<sup>86</sup>

The first modern claims settlement was made by the National Government in 1992, concerning the sea fisheries settlement. The treaty-based settlement policy with *iwi* started in 1994. At the end of the same year the Government introduced a fiscal envelope which intended to provide a durable, full and final settlement for historic claims, based on direct negotiations on an *iwi-by-iwi* basis. The intention was to limit as non-negotiable the total value of all claims to \$ 1 billion which was to be distributed over a ten years period and covering all costs of the settlement policy. The government's idea was to return all property rights which the compromise in negotiations would indicate as being fair. In the absence of sufficient property rights there would be offered cash and assets. Category A included land of special cultural, historical or spiritual significance, and category B other sites of special significance: lakes, river beds and mountains. In Category C areas conservation values would be maintained. Where the changes to common heritage were involved, the maintenance of provisions for public access and quality of stewardship would be part of the settlement. Sir Hēpi Te Heu Heu gathered three nationwide *hui* at Hirangi where Māori rejection of the plan - inconsistent with the principles of honour and good faith - was unanimous. The Bolger government did not include treaty principles among the settlement principles but promised to acknowledge the historical injustices and to act in the best interests of all New Zealanders. The durable settlements had to be fair, sustainable and remove the sense of grievance; make sure that the resolution process was consistent and equitable between the claimant groups; exclude article 3 rights in the treaty on royal protection and citizenship; and make sure the settlements take into account fiscal and economic constraints. The Māori representatives answered that the claims should be primarily guided by the principles of natural justice. Among interests of natural resources they listed the ownership, use, value and regulatory

---

85 Treaty Negotiations (2003), pp. 25-27; Office of Treaty Settlements.

86 Alves (1999), pp. 78-79; Treaty Negotiations (2003), p. 34; McHugh (2004), p. 536; Richardson & Imai & McNeil (2009), pp. 387, 395, 418.



interests. The new coalition government finally ended the financial cap as a political promise to the Māori and focused on the final settlements as being benchmarks.<sup>87</sup>

The settlements are based on guiding treaty principles. They do the following: recognise the tribal *rohe*; include acknowledgement, apology, and cultural and commercial redress; bind to the Crown; and are as historical settlements always final. The financial compensation has already passed the \$1 billion level.<sup>88</sup> Two early claims, Tainui and Ngāi Tahu, are good examples of settlements due to their large quantity of loss and breach. The National Government used on them an amount from all the settlement funding that was comparable to their quantum in relation to the fiscal cap. The Tainui Confederation, the dominant element of the Māori Kingdom, had the largest *raupatu* claim on lands confiscated in 1863 by the New Zealand Settlement Act 1863 (4,865 sq km). The claim process had a long background: Based on the recommendations of the Sim Commission (1927) the Waikato-Maniapoto Maori Claims Settlement Act 1946 was enacted which established the Tainui Maori Trust Board. The government offered £ 6,000 for 50 years and then £ 5,000 each year, which was increased further in 1955. In 1979 an advance payment allowed farming land to be purchased. Together with the Nga Marae Toopu representing 120 *marae*, the board participated in the negotiations with the Crown. The final Tainui Settlement (1995) included the return of 158 sq km of land, an apology from the Queen and monetary compensation of \$170 million. The tenants received guarantees and the tribe withdrew its claims over coal mines and conservation estates. The Tainui Maori Trust Board was replaced by Te Kauhanganui O Waikato, an incorporated society

87 Durie (1998), pp. 190-194; Alves (1999), pp. 76-77, 81; Mutu (2011), p. 57. The modern iwi settlements reached were the following: Treaty of Waitangi Fisheries Settlement (1992); Ngāti Rangiteaorere Settlement (1993); Ngāti Whakaue Settlement (1994); Hauai Settlement (1995); Waikato Raupatu Claims Settlement (1995); Waimakuku Settlement (1995); Rotoma Settlement (1996); Te Maunga Settlement (1996); Ngāi Tahu Claims Settlement (1997); Ngāti Tūrangitukua Claims Settlement (1998); Pouakani Claims Settlement (1999); Te Uri o Hau Claims Settlement (2000); Ngāti Ruanui Claims Settlement (2001); Ngāti Tama Claims Settlement (2001); Ngāa Rauru Kītahi Claims Settlement (2003); Ngāti Awa Claims Settlement (2003); Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement (2003); Maori Commercial Aquaculture Settlement (2004); Te Arawa Lakes Settlement (2004); Ngāti Mutunga Claims Settlement Act (2005); Te Roroa Claims Settlement (2005); Affiliate Te Arawa Iwi and Hapu Claims Settlement (2008); Central North Island Forests Land Collective Settlement (2008); Port Nicholson Block Claims Settlement (2008); Waikato-Tainui Raupatu Claims Waikato River Settlement (2010); Ngāti Apa (North Island) Claims Settlement (2010); Ngāti Tuwharetoa, Rauhawa and Te Arawa River Iwi Waikato River Settlement (2010); Whanganui Iwi On-account Settlement (2011); Ngāti Manawa Claims Settlement (2012); Ngāti Whare Claims Settlement (2012); Ngāti Pāhauwera Treaty Claims Settlement (2012); Ngāti Porou Claims Settlement (2012); Maraeria A and B Blocks Claims Settlement (2012); Ngāti Mākinō Claims Settlement (2012); Rongowhakaata Claims Settlement (2012); Ngāi Tāmanuhiri Claims Settlement (2012); Ngāti Whātua Ōrākei Claims Settlement (2012); Ngāti Whātua o Kaipara Settlement (2013) and Waitahu Claims Settlement (2013). Cf. Ngāti Tūrangitukua Claims Settlement Act 1999, Preamble (n)-(o); Pouakani Claims Settlement Act 2000, ss. 12, 34; Te Uri o Hau Claims Settlement Act 2002, s. 39; Ngāti Ruanui Claims Settlement Act 2003, ss. 3, 15, 26; Ngāti Tama Claims Settlement Act 2003, ss. 3, 12, 20; Maori Commercial Aquaculture Settlement Act 2004, s. 6(1); Ngāa Rauru Kītahi Claims Settlement Act 2005, Preamble, (15), s. 15; Ngāti Awa Claims Settlement Act 2005, Preamble, (1), (16); ss. 3, 15, 161; Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, Preamble, (4), (45), ss. 3, 15, 21, 116; Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2005, s. 4; Ngāti Mutunga Claims Settlement Act 2006, ss. 3, 29; Te Roroa Claims Settlement Act 2008, ss. 27, 87; Ngāti Apa (North Island) Claims Settlement Act 2010, ss. 4, 7-8, 13; Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s. 5.

88 Office of Treaty Settlements.

of 61 *marae*, which held all shares in the trust companies set up under the settlement. There were also critics: some Māori wished that the settlement should have been made with each of the 33 *hapū* individually. This was a symptom of Māori inner tensions which shadowed the settlement negotiations generally.<sup>89</sup>

Ngāi Tahu, located on South Island, is one of the largest tribes. Unlike most tribes, 75% of its members live in their traditional areas. Besides the land questions the tribe was provided with health, education and welfare options. The Ngai Tahu had sold for a low price or lost their lands (over 100,000 sq km) and their *mahinga kai* (food resources) between 1844-1864. The claim involved the complete South Island, which made negotiations challenging. The environmentalist and recreation organisations were also concerned about the effects of the settlement. WT's three-volume *Ngāi Tahu Report* (1992) includes important principles for remedial action: the statutes must ensure that Māori values are made part of the criteria of assessment before the tribunal or authority involved; there must be proper and affective consultation with the Māori in advance; there must be representation of the Māori in territorial authorities and national bodies; and representation before tribunals and authorities making planning and environmental changes. Ngāi Tahu established a trust board (later *rūnanga*) to administer compensatory payments. The reached settlement (1996) differed from the Tainui claim: it had no *raupatu* claims but the focus was besides the land in sea fisheries, *mahinga kai* and cultural redress. The final settlement granted the Ngāi Tahu the following: a formal Crown apology; \$ 170 million in cash; 13,800 sq km of land; the possibility to purchase Crown properties at market prices from an agreed list for maximum \$200 million; the right of first refusal over surplus Crown land in a number of categories with a relativity clause; and title to historically important locations as nature reserves which were leased to the Conservation Minister in perpetuity. *Mahinga kai* rights included management rights to reefs, title and use of customary fishing areas and first right of refusal for harvest rights of shellfish species. The settlement also restored original Māori names.<sup>90</sup>

The Taranaki tribes made altogether 21 claims to the WT. In its *Taranaki Report* (1996) the tribunal criticised with exceptionally strong wording the government's policy and held the Crown's purchases of Taranaki lands as invalid. The Māori wars started in the 1860s in their territory and they lost 8,000 sq km of territory through confiscation, and later an equal amount by illegal purchases and land reforms. No land was returned. The WT deemed their losses as the most severe in the country. It estimated that full reparation based on usual legal principles is unavailable to the Māori. To require that Māori leaders would sign a full and final

---

89 Waikato Raupatu Claims Settlement Act 1995, ss. 10-24, 38, Schedule 4; Durie (1998), pp. 196-198; Alves (1999), pp. 124-127; Treaty Negotiations (2003), p. 32; McHugh (2004), pp. 515-516, 522. *Kauhanganui's* position as legal person is based on the Incorporated Societies Act 1908 and has met structural problems with traditional forms of government; The judiciary has been reluctant to intervene in the Māori communities' inner conflicts, which has echos *Wi Parata* - doctrine.

90 Ngāi Tahu Claims Settlement Act 1998, Preamble, ss. 202-236, 287-314; WT, Ngāi Tahu Report (1992); Durie (1998), pp. 198-202; Alves (1999), pp. 134-135. Only 6.3 sq km of conservation estate, totalling 50,000 sq km, was returned.

agreement would only serve to destabilise their authority. Instead, significant compensation was paid.<sup>91</sup>

The settlements have offered new economic opportunities to the tribes. In 1985 several Māori incorporations and other organisations established the Federation of Maori Authorities (FOMA), which is a business network of Māori resource-based businesses whose main objectives are to encourage active and economic business development and to provide professional and commercial services to members. FOMA has strongly lobbied for the drafting of new legislation. Since 1995 it has had co-operation with the ministry-based Maori Land Investment Group (MLIG), which has promoted the effective utilisation and development of collectively owned Māori land.<sup>92</sup>

#### 4.2.4. *Mana Motuhake*

*Mana Motuhake* means self-determination but is often connected to the parallel Māori political and legal structures. Already the Declaration of Independence (1835) included an idea of Māori nation state which would gather together the separate tribes. The Declaration, recognised by the British Government and King William IV, proposed a Māori legislature, a parliament consisting of chiefs and having full legislative powers. The *kaumatua* would hold annual *rūnanga* where laws for the islands might be laid down by the chiefs. The impetus to a confederation of tribes came probably both from the British agents and the Māori themselves. *Nu Tireni* (New Zealand) would have been ruled by Māori values, practices and aspirations.<sup>93</sup>

The Treaty of Waitangi changed the course: there was no more talk about a Māori state; the Māori believed, instead in a Hobbesian indivisible state of settlers, in a divided sovereignty. The disappointment to settler policy and the will to stop the loss of land led the Māori to search for an alternative to the *kāwanatanga* model or cession of governmental power to the British Crown. The alternative was called *mana motuhake* - creation of parallel structures of politics and legislation. From 1853 a northern movement developed which stressed the Māori sovereignty. In 1857 two chiefs from Otaki began to promote a separate Māori parliament and king. In the background discontent was growing among the Māori to Pākeha forms of government. The movement was an attempt to reconstitute tribalism into a confederate form and counterbalancing the *mana* of the Crown. Several meetings were arranged in the Waikato and Auckland regions. In all, 23 North Island tribes supported the idea which resulted in *kingitanga* (kingdom), an association of independent tribes. The movement wanted equality, a parallel *mana* with the Queen with both owing allegiance to God. They trusted in the promises of *rangatiratanga* in the treaty. Based in Waikato in central North Island the movement chose Te Wherowhero as their first king in 1858. The kingdom

---

91 Taranaki Report (1996), pp. 1-14, 307-315; Mutu (2011), pp. 33-34. "If war is the absence of peace, the war has never ended in Taranaki, because that essential prerequisite for peace among peoples, that each should be able to live with dignity on their own lands, is still absent and the protest over land rights continues to be made." Cf. Taranaki Report (1996), s. 6.

92 Durie (1998), pp. 144-145.

93 Te wakaputanga o te Rangatiratanga o Nu Tireni (1835); Orange, p. 195; Durie (1998), pp. 3, 220.

operated in Waikato and Parihaka as an autonomous Māori polity beyond the control of the colonial state. Those *iwi*, which did not place themselves under the king, developed *rūnanga* or tribal assemblies. Both asserted tribal control over their land.<sup>94</sup>

The majority of settlers were hostile to the movement. Governor Browne gathered 200 Māori chiefs in Kohimarama in 1860 to strengthen the treaty bonds between the Pākehā and Māori. The meeting was more important to the Māori as it highlighted to them the significance of the treaty as a guarantee of their rights. After the meeting Browne continued the pressure against the King Movement by demanding its submission without reserve for the Queen's sovereignty and the authority of law. Even after the outbreak of war the moderate Kingites kept the discussion open with the government. Nevertheless, the war spread to Waikato and the Māori fought on both sides of the front.<sup>95</sup>

The war and confiscations embittered many Māori and their applications to get the lands back went unanswered. *Rūnanga* and *komiti* were adopted to answer the local needs. They formed parallel structures to retain tribal influence against the changes around. *Rūnanganui* became a tribal council to retain *mana* in the face of growing settler challenge. They served to reform, consolidate or re-affirm tribal associations, and to determine *hapū* and *iwi* relationships with the Government. Difficulties with the Government led to expansion of *rūnanga* in the 1870s. In Hawke's Bay region a repudiation movement arose to obtain compensation for fraudulent land dealings. Soon its aims, however, broadened. Wiremu Tamihana had called in 1856 for establishment of a national *rūnanga*. In 1879, Paora Tūhaere, the principal chief of the Ngāti Whatua, convened to Orakei *marae* a meeting of chiefs. They felt that a separate parliament would enable them to better work together. A Māori parliament, *Kotahitanga*, was first convened by Ngapuhi in 1879-1890s in Kohimarama and Ngapuhi. Its aim was to discuss treaty issues and to unify the scattered tribes in New Zealand under the same organisation. In 1891 convened a new, broader *Kotahitanga* at Kaikohe. A nationwide meeting of *Te Kotahitanga o te Tiriti o Waitangi* opened in Waipatu in 1892 to supplement the New Zealand's parliament. The Māori Parliament retained the traditional *rūnanga* principle of consultation and deliberation, but also European procedures. The parliament had two houses: the upper house of 50 chiefs and the lower house of 96 younger men. For elections there were tribal electoral districts. *Kotahitanga* demanded the New Zealand's Government to abolish the Native Land Court and to establish the promised Native districts. In all, 22,000 peoples supported the Māori Parliament's petition. The Maori Councils Act 1900 watered down the old *Kotahitanga* but a parallel *Kotahitanga o Te Aute* convened in 1897-1902.<sup>96</sup>

King Tawhiao appealed to the government for the establishment of a Māori chiefly council to administer the indigenous rights under the treaty. While rejected, he established his own *kauhanganui* (Great Council), referring to s. 71 of the Constitution Act 1852. Tawhiao

94 Orange (1993), pp. 142-143; Sharp (1998), pp. 252-253. *Kingitanga* is the missionaries' biblical translation from English, used in the Declaration of Independence 1835 with the meaning "sovereign power"; *Mana motuhake* refers to power and control. It was adopted as a motto by the *kingitanga* movement and has been later used to stress Māori autonomy and separate development. *Mana motuhake* emphasises, more than *tino rangatiratanga*, independence from state and Crown.

95 Orange (1993), pp. 145, 148-150, 157, 164.

96 Walker (1984), p. 7; Orange (1993), pp. 190-191, 199-202, 215, 224-227; Barlow (1993), pp. 57-58; O'Malley, p. 212. The last *kotahitanga* was established by young Māori educated at the Anglican Te Aute College, Hawkes Bay. One of them, Sir Apirana Ngata, was later influential in New Zealand's politics.

proclaimed his royal *mana* in 1891 and a Māori Constitution was enacted three years later. It outlined the governmental and administrative structure of the King Country. The King's Parliament, bicameral *kauhanganui*, was located in Maungawa. The Kingites still recognised the covenant with the Queen, but the King had *ko te mana motuhake* – a separate and independent power. Both existing Māori Parliaments legislated on land questions, and also discussed on hunting and fishing rights, self-determination and the constitutional relationship to Pākehā institutions. In 1894 MP Hone Heke tried to render the Kingite institutions and legislation legitimate by introducing to New Zealand Parliament the Native Rights Bill, which included propositions to create a separate Māori constitution, and own legislature to enact laws on Māori personal rights, lands and other property. As a result, the non-Māori members of parliament walked out of the chamber, and the bill was finally defeated in 1896. In 1897 Premier Seddon proposed a national Māori Council, consisting of 50 members, of which half were to be elected and another half were to be appointed by the Māori king. When King Mahuta demanded also resolution of *raupatu* claims, the initiative did not come about.<sup>97</sup>

At one time in the 1890s there were three parallel Māori parliamentary systems. Only the Māori kingdom has survived until today. The other independent tribes preserved their *rangatira*. A difficulty to meet tribal unity was due to competition in *rohe* and influence. Besides the supra-tribal systems of *kingitanga* and Rātana Church, the northern tribes of Takitimu have federated as *waka*, consisting of six *whenua*.<sup>98</sup>

Mason Durie has described the constitutional elements of the Māori self-determination as *mana wairua* (spiritual and cultural values, beliefs and practices); *mana whenua* (*iwi* and *hapū* ownership and control over tribal resources); *mana ariki* (authority of paramount leaders within their own tribes and as nationwide leaders); and *mana tangata* (rights of individuals to organise as Māori and to assert citizenship rights). In Taranaki Report the Waitangi Tribunal described the autonomy or self-government as a right to constitutional status as first peoples and as a right to manage their own policy, resources and affairs within the minimum parameters necessary for the proper operation of the state.<sup>99</sup>

The renewed policy of the courts since the mid-1980s activated several Māori groups to demand recognition of their sovereignty. Ngati Whatua stated in 1993 that its sovereignty had remained under the Declaration of Independence of 1835. It and all similar demands have been rejected in the courts. A new model of Māori aspirations has been *tikanga rua* which has aimed to establish a separate second house to the parliament to legislate on the questions of *tikanga Māori* (Māori law). This upper house, *Te Rūnanganui o the Tiriti* (The Treaty Council), would check the compatibility of the lower house bills related to treaty before giving assent.<sup>100</sup>

In the early 1990s when the influence of the Maori Council diminished, the Māori Queen Te Arikinui, Sir Hepi Te Heuheu and Te Reo Hura, the head of Rātana Church, made efforts to

97 Walker (1984), p. 5; Ritchie (1995), p. 122; Spiller (2001), p. 162. The Kingites did not reject completely the settler state's structures. King Mahuta was elected in 1903 as member of New Zealand's parliament and minister.

98 Ritchie (1995), pp. 124-125.

99 WT, *Taranaki Report* (1996), s. 1.6; Durie (1998), p. 229.

100 NZHC, *Re Manukau* (1993); Havemann (1999), p. 119; McHugh (2004), p. 506. This model has been proposed for instance by the Anglican Church of Aotearoa, itself including Māori structures.

re-establish *kotahitanga* and *mana motuhake*. The outcome was the National Māori Congress (*Te Whakakohitanga o Nga Iwi o Aotearoa me te Waiponaumu*), established in 1991. In the early 1990s was constituted a national forum for 47 tribal and urban authorities who had assigned their residual rights to a national body to undertake the following: provide a national forum to address economic, social, cultural, environmental and political issues; promote *iwi*-based *tinu rangatiratanga*, constitutional and legislative arrangements of development and self-determination; to carry out administrative, economic, social and cultural functions to monitor government policy; to lobby the law making-process; and to advance, co-ordinate and promote a unified national *iwi* position in foreign politics. The Congress was guided by the principles of *whatakotahi* (shared traditions and aspirations), *mana motuhake*, *tinu rangatiratanga* and *paihere tangata* (joining together in the pursuit of common goals). The structure included an executive and annual congress. Nine committees took responsibility for the development of the Congress.<sup>101</sup> The Congress was related to changes caused by the government's privatisation policy and the Māori's will to lobby for a constitutional change, which still waits its time.

At the local level, *marae* are the most enduring and authentic forum for debate and decision making. Most of them centre on *whānau* or *hapū* and reflect the culture and history of its members, ancestors, common journeys and joint fates. Decisions made in *marae* carry often special authority as they relate directly to the affairs of a group. Most *hui* are arranged there to reach binding decisions. *Marae* are governed by trustees, representing *whānau* as key stakeholders and appointed by tacit approval or election. The autonomy of *marae* is restricted by legislation and local bylaws. The trustees are appointed by the Maori Land Court. At the same time the *marae* are expected to conform to the customs of their respective tribes. This makes of *marae* an interesting mixture of a traditional and statute-based structure. Their structures can also vary. Besides independent *marae* they may be part of an institution with a supportive role. There are *marae* in schools, universities, polytechnics, hospital, churches and in the New Zealand Army to observe the appropriate customs. The Tainui Maori Trust Board has returned to the *rūnanga* model, which has transferred the tribal accountability back to *iwi*. In all, 60 *rangatahi* were trained to take their place in local *marae* and in *rūnanga*. Many other tribes are more related to their traditional forms of government, but often parts of the statute based systems, like incorporations or land trusts.<sup>102</sup>

#### 4.2.5. Outside the Iwi and Hapū: Urban Māori

The moving of Māori from rural to urban communities between 1950 and 1970 was rapid. In the 1960s the government's plan was to disperse Māori families among Pākeha to progress the integration policy but the great influx of Māori created poor suburban Māori enclaves. Over 85 % of Māori live today in urban centres. In the largest cities of New Zealand live also a significant number of people from the associated states and territories. This fact challenges

---

101 Ritchie (1995), pp. 186-188; Durie (1998), p. 230; Havemann (1999), p. 212. The policy traces back to the objectives of the 1835 Declaration of Independence.

102 Te Ture Whenua Maori Act 1993, ss. 211-284; Resource Management Act 1993, s. 354; Durie (1998), pp. 221-222, 230-231; McHugh (2004), 423.

the traditional Indigenous structures. The New Zealand Maori Council has recognised this in its policy which serves both the traditional tribal and urban structures. The urban Māori have established on a voluntary basis a number of associations and trusts, called Urban Maori Authorities, which are often pantribal units that do not follow any of the traditional structures.<sup>103</sup>

The urban Māori have claims that are centred on politics of recognition and responsiveness and the redistribution of resources. The Māori Department's *tū tangata* – philosophy provided from 1978 a new dynamic for the Māori to reorganise themselves including the spirit of devolution, community empowerment and community-based programmes. They began to manage programmes for employment, welfare and economic development and to support Māori culture and practices, and to help the Māori to find their roots. Their political lobby groups actively promoted the political, social, economic and cultural concerns of urban Māori. In 1984 the tribal committees was changed to Māori committees. Despite this the Government's policy paper *Te Urapare Rangapū* (1988) stressed still *iwi* as the sole structure to negotiate in treaty relations.<sup>104</sup>

In 1996 the Court of Appeal recommended for urban Māori separate provision akin to distribution of the benefits. The urban quest culminated in 1998 in the question of whether the purpose-based urban Māori trusts could as treaty partners, exercising *rangatiratanga*, be beneficiaries of the 1992 fisheries settlement. The *iwi* saw themselves as the sole beneficiaries due to their *whakapapa*, and the urban claims as based on welfarism. They offered as a solution extraterritorial membership based on *whakapapa*. But there are also some *iwi* located inside urban areas who have offered service delivery to all Māori living within their *takiwa*. The *iwi* resistance has limited the urban structures to purpose-based service delivery.<sup>105</sup>

In 1998 the Waitangi Tribunal held that the exercise of *rangatiratanga* could take place also in modern settings. The policy of devolution was designed to empower and create partnership with Māori communities as they were. All Māori were entitled to the benefit of the treaty. In regard to the social welfare question the tribunal has indicated that urban Māori trusts running from *kaupapa* are a manifestation of *rangatiratanga* in the sphere of service-delivery. As a consequence, the amended family legislation enables the urban trusts and other similar structures to apply money to deliver large-scale social services.<sup>106</sup>

#### 4.2.6. Associated States and Territories

To the realm of New Zealand belong two associated states, the Cook Islands and Niue, and an associated territory, Tokelau. West Samoa gained its independence in 1962, but on the other island territories there has been no strong support for independence. British rule

---

103 Community Development Act 1962, s. 2; Meredith (2004), pp. 164-166, 171. A census from 1996 indicated that 25% of Māori did not identify their *iwi*.

104 Meredith (2004), pp. 163, 167, 170.

105 NZCA, *Te Runanga o Muriwhenua v. Te Runanganui o te Upoko o te Ika* (1996); McHugh (2004), pp. 518-520.

106 Children, Young Persons and Their Families Act 1989, ss. 139-140, 400-402; WT, *Te Whānau o Waipareira Report* (2002), s. 8; Meredith (2004), p. 171.

was first extended to Tokelau in 1877 and each of its three islands became a protectorate of Britain in 1889. The Cook Islands were first under the influence of London Missionary Society (1823-1888). The rumours of a French invasion awoke the Colonial Office in London, which appointed in 1881, based on a petition of European residents - a consul to the island. In 1885 New Zealand promised to pay, and was granted the nomination of consul, who became a Resident. Only three years later some *ariki* asked for British protection and the Colonial Office established a protectorate. Resident Moss collaborated with Queen Makea Takau to develop a local government, free of missionary influence. In 1890 he persuaded *ariki* to establish a General Council as legislature for all islands. It included three *ariki*, three district judges, one *mata'iaipo* and one European resident. Moss advised *ariki* in drafting and administering the laws. He signed all local acts in the name of the New Zealand Government and was able to reject all bills. He also introduced a European administration, customs, postal services, Supreme Court, and a division of districts (*tapere*). *Arikis* were, however, frustrated with the loss of their *mana* and wanted more direct British protection – instead of that from New Zealand. Despite of this Moss continued his fundamental reforms. In 1891 a Federal Parliament was created with an upper house including five Rarotongan *ariki* and the General Council was replaced by an Executive Council of three district *ariki*. The Queen became the formal head of the Federal Government. In the reform of 1893 the Parliament moved to majority rule with universal suffrage and direct European representation was abolished.<sup>107</sup>

Prime Minister Seddon wanted to extend the dominion's influence in the Pacific region as a buffer against "Asian invasion". In the meanwhile, Resident Moss had fallen in disfavour due to his independent policy. The Government instructed Chief Judge Prendergast to visit the islands and raise corruption charges against Moss. This took place in 1897 and the following year Moss was replaced by Colonel Gudgeon. He reformed the islands' administration but prepared simultaneously its annexation to New Zealand which took place in 1901 when the Executive Council formally asked it. New Zealand's Government accepted the offer and promised that a Council of Ariki would replace the Federal Parliament, the Queen would remain as head of Government, and the land rights would not be changed and New Zealand's legislation would be in force only if approved by the council, which would make all appointments and dismissals of civil servants. The promises were kept only partly: to the council was left the local governance but the real ruler was Gudgeon, who was appointed in 1909 as Resident Commissioner and the Council's advisor, but under responsible Minister's supervision. New Zealand's government introduced also Island Councils which in 1904 replaced the old district structures. Queen Makea remained still as the nominal head of the Ariki Council. The self-government was limited to advisory Island Councils.<sup>108</sup>

World War II was a culmination point in policy with growing demands for self-determination. New Zealand took steps to increase the territory's political authority. It enacted the Cook Islands Amendment Act 1946 which established a 20-member Legislative Council. It was able to make ordinances besides the Resident Commissioner. It was renamed in 1958 as the Legislative Assembly. It included five officials, 14 elected members, seven

---

107 Gilson (1991), pp. 1, 61-65; Sissons (1999), pp. 11-14; Cook Islands Government.

108 Cook Islands and Other Islands Governance Act 1901, ss. 2, 4-5, 7-8; Cook Islands Act 1915, s. 59; Gilson (1991), pp. 88-89, 101, 110-112, 121, 129-130.



members appointed by Island Councils and one member elected by the non-indigenous community.<sup>109</sup>

The king of Niue petitioned British protection in the 1870s. Britain concluded a formal treaty with the Savage Island (Niue) in 1900 and the island was annexed to the protectorate of the Cook Islands in 1900. Niue was granted a separate administration three years later. By the Cook Islands Amendment Act 1957 the Island Council of Niue was replaced by the Niue Council, where the Resident Commissioner served as chairman.<sup>110</sup>

The three atolls of Tokelau were annexed after 27 years of protectorate to the British colony of Gilbert and Ellice Islands (present Kiribati) in 1916. In 1925 the status changed again, when New Zealand acquired the administrative control of the islands. The next year New Zealand delegated the power to legislate for Tokelau to the administrator of Western Samoa, which was then also under New Zealand. After World War II (1946) Tokelau was placed on the United Nations' list of non-self-governing territories as a dependent territory of New Zealand. New Zealand checked its relation to islands and in 1948 New Zealand's Parliament enacted the Tokelau Act, which made the territory an integral part of New Zealand whose status may be changed by the act of parliament. The aims to replicate Gilbert and Ellis Islands' administration failed due to the islands' isolation.<sup>111</sup>

Due to the decolonisation process and the UN Resolution 1514 (1960) New Zealand offered to the Cook Islands and Niue four possible options: independence, integration to New Zealand, independent federation of Polynesian countries, or internal autonomy in association with New Zealand. Both chose the last-mentioned option. Tokelau was offered transfer to West Samoa or the Cook Islands but the islanders wanted to continue the *status quo*. For the Cook Islands a constitution was enacted in 1965 which created a self-governing territory in free association with New Zealand, leaving to the mother country the responsibility for external affairs and defence. Despite this, the Cook Islands were able to enter into international arrangements and independently make agreements with independent states. It has diplomatic relations with 19 countries and is a member of e.g. Cotonou Partnership Agreement, South Pacific Forum, Asian Development Bank, South Pacific Commission, International Civil Aviation Organisation, FAO, WHO, UNESCO, and is an associated member of the British Commonwealth.<sup>112</sup>

The administration follows the model of New Zealand. The Parliament (until the 1981 Legislative Assembly) has 24 elected members from single-member constituencies for 5-year terms (one for overseas islanders) and a Cabinet with a Premier. All members may introduce a bill. For territorial administration the Cook Islands have 31 different ministries and agencies. The Queen's Representative represents the Queen who is the head of state with executive authority. He/she works in three-year terms on the advice of the Prime Minister and the

---

109 Cook Islands Amendment Act 1946, ss. 2-3, 12; Cook Islands Constitution Act 1964, s. 27-29; Ntummy (1993), p. 297; Angelo (1995), p. 413. Seddon made in May 1900 a tour in South Pacific to invite several Crown colonies to join the realm of New Zealand, among them Tonga and Fijhi. The German West Samoa was occupied by the New Zealand Army 11 days before the outbreak of World War I.

110 Ntummy (1993), p. 158. The Treaty of Niue was the only formal treaty in the region by the British authorities besides the Treaty of Waitangi.

111 Tokelau Act (1948), ss. 3-4; Huntsman & Hooper (1996), pp. 265-266, 269; Angelo (1995), p. 413.

112 Cook Islands Constitution Act 1964, s. 5; Ntummy (1993), pp. 4, 13, 158; Huntsman & Hooper (1996), p. 317; Cook Islands Government.

Cabinet which has 3-6 members. He/she appoints all Ministers and gives royal consent to statutes. The islands have a similar Executive Council as in the mother country. The Executive Council may amend the Cabinet's decisions when the Queen's Representative has not given to them a royal consent. The High Commissioner has a more nominal role as the mother country's official representative. As recognition of Native royal heritage, the House of Ariki was established in 1967, which was a consultative body of 24 hereditary chiefs serving one-year terms, and appointed by the Queen's Representative. The Parliament may submit to the house bills on welfare, customs, tradition, and land tenure for opinion. The House of Ariki has been active since the beginning and has been able to change land legislation and to strengthen the customary rules. The government soon wanted to limit the powerful nobility's powers to which the House of Ariki answered in 1970 by demanding more power in matters concerning the land title and local government, using as their arms *ara korero* (meetings) and *ara tiroa* (customary duty to work for *ariki*). The legislature complemented the House of Ariki in 1972 with Koutu Nui, the council of lower chiefs – again to restrict *ariki*'s power.<sup>113</sup>

The local government is vested in the Island Councils, where usually belong the local *ariki*, a representative of *aronga mana* (Council of Chiefs), local MPs and elected members. The last-mentioned have a right to vote. The Council is chaired by a mayor, who has a deliberative vote. To the Island Councils' regulatory powers belong the right to execute and administer local ordinances and bylaws, assist in the coordination of economic and social development activities, assist the territorial government in the good rule and government of the islands. The Rarotonga Local Government Bill 1988 suggested District Councils should be based on the *vaka* system, which took place 11 years later. The first mayors were elected in 2000. The three *vaka* councils had 13 (Te Au o Tonga), 8 (Puiakura) and 9 (Tikitumu) members respectively. As part of the islands' unsteady political life the experiment did not succeed and the system was, despite local protests, repealed in 2008.<sup>114</sup>

The development was more limited and delayed in Niue. The island was ruled by the old Cook Islands Act until 1966, when New Zealand's parliament enacted the Niue Act. It delegated some of the resident commissioner's powers to the Niue Assembly. Later the Resident Commissioner became responsible to the Niue Executive Committee. In the first eight years the Assembly was able to make statutes only on limited matters, but in 1974 New Zealand granted the island a self-governing status and its own Constitution. The island's status could no more be changed unilaterally by New Zealand. New Zealand has retained powers related to citizenship, external affairs, defense and care of economic and administrative

---

113 Cook Island Act 1915, ss. 59, 70; Constitution of the Cook Islands 1965, art. 2-5, 8, 12-13, 18-19, 25, 27, 42, 46; Cook Islands Constitution Act 1964, Schedule 1, ss. 2-9, 11A, 12-13, 24; House of Aris Act 1966 (Cook Islands); Reforming the Political System of the Cook Islands (1998), pp. 15, 32, 35, 62; Sissons (1999), pp. 61, 64-67, 72; Cook Islands Government. The power struggle is far from over: in 2008 the House of Ariki attempted a coup by dismissing the Queen's representative and government. They tried to regain prestige and *mana*, but failed; There has been some discussion about the consequences if New Zealand were to become a republic. The Queen is head of state in relation to her realm of New Zealand; The Cook Islands' political life has been turbulent: most of the legal reforms proposed in the 1990s have not been realised. In 2006 the Queen's representative dissolved the parliament, based on lack of confidence.

114 Outer Islands Local Government Act 1987 (Cook Islands), ss. 4-7; Rarotonga Local Government Act 1997 (Cook Islands); Rarotonga Local Government (Repeal) Act 2008 (Cook Islands), s. 2; Reforming the Political System of the Cook Islands (1998), pp. 56-57; Cook Islands Government.

assistance and facilities for courts and public services. The Niue Assembly can in theory repeal these provisions but it is not probable due to the island's weak economic and demographic situation.<sup>115</sup>

The head of state for Niue is the sovereign of New Zealand, who has the executive authority. She is represented by the Governor General of New Zealand. The formal representative of the New Zealand government is the High Commissioner. The executive authority is practiced on behalf of the Queen by the Cabinet of Niue. The right of the monarch to advice and information is provided by the ministers of New Zealand and Niue. The Cabinet has a Premier and three other members who are collectively responsible to the Assembly. They steer the general direction and control of the executive government of Niue. The Niue Assembly has 20 members elected from village constituencies and six from a general constituency for three years. All members of the Assembly can introduce bills. Like on the Cook Islands, New Zealand's laws are applicable only after implementation by the Assembly of Niue and there are very few laws of New Zealand in force. For territorial administration there are a number of specialised Government agencies. For local government there are elected Village Councils with bylaw-making powers. Like the Cook Islands, Niue has the possibility to create direct international connections. Eight countries have their consulates in Niue, and the territory is a member or associated member in several international organizations.<sup>116</sup>

New Zealand's representative for Tokelau is the Administrator, who has the ultimate decision-making power on administration. His office is in Wellington. Many daily administrative affairs are delegated to the official secretary who was located together with Tokelau Public Service in Apia, Western Samoa in 1955-1993, but who was later moved to Tokelau. New Zealand began to develop Tokelau's administration since 1963 and held several meetings in the islands. A temporary halt to development was a cyclone, which led New Zealand's Government to draft the Tokelau Resettlement Scheme. In 1966 a large number of Tokelauans were relocated to the mother country. In the early 1970s the tide changed again. General Fono, a meeting of three atolls, was promoted from 1972 as the central body. Its membership has been reduced from an original 60 members to a more efficient 27 and it has gradually acquired concrete decision power. Each atoll sends nine representatives to the meetings arranged few times annually. General Fono has an increasing role in political and executive questions and budgetary allocations, and no statute on Tokelau can be approved without its consent. Also the chief minister's (*ulu*) role has strengthened. New Zealand's government has committed to the development of Tokelau's gradual self-determination. In 1994 it established the Constitutional Special Issues Commission and to Tokelau has been arranged several UN visiting missions. Since 2004 New Zealand has taken steps to create the associate state of Tokelau – similar to the Cook Islands and Niue. The local support has not been, however, unanimous: in two referenda (2006 and 2007) the change of status did not reach the demanded 2/3 majority.<sup>117</sup>

---

115 Niue Constitution Act 1974, ss. 3, 6, 8; Niue Act 1966, ss. 5, 9, 31, Ntummy (1993), pp. 158-160, 167.

116 Constitution of Niue 1974, art. 1-4, 16, 36; Niue Act 1966, ss. 4, 50; Niue Constitution Act 1974, Schedule 2, ss. 1-5, 16; Ntummy (1993), pp. 162-163; Niue Government.

117 Tokelau Amendment Act 1967, ss. 2, 4; Ntummy (1993), pp. 297; Angelo (1995), pp. 414-415, 421; Huntsman & Hooper (1996), pp. 318-320; Angelo (1999); Tokelau Leaders Confident of Stronger Backing for Next Referendum on Self-Determination (2007).

The decision power in Tokelau was concentrated to three Village Councils in 1916-1975, when New Zealand's Government repealed their powers. The local powers were returned in 1986. The three Village Councils on each atoll are independent of each other. The Chairman of the Council is called *faipule*, who acts also as the judicial officer of the island. *Pulenuku* is the Village Mayor who takes care of the infrastructure and daily life of the village. Both are elected for three years. A third official is *failautuhi*, the Village Clerk and Treasurer. Each extended family, or *kaiga*, has its own representative in the Council. In the island of Fakaofu the Council is more limited: it consists of a small group of senior leaders. The will of Village Councils is executed by the able-bodied men of each village.<sup>118</sup>

#### 4.2.7. Māori Constituencies

A unique feature in New Zealand is the guaranteed parliamentary seats for Māori. From the 1840s there were discussions on the enfranchisement of Māori to better assimilate them into British society. Earl Grey, the Secretary of the State for Colonies, suggested that the Māori franchise should be dependent on their ability to read and write English. The assimilation policy to civilise the Māori began in around 1847 as the construction of responsible government started. Despite many settlers' resistance the Constitution Act 1852 created a male franchise system based on property and without distinction to race. Only seven years later the Māori were, however, disenfranchised by Crown law officers who saw that the Māori were ineligible to vote due to their collective ownership of land. When, however, the rapid population increase on South Island due to the gold rush threatened North Island's parliamentary dominance, a Māori parliamentary representation was introduced as a temporary political expedient to retain the balance of power in parliament. It was also a measure to reward loyal natives and a countermeasure to criticism in Britain against the war confiscations. Four electoral Māori districts were designed as a temporary measure for five years but became from 1876 a permanent arrangement. The Māori voters were able to doublevote both in Māori and general electorates in 1879-1893 on the basis of a £ 25 freehold estate. Some of them were even chosen to the Upper House and to the cabinet.<sup>119</sup>

The Rātana Church, an Indigenous religious movement, began to gain remarkable ground in Māori politics from 1928 when it established the Rātana Polical Party. It made an alliance with the Labour Party and dominated the Māori seats in parliament from 1937 until the 1980s. There have always been doubts about the extent to which the sitting members directly represent Maori interests. The sitting members have often owed their first loyalty to their parties. The old British first-past-the-post electoral system also profited the local electorate's majority. A fundamental electoral reform was made in 1993, when the mixed member proportional system (MMP) was brought into use. The rules determining the number of parliamentary seats for Māori were altered. The number of Māori electorates – including the Chatham Islands - has been increased (five in 1996, six in 1999 and seven in 2005). The total

---

118 Tokelau Village Incorporation Regulation 1986, ss. 5, 8, 14, 18; Ntummy (1993), p. 302; Angelo (1995), p. 422; 270

119 The Maori Representation Act 1867, ss. 4-5; Walker (1984), p. 3; Havemann (1999), pp. 386-387; Hayward (2003), pp. 58, 137.

number of Māori in parliament is due to a double-system and proportional representation much higher, representing their average share of total population. A new Māori Party was established in 2004 and the following year it won a majority of Māori seats.<sup>120</sup>

At the local level the devolution process brought forth experiments to give the Māori electorate better voice. The Auckland Regional Council had in 1986-1992 Māori constituencies based on parliamentary districts before the National Government repealed the empowering statute. After the recommendations of the Royal Commission on Auckland's Governance a Maori Advisory Board was established, which has a non-binding consultive role. A new, more lasting arrangement took place when the Local Electoral Act 2001 opened up the possibility for the local authority to switch the system to a single transferable vote to increase the representation of minorities. The Trapski Report (1998) suggested fundamental reforms. Consequently, to the Bay of Plenty Regional Council was introduced in 2001 wards for electors on the Māori parliamentary roll. There are three Māori seats (25%, based on a mathematical equation). The number of Māori seats can be checked when the share of indigenous population changes. At the local level the reform has transferred the system from economic and geographical representation to ward or singular at-large electorate. It is designed to better reflect the contemporary environment. The Bay of Plenty has stayed an exception in New Zealand and only a few local authorities have chosen the single transfer vote polling system, which favours the Māori.<sup>121</sup>

The Federation of Cook Islands had from 1893 a universal suffrage (also women) for two elected members of the federation's Parliament. The Cook Island's Constitution (1965) connects the electoral rights to residency. The Legislative Assembly limited from the beginning the demanded time of residency to three months. A special constituency is for Indigenous overseas Cook Islanders representing the large communities in New Zealand and Australia, although there has been from time-to-time also voices to repeal the arrangement.<sup>122</sup>

---

120 Electoral Act 1993, ss. 45-46, 78, 112; Armitage (1995), p. 145; Hayward (2003), pp. 134-138; Richardson & Imai & McNeil (2009), pp. 304-305. In 1991, about 45% of Māori were registered to general rolls, 30% to Māori rolls and 25% had not registered. In 1996 fifteen Māori were elected to Parliament and three of them to cabinet, including the deputy prime minister. Six years later the total number rose to 20, but only two of them were chosen to cabinet; The Rātana Church was established in 1918 by the faith-healer Tahupotiki Wiremu Rātana.

121 Local Government Amendment Act (No 2) 1986, s. 3; Bay of Plenty Regional Council (Maori Constituency Empowering) Act 2001, ss. 5-6; Local Electoral Act 2001, s. 19Z-19ZH; Maori Seats And Constituencies and Local Authorities (2004), pp. 9, 12, 16; Hayward (2003), p. 136; Anaya (2011), p. 17; Mutu (2011), p. 129. Before the reform an estimated 3% of local councillors were Māori; In the Bay of Plenty Region 28% of the population are Māori. Before the electoral reform no Māori was elected to the regional council.

122 Gilson (1991), p. 67; Sissons (1999), pp. 15-16. In *Maurangi v. High Commissioner of the Cook Islands* the Court of Appeal did not want to take a stand on the political question of whether Cook Islanders living abroad should be allowed to vote in the islands' general elections. Cf. NZCA, *Maurangi v. High Commissioner of the Cook Islands* (1975).

#### 4.2.8. *Taxation and Financial Autonomy*

Those *iwi*, which have reached a final settlement and have created *rūnanga* structure, have limited taxation rights. All Māori authorities are, however, under New Zealand's tax system and legislation. They must give a complete statement each year of their taxable income for the preceding year. The Audit Office of New Zealand supervises all public funds on the Cook Islands and Niue. The Island Councils can order local payments as fees, services, charges, fines, contributions, subscriptions and rents. The government of New Zealand provides annually fiscal resources to Niue and Tokelau because both depend heavily on imports which come mainly from New Zealand.<sup>123</sup>

#### 4.2.9. *Citizenship*

The Māori are New Zealand citizens, enjoying all the benefits, rights and privileges that go with it. This is derived from the right to *tino rangatiratanga* under article 3 of the Treaty of Waitangi. Also the residents of associated states and territories are British nationals (Commonwealth citizens) and New Zealand citizen. The Cook Islanders have a status of permanent resident of the Cook Islands which defines the electoral and social rights. The status includes all persons born on the islands, having a parent who was a permanent resident at the date of the person's birth; having a father, who was a permanent resident at the date of the father's death; and those adopted by a person who was a permanent resident at the date of the adoption. A person may apply the status and the Constitution permits the parliament to prescribe the qualifications for applicants. The status may be also revoked if a person is absent from the Cook Islands for more than three years, indicating that he/she has ceased to make a home on the islands. There are no equivalent provisions for Niue or Tokelau. The Tokelau Immigration Regulations 1991 require a permit for other New Zealanders to reside or work in Tokelau.<sup>124</sup>

### 4.3. **Canada**

#### 4.3.1. *The Constitutional Status of the Indigenous Peoples*

The indigenous peoples came formally under British/Canadian Authority between 1713 and 1905. The basis for the constitutional status of indigeneous peoples are the two Constitution Acts, 1867 and 1982, the latter forms the Canadian Charter of Rights and Freedoms. The Constitution Act, 1867, recognises the existence of Indians in s. 91. The subsection 24 follows the policy of protection, expressed in the Royal Proclamation of 1763. The Indians form in

---

123 Tax Administration Act 1994, s. 69B; 70B; Te Runanga o Ngai Tahu Act 1996, s. 30; Taxation (Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003, ss. 97-98; Ntummy (1993), pp. 10-11, 159, 166, 298, 300.

124 Treaty of Waitangi (1840), art. 3, Constitution of the Cook Islands 1965, art. 46, 76A; Cook Islands Constitution Act 1964, s. 6; Constitution of Niue 1974, art. 36; Niue Constitution Act, 1974, s. 5; Citizenship Act 1977, ss. 29, 684A; Wilson (1997), p. 6.

this provision a distinct legal category of people for which the Crown has reserved lands. There is no definition of an Indian title to land or pre-existing sovereignty as the fathers of the Canadian Constitution expected the Indians to assimilate.<sup>125</sup> The subsection 91(24) has been untouched since the birth of the confederation.

Despite the mention of Indians in the Constitution Act, 1867 and the treaty making process, there was “a period of erosion” in aboriginal and treaty rights. A first sign of change was the reform of Indian Act in 1951. The post-war atmosphere forced the federal legislator to check its stand on discriminative Indian legislation. During the repatriation process of the Canadian Constitution, the first draft of the new Constitution Act (1980) included only a negative non-derogation provision on indigenous rights. After wide protests they were, however, included in the final version. The Constitution Act, 1982 and its Charter of Rights and Freedoms transferred the indigenous rights from common law’s pre-existing legal doctrine to constitutional law. The Inuit were recognised in SCC’s *Re Eskimos* decision (1939), and the Métis in the NRTA process of the 1930s. This recognition of all three indigenous categories was finally included to the s. 35(2) of the Constitution Act, 1982. In *Van der Peet* (1996) the Supreme Court defines as the purpose of s. 35 “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” Sections 25 and 35 recognise the existing Aboriginal and treaty rights of the First Nations, Métis and Inuit. Section 25 of the Constitution Act, 1982, refers to the protection of a specified minority group. That means a constitutional recognition of pre-contact rights of indigenous peoples. Section 35 is outside the rights part of the Constitution Act, 1982, which protects it from the s. 1 limitation (“justified in a free and democratic society”) and s. 33 override provisions. The nonderogation clause of s. 25 ensures that new legislation does not infringe the Aboriginal rights recognised in s. 35. There are, however, different interpretations as to whether s.25 gives the Indigenous communities also absolute or internal immunity. The French wording of the section supports more this interpretation. The other interpretations support relative protection of indigenous difference.<sup>126</sup>

The Aboriginal rights are based on Indigenous peoples’ inherent occupation of North America as sovereign nations before the arrival of settlers. The rights are held communally by the members of an Indigenous group and include everything necessary for their survival as Indigenous peoples. The Indigenous rights are *sui generis* and they must be interpreted according to a different set of rules. Treaty rights refer to solemn promises made when the treaties were signed with the First Nations. The Constitution recognises only existing Aboriginal and treaty rights as existent on 17 April 1982. The Indigenous peoples have the onus to prove the existence of Aboriginal rights through integral to the distinctive culture test. The proof is validated either in court or through the recognition of the federal Government. The Crown may override Aboriginal and treaty rights by federal legislation, but there must

125 Royal Proclamation (1763); Constitution Act (1867), s. 91(24); Dickason (1994), p. 257.

126 Constitution Act (1982), ss. 25, 35; SCC, *Re Eskimos* (1939); *Van der Peet* (1996), s. 31; Hogg (1985), p. 564; Elliott (2005), p. 76; Otis (2005), pp. 160-165; Hutchinson (2007), p. 184. The French version says: “Le fait que la présente Charte garantit certains droits et libertés ne porte pas atteinte aux droits et libertés – ancestraux, issus de traits ou autres – des peuples autochtones du Canada.”; Some, like Patrick Macklem, are worried that the Charter poses a risk to the continued vitality of indigenous difference when it authorises judicial reorganisation of indigenous societies according to non-Aboriginal values. Macklem 2001, p. 195.

be a clear and plain intention to extinguish them. Since 1982 it has been also difficult to extinguish the rights without the Indigenous group's consent.<sup>127</sup>

The Constitution Act, 1982, defines that a constitutional amendment concerning the Indigenous rights can be made only after a constitutional conference between the Prime Minister and the provincial First Ministers. The Prime Minister has also an obligation to invite the representatives of Indigenous peoples to participate in the conference. Section 35.1(b) can be read as a commitment to the recognition of Indigenous peoples in Canada as legitimate constitutional actors. There is, however, a question whether the right to self-government is included in the scope of s. 35(1). According to the Supreme Court the task for the courts applying s. 35 is to reconcile Indigenous rights with the sovereignty of the Crown. The House of Commons Special Committee on Indian Self-Government (Penner) Report (1983) and later Cooligan Report (1985) recommended the extension of the self-government concept: all range of law-making, politics, progressive delivery, law enforcement and adjudication powers would be available to the First Nations governments within their territories. Based on s. 37, there were arranged four constitutional conferences. The first conference (1983) guaranteed Aboriginal and treaty rights equally to both sexes and provided indigenous participation in future constitutional change. The three latter conferences (1984-1987) turned their attention towards the recognition of self-government. The 1985 conference stressed the following: recognition of right of self-government for Aboriginal peoples within the Canadian federation; requirement for negotiated tripartite agreements; constitutional protection of Aboriginal peoples' rights in negotiated agreements; and the non-derogation of Aboriginal or treaty rights. The first ministers accepted the concept of self-government, but did not find agreement for constitutional amendment. As a means to find a way out, the federal government introduced Bill C-52 (An Act Relating to Self-Government for Indian Nations), which died out when the federal Parliament was dissolved.<sup>128</sup>

The draft Meech Lake Accord (1987) was a disappointment to First Nations, as it concentrated on Québec as a distinct society and did not address the Indigenous rights. Eliah Harper, a Cree MP of Manitoba Legislature, was in a key position to invalidate the accord by his delay tactics. The Charlottetown Accord five years later was an unsuccessful attempt to reform the Indigenous peoples' status in Canada. It was based on a thorough consultation with Indigenous groups. The Accord would have recognised the Indigenous peoples right as first peoples to govern their land; representation in the Senate with double majority guarantees in matters affecting them; given candidacy to Supreme Court of Canada; given the right to participate in the First Ministers' Conferences; made the general non-derogation clause as protection; given the inherent right of indigenous peoples to self-government as one of the three orders of government in Canada; given broad powers and autonomy to control their inner affairs; and allowed a Métis self-government. The Charlottetown Accord (1992) would have changed the Constitution Act, 1867, s. 91(24) by creating a Métis Nation Accord, or

---

127 Elliott (2001), pp. 10-12, 34.

128 Constitution Act (1982), ss. 35, 35.1, s. 35(2); SCC, *R. v. Van der Peet* (1996); *Delgamuukw v. British Columbia* (1997); Cassidy (1991), p. 43; Armitage (1995), p. 79; Cairns (2000), p. 84; Olthuis & Kleer & Townshend (2008), p. 16; Otis (2005), pp. 71-72; Baudoin and Mendes (2007), pp. 16-17. A similar process of meetings has recently been arranged in Yukon.



Métis Constitution, which would have been nationwide binding. Also the legislative authority of the province of Alberta would have been preserved *vis-à-vis* Métis.<sup>129</sup>

These ideas were not completely abandoned. The work was continued by the Royal Commission on Aboriginal Peoples (RCAP), which first released in 1993 a discussion paper entitled *Partners in Confederation*. When the commission's work was still in progress, the federal Government recognised the right to self-government as a constitutional Indigenous right. It announced a willingness to enter into self-government negotiations and agreements with Indigenous nations. All self-government agreements should be subject to the Charter. In the 1996 the RCAP published its massive 4,000-page report which supported the modernisation of aboriginality. It proposed restoration of the Indigenous-driven sovereignty through the revitalisation of selected Indigenous customs and institutions. Besides the procurement of cultural sovereignty and territorial groundedness as a basis for the healing process and realignment of the political agenda to accommodate Indigenous authority alongside federal and provincial jurisdictions, they included control over the process and power of self-governance as a third order of the Canadian Government. The commission's design was a pan-Canadian First Nations government and a third chamber of Parliament called the House of First Peoples, which would have full responsibility within its own jurisdiction. It would have initiated legislation and provided advice to the House of Commons and the Senate on legislation and constitutional matters relating to Indigenous peoples. The federal Government would speak with it on a nation-to-nation basis. This has instead taken place in discussion with individual First Nations. RCAP estimated that there could be 50-80 units for self-determination. They would have an inherent right to self-government and their laws could override the federal and provincial laws in inner matters. All of them should have their individual constitutional frameworks from which to exercise the right. The commission suggested that a group of bands would hold a referendum to determine whether to proceed towards self-government and could then develop constitution and membership criteria. A Recognition Panel would take care of wider consultation with a larger membership. Two alternative models to indigenous self-government are according to RCAP a public government model and community of interest model - a non-territorial model to provide various services delegated through federal or provincial legislation.<sup>130</sup>

In the meantime (1995), the federal government announced its policy to implement the right of self-government.<sup>131</sup> In its policy paper *Gathering the Strength* (1998) the government reassured its commitment to First Nations self-governance.<sup>132</sup> While the political way to

---

129 Charlottetown Accord (1992), ss. 2, 9, 20, 23, 40-41, 53, 55-56; Olthuis & Kleer & Townshend (2008), pp. 16-17.

130 RCAP, Vol. 2, pp. 181, 314-320; Thibault (1998), ss. 159-249; Cairns (2000), p. 102; Elliott (2001), p. 163.

131 The possible areas of negotiation were: 1) full Indigenous responsibility: governing structures, membership, marriage, adoption, child welfare, aboriginal language, culture and religion, education, health, social services, enforcement of aboriginal laws, policing, property rights, land and natural resources management, agriculture, hunting, fishing, trapping, taxation, housing, local transportation, licencing and regulation of businesses; and 2) federal responsibility with limited indigenous powers: divorce, labour and training, administration of justice, penitentiaries, parole, environmental measures, fisheries, co-management, migratory birds co-management, gaming and emergency preparedness. Cf. Federal Policy Guide (1995).

132 *Gathering Strength* (1998), p. 8. The RCAP was influenced by the Harvard Project on Indian Economic Development (1992) which emphasises the legal factors.

amend the Constitution did not come to realisation, the Supreme Court showed remarkable judicial activism and took the leading role. It has characterised the indigenous societies since *Guerin* (1985) as *sui generis*. The court distinguishes the *sui generis* law from the international law and British colonial law in stressing the continuity of indigenous interests in land. *Sui generis* is a unifying principle underlying the different dimensions of title arising from the possession before the assertion of British sovereignty.<sup>133</sup>

The courts have evolved three main approaches to Aboriginal rights, the first based on the royal prerogative and the other two on common law. The dominant theory was until the 1980s the Royal Proclamation approach. It assumes that Aboriginal rights derive from the governmental recognition of 1763 and the rights must depend on legislative or executive government recognition to have legal status. In the 1980s and 1990s to the forefront came the occupancy and use approach that Aboriginal rights derive from common law recognition of traditional Indigenous occupation and use of land before the assertion of European sovereignty. A more advanced form of theory is the land and societies approach, promoted in the Supreme Court's *Sparrow* decision (1990), which means common law recognition of Indigenous peoples' prior occupation and use of land in North America in distinctive societies.<sup>134</sup>

A significant impulse to the Supreme Court's development on the doctrine on Aboriginal rights in the 1990s was the unsettled land question of First Nations in British Columbia. In 1990 the Supreme Court created the so-called Sparrow test to clarify the Aboriginal and Treaty rights. It helped to define whether or not the government regulations would be justified based on the s. 35(1) of the Constitution Act, 1982. In the Sparrow test the meaning of s. 35(1) was derived from the general principles of constitutional interpretation, principles related to Aboriginal rights, and the purpose behind constitutional provisions. The nature of 35(1) suggests that it is construed in a purposive way and demands a generous and liberal interpretation of words. The Government has responsibility to act in a fiduciary capacity in respect to Indigenous peoples. Their relationship is trust-like. The existing Aboriginal rights must be interpreted flexibly to permit their evolution over time. The contemporary recognition and affirmation of Aboriginal rights must be defined in the light of historical relationship. Legislation that affects the exercise of Aboriginal rights will be valid, if it meets the test for justifying the interference with the rights recognised and affirmed under s. 35(1). Federal power must be reconciled with federal duty and the best way to achieve this is to demand the justification of government regulations that infringes upon or deny Aboriginal rights. The way in which the legislative objective will be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and the Indigenous peoples. The extent of legislative or regulatory impact on the existed Aboriginal rights may be scrutinised to ensure recognition and affirmation.<sup>135</sup>

In 1996-1997 the Supreme Court gave several new definitions on the indigenous rights. *Van der Peet's* (1996) significance is in establishing a cultural test, which will be returned to

---

133 SCC, *Guerin* (1985), ss. 382, 387; *Simon v. The Queen* (1985), s. 404; *Sparrow* (1990); *Sioui* (1990); *R. v. Côté* (1996), ss. 42-54; *Delgamuukw* (1997), ss. 113-114; Cook & Lindau (2000), pp. 107-108.

134 Elliott (2005), p. 33.

135 SCC, *Sparrow* (1990).

later. In *Van der Peet* Lamer CJ also referred to distinctive societies which existed there before the colonial encounter. In her dissenting view L'Heureux-Dubé J stressed that the Indigenous peoples were before the contact independent nations, occupying and controlling their own territories with distinct culture, own practices, traditions and customs. In *Badger* (1996) the court held that a treaty represents an exchange of solemn promises between the Crown and Indian nation. It acknowledged that *sui generis* First Nations jurisprudence and order are inherent to First Nations societies. The honour of the Crown is at stake and it is assumed to fulfil its promises. Ambiguities and doubtful expressions must be resolved in favour of the Indians and any limitations restricting the Indian rights under the treaties must be narrowly construed.<sup>136</sup>

The Supreme Court has been generally cautious in discussing self-government as a general judicial concept. In *Adams* and *Côté* (both 1996) it dissociated the ancestral rights and Aboriginal title. In *Delgamuukw* (1997) Lamer CJ said that before the contact the First Nations already lived in communities and participated in distinctive cultures. It separated them from all other minority groups in Canadian society and mandates their special legal and constitutional status. The constitutional force given to Aboriginal rights protects them against provincial legislative power, precludes a unilateral extinguishment of their rights, provides them a basis for recognition of Aboriginal rights, negotiations and settlements of claims, and assists them in reconciling the rights and interests that arise from distinctive societies with the sovereignty of the Crown. The legal rights of the Indian people will have to be in accordance with wider society through political compromises and accommodations based on negotiations and agreement and ultimately in accordance with the sovereign will of the community as a whole.<sup>137</sup>

In *Westbank* (1999) the court has stressed flexibility when interpreting the Constitution. The different orders of government are not separated from each other. *Corbiere's* (1999) most important outcome was Bill C-7 which presented an interim, more facilitative regime to supersede the Indian Act, pending each Nation's own self-government agreement and based on the idea of implementing constitutional values into the Indigenous system of governance. Bill C-7, or First Nations' Governance Act (2002), was controversial as a boilerplate over Indian governance. The First Nations protested the lack of consultation and incompatibility with the right of self-government. The reform of Indian policy had to be done one group at a time.<sup>138</sup>

Following *Calder* the federal government adopted a comprehensive claims policy and regional initiatives, aimed at the settlement of land disputes and self-government agreement. The federal policy was known as the Kelowna Accord. It was meant to intensify the action by recognising the inherent right of self-government and setting out what areas of jurisdiction are negotiable, with whom the government will negotiate, and how negotiated agreements are to be ratified. A major objective was to harmonise laws by developing co-operative arrangements that would ensure the harmonious relationship of laws, indispensable to

---

136 SCC, *Van der Peet* (1996), ss. 30, 35, 106; *R. v. Badger* (1996), ss. 76-82.

137 SCC, *Adams* (1996), ss. 25-30; *Côté* (1996), ss. 84-88; *Delgamuukw* (1997), ss. 180-181, 186, 207.

138 SCC, *Westbank First Nation v. British Columbia Hydro and Power Authority* (1999), s. 18; McHugh (2004), pp. 337, 433.

the proper functioning of Canada.<sup>139</sup> The Kelowna Accord was rejected by the following Conservative government.

#### **4.3.2. Indigenous Definition**

In the Canadian context an *Indian* was defined for the first time in the Act for Lower Canada, 1851. The definition was based on tribal membership, marriage, residence and adoption by Indian parents. The law created also separation between status and non-status Indian categories. Soon the law was revised to exclude the whites living among the Indians and non-Indians married to Indian women. After 1867 the male bloodline became the major definition of an Indian. The Gradual Enfranchisement Act, 1869 specified the definition with blood quantum: a status Indian had to have at least 25 % Indian blood. Also the distinction between men and women was specified: if a registered Indian man married a non-Indian woman, she acquired her husband's status, which was passed on to their children. In contrast, the Indian wife of a non-Indian lost her right to annuity payments, to be a member of a band, or even to be an Indian within the meaning of the act. According to a double mother rule a one-quarter Indian wife could be included, but her children could not claim Indian status. This definition of Indian status was retained until 1985.<sup>140</sup>

The first Indian Act (1876) defined an Indian "a person who pursuant of this Act is registered as an Indian, or is entitled to be registered as an Indian". Indian blood continued to be another important ground for definition. It indicated belonging to a band and entitled use of its lands. The act narrowed federal recognition of indianness in eastern Canada to those indigenous people who already lived on recognised reserves or belonged to recognised Indian bands. The act defined also two other categories of Indian: a non-treaty Indian was "any person of Indian blood who reputed belong to an irregular band or who follow the Indian mode of life". An enfranchised Indian had, subsequent to the grant of letters patent, ceased to be an Indian.<sup>141</sup>

The revision of Indian Act in 1951 changed the definition in a more technical and complicated direction. The Indian status relied on registration or entitlement to register on a roll maintained by the department. The half-breeds and women married to a non-Indian were still excluded. The definition has been modified in the Indian Act, 1985: the register with band lists has been preserved and maintained in the department, but the blood quantum has been replaced by a two-generation cut-off clause which demands that a person must have two status Indian grandparents. It has become possible to transfer the control of membership to local bands, who must create their own membership rules. Change in the status of many women, who had regained their status after 1985, but who had not been accepted back to the reserves, has led the department to redefine Indians into two categories: federally registered and those accepted as band members. Persons who had relinquished their Indian status in the enfranchise process have been able to resume it through an application process. Before 1985,

---

139 Aboriginal Roundtable to Kelowna Accord (2005), First Ministers Meeting on Aboriginal Issues.

140 Act for Lower Canada, 1851, s. 2; Gradual Enfranchisement Act, 1869, ss. 1, 6; Indian Act, 1876, s. 3; Dickson (1994), pp. 250-251.

141 Indian Act, 1876, s. 2; Lawrence (2004), p. 84.

the category of *non-status Indians* had importance. They were individuals, excluded from recognition either by a band or by the department. With the new Indian Act many of them gained or regained the recognition, which ended the concept as a significant category. The federal administration prefers to speak about Indians living off the reserves.<sup>142</sup>

A first attempt to define the *Métis* was made in 1845, when some of them asked the Red River Governor Christie to define their special status. The governor held that they had the same rights as all other British subjects. When the federation of Canada was born, a general definition on the *Métis* was not made. In several documents they were referred as half-breeds. Some of them identified as Indians to receive the benefits and membership of Indian reserves. After Bill C-31 they have no legal means to return to being a *Métis*. The Ewing Commission (Alberta, 1934-1936) defined the *Métis* as anyone with any degree of Indian ancestry who lives the life ordinary associated with the *Métis*. The *Métis* Association of Alberta extended later the definition to include anyone who considered himself/herself a *Métis* and who was accepted by the community as such. The *Métis* Population Betterment Act, 1938, defined a *Métis* as “a person of mixed white and Indian ancestry having not less than one-quarter Indian blood. In *Metis Settlements Act*, 1990, a *Métis* is a person of Aboriginal ancestry, who identifies with *Métis* history and culture. Persons registered as an Indian under the Indian Act and as Inuit for the purposes of a land claim are expressly excluded. The *Métis* Nation defines for its citizenship criteria self-identification, historical ancestry, distinctiveness and acceptance by the community.<sup>143</sup>

The *Métis* cannot be defined like the First Nations or Inuits by using as a criterion pre-contact existence. Instead, in *R. v. Powley* (2003) the Supreme Court has created, based on the Van der Peet case, a pre-control test focusing on the period between a particular *Métis* community's appearance and its entering to Canadian society. The court used a purposive reading of s. 35: the inclusion of *Métis* is based on a commitment to recognise the *Métis* and enhance their survival as distinctive communities. The first criterion is belongs to an identifiable community, a group of *Métis* with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. The Supreme Court found three broad factors to identify a *Métis*, reminding of the *Métis* Nation's criteria: self-identification as a member of the *Métis* community; evidence of ancestral connection to a historic *Métis* community; and demonstrated acceptance by a modern *Métis* community. Later, lower courts have several times stressed as important aspects of evidence of the recognition of the community, genealogical evidence, contextuality, site specific community and a common purpose based on historical realities.<sup>144</sup>

*The Inuit* have faced similar difficulties over official definition as the *Métis*. They were likewise a challenge to Canadian officials, living in a federal territory without provincial supervision. According to the Constitution Act, 1867, s. 91(24) only the Indians and their

142 Indian Act (1951), s. 12; Indian Act, 1985, ss. 5-6, 8-10, 12(1); Dickason (1994), p. 332; Armitage (1995), p. 84; Beaudoin & Mendes (1996), p. 17.21.

143 *Métis* Population Betterment Act, 1938 (Alberta), s. 2; Bell (1994), p. 8; Dickason (1994), p. 264; Weber (2004), s. ; Isaac (2008), pp. 3-4.

144 SCC, *R. v. Powley* (2003), ss. 12-13, 31-33; Isaak (2008), pp. 13-14. Cf. BCPC, *R. v. Willison*; NBPC, *R. v. Castonguay*; *R. v. Daigle*; ONCJ, *Ontario (Minister of Natural Resources) v. Beaudry* (2006); SPC, *R. v. Laviolette* (2005); *R. v. Norton* (2005).

lands were under federal jurisdiction. In 1939 the Supreme Court of Canada ruled, based on narrow historical evidence, that “the Esquimaux.... are included among the Indian races”. They have since been under federal authority, but are excluded from the Indian Act. The Nunavut Land Claims Agreement (1993) defines them as indigenous people who since traditional times used and occupied the lands and waters of the Nunavut Settlement Area. They are Inuit as defined by Inuk custom and associated with the community. In defining the Nunavik, Inuvialuit and Nunatsiavut membership, the ancestry and adoption to the community are decisive factors. In Nunatsiavut a 25% blood quota is still in use.<sup>145</sup>

### 4.3.3. *The Treaties and Agreements*

#### 4.3.3.1. *Allies Become Wards*

Today there are more than 500 treaties in force between the federal/provincial Crown and the Indigenous peoples, which vary from tiny lots to Nunavut Agreement, creating an ongoing relationship while the self-government models vary to a great extent. The first treaty-making period was in 1763-1923. These historical treaties were negotiated in the context of superior bargaining power on the part of the non-Indian parties and there was increasing imbalance over time. The era of modern agreements started in 1973. The First Nations have continued to look to treaties as acts of constitutive self-determination and critical points of reference for determining their specific ongoing rights and place in the larger world.<sup>146</sup>

The First European power in present Canada was France. With the consolidation of royal power it built up relations with the indigenous peoples, based on formal declarations. Only treaties in written form were peace treaties with the Indian tribes and confederations. The most important of them was *Paix des braves* (1701) between France and its enemy, the Iroquois Confederation. The French king was proclaimed as the Sovereign of all territory and the protector of Indian tribes. The Christian indigenous villages (*réduction*) and the schools for Native children were showcases of the superior French culture. They had a cultural and religious mission with a strong flavour of assimilation. Governor de Champlain saw as an outcome the merger to one French people. On the other hand - due to their weak position - the Frenchmen needed local tribes as their allies. Therefore, they were ambiguous when dealing with the idea of indigenous sovereignty.<sup>147</sup>

The oldest British treaty including the territories of present Canada was the Portsmouth Treaty (1713), including the Maliseet people. The early treaties were treaties of peace and friendship: no land was ceded by them. The Treaties of Boston and Drummer (both in 1725)

---

145 James Bay and Northern Quebec Agreement (JBNQA, 1975), s. 1; Western Arctic Claim Inuvialuit Final Agreement (IFA, 1984), s. 2; Nunavut Land Claims Agreement (NLCA, 1993), s. 1; Labrador Inuit Land Claims Agreement (LILCA, 2005), s.1; SCC, *Re Eskimos* (1939), p. 141; Elliott (2005), p. 20. Inuit means “a man”. Eskimo is a Cree word, which means “he eats it raw”; The Indian Act, 1951, said: “This Act does not apply to the race of aborigines commonly referred to as Eskimos”; Inuk is the singular form of Inuit.

146 Anaya (2004), p. 188.

147 Grand Paix de Montréal (1701); Dickason (1994), p.167; Özücü (1996), p. 3. According to de Champlain, “Our young men will marry your daughters, and we shall be one people”. In *Côté and Adams*, the Supreme Court held that France was unequivocally opposed to the existence of Aboriginal rights.

were similar, including the Mi'kmaq, Maliseet and Abenaki. Through treaties the British Crown became the rightful possessor of the present-day Maritime Provinces but not all tribes accepted the terms. Annuities and guarantees of traditional economy were included for the first time to the Halifax Treaty (1752). The Nova Scotia County Court held in 1928 that it was a mere agreement made by the Governor and his Council with a handful of Indians: "The savages' right of sovereignty, even of ownership, were never recognized". The territory had passed to the United Kingdom by a treaty with France, who had acquired it by priority of discovery and ancient possession. An agreement with Indians could be terminated by provincial or federal Government. As Indian sovereignty had never been recognised, the 1752 agreement could not be classed as an international treaty. This view was upheld until 1985 when the Supreme Court reversed in *Simon* the interpretation. Dickson CJ held that the Indian treaties must be given a fair, large and liberal construction in favour of the Indians, and that they should be construed in a sense naturally understandable by the Indians.<sup>148</sup>

The Indian status began to form in the mid-eighteenth century. In 1755, during the war against France, the British government established the Indian Department and appointed a superintendent of Indian affairs who was responsible for political relations with Indian people, boundary negotiations, enlistment in wartime, and protected them from traders. The Royal Proclamation of 1763 recognised the importance of First Nations as allies. It unified the Indian policy and secured their rights under the auspices of British justice and the principle of negotiated treaty over unextinguished title. The Royal Proclamation has a constitutional status, as cited in s. 25 of the Constitution Act, 1982.<sup>149</sup>

Treaties following the Royal Proclamation permitted the use of land in return for a trade agreement. The Indians were to keep peace with the British and give them military assistance and material benefits. Between 1764-1825 a total of 12 treaties were negotiated. These early treaties of peace and friendship were often imprecise, but as the number of settlers increased, the agreements became essentially land transfers. Already the agreement of 1784 with the chiefs of Lower Canada ceded over 12,000 square kilometres of land to the Crown. In 1790-1793 the Ojibwa, Odawa and Potawomi ceded 20,000 square kilometres more. The annuities substituted cash payments for land from 1818.<sup>150</sup>

The war of 1812 with the United States was a turning point. The Indians were no more considered as allies but as subjects of the Crown. This change was visible in the case law of Upper Canada. Governor Haldimand had granted the Grand River reserve to Britain's Iroquois allies in 1784. The early nineteenth century leases raised a question on indigenous legal status. The Upper Canada's Court of King's Bench ruled in 1835 that the Six Nations' Indians were mere tenants at the will of the Crown. Later Robinson CJ held that although the Indians were "distinct tribes as respect of their race, yet that gave them no corporate powers or existence"... "The common law is not part savage and part civilized". Also Darling Report (1828) expressed the Crown's goal: to assimilate the Indians as members of civilised society. Governor Head negotiated in 1836 a Treaty with the Ojibway and Ottawa, which established

---

148 Treaty of Portsmouth (1713), art. 1; Treaty of Boston (1725), art. 1; Treaty No. 239 (1725), art. 1; Halifax Treaty (1752), art. 4; NSCC, *R. v. Syliboy* (1929), s. 313; *Simon v. The Queen* (1985), s. 399; Dickason (1994), pp. 346, 348; Karsten (2002), p. 57.

149 Armitage (1995), p. 73.

150 Dickason (1994), pp. 189-191; McHugh (2004), pp. 152-143.

Manitoulin Island as a place of refuge for indigenous people. The Crown recognised the Aboriginal title to the island. In return, the Indian nations agreed to relinquish or modify their rights of exclusive use and enjoyment in favour of non-exclusive rights in order to enable other indigenous people to relocate there in the future.<sup>151</sup>

In 1844 the management of Indian affairs in the Canadas was transferred from the military authorities to the governor's civil secretary. The imperial administration was not coping well with the local administrative problems, and the responsibility was entrusted in 1860 to provincial Governments. Herman Merivale, permanent undersecretary of the Colonial Office, developed the concept of regional approaches. There were as many policies as there were colonies: in the Maritimes insulation and in the Canadas amalgamation. The common theme was, however, the civilisation of Indians.<sup>152</sup>

The period since 1850 was a beginning of huge land-cession treaties. Two important treaties in Upper Canada were the Robinson Treaties (1850). They created a standard pattern for public and open negotiations, based on the Royal Proclamation of 1763. According to them: the lands were to be surrendered to the Crown; each treaty had an annex of schedule of reserves to be held in common; annuities were paid to each member of a signing band; and the hunting and fishing rights on unoccupied lands were guaranteed. The Enfranchisement Act's (1869) goal was with time to abolish the Indians's special status, but it did not affect the enfranchised Indians treaty rights, except for the treaty payments. They still had a right to live on reserves. This opened a right to business licence, to buy liquor and send children to public schools. Despite these attractions, only 102 Indians gave up their special status in 1858-1921. Later the vote and land requirements were eased and more Indians enfranchised. The Indian Department's purpose was the extinction of Indians as Indians.<sup>153</sup>

#### 4.3.3.2. *Numbered Treaties: the Era of Extinguishment*

Also the founding fathers of the Canadian Confederation supported assimilation. The treaty making was seen as a moral obligation, as a means of avoiding conflict. When the Canadian government acquired the Rupert's land in 1870, which did not belong to the lands covered by the Royal Proclamation, it promised to negotiate with Indians for the extinguishment of their title and the setting aside of reserves for their exclusive use. Canada's promise to Britain to honour the provisions of the Royal Proclamation led to eleven numbered treaties between the Crown and the Indians and some Métis in 1871-1922, covering parts of Ontario, the three Prairie Provinces, northeastern British Columbia and the southern Northwest Territories. Outside the numbered treaties were left most of British Columbia, the Northwest Territories,

---

151 UCKB/UCQB, *Doe ex D. Jackson v. Wilkes* (1835); *Doe ex d. Sheldon v. Ramsay* (1852), p. 123; Macklem (2001), p. 133; McHugh (2004), pp. 155-156. From Québec can be later found one exception in case law. In 1867 Monk J (Québec Superior Court) held that the Indians' laws and usages were in full force. He followed the reasoning of Marshall court in *Worcester v. Georgia*.

152 Dickason (1994), p. 248; McHugh (2004), p. 182.

153 Gradual Enfranchisement Act, 1869, ss. 16-17; Crown Treaty 60 (1850); Crown Treaty 61 (1850); Tobias (1976), pp. 22-23; Dickason (1994), 327. Superintendent Scott promised to "continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian department."



Québec and the Maritime Provinces. Newfoundland did not belong to Canada before 1949. Three treaties had their areas extended and several were modified by later adhesions, the last time in 1956. The numbered treaties are similar in form and contents. They define the relationship between the federal state and the different bands in different geographical regions of Canada, thus guaranteeing the protection of Indigenous rights in return for extinguishment of Aboriginal title over the remaining lands. The federal Government regarded the treaties as the final means of opening up Indian lands for settlement and development. The Indians, on the other hand, believed that they could adapt to the demands of the contemporary world within the framework of their own traditions.<sup>154</sup>

In Treaties 1-2 (both in 1871) the Saulteaux and Cree were offered a present, an annuity and 160 acres of land for a family of five. In 1875 the treaty terms were annexed with Treaty 3 (1873, Saulteaux), which raised the annuities. Further, there was given a gratuity.<sup>155</sup> Treaty 3 gave for a family of five 640 acres of land. Treaties 1-3 promised to Indians buggies, livestock, seeds, farming equipments and supplies.<sup>156</sup> Treaties 3-11 included general hunting and fishing rights, ammunition and fishing nets. The chiefs and headmen were given distinctive suits of clothing for chiefs with flags, medals and annual gratuities. All treaties established schools on reserves and prohibited the sale of liquor.<sup>157</sup> Treaty 6 (1876), covering central Alberta and Saskatchewan, includes a provisions on medicine chests, kept at the home of the Indian Agent for use by the people, and assistance against famine, and pestilence relief.<sup>158</sup> Treaty 7 (1877) in southern Alberta promised 1 sq mile land for a family of five, cattle for raising stock, a Winchester rifle, medal, flag and salary for the teachers.<sup>159</sup> Treaties 8-11 (1899-1921) were northern resource development treaties. In the background was the arrival of American gold seekers on the banks of the Mackenzie River in 1898, the need for mining development and infrastructure, and later also the discovery of oil. The numbered treaties area was extended to northeast British Columbia, northern Alberta, northwest Saskatchewan, western and southern NWT and eastern Yukon, which included mineral rich areas and farming opportunities and controlled the roads to goldfields. The treaty areas covered huge territories: Treaties 8 and 11 covered 841,000 sq km and 963,000 sq km respectively. The Indians of the north wanted assistance during famine periods, social care and education, and even a railway. They had learned the conditions of former treaties and had two main concerns: free fishing and hunting rights and the fear to be located to reserves. They were assured that selection of reserve lands would be left for the future. They were offered free ammunition and fishing nets. The Métis in the treaty area were offered either 240 acres of land or \$ 240 in cash. The treaties were amended several times but many vocal promises were not realised: absolute ownership of lands and the health and social care were left outside the written documents. The northernmost areas

---

154 Brown & Maguire (1979), p. 32; Dickason (1994), pp. 273-277; Eisenberg & Spiller-Halev (2005), p. 286. Prime Minister MacDonalld said that "the great aim of our civilization has been to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion, as speedily as they are fit for the change."

155 Treaty 1 (1871); Treaty 2 (1871).

156 Treaty 3 (1873).

157 Treaties 3-11 (1873-1921).

158 Treaty 6 (1876).

159 Treaty 7 (1877).

offered more hardships and less advantage to the Canadian Government to prepare a treaty. There were also less politically active Métis.<sup>160</sup>

The difference in languages and concepts caused misunderstanding. The federal Government saw that the treaty offered the Indians usufructuary rights, subject to governmental regulation and excluded rights in the areas required for settlement, mining, lumbering and trading. The Indians had a different view though: they understood they had been guaranteed free rights to hunt, fish, and trap. The northern Indians did not know the concepts of finite boundaries. The Indians saw the Treaty 8 as a peace and friendship treaty. Later, when the government began to survey the area in 1913-1915, they understood that the white man interpreted the treaty in a different way. The Dogribs demanded a written special recognition of their rights in 1920. The Dene Nation litigated in 1973 in Alberta against the Treaties 8 and 11 by claiming that they were fraudulent. They lost the case.<sup>161</sup>

The first numbered treaties excluded the Métis, but Lieutenant Simpson, who negotiated the treaties, allowed individuals to make a choice to identify as either Indian or half-breed. Most chose the first option. In Treaty 3 the Ojibway chief Mawedopenais succeeded to include the half-breeds to the treaty and they are the only Métis who have been able to access numbered treaties as such. In 1879 the Indian Act was amended to enable “really half-breed” individuals to withdraw from a treaty and in 1880 the federal government excluded them by amending again the Indian Act, after the intervention of missionaries and NWMP. Scrip was made available since 1885: the Métis were offered either 240 dollars of money or 240 acres of land per family, but in the negotiations of Treaty 11 only money. The scrip was tempting: in two first years more than 1,000 people discharged their treaty rights and three Treaty 6 First Nations in Alberta ceased to exist. In Yukon, where the Indian tribes were left outside the numbered treaties, there was less distinction between the Indians and half-breeds and the scope of federal jurisdiction was left open. The indigenous people were offered small parcels of land as residential reserves. While not protected by the treaties, they were easy to relocate.<sup>162</sup> The Supreme Court approached the questions in the *Ross River* case (2002), where it gave the federal government a broad discretion on the question.<sup>163</sup>

The federal government made in the treaty area a separate decision concerning Sioux refugees in 1874. They were former British allies, who were given 12,000 acres of land per family. Their reserves have never been included in any treaty, but they are registered and entitled to Indian status except for annuities. Also the Lubicon Lake Indian Nation in Northern Alberta was left outside a numbered treaty. Since 1933 it has litigated on decision right and profits over oil and mineral resources in their territory. The Nation was promised

---

160 Treaty 8 (1899); Treaty 9 (1905); Treaty 10 (1906); Treaty 11 (1921); Champagne (1994), p. 519.

161 Treaty 8 (1899); Treaty 9 (1905); Treaty 10 (1906); Fumoleau (1973), pp. 58-59; Dickason (1994), pp. 373-378. British Columbia did not resist the late treaties because it esteemed their territory worthless; The first Treaty Eight reserve was established only in 1961 in Fort Nelson, British Columbia.

162 Indian Act (1879), s. 3; Dickason (1994), pp. 306-310, 316-317-373; Lawrence (2004), pp. 89-90, 93-94. Often the line between an Indian and half-breed was more or less artificial. In Treaty 3 the scrips were available only in NWT. In Ontario the same people were defined as Indians. The Supreme Court has held this historical division recently in *Alberta v. Cunningham* (2011), where the Métis classified as Indians are excluded from Métis settlements in Alberta.

163 SCC, *Council of Ross River Dene Band v. Canada* (2002), ss. 67-68; One of the Yukon tribes was relocated four times in eight years.

a reserve in 1939, but a dispute on band lists prevented it. In 1952 began the mining and oil explorations. In 1990 Chief Ominyak submitted to the United Nations Human Rights Committee a communication claiming that the federal government denied their right to self-determination and free disposal of natural resources. The federal government held the communication as inadmissible since all domestic remedies had not been exhausted. The committee confirmed that Ominyak as an individual could not under the First Optional Protocol claim to be a victim of a violation of the right of self-determination, but it also held that in the light of art. 27 certain recent developments threatened the way of life and culture of the Lubicon Lake Band and constituted a violation of the article as long as they continue. The Canadian government attempted to subsequently force a settlement on terms rejected by the Lubicon Cree and matters were left at an impasse. Another similar, longlasting conflict took place in Ipperwash, Ontario, where the Chippewas tried to obtain back former reserve land, taken over by the army in 1942. After confrontations the federal government agreed to clean the area up and to support research on issues related to nearby Provincial Park, also former reserve land. The area was returned to the Chippewas in 2009.<sup>164</sup>

Some northernmost Indian tribes asked a treaty to protect their hunting, fishing and trapping rights and to protect them from famine, but the federal government held a treaty there as unnecessary due to poor prospects of settlement and costly administration. The Dominion Lands Act did not apply to non-extinguished areas. The Indian department opened in 1911 as an agency in Fort Simpson to distribute relief and to carry out experiments in farming, followed by HBC, which opened a trading post north of the polar circle and introduced the currency in the fur trade. A turning point in the north was collapse of the fur trade and the start of oil production in the 1930s. The Ministry of Interior established temporarily a northern branch. To keep the process in order, the federal Government restricted access to the Mackenzie District in NWT to those “mentally and physically able, and properly equipped and outfitted”.<sup>165</sup>

British Columbia has been another exception in treaty policy. To block the American advance to the north, British Crown established the Vancouver Island (1849) and British Columbia (1858) colonies. HBC and Governor Douglas managed first together the Vancouver Island. Unlike the company, Governor wanted to sign treaties with the Indians. He treated the tribes as British subjects and saw his own role based on the Crown trusteeship as a mediator. In 1850-1854 he concluded 14 treaties with Salish bands on Vancouver Island. In exchange for extinguishment of lands the tribes were confirmed possession of their villages and cultivated lands, and a liberty to hunt and fish on unoccupied land. The treaty formula was copied from New Zealand Company's land purchase. The colony's treaty-making ended in 1854 to the lack of funds and frustration of meagre results. Douglas' follower, Joseph Trutch, turned to a more aggressive policy and denied the existence of aboriginal title. When British Columbia joined the Confederation, only s. 13 in the British Columbia Terms of Union reminded about dominion's constitutional responsibility towards the Indians. It took yet another 67

---

164 UNHCR, *Bernard Ominyak, Chief of the Lubicon Lake Band v. Canada* (1990), s. 32; Dickason (1994), pp. 282-283; Anaya (2004), p. 257; Elliott (2005), p. 180; IWGIA (2010), p. 62. Since 1989 two groups have broken away from the Lubicon Lake band and have been recognised by the federal government as separate bands. Treaty 8 chiefs have not recognised the decisions' legitimacy.

165 Dickason (1994), pp. 371, 377-378.

years before British Columbia fulfilled its obligation to transfer Indian reserve lands to federal authority (1938). The reluctance to acknowledge Aboriginal rights has continued long in British Columbia. Still in 1991 McEachern CJ from the British Columbia Supreme Court ruled that Aboriginal plaintiffs' ancestors lacked the "badges of civilization" and were "primitive people". Their life was at best "nasty, brutish and short".<sup>166</sup>

By 1912 the Crown had made 483 treaties but soon the making of new treaties halted. The ideology of enfranchisement gained new speed in 1917, when the Indian Act was amended to grant a vote without property to Indians living off reserves. Within two years almost 500 Indians gave up their Indian status. The federal government encouraged also the treaty Métis and Indian women married to non-Indian men to give up their Indian status. Between 1920-1922 the Indian Act included a provision, where the superintendent was empowered to enfranchise Indians whom he considered qualified, even without their own will. For instance, obtaining a university degree could lead to losing the Indian status. A modified version of that provision was in force from 1933-1951 and the compulsory enfranchisement was dropped only from the revised version of the Indian Act in 1951.<sup>167</sup>

#### *4.3.3.3. Renewed Treaty Policy*

In the 1960s the Conservative Diefenbaker and Pierson governments supported the idea of an Indian Claims Commission, based on the US model. Also the Indian administration implemented a number of programmes to answer the continuing treaty and aboriginal title claims. After Pierre Trudeau's Government had failed to introduce in 1969 the so-called White Paper, which would have abolished the Indian Act and dismantled the established legal relations between the Aboriginal peoples and the state of Canada in favour of equality, and the Supreme Court's *Calder* decision, acknowledging for the first time that the Aboriginal title to land existed before colonial encounter, the federal Government established in 1973 the Office of Claims Negotiations. The following year the Government developed a policy paper named Indian-Federal Government Relationships. Its principles were based on the concept of a partnership between the federal government and First Nations. As a consequence, the Office of Native Claims was established to negotiate settlements. The federal policy developed further with the Mackenzie Valley Pipeline Royal Commission (1977), which could be regarded as a milestone. The Commission's report brought the self-determination to the official vocabulary. The federal Government developed two formal negotiation policies. The Comprehensive Claims Policy (since 1981) authorised the federal government to negotiate claims of undefined Aboriginal rights. The policy was renewed in 1986. The main points in the new policy were a stress on exchange of rights, self-government, resource revenue-sharing, environmental management, offshore areas, interim measures and implementation

---

<sup>166</sup> British Columbia Terms of Union (1871), s. 13; BCCA, *Delgamuukw v. British Columbia* (1970), ss. 11, 21, 26; Tennant (1990), pp. 30-38; Remwick (1991), pp. 52-54; Dickason (1994), p. 242, 325; McHugh (2004), pp. 174-175. The Douglas treaties covered only 3% of Vancouver Island; (1991), The pace of negotiations has been slow even elsewhere. The Manitoulin Island Treaty (1862) was signed in 1990, granting the Ojibwa 364 sq km of reserve land.

<sup>167</sup> Indian Act (1920, 1933); Dickason (1994), pp. 189, 331.

plans. The alternative is the specific claims process. As an answer to growing criticism the federal Government established in 1991 the Indian Specific Claims Commission to negotiate claims where the government had breached a treaty promise relating to land, mismanaged First Nations land or assets, or violated a statutory obligation to a First Nation. The process was speed up, restrictions to pre-Confederation claims were revoked and there was created a joint working group. The Commission was replaced in 2003 by the Canadian Centre for the Independent Resolution of First Nations Specific Claims to deal with compensation claims arising as a result of the government's treaty, legislative, or administrative obligations and help the First Nations in research and dispute resolution efforts. Both policies call for the federal government to negotiate claims if the claim demonstrates an unfulfilled legal obligation on the part of the government. Due to Canada's federal structure, the provinces and territories have often participated in the negotiations. The federal Government has negotiated altogether 23 Comprehensive Claims.<sup>168</sup>

In 2007 the federal Government made a commitment to resolve the outstanding specific claims quickly. A Specific Claims Action Plan proposed four key initiatives: to create a new tribunal staffed with impartial judges who would make final decisions on claims when negotiations fail; make arrangements for financial compensation more transparent through dedicated funding for settlements; speed up processing of small claims and improve flexibility in the handling of large claims; and to refocus the existing Indian Specific Claims Commission to concentrate on dispute resolution. The specific claims include Treaty Land Entitlement (TLE) claims, dealing with the Crown's failure to provide First Nations with sufficient reserve lands. The Prairie Provinces have negotiated separate TLE agreements, based on the Constitution Act, 1930, which has a legal requirement to make land available. In Saskatchewan the TLE Framework Agreement (1992) covers 28 and a similar agreement in Manitoba (1997) 21 First Nations, who have not received full land entitlement under treaties. The federal and provincial governments granted in Saskatchewan \$516 million and in Manitoba \$76 million to settle the land debts. The First Nations were able to purchase federal, provincial or private land anywhere in Saskatchewan. In Manitoba 3,990 sq km of Crown land was offered and further 464 sq km to be purchased. Later similar agreements have been made across Canada.<sup>169</sup>

The modern agreements have excluded the Indian Act, but it still directs the daily life of those First Nations bands which have not made a comprehensive agreement with the federal and provincial governments. In 1999 the federal parliament enacted the First Nations Management Act which gave the First Nations the possibility to exit the Indian Act in favour of more extended regime. The band councils have become legal entities having the capacity, rights, powers and privileges of natural person. The agreements are not statutorily under the s. 35 protection. Further, not all First Nations have been willing to change their system: some of them wanted to protect their specificity or had doubts about the federal government's motives. In 2002 a more comprehensive reform was initiated, the Bill C-7 (The First Nations

---

168 Baudoin and Mendes (2007), p. 17-9; Remwick (1991), p. 64; Mc Hugh (2004), pp. 332-334; Elliott (2005), pp. 165-166, 385-387; Belanger (2008), p. 58; Richardson & Imai & McNeil (2009), pp. 383-384, 394-395. In 1973-2008 1,279 specific land claims were made, of which 489 were concluded. Together all agreements were worth of over \$2 billion. Over 800 claims were still unsolved.

169 Belanger (2008), p. 59; Olthuis & Kleer & Townshend (2008), pp. 111-112; Land Entitlement Fact Sheet.

Governance Act). The First Nations, however, were against its rigid governmental format, which did not take into consideration enough the Indigenous needs. The bill would have demanded of each band a code for leadership selection with an amending procedure and an appeal process; modern standards of financial and operational accountability through principles of transparency, disclosure and redress; and a governance code containing rules for council and band meetings, standards for frequency, notice, access to information, privacy and conflicts of interest. Bill C-7 would have recognised the bands' legal capacity and extended its law-making powers in internal affairs. The bands governance would have become subject to the Human Rights Act, but the bill lapsed in 2003.<sup>170</sup>

As a consequence of various critiques on the slow pace of the process, the federal Parliament has enacted the Specific Claims Tribunal Act, 2008 which includes three separate timelines for assessing and negotiating specific claims. If the timelines are not met, the First Nations can take their claims to the tribunal for binding decision. It must determine if the Crown has an outstanding lawful obligation and how much compensation is owed. The tribunal has a \$150 million cap on compensation. Fifteen First Nations or groupings have made a self-government agreement with the federal Government: eleven Yukon First Nations in 1993, 1997-1998, 2002-2003 and 2005; Nisga'a (1999) and Westbank (2003) First Nations in British Columbia, Tãichô in NWT (2003); and the Labrador Inuit in 2005. The Yukon agreements were made in addition to comprehensive land claims agreements. Nisga'a, Tlichô and Labrador Inuit agreements are the only comprehensive agreements which include detailed self-government regimes within the same document as the land claims. The Anishnaabe draft agreement, rejected in 2004 by the four First Nations affected by it, would have replaced most of the Indian Act and recognised a regional group as a Government outside of the comprehensive land claims process. In most above-mentioned agreements the self-government is based on the municipal model, with the exception of Nisga'a and Labrador Inuit agreements.<sup>171</sup>

Similarly, the provincial governments have participated to tripartite negotiation processes because the federal government has no plenary authority in the provinces. There are provincial agreements, which relate to ancestral rights, hunting, trapping or indigenous culture. For instance, Québec has adopted a number of laws concerning the James Bay and Northern Québec agreements and recognised a right to autonomy and the promotion of economic, social and cultural conditions of nine First Nations and the Inuit. It has also reserved and allotted lands for the benefit of Indian bands usufruct of lands, which are gratuitously transferred to the government of Canada to be administered in trust for Indian bands. Ontario has established the Indian Commission of Ontario and Saskatchewan the Office of Treaty Commission. The most active treaty process, however, has been in British Columbia, where the treaty process started later, due to the province's stand. In 1993 there was finally established the British Columbia Treaty Commission, which was influenced by the Waitangi Tribunal in New Zealand. It assesses the readiness of the parties to negotiate, allocates negotiation funding to First Nations, monitors and reports on the progress of negotiations and may facilitate the meetings or assist in resolving disputes. The negotiation process has

---

170 First Nations Land Management Act 1999, s. 18; McHugh (2004), pp. 476-477. The Indian Act is exempted from the Human Rights Act (s. 67).

171 Tãichô Community Government Act, 2004 (NWT), s. 8; Specific Claims Tribunal Act, 2008, ss. 15-16, 20; Belanger (2008), p. 61; Olthuis & Kleer & Townshend (2008), p. 110.

six stages: statement of intent, preparation for negotiations, negotiations of a framework agreement, agreement in principle and final treaty, and implementation of the treaty. In 2008, 58 First Nations were participating in the process.<sup>172</sup>

DIAND has supported with various programmes Indigenous business life, and there are today more than 20,000 businesses owned by indigenous people. The Manitoba Councils Investment Group is a good example of these results. A special form of modern provincial agreements, after the American model, deals with gaming, which has become a major income for many First Nations. The federal Criminal Code generally prohibits gaming in Canada but in 1985 the code was amended to allow it subject to provincial regulation and certain conditions. In the 1990s several First Nations tried to create their own gaming operation following the American model, which led to criminal charges and court battles. The *Pamajewon* case (1996) went to the Supreme Court, which narrowed the claims to the regulation of high-stakes gambling and connection to pre-colonial society. After *Pamajewon* the Province of Ontario made an agreement with the Rama Mnjikaning First Nation to establish Casino Rama. The Ontario Lottery and Gaming Corporation distribute a portion of the corporations' revenues to the First Nations of Ontario. Also other provinces have created their own gaming regulations. In Saskatchewan there has been established a provincial Indian Gaming Authority with indigenous representation, which delivers profits to First Nations and Métis through the Federation of Saskatchewan Indian Nations, Saskatchewan Indian Gaming Authority and The Clarence Campeau Development Fund (Métis). The First Nations have their own (unofficial) First Nations Gaming Act. Manitoba and Alberta have Gaming Commissions and a Gaming Association, respectively. All provinces are not as willing to co-operation: either they limit the operations to lottery, or - like in Québec - the provincial authorities and the courts have tried to restrict the activities.<sup>173</sup>

#### 4.3.3.4. *Modern Treaties*

The Sechelt Indian Band in British Columbia was the first band to be excluded from the Indian Act's provisions in 1981. The province wanted to demonstrate that Indian goals could be achieved outside the contexts of constitutional change and land claims. The band became in 1986 a legal entity with the capacity, rights, powers and privileges of a natural person. It was granted the capacity to contract, acquire and hold property, and expend, invest and borrow monies and litigate. The Sechelt Indian Government District has jurisdiction over all Sechelt lands. The band council has broad management and legislative powers. An Advisory Council aids in planning and recommends servicing programmes. Due to their semiurban location the Sechelt received only 933 hectares of new land, but \$42 million in cash. The land

---

172 Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple Québécois et de l'Etat du Québec, 2001 (Québec), Préambule, ss. 11-12; Loi sur les terres du domaine de l'Etat, 2010 (Québec), ss. 51-52; Coyle (2006), p. 811; Elliott (2005), pp. 133, 193.

173 Lotteries Act, 1976 (New Brunswick). s. 1; Saskatchewan Gaming Corporation Act, 1994 (Saskatchewan), ss. 6, 25; Lottery and Gaming Corporation Act, 1999 (Ontario), s. 14(1); SCC, *Pamajewon* (1996), ss. 25-30; Report of Rodolfo Stavenhagen (2004), p. 77; Olthuis & Kleer & Townshend (2008), pp. 397-403. The Mohawk of Kahnawake passed their own gaming law and established the first on-line gaming-server in North America.

was vested in band with full powers of disposition. A comprehensive land claim agreement in principle was agreed in 1999. An interesting feature in the Sechelt municipal self-government model is its jurisdiction over the non-Indigenous residents. The self-government is also protected by limiting the voting right and the right to hold office to Indigenous peoples.<sup>174</sup>

Nisga'a Final Agreement (1999), including 1,992 sq km in fee simple and \$190 million in cash, has been an important precedent. The federal government included for the first time the governmental autonomy to treaty and the jurisdiction has an evolving character. The agreement attempted to provide certainty without extinguishing Aboriginal rights and title. By replacing the municipal structures of former treaties and the Indian Act, it has powers belonging normally to provinces. Benefiting the constitutional protection of ss. 25 and 35 rights, the nation is recognised as a definite entity in terms of its membership, territory and political and legal institutions. The governmental powers are divided between the Nisga'a Lisims and Village Governments. The agreement covers a full set of property and other rights enjoyed by the Nisga'a, including surface, subsurface and fishing rights. Non-Nisga'a citizens living permanently on Nisga'a lands may vote and be elected as members to public bodies. The Nisga'a Nation has proper control of its budget. The provincial or federal government laws are paramount in health services and intoxicants and are exclusive concerning the criminal law.<sup>175</sup>

In British Columbia, altogether 116 First Nations began negotiations on agreement with the treaty commission on 47 different negotiating tables. Of these, 39 achieved agreement-in-principle. Gwaii Haanas (1993) and Westbank First Nation (2003) were the first to reach a final agreement after Nisga'a. In 2006 three new final agreements were achieved, with the Lheidli T'enneh, Tsawwassen and Maa-nulth First Nations. Gwaii Haanas, encompassing the Queen Charlotte Islands archipelago, had in the background a long controversy on logging on the islands which threatened the traditional habitat. The Haida Nation designated the area as a tribal heritage site. The logging continued until Canada and British Columbia signed an understanding in 1987, which led to designation of terrestrial and marine national park (1988). The agreement (1993) created a Management Board with equal representation to make recommendations to both governments. The board members became responsible for their respective government agencies to ensure that legislation, policies and agreements were adhered to. The Supreme Court held that the Crown must consult with indigenous groups when it proposes to take an action that may interfere with existing indigenous or treaty rights. This led both the federal and provincial/territorial level to develop a third form of negotiations besides the two forms of claims policies - the *ad hoc* consultation policy to

---

174 Sechelt Indian Band Self-Government Act, 1986, ss. 6, 17-18, 26; Sechelt Indian Government District Enabling Act, 1996, s. 4(1); Sechelt Indian Government District Enabling Act Advisory Council Regulation, 1988, ss. 1, 4; Canadian Charter of Rights and Freedoms, p. 17.23. The Nisga'a were the first Indians in British Columbia to be able to raise a common front for claims. They were followed by the others.

175 Nisga'a Final Agreement (2000), ss. 9, 19-21, 34, 36, 39, 41, 44-45, 47, 89, 100-103, 115; Otis (2005), p. 91; White & Maxim & Spence (2004), p. 127. The Nisga'a authority is paramount in the Nisga'a Constitution and Government, citizenship, culture and language, property, health services, faith healers, use of lands, child and family services, adoption, education and cultural property. The four Village Governments have a similar paramouncy in local administration and regulation of village lands. The federal and provincial laws of general application prevail in regard to public order, peace and safety, buildings and public works, traffic and transportation, marriage, social services, health services, gambling and gaming, and intoxicants.



meet the decision's requirements. In 2010 the federal Government has made *Kunst'aa guu* – *Kunst'aagah Reconciliation Protocol* with Haida Gwaii to further refine and elevate the procedure. There is established the Haida Gwaii Management Council to direct the use and management of land and resources.<sup>176</sup>

The Westbank First Nation have specific powers to land and resource management, landlord and tenant relations, health services, culture, language, education, public works and community services. The federal legislation has supremacy on peace, order and good government. The lands stay as reserves and the First Nation had a tax immunity based on the Indian Act. The agreement is not a section 35 treaty. The Tsawassen and Maanulth Final Agreements follow the structure of Nisga'a Agreement with some basic differences. They are binding to the Crown but First Nations have relieved all their claims. There are no more reserves, but the Charter rights and federal/provincial laws are applied to them. First Nations have well-defined law-making powers. The federal laws regulate the criminal law; official languages; peace, order and good government, protection of health, safety of all Canadians and human rights (Tsawassen); and intellectual property, aeronautics, shipping, navigation, labour relations and working conditions (Maanulth). In the case of conflict, the federal and provincial laws prevail. The First Nations' citizens preserve all rights and benefits of Canadian citizens. Unlike Nisga'a and Tsawassen, Maanulth is a confederation, where each member forms a separate and distinct legal person with equal rights.<sup>177</sup>

In Ontario, the legislation allows agreements on the municipal system in the limits of reserves occupied by the First Nations. The Missauga First Nation reached in 1995 a final agreement on reserve lands, whose northern border had been surveyed incorrectly in the 1850s. Three years later the federal Government signed a framework agreement on fiscal relations, elections and government structures with the Anishinabek Nation, covering over 30 Ontario First Nations.<sup>178</sup>

In 1993 the Yukon First Nations, left outside of the Treaty 11, were included in the treaty system in the Umbrella Final Agreement (UFA), where they ceded, released and surrendered all their Aboriginal claims rights and titles to the Crown. The interpretative provisions establish the principle of equality between the parties. The self-government process is included to separate self-government agreements. The first four agreements (Vuntut Gwich'in, Champagne and Aishihik, Teslin Tlingit and Nacho Nyak Dun) covered altogether 41,000 sq km and a financial settlement of \$ 242 million. Each First Nation received legislative power in specific fields. Similar self-government agreements were signed also with the Little Salmon/Carmacks and Selkirk (1997), Tr'ondëk Hwëch'in (1998), Ta'an Kwach'an (2002), Kluane (2003), Kwanlin Dun (2005) and Carcross/Tagish (2005) First Nations. All First Nations are legal persons. The settlement lands are divided to two classes – 1) category A: rights equivalent to fee simple title to the surface and full fee simple title to the subsurface, and 2) category B: rights equivalent

---

176 Haida Gwaii Reconciliation Act, Preamble, ss. 3-4; Haida Agreement (1993); Belanger (2008), p. 57; Richardson & Imai & McNeil (2009), p. 384. The model was copied in ten years' time to 11 other national parks.

177 Maanulth First Nations Final Agreement Act, 2007, ss. 1, 13, 43; Tsawassen First Nation Final Agreement Act, 2007, ss. 2.9, 2.11-12, 2.15, 2.19, 2.22-24, 2.33; Westbank Indian Self-Government Agreement (2003); Elliott (2005), p. 196.

178 Municipal Act, 2001 (Ontario), s. 21(1); Elliott (2005), pp. 178, 200.

to fee simple surface title. The single First Nations have their separate self-governments. They have established their own constitution, citizenship, governing body and legislative powers. They may manage, establish and keep land records and manage, administer, allocate and regulate their harvesting rights. They can compel the territorial government to negotiate the transfer of the administration of programmes or services. The governments may delegate any of its powers to any legal entity in Canada.<sup>179</sup>

A specific problem in many modern agreements is that their self-government is negotiated as a side agreement which has no direct constitutional effect. This formula was used for the first time in UFA and was later copied in British Columbia and other provinces. According to the Campbell Government's so-called Principle Six an "Aboriginal self-government has characteristics of local government, with powers delegated by Canada and British Columbia".<sup>180</sup> That is, at least in theory the agreements could be repealed by Legislature.

Dene Indians were signatories to Treaty 11 but there were established no reserves. Their lifestyle became threatened in the early 1970s when the federal government decided to begin the planning of the Mackenzie Valley pipeline to carry oil from NWT to American markets. The Dene formed Indian Brotherhood (later Dene Nation). In 1974 the federal Government appointed Thomas Berger J to inquire about the effects of the pipeline. After large inquiry he proposed that the pipeline should be delayed for ten years to allow the Dene to settle land claims and to prepare for the project. In 1976-1977 started negotiations with the Dene Nation and the Métis Association of NWT on Mackenzie Valley and western NWT. Later the negotiations split. The reached settlements are Gwich'in Final Agreement (1991), Sahtu Dene and Métis Agreement (1993) and the Tlicho Agreement (2003). The Agreements include rights to large land mass: for Gwich'in 16,000 sq km of land in fee simple with a right to exploit specified stone and soil substances, and 6,000 sq km with various mining and mineral rights and all pre-existing rights, titles or interest to land burden the Gwich'in title to land; for Sahtu Dene and Métis 41,000 sq km; and for Tlicho 39,000 sq km, including the mines and mineral rights, but excluding water in or under lands or on the boundary to their lands. The payments vary from \$75-90 million paid in 15 years time.

The agreements include a share of resource royalties for hunting, fishing and trapping rights, exclusive commercial wildlife activities and some subsurface rights. The agreements have economic development programmes in the settlement area and a commitment for the territorial government to make preferential contracts and policies to maximise local and regional employment. They have also involvement in forestry, national parks, land use planning and subsurface resources. All laws of general application continue to apply to Tlicho citizens. The Tlicho government may grant leases and licenses to use and occupy Tlicho lands but it has an obligation to continue administering the rights and interests of parties with pre-existing rights to land. It can make discretionary decisions respecting the pre-existing right, interest or resource management policy.<sup>181</sup>

---

179 Yukon First Nations Self-Government Act, 1994 (Yukon), s. 8; Umbrella Final Agreement (UFA, 1993), s. 2; White & Maxim & Spence (2004), p. 154.

180 UFA (1993), ss. 2.1-2.2.

181 Gwich'in Comprehensive Land Claims Agreement (1991), ss. 18.1-18.2; Tlicho Agreement (2005), ss. 2.8-2.9, 18.1, 18.6; Minority Rights Group (1994), pp. 119-121; White & Maxim & Spence (2003), pp. 186-187.

Canada has established the office of the federal interlocutor for Métis and non-status Indians, which has a portfolio in the Executive Cabinet, transferred to DIAND in 2004. This has significance, because the federal government has traditionally taken the position that the Métis have primarily provincial responsibility. The federal interlocutor engages with Métis through tripartite negotiation processes and bilateral relationships. The bilateral process has led to Métis Nation Framework Agreement (2005). It aims to: engage in a new partnership; build the capacity of Métis National Council and its governing members to represent the interests of the Métis Nation; develop the negotiation and discussion processes; identify options to resolve the outstanding issues; and to identify initiatives. The framework agreement also addresses the implementation of the *Powley* decision.<sup>182</sup>

At the provincial level, the Métis are included besides the Sahtu Dene and Métis Agreement in the NWT Métis Nation Framework Agreement (1996) and Dehcho Framework Agreement (2001). The Legislature of Newfoundland and Labrador recognised the Labrador Métis Association in 1985. Saskatchewan has passed the Métis Act (2001) which recognises their contribution to Canada, establishes a bilateral process to work on land, harvesting, governance and capacity building, and establishes the Métis Nation – Saskatchewan Secretariat Incorporated as the administrative body of the Métis Nation of Saskatchewan. The secretariat has responsibility for the implementation of the policies and programmes of the Métis Nation. British Columbia has made a Relationship Accord with Métis (2005), stressing health, housing, education, economic opportunities, collective renewal and Métis identification. A more modest, tripartite temporary draft (2002-2007), called the Memorandum of Understanding, was made in Manitoba between the parties. Its focus was on self-government questions.<sup>183</sup>

#### 4.3.3.5. *Nunavut: a Public Government*

The Canadian administration reached the Arctic relatively late. First there were only missionaries and fur traders present. From 1907 Canada used a sectoral theory to gradually annex the Arctic symbolically. The Northwest Mounted Police reached the eastern Arctic permanently only in 1922. In 1927 the Inuit affairs were transferred to the Northwest Territories. Despite the definition as Indians (1939-1950) the Inuit were treated separately. The post-war Robinson Report, which raised questions on the Inuit's poor living conditions, led the department to take in 1950 over their administration. Due to strategic reasons and to strengthen the Canadian sovereignty the federal government saw it as important that the Inuit would remain in the north despite many hardships. In 1953 a large number of Québec Inuit were forced to relocate to strengthen the Canadian presence in the north, although it broke their traditional community patterns. From 1947, in the north were built weather stations and the Distant Early Warning radar line. Ten years later Diefenbaker's government started the New North Programme, which was based on improved infrastructure to facilitate the bringing of industrial know-how to exploit northern resources. The Iqaluit Council

---

182 Isaac (2008), pp. 49-50.

183 Métis Act, 2001 (Saskatchewan), ss. 2, 5; Métis Nation Relationship Accord (British Columbia, 2005); Isaac (2008), pp. 58, 62.

was established in 1962 and the municipal administration one year later. In 1967 the seat of territorial government, including the commissioner and council, was transferred to Yellowknife. The territorial government took the task of developing local administration in the Arctic. It established Settlement Councils with delegated limited responsibility. Their modest function was to advise the government on existing and proposed policies for the running of the settlements. The local councils were part of the larger programme of assimilation into general Canadian culture.<sup>184</sup>

The Inuit awakening began in the 1960s. The first educated generation began to defend the Inuit rights in changing conditions shadowed by economic exploitation. The Inuit started in the 1960s negotiations to obtain own territory and in 1971 was established the Inuit Tapirisat of Canada (ITC) which did not recognise the surrender of indigenous rights. Two years later it presented to Trudeau's government a draft agreement on settlement of Inuit land claims. The strong emphasis on nationhood was abandoned by the ITC from 1977. The original Northwest Territories had covered all Arctic Canada east of Yukon and north of the provinces and Ungava Peninsula (present Québec and Newfoundland-Labrador). It was an artificial construction with different geographical elements administered from Yellowknife, the southwestern end of the vast territory. In the western half the indigenous people lived as minority, divided in several First Nations, Métis and Inuit groups. In Eastern Arctic the Inuit formed a clear majority of more than 80 % of the total population. The negotiations showed to be difficult. The Public Commission of Inquiry on Northern Territories (1966) was against the idea. Nevertheless, only ten years later the ITC started with the federal Government negotiations to create a territory of self-government. Later these negotiations concentrated on the Eastern Arctic, when the Inuit in the western part of the territory negotiated their own agreement. Nunavut Tungavik Corporated was established by ITC as the legal representative of the Inuit of Nunavut for the treaty rights and treaty negotiations. Due to the Inuit's strong territorial position, the negotiators chose a public government model instead of an ethnical one.<sup>185</sup>

There was a question on the application of Inuit territorial rights. The Inuit had before the Canadian arrival an effective and exclusive control of their areas. In Inuit customary law the possession meant peaceful and collective utilisation and occupation of ancestral lands. In April 1982 the majority of people in NWT voted for the division of the territory. The land dispute between the Inuit and Dene Nation was bitter. John Parker, the arbitrator, suggested in 1991 another referendum on a land claims agreement which 85 % of Inuit supported. The Nunavut Land Claims Agreement and Nunavut Acts, ratified in 1993, created the new territory of Nunavut, one of the 12 administrative units in Canada. The transitional period ended in 1999. Nunavut is the most far-reaching agreement with the Indigenous peoples in Canada. It uniquely combines the public territorial government with the Indigenous self-government. With the agreement the Inuit agreed to cede, release and surrender all Aboriginal claims, rights, titles and interests in and to lands and waters within Canada and adjacent offshore

---

184 Goldstein (1990), pp. 40-41; Dickason (1994), pp. 380-381, 396-401; Duffy (1988), pp. 11, 16, 47; Minority Rights Group (1994), pp. 112-114. The theory of sectors means a zoning of territories as a pretext to annex them symbolically; One part of Grise Fiord's have later returned to their old homes and received compensation from the federal government.

185 Dickason (1994), pp. 414-415; Minority Rights Group (1994), pp. 114-115.

areas within the sovereignty and jurisdiction of Canada. They further agreed on behalf of their heirs, descendants and successors not to assert any cause of action, claim or demand of any nature based on any Aboriginal claims, rights or interests in and to lands and waters.<sup>186</sup>

NLCA and the Nunavut Act (1993) define the scope of package. The Inuit agreed to cede, release and surrender to the Crown all claims, rights, title and interests to lands and waters anywhere within Canada. The agreement has constitutional protection as it is a land claims agreement in the meaning of s. 35 of the Constitution Act, 1982. The territory comprises 2.1 million sq km, or 20 % of Canadian territory while the population is only 31,000. The Inuit title is recognised to 35,257 sq km, including the mineral rights. A \$1.148 billion capital transfer payment was paid to Inuit between 1993-2007. Further the Land Claims Agreement included \$13 million Training Trust Funds and a share of federal government royalties from oil, gas and mineral development on Crown lands. The Inuit have a right to harvest wildlife on lands and water and a right to use water. They have right of first refusal on sport and commercial development of renewable resources in the Nunavut Settlement Area, a right to carving stones and involvement in the planning and management of three federally funded national parks.<sup>187</sup>

The territory is made up of three regions and 28 communities. The Commissioner of Nunavut is appointed by the Governor in Council. The cabinet is called the Executive Council of Nunavut. Its departments are set up in communities, which makes the government highly decentralised. The territorial legislature is called the Legislative Assembly of Nunavut. All residents have the right to elect its 19 members. The Governor in Council can disallow a statute up to one year after its enactment. The statutes of NWT can apply to Nunavut after the Assembly's implementation. The Assembly sits a minimum one time per year and is elected for five years. Nunavut has a territorial judiciary and its own penitentiary. The result is a publicly elected, largely Inuit territorial government that preserves the rights of all residents with special attention to the Inuit. Inuit employment is increased and maintained at a representative level.<sup>188</sup>

#### 4.3.3.6. *Other Arctic Agreements*

The other Inuit groups live in northern Québec (Ungava), in coastal Labrador and in northwestern NWT. Their status was for a long time under dispute. The district of Ungava was removed to the province of Québec in 1912. In 1939 Québec wanted to place the responsibility for the Inuit into federal hands. They claimed that the Inuit were Indians, which were under the federal responsibility according to s. 92(24) of the Constitution Act, 1867. The federal government tried to prove the contrary. The Supreme Court ruled, based on vague evidence,

---

186 Nunavut Act, 1993, s. 1; Bernier (1986), pp. 320, 327; Curry (2004), p. 165.

187 Nunavut Act, 1993, s. 3, 5, 11-12, 23, 28-29, 31, 49; NLCA (1993), ss. 3-4.

188 Nunavut Act, 1993, ss. 5, 12, 18, 23; NLCA (1993), s. 23; Elliott (2001), p. 138; Richardson & Imai & McNeil (2009), p. 305. The Legislative Assembly may legislate on territorial elections; offices; administration of justice; prisons; municipal and local institutions; hospitals and charities; land; direct taxation; territorial revenues; the Inuit languages; property; civil rights; education; marriage; territorial companies; game; agriculture; local agreements; and money for territorial purposes.

that the Inuit were Indians and they were since then under federal responsibility since then. In 1950 the authority over them was vested to the Minister of Resources and Development. With the growth of nationalism Québec changed its attitude. After the recommendation of the Bracle commission (1962) the province took over the administration of northern Québec. The recent Bouchard-Taylor Commission's Report (2008) has stressed a plural, democratic and equal society, to whose values also the Indigenous people may be included.<sup>189</sup>

The first treaty including the Inuit was the James Bay and Northern Quebec Agreement, concluded between the governments of Canada and Québec and the Cree and Inuit of Northern Québec in 1975. The province of Québec started in 1973 a massive project to take advantage of waterpower resources. As a response, the Indigenous peoples started litigation. Their first victory was the decision of the Québec Superior Court (1973), which halted the project until an agreement with the Indigenous people could be negotiated. The final accord was ratified two years later. It prevented the province to take unilateral action and today its rights are constitutionally protected. The Crees and Inuit ceded all their claims, rights, titles and interests in and to land and other rights in Québec and Canada. The pact gave to indigenous peoples a cash settlement of \$232.5 million over 21 years and substantial control over their political, economic and social affairs.<sup>190</sup>

The territory was divided in three categories: 1) 1,348 sq km of land under the complete and exclusive indigenous control and exclusive use with mining and forest resources; 2) 15,706 sq km for exclusive right of hunting, fishing and trapping under provincial jurisdiction; 3) special type of public lands with specific development rights. Québec has established for Category II lands a cooperational body called the James Bay Regional Zone Council, which serves both the indigenous and non-indigenous communities. JBNQA created the Québec Cree and Kativik Regional Governments. Later the Naskapi Development Corporation was established. They receive payments from the federal state (25%) and Québec (50%) through the Cree Board of Compensation, the Makivik Corporation (*Makivik Kuapuriisat*) and the Naskapi Development Corporation, which administrate the lands and funds. The Inuit villages – Québec north of the 55<sup>th</sup> latitude, have been called Nunavik ("Place to live") since 1983. In 1991 the Inuit and non-Inuit in northern Québec voted in a referendum for the establishment of a Regional Assembly and a Constitution. In 2006 the Nunavik Inuit Land Claims Agreement was made and the following year an Agreement-in-Principle was signed for the creation of the Nunavik Regional Government which had an estimated implementation time of 2013. It amalgamates three JBNQA institutions: the Kativik Regional Government, the Kativik School Board and the Nunavik Regional Board of Health and Social Services. The Inuit communities of Nunavik are incorporated in municipalities under provincial laws.<sup>191</sup>

There was almost endless litigation on the agreement in the first decades. JBNQA was amended in 1978 by the Northeast Québec Agreement including the Naskapi. They were

---

189 SCC, *R. v. Eskimo* (1939); Dickason (1994), p. 381; Minority Rights Group (1994), p. 111; Scott (2001), p. 52; Weller (2010), p. 649.

190 Minority Rights Group (1994), p. 116-118; Aikio & Scheinin (2005), p. 24. The price was a flooded territory of 15,500 sq km.

191 JBNQA (1975), ss. 5-7, 11-13; Loi sur le Conseil régional de zone de la Baie James, 2001 (Québec), ss. 2, 6; Loi sur la Société du développement des Naskapis, 2007 (Québec), ss. 7-14; Loi sur la Société Makivik, 2007 (Québec), ss. 7-14; Olthuis & Kleer & Townshend (2008), p. 140; IWGIA (2010), p. 52.

further added in 1984 by the Cree-Naskapi Act which replaced the Indian Act in northern Québec and was the first Indigenous self-government model in Canada. Its central features are unique title, administration of band affairs, internal management, public order, taxation for local purpose, and local service-structure. The RCAP report estimated that the effort of agreement bodies had been sincere but their success limited. In all, there had been a very significant improvement over the situation preceding their creation. The Cree complained that the structures were unsympathetic in their form and operation and Québec had treated the Category III land without regard for the First Nations. It had allowed without advisory procedures increased logging and road-building and planned large-scale hydro-projects and policy changes independently.<sup>192</sup>

Based on the RCAP's recommendations, the National Assembly of Québec enacted in 2002 *La paix des braves*, where the Cree abandoned the litigation as a means of enforcing their rights although it allowed the parties to maintain their legal positions regarding the original agreement and its interpretation. In 2007 the nation to nation Agreement Concerning a New Relationship was agreed between the Government of Canada and *Eeyou Istchee* (Grand Council of the Crees). The agreement strengthens the political, economic and social relations between the provincial and First Nation governments based on cooperation and partnership. The Indigenous villages are municipal structures. The Cree Regional Authority takes care of the administration, general welfare, education, culture, youth training, recreational centres and preservation of way of life, values and traditions of the James Bay Cree. The Naskapi and Inuit have respective regional authorities acting as municipalities. The Kativik Regional Government, the Makivik Corporation and the province have concluded the Partnership Agreement on Economic and Community Development in Nunavik (Sanarrutik Agreement, 2002). It includes provisions on electric transmission, hydroelectric potential, provincial parks, community and economic development projects and wildlife management.<sup>193</sup>

Six Inuit settlements in western NWT broke away from common negotiations with the eastern Inuit in 1977 and seven years later reached the Inuvialuit Final Agreement (IFA). They gave up all their claims to land in exchange for legal title to selected lands, financial compensation and other rights. They were provided with 91,000 sq km of land, including 13,000 sq km in fee simple absolute with subsurface rights. The financial compensation was \$45 million paid in 13 years time, a \$10 million Economic Enhancement Fund and a \$7.5 million Social Development Fund. IFA has no provisions on self-government. The lands are vested in the Inuvialuit Land Corporation. Each local community has its own non-profit organisation to manage the compensation and benefits. They control together the Inuvialuit Regional Corporation. The Inuvialuit has reached a separate Agreement-in-Principle on self-government in 2003. It would create an Inuvialuit Government and Council. The government

---

192 Loi sur les Cris et les Naskapis du Québec (1984), s. 2.1; JBNQA (1975), ss. 11-13; White & Maxim & Spence (2003), p. 231.

193 Loi sur les villages Cris et le village Naskapi, 2009, s. 2; Loi sur l'administration régionale Crie, 2009 (Québec), s. 6; Loi sur les villages Nordiques et l'administration régionale Kativik, 2012 (Québec), s. 244; Décret concernant la publication de l'entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec (2007), Préambule; Research Report for Land, Resources and Environment Regimes Project (1995), pp. 3-5; Partnership Agreement on Economic and Community Development in Nunavik (2002); Belanger (2008), p. 11. *Paix des Braves* ("The Peace of the Brave") refers to the early peace treaty between the French Crown and the Iroquois (1701).

will have the power to make laws on internal matters. Negotiations on joint Beaufort-Delta regional public self-government with the Gwich'in ended without results in 2006.<sup>194</sup>

The Labrador Inuit have cohabited with the European settlers from the nineteenth century onwards. Both maintained distinct hunting and trapping areas with minimal overlapping. Later the province of Newfoundland had little opportunities to support the communities and most financial aid came from the federal government. The province refused for a long time to grant special rights to Indigenous peoples. The Labrador Inuit Association submitted in 1978 a proposal for the settlement of claims to the federal government, demanding rights to land, compensation and management powers over resources and the regional government. Finally, in 2005, was signed the tripartite Labrador Inuit Land Claims Agreement (LILCA) which established to coastal Labrador the Labrador Inuit Settlement Area called Nunatsiavut. It consists of five Inuit communities, administered by Inuit Community Councils – municipal structures - with 6,200 sq km in Inuit ownership. They have also specific rights to 74,000 sq km of land and 44,000 sq km of tidal waters extending 12 miles off the coast. Within the settlement area, 16,000 sq km are defined as Labrador Inuit Lands, excluding subsurface resources. The package included \$130 million as compensation for the relocation of communities in the 1950s. The land use planning is developed jointly by the province and the Nunatsiavut Government in the Regional Planning Authority. The Inuit have exclusive right to carving stones in Inuit lands. All residents have personal water use rights. The industrial use of water must obtain a permit from the province. Marine management plans and development of non-renewable resources in ocean areas requires prior consultation with the Nunatsiavut Government and require Inuit Impacts and Benefits Agreements. The Inuit will receive 25% of provincial revenues from subsurface developments in Labrador Inuit Lands, 50% of the first \$2 million and 5% of any additional provincial revenues from subsurface resources in other settlement area. The revenues are capped when they will exceed the average per capita income of all Canadians. Further, the Nunatsiavut Government will receive 5% of provincial revenues from subsurface resources from the Volsey's Bay project and payments from Volsey's Bay Nickel Company Ltd. and Vale Inco. Some 3,700 sq km are separated for Thorngat Mountains National Park.<sup>195</sup>

Nunatsiavut has a Constitution, Executive Council, Assembly, local governments, First Minister and a President with a 4-year term of office. The administration's special character is that it also represents all the Inuit of Labrador nationwide. As compromise the Nunatsiavut Assembly and administrative are in separate locations. The legislative powers include health services, education, management of rights and benefits, citizenship, justice, culture and language. Nunatsiavut has also received from the provincial Government 130 million dollars as compensation for the forced relocation of communities during the 1950s. The Indigenous leaders in the north have proposed a 3-10 years residency requirement for non-Indigenous people before voting or holding a public office and a guaranteed 30 % Indigenous representation in the regional governments with a veto over legislation affecting crucial

---

194 IFA (1984), s. 7(1); Jurisdictional Response to Land Resources, Land Use and Inuvialuit Settlement Regulation (1997); Hamilton (1994), p.; Olthuis & Kleer & Townshend (2008), p. 144.

195 Labrador Inuit Land Claims Agreement Act, 2004 (Newfoundland and Labrador), s. 8.2; LILCA (2005), ss. 1, 4-9, 19; White & Maxim & Spence (2004), pp. 101-103.



Indigenous interests to protect the indigenous communities from uncontrolled migration and economic exploitation.<sup>196</sup>

#### 4.3.4. Reserves and Settlements

##### 4.3.4.1. From Reductions to Reserves: Isolation and Assimilation

Canada has over 600 Indian bands living on 2,800 reserves and eight Métis settlements. The Indian reserves cover a land space of 32,000 sq km. The Inuit are not included in the reserve/settlement system due to late contact and geography. Historically the Canadian governments have sought to integrate indigenous people under general legal regimes, although this goal has been often contradicted and undermined by continued discrimination and segregation. The segregation has been also viewed as a defence of highly valued cultural heritage. The First Nations have generally supported autonomous control of lands, although they have opposed its limitation to only a small remnant of their traditional lands. They have generally resisted the integration of reserve lands into the general land regimes and have argued for an expansion of lands controlled by the First Nations as part of the land settlements. The reserve system is a special phenomenon of southern Canada where the population density is higher and the land more wanted.<sup>197</sup>

The reserve system developed in several stages. In the background were *réductions*, supervised by the Jesuit and Sulpician orders. They had the idea to reduce the Indians as settled farmers, who would be easier to convert and assimilate. The first of these early reserves was Sillery (1637) for Montagnais. Its title rested with the Jesuits until 1651. It was a residential mission for introducing agriculture to Indians whose lands had been overhunted and overtrapped. Many setbacks led, however, to the closing of *réduction* in the 1650s.<sup>198</sup>

An agreement with the chiefs of Upper Canada (1784) created a reserve for the Six Nations, including many Iroquois refugees from the colony of New York. The original area of the reserve was 11,500 sq km. Superintendent Darling advocated in his report (1828) that establishing of model farms and villages were the best means of civilising the Indians. Such a village was formed along the Credit River. Around 1830 Sir James Kempt, the governor of Lower Canada, supported the idea of model villages, where the Indians would become self-supporting citizens. The early villages were located in Canada West (Ontario) and were for Christian Indians. They followed the model of earlier French experiments. Also the Moravian Church had established its own model villages since 1792, followed by several other Christian denominations. This policy lasted until the early twentieth century.<sup>199</sup>

---

196 Labrador Inuit Constitution (2002), ss. 3-5, LILCA (2005), s. 17; Minority Rights Group (1994), pp. 123-124; Kymlicka (1989), pp. 146-147; Nunatsiavut Government.

197 Kymlicka (1989), pp. 145-146; Report of Rodolfo Stavenhagen (2004), p. 3.

198 Stanley (1950), pp. 178, 185. The model for *réductions* were the Jesuit missions (*reducción*) in South America.

199 Dickason (1994), pp. 190, 228, 234-236; 320. File Hills Colony (since 1901) aimed at assimilation and individual farming in 80 acres lots. The life of colonists was highly controlled and even marriage partners were selected for them.

Sir Francis Bond Head, the Lieutenant-Governor of Upper Canada, however, saw the model villages as a waste of time. Instead, he took advantage of a gift distribution on Manitoulin Island in 1836 and arranged there an Ojibwa Indian territory with a promise of the Crown's protection. Another territory concerned the Bruce Peninsula. William McDougal negotiated in 1862 a surrender agreement with the Indians for \$700. Almost 2,500 sq km of land was extinguished. Each family was promised 100 acres of land.<sup>200</sup>

In Britain, the Select Committee on Aborigines (1836-1837) developed a new set of policies based on the empire's civilising role. The former allies were becoming wards. One of the first signs in Canada was Upper Canada's Crown Lands Protection Act, 1839. The Crown became the guardian of Indians which were excluded from political rights, based on individual wealth and property. The Bagot Commission on Indian Affairs (1842-1844) had far-reaching effects on the development of reserves. The commission had stressed that the Indians had a right of possession to their lands and to the compensation in the connection of surrenders. It recommended a census to arrange the band lists, reserves be surveyed and boundaries be publicly announced. In 1850 the Legislatures of Upper and Lower Canada passed laws to protect the reservations from outside intruders.<sup>201</sup>

In the 1850s Governor Douglas created small reserves for Salish Indians on Vancouver Island. After entering to the federation, British Columbia laid out 82 small reserves, mostly for Salish people. Finally, in 1938, British Columbia fulfilled the terms of s. 13 of the Act of Union (1871) by transferring 2,400 square kilometres of land to federal authority to be Indian reserve lands.<sup>202</sup>

The 1860 Management of Indian Lands and Properties Act moved the administration of reserves to the chief superintendent of Indian affairs who was under the aegis of the Department of the Secretary of State between 1868-1873, Department of Interior between 1873-1936, Department of Mines and Resources between 1853-1966 and from 1966 under the Ministry of Indian Affairs and Northern Development (DIAND).<sup>203</sup>

The Department of the Secretary of State aimed at consolidating the legal variety to a uniform system. The development of modern Indian legislation began with the Enfranchisement Act, 1869, which changed the definition of an Indian. The law aimed, among other things, at breaking down the traditional chieftainship on the reserves. To be able to become a Canadian citizen, to do business outside the reserve, to buy liquor, to send children to public schools and to own land outside the reserve, an adult male Indian had to be enfranchised. An enfranchised Indian was to be removed from the Indian register and would cease to be legally an Indian. Also Indian women were separated legally from men. If they married a non-Indian, they lost their right to be Indians in legal terms. There were established elected band councils, creating federal control of on-reservation governance. The chiefs and councillors were elected from over 21 years old male band members according to procedures set by the superintendent general of Indian affairs. They could be also deposed

---

200 Dickason (1994), pp. 237-238, 255.

201 Crown Lands Protection Act, 1839, s. 1; Dickason (1994), pp. 250-252, 258, 383-385; Armitage (1995), p. 74.

202 Tennant (1990), pp. 21-38; Dickason (1994), pp. 262, 325; Stokes (2000). British Columbia has today 1,600 small reserves (70% of the total number in Canada).

203 Dickason (1994), 252.

by the governor. He had a right to choose the suitable bands - without their consent - to the three-year elective system. The council had limited powers to make bylaws of municipal character and to decide on public health, compartment, stock trespass and infrastructure.<sup>204</sup>

From the late nineteenth century the patterns of lawmaking and policy in Canada tended towards protection policy which made it possible to practice an “out of sight, out of mind” policy. In the nearhood of urban centres the policy of assimilation became dominant. It followed the American model where the settler-state assumed complete control of daily indigenous life through officials holding broad discretionary powers. The Indian Act, 1876, was an expression of a civilising mission whose goal was encouraging assimilation on a voluntary basis. There was no possibility to return to Indian status once lost. The act collected together the federal legislation on Indians and still sometimes regulates, in modified version, most Canadian Indians’ daily life. The law included provisions for the definition of Indian, the recognition, protection, management and sale of reserves, the payment of monies to support and benefit the Indians, the election of councils and chiefs, Indian privileges, criminal prosecutions, control of intoxicants and provisions for enfranchisement. The assimilation was hastened by an attempt to eliminate the tribal systems. The reserve was defined as a tract of land set aside for the use and benefit of a band, whose legal title is vested in the Crown. The chief and council had limited decision powers, but the department’s Indian agent kept the real executive power. Until 1982 the Band Council, a limited, municipal form of self-government, was the only authority granted to Indians. In 1880, the band council’s and Indian agent’s powers over the chief were increased.<sup>205</sup>

The Indian Act further defined the administrative structure of Indians, based on earlier statutes which denied the inherent status and political authority of traditional structures. The principal features in administration were the superintendent and his agents and the Indian band, supported by the church missions and residential schools. A band was a creation of the Indian Act, defined as a body of Indians for whom the Government holds moneys for their common use and benefit, or whom the Governor in Council has declared a band for the law’s purposes. A band member was a person whose name appeared on a band list or was entitled to it. The federal government’s goal was administrative uniformity but it also wanted to hasten assimilation by eliminating tribal systems. There was to be one chief for every band of 30 members, or one chief and two second chiefs for every 200 members. The maximum number of chiefs was six chiefs and 12 second chiefs and councillors. The chief’s term in office was determined as three years and he could be removed at any time for dishonesty, intemperance or immorality at the department’s discretion. The Superintendent was given wide discretionary powers. He was represented by Indian agents who became the real land lords. After many amendments he had finally control over property, schooling, public works, hunting, right of assembly, ceremonies and residence. He could also override the elections and decisions of Indian bands.<sup>206</sup>

---

204 Gradual Enfranchisement Act, 1869, ss. 6, 11-12; Dickason (1994), pp. 355-359; Armitage (1995), pp. 77-78; Anaya (2004), p. 33; McHugh (2004), p. 216. To own land the male Indian had to submit to a three-year probation period to show his knowledge of European farming.

205 Indian Act, 1876, ss. 3-22; Act to Amend and Consolidate the Laws Respecting Indians, 1880, s. 28;

206 Indian Act, 1876, ss. 61-63; Leslie & Maguire (1979), p. 65; Dickason (1994), pp. 284-285; Armitage (1995), pp. 89-90.

The Indian Advancement Act, 1884, aimed at transforming the tribal bylaws into municipal laws. The number of councillors was reduced to six and the term to offices became annual. A major addition to the few bands in the new system was an enlarged bylaw making power to tax on reserve lands. In 1899 the elected government became compulsory in eastern Canada with three-year offices. The act of 1884 was incorporated into the Indian Act in 1906. The band councils persisted because the federal government was dealing through them. The responsibilities of the chief and council included: public health; maintenance of roads, bridges, ditches and fences; construction and maintenance of schools and other public buildings; and the granting of reserve lots and their registration. The real power, however, rested in the hands of an Indian agent who paid the bills and controlled the band funds.<sup>207</sup>

The period 1885-1951 could be characterised as a process of centralising tendencies. The Indian Act created a broad Crown guardianship over Indigenous peoples and their lands. The Department assumed increasing power in the tribes' daily life. The Indian Agents' powers were finally overwhelming: they supervised all sectors of public and private life, presided over the band councils' meetings and directed political life. Until the 1950s, most of the legal changes had a deteriorating effect on First Nations and Inuit. The local government failed in many rural and isolated reserves, where the agency system continued until 1969. By complying with the system the bands assured themselves more generous welfare grants. The price was dependency and paternalism and the weakening of communal activities.<sup>208</sup>

The Department had a goal from the late nineteenth century to restrict the free movement of Indians to other reserves and urban centres. The pass system created to control the situation was against the treaties and the Department had to use other means. In 1890 Indian agents were empowered as justices of peace to enforce the criminal code's anti-vagrancy provisions. There are several Indian nations living on both sides of United States-Canada border. The question of cross-border co-operation is especially important for these peoples, including the League of the Six and Wabanaki Confederacy. The oldest document treating the question is the Jay Treaty of 1794, which guaranteed a free passage for the Iroquois living along the U.S.-Canadian border at Akwesasne. A disadvantage of this privilege has been the encouragement of smuggling<sup>209</sup>

---

207 Indian Advancement Act, 1884, ss. 3-4; Indian Act, s. 1985, s. 74(2).

208 Tobias (1976), pp. 21, 24; Dickason (1994), p. 288. The most remarkable legal changes were: the Indian agents became justices of peace, able to enforce regulations (1881); right to depose immoral, incompetent and intemperate traditional chiefs and to prevent their re-election (1884); the prohibition of traditional religious ceremonies (1884); exclusion of half-breeds (1886); the applicability of provincial game laws (1890); Right for Governor in Council to send children to residential schools (1894); right of superintendent to remove Indians from reserves, which located in the vicissitude of urban settlements of more than 8,000 inhabitants if the Exchequer Court so ruled (1905); right to municipalities and companies to expropriate parts of reserves in the need of constructing roads, railways and public works, and remove entire reserves if deemed expedient (1911); demand of permit to use aboriginal costume and to perform traditional dances (1920); punish children who did not attend the residential schools and their parents with criminal penalties (1920); right of superintendent to lease out uncultivated land to non-aboriginals (1918); right to the Department to ban hereditary rule of bands (1920); possibility of compulsory enfranchisement (1922); revention of funding for Indian legal claims (1927); right to prevent the entrance of an Indian to pool hall (1930); right to Indian agents to direct band council meetings and cast a deciding vote (1936); and inclusion of the Eskimo (1939). Cf. Indian Act (1881-1939).

209 Indian Act (1890); Snow (1996), p. 201.

#### 4.3.4.2. *Post-War Reserves: Integration and Survival*

After the Second World War the attitudes began to gradually change. A joint committee of the federal parliament was established in 1946 to review the Indian Act and Indian administration. Its report two years later increased self-government and financial assistance, power to incorporate as municipalities, easing of enfranchisement conditions, cooperation with the provinces in extending service to Indian peoples, political voice for women, equal alcohol-policy and transfer to general education to advance assimilation. Some of these proposals were included in the final revision of the Indian Act in 1951 which aimed to integrate the First Nations services, but the primary objective remained assimilation. The bands acquired authority in management of surrendered and reserve lands, band funds and the administration of bylaws. They could spend capital and revenue funds. Nevertheless, it was a culmination point. The Minister's power as Superintendent was became supervisory with a veto right. The bands' measure of self-control was increased allowing them to be incorporated as municipalities. In the same decade the compulsory enfranchisement and restrictions on political organisations were repealed. Nevertheless, according to section 88 all laws of general application became applicable to Indians, except insofar they are inconsistent with the act. This controversial section reflected the increased role of provinces and the aim to draw them more actively to the administration of Indian affairs. This principle was confirmed in *Kruger et al. v. the Queen* in 1978.<sup>210</sup>

The Joint Committee of the Senate and House of Commons recommended in 1961 that the Indian Affairs branch should speed up the process of integrating Indian into the wider society. Another commission studied between 1963-1967 Indian life. Its Hawthorne Report (1966) gave 151 recommendations, with good reception from the First Nations. According to the report, the Indians should not be forced to acquire values of the main society. The department should assume a more active role as an advocate for Indian interests both in government and society, and Indians should be consulted when major legislation affecting their interests was considered. The Indian Act should be preserved, but in a modified form. The commission did not believe that the Indian could achieve self-reliance in the near future while there was a lack of indigenous organisations. The report took in use the notion Citizens Plus when describing the Indians' special status. It recommended that Indians should retain their special privileges of status while enjoying full participation as provincial and federal citizens. The federal government should protect their special status and act as a national conscience to promote their social and economic equality. The federal authorities oriented towards family, extended kinship and traditional groupings.<sup>211</sup>

The policy changed, when the Liberal Government of Pierre Trudeau gained power in 1968. Trudeau wanted to promote equal status of all Canadians with individual rights

---

210 Indian Act (1951), s. 87; Indian Act (1985), s. 88; SCC, *Kruger et al. v. the Queen* (1978), s. 116; Armitage (1995), ss. 78-80; The compulsory enfranchisement of Indian women marrying a non-Indian and so-called double mother – rule reflected the continuation of assimilative policy; The assimilation policy was visible in the policy paper preparing the reform of the Indian Act, which was presented by anthropologist Diamond Jenness, a New Zealander: A Plan for Liquidating Canada's Indian Problem within 25 years.

211 Hawthorn (1966); Dickason (1994), p. 400; Wilkins (2000). As late as 1955-1975, some 2,666 Indians gave up their status and 10,484 lost their status due to the double-mother rule. Morse (1985), p. 2.

replacing group rights. Despite the public hearings of First Nations, Jean Chrétien, Minister of Indian Affairs, published in 1969 a White Paper. The document summed up the federal Government's goal: "Special treatment has made of the Indians disadvantaged and apart. Obviously, the course of history must be changed." The Indian would be free to develop their cultures in environment of legal, social and economic equality with other Canadians. The document proposed structural integration of Indians into Canadian society; repeal of the Indian Act and department; gradual termination of treaties; ceding the control of Indian lands to Indian people; and increased involvement of the provinces in the delivery of social services. In the background were the rising administrative costs, rapid increase of indigenous population, failure of residential school system and a growing need for bigger social services. The government's aim was to eliminate the special legal rights and status of indigenous peoples. The Crown would offer \$ 50 million in five years time for Indians economic development. Trudeau's dream of a culturally and ethnically indifferent society met the First Nations' resistance. The National Indian Brotherhood (NIB) and the Alberta Indian Association ("Citizen Plus") led the campaign. Citizen Plus published the Red Paper, which became the official First Nations' response. They wanted the Indian Act to be revised and demanded that the treaties be entrenched as a part of the Constitution Act, 1867. As they concluded, "the only way to maintain our culture is to us to remain as Indians. To preserve our culture it is necessary to preserve our status, rights, lands and traditions. Our treaties are the bases of our rights." Positive effects of the reserve system were as following: that the Indians had free choice over the use of their lands; they received per capita share of the band's funds if they chose to leave the reservation; the system combined considerable freedom of individual choice over the use of resources; and protection of the community from the disintegrating effects of collective action problems. Minister Chrétien buried formally the White Paper in 1971 but the stalemate concerning the Indigenous rights continued until the *Calder* case (1973).<sup>212</sup>

Redefinition of the Indigenous peoples' constitutional rights in 1982 led to new revision of the Indian Act in 1985. Although the influence of the Indian Act is decreasing with new agreements, it still influences the life of several First Nations. The law has preserved the classical definition of reserves: they are set apart and held by Her Majesty for the use and benefit of bands. An Indian band can enter into contracts, sue and be sued, and be liable for provincial offences. Its status as natural person is limited by the federal and provincial government's rights. Registered Indians who are band members living on the reserve have the following rights: they can vote in band elections and run for office; they can enjoy Aboriginal and treaty rights; they are entitled to tax exemptions; and they may enjoy other rights and benefits. It signified the end of official assimilation policy in the Indian legislation. The changes have included the removal of gender-based discrimination; abolishing the concept of

---

212 Statement of the Government of Canada on Indian Policy (1969), ss. 1, 3, 7, 12, 19-21; Kymlicka (1989); p. 148; Dickason (1994), p. 388; History of Indian Act (1978). Trudeau's program was influenced by two American initiatives: the termination program of the U.S. Bureau of Indian Affairs (1952-1970) and the General Allotment Act, or Dawes Act (1887-1934) which signified severe attrition of Indian lands. Another visible influence was the ideal of racial equality developed in the United States and in the United Nations; The White Paper had some influential First Nations spokesmen, like Senator James Gladstone and lawyer William Wattunee.

enfranchisement; restoring Indian status and band membership to individuals and children who had lost them through the operation of discriminatory clauses; and providing bands the power to make bylaws. The bands are paid out of the Consolidated Revenue Fund. The Supreme Court has ruled that, based on the Crown's fiduciary obligation, the monies held in trust for the bands must be used for the bands' best interest. The jurisdictional matters of Indian bands include the delivery of social services; resource acquisition and use of land for economic regeneration; promotion of distinct cultural and language systems; band membership and entitlements and federal expenditures according to indigenous priorities. Since 2000 all bands have only one chief who together with the Band Council has a fiduciary duty to the band, its members and assets. The present Governor in Council's regulations on the Band Councils' procedure dates from 2006.<sup>213</sup>

#### 4.3.4.3. *The Métis Settlements*

The Métis' slow evolution to nationhood was based on trade war between the trade companies and the birth of the Red River farming colony. They called themselves under Louis Riel's leadership as the New Nation. The Métis proclaimed in the Declaration of the People of Rupert's Land and the Northwest that "a people, when it has no government, is free to adopt one form of government in preference to another, to give or refuse allegiance to that which is proposed."<sup>214</sup> Riel became the President of the First Provisional Government in December 1869. The Métis Government demanded self-government in Canada. The Canadian Government, although cautious, recognised the government. The Second Provisional Government in February 1870 was based on negotiations with the Canadian government and led to the Manitoba Act, 1870, which was included into the Canadian constitutional law.<sup>215</sup>

The political co-operation between the Métis and newcomers did not succeed well. Many promises were broken. Although John Norquay, an English-speaking Métis, was elected as the premier of Manitoba in 1878, many Métis were impoverished and frustrated by broken promises. They moved west- and northwards. After the rejection of their rights the Métis began to establish their independent settlements. The most significant of them was established by Gabriel Dumont north of Red River colony in 1872, around the Catholic missions. It was known as the settlement of St. Laurent. The following year they chose Dumont as President and eight councillors to assist him. Dumont negotiated with other Métis communities about the self-government plan. They were ready to subsume to British control after the authorities were ready to govern, which took place in 1877.<sup>216</sup>

A new confrontation happened in the 1880s, when the Canadian authority was extended from coast to coast. The Métis called Riel back in 1884. He sent a petition to Ottawa and asked

---

213 Indian Act, 1985, ss. 12, 18, 72, 74(2), 80; Indian Band Council Procedure Regulations, 2006; SCC, *Ermine-skin Indian Band and Nation v. Canada* (2009); Havemann (1999), p. 201; Olthuis & Kleer & Townshend (2008), pp. 196-198. The other legislation use the term First Nations instead of band. In 2007 the BCCA ruled that there is a distinction between the two notions, based on differences in legal definitions.

214 Declaration of the People of Rupert's Land and the Northwest (1869).

215 Dickason (1994), pp. 263, 268-272; Sealey & Lassier (1997), p. 33

216 Dickason (1994), pp. 293-296.

his people to be treated with full dignity. The Canadian government established a commission to list the Métis and their claims. Riel was not happy with the meagre results and established in March 1884 a provisional government. His goal was to establish two provinces with similar guarantees to those in Manitoba. The tensions led to a short rebellion, where the Métis and Cree Indians took arms. During the rebellion Riel published a Métis Bill of Rights, where he demanded similar land grant rights to the Métis in Northwest Territories; the possibility to receive patents to their lands; the transforming of the districts of Alberta and Saskatchewan into provinces; legislatures elected on the basis of representation; and respect for the lawful customs and usages of the Métis. Some of these ideas continued their life decades later. On the other hand, the Métis fight for recognition as a colony with a special status that would acknowledge their indigenous rights and distinctive lifestyle was not realised. The Rebellion ended in May 1885. Six months later Riel was hanged.<sup>217</sup>

During the treaty negotiations the majority of Métis who chose in treaty negotiations compensation in money became white Canadians. Those few, who took land instead, became Indians. This became an important legal watershed among the Métis community. The Klondike gold strike changed temporarily federal policy: the federal government proposed that Métis would be included within Indians. Most of the Métis, however, resisted the proposal and the Crown commission set up a negotiated scrip of \$240. In the 1920s and 1930s some disappointed Métis, who had given up their treaty status, applied for reclassification. An inquiry by the Alberta District Court led to restatement of 129 individuals, whose status had been deleted. On the other hand, in 1942 the Department investigated its band lists and discharged 663 individuals.<sup>218</sup>

In 1895 the Oblate Father Lacombe established the first Métis settlement in St. Paul-des-Métis, Alberta. Prime Minister Laurier accepted the plan as an alternative to the scrip system and to avoid granting a special status. The Crown contributed to the plan with only \$2,000. Four townships near Saddle Lake Indian Reserve were leased for the project for 99 years at \$1 per year. The reserve was under a syndicate, including three Catholic bishops, Father Lacombe and two lay persons. Within a few years there lived 50 families. Difficulties in farming and lack of money led the settlement to soon decline and in 1910 it was finally closed.<sup>219</sup>

L'Association des Métis d'Alberta et des Territoires des Nord-Ouest (1910) aimed at a broader programme. In 1934 was set up the Ewing Commission to investigate the Métis situation. It found that the farming Métis of south and central Alberta were without a land and subsistence base. They were destitute, malnourished, had severe health problems and 80 % were illiterate. In its final report the Commission described the Métis' situation as unfortunate: many of them lived near white settlements in shacks on road allowances. Even the northern hunters were without education and services. The commission saw as the only solution the changing of the Métis way of life to conform to that of the dominant society. The provincial Government had no legal obligation to help the Métis but there were humanitarian

---

217 The Revolutionary Bill of Rights (1885); Dickason (1994), pp. 306-310, 313-314.

218 Dickason (1994), p. 318.

219 Order in Council, 28 December 1895; Sawchuk (1981), p. 166; Dickason (1994), pp. 360-361. The federal government blamed the Métis about lack of interest to project and laziness to make the settlement viable. The Métis accused the government, church and French Canadians together of not fulfilling their obligations; The Oblates are a branch of the Order of Saint Benedict (*Ordo Sancti Benedicti*).



reasons. The Commission found out that a number of former members of the St. Paul-des-Métis Settlement were successfully farming around Fishing Lake. They had petitioned their own land since 1929 and there were plans for the general development of the area. The provincial Métis Association had previously proposed to the government 11 possible sites for Métis settlements and the commission proposed the establishment of farming colonies to good agricultural land near the lakes and forests. The colonies would have to relocate out of white interference and there should be provision for possible later expansion of colonies. The colonies were considered as a welfare measure. Government-appointed supervisors would administer the colonies. The Commission was careful to not define any special Métis status: they were to be self-supporting farmers. Later the colonies would through a natural process of assimilation dissolve into individual farms. The commission's report also recommended that the northern hunting and trapping Métis would be granted 320 acres of land on the same basis as in the southern province. They should be allowed free hunting and fishing permits, and a preference in acquiring them in areas where there existed a danger of game depletion. As a result, the Alberta Legislature enacted the Métis Populations Betterment Act, 1938. Three years later the Governor General in Council was empowered to create game preserves on the settlements and in 1942 the minister in charge was granted a power to levy an annual tax.<sup>220</sup>

The Government of Alberta selected in 1938 ten locations from central Alberta for the Métis settlement and farming. In the beginning the settlements had an inherent weakness: they had no underlying title and the lands were held on leases. Two settlements in difficulties were closed in the 1950-1960s but the other eight still exist. Originally each settlement dealt individually with the provincial government but in 1975 the Alberta Federation of Métis Settlement Associations was created to co-ordinate administration and prevent closure of settlements. Problems in administration led to tensions and lawsuits with the provincial officials. The provincial Ombudsman, who adjudicated the disputes, urged the provincial government to give the Métis more control in the running of their own affairs. This took place when the Social Services to Municipal Affairs transferred responsibilities to Métis. At the time of constitutional reform, the Government of Alberta established the joint MacEwan Committee to review the Métis Betterment Act. Its report (1984) reflected the government's devolution policy. It suggested the following: Métis self-government; transfer of Métis land's title to the settlements; establishment of a Senate of Elders to resolve disputes in each settlement; trust funds; and a cultural definition of Métis. Consequently, the provincial Government published a paper called *Metisism: A Canadian Identity*, which asserted the Métis Aboriginal rights to land and government. The amended Alberta Act (1985) transferred the settlement lands to existing Métis settlement associations or corporate entities, but excluded the mines and minerals.<sup>221</sup>

The provincial Government introduced in 1988 two bills which included constitutionally protected Métis lands set aside as settlement areas; settlement councils responsible for local government with powers to make decisions on membership and land allocation; general council, responsible for addressing common concerns of the settlement councils; and

---

220 Dickason (1994), pp. 362-364; Weber (2004), pp. 331-332.

221 Purich (1968), pp. 148-149; Bell (1994), pp. 8, 12-16; Dickason (1994), p. 363.

consistency of provincial jurisdiction with the protection of the Constitution over lands and institutions. The bills were the basis for the final Alberta-Metis Settlements Accord (1989). In 1990 the Legislature of Alberta passed new laws: the Metis Settlements Accord Implementation Act, the Metis Settlements Act and the Constitution of Alberta Amendment Act. The pact granted title to 5,120 sq km of land, limited self-government and a cash settlement of \$ 310 million for 17 years. For economic administration the Settlement Sooniyaw Corporation was established with a \$75,000 contribution from each settlement. A provincial Native Economic Development Program agreed in principle to allot \$ 4.2 million for an umbrella five-year development plan, including the delivering of social services and economic development projects. Each settlement is a natural person, having a Settlement Council of five members with municipal powers to decide on commercial activities, investments, lending and the borrowing of money and make bylaws. A representative corporate body is called the General Council. It consists of four elected officers and all settlement councillors, and has the authority to enact policies affecting the collective interests of the settlements. It may also ask the minister to make regulations specifying that particular policies have no effect to the extent of inconsistency. The General Council is administered by a two-part consolidated fund. The policy requires the General Council to make a financial allocation policy. The minister may also make municipal affairs grants to Métis settlements.<sup>222</sup>

#### **4.3.5. Traditional and Alternative Forms of Self-Government**

During recent decades in North America the emergence has taken place of supratribal identity - "indianization".<sup>223</sup> The First Nations draw their legitimacy from the collective and interest rights to self-determination. The search of unity among the Indians has long roots that go far beyond the colonial times. The Iroquois Confederacy was established during the sixteenth century. The two major proponents against the prevailing system have been the League of the Six and the Wabanaki Confederacy, both living across the national border. They see the self-determination not just as narrowly defined and mutually exclusive peoples, but as segmented political structures defined by kinship, geography and function. The Iroquois base their identity on the Great Law of Peace. It is described as a big tree with roots extending in four major directions to all peoples of the earth. All are invited to follow the roots to the tree and join in peaceful coexistence and cooperation under its great long leaves. The Great Law promotes unity among individuals, families, clans and nations while upholding the integrity of diverse identities and spheres of autonomy. The Iroquois have preserved up to the present time a matrilinear clan system, the Great Binding Law (*gayanashagowa*) and a political league

---

222 Metis Settlements Act, 1990 (Alberta), ss. 3-4, 6-8; Constitution of Alberta Amendment Act, 1990 (Alberta), s. 2; Municipal Affairs Grants Regulation, 2000 (Alberta), Schedule 4, s. 2(1); Métis Settlement Accord (1989); Bell (1994), pp. 17-20, 27; Dickason (1994), pp. 364-365; Richardson & Imai & McNeil (2009), p. 298.

223 Cornell (1988), p. 72.

of the Six Nations (*Hodenoosaunee*). They assert their independence of Canada and use their own passports when travelling abroad.<sup>224</sup>

A first attempt to build a larger First Nations' unity took place in the 1780s when the Mohawk chief Joseph Brant lobbied for a Pan-Indian Confederation and was able to convene 35 nations to Sandusky, Ohio. The Indian legislation of 1868-1869 was designed to break down tribal forms of government as irresponsible. The Mohawk of the Bay of Quinte were the first to introduce a new, elected band council's model but otherwise the Six Nations strongly opposed the elective system. Despite the fact that the Indian Act's amendment (1880) prohibited the hereditary chiefs from exercising power, many bands used the elective system to elect traditional leaders. Even if they were deposed by the Superintendent General, they could be re-elected. In many communities the two systems coexisted.<sup>225</sup>

In St. Regis the struggle began in 1892, when the traditional chiefs were after the American model replaced by a band council. In 1899, when the elected governments became compulsory in eastern Canada, in St. Regis took place an armed conflict and the traditional chiefs were arrested and imprisoned. Despite harsh measures the traditional leaders were elected again many bands. As a consequence, all future elections failed until 1908. The Canadian Government appointed in 1923 an investigator to examine the question of government on reserves. He could not find virtue in tribal government and suggested the institution of an elected system at the earliest possible date. The following year, a one-year elected system was imposed and the hereditary council was abolished according to an amendment of the Indian Act. While the women had a significant role in election of chiefs in the hereditary system, the new system did not give them the right to vote. The forced restructuring of the Six Nations electoral system raised wide criticism in Canada and abroad. Investigator Scott defended the arrangements by saying that the Iroquois could only benefit from British laws which were civilising and protective under all circumstances.<sup>226</sup>

The hereditary faction did not disappear but advocated for sovereignty. The supporters of the new system (Dehorners) were mainly Christians, while the traditional faction represented more often the Longhouse Religion. In the power struggle Cayuga chief Deskadeh finally won: he demanded the recognition of Iroquois sovereignty. He appealed to the Supreme Court of Canada and the Privy Council, without success. Neither did the Iroquois' two direct appeals to King George V have any effect. When there was an armed conflict between the Iroquois and the Royal Mounted Police, the Netherlands promised to act as an intermediary and brought the case to the League of Nations. Deskadeh asked for home rule for Iroquois Nations. The federal government in Ottawa disagreed. It responded that in no constitutional document did there exist a special provision for the Indians. When Estonia, Ireland, Panama and Persia

---

224 Dickason (1994), p. 359; Anaya (2004), p. 102. There are also other confederations that have claimed sovereignty, like the Blackfoot Confederation living in Alberta, Saskatchewan and Montana; The Declaration of the First Nations (1990) describes well the growing self-esteem of the indigenous people in Canada: "The Creator has given us the right to govern ourselves and the right to self-determination. The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other nations." Cf. Declaration of the First Nations (1990).

225 Indian Act (1880); Dickason (1994), pp. 216, 260, 284, 320-321.

226 Stone (1975), p. 381; Titley (1986), p. 133; Johansen (1996), p. 25. Ironically Ludger Bastien, a traditional chief of Loretteville Huron, was elected the same year to Québec's Legislature. He was eligible because tribe's position was defined with France before the British rule.

began to rally to the Six Nations' cause, the British Government intervened. It accused the foreign states of interfering in the British Empire's internal affairs and the case was dropped from the organisation's agenda in 1924.<sup>227</sup> Two years later the British and American Claims Tribunal ruled that the United Kingdom could not maintain a claim for the Cayuga nation as such under the Treaty of 1814 but that a claim could be advanced only for the Cayuga Indians living in Canada on the basis of their British nationality. An Indian tribe had no legal personality internationally.<sup>228</sup>

Despite the early death of Deskadeh the traditionalists continued their efforts. Despite the amendment of 1927 of the Indian Act, which banned a right to raise funds without permission and prevented the Indians to create pan-Indian political organisations, the Iroquois renounced 1928 their allegiance to Canada and the British Crown by declaring independence. They petitioned the League of Nations membership in 1923 and the United Nations membership in 1977. In 1959 a group of hereditary chiefs in the Six Nations Reserve tried to reclaim control of the Reserve Government by taking over the Band Council offices and proclaiming an end to the elective system. The RCMP evicted them but the result was an approach of elected and hereditary chiefs. In considering Canada's report in 1992, the UN Committee on the Elimination of Racial Discrimination (CERD) asked in connection to the dispute between the Mohawks and the Quebec provincial government whether Canada had adopted legislative or constitutional provision concerning the exercise of the right to self-determination. The Canadian Government held that the self-determination issues were outside the competence of the Committee.<sup>229</sup>

Another proponent of sovereignty is the Wabanaki Confederacy, located in Eastern Canada and New England. It was reconstituted in 1978 by Mi'kmaq, Maliseet and Abenaki in Canada and Passamaquoddy and Penobscot in the United States. Together with Wampanoag, Pennacook, Wappinger, Powhattan, Nanticook and the Leanape Confederacies representing the 13 surviving indigenous nations along the eastern seaboard, they have asserted their sovereignty over the entire Maritime and New England regions. The Mi'kmaq have tried several times to find support for their self-determination. Their Grand Captain attempted in his application to the UN Human Rights Committee to show the collective right of self-determination, protected by the article 1 of the ICCPR. The Committee held that the grand captain could not prove representing the Indigenous people: an individual communication process cannot be used to vindicate a right of a people. In another case the Mi'kmaq stated that the Canadian government had not legally obtained sovereignty over the Mi'kmaq Nation. It had deprived the alleged victims of means of subsistence by enacting and enforcing law and politics that had a detrimental impact upon Mi'kmaq society. The Mi'kmaq tried to obtain recognition of the Mi'kmaq Nation as a state but the application did not succeed. They were also rejected a claim on behalf of the tribal society that its rights to political participation under ICCPR had been violated by Canada's refusal to allow a representative of the society

---

227 Dickason (1994), pp. 357-358; Horn (1996), pp.102-103; Snow (1996), p. 133, 158-162, 183-184, 191. The Longhouse Religion, established by the Seneca prophet Handsome Lake, supported the recovery of Iroquois' traditional structures.

228 American and British Case Arbitration Tribunal, Cayuga Indians (1926), pp. 173, 179;

229 Indian Act (1927); Dickason (1994), pp. 328, 358; Snow (1996), p. 218; Musgrave (1997), p. 173; Anaya (2004), pp. 231-232.

directly participate in discussions on the reform of the Canadian constitution. The Committee ruled that the right was not infringed because a number of Indigenous peoples' associations were invited to participate in various phases of the constitutional reform process. They were presumed to represent the interests of all indigenous peoples of Canada. The deficiencies in the arrangement would be best worked out at the local level.<sup>230</sup>

The Cree have created a Cree Confederacy with member communities from six Canadian provinces and the United States. They have discussed whether to include the Cree Métis to their confederation. The situation in Québec is complicated. The indigenous peoples' territory (Ungava peninsula) was transferred to Québec only in 1912 and covers 2/3 of the province's landscape. The Crees claim a right to secede, should the Cree people and its territory be forcibly included in a sovereign Québec.<sup>231</sup>

Several First Nations' final agreements have since the 1980s recognised to some extent the existence of traditional forms of government. In British Columbia, the self-governing First Nations have statutory traditional forms of government and officials. The Federal Court of Canada has developed jurisprudence on disputes arising from customary selection of Indian band leaders. The codes for these elections are created by the bands. The procedures for their adoption are often contentious. The judges have adapted some general administrative law principles, including bias and procedural fairness, taking into account the small size of the communities.<sup>232</sup>

#### 4.3.6. *Emerging Structures*

About 50% of all Indigenous people in Canada live in urban centres. The RCAP Report identified four approaches for urban indigenous peoples: extra-territorial, where a tribal nation takes responsibility for its urban members; tribal nation, taking responsibility or assuming a primary co-ordinating function; urban communities of interest-approach, where indigenous groups are formed and function for particular purposes; and a pan-Aboriginal model. The RCAP observed that all these approaches had problems. Although the report recognised that the "territorial anchor" was the basis for Aboriginal nationhood, the geography is often against the traditional models. In its response the federal Government showed similarly relative neglect to urban dimension and supported the reserve-based model.<sup>233</sup>

In Toronto Indigenous people run many specific structures, including community centres, elementary schools, libraries, health clinics, men's residences, senior citizens' residences and child welfare agencies. In these kinds of communities – the RCAP's third model as communities of interest - it could be possible to co-ordinate all services under an

---

230 *Mi'kmaq Tribal Society v. Canada* (1984), ss. 1-2; Champagne (1994), p. 117; Lawrence (2004), p. 240; Conte & Davidson & Burchill (2004), pp. 20, 35.

231 Bayefsky (1982), p. 339; Radan (2003), pp. 630-631, 638; Lawrence (2004), p. 241.

232 Richardson & Imai & McNeil (2009), p. 310. Cf. Nisga'a Final Agreement Act, 1999, Preamble; Maanulth First Nation Final Agreement Act, 2007 (British Columbia), s. 13.3.2; Tsawassen First Nation Final Agreement Act, 2007 (British Columbia), s. 16.8; For instance, the legislation recognises Nisga'a *simgiyut* (hereditary chief), *sigidimhaunuk* (matriarch) and *angol-oskw* (family hunting, fishing and gathering territory). Cf. Nisga'a Final Agreement Act, 1999, Preamble.

233 RCAP (1996), Vol. 4, pp. 248, 519-622; Gathering Strength (1998), ss. 8-11.

umbrella organisation. The Nisga'a Nation has an interesting statute-based structure of four extraterritorial Urban Locals, which form part of the administrative structure. Elsewhere the legislation allows creation of First Nations' municipal systems in the limits of occupied reserves. The municipalities can also extend by agreement their services to First Nations and create joint structures, like companies.<sup>234</sup>

The RCAP report held it possible that some rural communities with a high concentration of Métis could function as key locations to preserve and perpetuate their culture for the future. The report speaks even about a national Métis government. The Métis have returned to Riel's dream and advanced towards more centralised structures. They have created local and community councils for representation. Each province has a provincial Métis organisation, which represents the Métis regionally and undertakes cultural and socio-economic programming and services. In their governance structure the leaders are elected through province-wide ballot box elections. The organisations accountability is maintained by holding annual assemblies. The Métis Nation – Saskatchewan has adopted a constitution which has established Métis self-government organisations: a Legislative Assembly which enacts Métis legislation and regulations, the Senate to oversee citizenship and elections, and the Provincial Métis Council as the cabinet with a corporate secretariat. Saskatchewan has partly recognised the Métis structures by recognising their distinct culture and heritage and contribution, establishing a bilateral process for negotiations and legally recognising the Métis Nation – Saskatchewan Secretariat Inc. as a body corporate and administrative body with bylaws-giving powers. The provincial organisations have also created increasingly different co-operational structures. The Métis Nation of Alberta (MNA) created in 1988 the Apeetogisan Development Inc. to support indigenous entrepreneurs and expanding their businesses. Its initiatives have spread to the oil and gas industry as well.<sup>235</sup>

The Métis National Council (MNC) is formed by provincial organisations to mandate a national governance structure. The president of each provincial organisation sits as a member on the Board of Governors. A national President is elected by the MNC's General Assembly every two or three years. The MNC has two secretariats: the Métis National Youth Advisory Council and the Women of the Métis Nation which participate in the work of the national organisation. The MNC has also a national Government, the Métis Nation Cabinet. The President appoints ministers who are accountable for specific ministries and pursue sectoral initiatives on behalf of the Métis Nation.<sup>236</sup>

---

234 Nisga'a Final Agreement Act, 1999, s. 11.9; Municipal Government Act, 1998 (Nova Scotia), s. 60(1); Municipalities Act, 2002 (Yukon), s. 27(1); City of Toronto Act, 2006 (Ontario), s. 17(1); *Loi sur les cités et les villes*, 2012 (Québec), s. 29.10; Richardson & Imai & McNeil (2009), p. 300.

235 Métis Act, 2001 (Saskatchewan). ss. 2-3, 5-9; *Institutions* (2002); RCAP, Vol. 4, pp. 200, 203, 217, 232-233; Wilson & Mullet (2008), pp. 334-335, 346-347

236 Wilson & Mullet (2008), p. 335.

#### 4.3.7. *Citizenship: Access to Canadian Society*

The enfranchised Indians lost their Indian status and became automatically Canadian citizens according to the 1869 law. Otherwise the Indians became citizens with full electoral rights only in 1960 when the Citizenship Act was reformed. Several modern agreements create a First Nations or Inuit citizenship. The two most important criteria are ancestry and Canadian citizenship. The First Nations can decide who belongs to a nation and who can be admitted as a new member. Many of them have created membership codes (citizenship codes) which replace the old band membership rules. The respective minister must be informed on the code process with a new list. A First Nation's citizenship is not the same thing as registration under the Indian Act, the latter being historically more restrictive. The membership decisions by the chief or council may be submitted to judicial review by the courts.<sup>237</sup>

Unlike the Indians, the Métis became with the Manitoba Act, 1870, Canadian citizens. They and non-status Indians became ordinary citizens under provincial jurisdiction in matters of property and civil rights. In 1990, during the legislative process in Alberta, the provincial government enacted a Transitional Membership Regulation, which required each Settlement Council and the Minister to provide the Commissioner of the Metis Settlements Transition Commission with a list of settlement members. Those persons with their name in both lists are confirmed as members and those with their name on one list as uncertain members. Those in the second category had a right to apply to the Metis Appeal Tribunal for confirmation of membership. The Metis Settlements Act, 1990, gives to Settlement Councils the authority to decide on the following: applications for membership, based on age, residence and proof of Métis identity; terminate a membership; and to allocate land to settlement members subject to appeal to the Appeal Tribunal. An Indian or Inuit can be a member only if they have been registered as members with a settlement bylaw when less than 18 years old, one or both parents having the membership and lived a substantial part of their childhood in the settlement. Each provincial organisation has a membership list and sometimes also registry. Based on those lists there has been created a nationwide Métis citizenship.<sup>238</sup>

#### 4.3.8. *Enfranchisement and Electoral Rights*

The election was introduced for the first time to Indians in the reduction of Sillery by the Jesuits in 1640. This was an early attempt to get Indians to govern themselves in European style. It took, though, more than 200 years before British rule began to carry out the European model. The pre-Confederation Indians had limited provincial voting rights as they were dependent on individual land ownership. As wards of the Crown their Indianness closed them outside the federal electoral rolls. In 1857 the Gradual Civilization Act confirmed the prevailing policy of assimilation: the educated, debt free male Indians over 21 years old and of good

---

237 Enfranchisement Act, 1869, s. 16; Act to Amend the Canadian Elections Act, 1960; Nisga'a Citizenship Act, 2000 (Nisga'a), s. 2; Olthuis & Kleer & Townshend (2008), pp. 230-231. Québec granted the First Nations a right to vote in provincial elections only in 1968.

238 Manitoba Act, 1870, s. 17; Metis Settlements Act, 1990, ss. 74-84; Bell (1994), p. 25; Wilson & Mullet (2008), p. 334-335.

moral character could be enfranchised. All others had to go through a three-year qualifying period. In practice, there were few volunteers. The Indian Act, 1876, made enfranchisement compulsory to Indians who obtained a university degree or became doctors, lawyers or clergymen, i.e. they lost their Indianness through education and became civilised.<sup>239</sup>

The federal franchise was revised in 1920, 1946 and 1950. The last revision still limited the voting right to those Indians who had executed a waiver of their exemption from taxation. The Indians' general right to vote in federal elections was enacted only in 1960. As an exception, the veterans of both World Wars and the Korean War were granted federal franchise after the wars, and with some delay in provinces. In provincial elections Ontario prohibited the on-reserve Indians to vote in 1876. Also off-reserve Indians were excluded between 1884-1908. Similar prohibition to all Indians (New Brunswick, 1889) and to on-reserve Indians (Prince Edward Island 1913, Québec 1915) were passed elsewhere. The voting right was returned to off-reserve Indians in New Brunswick, British Columbia and Saskatchewan between 1944 and 1951. After 1960 the provinces quite soon followed the federal example of giving to all Indians the voting right, in Québec this did not happen until 1969<sup>240</sup>, which for a long time saw the Indigenous people as a federal question.

The Enfranchisement Act, 1869, introduced a three-year elective system for bands, which were ready to adopt a self-government with limited right to pass their own bylaws. The Indian Act's amendment (1880) strengthened the superintendent general's position in confirming his power to impose the elective system whenever he thought a band was ready for it. All chiefs had to be elected. The Indian Advancement Act, 1884, introduced an alternative system of annual elections, changing the focus to a municipal model. The chiefs deposed by the Governor in Council on grounds of dishonesty, intemperance or immorality could not be immediately re-elected. The proposed system became very unpopular. The federal Franchise Act, 1885, introduced by Prime Minister Macdonald, gave dominion franchise for all males who were British subjects and who met minimum property qualifications. The law gave a voting right also to non-enfranchised male Indians in rural areas of Ontario and Québec having property worth \$ 150. The law was strongly opposed and repealed in 1898 by the Liberal Government as derogation to the dignity of people. In 1895 the federal Government rendered elections mandatory in 55 bands of eastern Canada and four years later extended the system to all bands. A more tolerant policy towards customary elections was used in the less organised western parts of the country.<sup>241</sup>

The different electoral systems were consolidated in 1906, with recognition of four parallel electoral systems: one-year, three-year, appointed and hereditary systems. In the revision of the Indian Act (1951) the one-year system was repealed and the women were granted a voting right in band council elections. By the time of reform the Indian bands were more willing to accept the electoral system. In 1951 there were 400 bands with a hereditary system, 185 with

---

239 Gradual Civilization Act, 1857, ss. 5-15; Indian Act, 1876, ss. 86-93; Thwaites (1896), Vol. XVIII, pp. 101-106; Up to 1951, around 5,000 Indians (5%) had been enfranchised.

240 McHugh (2004), p. 363. Québec later has stressed that the indigenous people form part of its collective culture.

241 Enfranchisement Act, 1869, s. 10; Indian Act (1880); Indian Advancement Act, 1884, s. 4; Franchise Act, 1885, s. 40; Dickason (1994), pp. 320-321; McHugh (2004), p. 258. The "insufficiently" advanced Treaty 3 bands were still excluded from the electoral system.



a three-year system and just nine with a one-year system. Within two years the majority of bands had changed to an electoral system, but in the early 1970s 1/3 of all bands still had a hereditary system. Today most of the bands are elected by secret ballot, although the procedures may be authorised by band custom or Indian Act. The Indian Act limited the right to participate in band council elections and to hold office to band members who ordinarily resided on the reserve. While a remarkable part of band members lived outside the reserves, this formed a clear defect in legislation. John Corbiere, a Batchewana chief from Ontario brought the case to the Supreme Court, which held that s. 77(1) constituted an unjustified discrimination against off-reserve band members. The court suspended its decision for 18 months to enable the federal government to renew the electoral system. Consequently, the Indian Act was amended in 2000 allowing for the first time the band members living off the reserve to vote in band elections and referendums.<sup>242</sup>

The responsible minister can give orders on the form of elections in bands. A band must have one Chief, one councillor for every 100 members of the band (always 2-12). The Governor in Council may define whether the Chief is elected by electors or councillors, whether the Chief is a councillor, and how the election will take place. He/she may also set aside an election which is void. The main rule is that there is one electoral section. A Councillor can be elected only among persons living within the electoral section. Each over 18 year-old band member is qualified to vote. The Chief and Councillors hold office for two years.<sup>243</sup>

There have been suggestions to follow the electoral quota system for Indigenous peoples or minority representation after the New Zealand and American models. In 1999 Premier Thériault proposed in New Brunswick that two seats be reserved for First Nations, which the First Nations, rejected because they feared that it would shadow the larger questions of self-government. The Electoral Reform Commission and other federal commissions have recommended instead adjusting electoral boundaries to create ridings with higher concentrations of Indigenous people. The federal Government has not adopted this recommendation although there a significant underrepresentation of Indigenous peoples at the federal level: before the creation of Nunavut only nine Indigenous people had been elected to the House of Commons. In Manitoba and Alberta officials have to take into consideration when fixing the electoral boundaries the Indian reserves and the Métis settlements.<sup>244</sup>

New self-government models include restrictive electoral regulations. In the Sechelt territory, British Columbia, the voting right is limited to Indigenous people despite the fact that all residents are under the band's administration. This has been explained by the will to protect the Indigenous rights. In Nisga'a Nation all persons with Nisga'a ancestors are eligible even if neither of their parents belonged to one of the tribes.<sup>245</sup>

---

242 Constitution Act, 1982, ss. 77(1)-(2); Indian Act, 1985, s. 15(1); Act Respecting Indians, 1906, ss. 172-196; Indian Act, 1951, s.; SCC, *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (1999), s.; Olthuis & Kleer & Townshend (2008), p. 196; McHugh (2004), p. 258.

243 Indian Act, 1985, ss. 74-75, 77-79.

244 Electoral Boundaries Commission Act, 2000 (Alberta), s. 14(c); Electoral Divisions Act, 2012 (Manitoba); Knight (2001), pp. 1065-1077; Richardson & Imai & McNeil (2009), p. 305.

245 Nisga'a Final Agreement Act, 1999, s. 20; Nisga'a Elections Act, 2012 (Nisga'a), part. 3; McHugh (2004), p. 393.

The Métis have been since the mid-nineteenth century Canadian citizens. There has been created a special procedure for elections in Métis settlements of Alberta. Each Settlement Council has five members for five year terms that have been elected by the settlement members in general elections and who together form the settlements' common General Council. The legislation defines also the Métis Settlement Access Committee, which defines the settlement membership. The membership is applied from the Settlement Council and the applicant must be an over 18 years old Métis, who has previously lived in the settlement or has resided at least for five years in Alberta.<sup>246</sup>

The Inuit were excluded from voting in federal elections until 1950. Then the provision in the Dominion Elections Act was repealed as a part of the general reform of legislation on indigenous peoples. Still there were difficulties at the local level: the residents of the eastern Arctic could vote only since 1966 in territorial elections, when the Northwest Territories Act was amended. The reform was resisted, as "most Eskimos were unable to speak English and wouldn't be able to cast an intelligent vote". In the public government model of Nunavut all residents of the territory may vote. As a majority, the Inuit do not need special electoral protection. The Nunavut Implementation Commission suggested in 1994 a unique system of two-member constituencies with gender parity, or an equal number of men and women elected to the Legislative Assembly. The political opposition was, however, able to bring the plan to a public vote. After significant lobbying the proposal was rejected in 1997.<sup>247</sup>

#### **4.3.9. Tax Exemption**

The purpose of tax exemption is to preserve Indian property on reserve. Upper Canada excluded the Indian lands in 1850 from property tax. The main reason was to protect the Indians from outsiders' blackmailing. According to the Indian Act of 1876, the lands held in trust by the Crown for the benefit of the Indians could not be taxed, except when they held property under lease or outside the reserve. The Indian Advancement Act, 1884, granted to tribal councils, which had adopted the new system, powers to tax on reserve lands, subject to the approval of the Department.<sup>248</sup>

In 1951 the Band Councils acquired authority to administer band funds. They could spend capital and revenue monies for anything deemed to be in its general interest, unless the Governor in Council expressed reservations. A band could even fund lawsuits. Full control over the funds was given for the first time to the bands in 1958. By the 1960s the trust funds included capitalised annuities and moneys derived from other assets. Major sources of income were from leases on Indian reserve lands, timber sales, leasing oil and gas exploration rights and sale of gravel. The size of trust funds varied considerably. The degree of bands' financial autonomy was directly proportional to their control of revenues. The Six Nations had one of the strongest economies. In 1988 the Indian Act was amended to allow the First Nations to pass property taxation bylaws for reserves with minister's approval. They had to

---

246 Metis Settlements Act, 2000 (Alberta), ss. 3, 8-9, 12, 74, Schedule 3, s. 2.

247 Duffy (1988), pp. 70-73; Richardson & Imai & McNeil (2009), p. 305.

248 Indian Act, 1876, ss. 29-44; Indian Advancement Act, 1884, s. 11; SCC, *Bastien Estate v. Canada* (2011), s. 21-28; Karsten (2002), p. 60.

be reviewed by the Indian Taxation Advisory Board. In 1990 the Westbank and Kamloops Indian bands passed their own taxation bylaws, and soon they were followed by 40 more First Nations. The Aboriginal Action Plan (1998) promised a new fiscal relationship between the federal and indigenous governments. The plan envisioned common accounting, data exchange and standards of accountability. It promised to reclaim legislative initiative over judicial initiative.<sup>249</sup>

No reserve Indian is subject to taxation in respect of the ownership, occupation, possession or use of any property. They are also freed of several provincial consumption taxes, including the alcohol, tobacco and fuel taxes. Neither a succession duty, inheritance tax or estate duty is payable on the death of an Indian on the before-mentioned property. The registered Indians living outside a reserve have only partial tax exemption, but have otherwise the same rights. Non-member registered on-reserve Indians are only entitled to full tax exemptions and have some of the First Nation's rights and privileges. Finally, a non-registered First Nation's citizen has no tax exemptions, but he/she can enjoy many of the First Nations' rights and benefits and participate in its political life. The Aboriginal and treaty rights for this last group are only partial and not always clear.<sup>250</sup>

The Indian Act establishes two types of taxes: the First Nations tax and the First Nations goods and services tax. They are collected and administered by the Canada Revenue Agency. The federally approved First Nations may make laws and bylaws to implement the taxes. On reserves all residents pay these taxes. The First Nations Tax applies to sales of alcohol, fuel and tobacco on reserves. In 2008 21 First Nations had this tax, but the federal government is not willing to enter new agreements. It prefers instead the First Nations Goods and Services Tax, which applies to all taxable supplies. An alternative taxation system is offered by the First Nations Fiscal and Statistical Management Act, 2005, which has established four institutions: the First Nations Tax Commission (advisory board), the First Nations Finance Authority (loans and investments), the First Nations Financial Management Board (supervision and management arrangements), and the First Nations Statistic Institute. The act imposes a third party management on First Nations government in debt or where allegations of mismanagement are made. Under third party management the respective minister orders all financial operations on specific First Nations to be controlled by appointed firms. The First Nations chiefs are accountable both to Indian Affairs and to their own people, while they lack control over their own revenues.<sup>251</sup>

The Indian Act is not applicable to self-governing First Nations. Each of them has a specific power to tax. The Umbrella Agreement First Nations, Tlicho Government and the Nunatsiavut Government have adopted Personal Income Tax Agreements, which cover all residents in

---

249 Indian Act (1951); Indian Act, 1985, s. 83(1)(a); Dickason (1994), p. 384; Stokes (2000); Richardson & Imai & McNeil (2009), p. 298; Cook & Lindau (2000), pp. 26-27.

250 Indian Act (1985), s. 83; Olthuis & Kleer & Townshend (2008), pp. 232-233. Cf. Indian Self-Government Enabling Act, 1996, ss. 2, 31-37; Revenue Tax Act, 1988 (Prince Edward Island), s. 20(3); Motor Fuel Tax Act, 1996 (Ontario), s. 20.1; Tobacco Tax Act, 2000 (Alberta), s. 45(2); Règlement sur les Indiens, 1981 (Québec), s. 2; Sale of Marked Tobacco on Indian Reserves Regulation, 2006 (Manitoba), s. 2; Sales of Unmarked Cigarettes on Indian Reserves Regulation (Ontario), s. 2, 4; Fuel Tax Regulation, 2007 (Alberta), s. 8(2); Règlement d'application de la loi concernant la taxe sur les carburants, 2013 (Québec), s. 12.1R1.

251 Indian Act, 1985, s. 87(2)-(3); First Nations Goods and Services Tax Act, 2003, ss. 4, 20; First Nations Fiscal and Statistical Management Act (2005), ss. 4, 17, 38, 58, 91.

their territories, but are harmonised with other federal and territorial taxes. Also property taxation in Nisga'a territory covers all inhabitants. The Westbank Indian Self-Government Agreement includes a tax immunity based on the Indian Act. The First Nation, forming only 4% of the total population, has powers to tax the property of the non-member majority. In several provinces the responsible minister may enter into a tax administration agreement with a band council and authorise the collection of taxes imposed by band laws.<sup>252</sup>

In *Nowegijick* (1983) the Supreme Court interpreted the scope of Indian Act. *Nowegijick* had earned his income off the reserve, but lived on reserve and worked for a band-owned company whose office was on the reserve. Dickson CJ defended the broad interpretation and held that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.<sup>253</sup>

The Akwesasne Mohawks, living on both sides of the US-Canadian border, have refused to pay sales tax and customs duties on items imported from the United States. They refer to Jay Treaty (1794) which guarantees unrestricted freedom of movement over the river, and give to local Indians a special status. The Canadian authorities and courts have held that after the War of 1812 the treaty is no longer in force. The case has been made more complicated by the fact that the United States has recognised a free passage for Canadian Iroquois. This was recognised for the first time in 1927 by the United States Federal Court in *McCandless* case. It and all subsequent decisions were based more on political necessity than Aboriginal rights. The United States Congress included the Iroquois' free passage to legislation in 1928. The Canadian Mohawks litigated unsuccessfully in 1956 and 1993. In 2001 Chief Mitchell tried to prove that an import duty free over the border is part of the Mohawk distinct culture. In Supreme Court *McLachlin* CJ held, based on *Van der Peet's* analysis, that there was insufficient evidence that the Mohawk had traded north of the St. Lawrence River. The cross-border trade was an important factor for the modern Mohawk and the cases context supported it, but the claimed right had to be quantifiable, enforceable and reasonably specific. *Binnie J* (dissent) held that the right Mitchell claimed could not have come into existence due to its incompatibility with the existence of Crown sovereignty.<sup>254</sup>

---

252 Elliott (2005), p. 175; Olthuis & Kleer & Townshend (2008), p. 203. Cf. Nisga'a Final Agreement Act, 1999, s. 16; Labrador Inuit Land Claims Agreement Act, 2005, s. 8; Treaty First Nation Taxation Act, 2007, s. 4; Revenue and Financial Services Act, 1983 (Saskatchewan), s. 71.1; Tax Administration and Miscellaneous Taxes Act (Manitoba), s. 95.1(2); Labrador Inuit Land Claims Agreement Act, 2004 (Newfoundland and Labrador), ss. 2, 8; Maa-nulth First Nations Final Agreement Act, 2007 (British Columbia), s. 19; Tsawassen First Nation Final Agreement Act, 2007 (British Columbia), s. 19; Loi sur l'administration fiscale, 2012 (Québec), s. 9.0.1; Loi sur la taxe du vente du Québec, 2013 (Québec), s. 541.47.3; Westbank Indian Self-Government Agreement (2003);

253 SCC, *Nowegijick v. R.* (1983), p. 41. *Nowegijick* is a significant departure from the reasoning in *Sikeya*, where the indigenous rights could be extinguished by general federal legislation.

254 Jay Treaty (1794), art. 3; SCC, *Mitchell v. M.N.R.* (2001), s. 64; *Yablon-Zug* (2008), pp. 576, 579, 585. The free right of passage is mentioned in s. 1359 of the Aliens and Nationality Act; The events of 1991 have led also the United States to check the freedom.

#### 4.4. Conclusions

Indigenous peoples' self-determination is based on their historical land space. Today only a minority of them live in their historical territories, but their claims are closely related to the historical situation, which gives them justification as first peoples. The central question in different settlements has been the compensation of past grievances. The western colonial states have a common cultural, religious and colonial background. Therefore, the methods of acquisition have been similar, but at the same time also tailored to local conditions. Great Britain and France were from the seventeenth century the main competitors in North America, Africa and Oceania, rushing to the same destinations.

The British authorities used as a basic form for acquisition of lands the formal treaties. The common law's doctrine of continuity recognised in most cases the existence of indigenous political organisations. In Canada the treaties were first based on equal standings, but later with the growth of the settler society the First Nations became wards of the Crown. The treaties were used to extinguish the indigenous rights. The British authorities did not recognise the Marshall doctrine of sovereign dependent nations, but used the system of reserves to isolate, civilise and finally assimilate the Indian tribes. The Métis were despite their early political organisation largely abandoned "in-between". They were neither white nor Indian. The Inuit had no contact with Canadian legislation due to their geographical isolation.

In New Zealand the British authorities met more equal force in the Māori tribes and subjugation to British political structures took a longer time. The Treaty of Waitangi recognised the Māori rights, although the treaty was soon neglected and there were differences in its interpretation while there were two different language variants. Unlike in Canada, the Māori were able to construct parallel structures and the *de facto* pluralism was in this sense more visible. A major difference was also that the dominant society was not able to isolate the Māori but tried direct assimilation. They were given also some major concessions in legislation, as the Māori seats in Legislature show.

France used similar methods of acquisition as Great Britain. They used formal treaties (New Caledonia, Tahiti, Wallis and Futuna), but also military threat (Tahiti) and *terra nullius* doctrine (New Caledonia, French Guiana). In New Caledonia was used a similar reserve system was used with isolation as in Canada, but its methods were more harsh and the policy was based more on segregation than assimilation. Even in Tahiti, where there existed a developed, parallel legal and political organisation, the French system replaced it. Based on the doctrine of *spécialité législative*, the local decisionmaking replaced in many cases the national legislation.

The Indigenous individuals were defined in legislation for segregation (First Nations in Canada) and electoral (Māori) purposes. In both bases blood quota was used to define the difference. France generally recognised only the individual French people and neglected the ethnic differences. A remarkable exception in this meaning was New Caledonia, where the acquisition of land and mineral profits led to the classification of the Kanak through new political structures created by the governors' decisions. In French Guiana the solution was different: the existence of Indigenous peoples was totally neglected.

World War II signified a remarkable change in attitudes to Indigenous peoples globally. This was related to the experiences of war, the decolonisation process and international

pressure. France made a constitutional reform in 1946, which changed the overseas colonies to overseas departments and territories.<sup>255</sup> The first-mentioned were tied more closely to the mother country while the last-mentioned acquired limited administrative autonomy. In Canada the Indian Act was reformed in 1951. It gave more decision-power to First Nations. In New Zealand the overseas territories became part of the decolonisation process. They gained an associate status in the 1960s and 1970s.

In all three countries the integration policy replaced the assimilation policy. The indigenous difference was to be abolished from legislation. Similarly, in all cases, the 1970s signified a new change. The indigenous peoples' position was checked first in Canada and some years later in France and New Zealand. All indigenous groups' constitutional recognition (1982), belongs to the same global process of recognition and redress. This includes: the new Indian Act (1985), the betterment of Métis status in Alberta, the new legislation, which has largely replaced the Indian Act by tailored self-governments, the creation of Nunavut as non-ethnic, territorial model and the significant case law in Canada; the new recognition of the Treaty of Waitangi (1975), new treaty-related legislation and case law in New Zealand; and the decentralisation process (1982), the Accord of Nouméa and the new autonomous structures in New Caledonia and French Polynesia in France they have been less related to the ethnic question. In this development Wallis and Futuna is the only exception. It has continuously preserved its strong, parallel customary structure. An explanation is its relative isolation and political/economic insignificance to France. A new, still open challenge to Indigenous structures themselves is the urban development. Both in Canada and New Zealand there have been attempts to give at least some legal recognition to new political structures, which do not follow the traditional, territorial structures.

Electoral rights and citizenship have been used as tools for segregation and assimilation, especially in New Caledonia and Canada (First Nations), but also as indirect means to preserve political balance (New Zealand). The post-war Western liberal thinking used the same means to support the integration policy. The development since the 1970s has again recognised these as expression of pluralism and difference. Several First Nations, Métis and Māori have their own membership codes and electoral structures, the electoral rights in New Caledonia are restricted and the Cook Islands use a resident definition. Similarly, the exemption in taxation has been an expression of difference but also immaturity in Canada (First Nations) and France (Pacific region). It has developed as a sign of plurality and difference in both countries. In New Zealand this difference can be seen in legal concessions to *iwi* organisations and in the semi-independent, although financially dependent, status of associated states.

---

255 This division is also visible in relation to EU law.

## 5. Community

### 5.1. France

#### 5.1.1. Customary Family Law

Courts in New Caledonia recognised the existence of customary family law in several decisions during the 1920s and 1930s. Since 1967 the territorial authorities have also recognised the customary marriages and divorces whose rules, confirmed by regulation in 1978, may vary in different customary areas (*aire*). Customary marriages are still organised by the clans, but must be confirmed within 30 days by the local mayor. The mixed marriages produce civil law effects. In customary divorces only the husband may start the process and the spouses' clans have exclusive jurisdiction in divorce cases. Customary adoption's basic requirement is the consent of the families. Legitimate, natural or adopted children, whose father or mother have customary status, have equal status before the law.<sup>1</sup>

The customary rules of succession were recognised in 1962. They are related to customary lands and are established principally through the maternal uncle. The only exception is related to real property acquired in conformity with the civil law and may therefore follow the partilinear succession. Anyone with interest in succession may ask the relevant authorities to hold a family or clan meeting to discuss the distribution of the deceased's property. The records of discussion may be challenged within 30 days. After this period the provincial official gives a certificate of inheritance or title. In Wallis and Futuna the inheritance is divided by the chief of the family.<sup>2</sup>

In Wallis and Futuna the customary character of marriage is emphasised when there is a question about a union between two clans or kingdoms. Then a divorce may raise difficult questions on clanic authority and its limits. It is not just a question about the individuals but about the Indigenous community as a whole and its material and spiritual well-being. In a case where a widow was not granted a pension due to her church marriage, the Tribunal of Nouméa has ruled that the church/customary marriage is a valid basis for a pension. Similarly,

---

1 Loi organique no. 99-209 du 19 mars 1999, art. 10; Arrêté no. 2063 du 20 septembre 1978; Délibération no. 424 du 3 avril 1967 (New Caledonia); Cour d'appel de Nouméa, *Tialetagi c. Lie* (1999); Ntummy (1993), p. 619; Agniel (2008), p. 90. For early decisions, cf. Tribunal suprême d'appel de Nouméa, 11 juillet 1921 (*no. 338*), 8 août 1823 (*no. 111*), Cour d'appel de Nouméa, 19 septembre 1933 (*no. 86*); The customary marriages were for the first time recognised by legislation in French Western and Equatorial Africa in 1939; The French civil law knows two kinds of adoptions: *adoption plénière* and *adoption simple*. The first-mentioned is subject to more stringent conditions and its effects are more far-reaching.

2 Accord de Nouméa, s. 1.1; Arrêté no. 11 du 20 juin 1962 (New Caledonia); Arrêté du 8 septembre 1980 (New Caledonia); Ntummy (1993), p. 620; Rau (2006), p. 71.

the customary family law has prevailed in the interior of French Guiana. Until 1969 there was no registration of people.<sup>3</sup>

The Pomare Code (1819) was strongly influenced by the British missionaries, who aimed at reform of Polynesian values. The polygamy, concubinage, divorce and adultery were prohibited by law. In 1838 the British missionaries asked the queen of Tahiti to prohibit the mixed marriages, which she refused to do. During the protectorate a Tahitian woman who married a French man had to submit the succession question to a Tahitian court. The reason was the land property which was still under Tahitian jurisdiction. In 1876 the governor's Administrative Council decided that succession questions would be submitted to District Councils. Despite the advance of civil law, the customary adoption has remained strong. In French Polynesia there are approximately 4,000 children who are *fa'āamu*, or customarily adopted. The Court of Appeal of Papeete has ruled that the customary adoption does not confer succession rights. On the other hand, the Polynesian fiscal statutes include them under territorial taxation under the same rules as legitimate children in law. In *Hopu & Bessert v. France*, UNHRC alleged that France has breached the Tahitians' right to family. The Committee saw that cultural traditions should be taken into account when defining the notion of family in a specific situation. The family was interpreted to include the relationship between the Indigenous people and their ancestors, as is consistent with Tahitian tradition.<sup>4</sup>

### 5.1.2. Education: Tool of Unitary State

Governor Guillaïn ordered in 1853 that French became the language of instruction in New Caledonia and ten years later the use of all other languages at school was forbidden. However, the public education was extended in all Pacific territories to more isolated countryside communities only after World War II. As part of the new decentralisation, the legislation on COMs' instruction was reformed in 1986. The Agreement of Matignon promised that France would educate 400 young Kanak to leading positions. Later the programme has been extended to include a broader group. This promise was also mentioned in the Accord of Nouméa, which stressed taking into account the following: local realities; regional environment; the needs of balancing the content and method of formation; and mutual educational co-operation with the Pacific states. The secondary education and the Centre of Pedagogical Documentation have been transferred since 2009 to the control of the territorial government. As a limitation, the Constitutional Council ruled in 1994 that the territorial collectivities cannot decide on public subsidies of private education.<sup>5</sup>

In Tahiti the early education was dominated by the Protestant missionaries but soon replaced by the Catholic Church. The Tahitian education was replaced by French education

---

3 Tribunal de Nouméa, 11 juin 1990, no. 930; Faberon & Doumenge (1999), p. 121; Arnoux (1996), p. 1624.

4 Pomare Code (1819, Tahiti), laws IX-X, XII; CA Papeete, 20 janvier 2011; UNHRC, *Francis Hopu & Te-poitu Bessert v. France* (1993), s. 10.3; Newbury (1980), pp. 92, 192-193; Rayboud (1991); Bechtel (2002), p. 207; Adoption des enfants Polynésiens – DAP des enfants fa'āamu.

5 Accord de Nouméa, art. 4.1.1.; Loi organique no. 99-209 du 19 mars 1999, art. 23, 27; Accord de Matignon (1988), Texte no. 2; CC, *Décision no. 93-329 DC* du 13 janvier 1994; Aldrich (1993), p. 143; Bechtel (2002), p. 48; Nouvelle-Calédonie.



from 1880 and the school was used as a media of cultural assimilation. In 1939 the Catholic Church laid a plan to educate adolescent Polynesian as technicians and teachers. Five years later, de Gaulle's provisional administration promised to promote educational services in Polynesia but it took 40 years before French Polynesia obtained control on education (1984). Twelve years later the competence was extended to the creation of establishment of secondary education, but the highest education is still conditional on an agreement between the state and the territory.<sup>6</sup>

According to the law of 1961 the state has responsibility for education in Wallis and Futuna, but in practice the agreements between the Ministry of National Education and the Catholic Mission (since 1969) signify that the Catholic Church takes care of all primary education in the islands. The state has, however, "hired back" the responsibility for secondary education for 30 years from the Catholic Mission. Also French Guiana has exceptional arrangements for its indigenous people. Their children are freed from compulsory school attendance by permission of the prefect, because many children participate in the seasonal hunting in the rain forests with their families, which does not support the demands of sedentary life. There have been also efforts to support the Indigenous children's learning through different state-funded projects, e.g. programme of far-distance instruction, co-operation with Brazil to support the indigenous children and special structures for Indigenous children with handicaps or learning difficulties.<sup>7</sup>

### 5.1.3. *Media: Monopoly or Freedom of Expression?*

Broadcasting has been a state monopoly in France. Beginning with the telegraph, the monopoly was soon extended to radio and television. Even when the state broadcasting network was made a distinct corporation in 1959, it remained under strong government influence. Split into a number of radio and television channels in 1974, broadcasting remained a state monopoly, supervised by the the Supreme Council of Audiovisuality (CSA) and the parliamentary Committee for Radio and Television. The CSA controls the use of new frequencies of television and radio and gives them authorisation. In 1989 the CSA was given powers, which allowed the duration of the licence to be curtailed, and the imposition of a fine. The law gave a right to hearing and to challenge a decision before the Conseil d'Etat as well as requiring that full reasons are given for any penalty. The monopoly was even strengthened in 1978, and upheld by the Constitutional Council, which made it a criminal offence to broadcast in breach of the monopoly. In 1982 the council specified the right to broadcast belonging to the freedom of expression principle in article 11 of the Declaration of 1789. It drew analogies from other texts to reach these ends. When interpreting the pluralism in article 11, it held that the form of pluralism is primarily for the legislature to determine. The principle of pluralism justifies the competition in media. Pluralism can appear within the public sector or between the public and private sectors. It can be internal when a particular media institution is required

---

6 Loi organique no. 96-312 du 12 avril 1996, art. 6 al. 11; Loi no 84-820 du 6 septembre 1984, art. 3; Newbury (1980), pp. 204, 281, 311; Sem (1996), p. 111.

7 Payé (2001), p. 229; Plan d'action pluriannuel (2000); Préfecture des Îles Wallis-et-Futuna; Guyane Française: composition ethnolinguistique.

to include a variety of opinions within its columns or air waves. The parliament can make adequate provisions to guarantee pluralism in the public sector. If a particular area has only one authorised frequency, the National Commission of Communication and Liberties may require the licensee to undertake obligations to ensure the free and pluralist expression of ideas and currents of opinion.<sup>8</sup>

The broadcasting was extended to all overseas territories in 1954. Since the beginning there has been also programmes in indigenous languages - French Polynesia and Wallis and Futuna are in the media characteristically bi-/trilingual. In New Caledonia a radio station was established as early as 1937, and television programmes started both in New Caledonia and French Polynesia in 1965, but in Wallis and Futuna only in 1986. Since 1982 the state producer of broadcast services has been *Société de radiodiffusion et de télévision française pour l'outre-mer*. In New Caledonia, CSA must consult the territorial government on all decisions dealing with the territory. The audiovisual communication has been transferred since 2009 to territorial responsibility. The Kanak names, their cultural objects and languages are respected and their cultural development supported in the media. In French Polynesia, territory has produced and transmitted local social, cultural and educational programmes since 1984. The breaking of the state monopoly in 1994 has strengthened the position of Tahitian language in the media.<sup>9</sup>

#### 5.1.4. Social Republic: Health and Social Services

In New Caledonia the repeal of *Code de l'Indigénat* (1946) signified for the Melasian population freedom from many restrictions. Largely neglected before, the Melanesian population was now included to the social and economic programmes of the Fourth Republic, which improved their health. The goal of the state's policy, continued by the Fifth Republic, was to integrate the Kanak into French society and culture which mostly affected the narrow Melanesian middle-class. In 1986 the French government designed for the territory an economic revival plan.<sup>10</sup> The law of 9 November, 1988 and the guidelines of the Accord of Matignon gave to the Congress of New Caledonia a central role in social and health questions: the economic development, housing, facilities, youth, sport and social actions were given to the competence of the provinces.<sup>11</sup> In 1995 the legislation was again modified. Accordingly, public health, medical care and social protection belong to the territory. There has been created a territorial social security system in the case of illness, including free medical care for low-income citizens varying according to province. The organic law of 1999 stresses

---

8 Loi no 86-17 du 28 juillet 1978, art. 71; CC, *Décision no. 78-96 DC* du 27 juillet 1978; *Décision no. 82-141 DC* du 27 juillet 1982; *Décision no.86-217 DC* du 18 septembre 1986; Vernier (1993), p. 93; Bell (2001), pp. 167, 173-174, 191.

9 Loi no. 86-652 du 29 juillet 1982; Loi organique no. 99-209 du 19 mars 1999, art. 27; Décret no. 54-959 du 14 septembre 1954; Accords de Nouméa (1998), art. 1.3, 3.2; Aubry (1992), p. 136; Sem (1996), p. 122; La France première.

10 Ntummy (1993), pp. 598-599; Payé (2001), p. 209; Bechtel (2002), p. 48.

11 Accords de Matignon, Texte no. 1; Accord de Nouméa (1998), art. 4.3.1.; Loi no. 88-1028 du 9 novembre 1988, art. 1, 9.

especially social housing.<sup>12</sup> The territorial Government has negotiated a Social Pact (2000) to create conditions for social peace. The pact uses the notion preventive dialogue to describe a more advanced cooperation between the employees and employers. The living conditions of the less favoured are promoted by more balanced wage development, improvement of living conditions and redefinition of child benefits. The pact also has aimed to create new work markets, protect the local work force and to preserve the territory's vital interests.<sup>13</sup>

Governor de Géry started in Polynesia a public works programme in 1937. In 1944 the French provisional administration promised to promote health services which took place with the Fourth Republic's new social policy in the Pacific. The Constitution of 1946 stressed strongly the social policy: to promote the welfare of overseas territories the state's role was increased. The new economic policy included creation of a public welfare system and nationalisation programme. New agencies promoted technical and commercial innovations. Like in New Caledonia, the health care belongs today to the territorial government. In French Guiana it is the responsibility of the Regional Council and only on Wallis and Futuna does the responsibility still belongs to the state through its local Health Agency.<sup>14</sup>

## 5.2. New Zealand

### 5.2.1. Gender Equality and the Decline of Customary Family Law

With the Treaty of Waitangi Amendment Act 1985 women are allowed to speak after the *kawa* (procedure) of *marae*, but still in 2005 a female Pākehā probation officer complained about the discrimination of women in *poroporoaki* (farewell) ceremony which was arranged for male offenders who had completed a violence prevention programme. The women were not permitted to speak or sit on the front row. The process led the Department of Corrections to release new guidelines which give all participants equal roles and permits the use of another language than Māori while protecting the traditional values.<sup>15</sup> Recently the New Zealand Law Commission has suggested that gender discrimination in traditional structures should not be permitted.<sup>16</sup> The challenges related to the equality of sexes are also evident in the associated states. Concerning the Cook Islands, the Committee on the Elimination of Discrimination Against Women has noted that there is still work to do to change traditional attitudes related to culture and women's role in society.<sup>17</sup> On the other hand, it has advanced and today also women can become *ariki*.<sup>18</sup>

---

12 Loi no. 95-173 du 20 février 1995, art. 2; Loi organique no. 99-209 du 19 mars 1999, art. 22.

13 Pacte social (2000), ss. 1.1, 2.

14 Loi organique no. 2004-192 du 27 février 2004, art. 40; Newbury (1980), pp. 301, 311; Aldrich (1993), pp. 55, 69-72, 135; Préfecture des Îles Wallis-et-Futuna; Région Guyane.

15. Treaty of Waitangi Amendment Act 1985, s. 6(2); McHugh (2004), p. 572; Baird & Glazebrook & Holden (2009), p. 79.

16 Waka Umanga (2006), s. 4.53.

17 Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women. Initial Report of States Parties. Cook Islands (2006), I.1.2, II.5.

18 Richardson & Imai & McNeil (2009), p. 176.

In family legislation there were generally no separate provisions for the Māori, but until 1951 they were exempted from certain marriage requirements. The Half-Caste Disability Removal Act 1860 legitimated half-caste children when the parent married. The courts interpreted this provision so that, where the paternity of a mixed-blood individual was recognised, the child took the father's status.<sup>19</sup> Justice Salmond introduced the principle from American Indian law and it was added later to the Marriage Act 1880. Also the customary marriages related to the succession of Māori lands were recognised in the Native Land Act 1909 and subsequent case law, although there was no formal registration of marriage. The validity of customary marriage was strictly limited to this purpose. During the integration period the legislation ignored Māori values in the structure and constitution of the family.<sup>20</sup> The child welfare is, however, an area where the legislature has required Māori values to be taken into account. The Family and Youth Courts and the director general of social welfare have to understand and apply *tikanga* relevant to kin relationships and the chief executive of the ministry may enter into agreements with *iwi* on child and family support services. A child can be placed to custody *iwi* authorities for a maximum of 28 days. Also joint family homes are included to Māori lands.<sup>21</sup>

Before colonisation there was no system of succession because the title was held communally. Only small pieces of land supplying food or small items were defined. Nevertheless, the customary rules prevailed and were interpreted by the Maori Land Court until 1967, when the Maori Amendment Act, inspired by the integration policy, codified succession on Māori freehold land to correspond to the Pākehā rules. The *status quo ante* was returned in 1974, which allowed again a Māori customary succession, defined by the Māori Land Court. The Māori freehold land is exempted from succession provisions while the Te Ture Whenua Maori Act 1993 includes otherwise the Māori freehold land in the general legislation. The Law Commission has studied possibilities to recognise Māori autonomy on succession but has stressed that the basic objectives must be held in common with wider society.<sup>22</sup>

A customary marriage, which had no other formalities than cohabitation and common assent, was recognised in inheritance questions relating to Māori land. The Native Land Act 1909 and the subsequent case law confirmed this. For example, in 1932 the Supreme Court ruled that “these unions are recognized by the Native Land Courts as sufficient for the purposes of succession to the estates of Māoris and half-castes, whether the estate consists of land or personal property, and whether the land is customary or freehold”. No such union or

---

19 Half-Cast Disability Removal Act 1860, s. 3; NZSC, *Renata Ti Ni v. Tuihata Te Awhi and Rotia Hini* (1921).

20 Marriage Act 1880, s. 12; Native Land Act 1909, ss. 190-192; Maori Affairs Act 1953, s. 116; Joint Family Houses Act 1964, s. 25(2); Matrimonial Property Act 1976; Guardianship Act 1968, s. 23; McHugh (2004), p. 275; Young & Belgrave & Bennion (2005), pp. 52-53.

21 Children and Young Persons and Their Families Act 1989, ss. 139, 396, 400-402; Te Ture Whenua Maori Act 1993, Part IV; Māori Custom and Values in New Zealand (2001), pp. 58, 67-68, 89.

22 Maori Affairs Amendment Act 1967, s. 76; Maori Affairs Amendment Act 1974, s. 25; McHugh (1991), pp. 345-346. The MLC's basic rule has been: “The persons who succeed are the nearest of kin to the deceased owner by that line of descent through which his right to the land was derived being in the first instance his natural children.”

customary marriage, however, is valid for any other purpose. The customary marriages must still be registered if they can be ascertained.<sup>23</sup>

The customary adoptions (*whāngai*) were legally recognised for a long time due to customary land rights. The Privy Council gave opinion in two early twentieth century cases on validity of an adoption for the purposes of succession when a Māori couple had adopted a Pākehā child. They had done the adoption according to New Zealand statutes. However, the Māori customary law did not accept the adoption of a non-Māori. The Native Land Court and Native Appellate Court accepted the traditional Māori view. The Privy Council, however, reversed these decisions and held that continuing adaptation of Māori customs could enable a tribe to modify their customs. A European child adopted by Māori parents could succeed Māori land.<sup>24</sup>

The *whāngai* children were gradually excluded from the concept of child. The consolidation of legislation in the Maori Land Act 1909 ended the customary adoptions' legal status and the final blow was the family legislation of 1955. The MLC had until 1963 the power to make an exceptional adoption order where at least one of the applicants was Māori when all formal adoptions were removed to the Family Court. The court has, however, made exceptions to the narrow interpretation of law. For instance, the need to return to own cultural context has been recognised as basis for custody. Te Ture Whenua Act 1993 has returned to MLC powers to make an order which recognises a person *whāngai* of a deceased owner of Māori freehold land and may entitle him/her to success beneficial interests. Although the Law Commission recommended the official recognition of Māori customary adoptions in New Zealand in 2000, it has not led to general recognition.<sup>25</sup> Similarly, New Zealand's legislation extended to the overseas territories: the customary marriages and adoption have no force of law in associated states.<sup>26</sup>

### 5.2.2. *Assimilation Through Education and the Recovery*

Governor Gray granted in the 1850s funding for missionary societies' schools for the Māori and other Polynesian children. The Native School Act 1862 provided establishment of separate Māori schools to each community and the primary, secular education became compulsory in 1877. The separate Native School Division of the Department of Education existed until the 1960s when it was disbanded as part of the integration policy. In the 1930s the government started educational programmes to fund Māori schools, equipments, material, scholarships,

23 Births, Deaths, Marriages, and Relationships Registration Act, 1995, s. 14; NZSC, *In re Wi Tamahau Mahapuku (deceased)*; *Thompson v. Mahapuku* (1932).

24 JCPC, *In re The Will of Wi Matua, Deceased, Ex parte Reardon and Te Pamoā* (1908); *Hineiti Rirerire Arani v. Public Trustee* (1919).

25 Maori Land Act 1909, s. 161; Adoption Act 1955, s. 19(1); Family Protection Act 1955, s. 3; Te Ture Whenua Act 1993, s. 115; NZCA, *Keelan v. Peach* (2002), ss. 1, 42; FC, *Rikihana v. Parson* (1985); McHugh (1991), pp. 290-291; Armitage (1995), p. 146. Maori Custom Law and Values (2001), p. 59.

26 Cook Islands Act 1915, ss. 456, 509; Niue Act 1966, ss. 516, 580; Ntummy (1993), pp. 20, 162, 309; In Tokelau, *kaiga* has strict rules on personal relation within a group and with other groups, including the social roles and succession to land. Births, adoptions, marriages and divorces are, however, registered according to New Zealand's statutes and regulations.

benefits and exhibitions. The Maori War Effort Committees took care in the 1940s of education and vocational training in Māori communities. Later its work was continued in the Maori Women's Welfare League (from 1951) and trust boards (from 1955).<sup>27</sup>

The devolution policy of the late 1970s produced Māori language nets and schools, staffed by volunteers but supported by the Department. *Kōhanga Reo* (Māori language nests/preschools) was established in 1981 as a vehicle for the promotion of the Māori language, to stimulate *whānau* centre and to maintain a Māori environment by using immersion modes of learning. *Kura Kaupapa Māori* (primary total immersion schools) have been established since 1985. As a state school they can run only after a consultation with *Te kaitiaki o Te Aho Matua*, a Māori advisory body. The schools use the *whānau* method, stressing knowledge, pedagogy, discipline and curriculum. The knowledge is regarded to belong to a whole group or *whānau*. The learning environment includes traditional Māori features. The schools are included in the Education Act 1989 and have been since then part of the public school system. The Local Boards of Trustees must take into consideration views and concerns of Māori communities and to recognise the unique position of Māori culture.<sup>28</sup>

It is also possible to establish *wānanga* establishments, which use *ahuatanga Māori* (Māori tradition) according to *tikanga*. The Education Amendment Act 1990 concerns the tertiary educational institutions. In 1993 two tertiary institutions were established to offer degree courses emphasising Māori culture and language and today all tertiary councils have to acknowledge the principles of the Treaty of Waitangi. In 2004 the government published the Māori Potential Framework, a strategic approach to Māori development. The three goals of Māori education there are to live as Māori; autonomous participation as world citizens; and enjoyment of good health and a higher standard of living. The framework supports the realisation of Māori potential as a means to increase their welfare and wellbeing. Its four pillars are *rawa* (resource), *mātauranga* (knowledge), *whakamana* (information), and *aranga* (well-being).<sup>29</sup>

The latest amendment to the Education Act (2013) recognises partnership schools, which are called *kura hourua*. The responsible minister must appoint an advisory group of one or more members to advise the minister in partnership school questions. *Kura hourua* schools focus on the Government's priority groups, like the Māori and the Pacific Islanders, helping them to reach their potential. All schools have private sponsor organisations, where comes the name.<sup>30</sup>

Waitangi Tribunal's *Te Reo Maori Report* (1986) stated that Māori children were not adequately taught by the system's own standards. The Waikato Tainui settlement included a plan to improve the skill base and educational qualifications of the tribe. While the universities were the principal beneficiaries of the nineteenth century confiscation policy, the settlement

27 Maori Purposes Fund Act 1934, s. 10A(c); Maori Trust Boards Act 1955, s. 24; Armitage (1995), pp. 142, 146; Havemann (1999), pp. 383, 392; Smith (2005), p. 87.

28 Education Act (1989), ss. 62-63, 151, 155, 155A-B; Durie (1998), pp. 62-66. In 2003 there were 526 *kōhanga reo*, 61 *kura kaupapa* and 14 early childhood centres in New Zealand. on the whole 80% of Māori children participate in some form the indigenous educational programmes.

29 Education (Te Aho Matua) Amendment Act 1999, s. 2; Education Amendment Act 1990, s. 37; Ringold (2005), pp. 12-13, 32, 48. There is a growing need for Māori education: in 2003, already 25% of children were identified as Māori, but 57% of them had also a Pākehā background.

30 Education Amendment Act (2013); Ministry of Education.

included a proposal to establish endowed colleges at the universities of Waikato and Auckland. The colleges were to be symbols of the pride of Tainui and the means of producing future leaders for various branches. According to the plan, 1/3 of the students should be Tainui, 1/3 other Māori or Pākehā and 1/3 international students. The Waikato University's catchment area in the traditional King Country has the highest level of Māori participation. The University of Waikato's Maori Research Center helps the economic, social and educational development of tribal groups regionally and nationwide. In 2000 the Tainui opened also an endowed Hopuhopu College. In 2005 the Waitangi Tribunal's Report held as well-founded the Aotearoa Institute's claim, which instructs on *iwi* basis with Māori methods. In 2007 New Zealand revised its school curriculum, which takes advantage of the *Te Marautanga o Aotearoa* document and takes into consideration to a larger degree the indigenous structures and Māori language in school work. In the *Ka Hikitia* plan the Māori education structure took between 2008-2012 put more stress on learning, capacity of teachers, placing of resources, priority of Māori language in education and an increased role and involvement of *whānau* and *iwi* authorities. In associated states the local cultures, languages and traditions have been included in educational programmes since the 1960s.<sup>31</sup>

### 5.2.3. Māori Media

The first Māori newspaper *Te Kurere o Nui Tirenī* was published in 1842, but most papers ceased to appear in the 1930s when the Māori language was losing ground in society. A new coming of Māori media took place only in the 1980s, when legislation began to support the promotion of the language. In 1984 the New Zealand Māori Council established Aotearoa Broadcasting System (ABS), an independent Māori TV channel. The state-owned Broadcasting Corporation of New Zealand promised to provide funding and make transmitting equipments available to ABS if they successfully obtained the warrant but the promise was not fulfilled. In 1988 the Broadcasting Corporation of New Zealand was divided into two separate state-owned companies and the the Radio Communications Act 1989 reserved some frequencies for Māori but not in Auckland or Wellington, where one-third of the Indigenous population lived. Although the Broadcasting Act 1989 demanded consultation on Māori interests, the broadcasting policy was built on the needs of the market forces. The New Zealand Māori Council and other applicants to the Waitangi Tribunal claimed that radio frequencies are *taonga* and guaranteed within *tinō rangatiratanga*. The Tribunal found that broadcasting was a vehicle for the protection of the Māori language and that the Māori should have access to airwave spectrums. The tribunal recommended a six-month suspension of the government's process and allocation of FM frequencies to the Māori. The Māori Council applied to the High Court, where Heron J supported its claim and suggested a delay of six weeks in Crown sales to give the Waitangi Tribunal enough time to complete its investigations. In the same

---

31 Constitution of Niue (1974), art. 69; WT, *Te Reo Maori Report* (1986), s. 6.3; Report on the Aotearoa Institute Claim Concerning *Te Wānanga o Aotearoa* (2005), s. 5.1; Gilson (1991), pp. 74-75; Alves (1999), pp. 105, 130-131; Sissons (1999), pp. 13-14, 76; Anaya (2011), 58-60. Up to 2009 Māori participation in early childhood education increased to 91%, those staying in school numbered 46% and 21% were qualified to attend universities.

year a national *hui* stressed the significance of broadcasting for the Māori and concluded that Māori broadcasting required sufficient and independent funding to maintain a Māori TV channel, radio network, full news service and strong presence in mainstream media. Bilingual and bicultural policies should be pursued in programming and management of Māori broadcasting bodies. The *hui* also suggested establishment of a Māori Broadcasting Commission.<sup>32</sup>

In 1991 the High Court heard a new case raised by the New Zealand Māori Council and *iwi* of Ngā Kaiwhakapūmau. The Court did not see a breach of treaty in the government's new policy. The court, however, ordered a temporary injunction to the release of television assets until a protective scheme would be in place. The Ministry of Commerce produced an information booklet and sought Māori opinions in a series of *hui*. When the ministry recommended a time-frame for the development of Māori TV and an extension of Māori-language programming on commercial television, the High Court removed the restrictions on the transfer of assets.<sup>33</sup>

In 1993 the Privy Council ruled that the treaty principles impose a continuing obligation to take reasonable steps to assist in preservation of the Māori language by use of radio and TV broadcasting. Consequently, the government created a new agency called *Te Māngai Pāho* (Māori Broadcast Funding Agency) to promote Māori language and culture by making funds available for broadcasting and the production of programmes. The agency received a share of the public broadcasting fee (14.4%). Despite the early difficulties, within a few years there were established some 21 *iwi*-based radio stations. They operated on frequencies reserved by the Crown for the promotion of the Māori language and culture. Besides these, Radio Aotearoa started to transmit programmes in Auckland, Wellington and Christchurch. In 1996-1997 were launched a national radio service and the Aotearoa Television Network were launched, which made pilot Māori television programmes.<sup>34</sup>

The government had planned to auction part of the radio spectrum to international companies. In its Radio Spectrum Report (1999) the Waitangi Tribunal held that the Māori have a right to a fair and equitable share in the radio spectrum. The Crown has a treaty obligation to protect the Māori language and culture. In 2002 the Māori Television Service, received a promoted state subsidy of \$13 million per year. Finally, following the recommendations of the Waitangi Tribunal, the parliament enacted the Maori Television Service Act 2000 and Maori Television Service (Te Aratuku Whakaata Irirangi Maori) Act 2003. The the Māori Television Service's (since 2004), function is to promote *te reo Māori me nga tikanga Māori* by providing a high quality, cost-effective Māori television service in both national languages, that informs, educates and entertains broad viewing audience and enriches New Zealand's society, culture and heritage. The prime time broadcast should be in Māori.<sup>35</sup>

---

32 Broadcasting Act 1989, s. 36; Radiocommunications Act 1989, ss. 9-12; Durie (1998), pp. 68-70; Alves (1999), pp. 89-90; Cleave (2008), p. 13.

33 Durie (1998), pp. 70-71.

34 Broadcasting Act 1989, s. 53; JCPC, *New Zealand Maori Council v. Attorney General* (1994); Durie (1998), p. 70; Alves (1999), p. 91; Bell & Allen, p. 119. In the Act the agency is described as Te Reo Whakapuaki Irirangi; Before 1997, 14 legal actions were raised against the Crown on broadcast issues.

35 Maori Television (Te Aratuku Whakautu Irirangi Maori) Act 2003, Preamble, s. 8; WT, Radio Spectrum Management and Development Final Report (1999), s. 5.1; Anaya (2011), p. 60; Mutu (2011), p. 128. Māori Television has an audience of 1.6 million.



#### 5.2.4. *Recovering Health and Social Programmes*

The Maori Councils Act gave in 1900 the Maori Councils the local authority in questions of health, sanitation and the consumption of alcohol. Although in the background was the final aim of assimilation to Pākehā society, the new powers gave local communities also positive benefits. In 1903 legislation was reformed but few real changes took place. The Māori had a certain mistrust of this new attempt to administrate their lives and the first enthusiasm waned. There was a lack of workers and funding. In 1916 all health officers became under the Crown's tutelage and three years later the Maori Councils were forced into close co-operation with the restructured Department of Public Health where was established the Division of Maori Hygiene was established. From the 1920s the health affairs became a social laboratory. In 1929 the Native Affairs Department was but in charge of providing funds for land development, health, housing and local improvement for the Māori and Pacific Islanders which continued through the 1930s despite political changes. They included employment and professional skills programs for young Māori. All money was still paid to the Maori Trustee Account. In 1944 a separate welfare division was created which supported in the post-war situation Māori housing and rehabilitation of war veterans. The Department's role further increased through various social programmes during the 1950s and 1960s.<sup>36</sup>

Another line was the establishment of the Maori War Effort Committees (1942), which soon dealt with housing and social-security issues. This was a significant start and in 1945 the Parliament enacted the Maori Social and Economic Advancement Act. The Maori Executive Committees were able to pass bylaws on health, water supply and sanitation. The Act established female welfare officers who organised Committees of Māori Women to advance the welfare of women and children. The committees were the basis for the publicly funded Maori Women's Welfare League (1951) which has focused on family-centred interests in health, housing, welfare and education both at the national and tribal levels. Later the Maori Trust Boards Act 1955 gave the trust boards the possibility to participate in activities which promoted health, social and economic welfare, education and vocational training by grants, loans, housing schemes, medical services, hostels, roading schemes, schools, school material and scholarships.<sup>37</sup>

The Hunn Report (1960) suggested in the spirit of integration policy full extension of all welfare state benefits and services for indigenous people - which also took place. The subsequent legislation established Local and District Maori Councils. Committee Offices were established to advise and assist the Māori under the ministry in general welfare, health, housing, education, vocational training and employment. For the associated territories the government had besides the decolonisation policy the Official Relocation Scheme (1960-

---

36 Maori Purposes Fund Act 1934, ss. 3-4, 10A; Maori Housing Amendment Act 1938, ss. 2-5; Armitage (1995), p. 158; Hill (2004), p. 57-63; Smith (2005), p. 136. The Māori health situation was appalling: in the 1920s their death rate was still seven times higher than the average; The health reforms still had a social Darwinist label: "fysical, mental and moral betterment of race".

37 Maori Trust Boards Act 1955, s. 24; Havemann (1999), pp. 390-393; McHugh (2004), p. 273.

1967). Altogether 2,700 people were relocated especially from Tokelau to New Zealand. In the background were the natural disasters and social problems on the islands.<sup>38</sup>

In 1986 the government established the *matua whāngai* programme to maintain special children within the *whānau* instead of through departmental control. The programme was an attempt to recognise Māori values, practices and traditional structures for the nurturance of children. A tribal approach was integral in the implementation of the programme and in stressing the significance of the blood-ties. The Creation of Area Health Boards: The Treaty of Waitangi (1987) by the Department of Health proposed a provision for tribal participation in the development of policies, setting of priorities and administration of services. In 1990 was created, related to the Maori Health Commission, the Health Research Council which gathers information on issues affecting the Māori people, especially the cultural issues. The National government's *Ka Awatea* report (1991) recommended the continued use of Crown-approved *iwi* for social service delivery. The chief executive may enter into agreements with *iwi* on social and cultural social services.<sup>39</sup>

The Treaty of Waitangi was included as terms of reference to the Royal Commission on Social Policy from 1984. In 1994 the respective ministry arranged three *hui* on health affairs. The result was a holistic approach in addressing key concerns. The *iwi* participation has indicated the importance of primary health care in giving basic information on health matters. The *iwi* have sponsored immunisation programmes and well-child care programmes. In 1998 the National government published a policy paper known as Closing the Gaps. The subsequent government carried on the policy and allocated funding for social services and employment initiatives, but due to the opposition's critique about the discrimination in favour of the Māori, the programme was abandoned in 2000. On the other hand, the Parliament enacted the New Zealand Public Health and Disability Act 2000, which was the first law containing a treaty principles clause, formulated in terms of rights of process and involvement in decision-making. It recognises and respects the treaty principles in mechanisms that enable the Māori to participate in the delivery of health and disability services. *Whakatataka Tuarua* (Māori Health Action Plan) and *He Korowai Oranga* (Māori Health Strategy, both between 2006-2011) have provided the framework for the public sector to support the health of Māori *whenua*.<sup>40</sup> The four cornerstones of Māori health are *taha tinana* (physical health), *taha wairaa* (spiritual health), *taha whānau* (family health) and *taha hirengaro* (mental health). Among the means to advance Māori health are: the *Te Ao Auahatanga Hauora Māori* (Māori Health Innovation Fund, since 2013); *Hauora Māori* Scholarships; the *Ka tika ka ora* (Māori Health Provisional Work Programme); the National *Kaitiaki* Group (Māori control of Māori women's cervical surveying data); rural health mobile services; in-home services; telephone helplines; on-line support; and the Pacific Health Work Programme for the other Polynesian minorities.<sup>41</sup>

38 Maori Community Development Act 1962, s. 6; Maori Welfare Act 1962, ss. 8-16; Armitage (1995), p. 69; Sharp (1998), p. 56; Smith (2005), 187.

39 Children and Young Persons and Their Families Act 1989, ss. 199, 396, 400-401; Health Research Council Act 1990, ss. 21-23; *Ka Awatea* (1991); McHugh (1991), p. 395; Durie (1998), p. 224.

40 New Zealand Public Health and Disability Act 2000, s. 4; McHugh (2004), p. 507; Palmer (2008), p. 103; Anaya (2011), p. 63; Mutu (2011), pp. 101-102.

41 Ministry of Health.

Also alternative health care has some recognition. The traditional healers have formed a national association, *Ngā ringa whakahaere o te iwi Māori*. In 1995 WHO prepared a paper for the Ministry of Health on the framework within which the traditional healing could be developed in New Zealand. It proposed cultural integrity, medical pluralism and self-determination. The Ministry of Health has accordingly made co-operation with this *rongoā Māori* (traditional Māori healing), as formulated in the Māori cultural context.<sup>42</sup>

In all three associated states and territories the local public service has responsibility for health and social services. The medical service was introduced to the Cook Islands in 1894. In the aftermath of World War II New Zealand promoted there programmes related to social conditions, economy and infrastructure. The motivation was to promote the territory's independent development to transfer more responsibility to the local level. Despite this policy, immigration to New Zealand increased in the 1950s. With the self-government the Legislative Assembly introduced e.g. the Aged, Destitute and Infirm Persons Act (1966) and the Child Benefit Act (1978). The legislature has set limits to benefits: to be eligible for a pension one has to be a Cook Islands Māori. In other legislation the condition is either birth or residence in the islands. In Niue the Constitution places a duty on the Cabinet to provide all necessary services for public health, to secure people's reasonable standard of living and to secure their economic, social and cultural welfare. The Niue Public Service Committee is in practical charge of the services. In Tokelau, MacDermot, New Zealand's first Resident, created a village improvement programme. In 1965 the New Zealand Government started a reconstruction and education programme on the islands after the devastating cyclone. The other side of the coin was the encouragement of islanders to immigrate to New Zealand.<sup>43</sup>

### 5.3. Canada

#### 5.3.1. *Long Way to Gender Equality*

In the midst of the assimilation policy, which began already during the French period, there were some examples of the recognition of customary family law. In *Connolly v. Woolrich* (1867), Monk J of the Québec Superior Court ruled on the inheritance question. William Connolly had married in a Cree ceremony a Métis woman and they had children. Later he married a white woman in a Catholic ceremony. A son from the first marriage sued the second wife for a share in his father's estate. Monk J declared the Cree customary marriage valid on the basis that the Cree law had prevailed in the territory before the English law. Therefore, the children from the customary marriage were legitimate heirs of their father. Similarly, some modern settlements give the First Nations a say to in statutory indigenous lands in the case of divorce.<sup>44</sup>

---

42 Durie (1998), pp. 77-78; Ministry of Health.

43 Constitution of Niue (1974), art. 61-67; Cook Islands Act 1915, ss. 38-43; Niue Act 1966, ss. 21-25; Gilson (1991), p. 77; Ntummy (1993), pp. 15, 305; Huntsman & Hooper (1996), pp. 270, 321-322; Cook Islands Government.

44 Tsawwassen First Nation Final Agreement Act, 2007, s. 16.110; CSQ, *Connolly v. Woolrich* (1867), s. 79.

The Indian Act, 1876, created a legal difference between men and women. An Indian woman who married non-Indian or non-treaty Indian, ceased to be an Indian. A large number of Indian women had lost their Indian status this way and it was almost impossible to regain. The situation was different when a non-Indian woman married an Indian man, she became an Indian. But for her descendants the rule was different. Based on the blood quantum, the so-called double mother rule defined that if their son married a non-Indian, their children were no more Indians.<sup>45</sup> Further, the patrilinear ideology of the Indian Act did not take regard of the fact that a number of Indian tribes were in fact matrilinear in nature.

A process against the discriminating legislation was started in 1970 by Yvonne Bedard, who had lost her status as a member of the Six Nations Reserve in Ontario by marrying a non-Indian. She was joined in litigation by Jeanette Lavell, an Ojibwa from Wikwemikong Band, Ontario. The High Court of Ontario did not find in Mrs. Lavell's case the s. 12(1)(b) of 1951 Indian Act as a matter for judicial determination, but after she had won her case in the Federal Court, the High Court re-estimated its stand by ruling that the Indian Act discriminatorily treated the Indian women. Both cases were in the Supreme Court in 1973. Besides section 12(1)(b) of the Indian Act of 1951, Mrs. Lavell also referred to equality before the law in s. 1(b) of the Canadian Bill of Rights, 1960. The Supreme Court rejected the application by a narrow margin. It held that s. 12(1)(b) had no general applicability when it included only the Indians. The process continued, however, in 1977, when Sandra Lovelace, a former Maliseet Indian, took the issue to the UN Human Rights Committee. She alleged that the provisions of the Indian Act were inconsistent with ICCPR. The Commission held that "to prevent her recognition to the band is unjustifiable denial of her rights under article 27 of the Convention." The restrictions must have a reasonable and objective justification and be consistent with the other provisions of the Covenant. The UNHRC could not rule on the original cause of the loss of status, as the ICCPR was not yet in force at the time of Lovelace's loss of Indian status, but only on the continuing effects of its application.<sup>46</sup>

The section 28 of the Constitution Act, 1982, gives the gender equality a constitutional status. Consequently, the Band Governments were given the power to decide whether or not a woman would lose status when marrying a non-Indian, and three years later the federal Parliament decided to remove the s. 12(1)(b) from the Indian Act in 1985. The legal revision was also related to another question: whether the band councils should be bound by the sex equality provisions of the Charter which guarantee equal rights to male and female persons. The revision led to substantial restoration of band membership all over Canada. By 1991, 70,000 had regained their status after application. The total number of status Indians increased to 127,000 people in less than five years.<sup>47</sup>

The RCAP suggested in its report that Indigenous women should be guaranteed, equal participation and recognition of their safety in all reforms concerning the Indigenous peoples. One example of challenges is that if the land base is fixed and over-population

---

45 Indian Act, 1876, s. 3; Armitage (1995), p. 89.

46 Canadian Bill of Rights (1960), s. 1(b); Indian Act (1951), s. 12(1)(b); SCC, Lavell (1973); FCC, *Lavell v. Canada* (1971); OSCJ, *Isaac v. Bedard* (1972), pp. 552-553; *Re Lavell v. Attorney-General of Canada* (1972), pp. 186-187; UNHCR, *Sandra Lovelace v. Canada* (1981), ss. 13-14; Bayefsky (1982), pp. 244-265.

47 Constitution Act (1982), ss. 28, 35(4); Hylton (2000), pp. 180-182; Eisenberg & Spinner-Halev (2005), p. 125.

threatens, the rights of non-Indian spouses are often restricted. There are different variations on a marriage on reserve and the voting rights of both Indians and non-Indians. They are concomitants of the reservation system to protect Indian cultural communities. In connection with the Charlottetown process the indigenous women argued both for a constitutional recognition of the right to self-government and for an assurance that it would not override their federally guaranteed equality rights. Especially the NWAC was highly critical of the draft agreement which had been drawn up without their involvement and implied an erosion of women's rights. The RCAP strongly insisted that indigenous communities should not use discretionary powers to suspend women's rights. Also the CEDAW Committee has urged Canada to undertake awareness-raising programmes to challenge the indigenous communities about women's human rights.<sup>48</sup>

### 5.3.2. *Increasing Responsibility on Family Affairs*

The responsible federal minister has still significant powers in question dealing with the family. He/she may do the following: apply the executor of wills and administration of estates which have belonged to dead Indians; carry out terms of wills; administrate a dead Indian's property, if he/she died intestate; and declare void a will in those bands which are still under the Indian Act. This applies also to several self-governing First Nations. Also the care of children and "mentally incompetent" is vested in the minister, who can appoint for them guardians. The Band Council may determine a payment for an infant child's maintenance, advantage or benefit until the age of majority. The Minister may order annuity or interest money payments to the support of Indian's spouse, common law partner or family.<sup>49</sup>

Several provinces entitle the Indigenous communities to provide child and family services to their members. They have to be provided and the decision-making made in a manner which recognises and reflects their values, cultural identity, heritage, tradition, beliefs and concept of extended family. Québec has created special youth protection programmes for First Nations' youth and children in danger of alienation. The approved agencies are run in Ontario by Boards of Directors, which can use alternative dispute resolutions. Prince Edward Island use mediation and joint planning and family group planning conferences as alternative approaches. The Yukon has a Child Care Board, which includes a First Nations' representative. The territory has also a child and youth advocate, who has to be a specialist in indigenous affairs. Several provinces demand in child custody and adoption cases that the

---

48 RCAP (1996); Vol. 4, pp. 7-83; CEDAW Committee (2003); Kymlicka (1989), p. 149; Eisenberg & Spinner-Haley (2005), pp. 126-127.

49 Indian Act, 1985, ss. 43-46, 51-52, 68; Nisga'a Final Agreement, 1999, s. 11.116; Tsawwassen First Nation Final Agreement Act, 2007 (British Columbia), s. 4.31.

bands/communities participate in the process and be noticed. The child under customary care may receive a subsidy from agencies.<sup>50</sup>

In 1988 Manitoba established the Aboriginal Justice Inquiry which recommended the creation of a mandated provincial Métis agency to deal with First Nations and Métis child and family services. In 1999 the government established also the Aboriginal Justice Implementation Commission to identify the priority areas. The commission recommended that the province would enter into agreements with the Assembly of Manitoba Chiefs and Manitoba Métis Federation to develop a plan to develop their respective child and family services. The following year they signed an agreement, which established a joint initiative to recognise province-wide Métis rights and authority for child and family services. In 2000-2003 followed a joint implementation process. As a result, in 2003 was enacted the Manitoba Child and Family Services Authority Act. For the Métis were created the Métis Child and Family Services Authority, Métis Child, Family and Community Services and a Métis Family and Community Institute. The authority began to deliver community-based family services to the Métis, to prevent risks and to ensure for children appropriate and safe family relationships. The adoptions to Métis citizenship are, however, not included in the legislation. The essential question is, whether the Métis membership is a racial or cultural concept.<sup>51</sup> In *Powley*, the Supreme Court has held that the adoptees can be rights-bearing Métis through the ancestrally connected branch of its test.<sup>52</sup>

In most provinces and territories the adoptions must take into account the child's cultural background. For instance, Alberta demands in Indigenous adoptions that the Indigenous culture, heritage, spirituality and traditions are all taken into consideration. Some provinces and territories recognise in their legislation the customary adoption. Sissons J of NWT Territorial Court recognised in 1961 the Inuit customary adoptions as legally valid. The system was later accepted by the child welfare authorities in NWT. The First Nations' customary adoption has been recognised in case law on a case-by-case basis, based on the Adoption Act, which permits the courts to treat customary indigenous adoptions as though they were statutory adoptions, including the adoption rights. The legislation in British Columbia allows the adoptions in settlement First Nations. The customary adoptions are also allowed in the Yukon and Nunavut. In the Yukon, a court can, on appeal, confirm a customary adoption. Similarly, in Nunavut, the parents must obtain from officials a certificate of recognition from the Customary Adoption Commission. The customary adoptions are then filed in the Nunavut

---

50 Wilson & Mullet (2008), pp. 338-340. Cf. Family Services Act, 1980 (New Brunswick), s. 85(2); Child Protection Act, 1988 (Prince Edward Island), s. 1(a); Adoption Act, 1996 (British Columbia), s. 7(1); Child and Family Services Act, 1989 (Saskatchewan), s. 37; Child and Family Services Act, 2012 (Manitoba), Declaration of Principles; Child and Family Services Act, 1990 (Ontario), ss. 1, 13, 20, 34, 37, 58, 61, 212; Adoption Act, 2008 (Manitoba), ss. 30, 33; Intercommunity Adoption Act, 1996 (New Brunswick), s. 40(3); Child and Family Services Authorities' Act, 2003 (Manitoba), ss. 4, 6; Child, Youth and Family Enhancement Act, 2000 (Alberta), ss. 57-58, 67; Protections, Practices and Standards of Service for Child Protection Cases Regulation, 2000 (Ontario), ss. 6, 13; Child and Family Services Authorities' Act, 2000 (Alberta), Preamble; Child Care Act, 2002 (Yukon), s. 4(2), 36; Child and Family Services Act, 2008 (Yukon), ss. 168, 171; Child and Youth Advocate Act, 2009 (Yukon), s. 3(1); Loi sur la protection de la jeunesse, 2009 (Québec), s. 37.5

51 Child and Family Services Authority Act, 2003 (Manitoba), s.; Child and Family Services Act, 2012 (Manitoba), ss. 3-8, 134; Wilson & Mullet (2008), p. 359.

52 SCC, *Powley* (2003), s. 32.

Court of Justice. In all child policy the territorial legislation lays stress on Inuit principles. In Nisga'a Nation the customary adoption is dominant. It is done according to *ayuu\_khl* in settlement or stone moving feast. Newfoundland and Labrador recognises also the marriages according to Inuit laws as valid.<sup>53</sup>

In *Grisner v. Squamish Indian Band*, the Federal Court decided on a case, where a band member had adopted two adults who were the band member's children. The band's membership code granted membership to a person with one biological parent, but allowed only children under 18 years old to be adopted by two band members. The Federal Court held that the membership code discriminated between the biological and adopted children and was against section 15 of the Charter. *Casimel v. Insurance Corporation of British Columbia* recognised the grandparents' right to adopt their grandchildren according to customary law and they were entitled to insurance benefits. In other cases, however, the right was not recognised. Common to all decisions is that instead of earlier non-recognition they integrate the indigenous custom within the common law.<sup>54</sup> The Canadian legal system is common for all, but there are more plural tones than before.

### 5.3.3. Indigenous Education: Shadow of Residential Schools

During the French period (1608-1763) the first modest attempts were made to educate the Indian tribes of Saint Lawrence Valley and the Great Lakes region. The Jesuits and Ursulines established seminaries for indigenous children, focusing on French and religious ideas. The languages of instruction were mainly the indigenous languages, but for more advanced students also French and Latin were used. The Indians saw the education as a means to give a better future for their children.<sup>55</sup> The federal authorities, however, continued the assimilation policy. The Constitution Act, 1867, defines the education as a provincial responsibility. The Indians are however, under federal responsibility.<sup>56</sup> The treaties committed the federal government to provide and maintain schools and teachers on reserves. Education became the most expensive sector of Indian administration. The Gradual Civilization Act, 1857, signified the starting point for the so-called residential schools system, which had deep influences on the First Nations and Inuit. The federal Government saw it more economical to use already existing structures of missionary organisations. Residential schools were the dominant school system for Indigenous children until the 1960s. The federal government financed the construction and maintenance of schools, while the Catholic, Anglican and United Church took care of personnel and the daily operation of schools. The residential schools were esteemed as being a better option in order to advance the central goal of the

53 Indigenous Legal Traditions (2007), p. 127. Cf. Nisga'a Final Agreement Act, 1999, s. 20; Aboriginal Custom Adoption Recognition Act, 1994 (Nunavut), ss. 1-3; Adoption Act, 1996 (British Columbia), s. 71(1); Adoption Act, 1999 (Newfoundland and Labrador), s. 3(2); Child, Youth and Family Enhancement Act, 2000 (Alberta), s. 67; Family Abuse Intervention Act, 2006 (Nunavut), s. 1; Marriage Act, 2009 (Newfoundland and Labrador), s. 8. Tsawwassen First Nation Final Agreement Act, 2007, s.21.2.

54 Adoption Act, 1996 (British Columbia), s. 46; FCC, *Grismer v. Squamish Indian Band* (2006), ss. 61-83; BCCA, *Casimel v. Insurance Corporation of British Columbia* (1994), ss. 44-53.

55 Thwaites (1896), Vol. VIII, p. 227; Vol. XII, pp. 63-65; Deffain (1995), pp. 110, 116-117.

56 Constitution Act, 1867, s. 91(24).

programme to civilise the children and to render them Canadians. There were two kinds of schools: the boarding schools run on reserves for children aged 8-14; and the industrial schools, off the reserves and in urban surroundings, with elaborate programmes for students up to 18 years of age. In industrial schools the curriculum provided basic studies, training in agriculture, crafts, trades and household duties. The emphasis was on training in trades for the labour markets and agricultural work. There was an idea to assimilate the students after school into larger society and to prevent them from returning to the reserves. In reality they were often neglected and the school costs worried the department. The system's decline began at the beginning of the twentieth century. In its culmination period, there were about 60 residential schools.<sup>57</sup>

At first, the schools were voluntary. A compulsory school attendance for Indian children was amended to the Indian Act in 1920. An Indian agent could decide to keep a child at the school until 18 years of age. The indigenous children were eradicated of their language and culture. A similar system was used in relation to Inuit children in the 1950s and 1960s. The last school closed in 1996. Over 100,000 children were taken from their families and were prohibited to speak their native languages or practice their traditional customs with some exceptions. Although there was strong indigenous resistance, many people lost their connection to their ancestors' culture and language. Many schools were poorly administered: the students suffered from poor health conditions, and cultural oppression, physical punishments and sexual abuse were common. The Federal Government tried to improve the situation with new regulations. New financial arrangements gave more responsibility to Indian Affairs, although the personnel were still recruited by the churches.<sup>58</sup>

The RCAP Report was the first comprehensive study on residential schools. It made recommendations and called for a public inquiry. The federal government, however, did not mention the idea about public inquiry in its policy paper *Gathering the Strength* (1998). Instead DIAND promised \$350 million of funding to establish the Aboriginal Healing Foundation to support community based healing projects. The respective minister issued a Statement of Reconciliation, where she apologised for the first time for the devastating impacts of the residential school system. When the litigation increased, the department began to explore the possibility to use alternative dispute resolution. A series of exploratory dialogues were held between 1998-1999. In 2001 the Indian Residential Schools Resolution Canada was set up, which announced a National Resolution Framework to resolve the claims through an adjudicated resolution process. In 2003 were started 12 ADR pilot projects. The House of Commons Standing Committee was, however, unconvinced about the virtues of the programme. It suggested in 2005 its replacement by court-supervised and -enforced settlements for compensation and the establishing of a national Truth and Reconciliation Commission. The Committee's report was a political compromise.<sup>59</sup>

In the *Baxter* class-action suit (2005), worth \$12.5 billion, over 13,000 survivors alleged that they were physically or sexually abused by the church personnel. Externally the

---

57 Gradual Civilization Act, 1857, ss. 14-15; Miller (2006), pp. 9-11.

58 Indian Act (1920); Dickason (1994), pp. 333-336; Samson (2003), pp. 9-11; Miller (2006), pp. 41-50. It has been estimated that around 1900, of 28% of pupils died of tuberculosis and other diseases.

59 *Gathering the Strength* (1998), s. 4; Branting & Kymlicka (2006), pp. 227, 230-231.



residential school redress campaigns persuaded the dominant society to respond to the Indigenous communities' social-welfare needs, and to rebuild and mobilise the fractured communities. In 2006 the federal Government and the Assembly of First Nations reached the Indian Residential Schools Agreement, which promised that \$1.9 billion would be implemented through court approval and a five-month opt-out period for claimants. All former students are eligible for a common experience payment awarded on the basis of residential school attendance. Those who have experienced sexual or serious physical abuse can pursue additional compensation in an Independent Assessment Process. Health supports and counselling services are provided for individuals and additional funding is offered to the Aboriginal Healing Foundation to support community based healing projects. A national Truth and Reconciliation Commission is to be established with a budget of \$60 million in five years to provide a holistic, culturally appropriate and safe setting for former students, their families and communities and to promote awareness and public education among Canadians about the residential school system and its impacts. There is also available funding for commemorative events and memorials.<sup>60</sup>

In the 1876 Indian Act the maintenance of schools was given to the responsibility of the chief and council and free education was included in all numbered treaties. In 1951 the revision of the Indian Act gave the opportunity to transfer the responsibility for reserve schools to the provinces. Ten years later about 25% of Indian children participated in provincial schools. There were, however, also strong voices, which promoted the idea of separate and distinctive Indian education. Blue Quills, in St. Paul, Alberta, became the first school run by a band in 1970. From 1972 the federal Government officially allowed some bands to control their education and DIAND transferred programs and administration to Indian bands.<sup>61</sup>

The reservations' Indian schools are defined in section 114. The Minister of DIAND has the final decision to decide about the schools, but majority of schools are taken care by the bands themselves. The Indian Act give the Governor in Council the right to authorise the minister to enter into agreements with the provincial governments, territorial commissioners, public and separate school boards and religious or charitable organisations. The minister may also regulate on school attendance, buildings, education, inspection, discipline and, transportation. He/she may also appoint truant officers to enforce the attendance of Indian children at school. In Ontario and Manitoba, the provincial governments made in 1990 an agreement to administer the education in their reserves. The Nisga'a in British Columbia followed in 2000. Later British Columbia has rendered the practice general and created the First Nations Educational Authority and local Community Educational Authorities.<sup>62</sup>

Nova Scotia has transferred in agreement with the federal Crown (1998) the local pre-university education authority to ten Mi'kmaq bands which deliver education services to all

60 Indigenous Legal Traditions (2007), pp. 42-43, 46, 60-61.

61 Dickason (1994), pp. 329, 337. In 1990, there were already 53 band schools with 8,000 students (20%), while 47% were attending provincial schools. In all, 50% of bands and Inuit communities took part in federally funded cultural centre programmes in 72 centres. Cf. Indian and Inuit Elementary and Secondary Education (1991), pp. 4-5.

62 Indian Act, 1876, s. 63; Indian Act (1951); Indian Act, 1985, ss. 114-116, 119; Mi'kmaq Education Act, 1998, ss. 6-8; Education Act, 1990 (Ontario), ss. 12, 185, 188; Indian School Act, 1996 (British Columbia), ss. 10, 19; First Nations Education Act, 2007 (British Columbia), s. 2.

residents in their territory and can make laws on education. The province has established the Council on Mi'kmaq Education, which has an advisory and guiding role. Each community has a Community Education Board. The educational programmes and services must be comparable to other Canadian systems.<sup>63</sup> In New Brunswick the Mi'kmaq and Maliseet Nations have a quota in District Educational Councils.<sup>64</sup> In Manitoba, the First Nations may operate Adult Learning Centers.<sup>65</sup> Saskatchewan has a First Nations University and the Indian Institute of Technologies.<sup>66</sup> In Alberta, the Government is committed to encouraging the collaboration of all partners in educational system to ensure the educational success of indigenous students. The province consults, supervises and co-ordinates the indigenous educational, home education, distant learning, online and outreach programmes, services, curriculum, and instruction.<sup>67</sup>

The federal Crown has made a special agreement with British Columbia on the creation of First Nations Educational Authority, which can enact laws on their education. It can make contracts and invest or borrow money. The First Nations can own or jointly establish Community Educational Authorities, which may operate, administrate and manage the First Nation's educational system. The province has also First Nations Education Steering Committees. The responsible minister may establish and maintain schools on First Nations' land.<sup>68</sup> Ontario and Yukon support Indigenous teachers' education with special training. The teachers obtain a certificate of qualification to teach Indigenous students. The teachers must have fluency in indigenous languages and knowledge of their history and culture. The school boards and Special Education Advisory Boards in Ontario must have indigenous representation when there is a sufficient number of indigenous students.<sup>69</sup> In Manitoba and NWT the indigenous children have the right to student aid based on their ethnicity.<sup>70</sup> In the Yukon, the school curriculum must include indigenous peoples' culture, language and heritage. The objective is to promote understanding on their history, language, culture, rights and values and changing role in contemporary society. The school may also offer an opportunity to participate in indigenous cultural or harvesting activity. The minister can make a separate agreement on education with a First Nation which creates a Local Indian Education Authority.<sup>71</sup> In NWT, the District Educational Authorities may give license to teach indigenous land skills, knowledge or abilities. The territorial legislation stresses the

---

63 Mi'kmaq Education Act, 1998 (Nova Scotia), ss. 5-6, 8; Minority Education Act Regulation, 1997 (Nova Scotia), ss. 25-26, 31.

64 Education Act, 1997 (New Brunswick), s. 36.2(3).

65 Adult Learning Centers Act, 2007 (Manitoba), ss. 6-7.

66 Saskatchewan Indian Institute of Technologies Act, 2000 (Saskatchewan), s. 6.

67 Education Act, 2012 (Alberta), Preamble; Teacher Membership Status Election Regulation, 2004 (Alberta), s. 2(c).

68 First Nation's Jurisdiction on Education in British Columbia Act, 1986, ss. 9, 11, 21, 25; School Act, 1996 (British Columbia), s. 86(3); British Columbia Teachers' Council Regulation, 2012 (British Columbia), s. 4.

69 Teacher Certification Regulations, 1993 (Yukon), ss. 6, 8; First Nations Representation on Boards Regulation, 1997 (Ontario), s. 1; Accreditation of Teacher Educational Programs Regulation, 2002 (Ontario), s. 1(4).

70 Student Financial Assistance Regulations, 1990 (NWT), s. 7(2); Student Aid Regulation, 2003 (Manitoba), s. 38.

71 Education Act, 2002 (Yukon), Preamble, ss. 4(g), 7, 22(2), 55, 169(t).

importance of language, culture and heritage in education. The territory offers to indigenous peoples support services, including instruction material.<sup>72</sup>

With accession to Canada, the federal Government guaranteed the Métis a separate school system which secured in the beginning the French language education in Manitoba. The Sisters of Charity of Montréal established a French-language boarding school to St. Paul-des-Métis, Alberta, on the model of Indian schools. In treaty areas the Métis were mostly excluded from the Indian schools. An essential question was whether their families lived an Indian mode of life. Even in the Yukon with lesser distinction they were barred from accessing Indian schools. The churches defined them as whites, but the non-Indigenous school districts rejected them, too. They were left without education until the 1940s, when they were allowed to join the Indian schools. The Métis community at Île à la Crosse, Saskatchewan, took over the local school in 1973.<sup>73</sup> In 1980 the Métis Nation - Saskatchewan established the Gabriel Dumont Institute (GDI) to educate through cultural research as a means to renew and strengthen the heritage and achievement of local Métis. It is the first wholly Métis-controlled, accredited post-secondary institution in Canada. It is overseen by a board of directors and funded predominantly by the provincial government. GDI develops and publishes Métis-specific curriculum, trains Indigenous teachers through the Saskatchewan Urban Native Teachers Program with bachelor of education degrees, maintains libraries and information services, and administers and delivers scholarship programmes. In the 1990s also the Dumond Technical Institute and Gabriel Dumond College was established with two-year programmes.<sup>74</sup>

The Inuit education was started by the missionaries during the eighteenth century. From 1873 the mission schools received federal support. This bond lasted until 1947, when the introduction of family allowances and obligatory school attendance led the federal government to take over the charge in education and establish communal schools. The schools were still residential which alienated the Inuit children from their language and culture due to the prohibitions and the 10 months of isolation from their home and family. Many children were also adopted to the South without their parents being informed. The change began only in the 1970s when the territorial Department of Education pressed for the teaching of indigenous languages in schools and the inclusion in the curriculum of materials relevant to Inuit culture. A cultural inclusion programme was set up in some schools with modest results. Only in the late 1970s did the Territorial Council set up a special committee to undertake a systematic review and analysis of the educational system. It recommended the decentralisation of educational control, support of indigenous languages in the schools through a stepped-up programme of training indigenous teachers, developing relevant curricula in the Indigenous languages and improvement of adult education. The JBNQA established for Cree, Inuit and

72 Education Act, 1995 (NWT), ss. 60, 70. See also: Education Act (Saskatchewan), s. 92(1); School Act, 2000 (Alberta), s. 62(2); Education Act, 2012 (Alberta), s. 63(2); Louis Riel Institution Act (Manitoba), s. 4(d); K'atloodeeche First Nation's Educational District and K'atloodeeche First Nation's Educational Authority Regulations, 2006 (NWT), ss. 8-9; Teachers' Qualifications Regulation, 2010 (Ontario), ss. 11, 14; Special Education Advisory Commissions Regulation (Ontario), ss. 2, 4.

73 Manitoba Act, 1870, ss. 22-23; Dickason (1994), pp. 337, 361; Lawrence (2004), p. 95; McIntosh (2009), pp. 415-416. In the Yukon, a white father's recognition was decisive as to whether the child became a white or Indian.

74 Wilson & Mullet (2008), pp. 341-342.

Naskapi the Cree and Kativik School Boards. The Northeast Quebec Agreement created a similar arrangement for the Naskapi. They have the responsibility for developing and implementing culturally appropriate educational programs in different levels of education. In all, 25% of budget comes from the federal government, the rest from Québec and the school board is under the provincial education laws. In Frobisher Bay in 1980 a teacher education programme was started for the Inuit. Also the use of classroom assistants has improved the results. The number of Inuit students in secondary education has increased. In 1983 an Indigenous Languages Development Fund was created, which is used for the development of language teaching programmes in the schools and to design curricula for their region.<sup>75</sup>

The Inuit language and culture are central in the Nunavut's educational programme, which reflects local needs and values. This is also included to the programme of the Public College for the Eastern Arctic. At the local level the supervisory of principles in schools and home instruction belongs to District Educational Authorities. The Committees of Elders are used to monitor, evaluate and report on the carrying out of *inuit qaujimajatuqangit* duties.<sup>76</sup>

#### 5.3.4. Indigenous Media

The indigenous peoples in relation to the media are not expressly mentioned in the Canadian legislation. The Canadian Broadcasting Company (CBC) took interest in the north in the 1950s and set up the Northern Service in 1958. Under the Native Communications Program the federal government has provided support for private Indigenous news papers. The Native Broadcast Access Program similarly supported the indigenous television and radio programmes. Since 1972 the communication satellites helped to reach even the most remote communities. Today there are radio stations at several points to offer Inuit programme for listeners. After a suggestion by the ITC, the Inuit Broadcasting Corporation for TV and radio programmes was established in 1982. A problem was the limited space offered by CBC for the Inuit programmes. In 1991 The Aboriginal Television Network was set up.<sup>77</sup>

75 Loi sur l'éducation publique pour les Autochtones Cris, Inuit et Naskapis, 2012, ss. 569, 601, 687; Décret concernant la publication de l'entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec, 2007 (Québec), Préambule, s. 2.8; JBNQA (1975), ss. 16-17; NEQA (1978), s. 11; Minority Rights Group (1994), pp. 131-133; Duffy (1988), pp. 10, 100; Report of Rodolfo Stavenhagen (2004), p. 65. In 1976 Parti Québécois introduced the Bill 101, which promoted the use of the French language in public life, including education. The Inuit of northern Québec, who have been traditionally educated in English, protested and were finally excluded from the new legislation.

76 Inuit Language Protection Act, 2007 (Nunavut), s. 27.1; Education Act, 2008 (Nunavut), Preamble, ss. 1, 7, 21, 122; Public College for the Eastern Arctic Regulations, 1994 (Nunavut), s. 7(4). In 2004, only 40% of Inuit children attended school regularly. The values on Inuit language and education are *inuuqatigiit-siarniq* (respect and care on other people); *tunngararniq* (fostering good spirit by being open, welcoming and inclusive); *pijitsirniq* (serving and providing services to families and communities); *ajiqatigiinni* (decision-making through discussion and consensus); *piliriqatigiinni / ikajuqatigiinni* (working together for a common cause); *qanuqtuurniq* (being innovative, resourceful); and *avatittinnik kamatsiarniq* (responsibility and care for land, animals and environment). The responsible minister has responsibility to ensure that Inuit social values, principles and concepts of *inuit qaujimajatuqangit* (traditional knowledge) are followed.

77 Minority Rights Group (1994), pp. 133-135; Varennes (1996), p. 234.

### 5.3.5. *Gap in Health and Social Conditions*

In the Kelowna Accord, the federal Crown recognised the troubling gap of education, skills development, health care, housing, access to clear water and employment, and committed itself to the promotion of Indigenous peoples' socio-economic conditions.<sup>78</sup> The public health was trusted in the Indian Act, 1876, to the responsibility of the Chief and Council. The Indian Act also patronised the Indians' consumption of alcohol. Outside the reserves, where the Indian authorities or Indian agents had not the power to control, was a general prohibition against Indians obtaining alcohol.<sup>79</sup> In the late 1960s the Allied Tribes of British Columbia started litigation to break down the Indian Act's prohibition. There followed the only Supreme Court's case in which the equality clause of the Canadian Bill of Rights, 1960, was found to be in conflict with a federal statute. In *R. v. Drybones* (1969) the court held the alcohol prohibition provision as inoperative for breach of s. 1(b) of the Bill of Rights. The focus was on racial equality.<sup>80</sup> The Governor in Council has still the power to supervise and control the operation of pool rooms, dance halls and other places of amusements on reserves. Similarly band councils may control or prohibit public games, sports, races, athletic contests and other amusements.<sup>81</sup> Many provinces have legislated on the reserves' gaming and alcohol licences: the First Nations and Inuit decide in referendum or by local government whether to allow them.<sup>82</sup> Manitoba has arranged, through the Native Addictions Council of Manitoba, tailored counselling to Indigenous addicts and educational material for Indigenous schools.<sup>83</sup>

The Gradual Enfranchisement Act, 1869, gave elected band councils powers in building and maintenance of roads and public buildings. Similarly, the Indian Act, 1876 trusted to the chief and council the maintenance of roads, bridges, ditches and fences and the construction of public buildings.<sup>84</sup> These are still included in modern agreements: in Nisga'a Final Agreement the local Government has legislative power over roads, public works, traffic and transportation, but in the case of conflict the federal and provincial legislation of general application prevail. Several provinces and territories have made comanagement agreements with the First Nations: e.g., in Manitoba and the Yukon on a fire management agreement and in Québec on the roads.<sup>85</sup>

The Supreme Court overruled the 1962 decision by the British Columbia Court of Appeal, which accepted the segregation by ethnicity, based on a similar situations' test. Later, in *Andrews v. Law Society of British Columbia*, a positive discrimination was allowed only based on enumerated or analogous grounds justified in the s. 15 of the Charter. In 2005 the

---

78 Aboriginal Roundtable to Kelowna Accord (2005).

79 Indian Act, 1876, s. 63.

80 Canadian Bill of Rights, 1960, s. 1(b); SCC, *R. v. Drybones* (1970), ss. 283, 292-293, 297.

81 Indian Act, 1985, s. 73(e), 81(1).

82 Cf. Liquour Control Act, 1990 (Newfoundland and Labrador), s. 17.1(1); Liquour Control and Licence Act, 1996 (British Columbia), s. 7.1; Alcohol and Gaming Regulation Act, 1997 (Saskatchewan), s. 26; Nisga'a Final Agreement Act, 1999, s. 11.112; Gaming and Liquour Act, 2000 (Alberta), ss. 58-59; Gaming Control Act, 2002 (British Columbia), s.19.

83 Native Addictions Council of Manitoba Incorporated Act, 1990 (Manitoba), s. 3.

84 Gradual Enfranchisement Act, 1869, s. 12; Indian Act, 1876, ss. 23-24.

85 First Nation Indemnification (Fire Management Act, 2009 (Yukon); Fires Prevention and Emergency Responsibility Act, 2010 (Manitoba), s. 36; Loi sur la voirie, 2009 (Québec), s. 32.1; McHugh (2004), p. 482.

federal and provincial Crowns made with First Nations' chiefs the Transformative Change Accord which focused efforts on closing gaps in education, health, housing and economic opportunities and on promoting healthy communities. It was the only outcome of the federal Kelowna Accord. The change in federal election made the accord a dead letter elsewhere.<sup>86</sup>

Treaty 6 included the medicine chest clause which guaranteed assistance in the time of famine and pestilence relief.<sup>87</sup> In *Dreaver* case (1935), the Exchequer Court of Canada ruled that the clause meant all medical supplies, drugs and treatments.<sup>88</sup> Accordingly, the Governments of Alberta Saskatchewan later extended free medical and hospitalisation coverage of the national health plan to all Indigenous peoples. In 1951 the Indian Act gave a choice to transfer the health and social services to provincial care. There were also many areas of social policy on which the statute was silent. In the 1960s this devolution programme was partly realised. Its purpose was to transfer part of the federal financial responsibilities to the provinces. The programme soon met difficulties. The provinces wanted more authority over Indian peoples and their resources. A community development programme tried to encourage Indian self-management but met with protective bureaucracy.<sup>89</sup> Later several provinces recognised the indigenous peoples role in planning and delivering health services in communities. In the Prairie Provinces, the minister may enter to an agreement on First Nations' hospital and medical services.<sup>90</sup> In Ontario the minister may establish Aboriginal and First Nations Health Councils, which advice him/her on health and service delivery issues. The Aboriginal and First Nation health planning entities form local health integration networks on a geographical basis.<sup>91</sup>

The Governor in Council has the power to prevent, mitigate and control the spread of diseases on reserves, to provide medical treatment and health services and compulsory hospitalisation and treatment for infectious diseases among Indians, and to promote sanitary conditions in private premises and public places of reserves. He/she can make regulations governing commercial or industrial undertakings located on reserve lands. Similarly each Band Council may decide on health of residents and prevention of contagious and infectious diseases. The Band Councils are in charge on the construction of watercourses, roads, bridges, ditches, fences, local works, traffic, construction, repair and use of buildings, construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies. The Governor in Council may order inspection of premises on reserves and, if needed, their destruction, alteration or renovation, to prevent overcrowding of premises on reserves, and construction and maintenance of boundary fences.<sup>92</sup> The provinces can give loans and participate according to agreements with DIAND into the betterment of infrastructure and social conditions in the reserves and help them to establish standards, and develop social and economic development

---

86 SCC, *Andrews v. Law Society of British Columbia* (1989); BCCA, *R. v. Gonzales* (1962), p. 362; Olthuis & Kleer & Townshend (2008), p. 160.

87 Treaty 6 (1876).

88 ECC, *Dreaver* (1935).

89 Indian Act (1951); McHugh (2004), p. 332.

90 Public Health Act, 1994 (Saskatchewan), s. 4; Hospitals Act, 2000 (Alberta), s. 45(1); Regional Health Services Act, 2002 (Saskatchewan), s. 29(1); Regional Health Authorities Act, 2012 (Manitoba), s. 5(1).

91 Local Health System Integration Act, 2006 (Ontario), Preamble, ss, 14, 16. See also: Public Health Act, 1998 (New Brunswick), s. 58(1).

92 Indian Act, 1985, ss. 34, 53, 73, 81.

programmes, policies, building permits and public work opportunities for Indians. Several First Nations can use their customary rights as mortgages for individual members' house-building projects.<sup>93</sup>

The Indian bands receive government funding to administer their reserves and are eligible to receive funds to deliver social services and economic development projects. In 1994 DIAND published a pilot programme to transfer Indian Affairs programmes in Manitoba to First Nations. In 1996 the federal Government signed with the indigenous national organisations National Framework Agreements, which were enabling documents for Human Resources and Skill Development Canada. The agreements started the administrative devolution of indigenous labour market programming to the identified regional affiliates of indigenous organisations. The process was renewed in 1999. The organisations signed Human Resource Development Agreements with respective provincial organisations. The delivery structures administer support services by making strategic investments to meet the training and employment needs of Indigenous peoples.<sup>94</sup>

Also the provinces and territories have transferred social services to Indigenous peoples, based on agreements and committed to their welfare. They also offer them representation on respective boards. In Ontario the Indigenous communities can organise Home Care and Community Service Agencies and Long-Term Care Homes by making an agreement with the responsible minister. They are also entitled to provincial welfare benefits.<sup>95</sup> Saskatchewan has special employment and training programmes for the First Nations and Métis. The Ministry of Economy coordinates, develops and implies provincial policies and programmes related to indigenous economy and development.<sup>96</sup> British Columbia finances the First Nations' hospital projects.<sup>97</sup> In NWT, the Tāichō Nation has a Community Services Agency, which develops plans, politics and programmes on health, education, welfare and family matters. Other programmes promote indigenous employment.<sup>98</sup> The JBNQA established the Cree Board of Health and Social Services of James Bay and Kativik Health and Social Services. Today they have hospitals, clinics and different social centres. They decide on their own political direction but receive operational direction from the Québec Ministry of Health and

93 Flanagan & Alcantara (2004), pp. 493, 499. Cf. Indian and Native Affairs Act (Saskatchewan), s. 7; Department of Rural Development Act, 1979-1980 (Alberta), s. 8; Local Government Act, 1996 (British Columbia), s. 692(4); Highways and Transportation Act, 1997 (Saskatchewan), s. 7; Home Owner Protection Act, 1998 (British Columbia), s. 30(1); Disaster Financial Assistance Policies and Guidelines (Public Sector) Regulation, 1999 (Manitoba), s. 4.14.1; Public Highways Development Act, 2000 (Alberta), s. 19; First Nations Commercial and Industrial Development Act, 2005, s. 3(1); Alberta Mortgage and Housing Corporation Loan Regulation, 1985 (Alberta), ss. 70-72; Rural Emergency Housing Program Loans Regulation, 1985 (Alberta), s. 3(1).

94 Elliott (2005), s. 200; Wilson & Mullet (2008), pp. 342-343.

95 Indigenous Legal Traditions (2007), p. 333; Indian Welfare Services Act, 1990 (Ontario), ss. 2-3; Home Care and Community Services Act, 1994 (Ontario), ss. 2, 5, 9; Long-Term Care Homes Act, 2007 (Ontario), s. 129. See also: Regional Health Authorities Act, 2011 (New Brunswick), s. 20; Yukon Act, 2008, s. 49(1); Regional Health Authorities Act, 2001 (New Brunswick), s. 13.

96 Employment Program Regulations, 2008 (Saskatchewan), s. 12(1); Training Programs Regulations, 2008 (Saskatchewan), s. 4(1); Ministry of Economy Regulations, 2012 (Saskatchewan), s. 3(r).

97 Hospital District Act, 1996 (British Columbia), s. 20.

98 Tāichō Community Services Agency Act, 2005 (NWT), ss. 3-4; Order Approving Preferential Employment Program in Diavik Diamonds Project Socio-economic Monitoring Agreement, 1999 (NWT).

Social Services. Their task is to define regional health priorities for Nunavik and to allocate the budgets for regional strategies and hospitals. The Northern Québec Agreement includes also plans for economic development including the creation of employment opportunities, based on the Cree Employment Agreement.<sup>99</sup>

In many communities, native healing circles and lodges are used to address social problems. Indigenous health clinics use traditional healers. The federal Government allowed the Spallumcheen Band to take over the child welfare by a bylaw. The other bands have been able to take some control over their child welfare through intergovernmental agreements. The Yukon recognises and protects the indigenous control of their traditional nutritional and healing practices as viable alternative for seekers of health and healing services. The territorial legislation recognises also the use of traditional medicine and diet. The territory has a First Nations Health Commission and First Nations Health Services. The commission offers employment opportunities and training, including the First Nations Health Liaison and Child Life Worker Programmes and interpreter services. The hospitals' Board of Trustees has three First Nation members. The Equity and Training Policy promote the delivery of diagnostic and clinical services to Indigenous communities.<sup>100</sup>

The Métis were for a long time denied all health and social services. The Ewing Commission in Alberta (1934) was the first to hold hearings on Métis health, education and general welfare, to submit a report and to make recommendations for the improvement of their situation. The consequent Métis Population Betterment Act used a 25 % blood quota to restrict the number of those eligible for provincial benefits. In 1943, a Métis Population Betterment Trust Account was established, which was transformed into a fund in 1979. A provincial Métis Task Force was in place between 1969-1972 and stressed in its report the following: community development which belongs to people; community's ready access to resources; and creation of a Métis Development Branch to the Department of Health and Social Services. In 1987 the provincial Government of Alberta and the Métis Association of Alberta signed a framework agreement to work out plans for the improvement of services and greater participation of Métis in providing them. The agreement was renewed in 1992. In 2004 the First Minister and Indigenous leaders agreed on the creation of an Indigenous strategy on health questions. As a result the Region 10 Child and Family Authority were created. The Métis became for the first time equal partners in federal health programmes.<sup>101</sup>

When the family allowances and old age pensions were introduced in Canada, the Inuit were at first handled differently. They got credit at HBC posts for designated food supplies. The game was diminishing and the Inuit continued to die of starvation and disease. The process began in 1934 when HBC was demanded to take responsibility for the Indigenous in the north without expense to the department. The post-war Robinson Report paid attention to

---

99 Loi sur les Autochtones Cris, Inuit et Naskapis, 2006 (Québec), ss. 5-8; Loi sur les services de santé et les services sociaux pour les autochtones Cris, 2012 (Québec), ss. 3, 18; Décret concernant la publication de l'entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec, 2007 (Québec), Préambule, ss. 2.8, 4.19.

100 Health Act, 2002 (Yukon), s. 5(1); Hospital Act, 2002 (Yukon), ss. 5-6; Beaudoin & Mendes (1996), p. 17.29.

101 Bell (1994), p. 6; Dickason (1994), pp. 359-360, 364; Lawrence (2004), p. 95; Friesen & Friesen (2005), p. 15.



civilisation, education, health, diminished opportunities of traditional economy, and resources. The change was, however, slow. The federal government's public image suffered and it was finally forced to act. It airdropped supplies of food and started to relocate the Inuit groups. The peak time was between 1958-1962. The Inuit communities' forced relocation thousands of kilometres away was partly justified as a will to offer more efficiently direct services to scattered indigenous communities. Nevertheless, the relocation of the Inuit to permanent communities created a housing problem which the federal Government tried to solve by constructing an inadequate number of uniform houses in the arctic. In 1965, based on federal commission's recommendations in the Eastern Arctic a new Eskimo Housing Program was launched, which included massive rental house production. The co-operatives began to manage housing projects, retain stores and other commercial ventures. The last hunting camp was abandoned in 1970.<sup>102</sup>

The federal Government saw first that it has no responsibility of Inuit medical care because they had not signed a treaty. After World War II the introduction of the welfare state led to a standardised classification of race. The family allowances in the Yukon and NWT were paid to Inuit and all people living the Native way in kind, but to the whites and mixed-bloods not living like Indians in cash. In 1959 the federal government established the Northern Health Services and from the 1960s nursing stations. In 1963 the NWT government enacted several ordinances, which transferred to local councils the control of local business, infrastructure and public health, funded mainly by the property tax. Also created were development areas under Local Advisory Committees to provide control over building from the point of view of health, safety, engineering, economic and aesthetic considerations. With the support of the federal government's programmes infant mortality began to decrease rapidly and living conditions improve. The downside was the increase in social ills due to rapid social change from semi-nomads to urban dwellers. The Hamlet Ordinance of 1969 created pre-municipalities without a taxbase. The ordinance was incorporated to an amended Municipal Ordinance in 1972. Charles Drury's report (1980) suggested that family allowances, unemployment insurance benefits and old age pensions should be left with Ottawa, while all other branches should be decentralised and paid by the NWT government.<sup>103</sup> JBNQA created two councils for health and social services. For Inuit there is the Kativik Health and Social Services Council.<sup>104</sup> Nunatsiavut has the Nunatsiavut Civil Service and the Department of Health and Social Development.<sup>105</sup>

---

102 Duffy (1988), p. 42; Zaslow (1988), pp. 277-279; Dickason (1994), pp. 396-397; Minority Rights Group (1994), p. 113; Eisenberg & Spiller-Halev (2005), p. 286. Still in the early 1960s, 70% of Inuit had tuberculosis.

103 Duffy (1988), p. 27; Dickason (1994), p. 368; Hamilton (1994), pp. 110-113; Minority Rights Group (1994), p. 113; Lawrence (2004), p. 95.

104 JBNQA (1975), ss. 14-15.

105 Labrador Inuit Constitution (2005), s. 6.

## 5.4. Conclusions

Gender has been an important topic concerning the indigenous communities both in Canada and New Zealand. In Canada, the Indian Act, 1876 created an unequal system on mixed marriages: the First Nations' women had fewer rights than the men. This was corrected in the federal legislation only after the UN case law laid pressure on Canada (1985). In New Zealand the case law led similarly in the 1980s to changes in legislation dealing with the Māori traditional procedures, which shown themselves as being unequal. In associated states the international pressure has influenced the traditional communities. In France the Accord of Nouméa has created a possibility to gender discrimination, while the customary rules are decided by the customary organs (although confirmed by the Congress). In Wallis and Futuna and French Guiana the customary societies have been left predominantly untouched.

The customary family law persisted besides the Western law in the early settler societies. In New Caledonia and Wallis and Futuna it has continued uninterrupted until today. In New Caledonia the courts recognised its existence in the 1920, and the statute based recognition of customary marriage and divorce followed in the 1960s. The Accord of Nouméa has given the Kanak customary personal law a constitutional status, including also the question on inheritance. In Wallis and Futuna France has always recognised the existence of a parallel system, which is *de facto* dominant. In French Polynesia the early codification has led to the diminishing of the customary family law. Only customary adoption and inheritance has some relevance in today. In French Guiana the customary law prevails without official recognition in isolated communities.

Like in France, the customary family law has been related in New Zealand largely to land. The legislator attempted gradually to restrict the scope of custom. Since 1955 only customary rules on inheritance and adoption have remained. Since 1993 the Maori Land Court has had the discretion to confirm them on a case-to-case basis. Similarly, the associated states and territories have followed New Zealand's legislation: the customary family law has no official status. In Canada the customary marriage was recognised in early case law when the Indigenous law was still dominant in many areas. Later it was totally ignored until the 1960s, when the customary adoption was gradually recognised. It was similarly to France and New Zealand related to inheritance.

In all three countries, education has been in all three countries a means to assimilate. The civilising mission and social Darwinism have been reflected also in the legislation. In France and New Zealand public education was extended to indigenous people early, but in Canada for First Nations' (and later Inuit) children residential and industrial schools were created, which from 1920 were compulsory. Their poor management led in many cases to the lost of indigenous identity and language, even to abuse. The idea of Western culture's superiority remained influential until the 1980s in the form of integration policy. Only the Accords of Matignon and Nouméa in France, the rise of indigenous school forms in New Zealand and the creation of Indigenous schools and the remedial process in Canada have influenced the legislation which today supports more or less Indigenous education.

The Indigenous media has been a central question especially in New Zealand's legislation. The weakening of the Māori language was followed by a silent period in the media. The tide changed only in the 1970s, when the question of media became topical. The existence

of Māori radio stations was included in legislation in the 1980s, but the most remarkable event was the creation of statute-based Māori Television in 2004. In France the legislator's opinion was until the 1980s, that the state should have monopoly in audiovisual media. The Constitutional Council's case law reinterpreted the Declaration of 1789 to promote the pluralism and freedom of expression. The broadening of legislation has given the overseas territories more free hands to develop plurilingual and multicultural media. In Canada there is no express legislation on indigenous media, but the process has been similar with regard to timing to what happened in New Zealand: since the 1970s there has appeared an Indigenous media.

The Indigenous peoples' health and social conditions have clearly been worse than those of mainstream society. The aftermath of World War I signified a rise of new global consciousness in this sector. In New Zealand from the 1920s the legislator began to include the Māori in various health and social programmes. What was significant, was that this was done in co-operation with the Māori. Especially the alliance of the Labour and Rātānā Parties created favourable conditions to for this. The post-war social legislation gave to the Māori increasing autonomy in these questions. Similarly, in Canada the socially-orientated government of Alberta started the betterment of the Métis' conditions. The federal government began to gradually promote the Inuit conditions. The motives were the country's international reputation, and strategic and economic reasons. In the 1920 in France the officials understood also that the Kanak's situation was deplorable. However, only the change brought about by the Fourth Republic since 1946 signified the rise of strong constitutional social emphasis to the forefront. In all three countries the change in international atmosphere towards the Indigenous peoples has led since the 1980s to remarkable social reforms with regard to Indigenous health and social programmes and an increased Indigenous responsibility.

## 6. Land and Environment

### 6.1. France

#### 6.1.1. Customary Lands

In the French constitutional law property is an inviolable and sacred right. Much of the conceptual language on property stems from Roman law. The Civil Code adopted most of the basic divisions of Roman law: possession, *dominium*, usufruct and servitude. Neither the ancient customary law without influence: the medieval tenure system was swept away by the revolution, but the protection of the family and inheritance system was influenced by the ancient customs and desire to promote family solidarity.<sup>1</sup>

In Civil Code property is described as the right to enjoy and dispose of things in an absolute way. The ownership can be acquired by occupation when a property has no owner or if it is abandoned; or by acquisition in prescription (*usucaption*), when a person acquires the title to property by possessing it openly and peacefully over a long period of time. In acquisition the new owner must take some positive steps to show his ownership, a reason for why he/she is the person whose title the law should recognise. The acquisition is useful in long-standing situations. Social order requires the law to recognise longstanding possession which has become a settled part of social organisation. A person can acquire title by prescription even if he obtained possession in bad faith. Key elements for acquisition are that the claimant possessed the property in his or her own right in a peaceful and public manner.<sup>2</sup>

The effect of possession must be noticeable and public if the original owner is going to have a chance to react and claim the property. Ownership must also be claimed. Once it is claimed, it is deemed to have existed from the moment the claimant moved into possession. There are three distinct elements in the French registered land transaction: the claimant must usually obtain an *instrumentum* from a notary which records his title. The notary will receive the statements of witnesses and record them to demonstrate the right to ownership which is claimed. The prescription period only begins to run from the date on which forceable occupation ceased. Following the Roman law tradition, the Civil Code provides that the transfer of property is completed simply by the agreement of the parties. The Code contends itself with requiring the registration of gifts of property which could be mortgaged.<sup>3</sup>

French law recognises also collective property. Property held in common is called *masse indivise*. It is treated as a common asset to be managed for common profit. The fruits of the exploitation of the common property belong to *masse* subject to reasonable remuneration for services rendered by one of the co-owners. The common property consists also of debts. The

---

1 DDHC (1789), art. 17; Bell (2001), p. 277.

2 Bell (2001), pp. 285-286; Code Civil (1804), art. 544, 712, 2219.

3 Code Civil (1804), art. 1138, 2233; Bell (2001), pp. 287, 290. A property register (*publicité foncière*) of parcels was created only in 1807.

normal regime for the administration of common property applies unless there is a specific agreement. It is usual that the common property is entrusted to the administration of one individual. That person undertakes administrative tasks. The powers of the judge to intervene are limited. In agriculture the landhold is kept in common ownership and run as a single unit.<sup>4</sup>

The property rights less than ownership include usufruct and servitudes. Usufruct is defined, following Roman law, as a right to enjoy the things which another owns like the owner himself, but who has a duty to preserve its substance. During the usufruct the usufructuary has a right of enjoyment whereas the reversioner has the ultimate interest in the property. The reversioner expects to obtain the substance of the property at the end of the interest of the usufructuary. The usufructuary enjoys the property and the benefits coming from it. The interests of the usufructuary and the reversioner are reconciled by giving the former only those rights concerning the daily administration of the property.<sup>5</sup>

In New Caledonia French property law has met a special challenge. The Kanak identity is based on a particular connection with land. In New Caledonia's customary system the land was communal and a sacred foundation of life and society, related to the clans. The property right was vested in the clan chief who exercised control and supervision over the land. The individual members of the clan had usufructuary rights over land allocated to them. Due to its sacred nature, the customary land has been seen as inalienable. Only a clan chief was able to transfer the user rights to an outsider. The land grants to colonists began by the colonial administration in 1855, only two years after their arrival. The Kanak were assured that only purchased and non-occupied lands would be transferred to the state and granted to settlers. The French administration and Indigenous people had different ideas about what an occupied land would mean. For French authorities New Caledonia was *terra nullius*, and therefore indigenous people were only users, not owners, of the land. From 1867 the Kanak were divided by the governor's decision on tribes and the following year each indigenous tribe was allotted a reserve with limited tribal lands at the will of the state covering only 10% of the islands' land space. On Grande Terre they lost 80% of their lands. Only on the more isolated Loyalty Islands were their lands left intact. Most of the customary lands left were on the mountains and less fertile eastern coast, and even those territories were completely at the mercy of the governor, who could dispossess them.<sup>6</sup>

From 1897 the reserve system was intensified, limiting the family lot to three hectares. The penal colony became the most important land owner. To encourage colonisation, the governors granted land from the main island to many freed prisoners and finally, the regulation of 27 May 1884 granted free land to all French immigrants. A granted parcel included fields and pasture. It became in force only when the immigrant had accepted obligatory residence, had built a house and taken the lands in use. The mass immigration supported by Governor Feillet and la Société Le Nickel (SLN) further weakened the Kanak's situation. The *indigenat*

---

4 Loi no. 76-1286 du 31 décembre 1976, ss. 2, 7-8, 10; Bell (2001), pp. 294-296.

5 Code Civil (1804), art. 578; Bell (2001), 298-299.

6 Vigne (2000), pp. 5-6, 16-17, 19.

removed the indigenous people to shrinking reserves, as land was required for settlement and mining. The French legislator created for reserves a legal category of tribes.<sup>7</sup>

Gradually the French Government's attitude began to change. The Kanak were no longer assimilated, but instead integrated into society. From 1930 the state repurchased European properties and authorised the acquisition of land for indigenous people under the French legislation. The results were meagre due to a lack of capital and credit. After the war the state began to grant land in individual title to Melanesian war veterans. But there was not enough land on reserves for the rapidly increasing indigenous population. Since 1955 the administration of land grants was extended to all Melanesians and first non-veteran grants were awarded in 1959. The free grant was given under provisional title for five years and was subject to a development programme of cultivation, reforestation or pastoral improvements to obtain a full title. It was encouraged to convert reserve land into individual titles which possibility a number of Kanak took advantage of, but it was also problematic as it broke down the old customary rights. In the 1960s the European population began to rent unused lands adjacent to reserves. In 1970 credit facilities were extended to Melanesians and the process began to accelerate. A real land reform was started only in 1978 when the clan titles (*propriétés claniques*) were recognised and used as the basis of land redistribution and the customary law as the law regulating the clan property. The clan councils were allowed to administer the clan property. The customary land was, however, restricted to reserve lands. The state took the power of compulsory re-acquisition from the settlers, hurried by the direct occupation of lands by the Kanak. In 1986 the charge was given to the Agency of Rural and Land Development (ADRAF). Despite the political violence and many difficulties the Kanak customary land base increased more than 70% between 1978-98. In Grande Terre the Kanak owned collectively 17% of the land, the Europeans 18%, while 65% was still in territorial ownership (in 1998). on Loyalty Islands almost all the land was customary land.<sup>8</sup>

The Accord of Nouméa proposed the registration of customary lands that the parcel rights could be more clearly identified, the land reform to be continued and the leases to be defined by the Congress and Customary Senate.<sup>9</sup> The organic law of 1999 recognises in New Caledonia three types of land property: private property, public property and customary lands (*terres coutumières*). The property located in customary lands belongs to those having customary status. They are a central denominator of Kanak identity and 95% of them belong to this group. The customary lands form three classes: reserves; lands belonging to local group title; and claimed land titles. These lands are "inalienable, imprescriptible and sacrosanct collective property". They are defined in French law as G.D.P.L. (*groupements de droit particulier local*), which allows equalise the legal person of civil law with the group's customary rights holders. The customary lands' control is vested in *grand chef*. The lands cannot be leased. The individual rights include right to use, crops and to leave the land fallow. The transferable lands are those

---

7 Accord de Nouméa (1998), Préambule, s. 1; Arrêté no. 13 du 22 janvier 1868 (EFO); Arrêté du 27 mai 1884 (New Caledonia), art. 4; Déclaration du 20 janvier 1855 (EFO); Déclaration du 20 janvier 1862 (EFO); Vigne (2000), p.21.

8 Ordonnance no. 82-880 du 15 octobre 1982; Décret du 21 mai 1980; Déclaration no. 18 du 20 janvier 1855 (EFO); Plan de développement économique et social en longue terme à Nouvelle-Calédonie (1978), pp. 305-306; Ntummy (1993), pp. 615-617; Payé (2001), p. 422. Nouvelle-Calédonie.

9 Accord de Nouméa (1998), art. 1.4.

which “have been or are delivered by the territorial collectivities or public land establishments to answer to the expressed claims to the title having a relation to land.” The Customary Senate may establish a land register for customary lands, create new legal and financial tools to help their profitable use, and define the rents precisising the relationship between the customary proprietor and the user of the customary lands. The state has the right to expropriate the necessary land. The criterion is a special need of the Melanesians. To the Agency of Rural Development’s functions belong also the development of suburban transformation, because the Kanak are increasingly become urbanised.<sup>10</sup>

The Collective nature of Kanak land can create special challenges. For exemple, for an investment or construction, there is the need for all the clan members’ acceptance. The Territorial Assembly’s decision in 1970 gives guidance on this question. After the customary authority’s opinion there can be created individual parcels to be used for construction. The minutes of negotiations are signed by the Chairman of the Council of Elders or the tribal chief, and are thereafter registered before a state’s official. Usually one or two members of the builder’s clan act as guarantors of a construction loan.<sup>11</sup>

In 1838 the British missionaries asked Queen Pomare IV to start a land reform in Tahiti. It needed, however, the influential nobility’s acceptance and was postponed. In the agreement of 1842 the French authorities promised that the queen would be left the authority on the possession of soil. Tahitian legislation prohibited land transactions between Tahitians and Frenchmen and the cession of royal feudal lands (*fari’ihau*) was forbidden, but otherwise the collective customary land was to a great extent individualised during the protectorate. At the local level, the District Councils acted as land courts, regulating claims, sales and second transfers of title and for first instance hearings of family disputes over lands. When the land questions were partly transferred to French courts from 1865, the litigation reached its peak. A central question was the boundary demarcations. A large number of cases were dismissed due to lack of written evidence. Since 1855 the Tahitian legislation required testimony of at least three *ra’atira* but in 1875 the solution of most land questions was transferred to French courts. The Tahitians were annoyed and the declaration of King Pomare V (1880) asked to leave the land questions to the Indigenous tribes as had been the case during the protectorate. In 1887 the French governor made a compromise with the king (now in a nominal position), which preserved the customary title during a transitory period. The title would disappear when all land was surveyed and the individual ownership defined. The land register was extended to all territory and the civil law courts were amended in land cases with Tahitian assessors. *To’ohitu* continued as a parallel institution until 1932 and practiced often independent policy. With the decree of 1887 all unclaimed lands were transferred to the district’s or municipal community’s ownership as *faufa’a mata’eiina’a* (patrimonial land). This statute remained virtually unchanged until 1923 when the land legislation of Metropolitan France was extended to EFO. The process was finished even in the most isolated parts of the territory by 1945, after which date there has not been no customary lands. After World War II the French government wanted to promote agriculture in the territory whereby copra

---

10 Constitution (1958), art. 75; Loi organique no. 99-209 du 19 mars 1999, art. 1, 18; Ntummy (1993), p. 617; Vigne (2000), 35-43.

11 Délibération du 28 octobre 1970; Payé (2001), p. 422.

became the main agricultural product. The territory had a statutory right to unoccupied lands between 1957-1984 and again from 1996.<sup>12</sup>

Despite the individualisation of customary title to land the litigation has continued until today due to inaccurate land registration. The French authorities have used in French Polynesia a system where only registered land creates rights and reminds closely of the common law countries' Torrens system. At the same time it has broken traditional family structures where the rights are handed down from several generations, which has made it very difficult to define the individual rights. The territorial courts have held that one family branch is enough to prove a person's ownership right. In 1990 a project of land experts was established and in 1996 the Commission of Obligatory Conciliation. Although today only 0.5% are agreed common lands (*partage amiable*), the customary law has proved persistent in some narrow sectors. The traditional family structure is still much alive, and the chief of the family has a strong say in questions of property and succession. The customary adoption – as has been indicated elsewhere – belongs to the same category of questions. A Tahitian characteristic is also the importance of land acquisition, which is included in French law by the notion of *usucaption*.<sup>13</sup>

In Wallis and Futuna the Bataillon Code (1870) prohibited the selling of customary land for a “white man”.<sup>14</sup> The law of 1961 does not mention customary lands but included originally a provision, which made possible to regulate the customary lands with a degree. Due to the customary authorities' strong resistance the provision was later dropped from legislation and the only statute, which mentions the possibility to regulate the customary lands is the degree of 22 July 1957.<sup>15</sup> The customary chiefs have efficiently prevented all development projects they see as a threat to customary title and territory has also preserved a character of natural economy with traditional gifts and exchange of goods. The lands based on *agai fenua* (custom) are inalienable and inextinguishable. Each member of a family is a user of the family parcels. The rules related to land are flexible but there is a clear hierarchy of legal remedies if the families do not reach an agreement in the case of conflict. For example in Wallis they can first appeal to the members of *kutuga* (clan) or its elders. They have a customary authority as *fakamau'agu* (tribunal). The next stages are the village chiefs (*puke kolo*) and councils (*fono faka kolo*); chief of customary police (*pulu'i'uvea*); district chief (*faipule*) and council (*fono faka palokia*); Council of Ministers (*fono laki*) and finally *lavelua*. Relation to land is a blood tie: the illegitimate children are excluded from inheritance. Similarly, a widow loses at the moment of her husbands' death the right to land. *Fatogia* is a “land tax” which guarantees together with reciprocal *ma'ukava* (respect) the ownership of extended families' lands. The

12 Loi du 10 mars 1891; Loi no. 77-772 du 12 juillet 1977, art. 44; Loi no. 90-612 du 12 juillet 1990, art. 90 bis; Loi no. 94-99 du 5 février 1994, art. 4; Loi no. 96-312 du 12 avril 1996, art. 7 al. 2; Décret du 22 juillet 1957, art. 40 al. 5; Pomare Code (1848, Tahiti), laws XII-XIII; Newbury (1980), pp. 91, 184, 192, 216, 290; Aldrich (1993), p. 77; Sem (1996), pp. 106. In the high year of 1913 there were 21,000 land claims in queue; The Torrens system, used in Australia, New Zealand and Canada, was created by Sir Robert Torrens in South Australia during the early nineteenth century.

13 Sem (1996), pp. 236-238; Sage (2007), pp. 60, 75-76; Vannier (2007), pp. 84-86.

14 L'histoire des institutions à Wallis et Futuna.

15 Loi no. 61-814 du 29 juillet 1961, art. 4 al. 4; Décret no. 57-811 du 22 juillet 1957, art 40 al. 5-7; Payé (2001), p. 230.



strength of these rules has become evident in cases where the former islanders, now living in New Caledonia, have litigated to obtain former ancestral lands.<sup>16</sup>

In French Guiana all “vacant lands” became from 1946 the property of the state (since 1987 region) and it owns more than 90% of land space. The decree of 27 September 1948 (renewed in 1960) was the first statute which offered some legal protection to Indians. The state began to grant rights to use collectively the state land. The repeal of the Inini statute brought the Indian tribes under the French law but their traditional land claims have not been recognised. The decree of 14 April 1987 finally gave some protection for Indians by permitting the Prefect of Cayenne to plan zones for Indians where they could ask for free collective titles for farming, breeding or living for 10 years after which they could apply for a cession for perpetuity. The rules were codified in 1990. There are today 18 zones covering 6,300 sq km but the application process has appeared to be a dead letter. The access to Indian territories is highly restricted and a permit from the Prefect is needed.<sup>17</sup>

### 6.1.2. *Fishing and Sea Resources*

Fishing belongs to the exclusive competence and is regulated by EU legislation.<sup>18</sup> The territories may issue fishing licences to foreign fishermen only after the state has made an agreement. The law of 16 July 1976 established the exclusive economic zone (EEZ) to French Polynesia, extending 200 nautical miles (370 km) from the Polynesian coasts, covering 4.8 million sq km (the size of Western Europe) where the state obtained exclusive rights to exploit and explore the biological and non-biological soil and subsoil resources. The following year the territory obtained competence to exploit the sea resources but it was returned to the state in 1984. The territory, however, preserved the possibility to intervene when there is a question on exploration and exploitation of the riches of the sea. The law of 1990 preserved the competence for the state but conceded it to the territory and in 1996 the territory gained competence over all biological natural resources in EEZ. In 1994 the territory was allowed to grant fishing licences there. The International Convention on the Law of the Sea was ratified by France in 1995. France also signed the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific in 1990 (Wellington Convention), but has not ratified it. According to an association agreement with the European Union the EEZ is within the EU's fishing zone.<sup>19</sup>

In *Hopu and Bessert v. France*, the applicants to UN Human Rights Committee claimed that a pre-European burial ground and lagoon was a traditional fishing ground for about 30 families living next to the lagoon and a development of a luxury hotel threatened the right. The hotel company held the land on sub-lease, originated with a government-owned

---

16 Aimot & Tamole (2007), ss. 49-57.

17 Code du domaine de l'Etat (1990), art. R 170-56; Décret no. 46-80 du 16 janvier 1946; Décret du 27 septembre 1948; Décret du 10 janvier 1960; Décret no. 87-267 du 14 avril 1987; Arnoux (1996), pp. 1624, 1629; Bechtel (2002), p. 31.

18 Treaty on the Functioning of the European Union (1958), art. 3.

19 Loi du 16 juillet 1976; Loi du 12 juillet 1977, art. 62; Loi no 84-820 du 9 septembre 1984, art. 3; Loi no. 90-1247 du 29 décembre 1990, ss. 40-43, 45-46; Loi no. 95-1311 du 21 décembre 1995; Loi du 12 avril 1996; Arrêté du 7 novembre 1994; Sem (1996), pp. 120-122, 252; Ntummy (1993), p. 618.

company which had secured an order of dispossession against the complainants' claimed ancestors before leasing. Because France had reservation to article 27 of ICCPR, the Human Rights Committee referred to article 17, which France's activity had violated. The construction of the hotel complex had interfered with local people's rights to family and privacy.<sup>20</sup> The Committee's carefully chosen ruling can be indirectly interpreted so that France had breached its positive duty not to permit a private actor to do something which the state knew would harm human rights, or that the private company acted as a government corporation's agent, placing the direct responsibility for the interference on France itself. With broad reading there is no relevant difference between activity of public and private corporations where human rights interests are harmed.

### 6.1.3. *Nickel and Nuclear Testing*

With the creation of reserve lands the state reserved for itself the sole possession of mines, minerals, water systems and sources. Nickel became from 1863 the main resource of New Caledonia. Société Le Nickel (SLN; 1880) became the major enterprise with wide powers on Grande Terre. The mines were administered by the Council of Mines and headed by the high commissioner. The mining industry was revived in the late 1970s with chrome as a new product and the French government put resource management high on its agenda. In the aftermath of the Agreement of Matignon the Kanak of North Province demanded control over the resource of nickel because the local mining company (SMSP) was out of their control. The Accord of Nouméa established a new planning scheme of mining, controlled by the territory and demanded co-operation with the Indigenous population, which was realised when two Canadian companies arrived to New Caledonia. The energy policy's new objective was autonomy and balancing, with special attention given to Indigenous rural communities. The organic law of 1999 gives the Congress of New Caledonia a competence to pass *lois du pays* on the mining of hydrocarbon, nickel, chrome and cobalt. In 2009 the Congress adopted a mining plan and established the Strategic Committee on Industry to develop the field. The plan emphasises reasonable and balanced development of the mining industry and metallurgy, giving priority to the development of local resources, preservation of environment and giving a share of the benefits to the nearby communities.<sup>21</sup> The Congress has also established 14 zones (194 sq km) as protected areas where the mining is not allowed.<sup>22</sup> The mining industry must take into consideration also the provisions of the Charter of Environment.<sup>23</sup>

The law of 13 December 2000 demands the state and territorial collectivities respect, protect and support the Indigenous communities' knowledge, innovations and practices,

---

20 UNHRC, *Francis Hopu & Teपोaitu Besset v. France* (1993), ss. 2, 2.2., 10.2.-10.3.; Eide & Krause & Rosas (2001), p. 585; New Zealand Ministry of Foreign Affairs and Trade.

21 Accord de Nouméa, art. 4.2.2.-4.2.4.; Loi organique no. 99-209 du 19 mars 1999, art. 42; Relève des conclusions du VIIIème Comité des Signataires de l'Accord de Nouméa (2010), s. 3; Relève des conclusions du IXème Comité des Signataires de l'Accord de Nouméa (2011), s. 2C; Aldrich (1993), pp. 102-103; Bechtel (2002), pp. 47-48; Nouvelle-Calédonie.

22 Loi organique no. 99-209 du 19 mars 1999, art. 22; ESCAP Virtual Conference.

23 E.g. Charte de Environnement (2008), art. 7 ; CC, Décision no. 2013-308 QPC du 26 avril 2013, § 11.

based on traditional life, and their relation to the natural environment and sustainable use of biological diversity.<sup>24</sup> Similarly, the Accord of Matignon made environmental protection to the responsibility of the provinces.<sup>25</sup> The Accord of Nouméa demands respect for the protection of the environment, i.e. to make the development sustainable.<sup>26</sup> Also the association agreements with the EU give to the Pacific territories environmental protection and signify an important cooperation. An important subject to French Polynesia is the provisions on nuclear materials and radioactive waste. The provisions of Euratom Treaty are applicable there. The French government and EU have a duty to give information on these environmental aspects to the territory. France was under considerable international pressure due to its nuclear tests at Moruroa and Fangataufa, which have an influence not only on the territory and its Indigenous people, but also on the southern Pacific region in general. Its relations with the Pacific Islands Forum were strained. France halted the testing in 1996, and since 1998 the Forum members improved their relations with France. On Wallis and Futuna the environmental protection belongs to the local state agencies.<sup>27</sup> In French Guiana the legislation recognises the existence of a traditional right to use the region's property for the profit of inhabitants who get traditionally their subsistence from the forests.<sup>28</sup>

## 6.2. New Zealand

### 6.2.1. *Purchase and Confiscation: Reducing Māori Land Base*

The Treaty of Waitangi and the British acquisition of sovereignty over New Zealand did not at first remove the pre-existing tribal property rights. In the English version of the treaty the British Crown confirmed for Māori their pre-existing sovereignty and land rights, and the full exclusive and undisturbed possession of their “Lands and Estates Forests Fisheries and other properties.” Article 2 gave the Crown an exclusive right to purchase Māori land. It protected the Māori from unscrupulous dealers, but also supported immigration by creating a price differential and providing a mechanism for colonisation. The Crown acquired *imperium*, the right to govern, but preserved *dominium*, the private rights of ownership. Based on feudal theory, there was no land without a lord, i.e. the Crown was the ultimate owner of all land in its territory by the right of eminent domain, having the legal title to land. Two equity rights of ownership in English law were a right to occupy the land and when the right was not exercised the right to income generated by the non-owner's presence on the land. A fee was an estate on land capable of inheritance. The most common form was a fee simple absolute in possession, or freehold. The doctrine of Aboriginal title was based on the requirement that all settlers' title to land derived from Crown grant. It divided to territorial title, similar to freehold ownership, and to non-territorial title, like hunting and fishing rights.<sup>29</sup>

---

24 Loi no. 2000-1207 du 13 décembre 2000, art. 33.

25 Accords de Matignon (1988), Texte no. 2.

26 Accord de Nouméa (1998), Préambule, s. 1.4.

27 Bechtel (2002), p. 48; Sem (1996), pp. 278-280; Préfecture des îles Wallis-et-Futuna. Australia and New Zealand have sued against the nuclear testing of France in ICJ.

28 Code du domaine de l'Etat (1990), art. R. 710-56.

29 McNeil (1989), p. 79; McHugh (1991), pp. 93-100, 132.

In the beginning Native affairs, including land purchasing, were directed from London. The colonial secretary intervened in pre-treaty land transactions made by the New Zealand Company, the mission organisations and private persons. Based on the Land Claims Ordinances 1840-1841 the Land Claims Commission inquired those claims and could entitle to a claimant with *bona fide* transaction a Crown grant. For private persons the maximum was 2,560 acres. The New Zealand Company was guaranteed four acres of land for every £1 spent. In 1841 Lord Russell, the State Secretary, gave instructions to guarantee sufficient land for Māori occupation: 15-20% of land sale profits were to be reserved for Māori purposes. In fact, the administrative costs took a major part of it and little was done. The loss of Māori lands began. The colonial government needed land to expedite the process of settlement and the Māori saw in intertribal rivalry the sales as an opportunity to vindicate their claims to land. Soon they grew, however, disillusioned. The Crown's pre-emption right divided the authorities both in Britain and New Zealand and Governor FitzRoy was allowed to relax it by two proclamations in 1844, which allowed the settlers to buy directly land from Māori and to pay ten, later one, shilling per acre to the government but the pre-emption was returned by the ordinance of Governor Grey in 1846. It made also illegal to lease lands from Māori to graze cattle and sheep. Governor Gray started an efficient Crown's purchase programme which bought almost all South Island and large parts of North Island from Māori in a 15 year period with low prices. This opened the way for rapid settlement.<sup>30</sup>

The British Government's original position was that the Māori were true owners only of their cultivations, places of burial and habitations. The rest of the country was deemed in Lockean terms as waste land of the Crown. With instructions from London, Governor Grey issued in 1846 royal instructions that allowed the dispossession of uncultivated Māori wastelands. The instruction was overturned by the Court of Appeal in *R. v. Symonds* (1847). It ruled that the right of the Crown to extinguish Native title must be consistent with the universal principles of natural law, which recognise the validity of title and the need for the owners to consent before any transfer of title can take place. There were in fact two systems of tenure within the country: the Treaty of Waitangi was a declaratory of common law rules on Native title and the principles of natural law, binding on the Crown. Privy Council confirmed the binding nature of treaty in *Nireaha Tamaki v. Baker* (1901). The statutory regime put in place to integrate Māori title into the English landholding system assumed the existence of tenure of land under custom and usage.<sup>31</sup>

The New Zealand Constitution Act 1852 reserved the Crown a pre-emptive right to extinguish the Native title by purchase from the Māori owners. The Crown's pre-emption right was repealed only four years later. The Maori Reserves Act 1856 had negative effects on Māori when the trust commissioners leased the trust lands for insubstantial sums to settlers and the provinces received control from the sale of the Crown lands (until 1876). The resident magistrates and *rūnanga* were given two years later charge to determine *iwi*, *hapū* and *whānau* interests in land. Once the ownership had been confirmed by the Crown they could authorise the sale of land to Pākeha. The supporters of *kingitanga* decided in Lake Taupo that they would not relinquish their lands any more by sale or treaty grant. The parliament responded

30 Orange (1993), pp. 104-106; Havemann (1999), pp. 165, 167, 381; Spiller (2001), pp. 140-145.

31 Treaty of Waitangi (1840); JCPC, *Nireaha Tamaki v. Baker* (1901); NZSC, *Queen v. Symonds* (1847); Spiller (2001), p. 143.

by enacting measures to facilitate the privatising of Māori-Pākehā land transfers. Governor Browne authorised land sales by individual Māori occupants, a policy supported by the Duke of Newcastle, the new secretary of state for colonies.<sup>32</sup>

Led by the *kingitanga* movement, Māori resistance to land sales intensified. Disputed Waitara purchase in Taranaki was the final cause of warfare which lasted from 1860 to 1864. The land squatters used the war as a pretext to use the Native Land Court (NLC) to validate their titles. New legislation (1863) was enacted hastily in the war atmosphere and it left the Government a free hands to take through an operation which confiscated 12,000 sq km of land from those tribes which had resisted the British rule. The Weld ministry limited the confiscations to the end of 1867. The land tenure was changed and the Crown's supporters were rewarded by the Compensation Court (1866-1874). Military settlers were located from 1865 to the frontiers of confiscations. Parts of the King Country and Urewera were, however, able to resist the settlement until the 1880s.<sup>33</sup>

The first pre-emption era closed with the war. In 1856 Governor Browne had set up a Board of Maori Affairs to report on Māori land tenure and land purchasing. The board recommended establishing an indigenous lands registry and giving Crown grants for individual parcels of land. These propositions were included in the Native Lands Acts (1862-1909), which opened the door for settlers to force Māori to relinquish their land. The Native Land Act 1862 recognised Native title to all unextinguished lands but that it was not recognisable in courts until the NLC had issued a certificate under the act. The purpose was to do away with tribal ownership. The Crown's pre-emption provision was repealed and the Crown's Native Land Purchase Office was disbanded. The 1865 act moved the focus in land sales from *iwi* and *hapū* to title of persons to Native land. The land sales required that the land of *hapū* had to be surveyed first. Also the Chatham Islands were investigated in 1870. From 1870 there was a charge of surveys and court costs: many Māori had to sell their lands to cover these and other costs. The Māori-owned land fell from 71,000 sq km in 1870 to 28,000 sq km in 1915. The individual Māori took advantage of offers made by government officials or private Pākehā buyers. Many Māori also turned to their tribal *rūnanga* and *hui* for help, but the NLC did not recognise their authority - not even after their formal recognition by the legislature in 1883.<sup>34</sup>

The British Crown claimed that its own acquisition of sovereignty over territory included underlying title to all the land which the courts upheld. The customary land-based policy was superseded by a new juridical formation, the tenancy-in-common. In common law,

32 New Zealand Constitution Act (1852), s. 73; Karsten (2002), pp. 83-85; Havemann (1999), p. 168; McHugh (2004), p. 185. The Colonial Office in London tried to retain the control of indigenous policy as long as possible.

33 Loan Act 1863, ss. 3-4; Suppression of Rebellion Act 1863, ss. 2-5; Karsten (2002), pp. 85-90; Havemann (1999), pp. 167-169; Spiller (2001), pp. 148-149. The new legislation paradoxically recognised the tribes as political units but only in negative meaning, to ease the confiscations; According to the doctrine of forfeiture one cannot hold an estate from the Crown that has been betrayed by treasonable actions. The precedents were found from Ireland and East Cape Colony.

34 Native Land Act 1865, ss. 2-3; Immigration Act 1868, ss. 2-3; Native Lands Frauds Prevention Act 1870, s. 6; Native Land Act 1873, s. 28; Public Works Act 1873, s. 8; Orange (1993), pp. 166-171; Karsten (2002), pp. 85-90; Havemann (1999), pp. 167-169; Spiller (2001), p. 152; Boast (2010), pp. 627-646. A similar process for the abolition of customary tenure had previously taken place in Scotland, Ireland and North America.

exclusive occupation results in a fee simple estate which is, besides the Crown title, the largest permissible interest in land. Under the Native Land Act 1865 the Native Land Court would award title to ten or fewer trustees, treated as owners in fee simple with a right to alienate the land. In Hawkes Bay the NLC gave titles to few chiefs who were forced then to sell them for their debts. The Native Lands Frauds Prevention Act 1870 demanded every purchaser or lessee to obtain a certificate from a trust commissioner. The official's role was to investigate the transactions and ensure that the statutory requirements were met. The Fox government wanted, however, to speed up the economic development and settlement. The Native Land Act 1873 replaced the land acts' original 10-owner system with a demand for each individual owner of land to be listed in memorials of ownership (since 1880 certificates of title) and to obtain all of their signatures. The land could be leased for a maximum of 21 years. The land purchasing became a laborious project and created a system of fragmented ownership, affecting deeply the Māori freehold tenure. The English form of co-ownership of land, dealt with a group of freewilled owners tied by contract, replaced *whakapapa*, or the common ancestry, as a determinant, and the ownership rights became the source of *turangawaewae* (right to tribal land)<sup>35</sup>. Another statute, the Government Native Lands Amendment Act 1877 empowered the Crown to prohibit private purchasing of a block in which the Crown had taken an interest, consolidated in the Native Land Act 1909.<sup>36</sup> A short return to the principle of Māori communal ownership was the Native Lands Administration Act (1886-1888), which repealed the Native Land Act 1873. It stopped individual dealings with Māori lands and allowed the incorporation of owners of a block into an elected Block Committee with executive powers to determine terms of sale or lease.<sup>37</sup> The Native Equitable Owners Act 1886 tried to return the ten owners rule by allowing the NLC to make trust orders which inserted into the title as tenants in common together with the original grantees.<sup>38</sup>

### 6.2.2. *Wi Parata-Era: Denial of Rights and Attempts to Consolidation*

The New Zealand courts held until the 1870s that the Crown was bound by the common law and its solemn engagements to give full recognition of Indigenous proprietary rights. This changed in 1877, when James Prendergast, CJ, ruled in the Supreme Court's *Wi Parata* case - based on the legal fiction of all-encompassing Crown sovereignty - that the treaties with "primitive barbarians" lacked legal validity and must be regarded as simple nullity. The Native title was legally non-existent: the indigenous rights were at the most, moral. According to Prendergast, the Crown was the sole arbiter of its own justice. The case was a test case for Prendergast in policy of transforming New Zealand into "a better Britain". The case was to prevail over 100 years. It prevented Māori recourse to vindicate the indigenous property rights guarantee under the treaty. The Supreme Court developed the doctrine in 1881 when it ruled that the treaty had not given to Māori customary rights a character of title. This made it

---

35 Native Lands Act 1865, s. 23; Orange (1993), p. 220; McHugh (2004), pp. 187, 218, 266, 551; Young & Belgrave & Bennion (2005), pp. 14, 18; Spiller (2001), pp. 154-155.

36 Native Lands Amendment Act 1877, s. 6.

37 Native Lands Administration Act 1886, ss. 11, 33.

38 Native Equitable Orders Act 1886, ss. 6, 8.

possible to sell some trust reserves in the 1880s. In 1894 the Court of Appeal held that a claim of title by the Crown to any land was sufficient to oust the jurisdiction of courts.<sup>39</sup>

The Privy Council did not share *Wi Parata* doctrine. It took a stand on the question in two cases, *Nireaha Tamaki v. Baker* (1901) and *Wallis v. Solicitor-General* (1902-1903). In the first case it indicated that the Aboriginal title to traditional lands was recognised both by statute and common law. The Crown lacked unreviewable prerogative power in relation to the Indigenous lands. If the Māori could prove that an individual or tribe members had been in continual possession and occupation of the lands in dispute under a native title which had not been properly extinguished, the applicant was free to maintain an action in New Zealand's courts to protect his title or occupation.<sup>40</sup>

The uneasy New Zealand Government responded by Land Titles Protection Act 1902, which overruled the Privy Council's reasoning. But the process continued. The Privy Council returned the same year to the subject in *Wallis v. Solicitor-General*. The solicitor-general defended the *Wi Parata* doctrine. According to him the transactions of traditional tribal lands took place in a legal vacuum. The Privy Council rejected this view: tribe's endowment of land was fully justiciable and enforceable transaction. It was the court's task to determine the breach of trust. The Court of Appeal's position was "certainly not flattering to the dignity or the independence of the highest Court in New Zealand."<sup>41</sup>

As a response, the New Zealand's lawyers published its first and only Protest of Bench and Bar in 1903. They stated that all Māori cessions of their traditional lands were acts of state beyond the cognisance and enforcement of the courts. Sir Robert Stout, the groups' spokesman, left open whether continued appeals to the Privy Council were worth considering.<sup>42</sup> Nine years later Stout CJ tried, however, to minimise the damages of the break with the House of Lords in *Tamihana Korokai v. Solicitor-General* (1912) where he took a more conciliatory line on indigenous rights. The Court of Appeal recognised the departure from *Wi Parata*, but only partly. In common law recognition of Native title was returned to the *ante* 1877 situation but the court still held that the Crown was the sole arbiter of its own justice and could terminate the Native title in court by its own declaration.<sup>43</sup> The Privy Council returned to the traditional property rights only in 1941, when it rejected the attempts to insulate Māori ancestral property rights from legislation.<sup>44</sup>

Outside this exacerbated atmosphere around the case law, the definition of Māori land rights continued also in legislation. The Liberal Party was in power between 1890-1911. In the first phase it followed the Australian model by organising a radical land-reform programme, based on the following: progressive land and income taxes; compulsory purchase of large estates; perpetual leases in place of freehold and cheap; state-subsidised loans for farmers. The Native Land Laws Commission (1891) criticised the Crown's lack of consistent land policy and the neglect of tribal structures but its recommendations were mostly overlooked.

39 NZSC, *Wi Parata v. Bishop of Wellington* (1877), pp. 78-80; *Mangakahia v. NZ Timber Co* (1881); NZCA, *Tamaki v. Baker* (1894), pp. 382-383; Morris (2004).

40 JCPC, *Nireaha Tamaki v. Baker* (1901), pp. 382-384.

41 Land Titles Protection Act 1902, s. 2; JCPC, *Wallis v. Solicitor-General* (1902), pp. 179-180, 188-189.

42 McHugh (1991), pp. 114-115; Tate (2005), p. 108.

43 NZCA, *Tamihana Korokai* (1912), p. 345.

44 *Hoani Te Heu Heu Tukino v. Aotea District Maori Council* (1941), p. 382.

The Government established a Validation Court to rule incomplete and disputed land transactions. To prevent speculation in Māori land, the private purchase was again limited and halted altogether between 1893-1900. In the West Coast Settlement Reserves Act 1892 was created a public trusteeship for 800 sq km of Māori land, which was offered in farm tracts to Pākeha on 21 years leases. The legislation of 1892-1893 enabled the Crown to declare any Māori land suitable for settlement and the Crown bought large areas of Central North Island for a cheap price. The Māori did not profit from this assistance to settlers.<sup>45</sup>

The appointment of James Carroll, a half-Māori as the Native Minister in 1899 changed the Liberal government's policy. The result was a compromise between the objectives of government and Kotahitanga. The Maori Lands Administration Act 1900 established Maori Land Councils to each Māori district, chaired by a president and having a Māori majority. The councils took over part of the NLC's functions, including the ascertainment of ownership, partition, succession, the definition of relative interests and the appointment of trustees for Native owners under disability. A council could also manage the alienation of land when there were more than two owners and Governor in the Council's consent, to lease the surplus land as an alternative to sale and to investigate land titles through block committees. The powers were submitted to the direction of the NLC's Chief Judge. This promising start was finally watered down. The Pākeha accused Carroll of introducing "Native landlordism". The Maori Land Settlement Act 1905 abolished the councils and their functions were taken over by Maori Land Boards. The Stout-Ngata Commission (1907-1908) was set to investigate the situation. As a result, the Crown's pre-emption was halted again. The Commission recommended that 1,600 sq km of Māori land should be leased with the income reserved for the owners to give them capital to develop their retained lands.<sup>46</sup>

Sir Apirana Ngata and Sir John Salmond drafted together the Native Land Act 1909 which rationalised and codified the legislation into a more coherent form. The act, combining elements of self-management and paternalism, included some new initiatives. The statutory extinguishment of Māori customary title demanded the Crown to prove its title to land. The new alienation provisions sought to restrict Crown purchase of undivided shares. Incorporations received a more secure basis and the resolution to accept the Crown's offer was possible only after a meeting of owners. This signified an attempt to reverse the policy of individualisation and returning control to Māori collective bodies. The Maori Land Boards had to confirm all sales, leases and mortgages of Māori land and they were given wide discretions to refuse alienation. The Crown preserved its advantage in land purchase by using proclamations, which prohibited an alienation of a block, to regulate land sales. The basic structure of the Native Land Act 1909 was preserved until 1993. On the other hand, the act prevented the courts to question or invalidate Crown grant, leases and other alienations proclaimed by the governor free of Native customary title. In 1912 the Native title question was again in the Court of Appeal with the *Tamihana Korokai* case. According to Sir

---

45 Native Land Purchases Act 1892, s. 2-4; West Coast Settlement Reserves Act 1892, s. 4; Native Land (Validation of Titles) Act 1893, s. 11; Havemann (1999), pp. 172-174, 391; Spiller (2001), p. 160; McHugh (2004), p. 270.

46 Maori Lands Administration Act 1900, ss. 6, 9, 22; Maori Land Settlement Act 1905, ss. 2-3; Havemann (1999), pp. 174-175; Spiller (2001), pp. 163-164. A settler could acquire a restricted amount of Māori land only by a declaration of intent.



Robert Stout CJ a statutory recognised title had been created only with the 1909 legislation, which was against the Privy Council's ruling from 1901. The other judges supported Stout's narrow approach. The Crown claim had to be made by following the formalities of the 1909 act. As the Crown had never made a formal act evidencing the extinguishment of Native title, to the NLC was recognised as a jurisdiction to determine the customary owners. After this decision the courts accepted the traditional tribal property rights only to the extent of statutory recognition.<sup>47</sup>

After the ascendancy of Reform Party came to power the policy changed again. The consolidation of Māori blocks since 1911 prepared the last great wave of Government land purchase (1913-1920). The Native Land Amendment Act 1913 allowed the Government agents to purchase undivided shares, even if rejected by a meeting of owners. Poverty forced also many Māori to sell their lands. Only from the 1920s was it realised that further acquisition of Māori land would drive the increasing indigenous population into landless position, relying on the state's social care. Sir Maui Pomare introduced the Native Trustee Act 1920 which gave the management of Māori land to an independent Native trustee who would provide finance for land development. Between 1922-1953 ten Trust Boards were created by tailored legislation to administer *raupatu* money received from the government, under extensive ministerial oversight and audit. First was the Arawa Lakes Agreement (1922). A Royal Commission (1927) was established to inquire about the earlier confiscations. The result was the first statute based compensations for Taranaki tribes by the Native Purposes Act 1931. Sir Apirana Ngata became a prominent figure in Māori politics. As the Native Minister of the Liberal government (1928-1934) he was able establish in 1929 the statute-based Māori Development Schemes through which state funds were made available for Māori farming to create a sound economic base for tribes. The programme was unluckily hit by the Great Depression of the early 1930s.<sup>48</sup>

The Labour Party, in power since 1935 with the support of the Rātana Party, increased the state's role in Māori land management and development. The ascendancy of Peter Fraser as Prime Minister signified a new start in negotiations concerning claims, including Ngai Tahu, Waikato, Taranaki and Oakei. The Native Purposes Act 1943 offered a more flexible tenurial device as an alternative to incorporations in the form of trusts. It became in the 1950s the most important means of Māori land ownership. In 1944 the Waikato-Maniapoto Maori Claims Settlement Act was passed. The Native Department (since 1945 the Department of Maori Affairs) became a large organisation, especially concentrating on land settlement and management questions. The administration of large land blocks by the department continued until the 1980s when the Ministry of Maori Affairs recognised the importance of *whānau* and *hapū* working and managing their land themselves.<sup>49</sup> The legislation was consolidated with

47 Native Land Act 1909, ss. 84-86, 209; NZCA, *Tamihana Korokai v. Solicitor-General* (1912), s. 345; McHugh (1991), pp. 116-117; Karsten (2002), pp. 92-93; Spiller (2001), p. 167.

48 Native Land Amendment Act 1913, s. 109; Native Trustee Act 1920, ss. 3-4; Native Purposes Act 1931, ss. 46-66; Te Arawa Lakes Settlement Act 2006, Preamble, (9); Havemann (1999), pp. 174-175; Spiller (2001), pp. 150, 168; McHugh (2004), pp. 271-272; Smith (2005), p. 149. Altogether, the Māori lost between 1900-1930 over 15,000 sq km of land.

49 Native Purposes Act 1943, s. 8(1); Durie (1998), pp. 141-142; Sharp (1998), p. 57; Spiller (2001), p. 173. Section 438 allowed the establishment of alienation and utilisation trusts.

the Maori Trust Boards Act 1955. Unlike the incorporations, a board is able to acquire land or interest in land with the prior consent of the minister and sell, sublease or otherwise dispose of the land. It is required to keep an updated roll of beneficiaries based on birth-right.<sup>50</sup> More localised, smaller parcels of land (s. 438 trusts) are defined in the Maori Affairs Act 1953.<sup>51</sup> The Maori Appellate Court (MAC) has defined them as *pūtea* trusts of one block.<sup>52</sup> The commercial powers of trust boards are broadened with the Maori Trust Boards Amendment Act 1988.<sup>53</sup>

The rapid urbanisation changed the overall situation. The Hunn Report (1960) concluded that collective ownership operated as an obstruct to effective economic utilisation: there were even thousands of owners for one block. The number of titles added each year was equal to 20% of the Māori population. The Crown should buy up Māori land in trust for Māori people which would be opened to Māori farmers on open ballot. The Prichard-Waetford Committee Report (1965) continued with Hunn's reasoning. Common ownership and economic utilisation were incompatible objectives. The committee recommended the removal of a part of statutory protections of Māori freehold land. Despite the Maori Council's counterarguments the National government passed in 1967 the Maori Affairs Act, which brought profound changes: the Māori land could be converted to general land if held by not more than four joint owners; Māori trustees could sell Māori lease lands to owners even if not all owners agreed; shareholders lost their status as landowners and became shareholders in incorporation; special arrangement in the entitlement of persons dying intestate was abolished; and the MLC's jurisdiction was again reduced, with 960 sq km of land being compulsorily concerted to general land. In 1986 only 12,000 sq km of Māori-owned land was left (4% of the original amount). The uninhabitable lands had become national parks.<sup>54</sup>

### 6.2.3. *Renewed Importance of Land*

The Crown's attitude to Māori lands began to change gradually in the 1970s while Māori protests increased. Matiu Rata, the Labour Government's Minister of Maori Affairs, used his opportunity to introduce the Maori Affairs Amendment Act 1974 which returned the *status quo ante*. In the following year the Waitangi Tribunal was established which could make recommendations to the government on claims by Māori that the Crown had breached the principles of the treaty. Only the amendment of the act in 1985 led to real change when the tribunal was given retrospective authority to make recommendations on breaches since 1840. The reform of Maori Affairs Act took a long time. The Māori rejected the Maori Affairs Bill of 1978, but the Maori Council's request to rewrite the bill was accepted by the responsible

---

50 Maori Trust Boards Act 1955, ss. 24, 42-43.

51 Maori Affairs Act 1953, s. 438.

52 MAC, *Re an Appeal by the Ngai Tahu Maori Trust Board* (1982), ss. 15-16.

53 Maori Trustboards Amendment Act 1988, s. 3.

54 Maori Affairs Amendment Act (1967), ss. 6, 31; Report on the Department of Maori Affairs (1960), pp. 48-49, 54; Report of the Committee of Inquiry into Laws Affecting Maori Land and the Powers of the Maori Land Court (1965); Durie (1998), pp. 135-136, 139; Havemann (1999), pp. 172-174, 391. In the late 1990s, 260 sq. km of Māori lands were leased in perpetuity as farmlands, commercial sites and urban residential properties.

minister. The new draft was withdrawn by the changes of government in 1984 and 1990. Only in 1993 – after several hearings and changes - was the Te Ture Whenua Maori Act enacted. It has a significant Māori influence. The status of incorporations is returned and the traditional land made difficult to alienate. The incorporations may hold land for investment purposes; undertake business or action and enter to transaction, unless the legislation or incorporations' order prevents doing so. They can redefine or amend their objectives by resolution.<sup>55</sup>

Between 1977-1979 the Orakei Maori Committee Action Group occupied the Bastion Point area in Auckland for 506 days. The government had proposed to divide 24 hectares of land for residential purposes. The original reserve of Ngāti Whātua had been diminished several times and in 1951 they were relocated from the rest of land. The tribe was offered in 1977 the return of 13 hectares of land and \$200,000 in cash which divided the tribe. Finally the court gave an eviction notice and the occupiers were arrested by the police. The final outcome was a *hapū* reserve held in common use and benefit. The administrative body is the Ngati Whatua o Orakei Reserves Board, which has an equal representation on the trust board and Auckland City Council. In 1995 a similar drama took place at Moutoa Gardens in Whanganui on a smaller scale. This time the protesters did not gain as much support while there was no more novelty value. Both sides in the question radicalised and the case did not receive an immediate solution.<sup>56</sup>

A challenge to the Māori was from 1984 the Labour government's privatisation programme, which divided the Crown land to Landcorp (arable land) and to the Department of Conservation, the State Owned Enterprises (SOE, urban sites) and Forestcorp (other valuable Crown land). The State Owned Enterprises Act 1986 was objected to by the Maori Council. Its s. 27 fully protected the availability of Crown land only for claims lodged with the Waitangi Tribunal before the act. The parliament amended hastily the law with s. 9 mentioning in the general clause the treaty principles. The Maori Council appealed to the Court of Appeal by claiming the precedence of s. 9. The court ruled that the principles of the treaty included sovereignty, partnership, active protection and consultation. Special provisions were included to the Treaty of Waitangi (State Enterprise) Act 1988 to provide a protective mechanism whereby the Crown could sell SOEs off again. The tribunal was granted the power to make a binding ruling in respect of land transferred to a state-owned enterprise. All land titles would carry a memorial to warn a purchaser that the land could be resumed by the Government if there was a successful claim before the tribunal and compensation would be paid. Also the SOEs had a right to ask the tribunal to order the memorials be lifted. The tribunal could order a memorial be lifted from the title if there were no claims or if it was not well founded or upheld. Restructuring of the railways had started before the SOE Act. The Crown avoided expensive litigation by creating in 1991 a joint research team of the National Maori Congress

---

55 Maori Affairs Amendment Act 1974, ss. 4-5; Te Ture Whenua Maori Act 1993, s. 253; Treaty of Waitangi Act 1975. 8A-8B, 8D, 8HB-8HF; Treaty of Waitangi Amendment Act 1985, s. 3; Durie (1998), p. 136; Havemann (1999), p. 392; Spiller (1991), p. 175. In the late 1970s the Labour dominance in Māori politics was becoming to end. In 1980 Matiu Rata established the Mana Motuhake party.

56 Orakei Act 1991, ss. 6, 8, 20, 25; Durie (1998), pp. 124-129.

and the Crown and tribes to research possible claims.<sup>57</sup> The recent amendment (2012) to the SOE Act gives an opportunity to establish mixed ownership companies (up to 49% of shares can be sold).<sup>58</sup>

The responsible minister, however, introduced another scheme to accommodate surplus Crown properties, known as the Consultative Clearance Process (CCP). This process was administered by the Department of Survey and Land Information. It is obliged to notify *iwi* of Crown land intended for disposal. This gave *iwi* a chance to give a view on reasons within one month for withholding the sale. The claim has to be lodged with the Waitangi Tribunal. The lands are classified in the claim according to the settlement policy to A, B and C lands. Category A lands are essential to the settlement of claims. Category B and C lands have no special importance to a claim but they are important to a tribe. The Māori have criticised the process as giving too much power to officials in deciding the merits of claims. The Crown has further used the CCP to hold strategic lands. The Crown Settlement Portfolio holds all surplus properties within *raupatu* boundaries; claim-specific landbanks hold land for a specific claimant and regional land banks where a claim-specific land bank has not been established and the land falls outside a Crown settlement Portfolio.<sup>59</sup>

By the 1980s the mismanaged Maori Land Boards were near extinction and the Māori demanded direct devolution to the tribal system. In the late 1980s' judgments the Court of Appeal required the government to negotiate arrangements with the Māori to protect the availability for claims settlement of Crown land and related assets to be transferred to state enterprises. The court reserved the right to impose its own arrangements in the event of the parties failing to come to agreement.<sup>60</sup>

The Waitangi Tribunal's *Muriwhenua Report* (1997) was in the first case to consider the Māori interpretation of early transactions. The Crown had breached the treaty principles of protection, honourable conduct, fair prices and recognition. The government had failed to properly purchase the land. The tribunal questioned the Crown's notion of tenure and the onus of proof for the Māori. It signalled that it was ready for the first time to use binding recommendations.<sup>61</sup>

The river, foreshore and seabed rights have been a difficult and important issue. The Crown established early that the seabed, foreshore and the beds of estuaries and rivers belong to Crown ownership. In 1912 the Court of Appeal ruled that the NLC has jurisdiction to investigate a title to the bed of navigable lakes which were equalled to land.<sup>62</sup> In 1929 the NLC rejected further Crown claims to lakebeds. The two longest cases on rivers and seabed were the Whanganui River and the Ninety Miles Beach. The litigation on Whanganui riverbed

---

57 State Owned Enterprises Act 1986, ss. 9, 27; Treaty of Waitangi (State Enterprises Act) 1988, ss. 9, 27; NZCA, *New Zealand Maori Council v. Attorney-General* (1987); Durie (1998), p. 184; Christie (1997), pp. 47-48; Havemann (1999), pp. 176-177. The Court of Appeal has included in the scope of s. 9 coal, timber, railways and educational institution property.

58 State Owned Enterprises Amendment Act 2012; *New Zealand Maori Council and Others v. Attorney-General and Others* (2013), s. 1.

59 Durie (1998), pp. 134-135.

60 NZCA, *New Zealand Maori Council v. Attorney-General* (1989); Ritchie (1995), p. 127; McHugh (2004), p. 358.

61 WT, *Muriwhenua Land Report* (1997), s. 13; Mutu (2011), pp. 62-63.

62 NZCA, *Tamihana Korokai v. Solicitor-General* (1912), pp. 345-346.

started in 1938. The Maori Purposes Act 1951 gave the Court of Appeal a special jurisdiction on considering in the Whanganui question whether the Māori held the bed according to custom and usage before 1903. The court ruled in 1955 that the Māori own a riverbed as part of territory, recognised by statute, but seven years later added that the granting of freehold title has transformed the traditional rights into riparian rights, as part of the property of the owners under the *ad medium filum aquae* rule, and, therefore, there does not exist a separate *iwi* title to the river. The Māori have the right to enforce their claims only by reliance on a statute which recognises their rights. In 1963 the court ruled that the statutes had for a long time recognised the ancient customs and usage of Māori rights to lands. A statute land placed a burden on the Crown's paramount title to all land. The MLC could make a freehold order to fix the boundary of land fronting the sea at a low-water mark but otherwise the grant took effect to the high-water mark. The foreshore remained with the Crown, which was freed from the obligations of the Treaty of Waitangi. In fact, the Supreme Court had ended three years previously the practice of MLC to allow titles below high water mark. It held that the Harbours Act 1950 demanded a special act to grant foreshore and, therefore, excluded the MLC's jurisdiction to issue a freehold order. Where the title to adjoining has not been investigated, the land between the high and low water marks was vested in the Crown. The Waitangi Tribunal released in 1999 its *Whanganui Report*, where it held that the Māori customary ownership was never lost and the *ad medium filum aquae* rule had no application. It recommended that the Crown should recognise and protect the Māori rights to rivers. The settlement was made in 2009, where *iwi* co-manages the river with the local council and the government agencies in a way, which benefits the cultural, environmental, social, political and economic development of *iwi*.<sup>63</sup>

A more recent process of river rights has dealt with the country's longest river, Waikato River. It is for Māori *tupuna ara* (ancestral river) and *wāhi tapu*, and the water has *mauri* (force of life). The Court of Appeal has also recognised it as *taonga*, related to *mana*. In *Waikato River Settlement* (2010) the Crown has recognised its failure to protect the special relationship of the Waikato-Tainui with the river. The river contributes to New Zealand's culture, society, environment and economic well-being. There has been created a vision and strategy called *Te ture whakaimena o te awa o Waikato* (customary law of Waikato River). The strategy includes a resource-consent process and is part of the Waikato Regional Politics Statement. The Waikato River Authority directs through its vision strategy the following: the restoration and protection of health and well-being of the river for future generations; the promotion of an integrated, holistic and co-ordinated approach for the implementation of vision, strategy and management of the river; the funding of rehabilitation initiatives; and the local authorities by giving advice on how to amend the RMA planning, including the Waikato River Integrated Management Plan. The Guardians Established Commission is committed to cultural, social, environmental and ecological well-being. The river management agreement includes provisions on customary acts. The ownership of managed property is regulated,

63 Harbours Act 1950, s. 150; Maori Purposes Act 1951, s. 36; Foreshore and Seabed Act 2004, ss.3-6; *Re Ninety Miles Beach* (1955); *In re the Bed of the Whanganui River* (1962); *Re the Bed of Whanganui River* (1963); *Re Ninety Miles Beach* (1963); NZSC, *Re Ninety-Miles Beach* (1960); WT, *Whanganui River Report* (1999), s. 11; Spiller (2001), p. 179; McHugh (2004), p. 348; Young & Belgrave & Bennion (2005), p. 49; Anaya (2011), p. 44.

based on a co-management agreement. The government transfers to the Waikato Raupatu River Trust \$1 million annually for 30 years for the funding of comanaged projects. The trust has also a first refusal right with regard to Huntly power station and coal and mining permits related to Waikato River. The Rauhawa Trust Board and other smaller groups who litigated against the Crown on the basis of unequal treatment, settled their claims in 2010. A Waikato River Cleanup Trust has been established to secure the recognition of customary acts and contribution.<sup>64</sup>

In 2006 a settlement was reached on Te Arawa Lakes which preserves the existing structures on lakebeds with commercial activities, vested in the local *iwi*. The settlement has established a Rotorua Lakes Strategy Group with bylaw-making powers. The freehold estate in the lakebeds is inalienable. *Iwi* has the rights to public utilities without authorisation and the settlement recognises a fishing redress. On the other hand, the settlement does not grant any rights to water or aquatic life. The Crown has also set limits to obligation related to needs attached to lakebeds and to liability of contamination. The common law rights of navigation and recreational activities are preserved. To some lakes the Minister of Conservation can appoint guardians, who give recommendations on environmental, ecological and social effects to lakes.<sup>65</sup>

In the *Ngāti Apa* case (2003) the Court of Appeal changed its view on the MLC's jurisdiction to investigate title to land over the foreshore and seabed and answered positively, based on the common law doctrine of Native title. A *hapu* could prove customary ownership of foreshore or seabed. The remnant customary rights still subsisted in law over the beaches and seas.<sup>66</sup> The decision had a significant impact in New Zealand. It was a serious test for the government on Māori rights because access to the ocean was an essential question of great public interest and controversy. There was fear that the Māori could prove their exclusive customary ownership over the foreshore and seabed. The government responded by announcing that the uncertainty in law would be replaced by a statute which would both recognise the Māori customary rights and ensure access for all New Zealanders to beaches. The Māori arranged a mass demonstration, a 50,000 strong Hikoī, against the legislation, which was criticised also by WT, but the parliament enacted the Foreshore and Seabed Act 2004, which transferred the public foreshore and seabed to the Crown. The Te Ture Whenua Maori Act applied still to Māori freehold land, but not to public foreshore and seabed which could not become freehold land. *Rūnanga* of Ngai Tahu asked the CERD Commission to consider the new act against New Zealand's obligations under the international treaty. CERD found that the legislation discriminated against Maori customary rights and recommended the country to resume a dialogue with the Māori to seek ways of lessening its discriminatory effects. New Zealand Government, whose answer was negative, invited UN Rapporteur, Professor Stavenhagen, to estimate the situation in 2006. Also he criticised the law and suggested its repeal or significant amendment. The government had again a negative attitude to critique. In 2007 the CERD

---

64 Ngati Tuwharetoa, Rauhawa and Te Arawa River Iwi Waikato River Act 2010, ss. 4, 10-12, 14-16, 23, 36; Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Preamble, (1)-(2), ss. 4, 9, 12, 23, 47, 62, 75, 80; EC, *Chief Executive of the Minister of Agriculture and Forestry v. Waikari Regional Council* (2006); NZCA, *Paki v. Attorney-General* (2005), s. 87; Aho (2006), p. 108; Aho (2008), pp. 240-242.

65 Conservation Act 1987, s. 6X; Te Arawa Lakes Settlement Act 2006, ss. 23-27, 31-34, 38, 47, 75, 77.

66 NZCA, *Attorney-General v. Ngāti Apa* (2003), ss. 106-108, 116.

Commission returned for a second time to the question by demanding the Government to renew its dialogue with the Māori. New Zealand's foreign minister held CERD's attitude "meddlesome", but the Government promised finally in 2009 to repeal the act if a suitable replacement could be developed.<sup>67</sup>

In 2011, the Marine and Coastal Area (Takutui Moana) Act replaced the Foreshore and Seabed Act and restored the intrinsic, inherited coastal interests neglected by the previous law. The new legislation recognises the exercised *mana tuku iho*. To obtain a customary marine title, a Māori group has to prove that it has used and occupied the area without substantial interruption since 1840. The new law includes a burden of proof – clause, where the customary interest is deemed not to have been extinguished. There is a period of six years by which to assert customary interest claims. Central to all coastal protection and conservation is co-operation with the local *iwi* and *hapū*. To *wāhi tapu* areas can be appointed wardens.<sup>68</sup>

The doctrine of fiduciary duty has been under debate in New Zealand. Despite Sir Robin Cooke's reference to the Crown's fiduciary-like duties in the SOE cases the doctrine has not developed in New Zealand. The courts have occasionally referred to fiduciary duty in situations concerning entities charged with administrative assets for Maori. The Treaty of Waitangi Fisheries Commission held fishing quota for *iwi* under broader considerations of equity than those which bind the conscience of private trust funds. The Court of Appeal rejected the Canadian models when it held that a local authority does not hold a land compulsorily acquired and never again used for requisitioned purpose as a fiduciary for the original Māori owners. Nevertheless, in general, there are few Maori assets left in direct government control in the North American meaning. The doctrine has had also little influence as a tool for interpreting the statute law or for shaping the administrative law, as it has been overshadowed by treaty principles which are were directly incorporated into the statutory scheme, making the other interpretative devices needless. In SOE cases the Court of Appeal held that the Crown is responsible for ensuring it safeguarded sufficient assets to make available for the settlement of treaty claims. The court demanded the Crown's retention of assets otherwise unencumbered in law by Māori proprietary interest. The talk was based on interpretation of s. 9 of the State Owned Enterprises Act 1986 which subjected the statutory regime to the treaty principles. The doctrine of fiduciary duty functioned here as a canon of interpretation, mingling with other interpretative devices.<sup>69</sup>

---

67 New Zealand Foreshore and Seabed Act 2004; WT, *Report on the Crown's Foreshore and Seabed Policy* (2004), s. 5.3; CERD (2005), Decision 1(66), art. 7; Richardson & Imai & McNeil (2009), p. 279; Knefla & Westra (2010), pp. 22-24, 192; Anaya (2011), pp. 53-56.

68 Marine and Coastal Area (Takutui Moana) Act 2011, Preamble, ss. 5-6, 45-47, 51, 56, 78-80, 98.

69 NZCA, *Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission* (2002); *Attorney-General v. Maori Land Court and Proprietors of Tahora 2F2 and Wairoa District Council* (1998); McHugh (2004), pp. 534-535

### 6.2.4. Whenua Tūpuna

*Whenua Tūpuna*, or ancestral lands, are important to Māori identity. The Maori Affairs Act 1953 recognised two forms of Māori land: freehold land and customary land, which are inalienable.<sup>70</sup> The present legislation lists four categories: Māori customary land, Māori freehold land, general land owned by Māori, and Crown land reserved for Māori. The customary land is defined as “land... held by Māori in accordance with *tikanga Māori*...” The Māori freehold land’s beneficial ownership is granted by the MLC’s freehold order.<sup>71</sup> The traditional Māori land was held by *hapū*. It was necessary to Māori due to: spiritual growth and economic survival; contributing to sustenance, wealth, resource development and tradition; strengthening *whānau* and *hapū* solidarity; and adding value to personal and tribal identity and well-being of future generations. Internal, transferable use rights were distributed among ancestral descendants. A customary Māori title included *take tipu* (ancestral land passed down according to Māori custom), *take raupatu* (land acquired by conquest and occupation), *take ōhākī* (land allocated through the wish of a dying chief) and *take tuku* (gifted land). For all land an entitlement was conditioned by occupation and continual presence (*ahi kā*). After 1840 *ariki* used veto over disposition of land in consultation with other chiefs, although it was not accepted by the colonial authorities.<sup>72</sup>

Māori land rights, based on *tikanga Māori*, were recognised by the Colonial Office and New Zealand’s authorities in the early colonial period. The establishment of the NLC signified rapid transformation of Native title lands to Crown-derived tenure. The Native title was extinguished either by statutes or by the tribal owners themselves while the expropriatory power rested with the Parliament alone. The customary land rights were reaffirmed by the Court of Appeal in *Attorney-General v. Ngati Apa* (2003). Very little customary title is left today, although customary tenure has survived in a residual form. Non-territorial Native title has survived in some *urupā* (ancestral burial sites), in the collection of flora and fauna for medicinal and decorative purposes and access to and use of tribal fisheries. These are called Aboriginal servitudes.<sup>73</sup>

Already before the treaty the New Zealand Company reserved lands for Māori during the land transactions as tenths. The Native Reserves Act 1856 allowed the native owners to consent the Crown’s holding title to the land after which the commissioners could sell, lease and administer the land for their benefit without consultation. In 1862 the functions of the commissioners transferred to the governor’s responsibility. The reserved lands could be vested in the Crown by Order in Council by a declaration of owner assent. In 1882 the title to reserves was transferred to a public trustee. The reserve land leases were standardised to 21 years by the Westland and Nelson Native Reserves Act 1887. The Māori could obtain the title as trustees from 1920. W.L. Rees established a block committee system of land

70 Maori Affairs Act 1953, s. 2.

71 Te Ture Whenua Maori Act 1993, ss. 4, 129, 145.

72 WT, *Ngai Tahu Report* (1991), s. 25; McHugh (1991), pp. 76, 108; Durie (1998), p. 116. According to *ahi kā* (burning fire) a person absent for three generations lost all claims to land. The fire became *mātaotao*, cold.

73 Treaty of Waitangi Act 1975, s. 6A; NZCA, *Attorney-General v. Ngati Apa* (2003), s. 116; McHugh (1991), p. 134; Durie (1998), p. 115. Today 6% (15,000 sq km) of New Zealand’s land space (13% in North Island) belongs to Māori freehold land, divided in 26,000 titles. Some 80% is non-arable land.



management system to the Poverty Bay area to resist the individualisation policy. This led to the East Coast Native Trust which developed the land itself. The Native Land Court Act 1894 allowed incorporation for the purposes of alienation. This was further developed in the Maori Land Laws Amendment Act 1903 which defined incorporations as means of Māori management of freehold lands under the NLC's jurisdiction. Apirana Ngata, a Māori MP, was an active advocate of this policy. Also Ngapuhi *iwi* established treaty committees to determine the ownership of land blocks before the NLC's investigations. The Tuhoe *iwi* was able to gain a temporary legal victory in the form of Urewera District Native Reserve Act 1896 which established the Urewera Native Reserve with 2,600 sq km land determined by a joint commission. It provided a system of tribal management for all Tuhoe lands, but finally the region was regrouped by the Urewera Consolidation Scheme to blocks between 1919-1927, which ended the reserve, and most of lands went to the Crown.<sup>74</sup>

The acquisition of land continued still after the war to some extent. The long leases of Māori lands lasted for generations while the value of leasing rates dropped significantly. The rents were reviewed every 21 years. The Maori Affairs Act 1953 gave the MLC powers to set aside lands as Māori reserve based on historical significance or spiritual and emotional association of Māori with the land. The long hand of *Wi Parata* reasoning was codified to the act which prevented attacks against any Crown grants even if the native title was imperfectly or partially extinguished.<sup>75</sup> The Maori Reserved Land Act 1955 combined 43 statutes and set rules for reserved lands on national basis. It covers land whose title is vested in a Māori trustee. The tenants are given automatic right of renewal. The lessees are favoured over owners and the Māori trustees are given powers to purchase lands for ongoing sale to lessees. The Trust Board can appoint a Council of Elders to advice the board in questions related to *tikanga*, *reo* and *kāwa*.<sup>76</sup>

In 1975 a Crown commission suggested more dense reviewal of rents. The administration of the lands should be vested in incorporations. It was recognised that the nature of Māori land ownership had changed. Reserved lands were administered by regional organisations remote from *hapū* and traditional interests. A governmental review team (1991) proposed further a plan to enable the owners to resume their ownership and to buy back the improvements. The following reports were not in the Māoris's favour as they lacked sufficient compensation. Although the Maori Reserved Land Amendment Bill 1996 aimed at fixing these conditions, the policy still reflected close collaboration between the settlers and government in a way where the Māori lands should be used in a productive manner. The Foreshore and Seabed Act 2004 gave the High Court the power to establish a foreshore and seabed reserve to acknowledge *kaitiakitanga* over a specified area and enable it to be held for the common use and benefit. A group must show an uninterrupted occupation and use of the area since 1840.

74 Native Reserves Act 1856, ss. 6, 14; Native Reserves Amendment Act 1862, s. 7; Native Reserves Act 1882, s. 8; Westland and Nelson Native Reserves Act 1887, s. 3; Native Land Court Act 1894, ss. 53-60; Urewera District Native District Reserve Act 1896, s. 2; Native Trustee Act 1920, s. 4; McHugh (2004), pp. 268-270; Spiller (2001), pp. 163, 169.; O'Malley, pp. 227-245. Although a partial failure, thanks to Rees' plan the East Coast has remained one of the major areas still in Māori ownership. Most Urewera lands later became part of a national park.

75 Maori Affairs Act 1953, ss. 158, 439-439A.

76 Maori Reserved Land Act 1955, ss. 3, 5-6. See also: Maori Trust Boards Act 1955, ss. 15, 23; Maori Trustee Act 1955, ss. 13-24.

The members of a reserve board managed the reserve as guardians. The Chief Executive of the Ministry of Justice keeps the Public Foreshore and Seabed Register. The legislation was renewed in 2011 to strengthen the *iwi* rights. The responsible board in Te Puni Kōkiri has been given wide powers of discretion on general land aimed at the benefit of the Māori to develop the use of land. When there is disagreement between the Regional Council and the reserve board, the board can seek a decision from the Environment Court.<sup>77</sup>

The process to stop further alienation of Māori freehold land started with the Māori Affairs Act 1974. The final outcome after many revisions was the Te Ture Whenua Maori Act 1993. The act reformed the incorporations back into the form of trusts where the shareholders are the owners while day-to-day activities remain in the hands of an elected committee of management. The act reaffirms Māori concepts of land and represents a legal interpretation of *whānau* and *hapū* and their joint interest in a particular piece of land. Under the act it has become easier for owners to change general land back to Māori freehold land. Māori incorporation is commercially designed to manage whole blocks of land. In all, 15% of landowners may apply to the Maori Land Court to establish incorporation. It can also wind it up. Māori incorporations must have a constitution, defining the general meetings of shareholders, voting, committees of management and shares. The shareholders nominate and elect the committee members whose term of office is three years. The election must be notified to the MLC which can also suspend members. The Māori freehold land can only be transferred or sold when 75% of shareholders agree and the MLC confirms it. Further, the land must first be offered to the preferred classes of alienee, i.e. members of *hapū*. An exception to restrictions is the investment lands acquired afterwards. The land can in general be leased up to 21 years. The longer leases must be agreed by the shareholders' special resolution. The incorporations can mortgage Māori land. There is, however, a risk that in the case of insolvency the mortgagee can sell the land on the open market without consulting the incorporation or shareholders. The incorporations finances are controlled by the general meeting of shareholders, auditor and MLC. There can be paid a dividend to shareholders.<sup>78</sup>

The Te Ture Whenua Maori Act recognises Māori land as *taonga tuku ihu*, an asset inherited from earlier generations. The purpose of the act is to make sure that the owners of Māori land keep the land for future generations. A trust is an equitable obligation binding a trustee to deal with property over which he/she has control for the benefit of beneficiaries, anyone of whom may enforce the obligation. The trustee may also be a beneficiary. The landowners nominate a trustee whose role is either responsible, as a custodian or advisory. In general, he/she has to maximise the assets and minimise the liabilities of the trust. Some trust funds can be spent only for Māori community purposes. The act recognises five different trusts: *pūtea* trusts are small, uneconomic interests to pool owners' interests together; *whānau* trusts allow a family to bring together their Māori interests for the benefit of the family and their descendants and are together with *pūtea* share management trusts; *ahu whenua* is the most common trust which promotes the use and administration of the land in the interest of the owners; *whenua tōpū* are *iwi* or *hapū* designated to facilitate the use and administration of the

77 Maori Affairs Restructuring Act 1989, ss. 19, 27-28, 31-32, 47, 62, 64-66, 83; Resource Management Act 1991, ss. 2, 82A; New Zealand Foreshore and Seabed Act 2004, ss. 10, 36(1)(b), 37(4); Durie (1998), pp. 139-141; Tribal Customary Rights Orders (2005), pp. 3, 6, 8.

78 Te Ture Whenua Maori Act 1993, s. 150B; Maori Incorporations (2002), pp. 8-12, 15-16, 24, 27, 30-31.

land in the interest of tribes and extended families, often as part of settlements; and *kai tiaki* trusts are available for a minor or disabled individuals unable to manage their affairs. Their establishment follow a simplified form. The MLC has the power to terminate a trust if it falls short of expectations.<sup>79</sup>

Proof of Māori land rights involves evidence of custom or usage in relation to the claimed land at the time of British assertion of sovereignty in 1840. If the claimant group proves exclusive occupation, they have title equivalent to an inalienable fee simple estate. Proof of customary rights or uses not amounting to exclusive occupation could result in more limited interests. Where title has been established before colonial encounter, it is presumed to continue until shown to have been extinguished. The continued land alienation has led to major challenges in Māori advancement. The social cohesion between *whānau* and within *iwi* has been undermined by the individualisation of land titles and the forced abandonment of collective ownership. There is a challenge of two coexisting systems of land titles and land registration. The titles have become increasingly crowded and the land is not used as effectively as it could.<sup>80</sup> Some modern settlements have revoked the reserves, replaced by alternative arrangements.<sup>81</sup>

### 6.2.5. *Land in the Associated States and Territories*

The first attempt to land reform in the Cook Islands was made by Resident Moss in the early 1890s. In 1899 on the main island was established the Rarotonga Land Board. From 1902 Resident Gudgeon (now also chief judge) and the Land Titles Court began to investigate land titles and determine ownership based on “custom or other legal means”. Gudgeon CJ wanted to limit the chiefs’ control on land. In the Cook Islands Act 1915, to which the land legislation is still largely based, all land is vested in the Crown. The Crown’s title to land is to any title vested in any person for an estate in fee simple, or title lawfully held in any person by virtue of custom or usage before the commencement of the act. The Crown may take land for public purposes against adequate compensation. The Crown may grant land in fee simple or grant leases, licenses, easements or other limited estates, rights or interests in any Crown land. The interest in land is determined in the Cook Islands by statutes, common law and custom. Customary land is defined as “land which is vested in the Crown is held by Natives or the descendants of Natives under Native customs and usages of the Cook Islands”. Every title to and interest in customary land is determined according to the ancient customs and usage of indigenous people. The High Court Land Division has jurisdiction to investigate titles to customary land and to determine the relative interests of owners. If the court makes an order

---

79 Te Ture Whenua Maori Act 1993, ss. 213-218.

80 Durie (1998), pp. 116-117, 137-138; Spiller (2001), p. 177; Richardson & Imai & McNeil (2009), pp. 276-277.

81 Te Arawa Lakes Settlement Act 2006, s. 21; Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008, s. 78.

in favour of a person who operates to vest a legal estate in fee simple, the land becomes Native freehold land.<sup>82</sup>

There is, however, a general prohibition against the alienation or disposition of customary land. A will cannot change an interest in customary land. A Native freehold land can be alienated only by lease, licence or easement for a maximum of 60 years with a right of renewal. The alienations must be confirmed by the Land Division of the High Court. The native freehold land can also be mortgaged as a security for a housing loan, but the mortgagee cannot obtain title to the land. A minimum of three persons owning native freehold land may apply to the High Court to be incorporated as a body corporate, which has the power to occupy and manage the land as a plantation or farm, engage in farming or other operations on the land, use the land for the growing, felling, milling or marketing of timber, or to conduct other enterprises on the land. The body corporate may mortgage or lease the land under the same conditions as individuals.<sup>83</sup>

The land tenure system in Niue is principally based on custom. The land is exclusively reserved to the use of the Niueans. It is vested in the Crown but *mangafaoa* (family units) hold the land collectively on behalf of all its members and *leveki mangafaoa* (trustee) acts on behalf of the family. An individual can belong to several *mangafaoa*. A title to land is determined according to the custom and usages of the Niuean people by ascertaining and declaring the *mangafaoa* of land by reference to a common ancestor. Land may be occupied by the cabinet's order and cultivated and managed on behalf of *leveki mangafaoa*, owners or those interested in land. It can take title to land for Crown for any public purpose and the rights vested absolutely in the Crown. The land can be also set aside as a reservation for common use of the residents. The owners are entitled to compensation. The cabinet may also retain revenue to develop the land. When the land is already in public use, a written consent of the owner, trustee or assembly is required.<sup>84</sup>

In Tokelau all land is vested in the Crown as the ultimate title holder. The three categories of land are land held by the Crown (foreshore, land for public purposes and land alienated voluntary to the Crown); land held by the Crown subject to customary title (land under pure custom, land subject to non-customary rights, land subject to Crown lease); and land subject to an estate in fee simple (as 1 January 1949). All customary land is vested in the Crown and is held by the Crown to customary title. The alienation of land is only possible according to local customs and usages to a Tokelauan or to the Crown. The customary land includes *nuku* (village land), *kaiga* (family land) and church land. Most of the land is held in communal *kaiga* ownership. A senior male member of *kaiga* exercises the control over the land in consultation with the other members. The disputes are solved by the village councils. The responsible ministry has the right to take land for public purpose, which therefore becomes absolutely

---

82 Cook Islands Act 1915, ss. 421-422, 445; Constitution of the Cook Islands (1965), art. 40; Gilson (1991), pp. 84, 93, 116.

83 Land (Facilitation of Dealings) Act 1970 (Cook Islands), s. 22-24; Cook Islands Development Bank Amendment Act 1980 (Cook Islands), s. 31; Ntummy (1993), pp. 18-19.

84 Niue Act (1966), s. 462; Niue Amendment Act (No. 2)(1968), s. 11; Land Ordinance 1969 (Niue), s. 44; Ntummy (1993), p. 171.

vested in the Crown. The territorial waters extend to 12 nautical miles and the foreshore and seabed under the soil are vested in the Crown.<sup>85</sup>

### 6.2.6. *Kai Moana*

The closeness of the sea and the importance of *kai moana* (seafood) have made the fishing rights a central question in New Zealand. The Māori had already during the 1840s their first confrontations with the settlers on fishing resources. The fishing and food-gathering rights were first given some recognition, but since the 1860s the situation began to deteriorate. In the River Thames foreshore the Māori were provided purchase of land below the high-water mark as compensation. This was an exception and in 1872 James Prendergast, as Attorney-General, ruled that the title to lands below the high-water mark rested with the Crown.<sup>86</sup>

In 1877 the Fisheries Act was enacted, which guaranteed the indigenous fishing rights and included a reference to existing Māori fishing rights.<sup>87</sup> The subsequent acts included the same provision until the 1980s, but with very general wording they offered little real protection. Customary fishing needs were tolerated as a disappearing tradition. In the 1890s North Island's Maori were able to secure continued use of their eel weirs, access to oyster beds and freedom from licence fees for trout fishing. Soon there came, however, setbacks. Te Arawa disputed without success over their fishing rights in Lake Roturua. Although the 1908 Fisheries Act mentioned the Maori fishing rights, they were far from guaranteed. The Native Land Act 1909 closed the door to protect customary fishing rights by civil action. The only option was a territorial claim to the lake bed or foreshore strip. In 1912 the Māori agreed to surrender their claim of customary title to all lakebeds and riverbeds in New Zealand to the Crown in exchange for retaining the right to fish in those waters.<sup>88</sup>

In *Waipapakura v. Hempton* (1914) a Māori fisherwoman litigated against the confiscation of her nets. She claimed a customary right to fish under the provisions of the Treaty of Waitangi. Section 77(2) of the Fisheries Act 1908 exempted existing Māori fishing rights from the statute's regulatory scheme. The Court of Appeal indicated that the section could only refer to Māori fishing rights recognised by some other statute. There was no common law recognition of Māori rights to traditional fisheries. Further, the Native Land Act 1909 barred these kinds of suits and in common law the nonterritorial rights to tidal waters were vested in Crown.<sup>89</sup> The case was to prevail in New Zealand's courts for over 70 years. For example, in 1965 the Court of Appeal held that the customary rights were extinguished when title was granted to adjacent land.<sup>90</sup> The doctrine of *Wi Parata* and *Waipapakura* was first revised by the High Court in *Te Weehi v. Regional Fisheries Officer* (1986). The defence relied on s. 88(2) of the Fisheries Act which in principle guaranteed the Māori fishing rights. Williams J

---

85 Tokelau Amendment Act 1967, ss. 19-20, 23-25; Tokelau Amendment Act 1969, s. 7; Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977, ss. 3-4, 10; Ntummy (1993), pp. 308-309.

86 Orange (1993), pp. 187-188.

87 Fisheries Act 1877, s. 8.

88 Karsten (2002), p. 93; Orange (1993), pp. 188-189.

89 Fisheries Act 1908, s. 77(2); *Waipapakura v. Hempton* (1914).

90 NZCA, *Wiki v. Inspector of Fisheries* (1965).

rejected *Wi Parata* reasoning and referred after long neglect to Symonds (1847), according to which the local laws and property rights were not set aside by the establishment of British sovereignty. Section 88(2) excluded the customary fisheries from the statutory scheme. The common law was admitted again as a source of right for Māori fisheries. Customary non-territorial property right had never been extinguished, i.e. *tikanga Māori* was recognised in the exercise of customary fishing rights and the validity of aboriginal title was recognised for the first time in 1877. The property right is limited to acknowledged members of a local tribe and to those fishing under their permission and code.<sup>91</sup> WT added to these findings in the *Muriwhenua Report* (1988) that the customary law includes also some commercial use. The customary law is not petrified: it can also adapt technological change.<sup>92</sup>

In the afterwar period the Maori Executive Committees were authorised to control fishing grounds. The Fisheries Amendment Act 1986 tried to create a new system of fisheries management by the Quota Management System (QMS) in order to combat the depletion of fisheries. The system gave a share of total allowable commercial catch as individual transferable quotas (ITQ) to holders on yearly basis. The Māori saw the system as an attempt to privatise the fisheries. The solution did not work well: the remaining Māori entitlements were extinguished. After the appeal of the Maori Council the High Court issued in 1988 a local restraining order which stopped the entire quota system. The Waitangi Tribunal held that the legislation was in fundamental conflict with the treaty principles and terms. A new agreement was needed to comply with the treaty because the tribes owned the resources off the coast. This caused a public outcry against the tribunal. The Maori Fisheries Bill 1988 left open whether the tribes had disposed of their fishery rights and as consequence all fisheries were still theirs. After criticism the government offered a gradual arrangement. The Maori Fisheries Act 1989 offered a 10% fishery quota for four years at a rate of 2.5% a year. The government offered \$10 million in fishery assistance. The act also created the Maori Fisheries Commission with another \$10 million. It formed Aotearoa Fisheries Limited to facilitate the entry of Māori into the business and activity of fishing.<sup>93</sup>

Sir Robin Cooke CJ ruled in the Court of Appeal that customary Māori fishing rights were still protected under the treaty; that tribes could still file with the Waitangi Tribunal; and that the act of 1989 was not the ultimate solution. In 1992 Carter Holt Harvey Ltd. decided to sell 40% of New Zealand's largest fishing enterprise, Sealord Products. The Maori Fisheries Commission asked the National government for a respective fishing quota. The Commission's chairman O'Regan advocated that the quota should be shared separately between tribes. Ngāi Tahu had the largest claim, supported by the Waitangi Tribunal's proposition of 200-mile fishing zone in South Island, covering a 70% share of all of New Zealand's fisheries. The National government negotiated in late 1992 a deal where it would give the Maori Fisheries Commission \$150 million to buy 50% of Sealord Product's shares. The act ended the Māoris' commercial fishing claims and the Waitangi Tribunal's jurisdiction on it. The Crown would legislate to protect customary fishing rights. Accordingly, The Treaty of Waitangi (Fisheries

91 NZHC, *Te Weehi v. Regional Fisheries Officer* (1986).

92 WT, *Muriwhenua Fishing Claim Report* (1988), ss. 11-12. Williams J. also referred to precedents from the Privy Council (*Campbell v. Hall, Amodu Tijani*) and the Supreme Court of Canada (*Calder, Guerin*).

93 WT, *Muriwhenua Report* (1988), ss. 11-12; Christie (1997), p. 54; Milroy (2000), p. 65; McHugh (2004), pp. 273-422.

Claims) Settlement Act 1992 agreed to transfer large proportions of the nation's commercial fisheries quota to the Treaty of Waitangi Fisheries Commission (*Te Ohu Kai Moana*) to manage on behalf of all Māori and to provide funding to enable the Commission to purchase the Sealords Product fishing company. The commission leased with discount rate a 20%-quota of new fish species in QMS to *iwi*. The commission made also submissions on new legislation, the Fisheries Act 1996 and the Fisheries Act Amendment Act 1999, which made the statutory management regime more flexible with clearer guidelines. The commission tried to find an allocation method to satisfy both *iwi* and urban Māori authorities, but in 1999 the Court of Appeal ruled that the settlement assets could be distributed only to *iwi* – although they traditionally did not own the fishing resources.<sup>94</sup>

In its final report *He Kawai Amokura* (2003), the Commission suggested division of shares in fishing equally between the tribal coastline and population, (excluding the Chatham Islands) while money would be divided solely on a population basis. The allocation system would be guided by *tikanga* and be technically feasible, transparent, accurate and robust. Based on these outlines the parliament enacted the Maori Fisheries Act 2004 where *iwi* structure has a central role. *Te Ohu Kai Moana Trustee Limited* does the following: administers the settlement assets; fosters, promotes, commissions and funds the sustainable management of fisheries; and protects and enhances the interests of *iwi* and Māori. Another important statute enacted the same year was the Maori Commercial Aquaculture Settlement act, which granted a 20% quota of all aquaculture space in the coastal marine area. The Regional Councils may identify new space for aquaculture. The allocated space must be of an economic size and *iwi* aquaculture organisation must act to the benefit of all *iwi* members. It has a Māori Commercial Aquaculture Trust, which receives the Crown assets and holds them in trust. It has an annual reporting obligation. Its decisions can be applied to MLC.<sup>95</sup>

In 1993 the Customary Fisheries Sub-Committee of *Te Ohu Kai Moana* started consultations with Māori, based on the 1992 act. The subcommittee held that the customary fishing regulation must deliver *tino rangatira* over the resource; provide exclusive Māori use; and provide limited *kāwanatanga* for conservation purposes. The subcommittee wanted also to link the environmental protection to customary fishing regulations. In 1996 the government created exclusive *taiapure* fishing grounds, based on local committees that allow Māori to take *kai moana* (sea food) for spiritual or cultural purposes without legal restraint. The Crown has allocated 20 million quota shares to *Te Ohu Kai Moana Trustee Limited*.<sup>96</sup>

The legislation was amended by the Fisheries (Kaimoana Customary Fishing) Regulations 1998. They cover separately the North and South Island non-commercial customary fishing in

94 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Preamble, ss. 9-10, 40; NZCA, *Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission* (1997); *Manukau Urban Maori Authority v. Treaty of Waitangi Fisheries Commission* (1999), s. 19. O'Sullivan (2007), pp. 139-140. The Court of Appeals' presumption of authority to define the principles of the treaty was larger than the governments in New Zealand were used to; The UN Human Rights Committee supported in *Apirana Mahuika et al. v. New Zealand* (1993) the government's policy to give specific attention to the sustainability of Māori fishing activities as a whole.

95 Maori Fisheries Act 2004, Preamble, (9)-(13), ss. 10-32; Maori Commercial Aquaculture Settlement Act 2004, ss. 6, 10, 22, 32, 36, 40, 54; O'Sullivan (2007), pp. 139-140; Christie (1997), pp. 55-57; Milroy (2000), pp. 68, 70.

96 A Guide to the Fisheries (Kaimoana Customary Fishing) Regulations 1990, pp. 1, 4-6, 9-10, 13.

accordance with the treaty principles for *hui* and *tangi* (funeral). *Marae* can appoint *tangata kaitiaki/tiaki* as an official to authorise customary fishing in an appointed area. The minister of fishery can, however, cancel the appointment. The customary fishers must carry with them a written authorisation to prove their right. The Māori official can give a customary fishing authorisation also to a non-Māori according to *manaakitanga*-principle. A *tangata kaitiaki/tiaki* may develop Iwi Planning Documents for fisheries within *iwi's rohe* and for the development of sustainability measures for them. *Mātaitai* reserves are areas where the Māori manage all non-commercial fishing by making equally applicable bylaws. Reserves may only be applied for over traditional fishing grounds by *tangata kaitiaki/tiaki* and must be areas of special significance for Māori. The Ministry of Fisheries gives the approval to reserves. *Tangata kaitiaki/tiaki* may make bylaws on species and their quantity, size limits, fishing methods and areas. They apply to all individuals and are submitted to the Minister of Fisheries for approval. The conservation legislation does not directly effect the Māori fishing rights. The Maori Fisheries Act 2004 holds the assets in trust which has set *iwi* and *hapū* in competition with each other. In associated states and territories regulations aim at maximum protection of indigenous fishing and sea resources rights. Also in each three associated states and territories the fishing has have an important role. They have Exclusive Economic Zones, which guarantee that New Zealand has the world's largest fishing space.<sup>97</sup>

Ngāi Tahu developed Kaikoura whale watching in the 1990s as a major tourist attraction. The Court of Appeal ruled that they were justified in seeking to limit the granting of further licenses in the area. The whale watching was estimated as a tribal activity. In 1996 the Ngāi Tahu Settlement offered to tribe management of reefs, title and use to 32 customary fishing areas and first right of refusal for 30% of the harvest rights to five shellfish species. In 2002 the Waitangi Tribunal published its Ahu Moana Report on aquaculture and marine farming. The tribunal held that the Crown had not taken properly into account the tender coastal space that belongs to Māori. The country's fish stocks have become severely depleted.<sup>98</sup>

### 6.2.7. Crown Forests

Forest land is considered by Māori as *taonga*. It demands to preserve natural environment, landscape, amenities, wildlife fresh water and historical values. In 1988 the Government announced its intention to sell the state commercial forestry assets to reduce the national debt. The Court of Appeal held that the timber rights are included to the s. 9 rights of State-Owned Enterprises Act 1987. The government, however, decided to sell the cutting and milling rights instead of land. After negotiations the parliament passed the Crown Forest Assets Act 1989 which allows the land to remain in Crown ownership until all outstanding Māori claims to land are resolved. As the cutting rights are permitted to third parties, there is included a provision to guarantee the Māori rights when selling the trees. The Crown Forestry

97 Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977, ss. 6-8; Conservation Act 1987, s. 267H; Fisheries Act 1996, s. 29BA, 174-175; Ngai Tama Claims Settlement Act 2003, s. 72; Maori Fisheries Act 2004, ss. 36, 79, 93; Ntummy (1993), pp. 19, 309; Kerins (1994), pp. 3, 5; Christie (1997), pp. 55, 58; Palmer (2008), p. 103; Cook Islands Government. *Manaakitanga* means neighbourhood hospitality.

98 WT, *Ahu Moana Report* (2002), ss. 6-7; Durie (1998), p. 202; Mutu (2011), pp. 36-37.



Rental Trust was established for rentals from licenced Crown forests lands which it holds in trust to support claims to the Waitangi Tribunal. Several farms have been reforested, creating 120 forest parks with 17,000 sq km under protection. There have been several claims and challenges on allocation of Crown Forest Assets and a process to settle claims to Forest Licence Lands. Some modern settlements have also ceased the status of those lands.<sup>99</sup>

In 2008 the Central North Island *iwi* Collective (CNI), was established, which may request the company to transfer forest land to *iwi* or nominees. The company has to transfer assets from the Crown's agreed property to another CNI claimant if the settlement is reached. The case law refers to the fact that exclusive Māori rights include rights to standing timber and mineral resources. They are equivalent to fee simple. If there is a special and regulated sustainable forest management plan on regulated sustainable forest management permit as land to which the plan or permit applies, no person can fell indigenous timber on their land.<sup>100</sup>

### 6.2.8. Resource Management and Environment

An active resource management policy began in New Zealand during the 1930s. In 1937 the Labour government nationalised all petroleum rights. Despite Sir Apirana Ngata's resistance the policy continued. Uranium (1945), geothermal resources (1952-1953), natural water resources (1967) and gold and silver (1971) followed in the postwar period. The Crown's settlement policy is that Māori rights to minerals are use and value rights. Later it has, however, transferred the ownership of some specific materials, like *pounamu*, to individual *iwi*. The Māori see themselves entitled to take advantage of advances in technology to exploit the resources on their land. The Māori must show that they have used a natural resource in 1840 before it can be returned to them. In 1988 the Crown made an agreement with Coalcorp which made of the latter an agent of mining rights with surplus properties to be transferred directly to private purchasers. The following year the Crown announced that it will sell Coalcorp, including many Tainui *raupatu* lands. The Tainui Maori Trust Board, supported by several other *iwi*, took legal action to stop the sale. The Court of Appeal halted the selling of land in Waikato before there would be proof that Tainui would be content. As result, the land could not be transferred to SOE without a clause in the land title noting their liability to be restored. The Tainui and Ngāi Tahu settlements have given *iwi* particular resource management and representation rights in their *rohe* and setting enhanced rights at the level of communication and notification. An important report of the Waitangi Tribunal has been the *Petroleum Report* (2003), which recognised Māori interests in the country's oil and resources, and the Crown's royalty entitlements from petroleum. The report also held that an 11%-interest in Kupe petroleum mining licences must be available to be included to

---

99 Forest Act 1949, s. 67DB; Treaty of Waitangi Act 1975, s. 8HB(1)(a); Crown Forest Assets Act (1989), ss. 14, 17, 30-31, 40; Tutae-Ke-Wetoweto Forest Act 2001, Preamble, (6); Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008, s. 128; NZCA, *New Zealand Maori Council v. Attorney-General* (1987); *Tainui Maori Trust Board v. Attorney-General* (1989); Alves (1999), pp. 84-85, 138.

100 Central North Island Forests Land Collective Settlement Act 2008, ss. 16, 20; Aho (2007), p. 140.

Ngā Hapū o Ngā Ruahine settlement and Ngāti Kahunguru claims. The Crown has ignored the report.<sup>101</sup>

Following the American model, in 1926 the first Town Planning Act was enacted, followed by the Town and Country Planning Act 1953. The Resource Management Law Reform began in the late 1980s to rationalise the natural and physical resources' legislation. In *Huakina Development Trust v. Waikato Valley Authority* (1987) the Court of Appeal used the Treaty of Waitangi as an extrinsic aid when considering the existence of spiritual, cultural and traditional tribal relationships with resources.<sup>102</sup> The importance of treaty principles was also recognised in the report of the Parliamentary Commissioner for the Environment (1988). The final provisions were collected to the Resource Management Act 1991 (RMA) whose purpose is a more sustainable management of natural and physical resources; the safeguarding of life in its different forms; and to offer remedies to important national features. The use, development and protection must affirm as a matter of national importance the relationship of Māori and their culture and traditions with ancestral lands, waters, *wāhi tapu* and other *taonga*. The governmental decision-makers must have regard to for *kaitiakitanga* (environmental stewardship principle) when they administer the legislation. The municipal authorities have to consult with the Māori during the preparation of policy statements or plans and to take into account *iwi* resource management plans. The Māori have to be consulted when they are identified as an affected party in the consideration of applications for resource consents.<sup>103</sup>

The RMA process has been long, and has demanded radical changes in environmental management and planning by taking into use a co-management procedure. Section 33 of RMA provides a number of opportunities for Māori involvement in the natural and physical resources. It allows any local authority to transfer most of its functions, powers or duties under RMA with some restrictions to another public authority, including the *iwi*. The transfer must be publicly notified and it must be appropriate. Although there have been difficulties among the local councils with these transfers, the *iwi* and *hapū* have made their proper environmental management plans; there has been created *iwi* resource management units, the Environmental Risk Management Authority's Protocol on treaty principles and Conservation Management Strategies. There were created several consultation guides, among them the governmental Kia Matiratira (1992) for Māori. It stresses the *iwi* and *hapū* as developers of their lands and resources, and as *kaitiaki* to protect the environmental values, natural *taonga* and heritage in *rohe*. The Ministry for Environment has focused on the treaty principle of partnership as a key concept.<sup>104</sup>

---

101 Ngāi Tahu (Pounamu Vesting) Act 1997, s.3; NZCA, *Tainui Maori Trust Board v. Attorney-General* (1989); WT, *Petroleum Report* (2003), s. 5; Alves (1999), pp. 79, 128; Spiller (2001), pp. 179-180.

102 NZCA, *Huakina Development Trust v. Waikato Valley Authority* (1987), s. 210; Hayward (2003), pp. 61-62.

103 Resource Management Act 1991, ss. 5-8, 66, 74, First Schedule, s. 3, Forth Schedule, s.1; Kaitiakitanga and Local Government (1998), pp. 12-14, 16, 21; Spiller (2001), p. 180; There are differing views on the scope of consultation. The Environment Court stressed in 1997 a more holistic approach in consultation, focusing on wider treaty principle of informed decision-making based on partnership and active protection. Cf. EC, *Mason-Riseborough v. Matama-Piako District Council* (1997), s. 12; The affected party means here a group influenced by the decisions.

104 Resource Management Act 1993, s. 33; Kaitiakitanga and Local Government (1998), pp. 11, 24; Hayward (2003), pp. 43, 45, 48-54, 95-97, 101-102.

The Māori see the environment as a place where they belong and as a source where they have emerged. Many aspects of the natural environment are fundamentally *wāhi tapu*. The litigation to get back the lost lakes, mountains, foreshore and tidal lands began early. For instance, in Whakaharatau and Kauaeranga cases (1870) Francis Fenton CJ (NLC) declared that the Māori could hold rights to the foreshore goldfields, but these tidal plains were suspended by a government proclamation. Similarly the Māori claim to Whanganui River was formally commenced in 1938 but led to several setbacks at different levels of court which did not take a stand on Māori issues. The Conservation Act 1987 allows conservation covenants to be granted or reserved over any land. They have resulted in the return of Mount Hikurangi, vested to the *rūnanga* of Ngāti Porou in perpetuity. Similarly Taranaki/Mount Egmont, Mount Taupiro, Aoraki/Mount Cook and Mauao/Mount Maunganui have been returned to *iwi* ownership.<sup>105</sup>

There are specific, stringent requirements on all Māori resource issues, including the coastal marine areas, fresh water resources and utilisation of geothermal waters at all levels of government. The Māori give particular value to purity, heritage protection and use. These aims are promoted in a large network of participants. The management schemes and plans must include acceptable conservation. The responsible minister can appoint guardians for certain lakes and fisheries. The guardians can make recommendations on ecological and social effects.<sup>106</sup>

WT has expressed its concern on environmental protection and emphasised the importance of Māori values as part of the landscape in several reports. The *Manukau Harbour Report* (2003) claimed that the Māori have lost the use and enjoyment of land as a result of the following: compulsory acquisition of land; urban growth and city development; and the use and enjoyment of traditional waters by pollution, major works and commercial fishing. The Crown has failed to provide royal protection against them. The reports influenced the Environment Act 1986, which requires the responsible ministry to ensure that in the management of natural and physical resources a full and balanced account is taken of the principles of the treaty and heritage of the *tangata whenua*. The Conservation Act 1987 has incorporated the treaty principles to the level of consultation. The Department of Conservation gives assistance in conservation questions, helps to preserve indigenous freshwater fisheries and advocates conservation of natural and historical resources. Some modern settlements have revoked conservation areas due to new arrangements.<sup>107</sup>

In the *Mangonui Sewerage Report* (1986) the tribunal criticised the resource management, planning and conservation legislation as inconsistent with the treaty obligations. The Māori relationship with ancestral lands should always be relevant in land use planning and the Māori environmental values should include less tangible matters, historical associations and

105 Mount Egmont Vesting Act 1978, s. 4; Mauao Historic Reserve Vesting Act 2008, ss. 5, 7; Karsten (2002), p. 83; Hayward (2003), p. 58; McHugh (1991), p. 235; Aho (2006), p. 109. The sacredness of nature is a common feature among the indigenous peoples and their pantheistic religious background.

106 Bash (1995), pp. 143-144, 151, 191. Cf. Lake Wenda Preservation Act 1973, s. 5; Conservation Law Reference Act 1990, s. II B 6X(1); Fiordland (Te Moana o Atawhenua) Marine Management Act 2005, Preamble; Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, Preamble, (6), ss. 45, 58; Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008, ss. 37, 50, 71.

107 The Environment Act 1986; The Conservation Act 1987, s. 6; Te Arawa Lakes Settlement Act 2006, s. 22; WT, *Manukau Report* (2003), s. 2; Christie (1997), p. 46.

traditional relationships, as part of normal resource management decisions.<sup>108</sup> In the *Mohaka River Report* (1992) the tribunal focused the connection between the right to manage and the right to own resources. This means that the tribunal began to challenge the Crown's ownership assumptions and doubt the legitimacy of its management processes.<sup>109</sup> The following year the tribunal stressed in two further reports the following: Crown's obligation to protect under art. 2 of the treaty the continuing *rangatiratanga*; Māori management and ownership right over the resources; and share in the benefits from the use of particular natural resources. The Crown was obliged to protect them equally.<sup>110</sup> Waikato River Settlement (2010) deals with significant counter effects on environment. The co-managing authority has duties related to soil conservation. the Tainui Confederacy has a right of first refusal on Hentley Power Station and licenses. The Crown established the Nga Kaihautu Tikanga Taiao Commission, which provides advice and assistance to authorities in environmental issues.<sup>111</sup>

The Māori have also litigated to the Environment Court which holds jurisdiction over the RMA, Public Works, Historic Places, Forests, Local Government and Transit New Zealand Acts. In most Māori cases the assertions over resource use are closely related to ownership. For them the assertion of ownership or *mana* over resources is linked to the ability to manage, control and allocate the resources. The Environment Court, on the other hand, has made a clear distinction between ownership and management issues, based on RMA. The allocation, regulation and control are simple management functions.<sup>112</sup> This creates a clear contradiction between the Māori and court views.

The Maori Advisory Committee has been established to inform the Environmental Protection Authority (EPA) on Māori perspectives. The legislation requires the responsible minister to establish and use processes which give *iwi* adequate time and opportunity to comment on the subject matter of proposed regulations and to notify *iwi* authorities, customary marine title groups and proposed customary rights groups directly of applications which may have an effect on them.<sup>113</sup>

The question of climate change has been central, because it has an effect on the lands, waterways, flora, fauna and food sources. The Māori world view is holistic and stresses sustainability. The Māori gathered in *hui* have acknowledged that the Māori ecology must be a distinct section and that they must work together collectively, to ensure maximum benefit, and that the policy on climate change has to be fair, equitable to Māori, based on a principled approach and treaty partnership. The legislation demands the authorities to consult the Māori in questions related to environmental change.<sup>114</sup> In *Flora and Fauna Case* (2010) WT has dealt with rights related to Māori knowledge on indigenous flora and fauna as guaranteed in the treaty. It lists four major categories: *mātauranga Māori* (traditional knowledge); cultural property; intellectual and cultural property rights; and rights to environment, resource and

---

108 WT, *Mangonui Sevice Report* (1986), s. 7.1.

109 WT, *Mohaka River Report* (1992), ss. 2, 6.

110 WT, *Ngawha Geothermal Resource Report* (1993), ss. 8-9; *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (1993), ss. 1,5.

111 Hazardous Substances and New Organisms Act 1996, s. 24; Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss. 61, 76, 81, 85; Hentley has the largest coal power station in New Zealand.

112 Hayward (2003), pp. 66-67.

113 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, ss. 18, 32, 45.

114 Climate Change Responsibility Act, 1982, s. 3A; Aho (2007), pp. 147, 152.

conservation management. It has also raised the question about flora and fauna as *taonga*.<sup>115</sup> Accordingly, the Waikato River Settlement (2010) demands the Waikato-Tainui flora cultural harvest plan.<sup>116</sup>

### 6.3. Canada

#### 6.3.1. *Long Road to Recognition: Aboriginal Title*

The reserve land in Canada covers approximately 26,000 square kilometres (0.3 % of Canada's land area) - just a fragment of the original land area. Some 80% of reserves have less than 500 hectares of land. The present situation is a result of a long development. In the French period the areas of European settlement were divided into fiefs (*seigneurie*). In the French system the landlord had underlying title and seigneurial rights to the property, while the peasants had the usufructuary rights. As Indians were not yet French subjects but allies, the system influenced them only in the Catholic missions and *réductions*. The religious orders obtained the control to these lands in about 20 locations. One of the unclear landowning questions has continued until modern times. In 1717 King Louis XV granted a seigneurie to the Seminar of St. Sulpice at Lac des Deux Montagnes, 30 kilometres west of Montréal. The unresolved question was, whether the seminary was the sole proprietor or trustee. In 1761 the Iroquois had a successful plea against the Jesuits, when the military governor of Montréal returned the interests in local reserve to Indians. Later the British authorities, however, held that the French Crown had extinguished the possible Indian title. The Iroquois started litigation in 1781 by showing a Two-Row Wampum belt as evidence of their proprietorship, without success. The British issued in 1841 a special ordinance, confirming the Seminar's title. Most Indians rejected in 1853-1854 the Indian Department's offer of relocation. The litigation and acts of violence continued. In 1912 the Privy Council decided in favour of the Seminar while suggesting a charitable trust for the Indians that could be enforced.<sup>117</sup>

A new change took place in 1936 when the Seminar sold in the financial crisis a major part of its possessions to a Belgian real estate company which created sawmill operations. Later parcels of land were sold for agricultural development. The Department bought in 1945 Seminar's unsold lands and gave them to the responsibility of the Indians. The Iroquois did not accept the terms and made in 1975 and 1986 unsuccessful attempts to assert Aboriginal title to all the original territory. The modern crisis started in 1990, when the nearby town of Oka announced a plan to expand the local golf course in the neighbourhood of an Iroquois ancient burial site. The Iroquois warriors blocked the highways to the area. The standoff in Kanesatake reserve lasted for 78 days, costing the life of one Québec police officer. Finally the federal army was called to resolve the conflict. In September 1990 the federal government purchased the disputed area and the siege broke down. An interim agreement was reached 11 years later. The lands in the interim land base are set aside for the use and benefit of the Mohawks of Kanesatake as lands reserved for the Indians. The Mohawks have a capacity of

---

115 WT, *Flora and Fauna Report* (2010), s. 20.

116 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss. 63.

117 Stanley (1950), p. 206; Daniel (1980), pp. 79-82; Henderson (1980), pp. 2-5;

a natural person in relation to land and its management with limited law-making powers. There is a land governance code to set out principles, processes and rules for the exercise of jurisdiction.<sup>118</sup>

The Iroquois had similar challenges also elsewhere. The Six Nations have had a long legal battle since the 1830s, when Grand River near their reserve was opened for navigation. Parts of their lands flooded and their fisheries suffered. Further, their funds were used to purchase stock and reserve lands were granted to the company, both without the consent of the Iroquois. In 1841 their chiefs agreed to surrender their remaining land to the Crown to be held for them in trust. The Canadian government evicted all non-Indians from the reserve and secured its boundaries for the future. Later, five dams were built in the area. The Iroquois lost their case in the Exchequer Court (1948). However, on appeal the Supreme Court of Canada found that since the actual investment had not been completed until 1841 there was a ground for restitution if the statute of limitations had not taken effect. No remedies were, however, offered. The Iroquois of Kahnawaké litigated in the 1950s on 526 hectares lost for the St. Lawrence Seaway which passed through their reserve. After losing an island to Montréal's Expo 67 world exhibition the Iroquois evicted in 1973 all non-Indians from their reserve on the grounds of overcrowding.<sup>119</sup>

The early British treaties promised to save for the Maritime Indians their "own grounds". After the annexation of New France, the Crown gave several proclamations in the early 1760s to pacify the situation related to land. The first of them was issued in 1761 by the king to several governors. It forbade them to grant lands or make settlements that would interfere with Indians bordering on colonies. Any settlers found to be unlawfully established on Indian lands were to be evicted. The Royal Proclamation of 1763 promised, besides defining the borders of British possessions, that all lands not ceded or purchased were to be considered reserved lands for the Indians. The Crown reserved itself the right to extinguish Indian title. The Proclamation wanted to prevent "unjust Settlement and fraudulent Purchase" of Indian lands by slowing down the pace of colonisation to keep the peace on the frontier. The proclamation created a personal relationship between the Crown and the indigenous people.<sup>120</sup> The later case law has indicated that the proclamation confirmed the existence of Aboriginal title but it did not create it. It bears witness that the British policy towards the indigenous peoples was based on respect for their right to occupy their traditional lands.<sup>121</sup>

---

118 Kanesatake Interim Land Base Governance Act, 2001, ss. 4-5, 7, 9; Daniel (1980), pp. 79-82; Halmcrona (1999), pp. 9-14; Snow (1996), pp. 211-212; Otis (2005), pp. 62-63. A prelude to Oka crisis in early 1990 were armed conflicts in Akwesasne and Ganieneh, both located in the New York State. Another armed conflict took place the following year in Kahnawake, in the outskirts of Montréal.

119 Daniel (1980), pp. 122-130, 198; Snow (1996), p. 167. The original French grant to the seigneurie of Sault Ste. Louis was 180 sq km. The original reserve land has been reduced by more than 70 %.

120 Royal Proclamation (1761); Royal Proclamation (1763); Dickason (1994), pp. 188-189; White & Maxim & Spence (2003), p. 252-253; Otis (2005), pp. 60-61.

121 SCC, *Sparrow* (1980); *Guerin* (1984), s. 377; *Delgamuukw* (1997), s. 114; The Governors of British North America were told "to cultivate and maintain a strict Friendship and good Correspondence with the neighbouring tribes and to Use the best means You can for Conciliating their Affections and Uniting them to Our Government"; The extinguishment of Aboriginal title was for the first time included to Virginian legislation in 1655; Unlike the courts of Nova Scotia and Québec, following the restricted scope of Royal Proclamation, the Supreme Court has refused in *Côté* (1996) to take stand.

Despite these promises the questionable land sales to speculators became lawful in 1764 by letters patent. The squatters were soon difficult to control by the officials. The subsequent treaties focused on the centrality of land issues, due to the increasing demand of the settlers. After the war of 1812 the pressure on Indian lands grew rapidly as the number of settlers increased. In 1829 Sir John Colborne, lieutenant-governor of Upper Canada, suggested that the best way to finance the civilising of Indians would be the leasing and sale of their lands. Besides the assimilation policy there were also voices to protect the Indians. In 1836-1837 a Select Committee on Aborigines sought means to protect the Indians. As a consequence, the British parliament enacted the Crown Lands Protection Act, 1839, where the Crown was defined as the guardian of Indian lands. The Manitoulin Island plan of Governor Head was an expression of this policy.<sup>122</sup>

The assimilation policy and settler needs finally won the protective point of view. The Bagot Commission of 1842-1844 recommended that reserves ought to be surveyed and their boundaries publicly announced that all title deeds be registered and considered as binding, and the Indians be taught European techniques of land management. The Commission's recommendations were realised in the Gradual Civilization Act, 1857, which proclaimed that civilisation could only be achieved through the introduction of individualised property and land allotment. Qualified Indians could obtain through enfranchisement 20 hectares of hereditary fee simple land. From 1850 a commissioner of Indian lands (after 1860 chief superintendent) was set as the Crown representative to set aside land for reserves.<sup>123</sup> The subsequent legislation continued the new policy. An Act to Confirm title to Indian Lands in the Province of Canada, 1866 reserved to the provincial government a right to sell uncultivated reserve lands without consultation.<sup>124</sup> According to Gradual Enfranchisement Act, 1869, individual landholdings carved out of reserves were used to reward enfranchisement by means of location tickets that carried with them rights of inheritance.<sup>125</sup>

With the creation of dominion, to the Constitution Act, 1867 was included the subsection 92(24) which states that the lands reserved for Indians belong to federal jurisdiction. A legal paradox, however, arises with s. 109 which stipulates that all lands, mines, minerals and royalties from land are to be the proprietary interests of the four original provinces. Therefore, the provinces have a vested interest in opposing indigenous land claims. At the same time, the numbered treaties (1871-1921) were a means to open up Indian lands permanently for settlement and development. The undefined Indian title was considered usufructuary, a right to use the land. The federal Government aimed at extinguishing Indian title as quickly as possible to avoid possible confrontations. The Indian Act of 1873 allowed the superintendent to grant allotments on reserve lands in fee simple as a reward for enfranchisement. Otherwise the granting of reserve lots and their registration were given to the chiefs and band council. The Lands held in trust by the Crown for the benefit of Indians could not be taxed, mortgaged or seized in lieu of debt. Western Canada was included to the programme in 1880 although most bands resisted the measure. The first four provinces entering to the federation were granted control of Crown lands within their borders. The three Prairies provinces gained the

---

122 Henderson (1980), p. 10; Karsten (2002), pp. 75, 107; McGee, p. 67.

123 Gradual Civilization Act, 1857, Preamble.

124 Act to Confirm title to Indian Lands in the Province of Canada, 1866.

125 Gradual Enfranchisement Act, 1869, s. 20.

right in 1930, when the Constitution Act, 1930, transferred the beneficial ownership of land and natural resources to the Governments of Manitoba, Saskatchewan and Alberta. Each separate agreement recognised the obligation of the province to make unoccupied Crown land available to Canada so that it could fulfil outstanding land entitlements under treaty.<sup>126</sup>

In theory, the reserve lands could only be surrendered by the majority of over 21 years old male residents at a special meeting. Generally, the Band Councils resisted even limited leasing of lands. In 1879 the power to allot reserve lands was removed to the Superintendent General. He was empowered to lease undeveloped reserve lands without taking surrender or obtaining band consent. An exception was land held by location ticket, where a permission of the holder had to be obtained. The superintendent general's powers were enlarged in 1898, when he received overriding powers. Superintendent Sifton had an opinion that no reserve lands should be opened to any use without Indian consent. Despite his personal view, the department sold almost 3,000 sq km of reserve land between 1896-1909. About 50% of Canadian territory was formally ceded by the Indian tribes to government before the twentieth century.<sup>127</sup>

Tightening control of Indian Act signified that parts of reserves could be erected by municipalities or companies for the benefit of public infrastructure. During the First World War, the Indian Act was amended to appropriate and farm or lease reserve lands without band permission for war production. The three Greater Production Farms were financed out of band funds, but the bands had little advantage of them. Entire reserves could also be removed from the vicissitude of towns or as "expedient". The federal government used a direct method to limit the Indian protests on land policy. In 1910-1951 the Indian Act prohibited Indians using band funds for land claim actions without the approval of the Department, which with lack of money led to a long pause in Indigenous court processes in Canada.<sup>128</sup>

British Columbia followed its own path in land policy. HBC estimated that the Indians had only qualified dominion of occupancy to land as their use of land was unprofitable. Governor Douglas saw things somehow differently and tried to deal with the land question by means of treaties in an unequivocal recognition of aboriginal title. His follower, Lieutenant Governor Trutch, rejected the policy and started instead the programme of adjustments (1865) which took away much of the reserve land set aside for Indians. Next year he issued an ordinance, completed with the Pre-emption Act, 1870, which prevented the Indians to pre-empt land without written permission from the governor. Left was only the right of individuals to

---

126 Constitution Act, 1867, ss. 92(24), 109; Indian Act (1873-1911); Dogrib Final Agreement (2003), s. 2.4.1; Morse (1985), p. 356; Dickason (1994), pp. 77, 275-276, 323, 376. Reserve lands for Treaty 8 were defined only from 1961 due to First Nations' resistance.

127 Tobias (1976), pp. 17-18; Leslie & Maguire (1979), p. 67; Dickason (1994), pp. 249-252.

128 Indian Act (1910-1914); Dickason (1994), p. 326; Karsten (2002), pp. 77-78. The most famous case of reserve lands relocation took place in 1916. After a long dispute between the Saulteaux Indians and non-Indians a whole reserve in Selkirk, Manitoba, was relocated by law. St. Peter's Reserve Act, 1916, confirmed individual patents to reserve land held both by Indians and non-Indians. The last-mentioned were prepared to pay an additional \$1 per acre. The raised moneys were credited to the band. The new location of reserve was 105 kilometres north, on the shores of Lake Winnipeg. Only one fishing station was left on the band in the old site. The relocation was prepared by a Royal Commission, headed by Hector Howell CJ of the Manitoba Court of Appeals, who suggested that rather than investigate, the solution was to move the Indians. Cf. St. Peter's Reserve Act, 1916, s.1.



purchase lands from non-Indians. The settlers were allowed to pre-empt 65 hectares and purchase an additional 480 acres. When British Columbia entered the federation in 1871, it retained only province control of its Crown lands. It continued until 1908 its policy of granting lands to Indians in minimal lots and finally there existed 871 reserves.<sup>129</sup>

The Crown and the province established in 1876 a long-lasting Joint Commission for the Settlement of Indian Reserves in the Province of British Columbia. The reserves' land space was reduced several times. In the meantime, the Squamish (1906, 1910) and Nisga'a petitioned London (1913). The Privy Council was not able to consider the Nisga'a application as it did not come from a Canadian court. A royal commission recommended in 1916 that the specified reserve lands would be cut off and transferred to larger areas of lesser value. The result was that the Indians lost 146 sq km of land and entire reserves were eliminated. In 1927 the federal parliament's Special Joint Committee issued a final settlement. It stated that the Indians in British Columbia had not established any claim to the lands of British Columbia based on Aboriginal or other title. The claims were therefore fictitious. The committee suggested that the Indians would be granted \$100,000 annually as compensation for the lack of treaty rights. Finally in 1938 British Columbia transferred based on s. 13 of the Act of Union (1871) 2,400 sq km of land to federal authority to establish reserves. The Indian were able to pre-empt land in the province only with special permission until 1953. With the second largest First Nations population the province has the fourth largest allotment of land per capita. In 2005 the province gave a statement on New Relationship which recognised the inherent rights of Indigenous peoples to decide how to use their land.<sup>130</sup>

Outside the numbered treaties, in 1890 a formal arbitration was attempted with the establishment of a board to deal with disputes between Canada, Ontario and Québec. Without Indian representation, the board heard about 20 cases on financial matters and grievances over land. The board succeeded only in settling three cases. Two other decisions were later reversed by the courts. In Manitoba and the North-West Territories the treaty Indians were forbidden from acquiring lands by homestead or pre-emption. This aimed at preventing them from claiming both a share of a reserve and a homestead. The same happened in British Columbia without the protection of a treaty. The Indians left outside the treaties in the north were given by the federal government small parcels of land for their use, called residential reserves. They were easily relocated because they were not protected by the treaties but in some cases they were also actively protected.<sup>131</sup>

In the 1951 revision of the Indian Act the bands acquired authority to manage surrendered and reserve lands. Nevertheless, the act gave to the bands only rudimentary land use powers. The next step was the Indian Claims Commission, established in 1961. Eight years later, Indian Claims Commissioner Barber was given a mandate to receive and study grievances and suggest the processes by which particular claims could be adjudicated. The mandate, however, did not include Aboriginal title. In 1970 the commission's terms of reference were broadened to include comprehensive claims. In its final report (1977) the commission observed that claims could only be dealt with satisfactorily when the indigenous peoples would establish their

129 Tennant (1990), p.20; Dickason (1994), p. 243, 261-262.

130 Daniel (1980), pp. 50-52; Renwick (1991), pp. 53, 56; Dickason (1994), pp. 324-325; Belanger (2008), p. 353; Olthuis & Kleer & Townshend (2008), p. 160.

131 Dickason (1994), pp. 285, 351, 373.

position through research. They had the initiative to establish the claims. A Joint National Indian Brotherhood - Cabinet Committee (1975-1978) did not find any further results.<sup>132</sup>

According to the Indian Act, 1985, the minister may authorise the use of lands in reserves for the purpose of Indian schools, administration of Indian affairs, burial grounds and health projects, but the consent of Band Council is needed. The minister may with terms of legislation also manage or sell absolutely surrendered lands about which the department maintains a register. He/she may improve or cultivate uncultivated or unused reserve lands and employ there persons with the band council's consent, and independently operate farms on reserves and employ persons to instruct Indians in farming. Individual Indians are entitled to compensation. The Governor in Council may grant loans to Indian bands, groups or individuals for agricultural development. The possession of lands is allotted by the band councils but the minister can issue for an Indian a certificate on possession of land. The property belonging to a "mentally incompetent Indian" or children of an Indian is vested exclusively in the minister.<sup>133</sup> The modern treaties have removed the Indian lands from federal jurisdiction and the Indian Act is no longer applicable to such lands.

In 1996 the Canadian government and First Nations negotiated a framework agreement to provide an alternative land management regime on reservations. The First Nations Land Management Act 1999 gives the bands a choice to opt into a different self-governance regime over their reserve lands. Some 35 First Nations committed to the process which involved the drafting of a new land management code for each community and negotiation of individual agreements with DIAND. The drafted land management codes resemble respective municipal planning codes, setting out procedural standards. The small size of many reserves makes a long-term, sustainable management approach impractical. Some provinces have made agreements with DIAND to transfer unoccupied Crown lands to the federal Crown so that Canada could fulfil its treaty obligations.<sup>134</sup> British Columbia encourages the First Nations to develop their farm lands and land planning.<sup>135</sup> Saskatchewan co-ordinates with Indian bands on land planning and development, and the minister may enter into agreement with Indian bands for the establishment, operations, management and maintenance of pastures.<sup>136</sup> The Indian war veterans are a special group which has been granted lands paid by the Minister.<sup>137</sup>

The First Nations have developed traditional concepts in contemporary terms. Their cyclical and holistic world view in relation to land means that the land is held as common property by tribal nation as a whole. The rights have always existed. Tribal members have an undivided interest in the land. This social contract embraces all living things: rights to use the land belong also to former and future generations and even to other living things. Signing a treaty means to Indians a right to control the use of the land's resources. The First Nations Lands Management Act, 1999, does the following: reserves lands to be managed by

---

132 Indian Act (1951); Indian Act, 1985, ss. 18, 57-58, 73; Dickason (1994), pp. 352-352.

133 Indian Act, 1985, ss. 18, 20, 23, 51-53, 55, 58, 70-71.

134 Territorial Lands Act, 1985, s. 23; First Nations Land Management Act, 1999; Richardson & Imai & McNeil (2009), p. 363.

135 Agricultural Land Commission Act, 2002 (British Columbia), s. 6.

136 Provincial Lands Act, 1978 (Saskatchewan), s. 20(1); Pastures Act, 1998 (Saskatchewan), s. 6; Planning and Development Act, 2007 (Saskatchewan), s. 113(4); Transfer of Lands – Fulfillment of Indian Treaty Obligations Regulation, 1979 (Saskatchewan).

137 Veteran's Land Act 1970, s. 46(1).

the First Nation; sets out general rules and procedures for the use and occupation of lands by First Nations members and others; provides financial accountability for revenues from the lands; provides procedures for making and publishing First Nations land laws; identifies conflict of interest rules; identifies community processes to develop rules and procedures applicable to land on the breakdown of a marriage; identifies a dispute resolution process; sets out procedures by which the First Nations can grant interests in land or acquire lands for community purposes; allows the delegation of land management responsibilities; and sets out the procedure for amending a land code. A difference to the Indian Act is that a First Nation with a land code can make laws of the development, conservation, protection, management, use and possession of First Nation land and make environmental laws. In some provinces the First Nations may also make agreements with municipalities to use joint services.<sup>138</sup>

### 6.3.2. *Aboriginal Title in Case Law*

The Aboriginal title is an indigenous right related to land. The concept was used for the first time in *St. Catherine's Milling and Lumber Co. v. the Queen*, which was the first and decisive battle on Aboriginal title and provincial rights. The federal government, referring to the Royal Proclamation (1763), held that the Indians had been owners of the land in fee simple, but subject to the restriction that they could only sell the land to the Canadian government and the Indian title to land was extinguished by purchase. Treaties proved that aboriginal communities possessed a real estate in their ancestral lands, which included hereditary rights to occupy land, cut timber and claim mines and minerals. The government of Ontario disagreed: there was no Indian title in law or equity. The Indians' claim was simply moral. Property was only a creature of law, capable of being sustained only as long as the law that created it exists. The Indians had no rules or regulations that could be considered laws, and therefore, no title to their ancestral territories that could be recognised by the Crown. With no government nor organisation they could not be regarded as a nation capable of holding lands. The provincial government referred to *Calvin's Case* (1608): when the Crown conquered a non-Christian people, the Crown's law immediately replaced the local laws. The Royal Proclamation was a provisional arrangement, repealed by the Quebec Act and all possible titles were entirely at the pleasure of the Crown. Since Ontario had been granted jurisdiction of Crown lands under the terms of Confederation, the clearing of Indian title was in favour of the Crown by right of Ontario. Federal jurisdiction over lands reserved for Indians applied only to lands specifically reserved for Natives at the signing of the land-cession treaties. Chancellor Boyd had described in his earlier decision Indians as characteristically being without fixed abode, moving about as the exigencies of life demanded. Indians could treat with the Crown for the extinction of their primitive right of occupancy, but the government had perfect liberty to proceed with settlement and development of the country, displacing the Aborigines if necessary.<sup>139</sup>

After passing all stages, the case finally arrived to the Privy Council in 1888. The Privy Council did not accept Ontario's argument that the Royal Proclamation was obsolete, but

---

138 First Nations Land Management Act, 1999, ss.6, 18, 20, 26, 34-35; Municipal Act, 2013 (Manitoba), s. 250(2); Community Charter, 2003 (British Columbia), s. 13.1(1); Dickason (1994), pp. 352-353.

139 SCC, *St. Catherine's Milling and Lumber Company v. The Queen* (1887), pp. 580-598.

upheld its legality. The British had by discovery acquired title to Indian lands and, therefore, it rested with the Crown even before the treaty. The Privy Council recognised the legal existence of Indian interest in land. The Indians have a personal and usufructuary right of occupancy to the lands which is dependent on the good will of the sovereign and may surrender the title only to the federal Crown.<sup>140</sup>

St. Catherine's was a decisive case in determining the federal Government's Indian policy for 85 years. Like New Zealand, Canada relied on the British constitutional doctrine of unity of the Crown and parliamentary sovereignty. Unlike in the United States, the question of Indian title and property in general, was separated from the question of self-government. The first challenges to St. Catherine's doctrine came only in the 1970s. Before that the courts were sufficient to uphold the usufructuary rights. In *Regina v. White and Bob* (1965), the British Columbia Court of Appeal confirmed them on the basis that they had existed since time immemorial.<sup>141</sup> The Supreme Court's *Calder* case (1973) reopened the doctrine of St. Catherine's, being the first major case to deal with the sensitive land claims question in British Columbia. The province did not recognise the existence of Indian title in any form. The Nisga'a Nation's long process on their lands had not led to a settlement. Their tribal council proved that their right to land had not extinguished at the time of ascendancy to the Confederation. Frank Calder argued that the provincial land legislation was invalid in relation to Nisga'a. The British Columbia Supreme Court ruled that whatever rights Indians might have possessed at the time of contact, they had been overruled by the enactment of white man's law. On appeal, the Supreme Court narrowly upheld the ruling on technicality. It divided Aboriginal title in the question of extinguishment of common law. Hall J drew on *Johnson v. McIntosh* and held that Nisga'a derived their title from their possession of land from time immemorial while Judson J held that the title had been extinguished. All, however, agreed that such *sui generis* title was possible in common law and it flows from indigenous peoples' traditional use and occupancy of tribal lands. It encompasses a beneficial interest in lands and conceptualises title's nature and scope. The sole authority to extinguish belonged to the crown, on whose goodwill it depended: the rights could be extinguished by general legislation.<sup>142</sup> *Calder* was a partial victory to Indigenous rights in Canada and also an important step in the long process which led to the Nisga'a Final Agreement. Its broader outcome was the recognition in principle of indigenous territorial integrity, including the right of title-associated self-government.

After a long pause, *Guerin* (1984) was the first significant Supreme Court's decision on Aboriginal title after the Constitution Act, 1982. The court held that the Aboriginal title derived from common law recognition of Indigenous occupancy and use of the land prior to European settlement. In *R. v. Van der Peet* (1996), the court clarified that the aboriginal rights are based on two notions: original occupation prior to European settlement and cultural and traditional practices. The purpose of s. 35(1) of the Constitution Act, 1982, is to reconcile the Indigenous peoples' prior occupancy of land with Crown assertion of sovereignty. The court

---

140 JCPC, *St. Catherine's Milling and Lumber Company v. The Queen* (1888), pp. 542-548.

141 BCCA, *Regina v. White and Bob* (1964).

142 BCSC, *Calder v. British Columbia (A.G.)*(1970); SCC, *Calder et al. v. British Columbia (A.G.)*(1973), pp. 313, 328, 336.

acknowledged the occupation of the land by Indigenous peoples to fall under the protection of the Constitution. The right to land is an inherent element of Aboriginal rights.<sup>143</sup>

The Aboriginal title and political dimension were connected in *Campbell v. British Columbia*. Where the title is held communally by an indigenous group with decision-making authority, there must be a political structure for exercising that authority. The communal title and decision-making authority necessitate self-government in relation to Aboriginal title land.<sup>144</sup> This was also indirectly recognised by CJ Lamer, who observed in *Delgamuukw* (1997) that Aboriginal title is a collective *sui generis* right to land held by all members of an Aboriginal nation who participate in decision-making. It is in common law a recognised right of Indigenous peoples to land itself, which confers the right to use land for various activities. He defined the Aboriginal title as an exclusive use and occupation of land, including mineral rights and non-traditional uses of land. Their scope can be either broad or narrow. A three-stage test has to be met for the establishment of aboriginal title: land must have been occupied prior to the assertion of state sovereignty to land; the occupation of land must be continuous, demanding substantial maintenance of the connection between the people and the land; and the occupation must have been exclusive at the time of the assertion of sovereignty by the Crown. Factors to determine the physical occupation are the group's size, manner of life, material resources and technological abilities, and the character of the lands claimed. Land held pursuant to Aboriginal title can be sold, transferred or surrendered solely to the Crown and is inalienable to third parties. The Aboriginal title is held communally, which distinguishes it from normal proprietary interests. It is a collective right to land held by all members of an Indigenous nation and thus regarding the land are made by the community. Lamer took also standing on the question of whether several Indigenous groups can have a joint title when occupying land to the exclusion of other Indigenous groups. He suggested that shared exclusivity could result in joint Aboriginal title.<sup>145</sup> In *Haida* (2004) McLachlin CJ acknowledged that Crown holds legal title to the land, while Aboriginal title is a right to the land itself. The title conflicts expressly with non-Crown fee simple land ownership. Aboriginal title transcends the right to use the land and is a right to the land itself. As a constitutionally recognised and affirmed right it is a subspecies of Aboriginal rights.<sup>146</sup>

In the double case of *R. v. Marshall /R. v. Bernard* (2003), the Supreme Court held that essential to Aboriginal title is, whether it can be translated into a modern legal right. In cases of a lack of historical evidence, an Indigenous group has to provide evidence of present occupation as a proof of pre-sovereignty occupation. Continuity must be a substantial maintenance of the connection between the group and the land. McLachlin CJ held that the title is established by Aboriginal practices that demonstrate possession similar to title at common law. A proof of exclusive physical occupation of specific sites is required. Where the exclusive possession is not established, a non-exclusive occupation may establish Aboriginal rights short of title. McLachlin's view excluded the right of some nomadic and semi-nomadic peoples' right

143 SCC, *Guerin v. R.* (1984), pp. 377-382; *Van der Peet* (1996), ss. 38-43; Castellino & Allen (2003), p. 219.

144 BCSC, *Campbell v. British Columbia* (2000).

145 SCC, *Delgamuukw* (1997), ss. 48, 115, 158; Isaac (2006), p. 14; Knefla & Westra (2010), p. 7.

146 SCC, *Haida* (2004), s. 6; There are several precedents about the joint title in American case law. Cf. USSC, *United States v. Santa Fe Pacific Railroad* (1941).

to Aboriginal title.<sup>147</sup> On the other hand, Lamer CJ had stressed already in *Adams* (1996) that, although the land was central to the prior occupancy of Aboriginal peoples, it was not necessarily a particular plot of land.<sup>148</sup> McLachlin's narrow focus on common law concepts relating to property interests and the postage stamp theory of considering the Aboriginal title in respect of small pieces of land was also rejected by Vickers J in *Tsilhqot'in Nation* (2008). He held that even the large tracts of land could be considered subject to Aboriginal title.<sup>149</sup>

The controversial policy of extinguishment of aboriginal title dominated the Canadian policy *vis-à-vis* indigenous peoples until the 1980s. Prior to 1982 the federal parliament had the power to extinguish indigenous rights and titles. Judson J held in *Calder* that Government action amounting to complete dominion, inconsistent with conflicting interest, was sufficient to extinguish it.<sup>150</sup> Section 35(1) of the Constitution Act, 1982, recognised and affirmed the existing Aboriginal and treaty rights of the indigenous peoples. In modern treaties the Crown has sought compromises to affirm existing rights while meeting government demands for certainty. In *Sparrow* the Supreme Court defined how indigenous rights could be extinguished. By using s. 35(1) it transformed interpretation into a more substantive principle of public law. Section 35(1) provides unextinguished Aboriginal right with constitutional protection against legislative infringement but an aboriginal right is not absolute. If the government decides to infringe such rights when justified by the need of society, there has to be a proof of valid grounds to extinguish and a valid legislative objective respecting the fiduciary duty of the Crown regarding Indigenous peoples. To verify the government's clear and plain intention to extinguish the aboriginal right, the judicial system applies a two-part test: first, the test is based on an assessment of whether legislation would infringe existing aboriginal rights and whether such infringement is reasonable; and secondly, whether the infringement is justifiable on any grounds. In *Sparrow* the Crown failed to discharge its burden of proving extinguishment.<sup>151</sup>

In *Delgamuukw*, Lamer CJ held that the federal government has the exclusive jurisdiction to legislate on s. 91(24) of the Constitution Act, 1867 and exclusive power to extinguish Aboriginal title and rights. He laid a two-step analysis on infringement of Aboriginal title. Firstly, it must be in furtherance of a compelling and substantial legislative objective that is directed at recognition of the prior occupation of North America by Aboriginal peoples and reconciliation of Aboriginal prior occupation with the assertion of Crown sovereignty. He specified that the legislation which could infringe aboriginal title has to be based on the development of agriculture, forestry, mining and hydro-electric power, the general economic development of the interior, protection of the environment or endangered species, building of infrastructures, or settlement of foreign populations to support the aims. In determining legality of extinguishment of aboriginal title the judicial power is required to assess whether the infringement has been minimal enough, fair compensation has been paid and the

---

147 *R. v. Marshall / R. v. Bernard* (2003), ss. 54, 57, 74, 77, 82-83.

148 SCC, *Adams* (1996), s. 27-28.

149 BCSC, *Tsilhqot'in Nation v. British Columbia* (2008), part 16.

150 SCC, *Calder et al. v. British Columbia* (A.G.) (1973), p. 344.

151 SCC, *Sparrow* (1990); Castellino & Allen (2003), p. 217. The Human Rights Committee has in its fourth periodic report criticised the Canadian practice of using the extinguishment of indigenous rights as incompatible with the article 1 of ICCPR.

affected Aboriginal groups are consulted before the final decision. Secondly, the test requires an assessment of whether the infringement is consistent with special trust-like relationship between the Crown and Aboriginal peoples and the honour of the Crown.<sup>152</sup>

The Indigenous land rights have had some constitutional protections that prevent its legislative extinguishment and infringement in some instances. Section 91(24) of the Constitution Act, 1867 places the Indians and their lands within the exclusive jurisdiction of the federal Parliament. The Supreme Court has held that the provinces have lacked a constitutional authority to extinguish Aboriginal title since 1867. The Treaty rights within s. 91(24) are immune from provincial laws that would infringe them. Also section 35(1) of the Constitution Act, 1982, prevents Indigenous rights to be unilaterally extinguished even by Parliament. Since 1982 the extinguishment can only occur with the consent of the indigenous peoples. The usual remedy to Aboriginal title infringements is financial. There are, however, some exceptions to this main rule when the land is remote, of high significance to the indigenous people and where the degree of reliance on land by third parties or the public is minimal.<sup>153</sup>

The Crown has a constitutional duty to consult which is granted in honour of the Crown and is corollary of the Crown's obligation achieve just settlement of Aboriginal claims through treaty process. The duty arises when the Crown has knowledge of the potential existence of Aboriginal right or title. These give priority to s. 35 rights, prior consultation and other forms of expropriation. The three degrees of duty are according to Lamer CJ the "mere" consultation, which addresses the concerns of indigenous peoples; "significantly deeper than mere" consultation; and obtaining the Indigenous group's consent. Where the Crown contemplates action that could adversely affect asserted Aboriginal rights, it has a duty to consult and accommodate the affected Indigenous group. The Crown has to determine the strength of the claim to Aboriginal title; the potential impact of the Crown's actions on Aboriginal title; competing societal interests; and the necessity and proper method of accommodation. Treaties override the common law duty to consult indigenous people but they do not affect the general administrative law principle of procedural fairness, which may give rise to a duty to consult the rights holders individually. The constitutional duty to consult is rooted in the principle of the honour of the Crown, related to the special relationship between the Crown and indigenous peoples as peoples. The indigenous peoples' capability to enter into treaties is based on the recognition of pre-existence of indigenous institutions before the Crown asserted its sovereignty. The duty protects the collective rights of an Aboriginal people, but can nevertheless have individual aspects.<sup>154</sup>

The Canadian courts have developed a doctrine of Crown fiduciary duty to Indian bands, which first emerged in relation to the Crown's disposition of process to surrender reservation

<sup>152</sup> SCC, *Delgamuukw* (1997), s. 173.

<sup>153</sup> Cf. SCC, *Sparrow* (1990); *R. v. Gladstone* (1996), s. 43; *Delgamuukw* (1997), ss. 172-183; *R. v. Marshall* (1, 1999); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*(2005); *R. v. Morris* (2006); *R. v. Sappier/R. v. Gray* (2006), pp. 3-4, 43; RCAP, Vol. 2, pp. 527-557; Since 1982 the Canadian Constitution has offered better protection against the extinguishment than the southern neighbour, where the Congress has still plenary power over Indian tribes.

<sup>154</sup> SCC, *Delgamuukw* (1997), s. 168; *Beckman v. Little Salmon/Carmacks First Nation* (2010), s. 122; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* (2010), ss. 31-39; *Behm v. Moulton Contracting Ltd* (2013), ss. 28, 30-33; *Isaac* (2006), p. 23.

lands under the Indian Act which allows the indigenous peoples to use unoccupied lands until they are required for alternative use. The honour of the Crown is always at stake when it deals with Indigenous peoples due to the special historical relationship. The Canadian courts have followed the American model in basing the executive liability on the federal government's assumption of comprehensive management powers over tribal property and in using the fiduciary relationship as a means of interpreting statutes that had an adverse impact on tribal interests. In a co-management regime a commission or board is established with indigenous and government appointees. The idea is to facilitate a collaborative relationship that embeds indigenous participation. Canada uses co-management boards extensively and they are an important feature of all land claims agreements. The jurisdiction and composition vary depending on the land claims agreement.<sup>155</sup>

In *Guerin*, Dickson J held that the Aboriginal title to traditional lands is based on pre-existing occupation and control and is independent of government. The title of Aboriginal land could only be alienable to the Crown and be used in the interest of the indigenous people. The Crown's liability rested on the mismanagement of band assets. Its nature and the surrender provisions of the Indian Act impose an enforceable fiduciary duty on the Crown, a burden on the radical or final title of the sovereign which arose at the time of the surrender. This arises from the special relationship in which one party is under an obligation where is related a discretionary power. The fiduciary duty is *sui generis* character and has historic foundation. It is a trust-like, private law duty which applies to Aboriginal interests that are property-like in nature. The duty attaches to interests that are specific, cognisable and concrete. It can be enforced by equitable remedies. Still the Crown's power to manage assets comes from the Indian Act and its position as fiduciary arises from the combination of its common law and statutory positions. It took the principle of fiduciary obligation to equity with novel application to tribal peoples' assets.<sup>156</sup>

In *Sparrow* the court referred to the unique general relationship between the Crown and Aboriginal peoples. The guiding interpretive principle is the honour of the Crown and the first consideration should be the special trust relationship and the responsibility of the Government *vis-à-vis* Indigenous peoples. The common law has a presumption in favour of treaties and statutes relating to Indigenous peoples. Where a statute or the exercise of discretion under it would infringe an Aboriginal right, the responsible public official is required to demonstrate that the Crown owes a fiduciary obligation to Indians in regard to their lands. Section 35(1) justification requires proof of a valid legislative objective and proof of adequate Government accommodation of the protected Aboriginal or treaty right. The accommodation measures may include giving the protected right priority after the valid objective, ensuring minimum possible infringement to achieve the objective, consulting where appropriate with the people concerned, and providing compensation in cases of expropriation.<sup>157</sup>

Also in *Blueberry River* (1995) the Supreme Court held that the subject matter of the fiduciary duties was Indian land and resources connected to Indian land. The content of the fiduciary duty varies according to the circumstances.<sup>158</sup> *Gladstone* (1996) added to *Sparrow's*

---

155 Olthuis & Kleer & Townshend (2008), p. 13; Richardson & Imai & McNeil (2009), pp. 302-303.

156 SCC, *Guerin* (1984), ss. 383-392.

157 SCC, *Sparrow* (1990).

158 SCC, *Blueberry River Indian Band v. Canada* (1995), ss. 88-92.



list of potentially valid legislative objectives economic and regional fairness and historical resource reliance by non-indigenous groups.<sup>159</sup> In *Osoyoos* the court defined the duty as an interpretation guide and formulated an analytical approach for dealing with conflicting public and fiduciary duties. Indian interest in reserve land and Aboriginal title are fundamentally similar. Both are subject to a fiduciary duty owed by the Crown. Duty applies to expropriation as well as surrender situations.<sup>160</sup>

In *Wewaykum Indian Band* (2002) the court made a distinction between the honour of the Crown and fiduciary obligation. Section 35 is subject only to reasonable limits prescribed by law as can be demonstrably justified and fare in a democratic society. The fiduciary duty exists in relation to specific Indian interests. For it to exist, the Crown must have a discretionary control with a corresponding vulnerability for the Aboriginal peoples affected, and the subject of the duty must be a cognisable specific and significant Aboriginal interest, capable of generating a private law duty. The Crown wears many hats and represents many interests. The content of the Crown's fiduciary duty varies with the nature and importance of the interest sought to be protected. Before an Indian Act reserve is created, the Crown may owe a fiduciary duty in relation to Aboriginal interests in Indian Act land, but if it exists, it is limited to loyalty, good faith, full disclosure and ordinary prudence with a view to the best interest of the Aboriginal beneficiaries. Once a reserve is created the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation. Where there is a beneficial quasi-proprietary interest, equitable remedies may be available.<sup>161</sup>

*Haida* (2004) affirms that the concept of fiduciary duty is the general principle of the honour of the Crown which can apply in different ways depending on the context. It is limited to specific, cognisable Aboriginal interests. When deciding whether to infringe a specific Indigenous interest, the Crown is discharging a public function and must consider the interests of all Canadians: the Crown is bound to balance the different interests in making decisions that may affect Indigenous claims. Only proven or defined Aboriginal interests can attract the *Guerin* duty, and s. 35 rights the full justification of obligation in *Sparrow*. Therefore, *Guerin* and *Sparrow* are two related, but distinct applications of the honour of the Crown concept whose scope may overlap. The difference is that *Sparrow* applies only to s. 35(1) Aboriginal and treaty rights, while *Guerin* has its focus on contexts outside the scope of s. 35(1). *Sparrow* duty can extend to claimed, defined or resolved rights, while *Guerin* duty is limited to specific, cognisable Aboriginal interests. *Sparrow* duty is also broader: it can affect also non-land treaty commitments.<sup>162</sup>

It is still good to mention the recent SCC decision *Manitoba Métis Federation Inc.* (2013), where the majority of Justices held that the honour of the Crown requires the servants of the Crown to conduct themselves with honour whenever acting on behalf of the Sovereign. The honour of the Crown is engaged in the Crown's dealings with an Aboriginal people where explicit obligation is undertaken to the Aboriginal group. The concept is context-sensitive, but when the constitutional obligation to an Aboriginal group exists, the honour of the

159 SCC, *Gladstone* (1996), ss. 54-84.

160 SCC, *Osoyoos Indian Band v. Oliver (Town)*(2001), ss. 123-188.

161 SCC, *Wewaykum Indian Band v. Canada* (2002), ss 74-104.

162 SCC, *Haida* (2004), ss. 18, 45; Elliott (2005), p. 107.

Crown requires that the Crown takes a broad, purposive approach to the interpretation of the promise and acts diligently to fulfill that promise.<sup>163</sup>

### **6.3.3. Métis Title**

The definition of Métis title has been a more complicated process and Alberta is the only province in Canada which has recognised the Métis land title. Their rights were not recognised in the Constitution Act, 1867 and their major group in present Manitoba joined Canada only in 1870. The Manitoba Act, 1870, having constitutional status, guaranteed to Métis 5,700 sq km on land. Despite the promise to respect all existing occupancies, only 43 % was distributed to them. In 1874 the federal government offered to half-breed heads of families \$160 in scrip that could be used to purchase Crown land. In 1876 the grants to children were increased to 240 acres. Most Métis preferred to take money. Section 31 of the Manitoba Act was finally repealed in 1886 in a general consolidation of federal statutes.<sup>164</sup>

The Métis considered that their Indian heritage gave them an inextinguishable right to land which had developed for them some special features. They had a river lot system different from the standard Canadian square survey. When there were no official surveys made, the Métis could not make legal claims. Even in Manitoba, where the Manitoba Act guaranteed the Métis land rights, most of the claims were rejected due to insufficient cultivation. The Royal Commissions worked in 1885-1921 to extinguish Métis land claims. The federal government's view was that the Métis should apply for land on an individual basis. In those areas where Indian title had been extinguished, allotments were to be in money or land scrip worth 65 hectares for Métis heads of the household. In treaty areas a river lot of 40 acres could be purchased at one dollar an acre and then the Métis could select 160 acres of land for a homestead. The Métis outside the treaty areas could apply for scrip. The last two numbered treaties dealt with Métis. In Treaty 11 (1921) they received \$240 in cash. Even most of the lands granted in the legislation were acquired by land speculators. The Indian Act required between 1879-1884 that the Métis refund monies received under treaty. With this easement, many Métis gave up their treaty rights. They were also excluded from reserves in the amendment of Indian Act (1880).<sup>165</sup>

When white settlement increased, the Métis were scattered across small, impoverished bands. In St. Paul-des-Métis (1895-1908) it was planned that each family receive 80 acres of land, livestock, agricultural equipments and access to hay, grazing and woodcutting. Farmsteads were soon allotted, but they were located far away from each other. To increase the difficulties, the livestock and equipment did not appear and finally the settlement was closed. Many Métis moved northward, to the fringes of white settlements.<sup>166</sup>

---

163 *Manitoba Metis Federation Inc. v. Canada (Attorney-General)*(2013), ss. 65-83, 91-94.

164 Manitoba Act (1870), s. 31; Dickason (1994), pp. 296-297; 316; Isaak (2008), p. 34. By 1880, 3,186 claims had been settled, but there was little benefit for the Métis.

165 RCAP (1996), vol. 4, ss. 293-307; Morton (1938), pp. 236-238; Dickason (1994), pp. 296, 317, 360. During the first year there were allowed 1,678 claims, worth \$279,000 and covering 55,000 acres; 100 years later RCAP Report estimated that the Crown had breached its fiduciary duty in Manitoba.

166 Dickason (1994), p. 361.

The Great Depression of 1929 had disastrous effects on the Métis: they became “road allowance people”, living semi-squatting life on marginal lands. In 1931 was organised L’Association des Métis d’Alberta, which took up the cause of land settlement projects for the Métis. At the end of 1933, more than 300 families had been resettled in Northern Alberta. The reform-minded Government of Alberta answered the association’s efforts and agreed to a public inquiry. Also DIAND began to survey much later (1978) the impacts of federal policy and legislation on Alberta Métis’ life conditions. The Alberta Government’s policy paper *Metisism* (1982) described the Métis title in settlement lands similar to Indian title in reserve lands, vesting title in the Crown and beneficial use of the Métis.<sup>167</sup>

The Metis Settlements Land Protection Act, 1990, confirms the terms of the grant, places limits on disposition and prohibits the use settlement lands as security for debt. A fee simple title to Métis lands is issued to the General Council by letters patent. It is held in each settlement area by the corresponding settlement corporation, unless registered in the name of a settlement member, one at a time. It is subject to reservations from title set out in the letters patent and the Metis Settlements Land Protection Act. The letters patent and Metis Settlements Land Protection Act place conditions on the General Council’s title which operates to restrict the rights of the General Council and protect the Métis land base. The patented lands may be alienated only by the consent of all settlements and the majority of settlement members and are expropriated only with the agreement of the General Council and payment of compensation. The pre-existing land allocations granted to settlement members are extinguished and converted to interests. The application is made to a Settlement Council. The pre-existing interest held by non-settlement members may be recorded but not registered. If recorded before 30 June 1993, they are enforced with priority over other interests recorded prior to the pre-existing interests. Pre-existing interests become registerable interests only if they are authorised to be registred by General Council policy. A person entitled to Métis title is registered as a holder in the Métis Land Registry. Title to water and subsurface resources is retained by the province, but entry on settlement lands is prohibited without the consent of the affected settlement council in accordance with the terms of a Co-Management Agreement. The last-mentioned addresses issues of access, compatibility of development schemes with Métis land use, the establishment of a Métis Access Committee with powers to deny or set conditions of access, and Métis economic development rights.<sup>168</sup>

The only rights and interests in settlement land are those created by the Metis Settlements Act. The Métis authorities have created common law rules governing the interpretation of rights associated with the interest. The General Council has the authority to make policies in consultation with the Minister concerning the creation, termination, disposition and devolution of interests in settlement lands. The minister has the authority to place reservations, exceptions, conditions and limitations on entitlement to rights or interests. The General Council’s land policy provides the basic system of interests in settlement land, including principles governing the creation and transfer of interests and to create a land management system that balances the collective rights of the settlement with the individual rights of the

<sup>167</sup> Dickason (1994), pp. 361-362.

<sup>168</sup> Water Act, 2000 (Alberta), s. 166; Metis Settlements Land Protection Act, 1990 (Alberta), Schedule 3; Metis Settlements Act, 1990 (Alberta); Land Interests Conversion Regulation, 2003 (Alberta); Sawchuk (1981), pp. 48, 162-176; Bell (1994), pp. 8, 16, 25-26, 35-38; Lawrence (2004), p. 95.

landowner. The policy creates three distinct Métis interests in settlement land: Métis title held by settlement or its member; provisional Métis title, which may be granted for a fixed term by members who wish to use and make necessary improvements required for the issuance of Métis title; and allotments, which may be granted only for farming, ranch or business. A member may own a maximum of 70 hectares but he/she can hold almost the same number of additional lands for a fixed term by memorandum of allotment. Further, the policy makes it possible to create and transfer lesser interests to both settlement and non-settlement members. A holder of Métis title may lease lands, but a lease to non-settlement members must be approved by the Settlement Council and leases exceeding 10 years by a bylaw. A Settlement Council may force a sale or apply for subdivision of Métis title or an allotment if the holder of the interest fails to pay charges, levies or taxes owed to the settlement in relation to interest. An interest less than fee simple may be expropriated by the settlement if authorised in legislation. The Land Interests Conversion Regulation, promulgated by the minister, provides for the conversion and registration of interests by settlement members. The Métis land base is protected by restrictions on the taking of security interests in settlement lands and limitations on the province's right to expropriate settlement lands. Provisions which conflict with provincial legislation are unenforceable. The Constitution of Alberta prohibits the Legislature to amend or repeal the Metis Settlements Land Protection Act, revoking letters patent granting settlement land to the General Council, dissolving the General Council or changing its composition without the agreement of the General Council. The constitutional amendment may be repealed only if the Métis settlement lands are protected by the federal Constitution, which has not happened.<sup>169</sup>

The minister makes regulations regarding the establishment and operation of a Metis Settlements Land Registry, the settlement of disputes arising from the Metis Settlements Land Registry Regulation and the application of provincial land titles law. Matters addressed in the regulation include establishment of the registry, recording, registration, interests overriding the register, compensation, powers of the Appeal Tribunal and courts, administration, procedures, document requirements, plans, interests passing on death, and adoption of some provisions of the Land Titles Act. The land registry provides for certainty of ownership in land, simplify proof of ownership, facilitate economic and efficient disposition of interests in land and provide compensation for persons who sustain loss through unauthorised registrations. It promotes local monitoring and control over the creation or development of interests in settlement lands.<sup>170</sup>

The Métis' Aboriginal treaty rights were recognised in the Constitution Act, 1982 and in *Powley*, but the first court case to address directly whether a group of Métis have an Aboriginal title, was *Manitoba Metis Federation Inc. v. Canada* (2007). In the focus were ss. 31-32 of the Manitoba Act, 1870, which provided allocations of lands (Métis) and settlement of title (all Manitobans). MacInnes J of the Manitoba Court of the Queen's Bench ruled that the benefits under ss. 31-32 of the Manitoba Act were a one-time benefit to certain persons then alive and resident in Manitoba in 1870. These persons were aware of their rights at the time. Accordingly the claims were time-barred and the action was dismissed. The court also

---

169 Constitution of Alberta Amendment Act, 1990 (Alberta), ss. 2-6; Metis Settlements Act, 1990 (Alberta), ss. 99, 222; Metis Settlements Land Register Regulation, 1991 (Alberta), ss. 3, 6; Bell (1994), pp. 26-28, 36.

170 Metis Settlements Land Register Regulation, 1991 (Alberta), ss. 3, 6; Bell (1994), pp. 26-27, 42-43.

held the Manitoba Act not as treaty but merely as an act of parliament and constitutional document for all Manitobans. Therefore, the Manitoba Act, 1870, does not constitute Aboriginal or treaty rights in the meaning of s. 35.<sup>171</sup> The Supreme Court has, however, ruled in its recent decision that the Crown failed in the past to implement s. 31 of the Manitoba Act, 1870 consistently with the honour of the Crown. Therefore, s. 31 signified a solemn obligation of the Crown to a particular Aboriginal group.<sup>172</sup>

#### 6.3.4. *Inuit Title*

The lands and waters in Nunavut and Inuvialuit are vested in Her Majesty, i.e. are under federal supervision. The Inuit have claimed that they have a customary system of tenure, an organised and systemic use and occupation of their traditional lands and waters. This Inuit title was acknowledged by the Federal Court in *Hamlet of Baker Lake* (1980). It listed the conditions that had to be met to find an Aboriginal title to be valid. The Inuit had to establish that: they and their ancestors lived within and were members of organised societies; the societies occupied the specific territory over which they were claiming Aboriginal title; their occupation was exclusive; and the occupation was in effect when Britain claimed sovereignty over the region. Mahoney J said that “an Aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it, vested at common law in the Inuit.”<sup>173</sup>

The Nunavut Land Claim Agreement (1993) provides certainty and clarity of rights to ownership, use of lands, resources, rights to Inuit participants in decision-making about use, management, conservation of land, water and resources, offshore, wildlife harvesting rights and rights to participate in decision-making. The agreement also offers the Inuit financial compensation, a means to participate in economic opportunities, encourage self-reliance, and cultural and social well-being. The Inuit have an Inuit title to 35,000 sq km of land, including the mineral and water rights. The Nunavut Planning Commission oversees general land use planning. At least 50% of members of any panel dealing with Inuit-owned lands must be residents of the Nunavut Settlement Area. In the agreement the Inuit surrendered all their claims, rights, title and interests based on their assertion of an Aboriginal title anywhere in Canada. The key objective of the agreement was to create a new land and resource management system, which is comprehensive, exercising authority over the entire settlement area. The co-management bodies guarantee a linkage between land and wildlife management. Nunavut Water Board supervises the use of water and waste in the territory. Governor in Council may establish water management areas to Nunavut and give exemptions for licences. A special Nunavut Surface Rights Tribunal resolves conflicts between parties.<sup>174</sup>

---

171 MCQB, *Manitoba Metis Federation Inc. v. Canada (Attorney General)*(2007), ss. 430-431, 442; 445-447, 464, 510; Isaak (2008), p. 39. MacInnes J defined the time of the first imposition of British control as early as 1670, therefore watering down the Métis claims to land. S. 583.

172 SCC, *Manitoba Metis Federation Inc. v. Canada (Attorney General)*(2013), ss. 84-94.

173 Nunavut Waters and Nunavut Surface Rights Tribunal Act, 2002, s. 8; FCC, *Hamlet of Baker Lake v. Minister of Indian Affairs* (1980), s. 95.

174 NLCA (1993), ss. 5-6; Nunavut Waters and Nunavut Surface Rights Tribunal Act, 2002, ss. 14, 33, 82, 99; Duffy (1988), pp. 57-60; Olthuis & Kleer & Townshend (2008), pp. 134-135.

In the Inuvialuit Final Agreement the Inuvialuit have title in fee simple absolute to the beds of all water bodies found on their lands, although the Crown retains ownership of all waters and the title remain subject to existing easements, servitudes and rights of way. The Nunatsiavut agreement is based on traditional, current use and occupation of lands, water and sea ice in accordance with custom. These lands are classified as fee simple lands while the other lands are extinguished.<sup>175</sup>

### 6.3.5. *Hunting, Fishing and Trapping*

The Portsmouth Treaty (1713) agreed to save the Indians' liberty for hunting, fishing and fowling, based retrospectively an earlier treaty in New England (1693). The same wording was repeated in subsequent treaties, including the Drummer (1725) and Halifax (1752) Treaties. The latter acknowledged a right to "free liberty of Hunting and Fishing as usual" and "to trade to the best Advantage".<sup>176</sup> Despite this, the 1928 decision of Nova Scotia County Court held that the Indians were not competent contracting parties to the Treaty of Halifax and therefore there were no specific rights to hunt.<sup>177</sup> In *Francis* the Nova Scotia Supreme Court (1969) ruled that the eighteenth century treaties were still valid unless changed by legislation in the light of British North America Act, 1867.<sup>178</sup> This took place only one year later, when the federal Fishing Act was passed. In 1985 the same court gave a favourable decision to Mi'kmaq in *Simon*, according to which the treaty of 1752 was still valid and could only be superceded by federal legislation. The treaty right to hunt must be interpreted in a flexible way that is sensitive to the evolution of changes in normal hunting practices and it contemplates those activities reasonably incidental to the act of hunting.<sup>179</sup> The Maritime courts have also confirmed the treaty rights of non-status descendant of treaty signatories, although they may have an onus of proof.<sup>180</sup>

After 1812 the Indians had learnt to negotiate terms of treaties so that the rivers and forests remained open and they could continue hunting and fishing. In the Robinson Treaties (1850) the Indians were guaranteed "full and free privilege to hunt over the territory ceded by them and to fish in waters, except for those portions that would be sold to private individuals or set aside by the government for specific uses", which was confirmed in the Enfranchisement Act, 1869.<sup>181</sup> The first of numbered treaties to include hunting and fishing rights in the treaty area was Treaty 3 (1873). The treaty tribes received also from the government ammunition worth \$1,500 and fishing nets.<sup>182</sup> In 1890 North-West Territories and Manitoba made their game laws applicable to Indians, passing the express treaty rights. In the northern areas the

---

175 Labrador Inuit Land Claims Agreement Act, 2004 (Newfoundland and Labrador), Preamble, s. 7; IFA (1984), ss. 7(4), (43)-(44).

176 Halifax Treaty (1752), s. 4.

177 NSCC, *R. v. Syliboy* (1929), pp. 313-314.

178 NSCA, *R. v. Francis* (1969).

179 SCC, *R. v. Simon* (1985), ss. 42-56; Elliott (2001), p. 75;

180 White & Maxim & Spence (2003), pp. 252-254. Cf. NBPC, *R. v. Fowler* (1993), NBCA, *R. v. McCoy* (1994), *R. v. Paul* (1994) and *R. v. Chevrier* (1994).

181 Crown Treaty 60 (1850); Crown Treaty 61 (1850); Enfranchisement Act, 1869, s. 8.

182 Treaty 3 (1873).

mounted police began to enforce regulations against hunting wood buffalo. In 1894 the Unorganized Territories' Game Preservation Act was passed, which prohibited the use of poison and the running of game with dogs. It also defined the closed seasons on specified game. In 1911 HBC opened its first fur trade post at Chesterfield Inlet. In 1938 the Northwest Territories Council restricted trapping licenses in the area to residents of the territories.<sup>183</sup>

World War II and the construction of the Alaska Highway ended free hunting and fishing in the north. By the 1950s the Indians had to register their traplines in some areas. The collapse of white fox markets between 1948-1950 reflected the rapid change in the area. Since 1959 the co-operatives have participated in harvesting fish, fur and game. On the other hand, the officials realised that indigenous people must be encouraged to continue their traditional way of life, or otherwise they would degenerate. In 1923 to the north was established two large game preserves for exclusive Indigenous use and in 1935 the first reindeers were introduced to Western Arctic after the Alaskan model. The Governor in Council may enter into agreement with indigenous people on reindeer, which are the "property of Her Majesty", and can be sold to individuals or corporations for herding.<sup>184</sup>

Based on the Constitution Act, 1930, three Natural Resources Transfer Agreements (NRTA) were made, which extended the rights of Indians in three Prairies Provinces to hunt, trap and fish for food in all seasons on all unoccupied Crown lands and all lands to which they have a right of access. Hunting on private land is allowed if there is no visible, incompatible land use. The conflicting provincial laws are void. The Alberta Court of Appeal has stressed the history of recognition of Indian rights in federal law: when dealing with the Indian tribes there is a need to uphold the honour of the Crown. The Supreme Court has held that while some provincial laws can affect Indians without being invalid, other provincial laws relate to Indians *qua* Indians and are considered to interfere with exclusive federal jurisdiction under s. 91(24).<sup>185</sup>

The NRTAs extinguished all commercial hunting rights. In general, the right to harvest commercially is possible, if the commercial harvesting activity is proven to have been an integral part of the claimant's society prior to contact. A claimant must prove that the commercial activity was a defining feature of a distinctive culture in society. In *Horseman* (1990) the Supreme Court held that the original Treaty 8 rights had included also commercial rights but that they had been limited to subsistence rights by the Constitution Act, 1930.<sup>186</sup> Later the Supreme Court returned to the question in *Gladstone* (1996). Lamer CJ found, based on *Van der Peet* – test, that the Heiltsuk First Nation's pre-contact trade in spawn had been extensive enough to constitute an integral part of a distinct culture. The Heiltsuk had a

---

183 Unorganized Territories Game Preservation Act, 1894; Dickason (1994), p. 370.

184 NWT Act, 1985, s. 45; Northwest Territories Reindeer Regulations, 2006, s. 4; Zaslow (1988), pp. 277-279; Dickason (1994), pp. 319, 368-372, 378, 382, 395-396; McHugh (2004), p. 153.

185 Constitution Act, 1930, s. 13; Wildlife Act, 1998 (Saskatchewan), ss. 34-35; SCC, *Cardinal* (1974); ACA, *Wesley* (1932)

186 SCC, *R. v. Horseman* (1990); Elliott (2001), pp. 45-46, 82-83. The Constitution Act, 1930 applies only to provincial laws in Prairies Provinces and excludes the fishing rights.

priority, but not an exclusive right for commercial fishery.<sup>187</sup> In *Marshall* (1, 1999), the court recognised limited commercial fishing rights to earn livelihood.<sup>188</sup>

At the federal level, the Governor in Council may make regulations for the protection and preservation of fur-bearing animals, fish and other game on reserves. The band councils have power to make bylaws on preservation, protection and management of fur-bearing animals, fish and other game on the reserve. Many treaties contain rights to hunt, fish and trap, but they have also extinguished those rights. Further, they have been subject to changing regulations. For example, in the eve of the new Constitution Act, the federal parliament and provincial legislatures passed laws which restricted hunting and fishing rights, although they were against the guarantees in treaties. The federal and provincial governments have often acted unilaterally to remove lands from hunting territories. When the rights are not explicitly included to treaties or statutes they may survive as Aboriginal rights. Since 1982 the Aboriginal and treaty rights are enforceable against federal and provincial hunting and fishing laws. They can be only overridden by the Sparrow test. In treaty territories the hunting and fishing are not allowed on occupied and settled lands. Treaty rights may be generally exercised only within the boundaries of the tract surrendered, unless there is other historical proof of use. The rights in a territory overlapping provincial boundaries may be transferable.<sup>189</sup>

In the Douglas Treaties (British Columbia) the right to hunt as formerly extends to traditional hunting areas, which may be outside the surrendered tract's limits. In 1874 the federal government reminded the government of British Columbia of its obligations to protect the customary fishing grounds. British Columbia responded by promising reserves for each tribe that included their fishing stations, fur-trading posts and settlements. The First Nations became in British Columbia under the provincial hunting and trapping regulations from 1915. The subject was reopened in the 1960s when two Indians, Bob and White, had been charged of hunting outside the hunting season against the British Columbia Game Act, 1960. In 1964 the British Columbia Court of Appeal ruled that the Saalequun tribe, which had ceded land to Governor Douglas in 1854, had preserved a right to hunt in unoccupied areas. The treaty right prevailed over provincial game laws. The decision was upheld in the Supreme Court.<sup>190</sup> On the other hand, after the enactment of the Migratory Birds Convention Act (1960) the Supreme Court established that Indian hunting and fishing rights could be taken away by general federal legislation which prevailed over the treaties.<sup>191</sup> Also in two cases from 1985 the court ruled that provincial hunting laws applied to Indians in non-treaty areas.<sup>192</sup> Today the self-governing First Nations of British Columbia have wildlife committees and councils which promote the cooperative management of the resource and advises the minister on management and hunting matters. The First Nations may harvest wildlife for

---

187 SCC, *Gladstone* (1996), ss. 16-22.

188 SCC, *Marshall* (1, 1999), ss. 107-114. Also British Columbia and Ontario have similar cases. All courts have, however, not supported the commercial fishery.

189 Indian Act, 1985, s. 73(1)(a), 81(1)(o); Olthuis & Kleer & Townshend (2008), pp. 45-46, 74-75, 81.

190 BCCA, *Regina v. White and Bob* (1964); SCC, *Regina v. White and Bob* (1964);

191 SCC, *R. v. Sikeya* (1964), p. 642. See also: SCC, *R. v. George* (1966), pp. 578-579; *Daniels v. White* (1968), p. 539-541; *Derrickson v. Derrickson* (1976), ss. 60-63; *Jack v. R.* (1980), pp. 312-315. Today the Indians and Inuit have right to hunt migratory birds without a Migratory Game Bird Hunting Permit; The reserves created by British Columbia were the smallest in Canada, on average 5 hectares per Indian.

192 *Dick v. R.* (1985), ss. 27-45; *Jack & Charlie v. The Queen* (1985), ss. 29-40.



domestic purposes in their Wildlife Harvest Areas according to wildlife harvest plan and allowable harvest allocations. Their traplines are retained and some of them may trade and barter wildlife.<sup>193</sup>

Québec was the only province which did not follow the British Columbia's model. It was historically outside the treaty process and claimed a right to regulate all hunting and fishing. Only after confrontations on the Restigouche reserve did the province make an agreement with the First Nations on fishing rights.<sup>194</sup> Even today for all hunting and trapping an authorising licence is required. The Iroquois of Kahnawake, who charged licence fees to duck hunters and fishermen along the St. Lawrence Seaway located in the middle of their reserve as reminiscent of tolls charged in pre-colonial days, have been given in new agreement a right to protect and manage the wildlife and fish but it must be consistent with federal environmental laws and regulations.<sup>195</sup> In the JBNQA category II lands the Cree have exclusive hunting, fishing and trapping rights for personal and community use under provincial jurisdiction where the harvesting quotas are based on the provincial resource management plans, and the category III lands where the rights may continue under Québec's regulatory authority. The rights extend to trade and commerce with all by-products of harvesting activities. There is a right to possess and use all equipment needed and to travel and establish the necessary camps. There is a number species reserved to exclusive use of the Indigenous peoples. For migratory birds, the personal use is limited to the gift or exchange of all harvesting products within the extended family to protect them when necessary. In categories I-II they have the right to establish and operate commercial fisheries and in category III certain fish species. In categories I-II the right needs Indigenous peoples' consent. The agreement has established the Hunting, Fishing and Trapping Committee, composed of an equal number of indigenous and government representatives. The committee makes representations to the ministry about wildlife management and allocation issues, while the responsible minister has the final say. In all categories the rights are subordinated to development needs, but on the other hand, the indigenous rights to harvest take priority to legal change.<sup>196</sup>

Québec, Manitoba and Saskatchewan created rehabilitation projects to reclaim over-exploited areas for production of furs and supported the hunting and trapping lifestyles of the First Nations and Métis. Saskatchewan combined its fur production programme with farming assistance programmes. The western provinces have since the 1940s registered traplines, which have been instrumental in controlling trapping and maintaining the traditional way of life.<sup>197</sup> Alberta has created Indian Fur Management Licenses.<sup>198</sup> In the Yukon the First Nations must be informed of all changes, which prohibit or restrict the trapping rights.<sup>199</sup>

---

193 Maanulth First Nations Final Agreement Act, 2007 (British Columbia), s. 11; Tsawassen First Nation Final Agreement Act, 2007 (British Columbia), s. 10; Migratory Birds Regulations, s. 5(6); Nisga'a Final Agreement, 1999, s. 9; Dickason (1994), pp. 348-349. Karsten (2002), p. 61.

194 White & Maxim & Spence (2003), p. 227.

195 Agreement with Respect to Kanesatake Governance of the Interim Land Base, s. 25; Dickason (1994), p. 358.

196 JBNQA (1975), ss. 5, 24.

197 Dickason (1994), p. 365.

198 Wildlife Regulation, 1997 (Alberta), s. 103(1).

199 Trappers Regulations (Yukon), s. 21.

The Department of Fisheries and Oceans has made an agreement with more than 50 First Nations, part of them being long term agreements. Nationwide they include e.g. licences to sell, trade and barter the marine mammals. The responsible minister may issue a communal licence to an indigenous organisation to carry on fishing and related activities.<sup>200</sup> In Alberta and Labrador the indigenous people are licensed to fish for food for personal use or for immediate family. In Alberta they may also engage in sportfishing without license.<sup>201</sup> The Nisga'a and Tsawwassen Fisheries Committees facilitate the cooperative planning and conduct of fisheries and enhancement activities. The Lisims Fisheries Conservation Trust promotes conservation and protection of fish species, facilitates sustainable management and promotes and supports Nisga'a participation in the stewardship of fisheries. Nisga'a and Maanulth have harvest agreements, stewardship, operational guidelines and they participate in First Nations fisheries advisory processes. The responsible minister must issue each year a Harvest Document to the First Nation.<sup>202</sup> The federal and provincial governments support the First Nation's participation in the general commercial fishing industry. The self-governing First Nations may fish and acquire plants in their fishing areas and trade and barter them. The right is only limited by conservation, public health or safety.<sup>203</sup>

In Saskatchewan and the Northwest Territories indigenous peoples may fish without a licence by angling and other regular methods.<sup>204</sup> The Gwich'in Agreement confers the First Nation an exclusive wildlife harvesting right to their lands in all seasons, excluding fish and migratory birds. The Gwich'in have ancillary right to travel, establish and maintain hunting, trapping and fishing camps, and to trade edible products of wildlife inside the indigenous community. The purpose is to maintain traditional sharing among indigenous individuals and communities.<sup>205</sup> In the Sahtu Dene Agreement the right to use water shall not disturb any rights associated with a right to fish or hunt migratory game birds.<sup>206</sup> Due to their overlap with other agreements the Dogrib continue to have the traditional right to harvest wildlife in the NWT and Nunavut and *vice versa*.<sup>207</sup> A similar Fish and Wildlife Management Board has been included to the Umbrella Agreement. In the Champagne and Aishihik Agreement the harvesting for subsistence employing traditional, methods of equipment is allowed together with a right to trade, barter and sell fish products. The fishing management is co-ordinated. The First Nations have a right of first refusal to new fishing licenses. The right is limited by measures necessary for conservation, public health or safety.<sup>208</sup>

The courts have defined several times the scope of incidental activities. Hunting for food outside the traditional territories, fishing without a licence in traditional territory, carrying a gun to the hunting ground, teaching youth how to fish, building a fire or a cabin in a park and

---

200 Marine Mammal Regulations, 1993, s. 13(2); Report of Rodolfo Stavenhagen (2004), p. 50.

201 Alberta Fishery Regulations, 1996, s. 13; Newfoundland and Labrador Fishery Regulations, 2010, s. 10(4).

202 Nisga'a Final Agreement, 1999, ss. 8-9; Maanulth First Nations Final Agreement Act, 2007 (British Columbia), ss. 10.1-2, 10.4.; Tsawwassen First Nation Final Agreement Act, 2007 (British Columbia), s. 9.1-2, 9.65-66, 9.96.

203 Aboriginal Communal Fishing Licences Regulations, 2009, s. 4;

204 Saskatchewan Fishing Regulations, 1995, s. 4(3); NWT Fishery Regulations, s. 22(1).

205 Gwichin Comprehensive Land Claim Agreement (1991), s. 12.

206 Sahtu Dene and Metis Comprehensive Land Claim Agreement (2005), s. 20.

207 Dogrib Final Agreement, s. 2.

208 Amendment of Champagne and Aishihik First Nations Final Agreement, 2006 (Yukon), ss. 4, 6, 9.

hunting of game dangerous to a community are included in hunting and fishing rights. On the other hand, there are justified infringements to treaty rights - foremost health and safety. The courts have ruled that for safety reasons no person has the right to have a loaded firearm in a powerboat. In night hunting it must be estimated whether it is dangerous in particular circumstances. In all restrictions dealing with health and safety matters the governments should adequately consult the people affected.<sup>209</sup>

The governments and courts have met the question of whether the Métis are included to the provisions of the NRTA. Originally drafters used the definition of Indian found in the 1927 Indian Act which included all persons of Indian blood if they followed the Indian mode of life. In *Blais* (2003), the Supreme Court reasoned that the term Indians in connection with the NRTA did not include the Métis.<sup>210</sup> In *Grumppo* (1996) the Saskatchewan Court of Appeal held that the NRTA only accommodates, preserves and amends existing Aboriginal rights. There is a need to decide whether the Métis had an existing Aboriginal right to hunt before the enactment of the NRTA.<sup>211</sup> In Ontario (2004-2006) and Alberta (2004-2007) the bipartite negotiations have, following the *Powley* decision, led to interim harvesting agreements. In Ontario the Court of Appeal has demanded the Métis define first the traditional harvesting areas before a final agreement could be made.<sup>212</sup> The Alberta NRTA has been broadened to include the Métis. Their right is limited to harvesting for subsistence purposes subject to closures or restrictions implemented for conservation or safety purposes. The Métis must obtain licences according to Alberta statutes. The province has adopted the Métis organisations' membership criteria. In the Maritime region the Métis have had less success: the court cases in New Brunswick have indicated that there is no official recognition of their harvesting rights.<sup>213</sup>

In Saskatchewan, the right to fish without licence for food has been extended to the Métis.<sup>214</sup> Fishing in the Métis settlements of Alberta is subject to residential status or persons authorised to fish under settlement bylaws. The resident settlement members may fish for sustenance at any time of the year with a Métis Domestic Fishing Licence. The Minister of Environmental Protection may authorise a Settlement Council to issue Metis Commercial Fishing Licences for commercial purposes. The minister has an obligation to set aside a portion of the total designated catch for settlement members. The provincial Crown has retained also rights of fishery. The settlement members have also exclusive rights to hold or obtain in their lands game birds, and to keep baits for the hunting of wolves and coyotes on public lands based on a Métis Trappers' Licence.<sup>215</sup>

---

209 Olthuis & Kleer & Townshend (2008), pp. 77, 80. Cf. SCC, *Morris* (2006), ss. 108-139; *Adams* (1996), s. 59; ONCA, *Shipman* (2007), ss. 38-47; *Meshake* (2007), ss. 26-39; The federal Firearms Act demands that all gun owners must be licenced and their firearms and ammunition be registred. Several First Nations' organisations have challenged the law. Cf. Firearms Act, 1997, ss. 4, 7.

210 SCC, *Blais* (2003), ss. 32-35; McIntosh (2009), p. 417.

211 SCA, *R. v. Grumppo* (1999), ss. 85-87.

212 ONCJ, *R. v. Laurin* (2007), ss. 28-29. Isaac (2008), pp. 53, 59-61.

213 Isaac (2008), pp. 53, 59-61. Cf. NBPC, *R. v. Chiasson* (2001); *R. v. Castonguay & Faucher* (2002); *R. v. Daigle* (2003).

214 Fisheries Regulations (Saskatchewan), s. 91.

215 Métis Settlements Act, 1990 (Alberta), ss. 131-133; General Fisheries Act (Alberta) Regulation, 1997, s. 2; Wildlife Regulation, 1997 (Alberta), ss. 80, 85, 103.

The Inuit economic, social and cultural needs are recognised. They may harvest exceptionally also endangered species for subsistence purposes. The Nunavut Land Claims Agreement has the most extensive co-management procedure with wildlife management, resource management and environmental boards, which offer for Inuit a formal role in making recommendations to government decision makers. The Inuit and their spouses have an assigned right to harvest quantity of wildlife in the Nunavut Settlement Area. The identification is based on enrolment card. The personal harvesting has to respect the Inuit customary principles. The Nunavut Wildlife Management Board is the main instrument for wildlife management in the settlement area and the main regulator of access to wildlife. It creates a system of harvesting rights, priorities and privileges that reflect current and traditional Inuit harvesting. The wildlife management is governed by and implements principles of conservation. The hunters and trappers organisations and regional wildlife organisations oversee the exercise of harvesting. The function of organisations is to manage the harvesting among members. The Inuit have free and unrestricted access to all land, water and marine areas within the settlement area for harvesting purposes with some limitations. The beneficiaries are represented by the Tunngavik Federation of Nunavut. The seal hunting is a question of continuing controversy between Canada and the EU.<sup>216</sup>

Northern Québec's Indigenous peoples have a Hunting, Fishing and Trapping Coordinating Committee, which reviews, manages, supervises and regulates the harvesting and advises governments on wildlife management which has representatives from federal and provincial governments and the indigenous peoples. The province has also created a support programme for Inuit hunters, fishers and trappers, administered by the Kativik Regional Government. In addition there are the Nunavik Marine Regional Wildlife Board, Planning Commission and Impact Review Board. The legislation and agreements demand to take into account the traditional pursuits of Indigenous peoples. There are also JBNQA-based, zone-specific rules on traplines. The Indigenous peoples have collectively an exclusive right to harvest in the area, including trade and commercial activities, outfitting operations, right of first refusal, management of hunting, fishing and trapping regulations and an exclusive right to keep the wildlife in captivity or to raise it - although the right can be shared by an agreement.<sup>217</sup>

The Inuvialuit Final Agreement and legislation give the Inuit preferential harvesting rights, excluding the migratory birds, with compensation for losses arising from development in the settlement region. The laws of general application are applicable on Inuvialuit lands and the federal government retains management and control rights of fisheries, game and insectivorous birds. Six committees represent the indigenous hunters at the local level with further representation on the Inuvialuit Game Council. The overall charge belongs to the Wildlife Management Advisory Councils and Fisheries Joint Management Committee, while

---

216 Wildlife Act, 2003 (Nunavut), ss. 16-17, 75, 125; Order Giving Notice to Decisions not to Amend Some Species to the List of Endangered Species, 2006 (Nunavut), Annex 1; NLCA (1993), ss. 5, 12; Olthuis & Kleer & Townshend (2008), pp. 136-137; IWGIA (2010), p. 51.

217 Loi sur le programme d'aide aux Inuit beneficiaries de la Convention de la Baie James et du Nord québécois pour leurs actes de chasse, de pêche et de piégeage, 2006 (Québec), s. 2-3, 7; Nunavik Inuit Land Claims Agreement Act, 2008, s. 7(1); Loi sur les droits de chasse et pêche dans les territoires de la Baie James et du Nouveau-Québec, 2009 (Québec), ss. 2, 6-13, 26-28, 32, 40, 48, 54-55; Décret concernant la publication de l'entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec, 2007 (Québec), ss. 2-3. Nunavik Inuit Land Claims Agreement Act, 2008, s. 7(1);

the enforcement, collecting of scientific data and feedback role belong to local committees and the Game Council. The quota setting and restrictions are agreed. The Environmental Impact Screening Committee determines whether development proposals have a negative impact on the environment or wildlife harvesting and refers development proposals to the Environment Impact Review Board for public review.<sup>218</sup>

In the Yukon, the Inuit have the right to use traditional methods of harvesting, only restricted by public safety. They can without a permit exchange or barter the wildlife products among themselves. For the harvest of protected wildlife a minister's licence is needed.<sup>219</sup> The Labrador Inuit Land Claims Agreement has established the Torngat Wildlife and Plants Management Board for making recommendation to governments on the conservation and management of wildlife and plants in the settlement area. The respective minister has an overall responsibility for the conservation and management. The Torngat Joint Fisheries Board has similar function for fisheries. The province has also created an aquaculture licence-system.<sup>220</sup>

In *Sparrow* (1990) the Supreme Court of Canada analysed the wording of s. 35(1) of the Constitution Act, 1982, from a common law perspective. It addressed the meaning of existing aboriginal rights, the context and scope of aboriginal right to fish, the meaning of recognised and affirmed and the impact of s. 35(1) on the regulatory power of the federal Parliament. The court held that s. 35 provides constitutional protection for existing Aboriginal rights. The judicial interpretation of an existing Aboriginal right has to be sensitive to the Aboriginal perspective on the meaning of the rights at stake and be interpreted flexibly to permit their evolution over time. They are affirmed in contemporary form. Existential and categorical meaning of recognised and affirmed aboriginal rights are rights in existence when s. 35 came into constitutional effect. The Aboriginal fishing, land and hunting rights have priority over later restrictive legislation. On the other hand, the federal and provincial regulations may restrict them so long as the regulation rests on valid legislative objectives that are compelling and substantial and the limitation is compatible with the Crown's fiduciary duty to First Nations. The regulation exists because of pre-existing and independent aboriginal rights. It has to be converged and reconciled with the governmental power. The Court incorporated the First Nations' past to constitutional analysis of aboriginal rights by looking to traditional and historical practices as evidence of the existence of rights. The affected Musqueam band had been an organised society, whose right to fish had always been an integral part of their distinctive culture.<sup>221</sup>

In *Van der Peet* (1996) the Supreme Court distinguished the Aboriginal rights to harvest resources from Aboriginal title. It created a test according to which the Indigenous claimants must show that the activity to which they claim a right was an element of a practice, custom or tradition integral to their distinctive culture at the time of contact with Europeans, or in the case of the Métis, the court has spoken about effective European control. It has also defined the Aboriginal rights in connection with fishing rights as group and site specific.

---

218 Wildlife Act, 1988 (NWT), ss. 101-102; IFA (1984), s. 7; Olthuis & Kleer & Townshend (2008), p. 146.

219 Wildlife Act, 2002 (Yukon), ss. 201-202, 207-208.

220 Aquaculture Act, 1990 (Newfoundland and Labrador), s. 3.

221 SCC, *Sparrow* (1990). The Indian Food Fishery Licence was defined in ss. 27(1), (4) of the British Columbia Fishery (General) Regulations.

The indigenous treaty rights to trap and hunt are geographically limited and would lose their value without preservation of enabling wildlife habitat. Some scholars have criticised the court's decision as paternalistic. There is problem in relation to the *Gladstone* case, where the Heiltsuk Nation, the neighbours of the Sto:lo Nation, was proved to have a large-scale historical fishing right, unlike their neighbours. Nevertheless, both bands were members of the same traditional trading network. The evidence was based on European records which favoured the Heiltsuk. Based on *Gladstone*, the Heiltsuk have primacy in allocation of fishing stocks and fiduciary freedom to share the traditional resources. *Van der Peet*, on the other hand, demands the rights to be resolved in accordance with federal and provincial legislation and must show to be non-extinguished before 1982. The *Van der Peet* – trilogy divided the court, but its policy developed during the process becoming more generous and flexible.<sup>222</sup>

In *Adams* (1996) the appellant was able to demonstrate that fishing for food was an integral part of the Mohawks' culture in Québec. There was sufficient continuity in practice to establish an Aboriginal right and they obtained the licence.<sup>223</sup> In *Côté* (1996) the Algonkin appellants argued that they were exercising a right guaranteed both by the s. 35(1) and the Treaty of Swegatchy (1769). Based on *Van der Peet*, Lamer CJ found that food fishing within the lakes and rivers of a restricted zone was a significant part of the Algonkin life but, unlike in *Adams*, the federal and provincial governments have a right to limit the indigenous rights which are not expressly mentioned in the Constitution.<sup>224</sup> Also BCCA held in *Alphonse* (1993) that existing Aboriginal and treaty rights may be exercised on unoccupied private land.<sup>225</sup> However, the Supreme Court has specified in *Badger* (1996) that if the private property is occupied and visibly used, it may not be accessed by Indigenous peoples to exercise their rights.<sup>226</sup>

In *Sioui* (1990) the Supreme Court ruled that treaty guarantees could prevail over provincial regulations, provided that their content was consistent with the general purpose of the enabling statute.<sup>227</sup> In *Marshall 1* and *2* (1999), the court specified the significance of treaties: the Mi'kmaq Nation's fishing rights are based on British local treaties of 1760-1761. In *Marshall 1* (1999) the court held that a trade restriction provision should be construed to contain a positive treaty right to hunt, fish and trap goods to the extent that they yielded the Mi'kmaq a moderate livelihood. The right was constitutionally guaranteed and could be regulated only pursuant to s. 35(1), 1982.<sup>228</sup> The decision led to confrontation in fisheries and the Supreme Court had to return to the case in *Marshall 2* (also 1999). The court specified that the treaty right is limited to the historical local communities and comprises only traditional hunting, fishing and gathering. The right can be regulated by the government's restrictions when they do not deprive the treaty rights and can be infringed where it is justified for conservation or other compelling and substantial public objectives. General historical evidence can be used to

222 SCC, *Gladstone* (1996), ss. 16-22; *Van der Peet* (1996), ss. 46, 73; Barsh (1997), pp. 1001, 1003-1005.

223 SCC, *Adams* (1996), ss. 50-59.

224 *Côté* (1996), s. 83.

225 BCCA, *Alphonse* (1993), ss. 86-89.

226 SCC, *R. v. Badger* (1996), ss. 49-53. See also: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005), ss. 2, 45.

227 SCC, *R. v. Sioui* (1990).

228 SCC, *Marshall 1*, 1999, s. 64.

interpret a treaty text trade restriction clause as a free-standing commercial harvesting right, protected constitutionally against restrictions that govern non-treaty resource users.<sup>229</sup>

The Métis harvesting rights must generally be exercised within the traditional territory of a specific community and can be infringed for valid purposes by governments and subject to the same general restrictions which apply to rights-based harvesting by other indigenous peoples. In *Powley* (1993) the Supreme Court held that the members of the Métis community in the Sault Ste. Marie region had an Aboriginal right to hunt for food and that that right had been infringed without justification by the Ontario hunting regulations.<sup>230</sup> But as has been referred to above, the Supreme Court has limited the scope of Métis rights in *Blais* (2003), where the Métis were excluded from the NRTA licence to hunt deer out of season.<sup>231</sup>

The Provincial Court of Saskatchewan recognised in *Morin* (1996) the Métis rights to hunt, fish, and trap. The court held that the defendants, fishing out of season, were discriminated against. The Indian and Métis are two similarly situated groups of people and should be similarly treated under the fishery regulations. The defendants' right to equality had been infringed and therefore the fishery regulations had no force or effect on them. The Governments of Canada and Saskatchewan answered that the Métis rights had been extinguished in 1906. Because there was question on scrip, the courts in Saskatchewan held that there was no statute or order to extinguish the Métis right to fish. Based on the case, the Saskatchewan Environment has published A Guide to Métis Hunting and Fishing Rights in Saskatchewan. It limits the exercise of rights to the Northern Administrative District (NAD). A Métis must show that he/she is a permanent resident of the area, the ancestry has long-standing connections to a particular Northern Métis community where he/she resides, and that he/she is living a traditional lifestyle. The guide does not exclude the possibility of similar rights even elsewhere. The Aboriginal right is based on s. 35.<sup>232</sup>

Related to Inuit, the Nunavut Court of Justice found in *Kadlak* a *prima facie* infringement of an indigenous right, when the responsible minister overruled the Nunavut Wildlife Management Board's recommendation to allow traditional hunting of polar bears. The minister's decision was not justified under the *Sparrow* test.<sup>233</sup>

### 6.3.6. Timber Rights

The Biggot Commission of 1842-1844 suggested that a system of timber licensing be instituted for reserves. Two laws were passed in 1850-1851 to protect the reserves from outer exploitation. In *St. Catherine's Milling* (1888) the Crown explained that Indians had an inherent right to their resources. In reality, many reserves are too small for efficient log

---

229 *Marshall* (2, 1999), ss. 4, 36-37, 41.

230 SCC, *Powley* (1993), ss. 47, 53.

231 *R. v. Blais* (2003), ss. 39-41.

232 Dominion Lands Act, 1906, s. 6; SPC, *R. v. Morin* (1997); A Guide to Métis Hunting and Fishing. The Saskatchewan Court of Queen's Bench ruled later on apply that the province's fishing regulations formed an infringement of the Canadian Charter.

233 NUCJ, *Kadlak v. Nunavut (Minister of Sustainable Development)*(2001), s. 32; Olthuis & Kleer & Townshend (2008), p. 128.

harvesting.<sup>234</sup> The eighteenth century treaties dealing with the Maritime Provinces' indigenous peoples have led to litigation on logging rights. In 1998 the New Brunswick Court of Appeal overruled the lower court's decision and held that the commercial harvesting of timber is not a practice, tradition or custom integral to Mi'kmaq and Maliseet cultures. The Supreme Court returned to the question in the double case *Marshall/ Bernard* (2005). The Mi'kmaq Nation lost the case: the court ruled that logging, and cutting wood in the Crown lands was not a general treaty right.<sup>235</sup> Following the *Van der Peet* case, the Supreme Court, however, ruled in *Sappier/Gray* (2006) that the Maliseet and Mi'kmaq peoples in New Brunswick have an Aboriginal right to harvest wood for domestic purposes. The content of these resource-use rights is determined by practices, customs and traditions integral to the distinctive culture of the people at the time of contact with Europeans.<sup>236</sup>

The Governor in Council may authorise by regulation the minister to grant licences to cut timber on surrendered lands, and with the consent of a band council, on reserve lands.<sup>237</sup> The provinces have entered into agreements with the First Nations on harvesting on Crown lands. In Manitoba the logging may be undertaken in First Nations Commercial Development Zones only according to agreement.<sup>238</sup> In British Columbia the chief forrester must determine the allowable yearly cuts. The minister can enter into agreement with the First Nations about granting rights to harvest Crown timber in the form of the First Nations woodland licences. In the Community Forest Agreement the parties agree about treaty measures to use the forest economically. Based on negotiations the minister may grant forestry including special standards and free use permits for First Nations.<sup>239</sup> The Self-governing First Nations of British Columbia own their forest resources. They have exclusive authority to determine, collect and administer fees and royalties related to forest resources. It can implement forest management standards, provided they meet or exceed provincial standards. Nisga'a can purchase forest tenure on an annual level. The Minister of Forests defines the allowable annual cut for the Maanulth's harvesting, who have formed a corporation for harvesting rights.<sup>240</sup> The McLeod Lake Indian Band Agreement includes provisions on silviculture and reforestation.<sup>241</sup> In dispute between the Nuu-Chah-Nulth Council and MacMillan Bloedel on logging in Mearns Island, the BCCA reminded that an agreement must ensure that the importance of resources to Aboriginal parties is taken into account.<sup>242</sup> In *Tsilhqot'in First Nation* the BCCA held that the imposition of the provincial forestry management scheme removed the tribe's ability to control the uses of the land, created uncertainty about the protection of the land for future

234 JCPC, *St. Catherine's Milling* (1888); Dickason (1994), pp. 249-250.

235 SCC, *Marshall/Bernard* (2003), ss. 121-122.

236 SCC, *Sappier/Gray* (2006), s. 72.

237 Indian Act, 1985, s. 57(a); Indian Timber Regulations, 2002, ss. 4-10; Crown Lands and Forest Act, 1980 (New Brunswick), s. 4.

238 Pimitotah Traditional Use Planning Area Regulation, 2011 (Manitoba), ss. 4, 6.

239 Forest Act, 1996 (British Columbia), ss. 8, 12, 43, 47.

240 Nisga'a Final Agreement Act, 1999, ss. 5-6; Maanulth First Nations Final Agreement Act, 2007 (British Columbia), s. 9; Tsawassen First Nation Final Agreement Act, 2007 (British Columbia), s. 39; Maanulth Forest Corporation Interim Regulation, 2011 (British Columbia), s. 3, 6.

241 McLeod Lake Indian Band Treaty No. 8 Adhesion and Settlement Agreement Act, 2000 (British Columbia), s. 5;

242 BCCA, *Macmillan Bloedel v. Mullin* (1985).



use and deprived them of the ability to realise economic gains from harvesting by infringing their Aboriginal title.<sup>243</sup>

In JBNQA, the right to use the resources of forests in category I was transferred to the Cree for personal and community needs and commercial exploitation, extending to third parties acting with the consent of the communities and Québec authorities. In category II the operations are governed by Québec standards defined by the provincial Department of Lands and Forests. In category III the Cree can only apply from department wood to develop saw mills. In categories II-III the general forest protection regime is applicable and the dues are payable. The agreement between the province of Québec and the Cree Nation (2002) established as a co-management structure the Cree-Québec Forestry Board. Later the new convention between the provincial government and the Crees has created a detailed co-management mechanism for forest resources, including a Joint Committee to scrutinise the governmental initiatives and adoption of next generation forest plans.<sup>244</sup>

The Yukon recognises the important role of forests in society, culture and lives. The UFA charges the departments to manage harvest management activities. The minister has to consult with the First Nations before establishing planning areas and a Joint Planning Commission has been established. The Champagne, Aishihik and Teslin Tlingit nations have initiated forest management plans, which must include a description of traditional use of First Nations' forests and take into account their forest resource harvesting, management of customs, fish and wildlife harvesting rights, knowledge and experience. A woodlot plan has to include an estimation about the value of affected First Nation's forest resources. Also the Nacho Nyak Dun nation's co-operation with the department has increased forest management capacity. Renewable Resources Councils have to be consulted before establishing a new policy which affects the resources management of forests, allocation or forestry practices and legislation concerning forest resources. This ensures the local input into the management of forest resources.<sup>245</sup> In the NWT, the Gwich'in Agreement has left the definition of tree harvesting for commercial purposes subject to legislation. A final say in licences belongs to Renewable Resources Board. Only trees located on Gwich'in lands give right to ownership. Gwich'in may gather plant material for food, medicine, cultural and other personal purposes and for purposes required in the exercise of wildlife harvesting rights within the settlement area.<sup>246</sup>

The Métis have had more difficulties in reaching agreements on timber use. In *Castonguay* (2002) the New Brunswick Métis were unable to assert their constitutional right to cut timber as they were unable to demonstrate that they were Métis. Despite this example, there has been also some advance, too. The government of Newfoundland and Labrador made in 2004 a two-year forestry agreement with the provincial Métis organisation.<sup>247</sup>

243 BCCA, *Tsilhqot'in Nation v. British Columbia* (2008).

244 JBNQA (1975), s. 5; Décret concernant la publication de l'entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec, 2007 (Québec), ss. 2-3. In *MacMillan Bloedel Ltd. v. Mullin* (1985), the BCCA stressed the importance to find solution to questions through bilateral negotiations, not by litigation.

245 UFA, s. 17; Forest Resources Act (2008), Preamble, ss. 7-8; Forest Resources Regulation, 2010 (Yukon), ss. 2, 5, 15; White & Maxim & Spence (2004), p. 154.

246 Gwich'in Comprehensive Land Claim Agreement (1991), ss. 13-14.

247 NBPC, *Castonguay & Faucher* (2002); Isaac (2008), p. 62.

### 6.3.7. Resource Management and Environment

The Constitution Act, 1867, gave in s. 109 to provinces a proprietary interest to mines and minerals.<sup>248</sup> In *St. Catherine's Milling* (1888), the federal Government stressed that the Indians had before the extinguishment a right to claim mines and minerals from the land. Later the Privy Council described the Indian interest in pre-1867 reserve lands as usufructuary: the minerals are vested in the provinces<sup>249</sup>. Other courts have confirmed that the provinces may undertake or authorise projects of development on Indigenous lands after consulting and compensating them. A First Nation's council may require the minister of DIAND to transfer the management and regulation of oil and gas exploration and exploitation on reserve lands. A band council may also require the payment of moneys held in trust to the band in the Consolidated Revenue Fund and there will be made a separate payment agreement. Before the transfer the First Nation has to prepare Oil and Gas, and Financial Codes. In transfer agreements apply the laws of general application on trusts. The band may also vote on ratification of the agreement. The First Nation's management area will be set apart as a reserve, including later amended lands. The First Nation may make laws on the following: oil and gas exploration and exploitation in First Nations' managed area; terms; conditions; environmental assessments; protection of environment; consultation; punishable offences; inspection; and auditing. The laws must provide the same level of protection as the respective provincial laws, and comply with Canada's international legal obligations. A Band Council may also delegate the management of oil and gas affairs to an executive director, who can grant permits, leases and options to acquire permit or lease related to oil and gas rights on Indian lands. The Governor in Council may make regulations on the conduct, minimum requirements, consultation and bodies' administration, and exempt the First Nation from certain environmental assessments. The holder of lease can drill, product and treat oil and gas in the lease area, and transport, market and sell it. The usual period for a lease is five years.<sup>250</sup>

The Governor in Council may make regulations providing for the the disposition of surrendered mines and minerals underlying lands in a reserve. The provincial mining claims cannot be extended as such to reserve lands and the development of mining resources and must take place in a manner consistent with recognition and affirmation of existing constitutional Aboriginal and treaty rights.<sup>251</sup> The Indian reserves in British Columbia are in mineral rights subject to provincial legislation. An exception are the self-governing First Nations, who own the mineral (Nisga'a) or subsurface resources (Tsawassen, Maanulth) of their lands. The Nisga'a government may exclusively determine, collect and administrate fees of rents and royalties related to mineral resources. An exploration plan must have the Indigenous community's

---

248 Constitution Act, 1867, s. 109.

249 JCPC, *St. Catherine's Milling* (1888); *Attorney General of Quebec v. Attorney General of Canada* (1921).

250 Indian Oil and Gas Regulations, 1995, ss. 3, 10, 23-24; First Nations Oil and Gas and Moneys Management Act, 2012, ss. 6-7, 12, 15-17, 25, 30, 35, 38, 45, 61, 63; First Nations Oil and Gas Environmental Assessment Regulations, 2007, s. 11(1); Otis (2005), p. 89.

251 Indian Act, 1985, s. 57(c); Indian Mining Regulations, ss. 23, 31. See also: Mining Act, 1985 (New Brunswick), s. 24; Mining Act, 1990 (Ontario), ss. 2, 51, 78, 170; Mineral Exploration Standards Regulations, 2007 (Newfoundland and Labrador), ss. 1-2.

consent, and there may be arranged hearings concerning the Aboriginal or treaty rights. The term of lease is ten years with annual rent and payment of royalties.<sup>252</sup> In Saskatchewan, the Lieutenant General in Council may set aside and transfer the administration and control of Crown minerals to the federal Crown to satisfy the obligations and undertakings to the Indian bands. All environmental assessments must consider the environmental effects and their significance of effects, comments, techniques and economically feasible measures.<sup>253</sup> In the Yukon and the NWT, the federal government has to inform the First Nations on exploitation of minerals used for nuclear energy.<sup>254</sup>

Indian bands may claim water rights on the basis of both treaty and ownership of riparian land. The riparian rights include access to water, use of water, drainage, flow of water, quality of water, and accretion. An exception to these common law rights has been British Columbia where the right to use water is statutory based and vested in the Crown in the right of the province. The province has established for the selfgoverning First Nations ecological, water and hydropower reserves.<sup>255</sup> In Manitoba, the First Nations have to be consulted on all planning processes related to water protection.<sup>256</sup> Saskatchewan has entered into tripartite agreements on watersheds' management, administration, development, conservation, protection, control and use.<sup>257</sup> The water rights are important also in the Dogrib Final Agreement, where the First Nation has an exclusive right to use waters that flow through their lands, subject only to the North Slave Land and Water Board.<sup>258</sup> The Canadian Laws Offshore Application Act can extend the federal authority to provincial legislation. The Inuit of Nunavik Statement of Claim to the Offshore (1991) was the first Indigenous claim of its kind including overlapping areas of use in the offshore with the Inuit areas.<sup>259</sup>

The Government of Québec made agreements with the Cree and Innu First Nations on remedial measures to compensate hydroelectric projects in the area, including compensation of hunting, fishing and trapping activities and support to social, cultural and economic development.<sup>260</sup> In northern Ontario, the government has set out a joint planning process with the First Nations, which is consistent with and recognises the existing Aboriginal and treaty rights. It aims for sustainable economic development, which benefit the First Nations. The First Nations advise the respective minister on questions related to development, implementation and co-ordination of land use planning. The government and First Nations will prepare jointly a land use plan where the First Nations may attribute their traditional

---

252 Nisga'a Final Agreement Act, 1999, ss. 3.19-20; British Columbia Indian Reserves Mineral Resources Act, 1943, s. 2; Maanulth First Nations Final Agreement Act, 2007, s. 4.1; Tsawwassen First Nation Final Agreement Act, 2007 (British Columbia), ss. 4.22, 4.40, 4.96.

253 Crown Minerals Act, 1984 (Saskatchewan), s. 3.

254 Nuclear Energy Act, 1985, s. 10(4).

255 Water Act, 1996 (British Columbia), s. 44.01; Nisga'a Final Agreement Act, 1999, s. 4; Maanulth First Nations Final Agreement Act, 2007 (British Columbia), s. 8; Tsawwassen First Nation Final Agreement Act, 2007 (British Columbia), s. 4; Morse (1985), pp. 547-548;

256 Water Protection Act, 2012 (Manitoba), s. 17(1).

257 Saskatchewan Watershed Authority Act, 2005 (Saskatchewan), ss. 6, 42.

258 Dogrib Final Agreement (2003), s. 21.

259 Indigenous Legal Traditions (2007), p. 86.

260 Décret concernant la publication de l'entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec, 2007 (Québec), ss. 2, 7.

knowledge and perspectives to protection and conservation.<sup>261</sup> Manitoba has made a large planning initiative for the east side of Lake Winnipeg to enable the First Nations and other indigenous communities to engage in land use and resource management planning in designated areas of Crown land by giving special protection against adverse development. A planning council may develop a plan for the use of land, management and resources in the planning area. In planning it may apply traditional knowledge. The First Nations must be consulted of all water power projects in the province.<sup>262</sup> In Saskatchewan, the cooperative planning with the First Nations and Métis aims at maximal use of human and material resources in land use planning and development processes.<sup>263</sup>

Although the Supreme Court ruled in *Haida Nation* that the resource developers do not owe an independent duty to consult with the First Nations – which is the duty of the Crown – some companies have independently used an impact and benefit agreement (IBA) mechanism which are confidential. The IBAs are often negotiated between resource-sector corporations and indigenous communities, sometimes also with governments, to alleviate adverse socio-economic and environmental impacts that can arise from resource development. IBAs operate on a project basis and include provisions covering financial compensation, ownership, preferential hiring, preferential procurement of goods and services, education and training programmes, environmental protection, mitigation measures and monitoring, working conditions, social and cultural support, consent, participation in environmental assessment processes, monitoring and implementation and dispute resolution. IBAs may supplement official regulation with additional measures to accommodate the concerns of affected local communities. The Impacts and Benefits Agreements (IBA) mechanisms for building respectful relationships between Indigenous communities and natural resources companies are legally required in most modern treaties.<sup>264</sup>

In 1975 the Métis settlements of Alberta made a joint legal action against the provincial government for an estimated \$ 100 million in oil and gas revenues from settlement lands. In the Metis Settlements Land Protection Act, 1990, the mines and minerals, water, fixtures and improvements placed by the Crown prior to the grant are excluded from fee simple title. The provincial Crown has right of diversion, use of water, work mines and minerals, manage highways and road constructed prior to the grant and access to Crown fixtures and improvements. Since 1992 there has been a Surface Rights Board, which is constructed by panels of the Appeal Tribunal. The Métis have obtained greater control over subsurface access and the Métis may enter into agreements on entry. Even without an agreement a right of entry order may be granted by a panel of the Appeal Tribunal. The Co-Management Agreement (1990) enables the General Council to negotiate overriding royalties and participation options in mineral development agreements. The existing mineral leaseholder must obtain the consent of the occupants of the surface or a right of entry order from the Appeal Tribunal's panel. A grant can only be made if it belongs to a class permitted by settlement bylaw and

---

261 Far North Act, 2010 (Ontario), ss. 1, 5-7.

262 East Side Traditional Lands Planning and Special Protection Areas Act, 2009 (Manitoba), ss. 3, 10; Climate Change and Emission Reduction Act, 2008 (Manitoba), s. 17(2).

263 Statements of Province Interest Regulations, 2007 (Saskatchewan), ss. 3, 6.

264 SCC, *Haida Nation v. British Columbia (Minister of Forests)*(2004), s. 56; Duffy (1988), p. 61; Olthuis & Kleer & Townshend (2008), pp. 379, 386-392; Richardson & Imai & McNeil (2009), p. 368.

a Settlement Council approves it. In cases of disagreement the existing mineral leaseholder may apply to the panel, and further to the Alberta Court of Appeal. The Minister of Energy must send a mineral posting request to the Metis Settlements Access Committees under the Co-Management Agreement when recommended by the Crown Mineral Disposition Review Committee. In some cases the committee may also ask the minister to prepare a Notice of Public Offering, which is submitted for its approval. Its issues may include environmental, sociocultural and land use impacts, and employment and business opportunities. An approved notice is included in the next scheduled public offering of mineral rights.<sup>265</sup>

In JBNQA, Québec reserved for itself the mineral and subsurface resources on category I lands, but the right to mine is contingent on community consent. The affected indigenous persons are entitled to compensation. The indigenous peoples retain the right to use gravel and other material for personal and community use after receiving a permit from the responsible Québec ministry. In categories II-III the mineral exploitation can take place without compensation. The energy companies have specific rights to develop resources there. However, there should be avoided unreasonable conflict with harvesting activities and the governments have a joint obligation to correct the displacement of population by providing programmes and services that will contribute to economic and social development of both Native groups.<sup>266</sup>

In the Cree-Quebec Final Agreement (2002), the provincial government has set up a Mineral Exploration Board to assist the participation of Crees in mineral exploration, development of their industries, facilitate and encourage their access to regular Québec programme funding and to act as an entry mechanism for offers of service by Crees. There has been also negotiated a Mercury Agreement. All mining projects must take into consideration the environmental and social protection statutes. The provincial government has offered funding for 50 years totalling \$ 3.4 billion for community development, environmental administration, trapping, outfitting and craft associations.<sup>267</sup>

There have been discussions of royalty-sharing arrangements and other benefits. The construction projects related to oil and gas production must offer the indigenous peoples access to training and employment and have to take into account hunting, trapping, fishing and Indigenous culture in the vicinity of areas. The Métis settlements in Alberta have negotiated on royalties from mineral rights on the settlements.<sup>268</sup> In British Columbia, the Oil and Gas Commission's duty is to encourage the indigenous peoples to participate in oil and gas production processes by agreements. The province has also the Gas Utility Authority, which maintains the gas production system and can make agreements with the First Nations on gas utilisation.<sup>269</sup> In the Yukon the control and administration of the onshore oil and gas resources was transferred to the territorial government in 1998. To the First Nations is

265 Metis Settlements Act, 1990 (Alberta), Schedule 3; Metis Settlements Land Protection Act, 2000 (Alberta), ss. 4-6; Purich (1968), pp. 148-149; Bell (1994), pp. 35, 66-68.

266 JBNQA (1975), ss. 5, 28-29.

267 Cree-Québec Final Agreement (2002), s. 5; Décret concernant la publication de l'entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec, 2007 (Québec), ss. 2, 4-5.

268 Dickason (1994), p. 365; Hamilton (1994), p. 23; White & Maxim & Spence (2004), p. 154. See also: North Pipeline Socio-Economic and Environmental Terms and Conditions to the Province of Saskatchewan, 1981, ss. 29, 49, 51.

269 Gas Utility Act, 1996 (British Columbia), s. 2(3); Oil and Gas Acts Act, 2008 (British Columbia), ss. 4, 6.

offered the opportunity to obtain shares of oil and gas profits. The individual First Nations and territory have signed benefits agreements where the First Nations can determine the contents of benefits on category A lands and consider the license applications. They have also agreed on co-management of resources and recovery and royalties. The territory has also a Subsurface Rights Board with supervisory role.<sup>270</sup> The NWT agreements include general mining and mineral rights. The Gwich'in Agreement gives various mining and mineral rights to 6,000 sq km, divided into existing rights, rights without limitation and so-called Aklavik-lands with only subsurface rights.<sup>271</sup> In the Sahtu Dene Agreement the government has only an obligation to notify on subsurface resource exploration, but a consultation is needed on environmental, wildlife and land effects.<sup>272</sup> The Dogrib lands include mine and mineral rights, which the local government may grant to remove natural resources. The government's right to regulate and manage mining and minerals is restricted to only input as a consultant. The federal government retains a right of access to lands and waters and to use natural resources when incidental to delivering and managing government programmes and services or carrying out inspections authorised by legislation and in emergency situations. The Dogrib must also permit access to materials which are used for construction.<sup>273</sup> The Inuvialuit Final Agreement includes in a smaller area all mineral rights, and in a larger area, but no rights to oil, gas, hydrocarbons, coal and sulphur. There is a management structure for natural resources.<sup>274</sup>

In *Delgamuukw*, Lamer CJ ruled that the the following are objectives that can justify the infringement of Aboriginal title: development of agriculture; forestry; mining; hydroelectric power; general economic development; protection of the environment or endangered species; building of infrastructure; and the settlement of foreign populations. On the other hand, he placed an inherent limit on the uses Indigenous titleholders can perform of their lands that was intended to preserve the land for future generations. Lands subject to aboriginal title cannot be put to uses that may be irreconcilable with the nature of the occupation of land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place.<sup>275</sup> Also BCCA has developed a test for justification of the infringement of aboriginal rights. The court held that the province had failed in its obligations to consult and therefore the actions were unjustified infringements of the tribe's aboriginal rights. The environmental degradation posed by a government-licensed marina would impermissibly infringe a treaty right to fish.<sup>276</sup>

In *Lubicon Lake*, UNHCR ruled against Canada in dispute over natural resource development on the ancestral lands of Cree Indians in Alberta. Chief Ominayak alleged that Canada violated the right of self-determination by allowing the provincial government of Alberta to expropriate band lands for the benefit of private corporate interests. Canada

---

270 Yukon Surface Rights Board Act, 1994, ss. 8-10; Oil and Gas Act, 2002 (Yukon), Preamble, ss. 11-12, 68; Oil and Gas Licence Administration Regulations, 2004 (Yukon), s. 27(1).

271 Gwich'in Comprehensive Land Claims Agreement (1991), ss. 18.1-18.2.

272 Sahtu Dene Agreement, s. 22.

273 Dogrib Final Agreement (2003), ss. 18-19, 23.

274 IFA (1984), s. 7(1);

275 SCC, *Delgamuukw* (1997), s. 165.

276 BCCA, *Saanichton Marina Ltd. v. Claxton* (1989), ss. 38-40; *Tsilhqot'in Nation* (2006), part 20.

claimed that the continued resource development would not cause irreparable injury to the traditional way of life of the band. The Committee avoided the question raised by Canada, but held that historical inequities and some more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27. The Committee, however, held that an offer of the Canadian government to set aside 95 square miles of land for a reserve for the band and a sum of \$ 45 million as compensation for the historical inequities was an appropriate remedy within the meaning of article 2 of ICCPR.<sup>277</sup>

The Iroquois have a seven generations' principle, which requires that one considers the effects of decisions on the seventh generation yet to be born. Traditional environmental knowledge (TEK) is used generally among the indigenous peoples. In 1994 the Canadian Biodiversity Strategy was published, which includes within traditional knowledge the harvesting resources, medicinal plants, cultigens and the identification of local biological features and their history. Since 2003 the band councils have to ensure that an environment assessment of a project is conducted in accordance with the legislation. The Governor in Council may make regulations for the destruction of noxious weeds and the prevention of the spreading or prevalence of insects, pests or diseases, control and destruction of dogs and protection of sheep on reserves. The federal environmental protection legislation takes into account the special needs of Inuit welfare, lands, waters and culture. The responsible minister may establish advisory committees when needed.<sup>278</sup> In British Columbia the minister may enter into agreement with the First Nations on Environmental Assessment. The province has also implemented local management plans and fosters the use and development of clean and renewable resources in First Nations' communities.<sup>279</sup>

There has been several cases where the federal and provincial conservation legislation has contravened with the indigenous hunting, fishing and trapping rights. Generally the last-mentioned's rights are confirmed to have priority. Since JBNQA the indigenous peoples have an important role in the process of environmental evaluation of development projects. The most central environmental bodies are the James Bay Advisory Committee on the Environment and the Kativik Environmental Advisory Committee. In the James Bay agreement area the indigenous peoples have an exclusive right to harvest all but protected species of wild fauna. They have also representation in three environmental bodies: the Environmental Expert Committee of La Société d'énergie de la Baie James; the Environmental Quality Commission, responsible for the administration and supervision of the environmental and social impact assessment process in matters within provincial jurisdiction; and the Federal Environmental and Social Impact Assessment and Review Screening Committee, which monitors all development projects or development in the region. The JBNQA's protection regimes are also included to the Cree-Québec Final Agreement. The province has established joined

277 UNHRC, *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (1990), s. 32.

278 Richardson & Imai & McNeil (2009), pp. 341-342. Canadian Biodiversity Strategy (1994). Cf. Arctic Waters Pollution Prevention Act, 1985, 3; Indian Act, 1985, s. 73(b)-(c); NWT Waters Act, 1992, ss. 15.1, 15.3; Canadian Environmental Protection Act, 1999, s. 6(1); Canadian Environmental Assessment Act, s. 10.

279 Environmental Assessment Act, 2002 (British Columbia), s. 29; Clean Energy Act, 2010 (British Columbia), ss. 2, 20; Muskwan Kechika Management Plan Regulation (British Columbia). One example of clean and renewable resource use is the First Nations Clean Energy Business Fund which shares revenues with the communities.

commissions of environmental evaluation to study the projects' repercussions and to render recommendations for the ministers. Secondly, the agreements have foreseen mechanisms for co-management of some resources beyond the development projects' environmental evaluation process.<sup>280</sup>

Natural resources on First Nations land may be harmed by third-party pollution, emanating from places beyond indigenous control. The environmental effects of uncontrolled industrial activity came to public notice in the 1950s when it became evident that the Ojibwa Indians in Treaty 9 area suffered from mercury pollution. The treaty itself offered little help in resolving the damage caused to the environment. In 1986 the Grassy Narrows and Islington Indian Bands reached a Mercury Pollution Claims Settlement.<sup>281</sup> In 2008 an Ontario Superior Court found that Platinex Inc. had caused irreparable harm to the Kitchenuhmaykoosib Inninuwug First Nation due to loss of land, cultural and spiritual values. The government of Ontario paid to Platinex Inc. \$5 million and a counterlawsuit was dropped in 2009. The company surrendered all its mining claims in the area.<sup>282</sup> Similarly, The Labrador Métis Nation won its litigation process against the province in 2007 in a case, where a highway was constructed over important wetland and watercourse crossings. The Court of Appeal held that the province has a duty to consult the respondents in respect of their asserted Aboriginal rights, based on s. 35. Disposal and storage of waste is regulated. The permit must be obtained from the Minister and the burning of waste is prohibited. Modern agreements also include penalties against the pollution and for the protection of environment.<sup>283</sup>

The agreements with the self-governing First Nations of British Columbia play a primary role in the environmental assessment and protection of project proposals. The environmental standards must meet or exceed federal and provincial standards. The agreement protects the area against an uncontrolled investment from outside. The other comprehensive land settlements have provided jointly controlled resource management institutions. These are cross-cultural institutions that allow a co-operation in managing wildlife, forests, water and other natural resources.<sup>284</sup> In Ontario, the respective minister may enter into agreement with the First Nations or other Aboriginal groups on endangered species.<sup>285</sup>

The north has been especially profiled as the homeland of Indigenous people. The Mackenzie Valley Pipeline process was started with an inquiry between 1974-1977 chaired by Thomas Berger. Berger recommended putting on hold for ten years a pipeline to allow time for indigenous concerns. Similar commissions were later established in the Yukon and Ontario. In Mackenzie Valley the following have been established: the Mackenzie Valley Land

---

280 *Loi sur la qualité de l'environnement*, 2012 (Québec), s. 135; JBNQA (1975), s. 24; Cree-Québec Final Agreement (2002), s. 5; *Jack et al. v. The Queen* (1980); Olthuis & Kleer & Townshend (2008), pp. 78-79, 141; Otis (2005), pp. 93-94.

281 Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act, 1986, Preamble; Dickason (1994), p. 401; Isaac (2008), p. 62; IWGIA (2010), pp. 64-65. Cf. Indian Reserve Waste Disposal Regulations, ss. 3, 5, 10; Amendments of Self-Government Act, 2005 (Yukon), s. 13.6;

282 OSJC, *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2006), ss. 82-101.

283 NfLCA, Labrador Métis Nation (2007), ss. 36-39, 110.

284 Maa-nulth First Nations Final Agreement Act, 2007 (British Columbia), s. 22; Tsawassen First Nation Final Agreement Act, 2007 (British Columbia), s. 15.

285 Nisga'a Final Agreement Act, 1999, s. 10; Endangered Species Act, 2007 (Ontario), s. 19.



and Water Board, the Environmental Impact Review Board, and local Land Use Planning and Land and Water Boards with bylaw-making powers and with First Nations representation.<sup>286</sup>

The Yukon has engaged itself in the goal of encouraging the First Nations' sound economic development which combines modern values with the indigenous traditional economy and takes into account the potential cultural, spiritual and traditional importance of their land and water resources. The Indigenous peoples' special relationship with the environment is recognised and incorporated into First Nations' traditional knowledge. The Crown has to respect the First Nations' environmental rights as set out in UFA. The parties to the agreement cooperate in development on a geographical basis to meet the standards of environmental protection. The territory promotes through its Minerals Advisory Boards the First Nations' exploration opportunities in mining and the benefits.<sup>287</sup>

Nunavut's legislation upholds the Inuit traditional values in the management of wildlife. The Inuit harvesting rights are governed and subject to conservation principle. The guiding principle is *inuit qaujimagatuqangit*. A designated Inuit organisation has the right of first refusal unless the minister declares that the right has lapsed. The legislation protects critical habitat and wildlife sanctuaries. The Inuit organisations may participate to joint planning and management. The Nunavut Species and Risk Commission must include experts (*qaugimimilik / ihumatuyuk*) who have appropriate knowledge on the subject. The law created also an Elders Advisory Committee (*Inutuqait Miamiksijiit Angngutiksanik*), which supports the use of traditional knowledge in support of environmental decision-making. The territory has several bodies for resource and environmental questions. The Surface Rights Tribunal has been established to resolve disputes between the Inuit landowners who occupy Crown lands and persons holding subsurface rights who wish to access those lands. The tribunal also addresses disputes concerning the damage to wildlife by development. If there is no agreement, the tribunal establishes the terms and conditions of right of access to Inuit- owned lands and determines liability and the amount of compensation to Inuit harvesters. The Impact Review Board is an environmental assessment agency for the settlement area. It examines the impact of project proposals on the land, air and water, and on the people of the settlement area. It relies on traditional Inuit knowledge and recognised scientific methods to assess and monitor the environmental, cultural and socio-economic impacts of proposals and determines whether project proposals should proceed to develop and under what conditions. The Water Board is responsible for the use and management of water in the settlement area. The board determines whether water applications should proceed to development and under what conditions. The Planning Commission gives the Inuit control over all activities on settlement

---

286 Mackenzie Valley Resource Management Act, 1998, ss. 9-10, 12, 29, 35-36, 38, 54, 56-57, 101, 132; Dickason (1994), p. 405-406; White & Maxim & Spence (2003), p. 178. Among the tasks of the boards are land use planning, protection and promotion of First Nations' rights; social, cultural and economic wellbeing; conservation, development, utilisation of land and water resources for the benefit of all Canadians; and making of environmental impact reviews.

287 Economic Development Act, 2002 (Yukon), Preamble, s. 10(1); Environmental Act, 2002 (Yukon), ss. 53, 70; Yukon Environmental and Socio-Economic Assessment Act, 2003, s. 5; Forest Management Act, 2008, (Yukon), Preamble; Contaminated Sites Regulation, 2002 (Yukon); Yukon Minerals Advisory Board Order, 1999 (Yukon), s. 2(1); Agreement (Canada-Yukon Environmental Protection), 1995 (Yukon), Preamble, s. 4.

lands and a say in Crown lands. The commission co-operates with the territorial government to establish broad planning policies, objectives and goals for the settlement area.<sup>288</sup>

#### 6.4. Conclusions

Land is the most important single element related to their Indigenous identity. It links them to ancestors traditional areas, hunting and fishing and more recently, to resources. In all three countries the settler society saw the indigenous relation to land as usufructuary, while the first peoples saw the ownership in much broader terms. Also the Lockean idea of profitable use of land and confiscation of wastelands was common.

In the Pacific territories the customary land was first recognised by the French governors/state's representatives as the *de facto* situation but in New Caledonia and French Guyana it was soon treated as *terra nullius*, where the governors were able to confiscate lands with regulations. There was no one standard treatment of land questions: *spécialité législative* guaranteed the autonomy of local decision-making. In New Caledonia the Melanesian population was reclassified and pushed to reserves with less arable land. The rich mineral base accelerated national active immigration policy. In French Guyana the Indians did not exist in law: there was no indigenous land question. Tahiti followed a completely different model: the royal house sought actively to westernise the system and had started the individualisation of land owning, when the French law gained there ground. Gradually all land owning was individualised, but it broke the traditional form of land use and has caused continued litigation. Only in Wallis and Futuna was the customary society isolated and strong enough to resist the legal change of ownership and the land policy is still based on customary, family-based ownership.

In the two other countries the policy has been at least in theory more unified. Despite this, the land legislation in New Zealand has showed great discontinuity. Common law recognised the continuity of pre-existent ownership, which was ceded to the Crown with land purchase. The legislation was inclined to political changes and the Crown's and private persons' relationship in land purchase changed several times. The Māori wars in the 1860s led to large confiscations of land and Prendergast CJ's *Wi Parata* - doctrine rejected the existence of Native title. The last-mentioned, outdated expression of British colonialism prevailed until 1985. The legislation divided the land to customary land, which has been almost completely extinguished, to Māori fee simple land and general land. The collective Māori fee simple lands were registered by the Native Land Court as reserves, and from the 1920s the first trust boards were established to manage the land space.

In Canada the Indigenous land was in large areas (excluding British Columbia, old French possessions and the Arctic) purchased and extinguished by the treaties. The reserve land was in the bands' collective ownership, but the legislation was several times modified to make it

---

288 Wildlife Act, 2003 (Nunavut), ss. 1, 8, 10, 104-105; Wildlife Act, 1988 (NWT), ss. 143, 159-160; Olthuis & Kleer & Townshend (2008), pp. 135-136. The Wildlife Act lists 24 customary Inuit principles, which deal with respect; guardianship / stewardship on property and environment; practiced skills; working together for common purpose; holistic treatment of nature; flexibility; knowledge; hunting only for need; prohibitions; avoidance of unnecessary suffering for animals; and avoidance of disputes.

easier to purchase or confiscate the remaining reserve land. Like *Wi Parata* in New Zealand, *St Catherine's Milling* denied for almost 100 years the existence of Aboriginal title to land. Only the Calder case in 1973 opened the way to new policy.

In New Caledonia the state began to remedy the injustices in the 1930s by buying lands back for the Kanak, and in the 1970s the clan-based ownership of land was again recognised. With the Nouméa-process France today recognises reserve land, customary common land and individual Kanak lands and the state has actively bought lands back into Kanak ownership. The situation is very different in French Guyana, which is an integral part of France. The Indian peoples' customary land ownership has not been recognised, but they have been offered zones since the 1980s, where they can collectively obtain land for communities' use.

New Zealand's treaty settlements have recognised the injustice of land policy and the Crown has returned some confiscated areas to *iwi* ownership. Still there has been a long struggle on rivers, seabed and foreshores. The common ownership of lands is protected by the legislation and defined in traditional Māori terms. In associated states and territories the legislation has recognised the customary, family-based land ownership. In Canada in 1951 the reform of Indian legislation gave more say to Indian bands in land questions. The first modern agreements still extinguished the First Nations' and Inuit's land rights, but Nisga'a Agreement (1999) was the first to preserve the indigenous land rights, based on *Delgamuukw* doctrine. The modern settlements have granted to indigenous peoples extensive land rights divided into different categories. The case law has strongly stressed the Crown's fiduciary duty to protect the indigenous land rights. New Zealand's courts have not accepted the doctrine as clearly as in Canada. The Métis land rights are still guaranteed only in the settlements of Alberta: there is no clear nationwide constitutional or case law-based protection.

The traditional harvesting rights and forestry have been essential questions in New Zealand and Canada. France has also protected the fishing territories, but its legislation has no specific reference to indigenous rights. In New Zealand, devolution policy and extensive litigation have led to Ngāi Tahu settlement and the national fishing quota system, which guarantee to the Māori extensive customary and commercial fishing rights. Similarly, the Māori were active during the privatisation policy to preserve their rights to forest as *taonga*. The indigenous rights to Crown forest lands, especially in Central North Island, have been protected by legislation. Canada has extensive case law and treaty guarantee on traditional harvesting rights, recognising the right in unoccupied areas. More controversial has been the commercial fishing rights, where courts have demanded proof of pre-colonial harvest practices. Similar doctrine has been developed by the Supreme Court in *Powley* for the Métis. The forest rights are included to several modern settlements.

Resource management and conservation is essential to indigenous peoples due to historical and natural values, and profit share. In New Caledonia the post-Nouméa situation has opened up to the Kanak an opportunity to participate in the administration of mines. France has also extended its conservation policy to indigenous territories. In New Zealand Māori participation in resource management is defined in the Resource Management Act and other central legislation. The Māori have participated actively in environmental questions. Many historical places, like mountains and rivers are for them *wāhi tapu* and are protected by legislation and settlements. In Canada the resource management is still a major challenge. The individual settlements have guaranteed locally the Indigenous peoples'

share to profits and management of the mining, oil and gas industry and water use. Central questions in conservation have been the prevention of pollution and environmental damage. The agreement with the Haida Nation has been a precedent in conservation through national parks and nature reserves.

## 7. Culture

### 7.1. France

#### 7.1.1. *Caledonian Identity*

The Melanesian cultural awakening started after World War II as a reaction to the French policy of integration. The changes were, however, slow. In 1980 the French government established the Administrative Office for Melanesian Culture. One of the major principles in the Accord of Nouméa is the recognition of past grievances and sufferings: colonisation deprived the Kanak of their identity. The political and social organisation of New Caledonia has to take into account the Kanak identity. It means in society both geographic and ethnic rebalancing - reconstructing of society. The Kanak identity is defined predominantly in reference to land. Based on the agreement there has been established the Cultural Centre Jean-Marie Tjibaou (1998), which works “as the Kanak culture’s pole of radiation” to promote its rehabilitation. The Kanak culture is developed through artistic formation and media. The National Film Centre supports these projects. The Kanak Culture’s Development Agency has been transferred to territorial responsibility.<sup>1</sup>

The culture is defined in New Caledonia as a constitutive element of individual identity, which creates social bond of conscience about belonging to the community of destiny. It demands mutual recognition of cultural diversity. The full recognition of Kanak identity is a precondition to the refoundation of social contract. The Customary Senate has responsibility for a number of cultural affairs: listing and re-establishing of Kanak place names; identification and legal protection of the Kanak’s sacred sites; return of the Kanak’s cultural objects to New Caledonia; establishing of the Academy of Kanak Languages; effective protection of writers on Kanak culture; and conclusion of a particular agreement on the questions of cultural heritage between the state and New Caledonia. The cultural identity of French Polynesia is essentially connected to the language, and was for the first time recognised in the law of 1984 and repeated in later legislation.<sup>2</sup>

---

1 Loi organique no. 99-209 du 13 mars 1999, art. 23; Accords de Nouméa (1998), Préambule, art. 1, 3.4.-1.4.; Décret no. 2011-1588 du 17 novembre 2011, art. 3; Ntummy (1993), p. 598; Bechtel (2002), p. 47; Accord particulier entre l’Etat et la Nouvelle-Calédonie sur le développement culturel de la Nouvelle-Calédonie (2002), ss. 6, 8. Cf. the definition of culture in section 1.2.4.

2 Loi no. 84-820 du 6 septembre 1984, art. 1, 90; Loi organique no. 96-312 du 12 avril 1996, art. 1; Accord de Nouméa (1998), art. 1.2., 2.1.4; Accord particulier entre l’Etat et la Nouvelle-Calédonie sur le développement culturel de la Nouvelle-Calédonie (2002), s. 1.

### 7.1.2. Names and Symbols

The law of 1988 did not recognise the indigenous symbols of New Caledonia although they were already widely used. The situation, however, changed with the Accord of Nouméa: the indigenous names are listed and returned. The sacred Kanak sites are identified and protected. The Kanak names are respected and their cultural development supported in arts and media. The name of the territory is also possible to change with *loi du pays*. The Kanak symbols are recognised. The Customary Senate participates in the research of symbols for the territory. This took place in October 2010, when the Congress adopted by *loi du pays* a Kanak symbol, flag, motto, parallel anthem and new banknotes to official use.<sup>3</sup>

The Polynesian flag was banned after annexation to France in 1880. In 1943 Princess Teri'i Nui gave to Tahitian troops in the French army a modified Tahitian Flag. It took, however, more than 30 years before the flag was officially recognised. In 1977 the circular of the High Commissar allowed the use of the Polynesian flag besides the national flag on public buildings. Since 1984 French Polynesia has had a right to freely determine and use distinct signs besides the symbols of the republic. This includes the use of the Polynesian flag besides the French flag and territorial anthem. The law of 1996 further created territorial order and decorations.<sup>4</sup>

### 7.1.3. Language: Expression of Unity and Pluralism

All regional languages have been since 2008 included into the Constitution as belonging to the heritage of France. Despite this symbolic gesture French is the language of public life in all overseas areas.<sup>5</sup> The advance of the French language has influenced also the Indigenous languages. In New Caledonia and French Guiana, French is today the dominant language. In French Polynesia, French is also dominant, but the position of the Tahitian language is strong, and shows signs of strengthening. Only in Wallis and Futuna are the Indigenous languages still dominant in everyday life.

Although New Caledonia has a pidgin called Bichelamar, French has gained more central role as *lingua franca* than in other territories. The language of Kanak communication is today French. The Roman Catholic missions in New Caledonia used since the beginning French as the language of instruction. Large-scale immigration guaranteed its dominance in public

---

3 Accords de Nouméa (1998), art. 1.3, 1.5; Loi organique no. 99-209 du 19 mars 1999, art. 5; Loi du pays du 9 septembre 2010 (New Caledonia); Payé (1993), pp. 271-272; Machellen (2010), p. 16. The Caledonian anthem is *Soyons unis, devenons frères*, and the motto *Terre de parole, terre de partage*.

4 Loi organique no. 96-312 du 12 avril 1996, art. 3 al. 3; Loi no. 84-820 du 6 septembre 1984, art. 1 al. 5; Délibération no. 93-60 AT du 10 juin 1993 (French Polynesia), art. 1; Circulaire no. 67 du 27 septembre 1977 (French Polynesia); Marrani (2013), pp. 124- 127. The territorial anthem is *Ia Ora o Tahiti Nui*. Also Wallis and Futuna has adopted a flag, which is a version of the French *tricolore*; Jacques Derrida has defined two violent moments of French language policy: the replacement of Latin in order to consolidate the monarchic state and the Revolution, when linguistic unification became authoritarian and repressive. Cf. Derrida (1994), p. 47.

5 Constitution (1958), art. 75-1.

life. Because the Indigenous languages are small and scattered, French is today the dominant language in the main island.<sup>6</sup>

The use of Kanak languages was prohibited at school in 1863. In 1921 also all publications were prohibited in Indigenous languages. These sanctions were in force until 1984 when the process to find a way out from the blind alley led to concessions to the Melanesians. The organic law of 1992 recognised the four largest Melanesian languages - ahië, drehu, mengone and paicî - as regional languages. The Accord of Nouméa opened the way again to use the Kanak languages as a means of instruction. Their use should be promoted and respected, and their cultural development supported in instruction, arts and media. The Academy of Kanak Languages is in charge of determining the rules of their use and evolution. The Kanak languages were until 2008 the only regional languages with constitutional recognition. According to the Accord of Nouméa the Kanak languages are with the French languages of instruction and culture. Their place in instruction and media should be promoted. Their scientific research and instruction at the university level should be organised to support their use in primary and secondary instruction. The Academy of Kanak Languages sets up rules on their use and evolution. The organic law of 1999 mentions the languages in relation to instruction and culture, but does not specify their status. Based on the Loi Deixonne the four major Kanak languages became in 2000 voluntary subjects in kindergartens and public schools. This was related to the learning of local cultures. For the lycées and colleges an opportunity was given for the voluntary learning of local languages. In 2004, the languages became also subjects in the *baccalauréat*.<sup>7</sup>

Although the Kanak languages only limited public status, they may be used in some public occasions. The municipal councils in New Caledonia can choose in the strongly Melanesian communities to use a Kanak language instead of French in their meetings. Some administrative documents have been translated into Kanak languages. The difficulty is that there are a large number of languages, but a lack of Indigenous officials.<sup>8</sup>

The strong presence of Protestant missionaries and their educational work, started before the French arrival, was significant to the survival of the language in French Polynesia. The Tahitian book language was created by them in the early nineteenth century. The annexation of the islands to France ended the public education in indigenous languages and French became the only official language in 1880. The use of language continued in the Protestant Church and their Sunday schools. Also the Catholic Church followed the example, unlike in New Caledonia, where only French was used. The French authorities had also doubts on the utility of French as a language of instruction in the countryside during the interwar years. The promotion of Tahitian (*reo maòhi*) began only in the early 1970s, when also the Tahitian

---

6 Cerquigline (2003), pp. 347-348; Nouvelle-Calédonie; In all, 36% (89,000) of New Caledonians speak the 27 Melanesian languages, while 97% speak French. The largest indigenous language is Drehu (11,000 speakers), spoken on the Loyalty Islands where there is the most vital language community, but 20 languages have less than 2,500 speakers. Cf. ISEE.

7 Constitution (1958), art. 75-1; Accord de Nouméa, art. 1.1, 1.3; Loi no. 51-46 du 11 janvier 1951, art. 4, 6, 9; Décret no. 92-1162 du 20 octobre 1992, art. 1; Arrêté du 13 janvier 2004, s. 1; Sibille (2000), p. 60.

8 Loi constitutionnelle no. 92-554 du 25 juin 1992; Nouvelle-Calédonie.

Academy was established.<sup>9</sup> The Territorial Assembly made in 1980 a decision, according to which Tahitian was proclaimed as an equal official language with French but the language of courts would remain French. Conseil d'Etat quashed the decision.<sup>10</sup> In the legislation the indigenous languages were mentioned for the first time in in the organic law of 1984, which was renewed by the organic law of 1996, according to which the Tahitian language and other Polynesian languages "may be used".<sup>11</sup>

At the educational level, many children had become semilingual both in Tahitian and French. Loi Deixonne was extended in 1981 to include the Tahitian language, which became optional in kindergartens and public schools. The instruction was extended to the *baccalauréat* in 1985 and to higher education in 1990. The organic laws of 1984 and 1996 integrated the instruction of Tahitian and other regional languages and the pedagogical study of local language and culture to the school curriculum. This was supported by the creation of the French University of Pacific in 1987. The studying and pedagogy of the Tahitian language and culture take place in the pedagogical establishments. The national legislator was ready to allow in 1996 an obligatory instruction of Tahitian in kindergartens and elementary and secondary schools. The countereffect soon came. The Constitutional Council held that the instruction may be arranged during the regular school hours but only optionally. Today the Tahitian is a subject instructed during the school hours at all levels,<sup>12</sup> - a change based on gradual change in general French atmosphere towards the regional languages.

The present status of languages is based on the organic law of 2004. French is the official language of French Polynesia. Tahitian is a fundamental element of cultural identity as cement of social cohesion and as means of daily communication. The Polynesian languages are recognised and should be preserved "in order to guarantee the cultural diversity, which makes the richness of French Polynesia". French, Tahitian, Marquisian, Paumotu and Mangarevian are the languages of French Polynesia (but forgetting the languages spoken on Austral Islands). The private physical and legal persons may use them freely in their proceedings and conventions; they do not incur any nullity on the grounds of not been drawn up in the official language. The Tahitian language is a subject instructed in the frame of a normal schedule in kindergartens, primary and secondary schools and higher establishments of instruction. By the decision of the Assembly of French Polynesia, the Tahitian language can be replaced in some schools or establishments by one of the other Polynesian languages. The legislation does not prevent the use of Tahitian as the language of work. In courts interpreters may be used.

---

9 Turcotte (1982), p. 10; Aldrich (1993), pp. 140-141; Cerquigline (2003), pp. 317- 324; Debène (2011), pp. 307-309; In French Polynesia almost all people are bilingual: 75% of the population can speak the Polynesian languages (195,000), while 95% can speak French. Another questionnaire reveals, however, the supremacy of the French language: 69% speak French at home, while only 30% speak the Polynesian languages. Cf. Recensement 2007 (2008).

10 *Décision No. 2036 VP* du 28 novembre 1980 (Polynésie Française); *Décision no. 21 SE* du 20 octobre 1982 (Polynésie Française).

11 Loi organique no. 84-820 du 6 septembre 1984, art. 90; Loi organique no. 96-312 du 1996, art. 115.

12 Loi no. 84-820 du 6 septembre 1984, art. 90; Loi organique no. 96-312 du 12 avril 1996; Loi no. 2000-1208 du 13 décembre 2000; Loi organique no. 2004-192 du 27 février 2004, art. 57; Décret no. 81-553 du 12 mai 1981, art. 1; CC, *Décision 96-373 DC* de 9 avril 1996; Cerquigline (2003), pp. 325-326.



The Assembly of French Polynesia may locally replace the Tahitian by another Polynesian language.<sup>13</sup>

On 29 March 2006 Conseil d'Etat gave its opinion concerning the standing orders of the Polynesian Assembly. The local regulation made it possible to use in plenary sessions Tahitian and other Polynesian languages besides French. Conseil d'Etat rejected the regulation as contradictory to article 57 of the organic law. At the same time Conseil stressed Tahitian as a fundamental element of the cultural identity, social cohesion and daily communication. The opinion stressed the strict separation of public and private uses of language. French is obligatory in the operation of governmental institutions and the use of another language than French by an elected representative is therefore prohibited in public connection, but the Polynesian languages are important to guarantee cultural diversity.<sup>14</sup> In 2006 the members of the Academy of Tahiti sent to the French government an open letter, where they demanded official status for the Tahitian language and the modification of article 2 of the Constitution. They referred to Wallis and Futuna, where the public use of regional languages is more flexible. In French Polynesia, French would be seen even more than before as a "forced language" and an expression of colonial irritation.<sup>15</sup> The decision of Conseil d'Etat was litigated to the European Court of Human Rights (ECtHR), which unanimously rejected the petition in 2010. It held that a matter dictated by historical or political considerations in a part of a state belongs to the exclusive competence of the state.<sup>16</sup>

Despite the legislation and case law, the Polynesian languages are used in public life. The members of the Assembly use the Polynesian languages in speeches and public debates, and the high commissioner has silently accepted the practice. Some 48 municipal councils hold debates in three different Polynesian languages. Also Conseil d'Etat checked its standing in 2007, when it allowed the casual use of the languages in public, including the Assembly. The standing orders must indicate that French is the official language. The civil servant may answer to a customer in another language than French if the customer uses first that language. In tests for Polynesian public service the Polynesian languages may be optionally used.<sup>17</sup> The Administrative Tribunal of Papeete has ruled that the Polynesian languages may be used besides the French in civil law cases and the public use of Polynesian languages is in general possible. Polynesian expressions can also be used to indicate distinctions or administrative functions.<sup>18</sup> The Cassation Court has further ruled that the petitions may be formulated in a Polynesian language in either written or spoken form. The use of interpreters in the courts has been allowed since 1986.<sup>19</sup>

13 Loi organique no. 2004-192 du 27 février 2004, art. 57; Sibille (2000), pp. 63-64.

14 CE, *Haut commissaire de la République c. F.B. et M. Edouard Fritch*, 29 mars 2006.

15 Fakama 'uliga o te 'u ka fakapolinesia (2006).

16 ECtHR, *Birk-Levy v. France*, 21 septembre 2010; According to ECtHR the European Human Rights' Convention does not guarantee language freedom or right of elected representatives to use language of choice. The application was therefore inadmissible *ratione materiae*.

17 CE, *M. Edouard Fritch et al.*, 22 février 2007; *Société Civil Immobilière Caroline*; Code de procédure civile (2007), art. 6; Arrêté no. 1266 CM du 20 octobre 1986 (French Polynesia), s. 1; Debène (2011), p. 320.

18 Tribunal administrative de Papeete, 14 octobre 1999.

19 Cour de Cassation, *arrêt du 22 juillet 1986*; *Haut commissaire de la République en Polynésie Française c. Assemblée de la Polynésie Française*, 29 avril 2003.

In Wallis and Futuna the only legal guarantees of Indigenous languages are the Constitution's regional language - clause and the law of 2 August 1984 - which allows the Regional Councils to determine on complementary programmes related to language and culture. Due to extensive emigration, the majority of native speakers live today in New Caledonia. The two Indigenous languages are *de facto* dominant in daily life although French is the official and public language and the clear majority are bilingual. The debates in the local assembly and its plenary session are generally conducted in Indigenous languages before conclusion and decisions, which are announced in French. The latest convention between the Ministry of National Education and the Catholic Mission includes a possibility to arrange limited instruction in indigenous languages during the school hours in kindergartens and elementary schools, while French remains the proper language of instruction.<sup>20</sup>

According to the law of 13 December 2000, the regional languages in use in DOM make part of the nation's linguistic heritage. The state and territorial collectivities should promote those languages and to make their use easier.<sup>21</sup> In French Guiana are spoken six Indigenous languages. The state's local Directory of Cultural Affairs takes special regard to multilingualism and spoken culture. The Ministry of Culture has also set as a goal the development of knowledge on Indian languages, their codification and their use as pedagogical tools for instruction. Some modest steps have been taken based on general legislation to use the Indian languages in instruction. There are some bilingual Carib kindergartens and some teaching material has been published in four indigenous languages. In public life, the municipal council meetings need not necessarily be conducted in French because in certain municipalities in the Amazonian forests not everyone speaks French.<sup>22</sup>

The use of regional languages in media was almost non-existent until the 1970s. The law of 1 August 2000 allows broadcasts in regional languages as "part of cultural and linguistic heritage of France in all its regional and local diversity". Based on the law, television and radio programmes are provided for most Indigenous languages. Also the largest Indian languages in French Guiana are served by some public radio programmes.<sup>23</sup>

---

20 Constitution (1958), art. 75-1; Code générale des collectivités territoriales (2007), art. L.4433-26; Convention portant concession de l'enseignement primaire à la Mission Catholique (2006); Marrani (2013), p. 124. In Wallis and Futuna, where the European population is small, Wallisian (Uvean) is spoken at home by 60% of population (9,000), Futunan by 29% (4,500) and French by 10%. Some 89% can speak an Indigenous language, 78% French.

21 Loi no. 2000-1207 du 13 décembre 2000, art. 34.

22 Rouland (1998), p. 544; Sibille (2000), p. 58; Cerquigline (2003), pp. 276-292; The European Charter for Regional or Minority Languages and the French Dilemma (2002), p. 59; Plan d'action pluriannuel (2000); Préfecture de la Région Guyane; Guyane Française. According to one estimation (2005) the language with the largest number of Indigenous speakers is the Carib language (2,100), which is spoken also by Kalina'a. Altogether the number of different Indigenous speakers is shown to be as low as 3,900 (2.3% of total population), but the number may be much higher. Most of the Guianese speak French Creole (63%) while only 14% are estimated to speak proper French.

23 Loi no. 2000-719 du 1er août 2000, art. 3; Cerquigline (2003), pp. 281, 287.

#### 7.1.4. Cultural Objects

The state supported the return of the Kanak's cultural objects from French and foreign museums to New Caledonia. The Kanak cultural objects are respected and their cultural development supported in the arts and media. The state supports special policy in protection, conservation and development historical, artistic, archaeological and ethnologic heritage. The state supports a scientific and technical programme both at the territorial and provincial levels for the inventory and return of cultural objects and the promotion of co-operation between the cultural institutions. The archives are reconstructed according to the models of Metropolitan France. The instruction and practice of Kanak art and music is promoted and it should be also visible in the media. The state has established the Territorial Music School and the Art School of Nouméa for this purpose. French Polynesia funds artisans in traditional arts and crafts and audiovisual professions which take in consideration the richness of the Polynesian natural and cultural heritage. In Wallis and Futuna the state's Service of Cultural Affairs is responsible for the conservation of historical and cultural heritage, including the maintenance and management of archaeological sites. In French Guiana the state has programmes to preserve immaterial heritage and the region has an inventory service for cultural heritage. The region supports the Museum of Guianese Cultures, which collects, conserves and studies material testimony of cultures, ethnic groups and traditional societies of Guiane.<sup>24</sup>

In *Hopu and Bessert v. France*, the UNHRC determined that France violated ICCPR by authorising the building of a hotel complex on the historical burial grounds of Indigenous Tahitians. The Committee held that the construction work did interfere with local people's right to family and privacy according to article 17 of the ICCPR, which has to be interpreted broadly. Despite this, the hotel complex was later built.<sup>25</sup>

#### 7.1.5. Religion Challenges the Secular State

The strong position of religion among the Indigenous peoples and the constitutional ideology of secularism in France seem quite contradictory. There are four major exceptions to the strict separation of religion and state in France: in Alsace-Moselle and French Guiana the Concordat of Napoléon I is still in force; in Mayotte the Islamic law partly coexists with the civil law; and in Wallis and Futuna the rights of the Catholic Church are guaranteed by law.<sup>26</sup>

24 Délibération no. 2007-45 APF du 25 septembre 2007 (French Polynesia), art. 1; Délibération no. 2009-55 APF du 11 août 2009 (French Polynesia), art. 2; Accords de Nouméa (1998), art. 1.3.2. Accord particulier entre l'Etat et la Nouvelle-Calédonie sur le développement culturel de la Nouvelle-Calédonie (2002), ss. 1, 4-5; Préfecture des Îles Wallis-et-Futuna; Préfecture de la Région Guyane; Région Guyane.

25 UNHRC, *Hopu and Bessert v. France* (1993), ss. 2, 2.2., 10.3.; Anaya (2004), p. 258.

26 Rouland & Pierré-Caps & Poumarède (1996), pp. 335-326. In Wallis and Futuna the indigenous people are Catholic; in French Polynesia 55% are Protestant, 25% Catholic and 10% Mormons; in New Caledonia the Kanak are 50% Catholic and 50% Protestant; and the Indians of French Guiana are partly Catholic, partly adherents of traditional religions; Mayotte's Islamic law is based on fourteenth century Syrian Chafaite direction of Sunnism.

The Protestant missionaries arrived in Tahiti in 1796 and in 1819 King Pomare II converted to Protestantism and the missionaries became politically influential in the kingdom. The Pomare Code, created the same year, was also influenced by them. It included provisions prohibiting polygamy, adultery, human sacrifice and infanticide. Tattoo, which had magic-religious significance as protection against evil forces and spirits and as a sign of initiation, was forbidden. The code compelled also observance of the Sabbath. Reverend Pritchard became the dominant force in local politics and succeeded in asking the king to expel the Catholic missionaries from the islands. Later the Catholic Church returned and the official France promoted it until the strengthening of the anticlerical elements in the national government. In the early twentieth century the religious communities' status was for three decades unclear, but the decrees of 16 January and 16 December 1939 finally stabilised the situation by regulating the status of Catholic and Protestant missions in the Pacific Region. The selection of the missions' Presidents and the members of their Administrative Councils must be submitted for the High Commissioners' decision.<sup>27</sup>

There have been, from time to time, controversies between the official policy and the strong influence of religion in Polynesian society. In 2003 the territorial authorities funded the reconstruction of an Evangelical Church rectory, which was damaged by a cyclone. The Appellate Administrative Court of Paris ruled that the territorial authorities had a right to make an exception to the strict policy of *laïcité* due to the special role of religious communities in the territory, the isolation of the population, lack of public services which the religious communities supplemented, and the use of the building for public purposes.<sup>28</sup> Another exemple is from 2009, when the Assembly of French Polynesia decided to erect a large crucifix on the wall behind the speaker's chair.<sup>29</sup> religion plays a central role in Polynesian life and the principle of *laïcité* is interpreted rather flexibly, in case law's limits.

Wallis and Futuna was for a long time a "Marist theocracy". All Residents (representatives of France) were Catholic priests between 1886-1910. Related to the battle on religion in Metropolitan France, the new resident asked the King of Uvéa in 1910 to expel the head of the Catholic mission from the islands. This led to political uproar and the attempt was revoked. Even in legislation the Catholic Church dominated for a long time. The Code of Monseigneur Bataillon (1870) controlled the moral conduct of islanders strongly until the 1940s. Those who did not attend masses, showed disrespect to priests, and performed non-Christian behaviour could be fined.<sup>30</sup> The legislator had to recognise the strong dominance of the church in the law of 1961, which "guarantees to the population of the territory of the islands of Wallis and Futuna the free exercise of their religion, as far as the respect of their beliefs and customs is not against the general principles of law or provisions of the present law."<sup>31</sup> Although religious practising must, at least in theory, follow the republican principles,

---

27 Décret du 16 janvier 1939, art. 2; Décret du 16 décembre 1939, art. 2; Newbury (1980), p. 204; Ntummy (1993), pp. 637-638; Rayboud (2001).

28 CAA, *Haut-commissaire c. Territoire de la Polynésie-française*, 31 décembre 2003.

29 Machellen (2010), p. 2.

30 Aldrich (1993), p. 136; Ntummy (1993), pp. 622-623; Daughton (2006), p. 125. The Marists, or Society of Mary (Societas Mariae), is a Catholic order devoted to missions.

31 Loi no. 61-812 du 29 juillet 1961, art. 3.

especially equality, and be in consonance with the law of 1961, the dominance of the Catholic Church is guaranteed in indigenous communities and public education.

## 7.2. New Zealand

### 7.2.1. Preserving the Cultural Identity

In 1840 the British Consul Hobson gave an oral statement, later known as “the fourth article” of the Treaty of Waitangi. It was understood by Māori as general and binding, but by Pākehā as a time-related personal promise. Only WT has returned the statement back to the forefront. The Māori political activism in land legislation at the turn of the twentieth century was able to preserve Māori culture and identity in the remaining *whakapapa*-based land areas. The Maori Social and Economic Advancement Act 1945 stressed instead of plain assimilation integration to mainstream society by guidance and collaboration. The law promised to advance and preserve Māori culture, gave the tribal Executive Committees powers to make bylaws on the protection of *marae* houses and burial grounds. The Hunn Report (1960) continued this policy by suggesting integration of the two parts of society by preserving distinct Māori culture.<sup>32</sup>

The Maori Affairs Act 1953 allowed the MLC to set aside land as Māori reservation when it had historical significance or spiritual and emotional association to the Māori.<sup>33</sup> Later WT obtained a significant role in its recommendations. Waikato Day was created to commemorate the treaty’s role as a public holiday.<sup>34</sup> The Historic Places Trust has the power to declare a site as traditional or archaeological site after which they can be protected by heritage covenants.<sup>35</sup> In *Manukau* (1983) and *Kaituna* (1988) Reports the Waitangi Tribunal stressed the cultural and spiritual values to be taken into consideration in environmental questions. The treaty gives Māori values an equal place with British values and a priority when the Māori interest in *taonga* is adversely affected.<sup>36</sup> The Crown Forests Assets Act 1989 allows protective covenants for sites having historical, spiritual, emotional or cultural value to be enforced by the Minister of Conservation. This policy is confirmed in modern settlement legislation.<sup>37</sup>

The Bill of Rights Act guarantees for all persons who belong to ethnic, religious or linguistic minorities the right in the community with other members to enjoy culture, profession, practice of religion or use of minority language.<sup>38</sup> The wording reflects the international conventions’ individual right and has no direct reference to the Treaty of Waitangi or Māori.

32 Maori Social and Economic Advancement Act (1945), s. 35; WT, *Muriwhenua Land Report* (1997), s. 13; Armitage (1995), p. 145; E mea an ate Kāwana ko ngā whakapono katoa a Ingarani, o ngā Weteriana, o Roma, me te ritenga Māori hoki e tiakine ngatahitia e ia / The Governor says that the several faiths of England, of the Wesleyans, of Rome, and also of Māori custom shall alike be protected by him. Cf. Māori Customary Law and the Treaty of Waitangi (2001), pp. 72-73.

33 Maori Affairs Act 1953, ss. 439-439A.

34 Waikato Day Act 1976, ss. 3-4.

35 Historic Places Act 1980, ss. 2, 43-48, 52.

36 WT, *Kaituna Report* (1984), s. 10; *Manukau Report* (1985), s. 9.

37 Crown Forest Assets Act 1989, s. 18; Ngati Awa Claims Settlement Act 2005, Preamble, (16).

38 New Zealand Bill of Rights Act 1990, s. 20;

The Resource Management Act 1991 enables any interested body corporate to apply to the Minister for approval as a heritage protection authority. An authority may require a heritage order to protect places with special significance to Māori for special cultural or historical reasons. The territorial authority must be notified and the requisite information, public notification, submissions and hearing must be obtained.<sup>39</sup> Similarly, the New Zealand Historic Places Trust has to be advised on all construction projects concerning a *wāhi tapu* site. The trust funds can be used for cultural welfare and historic reserves have been established. The trust maintains a register of historic places and areas, and *wāhi tapu* areas. The Maori Heritage Council ensures that the trust meets the needs of the Māori in a culturally sensitive manner. It also develops Māori programmes for the identification and conservation of historic/*wāhi tapu* areas and assists the trust to develop and reflect a bicultural view in the exercise of its powers and functions and gives recommendations.<sup>40</sup>

The settlements have included the following: concepts of cultural redress, consisting of guardianship of sites of spiritual and cultural significance; access to traditional foods and resources; recognition of special and traditional relationships with the natural environment; greater participation in management and decision-making on natural resources and the environment; and visible recognition of *mana*. The cultural redress package includes the transferring of ownership of significant sites, creation of reserves, and the creating of camping entitlements. Many more disadvantaged Māori groups have, however, felt that they have been forgotten in the shadow of more preferential groups in negotiations.<sup>41</sup>

The same year the first international conference was arranged on the cultural and intellectual property rights of indigenous peoples at Whatakane. It connected the rights to the right of self-determination and they are inseparable from the claims on territorial rights. Its Mātaatua Declaration asks the states to repatriate indigenous knowledge and devise a comprehensive intellectual property rights regime. It qualifies the rights as collective and individual. The priority to them belongs to direct descendants of those who have assured the transmission of traditional knowledge.<sup>42</sup>

On the Cook Islands the centrality of traditional culture has been officially recognised. The inauguration of local chiefs is still performed in investiture ceremonies which have great symbolic value. They strengthen ties with the traditional past. The Ministry of Cultural Development (since 1974) encourages the performance of these ceremonies and other customary expressions of culture.<sup>43</sup>

---

39 Resource Management Act 1991, ss. 6(e), 152, 154(1).

40 Historic Places Act 1993, ss. 22, 85; Te Ture Whenua Maori Act 1993, s. 218; Building Act 2004, s. 399(1).

41 Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, Preamble, (5)-(6); Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s. 66; Treaty Negotiations (2003), pp. 36-38. One example is Ngāti Korokī Kohukura, which lost its *wāhi tapu* in 1946 when a dam flooded their sacred sites. They were not allowed to transfer their ancestral *wheua* (bones) and the historical Kurāpiro Rock which was a centrepiece of their identity was destroyed. Cf. Aho (2008), pp. 243-244; In its *Kaituna Report* (1986), the Waitangi Tribunal has extended the cultural and spiritual values to water resources (s.9).

42 Declaration of Mātaatua (1993), art. 2.5-2.6.

43 Sissons (1999), pp. 60, 73-74.

### 7.2.2. *Names and Symbols*

The United Tribes of New Zealand designed a flag in 1835 to express their sovereignty. It was replaced by the Union Jack only five years later. Similarly, on the Cook Islands the short-lived federation had a flag of its own before the islands were annexed to New Zealand. The Democratic Party government created a new flag in 1978 to stress the islands' own character. A referendum arranged in 1994 wanted to preserve the English name for the islands.<sup>44</sup>

The settlement process includes as part of the cultural redress package a possibility to change place names so they are bilingual or sometimes to Māori alone. The Ngai Tahu settlement restored 88 original Māori place names on the South Island besides the English names, including Mount Cook/Aoraki. The New Zealand Geographical Board collects Māori names and recommends them be used on official charts and maps, and encourages their use.<sup>45</sup>

### 7.2.3. *Te Reo Māori*

The Māori language (*Te Reo Māori*) is one of the core elements of *mana*. The written Māori was created early (1815), but the decline of the Māori language began in the late 1850s when it became a minority language. From 1867 school instruction was permitted only in English. The assimilation policy led soon to a general prohibition to speak Māori at school and the children were punished even outside the school hours of speaking their mother tongue. From 1909 Māori was allowed again as an optional subject and the language and culture returned gradually to schools from the 1920s thanks to the Māori politicians' lobbying. Māori remained the dominant home language among the indigenous communities until World War II and to the legislation was included the preservation of the Māori language, but rapid urbanisation soon changed the situation. The language change accelerated from the 1960s and the language was predominantly used in isolated rural communities and the Māori gatherings, while most of the families used English for communication. The Hunn Report saw it as a mere relic of ancient Māori life. In 1973, Ngā Tamatoa *iwi* collected a petition of 30,000 Māori for the government to legalise the use of the Māori language at all levels of schools. Also the Land March of 1975 wanted to promote the status of the language. Still there was little legal protection for the Māori language and very little space to use the language in public before the late 1980s. In 1984 the Māori activists laid their claim to the Waitangi Tribunal. Two years later the Waitangi Tribunal delivered its Te Reo Maori Report. It held that under article 2 of the treaty the language was an essential part of culture and *taonga*. The Crown had an obligation to protect the language on the basis of treaty-based guarantee. The tribunal recommended that Māori should become a language of the judiciary and administration at all levels; there should be a supervising body to foster the use of language; there should

<sup>44</sup> Reforming the Political System of the Cook Islands (1998), p. 88; Sissons (1999), p. 13.

<sup>45</sup> Ngāi Tahu Claims Settlement Act 1998, ss. 162-166; Te Uri o Hau Claims Settlement Act 2002, Schedule 14; Ngāti Awa Claims Settlement Act 2005, s. 115; Te Arawa Lakes Settlement Act 2006, s. 71; Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008, ss., 84, 86; New Zealand Geographical Board (Nga Pou Taumaha o Aotearoa) Act 2008, s. 6; Durie (1998), p. 202; Treaty Negotiations (2003), p. 39.

be an inquiry on education of the language; the broadcasting policy should recognise the treaty responsibilities; and bilingualism should be a prerequisite to some appointments of state service. Despite these guarantees the tribunal was reluctant to establish absolute rights for the Māori language.<sup>46</sup>

The subsequent Maori Language Act 1987 made Māori an official language of New Zealand. It recognised the language as *taonga* and conferred a right to speak Māori in legal proceedings. The Maori Language Commission (*Te Taura Whiri i te Reo Māori*) was established to promote the Māori as a living language, to advise and assist the Crown on its implementation as an official language and to hold inquiries, hearings and meetings.<sup>47</sup> The State Sector Act 1988 requires the chief executives of Government departments to recognise the aims, aspirations and employment requirements of the Māori people.<sup>48</sup> Despite these reforms the legislation did not demand the public authorities to speak Māori and there was no demand of language skills for high officials. In 1997 the government published five Māori language objectives: a larger number of Māori speakers by increased opportunities to learn the language; increased rate of Māori proficiency; increased opportunities to use Māori; developing the Māori language at all levels of modern activities; and fostering positive attitudes so that bilingualism would be valued as part of New Zealand society.<sup>49</sup>

The public schools started bilingual instruction in primary and secondary education schedules in 1978 after the Department of Education's directions. The devolution policy of the department began to promote the Māori through *kōhanga Reo* (language nest, preschool). The first of them was established in 1981, and today they number is more than 500. The programme has imparted language to new generations and also enculturated the environment. Four years later started *Kura Kaupapa Māori* (total immersion school), combining the objectives of Māori language promotion and primary school education, which were formalised under the Education Act in 1989 and included in the state education system on the minister's discretion. As a result, within ten years time two-thirds of Māori children were learning their language. The act also demands the Boards of Trustees arrange instruction of Māori on voluntary basis in public schools if parents ask it.<sup>50</sup>

In the media the goal has been to protect and render the Māori language available at in all levels of the national and local media. The Māori began to lobby for the change in the 1960s.

---

46 Native Schools Act 1867, s. 21; Maori Purposes Fund Act 1934, ss. 4, 10A; WT, *Te Reo Maori Report* (1986), s. 4; Stephens (2011), pp. 243-246. Bell & Harlow & Sharks (2005), pp. 67, 71-72; Baird & Glazebrook & Holden (2009), p. 74; Cleave (2008), p. 11; Kawharu (2003), p. 31. The Māori language is threatened. In 2006 28% of Māori (157,000) knew the language, but only 9% of adult Māori were fluent speakers. The estimate on native speakers – mostly elderly people – was estimated to be 70,000. Another version of the language, the Cook Islands Māori, was spoken by 39,000 people, of whom 17,000 lived in the Cook Islands. Niuean (8,000) and Tokelauan (3,000) are more distant West Polynesian languages. All associated states' and territories' indigenous languages are predominantly (60%) spoken in New Zealand and Australia due to massive migration. The Moriori language of the Chatham Islands became extinct during the nineteenth century. Cf. 2006 Census Data.

47 Maori Language Act (1987), Preamble, ss. 3-4, 6-7, Schedule 1.

48 State Sector Act 1988, s. 56.

49 Te Ture Whenua Maori Act 1993, s. 68; Durie (1998), p. 62. The major model in drafting was the Welsh Language Act 1967 (*comisiynydd y Gymraeg*), especially concerning the media and education; The Schedule of 1987 law lists 16 courts and tribunals where the Māori is allowed to use.

50 Education Act 1989, s. 63; Durie (1998), pp. 63-64; Bell & Harlow & Sharks (2005), pp. 19, 73.



The objective of *Te Māngai Pāho* was to guarantee that at least 50% of all programmes would be broadcast in Māori. The *iwi* radio stations network started in 1989, and now covers most of the islands. Ruia Mai broadcasts five hours every day in Māori language in Auckland. In the same year a Crown agency called *Te Reo Whakapaaki Irirangi*, was established which promotes the Māori language and culture by making funds available for broadcasting, produces programmes to broadcast and archives programmes. In 1997 the Aotearoa Television Network started, using the Māori language in programmes. The recommendations of the Waitangi Tribunal on the continuing obligation to take reasonable steps to assist in the preservation of *te reo Māori* by the use of radio and TV broadcasting led to the Maori Television Service Act 2000. The use of Māori words and phrases has increased in other media, too.<sup>51</sup>

Since 1908 all official documents in Māori have to be translated in English but Māori language expressions, including legal vocabulary, have become an important part of New Zealand's public life.<sup>52</sup> Since the 1980s a large number of laws which include a reference to the Treaty of Waitangi or Māori rights, have used Māori legal terminology. In 2007 the Faculty of Law at Victoria University started a project to create a legal Māori dictionary. It is part of the official policy to give the Māori more prominence in the public sphere and to reverse the language shift. In 1985 the Standing Orders of the Parliament were reformed which allowed an MP to address the speaker either in English or Māori and to speak in the House in Māori. Oaths have an equal effect in Māori. The entrance of the Māori Party has increased the use of the language. In 2009 simultaneous interpretation services were made available in Parliament. The use of Māori words in legislation has since the 1980s become widespread which shows an increased understanding of Indigenous culture and expressions.<sup>53</sup>

The District Court (1948) allowed translation in Māori, but the difficulty was the number of different language versions. The Maori Language Act 1987 confers a right to speak Māori in certain legal proceedings. It however limits obligatory use to the Waitangi Tribunal and to a number of special tribunals. The Dispute Tribunals Act 1988 lists those parties which may ask the right to use the Māori language in court. When there is controversy over translations the opinion of the presiding officer is decisive. The right to use the Māori language in the courts is not automatic. This was also confirmed in *Mihaika v. Police*, which denied the right to speak Māori before the courts, but several other court decisions have granted the right based on s. 4 of the Maori Language Act 1987.<sup>54</sup> The conclusion is that only spoken Māori can be used in a limited number of courts and in limited conditions.

51 Broadcasting Act 1989, ss. 53A-B; Maori Television Service Act 2000; Broadcasting Amendment Act 2000, s. 595(1); Maori Television (Te Aratuku Whakautu Irirangi Maori) Act 2003, s. 3; Broadcasting Amendment Act 2008, s. 10; Alves (1999), pp. 90-91; Bell & Harlow & Sharks (2005), p. 111; Baird & Glazebrook & Holden (2009), p. 75; Palmer (2008), p. 99.

52 Deeds Registration Act 1908, s. 20.

53 Oaths and Declarations Act 1957, s. 4A(1); Standing Orders 151(104, 1985); Bell & Harlow & Sharks (2005), pp. 13-14, 144; Ahu & Hoarc & Stephens (2011), p. 201; Magallanes (2011), p. 260; Stephens (2011), pp. 243, 253-254.

54 Maori Language Act 1987, ss. 3-4; Dispute Tribunals Act 1988, s. 4; NZCA, *Mihaika v. Police* (1980); Alves (1999), p. 87; Stephens (2011), pp. 249-252, 255. In 1979 the Court of Appeal ruled that a person who could speak and understand English could not use Māori in the court. This interpretation was based on the Pleadings in the English Act (1362), a medieval statute which was in force in New Zealand from 1858.

In the Cook Islands both Māori and English are public languages. Both are used also in education. In the Outer Islands Māori is the predominant language of instruction. All parliamentary bills must be written both in Rarotongan Māori and English (since 1946), but the parliament can also decide that only English be used and in conflict situations the English language prevails.<sup>55</sup> In Niue, both Niuean and English are official languages. The island's Constitution is equally authentic in both languages and all bills and acts are written in both languages.<sup>56</sup> In Tokelau the written language of public life and the church was for a long time Samoan. Today the education is both in Tokelauan and English.<sup>57</sup> Still the Pacific languages are threatened. The majority of islanders live in New Zealand where they have rapidly assimilated to the Anglophone community. The Ministry of Pacific Islands Affairs is running the Mind Your Language project to support the languages and the Ministry of Education has prepared curriculum guidelines for the languages.<sup>58</sup>

#### 7.2.4. *Taonga Tūturu*

New Zealand's legislators understood early the value of Māori artefacts (*taonga tūturu*). Since the 1930s the collecting changed to encouragement, research and instruction of Māori and Pacific arts and crafts. Each found artefact is *prima facie* the property of the Crown. The MLC determines the ownership according to custom and is empowered to vest the object in trustees and to enforce and police the trust. The sale of artifacts is limited to registered and official persons and institutions. Also Ngati Kuri has claimed against the use for profit of Māori designs, images and traditional material exported without Māori permission. Similarly, the Declaration of Mataatua has demanded the return of human remains, and funeral and cultural objects from museums. New Zealand recognises in arts *rohe* of Māori as *tangata whenua* and the role of the Pacific Islands peoples arts. In some modern settlements the attainability of stone materials, like *purangi* (green stone), for artistic use is guaranteed. The national Arts Council and Arts Boards give funding for indigenous arts. The New Zealand Maori Arts and Craft Institute formulates and implements policies in respect of furtherance and assistance to Māori culture, arts and crafts, make grants, and arrange and undertake exhibitions.<sup>59</sup>

---

55 Constitution of the Cook Islands 1965, art. 42; Cook Islands Amendment Act 1946, s. 15; Cook Islands Constitution Act 1964, s. 35.

56 The Constitution of Niue (1974), art. 23; Niue Constitution Act 1974, ss. 4, 23; Ntuny (1993), p. 297.

57 Bell & Sharks (2005), pp. 298-316; The situation in Tokelau has been influenced by the strong presence of missionaries.

58 Baird & Glazebrook & Holden (2009), p. 75.

59 Maori Antiquities Act 1901, s. 4; Maori Purposes Act 1934, ss. 4, 10A; Maori Social and Economic Advancement Act 1945, s. 12; New Zealand Maori Arts and Craft Institute Act 1963, s. 15; Protected Objects Act 1975, ss. 11-13; Arts Council of New Zealand Toi Aotearoa Act 1994, s. 5(b); Ngati Ruanui Claims Settlement Act 2003, s. 111; Declaration of Mataatua (1993), art. 2; Alves (1999), p. 85; Crawford (2008), p.246.

### 7.2.5. *Wairuatanga*

Everything in the Māori world has a spiritual dimension, *wairuatanga*. The encounter with British settlers challenged this view. Due to the Māori wars and the continuous land loss there was social demand for indigenous, prophetic and millenarian movements, which were based on indigenous, Judaic and Christian influences. Some of them described the Māori as a promised people or the lost tribe of Israel. They were often political and sometimes also violent. This uncontrolled form of Māori activism and uncertain medical techniques worried both the educated Māori and the British officials. A particular feature of indigenous spirituality in Aotearoa was *tohunga*, Indigenous priests and faith-healers. The initiative to suppress *tohunga* came actually from the educated Māori, who were afraid that the fragile balance in land policy and social reform would falter. Dr. Māui Pōmare suggested in 1904 legislation against the practices of *tohunga*. James Carroll, the Native Minister finally introduced the bill in 1906. He used it as an excuse to protect his own land reform policy. New Zealand's authorities were also irritated by the unwillingness of Maori Councils to co-operate in the surrender of wastelands and their protection of *tohunga*.<sup>60</sup>

Already the Criminal Code Act 1893 included a provision against the exercise or use of witchcraft, sorcery, enchantment or conjuration. Those who fraudulently claimed knowledge or skill in the occult or crafty science could be imprisoned for up to one year.<sup>61</sup> Also the Indicent Offences Act 1894 gave fines of £5 or one month imprisonment for the same crimes.<sup>62</sup> The Tohunga Suppression Act 1907 classified the offences as follows: to gather persons by practices of superstition or credulity; mislead by supernatural powers in treatment or cure of disease; mislead by supernatural powers in foretelling of future events or other wises. The courts were, however, unwilling to apply the law. The law was used for the last time in prosecution in 1955.<sup>63</sup>

Since the late 1980s the concept of *wāhi tapu* and spiritual interests have been included to legislation, including business, conservation, construction, land transport, mining, and resource management. And *wāhi tapu* can also be justified by common law Aboriginal servitude where certain characteristics of the original Aboriginal title survive over certain land to bind the holder of legal title but there is a difficulty of proof. The Department of Conservation manage the national parks in negotiating with the Māori on the protection and management of sacred sites and gathers information on them. The difficulty has been the unwillingness of Māori to reveal the sacred sites. Instead there were suggested "silent files",

---

60 Stephens (2001). Two of the prophetic movements have survived until present: Ringatū (16,000 members) and Rātana (50,000) Churches. The last-mentioned has significant political and social influence in Māori society; In the racial theories of the late nineteenth century the Māori were also called "Aryans of Polynesia" or "Vikings of the Sunrise". Cf. Smith (2005), p. 12.

61 Criminal Code Act 1893, s. 240. Four *tohunga* were convicted based on this law. Cf. Stephens (2001).

62 Indicent Offences Act 1894, s. 49.

63 Tohunga Suppression Act 1907, s. 2; Stephens (2001); Māori Custom and Values in New Zealand Law (2001), p. 24. Only three persons were imprisoned: the longest sentence of six months was for the "white *tohunga*" Mary-Ann Hill (1914). The law did not end the *tohunga* practices which are still used today. Cf. Stephens (2001).

to be kept by Māori tribal units. They could be used during the development projects.<sup>64</sup> The Waikato River Settlement (2010) recognises the role for customary authority in traditional burial. The Māori may carry out on Waikato River *fangihinga* (funeral ceremony) and *hari tuupaapaku* (translation of human remains).<sup>65</sup>

The legislation has also opened the door for litigation. The Environmental Court halted in 1995 the preparation of a sewage treatment to wetland as an alternative had not been considered and the project was against the spiritual values of Māori as *wāhi tapu*. Later the court gave a license to build a prison near Ngawha Springs, although the Māori applicants claimed that *taniwaha* (spirit being) of the site would be harmed. The court estimated that a prison be a restorative element and due to geographical distance from the springs would not affect the *taniwaha*. Otherwise the court did not want to make a finding based on metaphysical elements.<sup>66</sup>

### 7.3. Canada

#### 7.3.1. *Distinct Cultural Test: What is Indigenous Culture?*

The Constitution of 1867 established a bicultural nation, with dominant British and French elements, only mentioning the Indians as federal wards. Canadian society began to change rapidly during the 1950s. The development in Quebec, the Canadian Bill of Rights (1960), the Royal Commission on Bilingualism and Biculturalism, and the failure of Trudeau's White Paper and unification policy paved the road to *de facto* pluralism, which was recognised in 1971, when Canada became the first country in the world to proclaimed itself as multicultural.<sup>67</sup>

The federal government promised to do the following: assist all cultural groups that have demonstrated the desire and effort to continue to develop a capacity to grow and contribute to Canada to overcome barriers to full participation in Canadian society; to promote creative encounters and interchange among all Canadian cultural groups in the interest of national unity; and to continue to assist immigrants to acquire at least one of the official languages in order to become full participants in Canadian society.<sup>68</sup> The focus of policy, soon included to federal legislation, continued the policy of integration.

The multicultural character of the nation is also mentioned in the Constitution Act, 1982, Schedule B, s. 27, according to which "This Charter shall be interpreted in a manner consistent

---

64 State-Owned Enterprises Act 1986, s. 27D; Conservation Act 1987, s. 27; Education Act 1989, s. 214; Crown Minerals Act 1991, s. 51(2); Land Transport Management Act 2003, s. 18C; Building Act 2005, s. 399(1); Marine and Coastal Area (Takutui Moana) Act 2011, s. 51(e); McHugh (1991), pp. 231-234; 512, 613; Also Tokelau is, like Wallis and Futuna, a strongly religious community (half-Catholic, half-Protestant). The strict observance of Sunday and moral codes form an essential part of the islands customary law.

65 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss. 56, 60;

66 EC, *Te Runanga O Taumarere v. Northland Regional Council* (1996); NZHC, *Friends and Community of Ngawha Inc. v. Minister of Corrections* (2002).

67 "All citizens are equal. Multiculturalism ensures that all citizens can keep their identities, can take pride in their ancestry and have a sense of belonging. Acceptance gives Canadians a feeling of security and self-confidence, making them more open to, and accepting of, diverse cultures." Cf. What is Multiculturalism?

68 Breton (2005), pp. 262-275.

with the preservation and enhancement of the multicultural heritage of Canadians.<sup>69</sup> In the Canadian Multiculturalism Act, 1985 further objectives are defined as: the protection of cultural and racial diversity, support for the characteristics of Canadian heritage and identity, the equal existence and treatment of communities, the encouragement and assistance of social, cultural, economic and political institution, the promotion of understanding and creativity, the acceptance of diverse cultures of Canadian society and encouragement in using the minority languages.<sup>70</sup> Canada has committed respecting multicultural difference. This means support to protect collective rights, cultural integrity and dignity of the ethnic groups in Canada. June 21 has been declared as the federal National Aboriginal Day and several provinces and territories have decided to celebrate official days to commemorate the Indigenous peoples' significance in the nation's history and in the present.<sup>71</sup>

Québec uses instead of multiculturalism the expression interculturalism (*la culture de convergence*). Its special features are the recognition of the French language as the language of public life, respect for liberal democratic values, including civil and political rights and the equality of opportunity; and respect for plurality, including openness to and tolerance of other difference.<sup>72</sup> All provinces and territories recognise the significance of indigenous cultures and their traditional way of life. The provinces have created heritage sites and cultural conservation areas for social, ceremonial and cultural uses. The archaeological sites and Indigenous human remains are under special protection.<sup>73</sup> Nova Scotia has created Mi'kmaq educational programmes, resources and learning material on history, heritage, language, culture and tradition.<sup>74</sup> Several provinces and territories have committed to the cultural heritage of the indigenous peoples, and to the preservation and enhancement of the plurality of its residents' cultural heritage.<sup>75</sup> British Columbia has special rules of wills for the devolution of cultural property, which is regulated by the self-governing First Nations' legislation. The province has created the First Peoples Heritage, Language and Culture Council, which finances and supports the First Nations culture, initiatives, programs and services.<sup>76</sup> Tâichô Community Services Agency creates social programmes and services on Tâichô language, culture and

---

69 Constitution Act (1982), Schedule B, s. 27.

70 Canadian Multiculturalism Act, 1985, Preamble.

71 Proclamation Declaring June the 21<sup>st</sup> of Each Year as National Aboriginal Day, 1996; Beatty (1994), p. 97.

72 Loi sur l'exercice des droits fondamentaux et des prerogatives du peuple québécois et de l'État du Québec, 2001 (Québec), s. 14; Décret concernant la publication de l'entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec, s. 2.2; Charte de la langue française, 2011 (Québec), Préambule.

73 Archaeology Act, 1988 (Prince Edward Island), s. 14(5).

74 Education Act, 1995 (Nova Scotia), s. 3(1).

75 Wanuskewin Heritage Park Act, 1997 (Saskatchewan), s. 9; National Parks Act, 2001 (New Brunswick), s. 2; Heritage Conservation Act, 2009 (New Brunswick), ss. 1, 7, 45.

76 Nisga'a Final Agreement Act, 1999, ss. 17.36-39; Estate Administration Act, 1996 (British Columbia), s. 2.2; Heritage Conservation Act, 1996 (British Columbia), s. 4; First Peoples Heritage, Language and Culture Act, 2012 (British Columbia), ss. 3, 6, 8; Park Act, 1996 (British Columbia), s. 4.2; Wills Variation Act, 1996 (British Columbia), s. 1; Nisga'a Final Agreement Act, 1999, ss. 3.95-103; Maanulth First Nations Final Agreement Act, 2007 (British Columbia), s. 20.

way of life.<sup>77</sup> Nunavut recognises and promotes Inuit culture and values which underlie the Inuit way of life. The territory acknowledges *inuit qaujimajatuqangit* as the framework for its values in public and individual life. The existing Aboriginal and treaty rights are protected. The Nunavut's Human Rights Tribunal oversees that Inuit culture and values which underlie the Inuit way of life, are respected and can give sanctions.<sup>78</sup>

All Prairies Provinces recognise the role of the Métis people and their culture in society. Saskatchewan recognises the distinct culture and heritage of the Métis people and their contribution to the province.<sup>79</sup> Manitoba has rehabilitated Louis Riel due to his unique and historical role. The Louis Riel Institute promotes Métis education and the cultural institutions and fosters the understanding and appreciation of the culture, heritage and history of Manitoba and Métis people to the benefit of all Manitobans. It performs research, supports various programmes and acts as a resource center. The province recognises the role of Métis people as the first citizens in Manitoba.<sup>80</sup> Ontario and the Prairie Provinces offer library services and representation on library boards for Indians and Métis.<sup>81</sup>

The Indigenous peoples have stressed their unique character as first peoples. This was recognised only in the Constitution Act, 1982, after strong indigenous lobbying. SCC has defined the indigenous culture and identity in several cases. In *Sparrow* (1990) it ruled that the Crown has to offer constitutional protection to those practices and customs of indigenous cultures that pre-dated the arrival of Europeans and the contemporary expressions of those cultures.<sup>82</sup> The doctrine was developed further in *Van der Peet* (1996) where Lamer CJ created the distinct cultural test. The test aimed at determining whether a given practice was part of constitutionally protected rights. It has two parts: 1) characterisation phase: the judge must examine the historical roots of the challenged practice and the challenged practice must be adjusted to make it cognizable to the imported legal system. It aims to comprehend if its scope and nature qualify it to be treated as an aboriginal right. The first test has three parts: a) the nature of action claimed done pursuant to an aboriginal right, b) the nature of the governmental legislation or alleged to infringe the right, and c) ancestral traditions and practices relied upon to establish the right; 2) integral test, asking a) integrality and centrality

---

77 Tāichô Community Services Agency Act, 2005 (NWT), s. 4(1). See also: National Aboriginal Day Act, 2001 (NWT); Yukon Day Act, 2002 (Yukon); Human Rights Act, 2002 (Yukon), Preamble, s. 2; Amendment of Champaigne and Aisha First Nations Final Agreement, 2006 (Yukon), s. 1.1.1.

78 Human Rights Act, 2003 (Nunavut), Preamble, ss. 3-4, 16, 34.

79 Métis Act, 2001 (Saskatchewan), s. 2.

80 Louis Riel Institute Act, 1995 (Manitoba), ss. 2-4.

81 Public Libraries Act, 1990 (Ontario), ss. 10, 30; Public Libraries Act, 1996 (Saskatchewan), s. 48(1); Libraries Act, 2000 (Alberta), ss. 13, 16; Public Libraries Act, 2006 (Manitoba), s. 41.

82 SCC, *Sparrow* (1990).

to pre-colonial culture and continuity with colonial law and b) relation between particular modern behaviour and pre-contact integral practices, customs or tradition (continuity).<sup>83</sup>

Lamer J used a purposive approach to ensure that the recognition and affirmation of aboriginal rights are consistent with the fact that they are rights. The decision has been criticised from several viewpoints. The doctrine creates an oppositional polarity between the majority and Indigenous cultures. It also disconnects the definition of Aboriginal rights from pre-contact First Nations jurisprudence. McLachlin J found in dissent the integral test was too categorical for constitutional rights. Instead, she suggested a historically-based test for aboriginal rights which relies on interests and customs recognised in common law and Canadian history. L'Heureux-Dubé J suggested a dynamic rights approach to distinctive cultures. She saw "distinctive" as a problematic notion when used only in regard to individual acts.<sup>84</sup>

Bastarache J has explained the test in *Sappier /Gray* (2006), stressing flexibility when engaging an analysis because the object is to provide cultural security and continuity for the particular indigenous society. He describes the "culture" in broad terms. The culture is an inquiry into the pre-contact way of life of a particular indigenous community, including their means of survival, socialisation methods, legal systems and trading habits.<sup>85</sup>

The test has been used in various cases: in *Pamajewon* (1996) the Ojibwa defended their gambling activities by explaining that they derived from Aboriginal title or the broader inherent right to self-government and was constitutionally protected. The Supreme Court did not see gambling to be significant enough to be an integral part of the distinctive culture of the bands. Neither did it accept that a traditional practice could be a source of contemporary wealth. The Ojibwa had no right to establish high stake gambling facilities based on the Aboriginal power of self-government.<sup>86</sup> Only four years later the court saw, however, that the contract between the Province of Ontario and the First Nations bands on casinos and the delivery of their profits to registered Indian Bands in Ontario was in accordance with the affirmative action programmes defined in 15(2) of the Constitution Act, 1982.<sup>87</sup>

---

83 SCC, *Van der Peet* (1996), ss. 44-47, 63; *Van der Peet* test has been problematic to Métis due to its demand of pre-European contact Aboriginal societies. This was corrected in Powley (2003), which determined the entitlements of Métis under s. 35, by asking about the following: the characterisation of the right; identification of the historical and contemporary rights-bearing community; verification of claimant's membership; identification of the relevant time frame; determination of the practice's integrality to the claimant's distinctive culture; continuity between the past practice and contemporary right; determination of extinguishment; assumption of rights existence and infringement; and determination as to whether the infringement was justified. Cf. SCC, *Mitchell v. M.N.R.* (2001), s. 15; Powley (2003), ss. 19, 23-29, 37, 41-47.

84 SCC, *Van der Peet* (1996), ss. 68-74, 154, 260-275. John Borrows has criticised *van der Peet* doctrine for freezing indigenous societies to the past. The test is retrospective, inviting stories about the past but not telling what is significant to the survival of communities today. His alternative is based on common law recognition of ancestral laws and customs. The adoption of new practices, traditions and laws in response to new influences is for him integral to the survival of Indigenous communities. Cf. Borrows (2002), pp. 56-72. After *Delgamuukw*, the distinctive culture test does not include anymore Aboriginal title questions.

85 SCC, *Sappier/Gray* (2006), s. 33.

86 SCC, *Pamajewon* (1996), s. 40.

87 SCC, *Lovelace v. Ontario* (2000), s. 83-84, 90-92, 109-111.

### 7.3.2. *Names and Symbols*

From the early 1960s, Québec changed its policy on the northern part of the province, for a long time it had neglected, due to the rise in nationalism. To strengthen its claims to sovereignty over the territory, the provincial government began systematically to change the indigenous place names to French versions. The Charter of the French Language (Québec) allows today the First Nations and Inuit to use their traditional names and signs in Northern Quebec treaty areas.<sup>88</sup> In British Columbia, some key geographic features are renamed with Nisga'a and Nuu-Chah-Nulth names. Similarly, the Queen Charlotte Islands have been, based on a reconciliation protocol, renamed as Haida Gwaii.<sup>89</sup> In Nunavut, all public signs, maps, posters and commercial advertising must be displayed in Inuktitut besides the other languages. Also other modern agreements have similar goals to reintroduce the traditional names.<sup>90</sup>

### 7.3.3. *Indigenous Languages*

Most of the indigenous languages in Canada are threatened.<sup>91</sup> No province has an indigenous language as the official language, but many of them recognise their role.<sup>92</sup> In British Columbia, the Nisga'a, Hul'q'umi'num and Nuu-Chah-Nulth languages are recognised in the First Nations' own constitutions and have local status. Their status is, however, second to English. The Tsuwassen and Maanulth laws can be published in the indigenous language, but only the English version is obligatory.<sup>93</sup> Manitoba recognises that the Aboriginal languages are vital to the survival of the culture and identity of indigenous people. They promote their self-esteem, community well-being and cultural continuity. The government's role is to recognise them and to promote their preservation and use.<sup>94</sup>

---

88 Charte de la langue française, 2011 (Québec), Preamble.

89 Nisga'a Final Agreement Act, 1999 (British Columbia), s. 11; Haida Gwaii Reconciliation Act, 2010, s. 2; Maanulth First Nations Final Agreement, 2007 (British Columbia), s. 20;

90 Inuit Language Protection Act, 2007 (Nunavut), ss. 3, 6; Amendment of Champaigne and Aisha First Nations Final Agreement, 2006 (Yukon), s. 1.1.7; Scott (2001), pp. 53-54.

91 There are 55 Indigenous languages spoken in Canada. Only 18% of (207,000) indigenous people spoke native languages as their first language in 2006, in comparison with English (74%) and French (8%). The largest number of fluent speakers are on reserves and among the Inuit. The largest languages are Cree (78,000), Inuktitut (34,000), and Ojibway (18,000). Most languages are diminishing. According to the census of 2006 only the number of Inuktitut, Dene (11,000), Mi'kmaq (8,000) and Atikamekw (6,000) speakers has increased. The indigenous languages have best survived in Nunavut (71% of total population), NWT (14%), Saskatchewan (4%) and Manitoba (3%). The geographical isolation and late contact with the European population have better preserved some western and Arctic languages. The only exception is the Mi'kmaq-speakers in Maritime Provinces, where contact took place during the eighteenth century. Cf. Statistics Canada 2006; The RCAP's report has stressed the importance of a land base for the survival of indigenous languages and cultures. Cf. RCAP, Vol. 2(2), p. 451.

92 Cf. Official Languages Act, 1985, s. 7(3); Métis Act, 2001 (Saskatchewan), s. 2; Décret concernant la publication de l'entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec, 2007 (Québec), s. 2.2; Charte de la langue française, 2011 (Québec), Preamble.

93 Nisga'a Final Agreement Act, 1999, s. 2.7; Maanulth First Nations Final Agreement Act 2007 (British Columbia), s. 13.5; Tsawwassen First Nation Final Agreement Act 2007 (British Columbia), s. 16.16.

94 Aboriginal Languages Recognition Act, 2010 (Manitoba).



The Yukon recognises the significance of indigenous languages and promotes measures to preserve, develop and enhance them. Everyone has a right to use the indigenous languages in debates and procedures of Legislative Assembly. The assembly or its commission may make an order to translate official documents in indigenous languages.<sup>95</sup> The government of Newfoundland and Labrador has recognized Inuktitut as the first official language of Nunatsiavut territory.<sup>96</sup>

The Indigenous languages have an official status only in the Northwest Territories and Nunavut. Since 1988, the NWT has 11 official languages: Chippewyan, Cree, English, French, Gwich'in, Inuinnaqtun, Inuktitut, Inuvialuktun, North and South Slavey and Tlicho (Dogrib). The Aboriginal Languages Reception Board supervises the indigenous languages' status. Although English has dominant position in the Northwest Territory, all official languages have an equal status in the Legislative Assembly. All government and legal documents are translated to those languages and they may be used in the courts. The court decisions and public services at the territorial level are offered in either English or French as the *lingua franca*, but the indigenous languages may be used as well. The territory has a language commission, which supervises the use of official languages.<sup>97</sup>

The official languages of Nunavut are Inuktitut, English and French. Inuinnaqtun has the same status locally. The territory recognises the past grievances and need for remedy, and the role of elders and other guardians of the indigenous languages. The language is a fundamental medium of personal and cultural expression through which the Inuit knowledge, values, history, traditions and identity transmit. The language is connected to the development of dynamic and strong individuals in communities and institutions of Nunavut. The daily use of language is promoted at all levels of governmental, public, educational, social and economic sectors of life. All public institution must use as the work language Inuktitut, including the Legislative Assembly and all public services when requested. The innovative use and development of Inuktitut terminology are encouraged. In Nunavut all official documents, including public contracts, must be published in Inuktitut. All official languages can be used in courts, although English and French are the languages of decision. The situation is the same with administrative bodies, wher Inuktitut is optional. *Inuit Uqausinnik Taiguusiliuqtiit* (Inuit Language Authority) offers expertise on language and makes decisions about language use, development and standards. Members of authority must have indepth knowledge in Inuit language and culture. It may investigate language violations and apply to the Nunavut Court of Justice for remedy. The main principles of language policy are the same as in the school policy described above.<sup>98</sup>

The Métis have had traditionally three languages: French, English and Michif. The Manitoba Act (1870) guaranteed the language rights of the French-speaking Métis community in Manitoba in s. 23 including the equal status in the Legislature and the Courts but did

95 Language Act, 2002 (Yukon), ss. 1, 3.

96 Labrador Inuit Constitution (2005), ss. 1, 11.

97 NWT Act, 1985, s. 43.2; NWT Official Languages Act, 1988 (NWT), ss. 4, 8, 12-13, 18-23. The NWT's legislation has a provision that a marriage is not valid if there is no interpreter present at the wedding in the cases where either of the spouses does not understand English. Cf. Marriage Act, 1988 (NWT), s. 12(1).

98 Inuit Language Protection Act, 2007 (Nunavut), Preamble, ss. 2-4, 12, 15-16, 20, 27.1; Eisenberg & Spiller-Halev (2005), p. 286; Loukacheva (2007), p. 71.

not define the language of education.<sup>99</sup> During the 1880s the settlers overwhelmed the Métis and the status of the French language began to deteriorate rapidly. The Manitoba School Act, 1890, was a logical consequence to the development. It practically abolished the official status of French life in the province. The act caused a bitter cultural battle inside the country between the Anglo- and Francophone communities.<sup>100</sup> Although SCC was in favour of the Manitoba Act, the Privy Council preferred the School Act. Its reasons were the wording in s. 91 of the Constitution Act, 1867, according to which the education was primarily under the provincial jurisdiction.<sup>101</sup>

The French language was returned to a limited extent to public schools in 1896 after a compromise between the federal and provincial governments. The Catholic clergy plead to Pope Leo XIII, who to their dissatisfaction believed that the governments' remedial actions had "been inspired by the love for equity and good intentions." The status of French as an educational language had different fates in the following years. The years between 1916-1955, based on the Thornton Act, were a low ebb with reduced language rights. The educational status of French began gradually to recover from 1955 but bilingual education on equal terms was allowed only in 1967 when immersion classes were created. In 1970 the French language gained an official status in Manitoban schools.<sup>102</sup>

In the 1970s began a process to overturn the School Act of 1890. In 1979 the Manitoba Court of Appeal ruled that the School Act of 1890 was invalid. The following year the Supreme Court affirmed the decision in *Bilodeau*.<sup>103</sup> In 1985 the Governor in Council referred in *Re Manitoba Language Rights* SCC to a question, that asked if the province of Manitoba had unconstitutional legislation, when neglecting the s. 133 of the Constitution Act, 1867, and s. 23 of the Manitoba Act, respective of the bilingual legislation and documentation. SCC ruled that section 133 of the Constitution Act, 1867, demands bilingual enactment that English and French texts of law must be equally authoritative, and that there is a requirement of simultaneity in the use of both languages in law enactment. Therefore, all provincial laws between 1890 and 1985 were invalid and inoperative until they would be translated into French.<sup>104</sup>

The change was made in a transitory period by the provincial government. The Bill 113 (1981) returned the Francophone governmental services. Today the Métis have a right to use the French language in the legislature. Also all laws must be published both in English and French. Later the province has increased the scope of services in French. The City of Winnipeg, where most of the French-speaking Métis live in the province, became bilingual in the public services sector in 1992. The Métis' special needs for bilingual services, especially in family services, are guaranteed.<sup>105</sup>

---

99 Manitoba Act, 1870, s. 23. Michif is a mixture of French and Cree, spoken by less than 1,000 people.

100 Manitoba School Act, 1890; Rodriquez (2006), p. 53.

101 Rodriquez (2006), pp. 57-67.

102 Leo XIII (1897); Constitution Act, 1867, s. 91; Rodriquez (2006), pp. 57-67.

103 SCC, *Bilodeau v. Manitoba* (A.G.) (1980), ss. 15-21; MCA, *Forest v. Manitoba* (A.G.), 1979.

104 SCC, *Re Manitoba Language Rights* (1985), ss. 1, 124-128, 149.

105 Constitution Act, 1867, s. 133; Manitoba Act, 1870, s. 23; City of Winnipeg Charter (2002); French Language Services Regulation, 2005 (Manitoba), s. 1(c); Bilingual Service Centers Act, 2012 (Manitoba), s. 2(3); Rodriquez (2006), pp. 61-67.

Already in the eighteenth century Abbé Pierre-Simon Maillard had used Mi'kmaq symbols to create an indigenous writing system. A more successful project was that of the Methodist missionary James Evans, who created in early nineteenth century Manitoba a syllabic form of writing to Northern Cree, using already known symbols. In the early part of the nineteenth century the Cree had one of the highest levels of literacy. The first official document, where an indigenous language was used in Canada, was in Treaty 9, where the Cree chiefs indicated their acceptance by using the Cree syllabics. Reverend Peck, an Anglican missionary transported a syllabic system from Ojibway Indians to the Arctic. In Western Arctic other missionaries took in use the Latin scripture. In 1960 linguist Raymond Gagne was hired to create a standard orthography. He recommended dropping the syllabic system and replacing it with Latin script. The Eastern Inuit did not want to give up the old system. An answer was a dual orthography developed by ITC where two orthographies can be used interchangeably which has enabled the development of Inuit literature.<sup>106</sup>

The federal Hawthorne Report (1966) stressed the opportunity to use the indigenous languages in instruction. Between the 1960s – 1980s, Québec nationalist policy stressed that the public language in all province was French. Thereafter, the stand has softened: the Charter of the French Language recognises the right of the First Nations to preserve and develop their original languages and cultures. Their reserves are excluded as federal domain from Québec's language legislation. The majority of First Nations reserves use English as the language of instruction, although the use of Indigenous languages has been promoted, too. Only the tribes in St. Lawrence Valley speak French. In 1990, after the Oka uprising the Iroquois won a right to use English in the provincial courts. In the 1980s a large network of cultural education centres was established to offer programmes in Indian languages and cultures. In 1985 there were 65 of them.<sup>107</sup>

In the north of the province, JBNQA established the Cree School Board and Kativik School Board with instruction in Cree and Inuktitut, respectively. The North East Quebec Agreement gives the same recognition to the Naskapi language. Section 88 of the Charter of the French Language recognises the right to early primary instruction in Cree, Inuktitut and Naskapi, but the higher education has an objective to use French as the language of instruction. Indigenous leaders have sought a right to use other language than English or French in public services and education. They want to limit the advancement of official-language infrastructures to preserve their own culture. The Cree and Naskapi languages may be optionally used in council meetings and bylaws, while the primary languages are either French or English.<sup>108</sup>

New Brunswick promotes the use of the Mi'kmaq language in education and its introduction among the non-Native students.<sup>109</sup> In British Columbia the school boards can, based on an agreement, provide instruction in Indian languages. The Stó:lō Nation has revived

---

106 Dickason (1994), p. 241. Minority Rights Group (1994), pp. 135-137. The birth of Cree syllabics related to the millenarian indigenous religious movement of the 1840s.

107 Règlement sur la langue d'enseignement des enfants qui résident ou ont résidé dans une réserve indienne, 2003 (Québec), ss. 1-2; Charte de la langue française, 2011 (Québec), Préambule, s. 88; Dickason (1994), p. 337, 359; Scott (2001), p. 53; Bredimas-Assimopoulos (2005), p. 244.

108 Cree-Naskapi (of Quebec) Act, 1984, ss. 31-32; JBNQA (1975), ss. 16-17; NEQA (1978), s. 11.

109 Minority Education Act Regulation, 1997 (New Brunswick), s. 31.

in British Columbia their traditional language Halq'eméylem as the language of alternative, customary justice.<sup>110</sup> In the Yukon, the Minister may authorise an educational programme to be provided in a First Nation's language. The indigenous teachers are under the supervision of the local school board.<sup>111</sup> In the NWT, the District Educational Authority may determine the language of instruction, which is one of the 11 official languages. In schools which use English as the language of instruction, they must have also part of the educational programmes in another official language and *vice versa*. The authority may give also the right for home instruction in a language other than the school district's language of instruction.<sup>112</sup>

In Nunavut, the use of Inuktitut has gradually been allowed in schools since 1955, when the indigenous school assistants came to public schools. Today, the government has, in a manner consistent with *inuit qaujimaqatuqangit*, a duty to arrange instruction in Inuktitut at all levels of education. There must be arranged individual educational plans and language materials. The government has also to promote early childhood Inuktitut language development at the community level. All parents have a right to give their children education in Inuktitut. The Education Act guarantees to all children bilingual education in Inuktitut and English or French. In 2000 the Nunavut Department of Education published the Aajiiqatigiingniq Language Research Paper, which expressed concern about the indigenous languages' future and set as the objective a fully functioning bilingual society. The report suggested three kinds of schools: *qulliq* (Inuktitut as the main language of instruction), *insinnaqtun* (immersion schools) and mixed schools. There are still no unilingual Inuktitut schools.<sup>113</sup>

The federal government started in 1958 to support indigenous language newspapers and radio programmes. Many of CBC's radio programmes in Nunavut are bilingual. Since 1982 the Inuit Broadcasting Corporation has also transmitted TV programmes in Inuktitut for five hours per week. A nationwide Aboriginal Peoples TV Network started in 1992.<sup>114</sup>

#### 7.3.4. Cultural Objects

An ordinance by the governor of Vancouver Island (1865) against the looting of Indian graves was a rare example of the nineteenth century protection policy. Only the latter part of the twentieth century has brought understanding towards the indigenous cultural property and human remains. The First Nations and Arctic territories have protected the traditional artefacts and archaeological and paleontological sites. In Mackenzie Valley the authorities must notify the First Nations if they suspect a historical or archaeological site, or burial ground to be found. The federal government and western provinces have attempted to correct the past injustices by helping Indigenous groups to set up their own museums and repatriate

---

110 School Regulation, 1989 (British Columbia), s. 14.

111 Education Act, 1995 (NWT), ss. 70-71, 73-74.

112 Education Act, 2002 (Yukon), s. 50.

113 Education Act, 2002 (Nunavut), s. 17; Inuit Language Protection Act (2008), s. 8; Report of Rodolfo Stavenhagen (2004), p. 63; Summary of Aajiiqatigiingniq.

114 Minority Rights Group (1994), pp. 134-135; Varennes (1996), p. 234; CBC/Radio Canada. Aboriginal Peoples TV Network reaches 10 million people. Some 56% of programmes are in English, 16% in French and 28% in different indigenous languages.

sacred ceremonial objects, many of whom were sold to the United States. The negotiations to get them back have met, however, many difficulties.<sup>115</sup>

In 1959 the first Inuit co-operative was introduced to Northern Québec. The co-operatives spread all over the Arctic and began soon to prepare handicrafts and arts. Legislation and agreement give to Inuit the right to use stone material for traditional arts and crafts as the property of the indigenous people. In Québec the indigenous peoples may acquire a special permit from the Department of Natural Resources, but which is subordinated to possible mining developments on land.<sup>116</sup>

Several statutes and agreements are meant to protect Indigenous cultural values. In Nisga'a territory important cultural sites are protected through heritage site designation.<sup>117</sup> The Yukon has established the Yukon Heritage Resources Board, Yukon Historical Resources Application Board and Arts Advisory Council, which provide support for educational programmes, promote the recording and preservation of traditional languages, history, legends and cultural knowledge, and supervise the distinctive needs of First Nations' art. The minister can make an agreement, including a written consent, with a First Nation to designate a historical site. The territory acknowledges historical artistic objects' importance for identity, tourism and economic opportunities. UFA includes departments to manage and administer heritage resources in the settlement lands. The Gwich'in Agreement allows as cultural purpose the nation to trade plant material with other Indigenous persons for personal consumption. The legislator must consult the nation on all restrictions and give them a preferential right of gathering.<sup>118</sup> In the NWT Heritage Parks have been established to preserve and protect significant cultural or historical sites. Respective minister can limit and restrict tourism, which could harm archaeologically, historically, culturally or spiritually significant sites. The NWT has established a committee to promote the preservation and beneficial use of prehistorical and historical places.<sup>119</sup>

The Maa-nulth First Nations has made an agreement on the harvest of monumental cedar and cypress on provincial Crown lands for cultural purposes.<sup>120</sup> In *Kitkatla* (2002) another British Columbia band argued that the provincial law demanded protection of culturally modified trees on Crown land. The band claimed that law on heritage objects had a differential impact on Aboriginal peoples. The Supreme Court rejected the argument. Provincial law's main thrust was to protect heritage objects. It contained special protection for existing Aboriginal rights and set a careful balance between competing resource and conservation

---

115 Maanulth First Nations Final Agreement Act, 2007 (British Columbia), ss. 20.1-2, 20.5; Tsawassen First Nation Final Agreement Act, 2007 (British Columbia), s. 14; NWT Archaeological Sites Regulations, 2001, ss. 3-5; Nunavut Archaeological and Paleontological Sites Regulations, 2001, Mackenzie Valley Land Use Regulations, 1998, s. 12; First Nations Sacred Ceremonial Objects Repatriation Act, 2000 (Alberta), s. 2(1); ss. 3-7; Dickason (1994), pp. 261, 327.

116 Nisga'a Final Agreement Act, 1999, ss. 7, 17; Nunavut Waters and Nunavut Surface Rights Tribunal Act, 2002, s. 150(5); JBNQA (1975), s. 5; Zaslow (1988), pp. 277-279.

117 Nisga'a Final Agreement Act, 1999, s. 17.

118 Arts Act, 2002 (Yukon), Preamble, ss. 3-4; Historical Resources Act, 2002 (Yukon), ss. 4-5, 8, 10, 15, 28, 73. Gwich'in Comprehensive Land Claim Agreement (1991), s. 14; UFA (1993), s. 13.

119 Historical Resources Act, 1988 (NWT), s. 2; Tourism Act, 1988 (NWT), s. 12.

120 Maa-nulth First Nations Final Agreement Act, 2007 (British Columbia), s. 21. See also: Territorial Parks Act, 1988 (NWT), s. 3.

needs. As the legislation fell under the provincial property and civil rights power in the Constitution Act, 1867, it was valid.<sup>121</sup>

### 7.3.5. *Old Faith in Modern Society*

In New France royal power, trade and religion went hand in hand. The Charter of King Louis XIII (1628) supported the policy of Jesuits and other religious orders to convert the Indians, supported by trade and military alliances. The Catholic Church lost its monopoly only when New France became a British Colony in 1763. When the Dominion of Canada was born, to the Constitution Act, 1867 was included special provisions for denominational, Catholic or Protestant minority schools in Ontario and Québec which are still in force in Ontario.<sup>122</sup> An Indian child who is Roman Catholic, may not attend a Protestant school and a Protestant child may not attend Catholic school, except by written direction of the parent. When the majority of band members belong to the same religious denomination, the teacher in the reserve school has to belong to that denomination. A Protestant or Roman Catholic minority may have a separate school or dayschool classrooms on the reserve.<sup>123</sup>

Even today, the relation of state and religion in Canada could be described as legally disestablished religiosity. The Constitution Act, 1982, mentions God as the protector of Canada. Nevertheless, the indigenous peoples' religious expressions were early restricted. The war against the traditional religion and ceremonies began during the period of New France, when especially the Jesuits tried to ban the expressions of traditional religious expressions and habits. They saw the territory as New Jerusalem, where their task was to convert the Indian nations to Christianity. The main means were the missions, schools, reductions and privileged trade relations. Later the British missionaries continued the policy by pressing the federal government to ban the traditional religious ceremonies. In British Columbia were forbidden the *potlatch* (gift giving) feasts connected to gift giving and supernatural dances in 1884. The potlatch was regarded as incompatible with Western economic practices and inimical to the concept of private property. The missionaries tried also to remove totem poles as symbols of an undesirable faith and way of life. Neither did the Crown authorities accept their ceremonial endurance features. The Traditional customs and religious ceremonies were generally forbidden by the Indian Act in 1884. In 1895 followed the thirst dances of Prairie Indians and in 1906 all ritual dances were banned. In 1914 the revision of Indian Act prohibited even the public use of Indian costumes to perform dances without the prior written approval of the department. The rituals continued underground and the missionaries complained about the secret rituals. The RCMP raided the reserves and confiscated ritual

---

121 SCC, *R. v. Kitkatla* (2002), s. 78.

122 Constitution Act (1867), s. 93; Eccles (1990), pp. 43-46; Rouland & Pierré-Caps & Poumarède (1996), p. 368.

123 Indian Act 1985, ss. 118, 120-121; Loi sur l'instruction publique pour les autochtones Cris, Inuit et Naskapis, 2012 (Québec), s. 23.

paraphernalia, which was often further sold. The anti-*potlatch* and anti-dance provisions were repealed only in 1951.<sup>124</sup>

A response to restrictions was the rise of prophetic and healer movements. One of the first was the Iroquois Handsome Lake (Skanyadariyoh). His visions strengthened the attendance of traditional ceremonies, the nuclear family and morality of Iroquois society. His reform movement was soon called as *gai'wiiio*, the New Religion. Also among Ojibwa (*Midewiwin*), Cree (prophets Abishabis and Wasitack) and Sioux (the Ghost Dance) raised similar movements with profound social and millenarian aspects.<sup>125</sup>

Later the Crown has recognised that the right of exercise of ancestral customs and religious rights flows from binding treaty obligations. In 1991 the Province of Ontario recognised that the inherent right to self-government of the First Nations “flows from the Creator and from the First Nations’ original occupation of land”. In British Columbia, a judge found that the Stó:lō Nation had an Aboriginal right to use tobacco for religious purposes. The Nation’s members were excluded from custom duties and taxes in this context.<sup>126</sup> Prince Edward Island allows those under 19 year olds to receive tobacco as a gift related to traditional Aboriginal spiritual or cultural practice.<sup>127</sup> Similarly, New Brunswick allows exceptions to legislation for traditional Aboriginal spiritual or cultural reasons.<sup>128</sup>

But there are also cases when the courts can set limits to cultural and religious practices, when those practices seem to involve an abuse or mistreatment of some members of the community. The BCSC had to resolve this question in a case, where a group of men from the Coast Salish Indian band in British Columbia were accused of having assaulted, battered, kidnapped and imprisoned a member of the community, who was without his own will initiated in a spirit dance ritual. The representatives of the band witnessed that according to custom the initiations can occur on a voluntary or involuntary basis and the violence is symbolic. The court restricted the initiation ritual to a voluntary basis.<sup>129</sup>

The Supreme Court took a different stand in relation to the treaty of 1760, where the British commandant of Québec promised to Huron Indians free exercise of their religion, customs and trade. The court set aside convictions, where the Huron were charged with cutting down trees, camping and making fires in a provincial park in contravention to Québec’s legislation. The Supreme Court held that the Huron were engaged in a traditional ceremony and the rights guaranteed by the treaty could be exercised over the entire territory as long as the carrying on of the customs and rites was not incompatible with the particular use made by the Crown.<sup>130</sup>

---

124 Constitution Act, 1982, Title; Indian Act (1884-1906); Dickason (1994), pp. 286, 315, 327; Öricü (1996), p. 7. “Whereas Canada is founded upon the principles that recognize the supremacy of God...” Cf. Constitution Act, 1982, Title.

125 Dickason (1994), p. 237, 242; Snow (1996), pp. 158-162.

126 Olthuis & Kleer & Townshend (2008), pp. 47, 160.

127 Tobacco Sales and Access Regulation, 1988 (Prince Edward Island), s. 4(6).

128 Smoke-free Places Act, 2011 (New Brunswick), s. 2(2).

129 BCSC, *Thomas v. Norris* (1992). In the United States some Indian tribes could be described as theocracies with an official religion. The other denominations’ freedom to worship is limited and there has been cases related to discrimination. Cf. *Santa Clara Pueblo v. Martinez* (1978).

130 SCC, *R. v. Sioui* (1990).

## 7.4. Conclusions

The notion culture has been approached here broadly, including indigenous identity, names and symbols, language, cultural objects and religion. Understood this way, the different aspects of culture have been important to indigenous survival in settler societies. Although a “pro culture” nation, France has stressed until recently that there is only one French culture and heritage, and the local expressions of people’s life have been just variations of larger pattern. Therefore, the Accord of Nouméa has signified an important reform. It started the construction of new Caledonian identity, including both Kanak and French elements. The legislation supports also actively the preserving of Kanak traditional culture.

In New Zealand and Canada the indigenous cultures were for a long time seen as inferior to dominant western culture and only since the 1970s the legislation and case law have supported their survival. The Supreme Court of Canada has developed its case law to define the historical cultural practices of First Nations (*Van der Peet*) and Métis people (*Powley*) to define the scope of their rights. These definitions have been at the same also formal: they have been criticized to be “frozen rights”, which do not take into consideration the Indigenous peoples’ modern needs.

In all three countries has taken place since the 1980s a recovery of names and symbols. Old, historical names have been returned by legislation and the Indigenous symbols have been raised besides the state’s symbols in New Caledonia, French Polynesia, Nunavut and elsewhere. Only in New Zealand the symbolism has been present more or less all the time, which describes the country’s constitutional background as a union of two founding peoples. After confiscation and injustice, the protection of Indigenous peoples’ cultural objects has been recognised in all three countries’ legislation, first in New Zealand.

Language is one of the most important determinants of Indigenous difference. The Indigenous languages have also suffered of long oppression and are today endangered. France is the only country which has constitutionalised its language policy. French is the only public language. The recognition of Kanak, Tahitian and other “regional languages” has been cultural recognition. The effect of changes in public life and education has been modest, but legislators’ and judges’ attitude is no more negative, and the interpretation on regional languages’ public use has become more tolerant and broad.

New Zealand and Canada used especially school as means to unify the countries’ linguistic map. The use of indigenous languages was even prohibited, like in France, to the latter part of the 20<sup>th</sup> century. In New Zealand the change took place through case law and active lobbying and finally in 1986 the Māori became the second official language. The reform left, however, half-way, and the process is still going on. The education and media have been important fora to promote the use of the language. Similarly, in Canada several tailored modern agreements and territorial legislation have recognised the Indigenous languages an official status. Their education and public use have advanced.

Religion and traditional ceremonies have been problematic to settler societies’ legislators. France – constitutionally secular country – has tried first to limit the churches’ influence but became soon to make co-operation. This is especially true in Wallis and Futuna, where the Catholic Church has been guaranteed by law and agreements recognised status in society and



education. Elsewhere the case law has been flexible when there has been challenge to state's secular identity. This confirms the doctrine of *spécialité législative*.

New Zealand and Canada have been in this question different to France and also different between each other. Similar was the battle against millenarian movements. In both countries the legislation aimed at suppression on traditional form of religiosity. Often there were, however, in the background other motives than the protection of Christian unity. The difference has been the strong influence of religious movements and aspects in New Zealand's daily life: in politics, legal reforms and omnipresence of sacred. Also Canadian case law has in recent decades recognised the importance of Indigenous world view and religion to their culture, but has also set limits to acceptable forms of rituals in modern society.

## 8. General Concluding Remarks

In this comparative research I have approached the unitary state's relation to indigenous people in the macro level through three different countries: France, New Zealand and Canada, which represent a classical unitary state, bicultural nation and multicultural federation, and respectively, civil law, common law and hybrid legal systems. Their common background is in Western European legal and political heritage. They have also interacted in the same geographical theatres, in the Americas and Oceania. The two key notions – unitary state and different Indigenous peoples have raised here three approaches to comparison: This has been a study of change, which means historical understanding of legal plurality's development in society. The presumption of plurality has led to finding out how the plurality appears and works, and what its place has been in the legal and political change.

I have approached the forms of legal pluralism through different sectors of law and dimensions of society, which are based on two central international legal instruments – ILO Convention No. 169 and the UN Declaration on Indigenous peoples - expressing the essential questions for Indigenous peoples: law, justice, administration, self-determination, family, education, media, social affairs, land, resources, environment, culture, identity, language and religion. I have also attempted to indicate that the contextual factors – history, geography, culture, language and religion/morality have importance, when approaching the legal pluralism and legal change including the Indigenous question. It has helped also to understand the complexity of the three legal systems compared.

The direction of legal change *vis-à-vis* the Indigenous question has led from unitary state towards an asymmetric, plural system with differentiated rights, and the existence of a *de facto* legal pluralism and its forms. To pluralism I have included here the legal difference, or Indigenous peoples' right to difference in larger society, but also the existence and survival of indigenous legal expressions, or custom.

There exists an evident tension between the unitary state's ideology and the quest for difference. Although the legal positivism is still the dominant force in law, all three compared societies have moved in a more pluralistic and asymmetric direction. My hypothesis has been the existing legal plurality in these countries. The legal positivism excludes in its pure form the difference and pluralism as “non-law”, when it deals with social and ethical factors. When taking a look at the Indigenous communities this approach is not very useful. I have abandoned here also the traditional functional theory of comparative law. Although this research has a function, to study the challenge of unitary states *vis-à-vis* the indigenous quest for difference, I see too narrow the functional theory's *tertium comparationis*, which stresses in the spirit of the positive law only similarities and excluding the contextual factors outside the scope of research.

Legal pluralism has a long history. Even in Europe it has been a historical fact until the nineteenth century and beyond, and has experienced a new coming with globalisation. Several scholars have proved that law as phenomenon is more rich and plural than the mere

positivist theory might indicate. The legocentric Western law represents also only one corner of the global legal variety. The old, Eurocentric family tree taxonomies have given way to a more dynamic global view, law in move, which is mixed and mixing. The Indigenous understanding of law is very different from Western positive understanding, but still exists more or less within the unitary state.

My approach is macro-level comparison, which takes into consideration contextual factors: history, geography, culture, language and religion. The different sectors of broadly understood elements of law intertwine and form the total image of legal culture. Similarly, I have approached the legal reality with plural hypothesis: the legal pluralism is and has been out there. To understand the present situation it is important to understand the development in the past. There are also different speeds of development – at individual, social and fundamental levels. Also geography, language and moral questions/religion have shaped and influenced the plural societies. That is, the law and society are intertwined. And different legal families do not live in a vacuum: they have influenced each other.

After the downfall of the West Roman Empire, there were forces in feudal Europe which sought unity. The Catholic Church was challenged by ascending royal houses. The sixteenth and seventeenth century theorists prepared the road to centralised nation state and absolutism. The natural state was replaced by the sovereign's power based on social contract. Later this sovereign was replaced by people and parliamentary sovereignty, which paved the way to the breaking of old structures.

To the age of rising nation states was also linked the Age of Discoveries. The explorers met “the Other”: strange, non-Christian cultures. The Catholic theology defined the indigenous people as human beings, who are capable of making agreements. The European ideology had during the early Modern Age two main schools: the indigenous people were either ideal children of nature as noble savages, or ignorant children. The level of development in societies (in European eyes) defined the nature of early encounter. Either they were treated as allies or the virgin soil was *terra nullius*, whose population was ignored. In the case of New Caledonia and French Guyana the latter policy was evident.

The colonial states' self-understanding has influenced strongly the encounter. France has strong tradition of revolutionary, even missionary, idealism. In the background were the break with the royal, Catholic and pluralist past. The major touchstones of this policy have been equality, language and secularism. The radical disengagement with the past was, however, only partial. The old elements did not disappear and there had to be made compromises. In fact, two Frances have coexisted throughout history: the republican, secular, centralised and French-language France, and the royalist, religious, decentralised and plurilingual France. This dichotomy has also influenced the overseas. Further, the unitary France has always had due to this dichotomy seeds of federalism. At the same time, the contradiction is visible in the decentralisation process: there is administrative and cultural pluralism, but political and linguistic unity. The overseas – as later acquired and geographically separated, are, however, another France in the legal, cultural and administrative meaning. They are treated differently, but ought to join the common ideals of the republic, the glue of the unitary state, as the Constitution refers.

New Zealand is based on the Treaty of Waitangi, which created a new nation, including two elements: Pākehā and Māori. The British authorities hurried in competition with the

French and the Americans to find a solution which would give them a justification to acquire the land for the Crown. The Māori were a far too strong element to be treated as *tabula rasa*. At the same time the process united the indigenous tribes, which were far from united before. The treaty was largely ignored for over 100 years by the settler society, but returned in the early 1970s to the forum as the nation's founding document. It is still today without constitutional status and has legal standing only through the legislation which expressly mentions it. Nevertheless, it has strong symbolic and moral value, which has given justification also to Māori's demands and is still an ongoing remedial process.

The pan-Canadian identity has been challenged and confronted from various directions. The federation was born as a British counter-force to the United States, when the Loyalist colonies (including the territory of modern Québec) joined together. The difference to France or New Zealand is that Canada has neither been a classical unitary state or a nation originally based on indigenous heritage. The federation of Canada was established as a union of two dominant elements: the Anglo- and French Canadian societies. The independent colonies guaranteed that the federation was based on division of power between the central power and the provinces. Since the 1960s the disintegrative elements began to gain ground. This ethnically based movement has been the most influential in Francophone Québec. Paradoxically, it forms the nuclear area of New France, the settler society in Canada. Also the western provinces and the Indigenous peoples have activated to demand a more asymmetric model, but the demands have seldom reached the level of Québec. The solution in Canada has been a gradual change to the multicultural state: first at the ideological, and since 1982 also in constitutional level. Indigenous peoples' road to constitutionally recognised groups was long and complex. The repatriation of the Constitution rendered the First Nations from wards to more equal citizens. The most difficult the process of recognition has been for the Métis, whose fate was to fall "in-between" the white and indigenous worlds. After the renewed settlement process and two failed constitutional reforms the indigenous peoples' place in Canadian society is still under formation.

In general, the legal development and the presence of pluralism in these three countries in relation to their indigenous peoples could be described with several different denominators. I begin the analysis with the contextual factors. The historical change is essential in understanding the European-indigenous relations. Both British and French colonial powers went through five, partly overlapping major phases: the more or less equal encounter, assimilation/segregation, integration, reconstruction and the urban phase.

The levels of legal change are:

level	France	Canada	New Zealand
encounter	co-operation, agreements (1840-80)	alliance, agreements (1610-1850)	co-operation, agreement (1840-60)
assimilation/ segregation	reserves, assimilation, <i>terra nullius</i> , toleration (1850-1946)	reserves, segregation, neglect, assimilation (1850-1951)	extinguishment, assimilation (1860-1920)
integration	social and land programmes, centralisation (1946-1982)	reform of Indian Act, Alberta Métis, Inuit, White Paper (1938-73)	social programmes, Māori structures, Hunn Report (1920-1975)
reconstruction	Accord of Nouméa, decentralisation (1982-)	Constitution Act, 1982, constitutional conferences, Nunavut, modern agreements, case law (1973-)	associated states, Waitangi Tribunal, MLC, MAC, devolution, settlements, case law (1965-)
urban	growing challenge, no legal recognition (1946-)	some recognised structures, search for non-territorial forms (1950-)	urban structures, some recognition (1945-)

In the first phase, encounter, New Zealand's Māori, the Kingdoms of Tahiti, Wallis and Futuna, the Maritime and East Canadian Indian tribes and the Métis were treated respectfully. In Tahiti there existed a parallel legislation, in New Zealand the legislation included a theoretical possibility of parallel customary law system and in Wallis and Futuna it existed practically. The engagement was much shorter in New Caledonia and in Western Canada, where the solemn promises were soon abandoned. In French Guiana and the Canadian Arctic this phase was passed altogether. Generally, this early period was possible because of the balance of power: the settler state was still too weak and had to make concessions. The situation, however, changed as quickly as the settlers became the dominant element in society. The most brutal and direct system was in the French colonies of New Caledonia and French Guiana, where the legislation and regulations were used to subjugate the indigenous population to forced labour and dislocation or were completely ignored. The longest the transfer took place in French Polynesia, where the Polynesian population had a well-developed legal system and ethnic dominance. Only Wallis and Futuna has been able to preserve as dominant the Indigenous customary law until today due to the territory's geographical isolation and the French state's low material or strategic motivation to change the situation.

The second phase was that of assimilation/segregation. The end result in all studied countries was similar. Even the more developed legal systems, like among the Māori, Iroquois and Tahitians, were subjugated to the European legal system, which was not, however, able to destroy completely the social glue of customary societies. Of course, they were invited to enfranchise (Canadian Indians), to become true Frenchmen or New Zealanders, but all were not treated in law equally. Those who had shown strength (the Māori, Indian tribes, Polynesians) were given legal concessions, which meant for First Nations and Kanak also isolation while the South American Indians were forgotten and abandoned. A sad story is also

the fate of the Métis in Canada. They had a strong political and legal structure, but as half-breeds they were discriminated against and doomed to poverty. They were in “no man’s land”: neither really white, nor indigenous. The case law both in New Zealand (*Wi Parata*) and Canada (*St. Catherine’s Milling*) led to lengthy non-recognition policy of Indigenous title. The French non-recognition was more based on constitutional ideology of one and indivisible republic.

The third phase, integration, began earlier in New Zealand due to educated Māori’s growing political influence and post-World War I social consciousness. Similar signs were also in French colonies, but World War II became the true monitor of change. The establishment of the United Nations, the decolonisation process and movement to individual rights influenced all three countries. In France the colonies became DOM/TOM, and the Constitution of 1946 had a strong social flavour. In New Zealand the Māori legislation was reformed to integrate them more properly to society. In Canada the Indian Act’s reform in 1951 signified an end to the weakening of First Nations’ rights. During the integration period the difference and pluralism was not, however, of high prestige. Like during the assimilation period, the indigenous people were to be made part of settler society, although in more human means. The continuous centralisation and immigration in France, the Hunn and Hawthorne Reports and the White Paper in New Zealand and Canada were expressions of Western liberal society’s faith in individual rights and belief in disappearance of differential group rights and ethnic differences.

In the 1970s the global thinking was warming towards a more plural society. New Zealand had offered since the early 1960s options of full sovereignty or different levels of autonomy to its overseas territories. The Cook Islands and Niue chose association, later gradually followed by the Tokelau. The Māori, as integral part of New Zealand, had to wait ten more years. The strong Māori lobbying and political alliance led to the establishment of the Waitangi Tribunal. The case law was leading the way to legal reforms, which took place especially between 1987-1993. Despite these reforms the Treaty of Waitangi did not obtain constitutional recognition. The Māori took, however, advantage of the country’s fundamental devolution process, which together with treaty settlements increased *iwi*’s decision power. Similarly in Canada the case law opened the process. The repatriation of the Constitution, the tailored new agreements and court cases, which recognised the Aboriginal title and the Crown’s duties towards Indigenous peoples, signified a new page in the Indigenous question. Both in New Zealand and Canada the case law in the 1980s ended the long period of non-recognition of indigenous rights. France resisted the change longest and restricted the overseas territories’ self-government. In France the political change included a promise of decentralisation, which first, however, promised more than realised. Only after violent confrontations in New Caledonia was France politically forced to recognise the indigenous difference – tailored – in New Caledonia and give minor concessions to other territorial collectivities. In all three countries the land question has been central to the process of reconstruction and recovery.

The early enthusiasm promised even radical changes to Indigenous peoples’ status, but since the early 1990s *Realpolitik* and the countereffect to protect the settler societies’ unity began to influence the legal processes and case law. In Canada, two constitutional drafts and in New Zealand two attempts to reform the Māori self-government have failed and the workload of settlement processes has been underestimated. There are also different views on

how the process should be continued. There have been also signs of hardened government policy towards Indigenous peoples in several common law countries. A good example is the Foreshore and Seabed Act, which received plenty of international attention. Also the case law has become more conservative in New Zealand and Canada. In France, although the Nouméa process goes on, the most active period of reforms is over. On the other hand, in all three countries the legal reforms take place at a more local level than before.

A Fifth phase of legal change could be described as urban pluralism. It is still in early formative stage. On the other hand, it shows legal systems' dynamic side: law and structures are still on the move. This non-territorial, or personal model, will probably be the next great change in indigenous law. The future evolution of indigenous urban communities as political and legal entities is an important question. The traditional structures are challenged – and they often resist the change. There are some signs of the emergence of extra-territorial indigenous structures, while the legislation has supported the traditional territorial entities. The most favoured structures by the states have been the municipal or institutional (personal structures) with limited decision-making powers. Some units, like the Nisga'a Lisims or Nunatsiavut government, represent more extended structures, combining several elements.

Following Braudel's classification of historical change, the individual time has been turbulent especially in New Zealand. The legislation has been seemingly sensitive to political changes. The legislator has repealed on almost an annual basis land legislation and even central projects of self-government. The Māori have been on the surface level change an active pressure group. In rejection of the Iwi Rūnanga Act, the Treaty of Waitangi's inclusion in the Bill of Rights and in the Waka Umanga process the Māori groups themselves have influenced strongly the political decision-makers. A similar surface storm was evident in New Caledonia in the 1980s, when there were even three territorial laws in the same year. The reason was again political and ethnic: the political interest groups and ideologies were not able to speak with each other.

The social time is slower, more unconscious change. The deterioration of territorial rights during the Fifth Republic in France as an expression of a strong Gaullist state and as a counter-measure to the threat of decolonisation, the deterioration of Indian status in 1880-1950 in Canada as part of assimilation/integration policy, or the long influence of Labour/Rātana cooperation in the politics of New Zealand are examples of this kind of legal development, which is partly unknown to the wider public. And finally, geographical time is related to fundamental changes. They need time and signify an essential change in state ideology. This kind of change has been the recognition of pluralism and difference in all three states. It took place in Canada during the early 1970s, in New Zealand in the mid-1980s and in France in the latter part of the 1980s. In all countries this legal change, or recognition of legal fact, has also caused countereffects. The unitary state aims to protect its unity by restricting the acceleration of plurality and continuing demands. While the globalisation has increased the variations of already existing legal pluralism, the politicians and judges of systems, leaning on legal positivism, fear the consequences of an "all doors open" policy. Instead, they have built on settler society's continuity, where the concessions to Indigenous peoples are based on careful historical and tailored considerations.

The legal space is also influenced by geography. Some indigenous peoples have had the "blessings of isolation". This is especially true in Nunavut and Wallis and Futuna. Nunavut

was first touched by the Canadian law and order in the 1920s. Only in the 1950s, due to geopolitical, strategic and resource reasons did the Canadian government begin to interfere with the traditional societies. Their life and legislation changed rapidly in the 1960s, but then the ideology was also changing. They had passed the period of assimilation, and almost the integration, too. In Wallis and Futuna, the isolation worked somehow differently. The encounter was early, but the geographical isolation and the poverty of resources did not invite the Frenchmen to active intervention. The French state saw the loose relation to traditional society as the best solution. This peaceful coexistence has continued until these days. A third example of a geographical factor is French Guyana where inaccessibility and lack of material interest left the legislator inactive. There was no real need to legislate for people who did not exist officially. The social consciousness rose only later.

It is difficult to give an exhaustive definition of culture (cf. s. 1.2.4.), but it is well present in the legislation. France has used culture to promote the French civilisation. Therefore, Indigenous people have been part of the French heritage, whether they knew that or not. The Accord of Nouméa included a radical change to this ideology. The Kanak culture was recognised to have independent worth of its own. It was a break with official republican ideology. In New Zealand the Māori culture has been longest recognised in legislation by the historical artefacts and their protection. The forms of culture have been included to legislation only in the 1980s, thanks to the Waitangi Tribunal's case law. In Canada the relation to Indigenous culture was at the turn of the twentieth century negative: many traditional practices were prohibited. Only since the 1980s have the indigenous cultures been actively promoted in legislation.

The monolingual paradigm has been an important tool in the unitary states' legislation. The official languages have been used as a tool to advance the assimilation and integration. In France the development has been gradual: the French language was promoted to constitutional status only in 1992. The use of indigenous languages is restricted to private use. The case law has, however, interpreted broadly the public use of languages when they do not threaten the use of French. In New Zealand the Māori was for a long time neglected, but especially the Waitangi Tribunal's case law has led to the officialisation of Māori. It is not, however, equal in public life with English and seeks its place in society. In Canada the indigenous languages have gained ground as territorial or local public languages since the 1980s. Especially Māori, but also Inuktitut have increasing significance as legal languages.

Religion and morality have influenced the legislation and case law in all three countries. France has a constitutional principle of secularism, but even the metropolitan France has geographical exceptions to the rule. French Guyana is still influenced by the Concordat of Napoléon and in New Caledonia and French Polynesia the government has guaranteed the religious freedom. Wallis and Futuna forms again a major exception: the legislation recognises indirectly the special status of the Catholic Church, and the primary education has been completely granted to the Catholic Mission. In New Zealand the educated, Westernised Māori made at the turn of the twentieth century an initiative to suppress the representatives of traditional Māori religion and healing, who were influential in Māori communities. The legislation had little real significance. The legislation and case law have recognised since the 1980s again the Māori spiritual values. In Canada the Indigenous traditional religious expressions were also first suppressed in legislation by the initiative of missionaries. Later



the spiritual values have returned back to First Nations' legislation as an expression of their identity.

What is the role of legal pluralism in these societies? The legal pluralism has a different scope in France. It is visible especially in the family and land questions, language and other legislation related to culture, but almost non-existent in social affairs. In France the customary private law is recognised in New Caledonia and Wallis and Futuna. This customary status is applicable in all French territory. It includes customary land, customary marriage and divorce and customary succession. In Wallis and Futuna the customary law has also an unrecognised influence in public life. Some customary rules exist, like adoption in French Polynesia, exist, though are only slightly recognised in case law. On the other hand, the national legislator does not recognise much difference in education, media or health and social affairs.

In New Zealand and Canada the emphasis is more on social questions. New Zealand is much more restrictive to exceptions in family law, but recognises the Māori difference in education, media, health and social affairs. Canada has since the 1960s given limited recognition to customary adoption and succession, and takes into consideration the indigenous peoples in education, health and social affairs, but leaves the indigenous media to the private sphere. In New Zealand and its associated territories the customary law is today limited to land property and succession, also indirectly to adoption. In Canada the customary law has importance in local self-governing communities. The scope of customary law has, however, recently increased. Since 1920 in France, the 1980s in New Zealand and 1997 in Canada, the customary law has been applicable in the courts. New Caledonia has customary assistants in courts. Canada has since the 1990s indigenous courts for communities' internal questions, which are based on the Supreme Court's *Gladue* decision. All three countries use alternative dispute resolution. In France it is indirectly referred to in the Accord of Nouméa.

The customary land is recognised and promoted in New Caledonia and exists *de facto* in Wallis and Futuna. Also New Zealand and Canada recognise the customary land and Native/Aboriginal title. The customary/freehold legislation is most developed in New Zealand, where the question has been long-established, while the harvest question and the theoretical status of Indigenous land property has been a central question in Canadian case law. In all three countries the Indigenous resource management and conservation is regulated/statute-based.

The legal transfers have long roots. The Human Rights legislation in France and Canada has American (also First Nations) influences, and Canada has further influenced New Zealand. New Zealand has influenced Canada in the land purchase process, dispute resolution and settlement policy. France has followed in Tahiti and New Caledonia the Australian and North American examples in land owning, while the reserve system in Canada is based on French religious villages, which themselves have copied the Jesuits' religious model villages of South America. And globalisation is influencing to an increasing extent the legislation in all three countries. The domestic law is therefore possible to question as an intrinsic value.

Finally, the unitary state has moved in all countries in an asymmetric direction. There is no longer a classical unitary state – if there has ever been. There have been always legal exceptions and differences, based on historical, geographical, cultural, linguistic or religious motivation. As much they have been expressions of civilian and military power politics and material benefits. Nevertheless, the last 30 years have signified a deepening of this process.

It receives gradually new ingredients, and the process is far from over. In this pattern the public governments form their own category: Nunavut, French Polynesia, New Caledonia, Wallis and Futuna, Cook Islands and Niue all represent structures, where the indigenous peoples are dominant or an important element in decision-making. Elsewhere the legislator has preferred the municipal or function-based models with tailored features, which are easier to integrate into the national administrative system.

While most of Indigenous self-governments are demographically weak and economically dependent, it is probable that they will remain part of their framework states. Therefore, a possible way out from the present dead-lock is a more flexible, asymmetric unitary state. In Canada this would mean the realisation of the RCAP's and two constitutional accords basic ideas: the recognition of distinct societies inside the federation and sovereign dependent nations in the federation. Canada has moved towards legal pluralism which has a common legal system, but which leaves space to the oldest law in the country: the customary law in local and territorial level. In New Zealand tendencies to develop Māori self-government can be found, which would better take into consideration their traditional structures and offer better participation in legislation, including the customary values. The unitary France already has experience of semifederal structures during the Fourth Republic. The regional co-operation has increased e.g. in the Pacific and Caribbean regions. While tailoring the legislation to meet the local need also France has moved towards a more asymmetric model. Concluding this vision of "plurality in unity" both the states and their Indigenous people have advanced – through hardships - toward common solutions in asymmetric unity, or creative diversity.

# References

## Legislation and Regulations

### *a) France*

#### *i) Metropolitan France*

Arrêté no.1288 du 18 octobre 1947  
Arrêté no. 61/036 CG du 31 janvier 1961  
Arrêté no. 2063 du 20 septembre 1978  
Arrêté du 7 novembre 1994  
Arrêté du 13 janvier 2004  
Charte de environnement (2005)  
Code civil (1804)  
Code de communes de la Nouvelle-Calédonie (1999)  
Code de procédure civile (2007)  
Code de procédure pénale (1958)  
Code du domaine de l'Etat (1990)  
Code général des collectivités territoriales (1996)  
Constitution de 1791  
Constitution de l'an I (1793)  
Constitution de l'an VIII (1799)  
Constitution de 1814  
Constitution de 1946  
Constitution de 1958  
Décret du 8 mars 1790  
Décret du 10 mars 1790  
Décret du 19 novembre 1792  
Décret du 28 décembre 1885  
Décret du 6 juin 1930  
Décret du 8 août 1933  
Décret du 16 janvier 1939  
Décret du 16 décembre 1939  
Décret no. 46-80 du 16 janvier 1946  
Décret no. 46-2379 du 25 octobre 1946  
Décret du 27 septembre 1948  
Décret no. 54-959 du 14 septembre 1954  
Décret no. du 21 juillet 1957  
Décret no. 57-812 du 22 juillet 1957  
Décret du 10 janvier 1960

Décret du 19 février 1962  
Décret no. 64-250 du 14 mars 1964  
Décret du 17 mars 1969  
Décret no. 72-408 du 17 mai 1972  
Décret no. 76-1301 du 28 décembre 1976  
Décret du 21 mai 1980  
Décret no. 81-553 du 12 mai 1981  
Décret du 26 décembre 1983  
Décret du 27 décembre 1983  
Décret no. 87-267 du 14 avril 1987  
Décret no. 92-1162 du 20 octobre 1992  
Décret no. 2011-1588 du 17 novembre 2011  
Délibération du 28 octobre 1970  
Loi-cadre du 23 juin 1956  
Loi du 26 février – 4 mars 1790  
Loi du 16-24 août 1790  
Loi du 27 novembre 1790  
Loi du 30 mai 1854  
Loi du 30 décembre 1880  
Loi no. 11696 du 8 mars 1882  
Loi du 10 mars 1891  
Loi du 1 juillet 1901  
Loi du 1 mai 1902  
Loi du 9 décembre 1905  
Loi du 19 avril 1941  
Loi du 7 mai 1946  
Loi no. 51-46 du 11 janvier 1951  
Loi no. 51-1098 du 14 septembre 1951  
Loi du 26 juillet 1957  
Loi no. 59-1557 du 31 décembre 1959  
Loi no. 61-814 du 29 juillet 1961  
Loi no. 64-707 du 10 juillet 1964  
Loi no. 69-5 du 3 janvier 1969  
Loi no. 69-1263 du 31 décembre 1969  
Loi no. 71-1061 du 29 décembre 1971  
Loi no. 72-619 du 5 juillet 1972  
Loi no. 75-620 du 11 juillet 1975  
Loi no. 75-1349 du 31 décembre 1975  
Loi no. 76-655 du 16 juillet 1976  
Loi no. 76-1286 du 31 décembre 1976  
Loi no. 77-44 du 8 juillet 1977  
Loi no. 77-772 du 12 juillet 1977  
Loi no. 78-788 du 28 juillet 1978  
Loi no. 82-213 du 2 mars 1982

Loi no. 82-652 du 29 juillet 1982  
Loi no. 82-1152 du 30 décembre 1982  
Loi no. 82-1169 du 31 décembre 1982  
Loi no. 84-747 du 2 août 1984  
Loi no. 84-820 du 6 septembre 1984  
Loi no. 84-821 du 6 septembre 1984  
Loi no. 85-97 du 25 janvier 1985  
Loi no. 85-872 du 23 août 1985  
Loi no. 86-1067 du 30 septembre 1986  
Loi référendaire no. 88-1028 du 9 novembre 1988  
Loi no. 89-378 du 13 juin 1989  
Loi no. 90-612 du 12 juillet 1990  
Loi no. 90-613 du 12 juillet 1990  
Loi no. 90-1247 du 29 décembre 1990  
Loi no. 92-125 du 6 février 1992  
Loi no. 94-99 du 5 février 1994  
Loi no. 94-665 du 4 août 1994  
Loi no. 95-173 du 20 février 1995  
Loi no. 95-1311 du 21 décembre 1995  
Loi no. 96-312 du 12 avril 1996  
Loi no. 2000-719 du 1er août 2000  
Loi no. 2000-1207 du 13 décembre 2000  
Loi no. 2000-1208 du 13 décembre 2000  
Loi no. 2007-1774 du 17 décembre 2007  
Loi no. 2010-1192 du 11 octobre 2010  
Loi constitutionnelle no. 98-610 du 20 juillet 1998  
Loi constitutionnelle no. 2003-276 du 28 mars 2003  
Loi constitutionnelle no. 2008-724 du 23 juillet 2008  
Loi organique no. 95-173 du 20 février 1995  
Loi organique no. 96-312 du 12 avril 1996  
Loi organique no. 99-209 du 19 mars 1999  
Loi organique no. 2004-192 du 27 février 2004  
Loi organique no. 2011-918 du 1 août 2011  
Loi référendaire no. 88-1028 du 9 novembre 1988  
Ordonnance du 10 janvier 1944  
Ordonnance du 24 mars 1945  
Ordonnance du 22 août 1945  
Ordonnance no. 58-1337 du 23 décembre 1958  
Ordonnance no. 82-877 du 15 octobre 1982  
Ordonnance no. 82-880 du 15 octobre 1982  
Ordonnance no. 2000-549 du 15 juin 2000  
Ordonnance no. 2007-1434 du 5 octobre 2007  
Sénatus-consulte du 3 mai 1854  
Sénatus-consulte du 4 juillet 1866

*ii) French Guiana*

Arrêté du 14 septembre 1970

*iii) French Polynesia / Établissement Français d'Océanie / Tahiti*

Arrêté no. 13 du 22 janvier 1868  
Arrêté no. 1266 CM du 20 octobre 1986  
Circulaire no. 67 du 27 septembre 1977  
Décision no. 2036 VP du 28 novembre 1980  
Décision no. 21 SE du 20 octobre 1982  
Déclaration du 20 janvier 1855  
Déclaration du 20 janvier 1862  
Délibération du 23 mai 1985  
Délibération no. 93-60 AT du 10 juin 1993  
Délibération no. 2007-45 APF du 25 septembre 2007  
Délibération no. 2009-55 APF du 11 août 2009  
Pomare Code (1819)

*iv) New Caledonia*

Arrêté du 27 mai 1884  
Arrêté no. 11 du 20 juin 1962  
Arrêté du 8 septembre 1980  
Décision du 9 août 1898  
Décision no. 93-329 du 13 janvier 1994  
Délibération no. 424 du 3 avril 1967  
Loi du pays du 9 septembre 2010

*v) Wallis and Futuna*

Arrêté du 2 décembre 1968

***b) New Zealand***

***i) General Assembly***

Acts Interpretation Act 1924  
Adoption Act 1955  
Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008  
Arts Council of New Zealand Toi Aotearoa Act 1994  
Bay of Plenty Regional Council (Maori Constituency Empowering) Act 2001  
Births, Deaths, Marriages, and Relationships Registration Act 1995  
Broadcasting Act 1989  
Broadcasting Amendment Act 2000  
Broadcasting Amendment Act 2008  
Building Act 2004  
Central North Island Forests Land Collective Settlement Act 2008  
Chatham Islands Council Act 1995  
Children and Young Persons and Their Families Act 1989  
Citizenship Act 1977  
Climate Change Responsibility Act, 1982  
Conservation Law Reference Act 1990  
Constitution Act 1986  
Constitution of Niue 1974  
Cook Islands and Other Islands Governance Act 1901  
Cook Islands Act 1915  
Cook Islands Amendment Act 1946  
Cook Islands Constitution Act 1964  
Community Development Act  
Conservation Act 1987  
Constitution of Niue 1974  
Constitution of the Cook Islands 1965  
Criminal Code Act 1893  
Criminal Justice Act 1985  
Crown Forests Assets Act 1989  
Crown Minerals Act 1991  
Deeds Registration Act 1908  
Education Act 1989  
Education Amendment Act 1990  
Education Amendment Act 2013  
Education (Te Aho Matua) Amendment Act 1999  
Electoral Act 1893  
Environment Act 1986  
Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012  
Family Protection Act 1955  
Fiordland (Te Moana o Atawhenua) Marine Management Act 2005

Fisheries Act 1877  
Fisheries Act 1908  
Fisheries Act 1996  
Foreshore and Seabed Act 2004  
Forest Act 1949  
Guardianship Act 1968  
Half-Cast Disability Removal Act 1860  
Harbours Act 1964  
Hazardous Substances and New Organisms Act 1996  
Health Research Council Act 1990  
Historic Places Act 1993  
Immigration Act 1868  
Indicent Offences Act 1894  
Joint Family Houses Act 1964  
Lake Wanda Preservation Act 1973  
Land Titles Protection Act 1902  
Letters Patent Constituting the Office of Governor-General of New Zealand 1983  
Loan Act 1863  
Local Electoral Act 2001  
Local Government Act 1977  
Local Government Act 2002  
Local Government Amendment Act (No 2) 1986  
Local Government (Ackland Council) Act 2009  
Maori Affairs Act 1953  
Maori Affairs Amendment Act 1967  
Maori Affairs Amendment Act 1974  
Maori Affairs Restructuring Act 1989  
Maori Antiquities Act 1901  
Maori Commercial Aquaculture Settlement Act 2004  
Maori Community Development Act 1962  
Maori Councils Act 1900  
Maori Fisheries Act 2004  
Maori Housing Act 1935  
Maori Housing Amendment Act 1938  
Maori Lands Administration Act 1900  
Maori Land Settlement Act 1905  
Maori Language Act 1987  
Maori Purposes Fund Act 1934  
Maori Purposes Act 1951  
Maori Representation Act 1867  
Maori Reserved Land Act 1955  
Maori Social and Economic Advancement Act 1945  
Maori Television Service (Te Aratuku Whakaata Irirangi Maori) Act 2003  
Maori Trust Boards Act 1955



Maori Trust Boards Amendment Act 1988  
Maori Trustee Act 1955  
Maori Welfare Act 1962  
Marine and Coastal Area (Takutai Moana) Act 2011  
Marriage Act 1880  
Matrimonial Property Act 1976  
Mauao Historic Reserve Vesting Act 2008  
Ministry of Maori Development Act 1991  
Mount Egmont Vesting Act 1978  
Native Circuit Court Act 1858  
Native Committees Act 1883  
Native Council Act 1860  
Native Council Act 1863  
Native Districts Regulation Act 1858  
Native Equitable Orders Act 1886  
Native Exemption Ordinance 1844  
Native Land Act 1873  
Native Land Act 1894  
Native Land Act 1909  
Native Land Amendment Act 1913  
Native Land Court Act 1880  
Native Land Court Act 1886  
Native Land Court Act 1894  
Native Land Purchases Act 1892  
Native Lands Act 1865  
Native Lands Act 1867  
Native Lands Act Amendment Act 1868  
Native Lands Administration Act 1886  
Native Lands Frauds Prevention Act 1870  
Native Land (Validation of Titles) Act 1893  
Native Purposes Act 1931  
Native Purposes Act 1943  
Native Reserves Act 1856  
Native Reserves Act 1882  
Native Reserves Amendment Act 1862  
Native Schools Act 1867  
Native Territorial Rights Act 1858  
Native Trustee Act 1920  
New Zealand Bill of Rights Act 1990  
New Zealand Geographical Board (Nga Pou Taumaha o Aotearoa) Act 2008  
New Zealand Maori Arts and Craft Institute Act 1963  
New Zealand Public Health and Disability Act 2000  
Ngaa Rauru Kaitahi Claims Settlement Act 2005  
Ngāi Tahu Claims Settlement Act 1998

Ngai Tahu (Pounamu Vesting) Act 1997  
Ngati Apa (North Island) Claims Settlement Act 2010  
Ngati Awa Claims Settlement Act 2005  
Ngati Matunga Claims Settlement Act 2006  
Ngati Ruanui Claims Settlement Act 2003  
Ngati Tama Claims Settlement Act 2003  
Ngati Tūrangitukua Claims Settlement Act 1999  
Ngati Tuwharetoa, Rauhawa and Te Arawa River Iwi Waikato River Act 2010  
Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005  
Niue Act 1966  
Niue Amendment Act (No. 2) 1968  
Oaths and Declarations Act 1957  
Orakei Act 1991  
Pouakani Claims Settlement Act 2000  
Protected Objects Act 1975  
Public Works Act 1873  
Radiocommunications Act 1989  
Resident Magistrates Courts Ordinance 1846  
Resource Management Act 1991  
Standing Orders 151 (104), 1985  
State Owned Enterprises Act 1986  
State Owned Enterprises Act 2012  
Suppression of Rebellion Act 1863  
Supreme Court Act 2003  
Tax Administration Act 1994  
Taxation (Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003  
Te Arawa Lakes Settlement Act 2006  
Te Roroa Claims Settlement Act 2008  
Te Runanga o Ngai Tahu Act 1996  
Te Runanga o Ngati Awa Act 2005  
Te Runanga o Ngati Porou Act 1987  
Te Runanga o Ngati Whatua Act 1988  
Te Ture Whenua Maori Act 1993  
Te Uri o Hau Claims Settlement Act 2002  
Tohunga Suppression Act 1907  
Tokelau Act 1948  
Tokelau Amendment Act 1967  
Tokelau Amendment Act 1969  
Tokelau Amendment Act 1970  
Tokelau Amendment Act 1986  
Tokelau Amendment Act 1996  
Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977  
Tokelau Village Incorporation Regulation 1986

Treaty of Waitangi Act 1975  
Treaty of Waitangi Act 1988  
Treaty of Waitangi Amendment Act 1985  
Treaty of Waitangi (Fisheries Claims) Settlement Act 1992  
Treaty of Waitangi (State-Owned Enterprises) Act 1988  
Tutae-Ke-Wetoweto Forest Act 2001  
Urewa District Native Reserve Act 1896  
Waikato Raupatu Claims Settlement Act 1995  
Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010  
Waitangi Day Act 1976  
West Coast Settlement Reserves Act 1892  
Westland and Nelson Native Reserves Act 1887

*ii) The Cook Islands*

Cook Islands Development Bank Amendment Act 1980  
House of Arikis Act 1966  
Land (Facilitation of Dealings) Act 1970  
Legislative Assembly Powers and Privileges Amendment Act 1979  
New Zealand Laws Act 1979  
Outer Islands Local Government Act 1987  
Rarotonga Local Government Act 1997  
Rarotonga Local Government (Repeal) Act 2007

*iii) Niue*

Land Ordinance 1969

*c) Canada*

*i) Federal Legislation*

Aboriginal Communal Fishing Licences Regulations, 2009  
Act Respecting Indians, 1906  
Act to Amend and Consolidate the Laws Respecting Indians, 1880  
Act to Amend the Canadian Elections Act, 1960  
Agricultural Land Committee Act, 2002  
Alberta Fishery Regulations, 1996  
Arctic Waters Pollution Prevention Act, 1985  
British Columbia Terms of Union, 1871  
British Columbia Indian Reserves Mineral Resources Act, 1943  
Canadian Bill of Rights Act, 1960

Canadian Environmental Assessment Act  
Canadian Environmental Protection Act 1999  
Canadian Multiculturalism Act, 1985  
Clarity Act, 2000  
Constitution Act, 1867  
Constitution Act, 1930  
Constitution Act, 1982  
Cree-Naskapi (of Quebec) Act, 1984  
Criminal Code, 1985  
Dominion Lands Act, 1906  
Firearms Act, 1995  
First Nations Commercial and Industrial Development Act, 2005  
First Nations Fiscal and Statistical Management Act, 2005  
First Nations Goods and Services Tax Act, 2003  
First Nations Jurisdiction on Education in British Columbia Act, 2006  
First Nations Land Management Act, 1999  
First Nations Oil and Gas and Moneys Management Act, 2012  
First Nations Oil and Gas Environmental Assessment Regulations, 2007  
Forest Resources Act, 2008  
Franchise Act, 1885  
Gradual Enfranchisement Act, 1869  
Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act, 1986  
Haida Gwaii Reconciliation Act, 2010  
Indian Act, 1876  
Indian Act, 1985  
Indian Advancement Act, 1884  
Indian Band Council Procedure Regulations, 2006  
Indian Mining Regulations  
Indian Oil and Gas Regulations, 1995  
Indian Reserve Waste Disposal Regulations  
Indian Self-Government Enabling Act, 1996  
Indian Timber Regulations, 2002  
Kanesatake Interim Land Base Governance Act, 2001  
Labrador Inuit Land Claims Agreement Act, 2005  
Mackenzie Valley Land Use Regulations, 1998  
Mackenzie Valley Resource Management Act, 1998  
Manitoba Act, 1870  
Marine Mammal Regulations, 1997  
Migratory Birds Regulations, ?  
Mi'kmaq Education Act, 1998  
Newfoundland and Labrador Fishery Regulations, 2010  
Northwest Territories Act, 1985  
Northwest Territories Archaeological Sites Regulations, 2001

Northwest Territories Fishery Regulations, 1996  
Northwest Territories Reindeer Regulations, 2006  
Northwest Territories Waters Act, 1992  
North Pipeline Socio-Economic and Environmental Terms and Conditions for the Province of Saskatchewan, 1981  
Nuclear Energy Act, 1985  
Nunavik Inuit Land Claims Agreement Act, 2008  
Nunavut Act, 1993  
Nunavut Archaeological and Paleontological Sites Regulations, 2001  
Nunavut Land Claims Agreement Act, 1993  
Nunavut Waters and Nunavut Surface Rights Tribunal Act, 2002  
Official Languages Act, 1985  
Order Giving Notice to Decisions not to Amend with Species to the List of Endangered Species, 2006  
Order in Council, 28 December 1895  
Saskatchewan Fishing Regulations, 1995  
Sechelt Indian Band Self-Government Act, 1986  
Specific Claims Tribunal Act, 2008  
St. Peters' Reserve Act, 1916  
Tax Administration and Miscellaneous Taxes Act, 2012  
Territorial Lands Act, 1985  
Treaty First Nations Taxation Act, 2007  
Unorganized Territories' Game Preservation Act, 1894  
Veteran's Land Act, 1970  
Yukon Act, 2002  
Yukon Environmental and Socio-Economic Assessment Act, 2003  
Yukon Surface Rights Board Act, 1994

*ii) Alberta*

Alberta Mortgage and Housing Corporation Loan Regulation, 1985  
Child and Family Services Authorities Act, 2000  
Child, Youth and Family Enhancement Act, 2000  
Constitution of Alberta Amendment Act, 1990  
Department of Rural Development Act, 1980  
Education Act, 2012  
Electoral Boundaries Commission Act, 2000  
First Nations Sacred Ceremonial Objects Repatriation Act, 2000  
Fuel Tax Regulation, 2007  
Gaming and Liquour Act, 2000  
General Fisheries (Alberta) Regulation, 1997  
Hospitals Act, 2000  
Land Interests Conversion Regulation, 2003

Libraries Act, 2000  
Métis Population Betterment Act, 1938  
Métis Settlements Act, 1990  
Métis Settlements Land Protection Act, 2000  
Métis Settlements Land Register Regulation, 1991  
Métis Settlements Ombudsman Regulation, 2007  
Police Act, 2000  
Public Highways Development Act, 2000  
Rural Emergency Housing Program Loans Regulations, 1985  
School Act, 2000  
Teacher Membership Status Election Regulation, 2004  
Tobacco Tax Act, 2000  
Water Act, 2000  
Wildlife Regulation, 1997

*iii) British Columbia*

Adoption Act, 1996  
Agricultural Land Commission Act, 2002  
British Columbia Teachers' Council Regulation, 2012  
Clean Energy Act, 2010  
Community Charter, 2003  
Environmental Assessment Act, 2002  
Estate Administration Act, 1996  
First Nations Education Act, 2007  
First Peoples Heritage, Language and Culture Act, 2012  
Forest Act, 1996  
Gaming Control Act, 2002  
Gas Utility Act, 1996  
Heritage Conservation Act, 1996  
Home Owner Protection Act, 1998  
Hospital District Act, 1996  
Indian School Act, 1996  
Liquour Control and Licence Regulation, 1996  
Local Government Act, 1996  
Maanulth First Nations Final Agreement Act, 2007  
Maanulth Forest Corporation Interim Regulation, 2011  
McLeod Lake Indian Band Treaty No. 8 Adhesion and Settlement Agreement Act, 2000  
Motor Fuel Tax Act, 1996  
Muskwan Kechika Management Plan Regulation  
Nisga'a Final Agreement Act, 1999  
Oil and Gas Acts Act, 2008  
Park Act, 1996

School Act, 1996  
School Regulation, 1989  
Sechelt Indian Government District Enabling Act, 1996  
Sechelt Indian Government District Enabling Act Advisory Council Regulation, 1988  
Tsawwassen First Nation Final Agreement Act, 2007  
Water Act, 1996  
Wills Variation Act, 1996

*iv) League of the Six*

Constitution of the Five Nation (1916)

*v) Manitoba*

Aboriginal Languages Recognition Act, 2010  
Adoption Act, 2008  
Adult Learning Centers Act, 2007  
Bilingual Service Act Centers Act, 2012  
Child and Family Services Act, 2008  
City of Winnipeg Charter, 2002  
Climate Change and Emission Reduction Act, 2008  
Disaster Financial Assistance Policies and Guidelines (Public Sector) Regulation, 1999  
East Side Traditional Lands Planning and Special Protection Areas Act, 2009  
Electoral Divisions Act, 2012  
Fires Prevention and Emergency Responsibility Act, 2010  
French Language Services Regulation, 2005  
Louis Riel Institute Act, 1995  
Manitoba Child and Family Services Authority Act, 2003  
Manitoba School Act, 1890  
Municipal Act, 2013  
Native Addictions Council of Manitoba Incorporated Act, 1990  
Pimitotah Traditional Use Planning Area Regulation, 2011  
Police Services Act, 2012  
Public Libraries Act, 2006  
Regional Health Authorities Act, 2012  
Sale of Marked Tobacco on Indian Reserves Regulation, 2006  
Student Aid Regulation, 2003  
Tax Administration and Miscellaneous Taxes Act, 2012  
Water Protection Act, 2012

*vi) New Brunswick*

Crown Lands and Forests Act, 1980  
Custody and Delection of Young Persons Act, 2011  
Education Act, 1997  
Family Services Act, 1980  
Heritage Conservation Act, 2009  
Intercommunity Adoption Act, 1996  
Lotteries Act, 1976  
Mining Act, 1985  
Minority Education Act Regulation, 1997  
National Parks Act, 2001  
Public Health Act, 1998  
Regional Health Authorities Act, 2001  
Smoke-free Places Act, 2011

*vii) Newfoundland and Labrador*

Adoption Act, 1999  
Aquaculture Act, 1990  
Labrador Inuit Land Claims Agreement Act, 2004  
Liquour Control Act, 1990  
Marriage Act, 2009  
Mineral Exploration Standards Regulations, 2007

*viii) Nova Scotia*

Education Act, 1995  
Mi'kmaq Education Act, 1998  
Minority Education Act Regulation, 1997  
Municipal Government Act, 1998  
Police Act, 2004

*ix) Northwest Territories*

Education Act, 1995  
Historical Resources Act, 1988  
K'atlodeeche First Nation's Educational District and K'atlodeeche First Nation's District  
Marriage Act, 1988  
National Aboriginal Day Act, 2001  
NWT Official Languages Act, 1988



Order Approving Preferential Employment Program in Diavik Diamonds Project Socio-economic Agreement, 2004  
Student Financial Assistance Regulations, 1990  
Tâichô Community Government Act, 2004  
Tâichô Community Services Agency Act, 2005  
Territorial Park Act, 1988  
Tourism Act, 2006  
Wildlife Act, 1988

*x) Nunatsiavut*

Labrador Inuit Constitution, 2005

*xi) Nunavut*

Aboriginal Custom Adoption Recognition, 1994  
Education Act, 2002  
Family Abuse Intervention Act, 2006  
Human Rights Act, 2003  
Inuit Language Protection Act, 2007  
Legislative Assembly And Executive Council Act, 2002  
Order Giving Notice to Decisions not to Amend Certain Species to the List of Endangered Species, 2006  
Public College for the Eastern Arctic Regulations, 1994  
Student Financial Assistance Regulations, 1990  
Wildlife Act, 2003

*xii) Ontario*

Accreditation of Teacher Education Programs Regulation, 2002  
Child and Family Services Act, 1990  
City of Toronto Act, 2006  
Education Act, 1990  
Endangered Species Act, 2007  
Far North Act, 2010  
First Nations Representation on Boards Regulation, 1997  
Home Care and Community Services Act, 1994  
Indian Welfare Services Act, 1990  
Local Health System Integration Act, 2006  
Long-Term Care Homes Act, 2007  
Lottery and Gaming Corporation Act, 1999

Mining Act, 1990  
Motor Fuel Tax Act, 1996  
Municipal Act, 2001  
Police Services Act, 1990  
Protections, Practices and Standards of Service for Child Protection Cases Regulation, 2000  
Provincial Advocate for Children and Youth Act, 2007  
Public Libraries Act, 1990  
Sales of Unmarked Cigarettes on Indian Reserves Regulation, 1993  
Special Education Advisory Committees, 1998  
Teachers' Qualifications Regulation, 2010

*xiii) Prince Edward Island*

Archaeology Act, 1988  
Child Protection Act, 1988  
Revenue Tax Act, 1988  
Tobacco Sales and Access Regulation, 1988

*xiv) Québec*

Décret concernant la publication de l'entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec, 2007  
Loi sur l'administration fiscale, 2012  
Loi sur l'administration régionale Crie, 2009  
Loi sur la protection de la jeunesse, 2009  
Loi sur la qualité de l'environnement, 2012  
Loi sur la Société de développement des Naskapis, 2007  
Loi sur la Société Makivik, 2007  
Loi sur la taxe du vente du Québec, 2013  
Loi sur la voirie, 2009  
Loi sur le Conseil régional de zone de la Baie James, 2001  
Loi sur l'éducation publique pour les Autochtones Cris, Inuit et Naskapis, 2012  
Loi sur le programme d'aide aux Inuit beneficiaries de la Convention de la Baie James et du Nord québécois pour leurs actes de chasse, de pêche et de piégeage, 2006  
Loi sur les Autochtones Cris, Inuit et Naskapis, 2006  
Loi sur les cités et villes, 2012  
Loi sur les Cris et les Naskapis du Québec, 1984  
Loi sur les droits de chasse et pêche dans les territoires de la Baie James et du Nouveau-Québec. 2009  
Loi sur les services de santé et les services sociaux pour les autochtones Cris, 2012  
Loi sur les terres du domaine de l'Etat, 2010

Loi sur les villages Cris et le village Naskapi, 2009  
Loi sur les villages nordiques et l'administration régionale Kativik, 2012  
Loi sur l'exercice des droits fondamentaux et des prerogatives du peuple Québécois et de l'État du Québec, 2001  
Loi sur l'instruction publique pour les autochtones Cris, Inuit et Naskapis, 2012  
Règlement d'application de la loi concernant la taxe sur les carburants, 2013  
Règlement sur la langue d'enseignement des enfants qui résident ou ont résidé dans une réserve indienne, 2003  
Règlement sur les Indiens, 1981

xv) *Saskatchewan*

Alcohol and Gaming Regulation Act, 1997  
Child and Family Services Act, 1989  
Crown Minerals Act, 1984  
Department of Rural Development Act, 1979-1980  
Education Act, 1995  
Employment Program Regulations, 2008  
Fisheries Regulations, 2012  
Highway and Transportation Act, 1997  
Indian and Native Affairs Act, 1983  
Métis Act, 2001  
Ministry of Economy Regulations, 2012  
Pastures Act, 1998  
Planning and Development Act, 2007  
Police Act, 1990  
Provincial Lands Act, 1978  
Public Health Act, 1994  
Public Libraries Act, 1996  
Regional Health Services Act, 2002  
Revenue and Financial Services Act, 1983  
Saskatchewan Gaming Corporation Act, 1994  
Saskatchewan Indian Institute of Technologies Act, 2000  
Saskatchewan Watershed Authority Act, 2005  
Statements of Provincial Interest Regulations, 2007  
Training Programs Regulations, 2008  
Transfer of Lands – Fulfillment of Indian Treaty Obligations Regulation, 1979  
Wanuskewin Heritage Park Act, 1997  
Wildlife Act, 1998

*xvi) Yukon*

Amendments of Self-Government Act, 2005  
Arts Act, 2002  
Child and Family Service Act, 2008  
Child and Youth Advocate Act, 2009  
Child Care Act, 2002  
Contaminated Sites Regulation, 2002  
Education Act, 2002  
Environmental Act, 2002  
First Nation Indemnification (Fire Management) Act, 2009  
Forest Management Act, 2008  
Forest Resources Regulation, 2010  
Heath Act, 2002  
Historical Resources Act, 2002  
Hospital Act, 2002  
Human Rights Act, 2002  
Language Act, 2002  
Municipalities Act, 2002  
Oil and Gas Act, 2002  
Oil and Gas License Administration Regulations, 2004  
Teacher Certification Regulations, 1993  
Trappers Regulations, 1982  
Victims of Crime Act, 2010  
Wildlife Act, 2002  
Yukon Day Act, 2002  
Yukon Minerals Advancement Board Order, 1999  
Yukon First Nations Self-Government Act, 1994

*d) United Kingdom*

Act for Lower Canada, 1851  
Gradual Civilization Act, 1857  
Act to Confirm Title to Indian Lands in the Province of Canada, 1866  
Constitution Act, 1852  
Crown Lands Protection Act, 1839  
Quebec Act, 1774  
Statute of Westminster, 1931  
Union Act, 1840

## Case Law

### a) France

#### i) Conseil constitutionnel

Décision no. 65-34 L du 2 juillet 1965  
Décision no. 71-46 DC du 20 janvier 1972  
Décision no. 76-71 DC du 30 décembre 1976  
Décision no. 77-88 DC du 23 novembre 1977  
Décision no. 78-96 DC du 27 juillet 1978  
Décision no. 79-104 DC du 23 mai 1979  
Décision no. 82-137 DC du 25 février 1982  
Décision no. 82141 DC du 27 juillet 1982  
Décision no. 83-161 DC du 19 juillet 1983  
Décision no. 85-185 DC du 18 janvier 1985  
Décision no. 85-196 DC du 8 août 1985  
Décision no. 85-196 DC du 8 août 1985  
Décision no. 85-205 DC du 28 décembre 1985  
Décision no. 86-217 DC du 18 septembre 1986  
Décision no. 86-218 DC du 18 novembre 1986  
Décision no. 86-225 DC du 23 janvier 1987  
Décision no. 88-248 DC du 17 janvier 1989  
Décision no. 91-290 DC du 9 mai 1991  
Décision no. 94-329 DC du 13 janvier 1994  
Décision no. 94-345 DC du 29 juillet 1994  
Décision no. 96-373 DC du 9 avril 1996  
Décision no. 99-410 DC du 15 mars 1999  
Décision no. 99-412 DC du 15 juin 1999  
Décision no. 2000-1 LP du 27 janvier 2000  
Décision no. 2001-452 DC du 6 décembre 2001  
Décision no. 2001-454 DC du 17 janvier 2002  
Décision no. 2004-490 DC du 27 février 2004  
Décision no. 2004-494 DC du 10 juin 2004  
Décision no. 2013-308 QPC du 26 avril 2013

#### ii) Conseil d'Etat

Saïd Ali Tourqui, 27 février 1970  
Imbert, 25 janvier 1978  
Quillivère, 22 novembre 1985  
Kerrain, 10 juin 1991  
Le Duigou, 15 avril 1992

Bouquillard, 31 juillet 1992  
Province Sud de Nouvelle-Calédonie, 31 juillet 1992  
Territoire de la Nouvelle-Calédonie, 11 décembre 1992  
Syndicat des fonctionnaires, agents et ouvriers de la météorologie et de l'aviation civile,  
11 mars 1994  
Haut-Commissaire de la République en Nouvelle-Calédonie, 18 novembre 1994  
Avis no. 359461 du 24 septembre 1996  
Sarran, Levacher et autres, 30 octobre 1998  
Haut commissaire de la République c. F.B. et M. Edouard Fritch, 29 mars 2006  
M. Eduard Fritch et al., 22 février 2007  
Société Immobilière Caroline, 22 février 2007

*iii) Cour administrative d'appel de Paris*

Sarran, 23 mars 1999  
Mme. Demaret, 8 octobre 2003  
Haut-commissaire de la République c. Territoire de la Polynésie-française, 31 décembre  
2003

*iv) Cour d'appel de Besançon*

Mlles Narnada et Radjaswari c. M.P., 13 juin 1995

*v) Cour d'appel de Nancy*

Bonnard, 26 juin 1991

*vi) Cour d'appel de Nouméa*

arrêté du 20 février 1920  
arrêté no. 631 du 21 juin 1934  
arrêté no. 121, 8 juin 1998  
Tialetagi c. Lie, 12 avril 1999

*vii) Cour d'appel de Papeete*

Arrêt du 20 janvier 2011, no. 586/CIV/08/3

*viii) Cour de Cassation*

Arrêt du 22 juillet 1986

*ix) Tribunal administratif de Nouméa*

Sarran, 28 novembre 1996

*x) Tribunal administrative de Papeete*

Décision du 14 octobre 1999, no. 97PA00883

Haut commissaire de la République en Polynésie Française c. l'Assemblée de la Polynésie Française, 29 avril 2003

*b) New Zealand*

*i) Environmental Court*

Te Runanga O Taumarere v. Northland Regional Council. [1996] A 108/95

Mason-Riseborough v. Matamata-Piako District Council, [1997]

Chief Executive of the Minister of Agriculture and Forestry v. Waikato Regional Council, [2006] A 133/2006

*ii) Family Court*

Rikihama v. Parson [1995] 4 NZFL 289

*iii) Maori Appellate Court*

Re an Appeal by Ngau Tahu Maori Trust Board, [1982]

*iv) Native Land Court / Maori Land Court*

11 Bay of Islands, MB 253-278, [1929]

*v) New Zealand Court of Appeal*

Tamaki v. Baker [1894], 12 NZLR 483

Tamihana Korokai v. Solicitor-General [1912], 32 NZLR 321

Waipapakura v. Hempton [1914], 33 NZLR 1065  
Hineiti Rirerire Arani v. Public Trustee of New Zealand, [1920] AC 198  
Re the Ninety-Miles Beach, [1955] NZLR 419  
Re the Bed of the Wanganui River, [1962] NZLR 600  
Re the Ninety-Miles Beach, [1963] NZLR 461  
Wiki v. Inspector of Fisheries, [1965] NZLR 322.  
Maurangi v. High Commissioner of the Cook Islands, [1975] 1 NZLR 557  
Huakina Development Trust v. Waikato Valley Authority, [1987] 2 NZLR 188  
New Zealand Maori Council v. Attorney General, [1987] 1 NZLR 641  
New Zealand Maori Council v. Attorney General, [1989] 2 NZLR 142  
Tainui Maori Trust Board v. Attorney General, [1989] 2 NZLR 513  
Te Runanganui o Te Ika Whenua Inc. Society v. Attorney General [1994] 2 NZLR 20  
Te Runanga o Muriwhenua v. Te Runanganui o te Upoko o the Ika, [1996] 3 NZLR 10  
Manukau Urban Maori Authority v. Treaty of Waitangi Fisheries Commission, [1999] NZCA 232  
Keelan v. Peach, [2002] NZCA 296  
Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission [2002] 2 NZLR 17  
Attorney-General v. Ngati Apa, [2003] 3 NZLR 643  
Paki v Attorney-General, [2005] NZCA 584

*vi) New Zealand High Court*

Te Weehi v. Regional Fisheries Officer, [1986] 1 NZLR 680 (HC)  
Re Manukau, [1993] M 1380/92  
Friends and Community of Ngawha Inc. v. Minister of Corrections, [2002] A 110/02

*vii) New Zealand Supreme Court*

Queen v. Symonds, [1847] NZPCC 387  
Wi Parata v. Bishop of Wellington, [1877] 3 NZ Jur (OS) SC 72  
Mangakahia v. NZ Timber Co, [1881] 2 NZLR 345  
Renata Ti Ni v. Tuihata Te Awhi and Rotia Hini, [1921] NZLR 729  
In re Wi Tamahau Mahapuku (deceased); Thompson v. Mahapuku, [1932] NZLR 1397  
New Zealand Maori Council and Others v. Attorney-General and Others [2013] NZSC 6

*viii) Waitangi Tribunal*

Kaituna Report, Wai 4 (1984)  
Manukau Report, Wai 8 (1985)  
Te Reo Maori Report, Wai 11 (1986)



Mangonui Seavage Report, Wai 17 (1986)  
Muriwhenua Fishing Report, Wai 22 (1988)  
Mohaka River Report, Wai 119 (1992)  
Ngāi Tahu Sea Fisheries Resource Report, Wai 27 (1992)  
Ngawha Geothermal Resource Report, Wai 123 (1993)  
Preliminary Report on the Te Arawa Representative Geothermal Resource Claims, 7 WTR (1993)  
Taranaki Report, Wai 143(1996)  
Muriwhenua Land Report, Wai 45 (1997)  
Te Whānau o Waipareira Report, Wai 414 (1998)  
Radio Spectrum Management and Development Final Report, Wai 776 (1999)  
Whanganui River Report, Wai 167 (1999)  
Ngai Tahu Report, (2001)  
Napier Hospital and Health Services Report, Wai 692 (2001)  
Ahu Moana. The Aquaculture and Marine Farming Report, Wai 953 (2002)  
Petroleum Report, Wai 796 (2003)  
Report on the Crown's Foreshore and Seabed Policy, Wai 1071 (2004)  
Report on the Aotearoa Institute Claim Concerning Te Wānanga o Aōtearoa, Wai 1298 (2005)  
Flora and Fauna Report (2010), Wai 262

**c) Canada**

**i) British Columbia Court of Appeal**

R. v. Gonzales [1962], 32 DLR (2d) 290  
Regina v. White and Bob, [1964] 50 DLR (2d) 613  
Macmillan Bloedel v. Mullin, [1985] 61 BCLR 145  
Saanichton Marina Ltd. v. Claxton, [1989] 57 DLR (4<sup>th</sup>) 161  
R. v. Alphonse, [1993] 80 BCLR (2<sup>nd</sup>) 17  
Casimel v. Insurance Corporation of British Columbia [1994] 2 CNLR 22

**ii) British Columbia Supreme Court**

Calder v. British Columbia (A. G.), [1970] 13 DLR (3d) 64  
Campbell v. British Columbia (Attorney General), [2000] 2000 BCSC 1123  
Delgamuukw v. British Columbia, [1991] 5 CNLR 1  
Thomas v. Norris, [1992] 2 CNLR 139  
Tsilhqot'in Nation v. British Columbia, [2008] 2007 BCSC 1700

*iii) Cour d'Appel du Québec*

Québec (Procureur général) c. Savard, [2002] 4 CNLR 340

*iv) Cour Suprême du Québec*

Connelly v. Woolrich [1867] 17 RJRQ 75

*v) Exchequer Court of Canada*

Dreaver v. The King, [1935] 10 April 1935, Doc. No. 15186

*vi) Federal Court of Canada*

Lavell v. Canada, [1971] FC 347

Hamlet of Baker Lake v. Minister of Indian Affairs, [1980] 1 FC 518

Grismer v. Squamish Indian Band [2006] 2006 FC 1088

*vii) Manitoba Court of Queen's Bench*

Manitoba Métis Federation Inc. v. Canada (Attorney-General) [2007] MBQB 293

*viii) New Brunswick Provincial Court*

Castonquay and Faucher [2002] NBPC 31

*ix) Newfoundland and Labrador Court of Appeal*

Newfoundland and Labrador v. Labrador Métis Nation, 2007 NLCA 75

*x) Northwest Territories Court of Appeal*

Re Deborah, [1972] 5 WWR 203

R. v. Naqitarvik, [1986] 26 CCC (3d) 193

*xi) Northwest Territories Territorial Court*

Re Adoption of Katie [1961] 32 Dominion Law Reports (2<sup>nd</sup>) 686

*xii) Nova Scotia County Court*

R v. Syliboy, [1929] 1 DLR 307

*xiii) Nova Scotia Court of Appeal*

R. v. Francis, [1969] 10 DLR (3d) 89

*xiv) Nunavut Court of Justice*

Kadlak v. Nunavut (Minister of Sustainable Development), [2001] NUCJ 1

*xv) Ontario Court of Appeal*

Attorney-General for Ontario v. Bear Island Foundation, [1984] 49 OR (2d) 353

R. v. Shipman, [2007] 2007 ONCA 398

R. v. Meshake, [2007] 2007 ONCA 337

*xvi) Ontario Court of Justice*

R. v. Laurin, [2007] 2007 ONCJ 265

*xvii) Ontario Superior Court of Justice / Ontario Supreme Court*

Re Lavell v. Attorney-General of Canada, [1972] 22 DLR (3d) 182

Isaac v. Bedard, [1972] 2 OR 391

Platinex v. Kitchenuhmaykoosib Inninuwug First Nation, [2006], CanLii 20790

*xviii) Saskatchewan Court of Appeal*

R. v. Grumpo [1996] 159 DLR (4<sup>TH</sup>) 577

*xix) Saskatchewan Provincial Court*

R. v. Morin, [1996] 1996 1 CNLR 182

*xx) Superior Court of Justice (Ontario)*

Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation, [2008] 2 CNLR 201

*xxi) Supreme Court of Canada*

St. Catherine's Milling and Lumber Co. v. R., [1887] 13 S.C.R. 577  
Re Eskimos, [1939] 2 D.L.R. 417  
Smith v. the Queen, [1960] S.C.R. 776  
Sikeya v. the Queen, [1964] S.C.R. 642  
R v. George [1966], S.C.R. 267  
Daniels v. White, [1968] S.C.R. 517  
R. v. Drybones, [1970] S.C.R. 282  
Calder et al. v. British Columbia (A.G.), [1973] S.C.R. 313  
Lavell, [1974] S.C.R. 1349  
Cardinal v. Solicitor-General of Alberta, [1974] S.C.R. 695  
Kruger at al. v. The Queen, [1978] 1 S.C.R. 104  
Attorney General of Manitoba v. Forest [1979] 2 S.C.R. 1032  
Jack et al. v. The Queen, [1980] 1 S.C.R. 294  
Bilodeau v. Manitoba (A.G.), [1981] 1 S.C.R. 449  
Re: Objection by Quebec to the Resolution to Amend the Constitution [1982] 2 S.C.R. 793  
Nowegijick v. R., [1983] 1 S.C.R. 29  
Guerin v. the Queen, [1984] 2 S.C.R. 335  
Re Manitoba Language Rights, [1985] 1 S.C.R. 721  
Dick v. R., [1985] 2 S.C.R. 309  
Jack and Charlie v. The Queen, [1985] 2 S.C.R. 332  
Simon v. The Queen [1985] 2 S.C.R. 387  
Derrickson v. Derrickson, [1986] 1 S.C.R. 285  
R. v. Oakes, [1986], 1 S.C.R. 103  
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143  
R. v. Horseman, [1990] 1 S.C.R. 901  
R. v. Sparrow, [1990] 1 S.C.R. 1075  
R. v. Sioui, [1990] 1 S.C.R. 1025  
R. v. Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development) [1995] 4 S.C.R. 344  
R. v. Adams, [1996] 3 S.C.R. 101  
R. v. Badger, [1996] 1 S.C.R. 771  
R. v. Van der Peet, [1996] 2 S.C.R. 507  
R. v. Gladstone, [1996] 2 S.C.R. 723  
R. v. Pamajewon, [1996] 2 S.C.R. 821  
R. v. Côté, [1996] 3 S.C.R. 139  
Osoyoos Indian Band v. Oliver (Town), [2001] 3 S.C.R. 746

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010  
Reference re Secession of Quebec, [1998] 2 S.C.R. 217  
R. v. Gladue, [1999] 1 S.C.R. 688  
Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203  
Westbank First Nation v. British Columbia Hydro and Power Authority [1999] 3 S.C.R. 134  
R. v. Marshall, [1999] 3 S.C.R. 456  
R. v. Marshall, [1999] 3 S.C.R. 533  
Lovelace v. Ontario, [2000] 1 S.C.R. 950  
Mitchell v. M.N.R. [2001] 1 S.C.R. 911  
Kitkatla Band v. British Columbia [2002] 2 S.C.R. 146  
Ross River Dene Band Council v. Canada [2002] 2 S.C.R. 816  
Wewaykum Indian Band v. Canada, [2002] 4 S.C.R. 245  
R. v. Powley, [2003] 2 S.C.R. 207  
R. v. Blais [2003] 2 S.C.R. 236  
R. v. Marshall; R. v. Bernard, [2003] 2 S.C.R. 220  
British-Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371  
Haida Nation v. British Columbia (Minister of Forests), [2004] 3 SCR 511  
R. v. Decorte, [2005] 1 S.C.R. 133  
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388  
R. v. Sappier; R. v. Gray, [2006] 2 S.C.R. 686  
R. v. Morris, [2006] 2 S.C.R. 915  
Ermineskin Indian Band and Nation v. Canada, [2009] 1 S.C.R. 222  
Beckman v. Little Salmon/Carmacks First Nation, [2010] 2010 SCC 53  
Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, [2010] 2 S.C.R. 650  
Bastien Estate v. Canada, [2011] 2011 SCC 38  
R. v. Ipeelee, [2012] 1 S.C.R. 433  
Manitoba Metis Federation Inc. v. Canada (Attorney-General), [2013] SCC 14  
Behm v. Moulton Contracting Ltd., [2013] SCC 26

*xxii) Upper Canada's Court of King's / Queen's Bench*

Doe ex D. Jackson v. Wilkes, [1835] 4 UCKB 142  
Doe ex d. Sheldon v. Ramsay, [1852] 9 UCQB 105

*xxiii) Yukon Territorial Court*

R. v. Moses (1992) 11 CR (4<sup>th</sup>) 357

## **International Case Law**

### *i) American and British Case Arbitration Tribunal*

Cayuga Indians, [1926], 6 RIAA

### *ii) CERD Committee*

Decision 1(66), New Zealand Foreshore and Seabed Act 2004 (2005), CERD/C/66/NZL/  
Dec. 1

### *iii) Court of King's Bench*

Tanistry, [1608] Davis 28, 80 E.R. 516  
Campbell v. Hall, [1774] 1 COWP 204

### *iv) European Court of Human Rights*

Py v. France, 11 May 2005 (66289/01)  
Birk-Levy v. France, 21 September 2010 (39426/06)

### *v) European Court of Justice*

H. Hansen jun. & O.C. Balk GmbH & Co. v. Hauptzollamt de Flensburg, 10 October  
1978,  
C-148/77  
Commission of European Communities v. Italian Republic, 13 December 1991, C-33/90

### *vi) EEC Council*

Decision 91/482/EEC, 25 July 1991

### *vii) High Court of Australia*

Mabo v. Queensland (no. 2), [1992] 175 CLR 1

*viii) International Court of Justice*

Nottebohm case, Liechtenstein v. Guatemala, [1955] ICJ Reports 1955  
Western Sahara, Advisory Opinion, 16 October 1975  
Case Concerning East Timor, Portugal v. Australia, [1995] Rep. 90  
Construction of a Wall, Advisory Opinion, 9 July 2004

*ix) Judicial Committee of the Privy Council*

Hodge v. the Queen, [1883] 9 App. Cas. 117  
St. Catherine's Milling and Lumber Co. v The Queen, [1888] 14 A.C. 46  
Nireaha Tamaki v. Baker, [1901] AC 561  
Wallis v. Solicitor-General, [1903] AC 173  
In re The Will of Wi Matua, Deceased, Ex parte Reardon and Te Pamoā, [1908] NZPCC 522  
Hineiti Rirerire Arani v. Public Trustee, [1919] NZPCC 1  
Attorney General of Quebec v. Attorney General of Canada, [1921] AC 601  
Hoani Te Heu Heu Tukino v. Aotea District Maori Land Board, [1941] AC 308  
Attorney-General of St. Christopher Nevis & Anguilla v. Reynolds, [1980] 2 WLR 171  
New Zealand Maori Council v. Attorney General [1994] 1 NZLR 513

*x) Permanent Court of Arbitration*

Island of Palmas, [1928] 2 RIAA

*xi) Permanent Court of International Justice*

Legal Status of Eastern Greenland , [1931], Series A/B, No. 53.  
Clipperton Island (France v. Mexico), 28 January 1931

*xii) Supreme Court of The United States*

Johnson and Graham's Lessee v. William M'Intosh, [1823] 21 US 543  
The Cherokee Nation vs. The State of Georgia, [1831] 30 US 1  
Samuel A. Worcester, in error, vs. The State of Georgia, [1832] 31 US (6 Pet) 515  
US v. Santa Fe Pacific Railroad Co., [1941] 314 US 339  
Santa Clara Pueblo v. Martinez, [1978] 436 US 49  
Tee-Hit-Ton Indians v. United States, [1995] 348 U.S. 272

*xiii) United Nations Human Rights Committee*

Sandra Lovelace v. Canada (1981), Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40)

Mi'kmaq Tribal Society v. Canada (1984), Communication No. 78/1980 (30/9/80), U.N. Doc Supp. No. 40 (A/99/40)

Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada (1990), Communication No. 167/1984 (26/3/90), U.N. Doc. Supp. No. 40 (A/45/40)

Apirana Mahuika et al. v. New Zealand (1993), Communication No. 547/1993. UN Doc. A/56/40.

Francis Hopu & Tepoaitu Bessert v. France (1993), Communication No. 549/1993, UN Doc. A/52/40

Marie-Hélène Gillot v. France, Communication No. 932/2000, Supp. No. 40 (A/57/40)

Mahuika et al. v. New Zealand (2000), U.N. Doc. CCPR/c/70/D/547/1993

## **National Legal Instruments and Policy Papers**

### *a) France*

Accord de Nouméa (1998)

Accord particulier entre l'Etat et la Nouvelle-Calédonie sur le développement culturel de la Nouvelle-Calédonie (2002)

Accord particulier Nouvelle-Calédonie/Wallis et Futuna (2003)

Accords de Matignon (1988)

Briand, Auguste (1905), Rapport sur la separation des Églises et de l'État. Paris: Imprimerie de l'Assemblée Nationale

Cerquiglini, Alain (1999), Langues de France

Charte de l'environnement (2004)

Concordat (1814)

Convention portant concession de l'enseignement primaire à la Mission Catholique (2006)

Déclaration des droits de l'homme et du citoyen (1789)

Fakama 'uliga o te 'u ka fakapolinesia. Lettre ouvert pour la plurilinguisme en Polynésie (2006)

Pacte social (2000)

Plan d'action pluriannuel (2000-2009). Ministère de la Culture.

Plan de développement économique et social en longue terme à Nouvelle-Calédonie (1978)

Proclamation relative aux cultes du 27 germinal, l'an X de la République une et indivisible (1802)

Relève de conclusions du VIIIème Comité des Signataires de l'Accord de Nouméa (2010)

Relève de conclusions du IXème Comité des Signataires de l'Accord de Nouméa (2011)

Déclaration politique générale. Congrès de la Nouvelle-Calédonie (2011)



**b) New Zealand**

- A Guide for Departments on Consultation with Iwi (2003). Wellington: Te Puni Kōkiri.
- A Guide to the Fisheries (Kaimoana Customary Fishing) Regulations 1998 (2003). Wellington: Ministry of Fisheries.
- A Report on the Conversation (2013). [www.ourconstitution.org.nz](http://www.ourconstitution.org.nz)
- Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown (2002). Office of Treaty Settlements.
- He Tirohanga Rangapu: Partnership Perspectives (1988)
- He wakaputanga o te Rangatiratanga o Nu Tireni (1835)
- Ka Awatea (1991)
- Kaitiakitanga and Local Government: Tangata Whenua in Environmental Management (1998). Wellington: Office of Parliamentary Committee for the Environment.
- Māori Custom and Values in New Zealand Law (2001). Study Paper 9. Wellington: Law Commission / Te aka mutua o te Ture.
- Principles for Crown Actions (1989)
- Reforming the Political System of the Cook Islands. Preparing for the Challenges of the 21<sup>st</sup> Century. The Report of the Commission of Political Review. Rarotonga 1998.
- Report of the Committee of Inquiry into Laws Affecting Maori Land and the Powers of the Maori Land Court (1965)
- Report on the Department of Maori Affairs (1960)
- The Maori Land Courts. Report of the Royal Commission of Inquiry (1980).
- Treaty Negotiations. A Guide to Crown Policy and Practice (2003). Wellington: Ngā Kaitiaki Rēti Ngahere Karauna.
- Treaty of Waitangi (1840)
- Waka Umanga: A Proposed Law for Maori Governance Entities (2006). Wellington: New Zealand Law Commission

**c) Canada**

- Aboriginal Roundtable to Kelowna Accord. Aboriginal Policy Negotiations, 2004-2005 (2005)
- Agreement (Canada-Yukon Environmental Protection), (Yukon, 1995)
- A Guide to Métis Hunting and Fishing Rights in Saskatchewan (Saskatchewan)
- Amendment of Champaigne and Aisha First Nations Final Agreement (Yukon, 2006)
- Canadian Biodiversity Strategy (1991)
- Charlottetown Accord (1992)
- Charte de la langue française (Québec, 2011)
- Cree-Québec Final Agreement (2002)
- Crown Treaty 60 (1850)
- Crown Treaty 61 (1850)
- Declaration of the First Nations (1990)
- Declaration of the People of Rupert's Land and the Northwest (1869)

Dehcho Framework Agreement (2001)  
Dogrib Comprehensive Land Claim and Self-Government Agreement (2003)  
Entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec (Quebec, 2002)  
Federal Policy Guide: Aboriginal Self-Government: The Governance of Canada's Approach to Implimentation of the Inherent Right and the Negotiation of Aboriginal Self-Government (1995). Ottawa: Minister of Public Works and Government Services Canada.  
Final Report of the Royal Commission on Aboriginal Peoples (1995), Ottawa: Ministry of Supply and Services.  
Gathering Strength. Canada's Aboriginal Action Plan. A Progress Report (1998). Minister of Public Works and Government Services Canada.  
Grand paix de Montréal (1701)  
Gwichin Comprehensive Land Claim Agreement (1991)  
Haida Agreement (1993)  
Halifax Treaty (1752)  
Hawthorne, H.B., ed. (1966), A Survey of the Contemporary Indians of Canada. A Report on Economic, Political and Educational Needs and Policies. Ottawa: Indian Affairs Branch.  
Indigenous Legal Traditions (2007). Vancouver: Law Commission of Canada. UBC Press.  
James Bay and Northern Quebec Agreement (1975)  
Jurisdictional Response to Land Resources, Land Use and Inuvialuit Settlement Regulation (NWT, 1997)  
Labrador Inuit Land Claims Agreement (Newfoundland and Labrador, 2005)  
Maa-nulth First Nations Final Agreement (British Columbia, 2008)  
Métis Nation Relationship Accord (British Columbia, 2005)  
Métis Settlement Accord (Alberta, 1989)  
Nisga'a Final Agreement (2000)  
Northeast Quebec Agreement (Quebec, 1978)  
Nunavut Land Claims Agreement (1993)  
Proclamation Declaring June the 21<sup>st</sup> of Each Year as National Aboriginal Day (1996)  
Research Report for Land, Resources and Environment Regulations Project (1995)  
Revolutionary Bill of Rights (Métis Provisional Government, 1885)  
Royal Commission on Aboriginal Peoples (1996)  
Royal Proclamation (1761)  
Royal Proclamation (1763)  
Sahtu Dene and Metis Comprehensive Land Claim Agreement (2005)  
Statement of the Government of Canada on Indian Policy (1969)  
Tlicho Agreement (NWT, 2005)  
Treaty 1 (1871)  
Treaty 2 (1871)  
Treaty 3 (1873)  
Treaty 6 (1876)

Treaty 7 (1878)  
Treaty 8 (18?)  
Treaty 9 (1905)  
Treaty 10 (1906)  
Treaty 11 (1921-1922)  
Treaty No. 239 (1725)  
Treaty of Boston (1725)  
Treaty of Portsmouth (1713)  
Tsawassen First Nation Final Agreement (2006)  
Umbrella Final Agreement (Yukon, 1990)  
Westbank Indian Self-Government Agreement (2003)  
Western Arctic Claim Inuvialuit Final Agreement (1984)

## **International Legal Instruments and Policy Papers**

Alexander VI (1493), *Inter Caetera*  
Anaya, James (2011), *The Situation of Maori People in New Zealand*. UNCHR, 18<sup>th</sup> Session.  
CEDAW Committee (2003), *Conclusive Observations: Canada*. UN Doc. A/59/58.  
Charter of the United Nations (1945)  
Cobo, José Martínez (1986), *Study of the Problem of Discrimination against Indigenous Populations*. E/CN.4/Sub.2/1986/7, Add. 4.  
Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women. Initial Report of States Parties. Cook Islands (2006).  
Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1991)  
Covenant of the League of Nations (1919)  
Covenant on Economic, Social, and Cultural Rights (1966)  
Decision of the Council of the ECC 91/482/EEC, 25 July 1991  
Declaration of Mataatua (1992)  
Declaration on the Granting of Independence to Colonial Countries and Peoples (1960)  
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)  
European Charter for Regional Languages or Minority Languages (1992)  
Final Act of the Berlin Africa Conference (1885)  
International Covenant on Civil and Political Rights (1966)  
Leo XIII (1897), *Affari vos*  
Mission to France (2008), UNHCR, A/HRC/7/23/Add. 2  
Montevideo Convention on Rights and Duties of States, 26 December 1933  
Paul III (1537), *Sublimis Deus Sic Dilexit*

Report Of Rodolfo Stavenhagen, Special Reporter on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, of Mission to Canada (2004), E/CN.4/2005/88/Add.3  
Resolution A/Res/59/174, UN General Assembly, 22 December 2004  
Resolution 41/41A, UN General Assembly, 2 December 1986  
Status of Native Nations: Conditions under US Politics of Self-Determination (2007). Harvard Project on American Indian Economic Development. New Haven: Harvard University Press.  
Treaty of Amsterdam (1997)  
Treaty of Maastricht (1992)  
Treaty of Paris (1763)  
Treaty on the Functioning of the European Union (1958)  
United Nations Declaration on the Rights of Indigenous Peoples (2007)  
UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc. E/CN.4/Sub. 2/1986/7/Add. 4.  
Urban VIII (1639), *Commisum Nobis*

## **Literature**

Abelson, Donald E. & James, Patrick & Luszlig, Michael (2002), *Myth of the Sacred: The Charter, the Courts and the Politics of the Constitution of Canada*. Montréal: McGill-Queen's University Press.  
Aikio, Pekka & Scheinin, Martin (2005), *Operationalizing the Right of Indigenous Peoples to Self-Determination*. Turku: Institute to Human Rights.  
Aldrich, Robert (1993), *France and the South Pacific Since 1940*. Honolulu: University of Hawaii Press.  
Alves, Dora (1999), *The Maori and the Crown. An Indigenous People's Struggle for Self-Determination*. Westport: Greenwood Press.  
AlWardi, Sémir (2008), *Tahiti Nui, ou les derives de l'autonomie*. Paris: L'Harmattan.  
Anaya, James S. (2004), *The Indigenous Peoples in International Law*. Oxford: Oxford University Press.  
Arendt, Hannah (1963), *On the Revolution*. London: Penguin Books.  
Armitage, Andrew (1995), *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand*. Vancouver: UBC Press.  
Arnaud, André Jean, éd. (1993), *Dictionnaire encyclopédique de théorie et de sociologie du droit*. Paris: Librairie générale de droit et de jurisprudence, p. 619.  
Aubry, Jean-François (1992), *Droit des collectivités périphériques françaises*. Paris: Presses universitaires de France.  
Augustine, Aurelius (1972), *The City of God against the Pagans*. London: Penguin Books.  
Bagehot, Walter (2004), *The English Constitution*. Cambridge: Cambridge University Press.  
Banting, Keith & Kymlicka, Will, ed. (2006), *Multiculturalism and the Welfare State*. Oxford: Oxford University Press, pp. 6-13, 31-37, 61, 224-263.

- Barlow, Cleve (1993), *Tikanga Whakaaro. Key Concepts in Maori Culture*. Auckland: Oxford University Press.
- Bash, Graham (1995), *Local Government and Politics in New Zealand*. Auckland: Auckland University Press.
- Bausinger- Garnier, Laure (2001), *Lois du pays an Nouvelle-Calédonie. Véritable norme législative à caractère réglementaire*. Paris: L'Harmattan.
- Bayefsky, A.F. (2000), *Self-Determination and International Law: Québec's Lessons Learned. Legal Opinions*. Toronto: Martinus Nijhoff Publishers.
- Beatty, David M., ed. (1994), *Human Rights and Judicial Perspective*. Dordrecht: Martinus Nijhoff Publishers, pp. 93-131.
- Beaudoin, Gérald & Mendes, Errol, ed. (1996), *The Canadian Charter of Rights and Freedoms*. Ottawa: Carswell, ch. 17.
- Bechtel, Marie-Françoise, ed. (2002), *Les outre-mers entre décentralisation, intégration européenne et mondialisation*. Paris: École nationale d'administration no. 101. *Revue française d'administration publique*, pp. 39-61, 97-109, 69-95, 397-434.
- Belanger, Yale D., ed. (2008), *Aboriginal Self-Government in Canada. Current Trends and Issues*. Saskatoon: Purich Publishing Limited, pp. 57-63, 78-82, 90-93, 110-115, 160-165, 222-235, 260-282.
- Belich, James (1996), *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the 19<sup>th</sup> Century*. Auckland: Penguin Books.
- Bell, Adlan & Harlow, Ray & Sharks, Donna (2005), *Languages of New Zealand*. Wellington: Victoria University of Wellington
- Bell, Catherine E. (1994), *Alberta Métis Settlements Legislation. Overview of Ownership and Management of Settlement Lands*. Saskatoon: University of Saskatoon.
- Bell, Catherine E. (1999), *Contemporary Métis Justice. The Settlement Way*. Saskatoon: The University of Saskatchewan.
- Bell, John (2001), *French Constitutional Law*. Oxford: Oxford University Press
- Bell, John & Boyron, Sophie & Whittaker, Simon (1998), *Principles of French Law*. Oxford: Oxford University Press.
- Betts, Raymond F. (1991), *France and decolonisation 1900-1960*. London: Macmillan.
- Boczek, Boleslaw A. (2005), *International Law. A Dictionary*. Lanham: The Scarecrow Press, Inc.
- Bodin, Jean (1992), *On Sovereignty*. Cambridge: Cambridge University Press.
- Borrows, John (2002), *Recovering Canada. The Resurgence of Indigenous Law*. Toronto: University of Toronto Press.
- Borrows, John (2010), *Canada's Indigenous Constitution*. Toronto: University of Toronto Press.
- Braudel, Fernand (1979), *La Méditerranée et le monde Méditerranéen à l'époque de Philippe II*. Paris: Librairie Armand Colin.
- Braudel, Fernand (1980), *On History*. London: Weidenfeld and Nicholson.
- Braudel, Fernand (1990), *L'identité de la France. Espace et histoire*. Paris: Éditions Flammarion.
- Bredimas-Assimopoulos, éd. (2005), *Le Français au Québec. Les nouveaux défis*. Québec: Fides, p. 244.

- Breton, Raymond (2006), *Ethnic Relations in Canada. Institutional Dynamics*. Montréal: McGill Press.
- Brierly, J.L. (1961), *The Law of Nations. An Introduction to the International Law of Peace*. New York: Oxford University Press.
- Brown, George & Maguire, Ron, ed. (1979), *Indian Treaties in Historical Perspective*. Ottawa: Indian and Northern Affairs, p. 32.
- Brownlie, Ian (2003), *Principles of International Law*. Oxford: Oxford University Press.
- Buchanan, Allen (2007), *Justice, Legitimacy and Self-Determination. Moral Foundations to International Law*. New York: Oxford University Press.
- Caenegem, R.C. van (2000), *A Historical Introduction to the Western Constitutional Law*. Cambridge: Cambridge University Press.
- Cairns, Alan C. (2000), *Citizens Plus: Aboriginal Peoples and the Canadian State*. Vancouver: UBC Press.
- Cairns, Walter & McKeon, Robert (1998), *Introduction to French Law*. London: Cavendish Publishing Limited
- Castellino, Joshua & Allen, Steven (2003), *Title to Territory in International Law. A Temporal Analysis*. Aldershot: Ashgate.
- Cerquigline, Bernard, éd. (2003), *Les langues de France*. Paris: Presses universitaires de France, pp. 9-17, 28-123, 132-358.
- Champagne, Duane, ed. (1994), *Native North American Almanac. Reference Work on Native North America in the United States and Canada*. Washington D.C.: Gale Research Inc, pp. 82-92, 112-123, 487-491, 510-552.
- Chiba, Masaji, ed. (1986), *Asian Indigenous Law in Interaction with Received Law*. London: KPI, p. 4.
- Christie, Walter (1997), *Treaty Issues*. Christchurch: The Wyvern Press.
- Cleave, Peter (2008), *Iwi Station: A Discussion of Print, Radio and Television in Aotearoa/ New Zealand*. Palmerston North: Campus Press.
- Conte, Alex & Davidson, Scott & Burchill, Richard, ed. (2004), *Defining Civil and Political Rights, The Jurisprudence of the United Nations Human Rights Committee*. Padstow: Ashgate, pp. 35-40, 184-197.
- Cook, Curtis & Lindau, Juan Davis (2000), *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective*. Montréal: McGill-Queen's University Press.
- Copter, Olivier & Delcourt, Barbara & Klein, Pierre & Leurat, Nicolas, ed. (1999), *Démembrements d'Etats, et délimitations territoriales: l'uti posseditis en question(s)*. Bruxelles: Éditions Bruylant, pp. 414-420.
- Cornell, Stephen (1988), *The Return of the Native: American Indian Political Resurgence*. New York: Oxford University Press.
- Cotterrell, Roger (2006), *Law, Culture and Society. Legal Ideas in the Mirror of Social Theory*. Aldershot: Ashgate.
- Cox, Lindsay (1993), *Kotahitanga. The Secret to Maori Political Unity*. Melbourne: Oxford University Press.
- Crawford, J., ed. (2008), *Kia Kaha: New Zealand in the Second World War*. Melbourne: Oxford University Press, pp. 4, 238-246.

- Curry, Steven (2004), *Indigenous Sovereignty and the Democratic Project*. Bodmin: Ashgate.
- Daniel, Richard C. (1980), *A History of Native Claims Processes in Canada 1867-1979*. Ottawa: Department of Indian and Northern Affairs.
- Daughton, J.P. (2006), *Empire Divided. Religion, Republicanism, and the Making of French Colonialism, 1880-1914*. Oxford: Oxford University Press.
- Deffain, Dominique (1995), *Un voyageur français en Nouvelle-France au XVIIe siècle. Étude littéraire des Relations du père Paul LeJeune*. Tübingen: M. Niemeyer.
- Derrida, Jacques (1994), *Force de Loi*. Paris: Galilée.
- Dacey, A.V. (2010), *Introduction to the Study of the Law of the Constitution*. Indianapolis: Liberty Fund Inc.
- Dickason, Olive P. (1993), *Le mythe du sauvage*. Québec: Les éditions du Septentrion.
- Dickason, Olive Patricia (1994), *Canada's First Nations. A History of Founding Peoples from Earliest Times*. Toronto: McClelland & Stewart Inc.
- Dorsen, Norman, ed. (2003), *Comparative Constitutionalism*. St. Paul: Thomson/West, pp. 153-157, 375-388, 784-794.
- Doyle, William (1992), *The Oxford History of the French Revolution*. Oxford: Clarendon Press.
- Duffy, R. Quinn (1988), *The Road to Nunavut. The Progress of the Eastern Arctic Inuit Since the Second World War*. Kingston: McGill University Press.
- Durie, Mason (1998), *Te Mana, Te Kāwanatanga. The Politics of Māori Self-Determination*. Auckland: Oxford University Press.
- Eccles, W.J. (1990), *France in America*. Markham: Fitzhenry & Whiteside.
- Ehrlich, Eugen (1913), *Grundlegung der Soziologie des Rechts*. München: Dunkler & Humblot.
- Eide, Asbjørn & Krause, Catharina & Rosas, Allan (2001), *Economic, Social and Cultural Rights*. The Hague: Kluwer Law International.
- Eisenberg, Avigail & Spinner-Halev, Jeff, ed. (2005), *Minorities within Minorities. Equality, Rights and Diversity*. Cambridge: Cambridge University Press, pp. 1-60, 124-143, 242-291.
- Elliott, David W. (2005), *Law and Aboriginal Peoples in Canada*. Concord: Captus Press.
- Émeri, ed. (2000), *La question statutaire en Guadeloupe, en Guyane et en Martinique. Éléments de réflexion*. Pointe-à-Pitre: Éditions Josor, pp. 41-85.
- Evans, Malcolm D., ed. (2003), *International Law*. Oxford: Oxford University Press, pp. 47-48, 94-96, 205-262, 314-317.
- Faberon, Jean-Yves & Agniel, Guy, ed. (2000), *La souveraineté partagée en Nouvelle-Calédonie et en droit comparé*. Paris: La documentation Française, p. 158.
- Faberon, J.Y. & Doumenge, J.P., éd. (1999), *Identité, nationalité, citoyenneté outre-mer*. Papeete: Documentation française, pp. 121-123.
- Favoreau, Louis (1986), *Les cours constitutionnelles*. Paris: Presses universitaires de France.
- Favoreau, Louis & Philip, Loïc (1991), *Les grandes décisions du Conseil constitutionnel*. Paris: Éditions Sirey
- Foreshore and Seabed Act 2004: Treaty Customary Rights Orders: Information for Applicants (2005). Wellington: Tāhā o te Ture.

- Fourrat, Altide Canton (2006), *Les collectivités d'outre-mer et la décentralisation*. Paris: Territorial éditions.
- Friedman, Lawrence M. (1977), *The Legal System. A Social Science Perspective*. New York: Russell Sage Foundation.
- Friesen, John W. & Friesen, Virginia Lyons (2005), *First Nations in the 21<sup>st</sup> Century*. Contemporary Educational Frontiers. Calgary: Detselig Enterprises Ltd.
- Fumoleau, René (1973), *As Long As This Land Shall Last*. Toronto: McClelland and Stewart.
- Gall, Gerald L. (1983), *The Canadian Legal System*. Toronto: Carswell Legal Publications.
- Gaulle, Charles de (1971), *Toivon vuodet*. Porvoo: Werner Söderström.
- Gilson, Richard (1991), *The Cook Islands 1820-1950*. Wellington: Victoria University of Wellington.
- Glenn, Patrick H. (2010), *Legal Traditions of the World*. Oxford: Oxford University Press.
- Grimes, Arthur & Waers, Lydia & Sullivan, Ginny (2002), *States of Mind: Australia and New Zealand 1901-2001*. Wellington: Victoria University of Wellington.
- Halmcrona, Pia Maria (1999), *Les Autochtones et les médias au Canada: La représentation du Mohawk dans la presse écrite pendant la crise d'Oka en 1990*. M.A. thesis. University of Turku.
- Hamilton, John David (1994), *Arctic Revolution. Social Change in the Northwest Territories 1995-1994*. Québec: Dundurn Press.
- Hamon, Pierre & Troper, Michel (2007), *Droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence.
- Hannum, Hurst (1990), *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights*.
- Harding, Andrew & Öricü, Esin, ed. (2002), *Comparative Law in the 21<sup>st</sup> Century*. The Hague: Kluwer Law International, pp. 1-54, 102-107, 142-144, 447-475.
- Hargreaves, Alec G. (1995), *Immigration, "Race" and Ethnicity in Contemporary France*. London: Routledge
- Hart, H.L.A. (1997), *The Concept of Law*. Oxford: Oxford University Press.
- Havemann, Paul, ed. (1999), *Indigenous People's Rights in Australia, Canada and New Zealand*. Auckland: Oxford University Press, pp. 1-60, 88-141, 162-177, 197-213, 254-264, 302-326. 378-398.
- Hayward, Janine, ed. (2003), *Local Government and the Treaty of Waitangi*. South Melbourne: Oxford University Press, pp. 43-69, 95-115, 135-177.
- Henderson, William (1980), *Canada's Indian Reserves: Pre-Confederation*. Ottawa: Indian and Northern Affairs.
- Henriksson, Markku (2006), *Kanada: vaahteralehden maa*. Helsinki: Gaudeamus.
- Heraklides, Alexis (1990), *The Self-Determination of Minorities in International Politics*. London: Frank Cass and Co. Ltd.
- Hill, Richard S. (2004), *State Authority, Indigenous Autonomy. Crown – Maori Relationship in New Zealand / Aotearoa 1900-1950*. Wellington: Victoria University Press.
- Hobbes, Thomas, *Leviathan* (1974). Aylesbury: Hazell Watson & Viney Ltd.
- Hobsbawm, E.J. (1990), *Nations and nationalism since 1870. Programme, myth, reality*. Cambridge: Cambridge University Press.



- Hoëm, Ingjerd (2004), *Theatre and Political Process. Staging Identities in Tokelau and New Zealand*. Toronto: Berghahn Books.
- Hogg, Peter W. (1985), *Constitutional Law of Canada*. Toronto: The Carswell Co. Ltd.
- Horn, Frank, ed. (1994), *Minorities and their Right of Participation*. Rovaniemi: Northern Institute for Environmental and Minority Law, pp. 102-103.
- Huntsman, Judith & Hooper, Antony (1996), *Tokelau. A Historical Ethnography*. Auckland: Auckland University Press.
- Hylton (1994), *Aboriginal Self-Government in Canada: Current Trends and Issues*. Saskatoon: Purich Publishers.
- Hylton, J., ed. (2000), *Aboriginal Self-Government in Canada*. Saskatoon: Purich Publishers, pp.
- Imai, Shin & Logan, Katherine & Sherin, Gary (1999), *Aboriginal Law Handbook*. Scarborough: Carswell.
- Indigenous Legal Traditions (2007), *Law Commission of Canada*. Vancouver: UBC Press.
- Isaac, Thomas (2006), *Aboriginal Title*. Saskatoon: University of Saskatoon.
- Isaac, Thomas (2008), *Métis Rights*. Saskatoon: University of Saskatoon.
- IWGIA – The Indigenous World (2010). Copenhagen: IWGIA.
- Johansen, Bruce E. (1996), *Debating Democracy. Native American Legacy of Freedom*. Santa Fe: Clear Light Publishers.
- Johansson, Marjut & Pyykkö, Riitta (2005), *Monikielinen Eurooppa: kielipolitiikkaa ja käytäntöä*. Helsinki: Gaudeamus.
- Judge, Anna (2007), *Linguistic Policies and Survival – Regional Languages in France and Great Britain*. Houndmills: Palgrave-Macmillan.
- Karsten, Peter (2002), *Between Law and Custom. High and Low Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia, and New Zealand, 1600-1900*. New York: Cambridge University Press.
- Kawharu, Sir Hugh, ed. (2003), *Conflict and Compromise. Essays on the Maori Since Colonisation*. Auckland, p. 31.
- Kedward, Rod (2005), *France and the French. A Modern History*. New York: The Overlook Press.
- Kerins, Sean (1994), *Customary Fisheries*. Wellington: Te Ohu Kai Moana.
- Khan, L. Ali (1996), *The Extinction of Nation-States. A World Without Borders*. The Hague: Kluwer Law International.
- Knefla, A. & Westra, Haijo, ed. (2010), *Aboriginal Title and Indigenous Peoples. Canada, Australia and New Zealand*. Vancouver: University of British Columbia Press, pp. 7, 22-24, 192.
- Knop, Karen (2002), *Diversity and Self-Determination in International Law*. Cambridge: Cambridge University Press.
- Kuche, Denys (2004), *La notion de culture dans les sciences sociales*. Paris: Découverte
- Kymlicka, Will (1998a), *Finding Our Way: Rethinking Ethnocultural Relationships in Canada*. Toronto: Oxford University Press
- Kymlicka, Will (1989), *Liberalism, Community and Culture*. Oxford: Clarendon Press.
- Kymlicka, Will (1996a), *Multicultural Citizenship*. Oxford: Clarendon Press.

- Kymlicka, Will, ed. (1996b), *The Rights of Minority Cultures*. Oxford: Oxford University Press, pp. 1-54, 79-114, 123-286, 321-375.
- Kymlicka, Will (1998), *Finding Our Way*. Oxford: Oxford University Press.
- Kymlicka, Will (2001), *Policies in Vernacular. Nationalism, Multiculturalism and Citizenship*. Oxford: Oxford University Press.
- Kymlicka, Will (2002), *Contemporary Political Philosophy*. Oxford: Oxford University Press.
- Lacouture, Joseph (1940), *La politique religieuse de la revolution*. Paris: Éditions Auguste Picard.
- Lafargue, Régis (2003), *La coutume judiciaire en Nouvelle-Calédonie*. Aix-en-Provence: Presses universitaires d'Aix-Marseille.
- Lâm, Maivân Clech (2000), *In the Edge of the State. Indigenous Peoples and Self-Determination*. Ardsley: Transnational Publishers.
- Lawrence, Bonita (2004), *Real Indians and the Others. Mixed-Blood Urban Native Peoples and Indigenous Nationhood*. Lincoln: University of Nebraska Press.
- Le Conseil d'Etat de l'an huit à notre jour. *Libre jubilaire de deuxième centenaire* (1999). Paris: Adam Biro.
- Légrand, Pierre & Munday, Roderick, ed. (2003), *Comparative Legal Studies: Traditions and Transitions*. Cambridge: Cambridge University Press, pp. 3-395.
- Leslie, John F. & Maguire, Ron (1978), *The Historical Development of the Indian Act*. Ottawa: Indian and Northern Affairs.
- Little Bear, Leroy & Boldt, Menno & Long, J. Anthony (1984), *Pathways to Self-Determination. Canadian Indians and the Canadian State*. Toronto: University of Toronto Press.
- Locke, John, *The Two Treatises of Government* (1988). Cambridge: Cambridge University Press.
- Loukacheva, Natalia (2007), *The Arctic Promise. Legal and Political Autonomy of Greenland and Nunavut*. Toronto: University of Toronto Press.
- Lowe, Vaughan (2007), *International Law*. Bodmin: Oxford University Press
- Luchaire, François (2000), *Le statut constitutionnel de la Nouvelle-Calédonie*. Paris: Economica.
- Macedo & Buchanan, *Secession and Self-Determination*.
- Machellen, Nic (2010), *Under a New Flag? Defining Citizenship in New Caledonia*. Canberra: The Australian National University.
- Macka, Roger & Fleras, Angie (2005), *The Politics of Indigeneity. Challenging the State in Canada and Aotearoa New Zealand*. Otago.
- Macklem, Patrick (2001), *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press.
- Maddex, Robert L. (2008), *Constitutions of the World*. Washington, D.C.: CQ Press, pp. 154-158, 315-318, 82-86.
- Malberg, Carré de (1931), *La loi, expression de la volonté générale*. Paris: Librairie de Recueil Sirey.
- Maori Custom and Values in New Zealand (2001). Wellington: Law Commission.
- Maori Incorporations. A Guide. *Te Ture Whenua Maori Act 1993* (2002). Wellington: Te Tari Kooti.

- Marrani, David (2013), *Dynamics in the French Constitution. Decoding French Republican Ideas*. New York: Routledge.
- Mattila, Heikki E.S. (2006), *Comparative Legal Linguistics*. Ashgate: Aldershot.
- McCormick, D. Neil & Summers, Robert S., ed. (1997), *Interpreting Precedents. A Contemporary Study*. Aldershot: Ashgate, pp. 103-139.
- McHugh, Paul (1991), *The Maori Magna Charta. New Zealand Law and the Treaty of Waitangi*. Oxford: Oxford University Press.
- McHugh, P.G. (2004), *Aboriginal Societies and the Common Law. A History of Sovereignty, Status and Self-Determination*. Oxford: Oxford University Press.
- McInnis, Edgar (1969), *A Political and Social History*. Toronto: Holt, Rinehart & Winston.
- McKey, Liam (2011), *Waka Umanga: Has the Government Missed the Boat on Maori Collective Assets Management?* LL.M. Thesis, University of Otago.
- McNeil, Kent (1989), *Common Law Aboriginal Title*. Oxford: Clarendon Press.
- Menski, Werner (2009), *Comparative Law in a Global Context. The Legal Systems of Asia and Africa*. Cambridge: Cambridge University Press.
- Meredith, Paul (2004), *Urban Maori as "New Citizens": The Quest for Recognition and Resources*. Hamilton: University of Waikato.
- Merryman, J.H. (1985), *The Civil Law Tradition: an Introduction to the Legal Systems of Western Europe and Latin America*. Stanford: Stanford University Press.
- Metcalf, W, ed. (1982), *Understanding Canada: A Multidisciplinary Introduction to Canadian Studies*. New York: New York University Press.
- Miévilly, Sabine (2002), *Pourquoi maintenir les DOM dans la République française? Analyse géopolitique à partir du cas guyanais*. Cayenne: Ibis Rouge Éditions.
- Miller, Bruce G. (2000), *The Problem of Justice. Tradition and Law in the Coastal Salish World*. Lincoln: University of Nebraska Press.
- Miller, J.R. (2006), *Shingwauk's Vision. A History of Native Residential Schools*. Toronto: University of Toronto Press.
- Minority Rights Group, ed. (1994), *Polar Peoples. Self-Determination & Development*. London: MRP, pp. 105-146.
- Miquel, Pierre (1976), *Histoire de la France de Vercingétorix à Charles de Gaulle*. Paris: Librairie Arthème Fayard
- Montaigne, Michel de (1965), *Les essais*. Paris: Presses universitaires de France.
- Montesquieu, Charles Louis de Secondat, *The Spirit of Laws* (1977). Berkeley: University of California Press.
- Morange, Jean (1988), *La déclaration des droit de l'homme et du citoyen*. Paris: Presses universitaires de France.
- Moreau, Jacques (1995), *Administration régionale, départementale et municipale*. Paris: Éditions Dalloz
- Morton, Arthur S. (1938), *History of Prairie Settlement and Dominion Lands Policy*. Toronto: Macmillan
- Morse, Bradford W. (1985), *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*. Ottawa: Carleton University Press Inc.
- Mulholland, R.D. (1985), *Introduction to the New Zealand Legal System*. Wellington: Butterworths.

- Musgrave, Thomas D. (1997), *Self-Determination and National Minorities*. Oxford: Clarendon Press
- Mutu, Margaret (2011), *The State of Māori Rights*. Wellington: Huia Publishers.
- Nelken, David & Feest, Johannes, ed. (2003), *Adapting Legal Cultures*. Portland: Hart Publishing, pp. 7-49, 71-90.
- Newbury, Colin (1980), *Tahiti Nui. Change and Survival in French Polynesia 1767-1945*. Honolulu: The University of Hawaii Press.
- Nowak, Manfred & Ermacora, Felix (2005), *UN Covenant on Civil & Political Rights: CCPR Commentary*. Kehl: NP Engel.
- Ntumu, Michael A., ed. (1993), *South Pacific Islands Legal Systems*. Honolulu: University of Hawaii Press, pp. 3-24, 158-178, 296-313, 595-644.
- Olthuis & Kleer, Nancy & Townshend (2008), *Aboriginal Law Handbook*. Toronto: Thomson Carswell.
- O'Malley, Vincent (1998), *Agents of Autonomy. Maori Committees in the 19<sup>th</sup> Century*. Wellington: Huia Publishers.
- Oppenheim, Lassa (1905), *International Law, Vol. 1: Peace*. New York: Longmans, Green and Co.
- Orange, Claudia (1993), *The Treaty of Waitangi*. Wellington: Bridget Williams Ltd.
- O'Sullivan, Dominic (2007), *Beyond Biculturalism. The Politics of an Indigenous Minority*. Wellington: Huia Publishers.
- Örücü, Esin, & Attwooll, Elspeth & Coyle, Sean, ed. (1996), *Studies in Legal Systems: Mixed and Mixing*. The Hague: Kluwer Law International, pp. 1-17, 63-68, 207-268, 313-352.
- Örücü, Esin (2004), *The Enigma of Comparative Law*. Leiden: Martinus Nijhoff Publishers.
- Örücü, Esin & Nelken, David, ed. (2007), *Comparative Law. A Handbook*. Portland: Hart Publishing, pp. 3-35, 49-105.
- Otis, Ghislain, ed. (2005), *Droit, territoire et gouvernement des peuples autochtones*. Québec: Presses de l'Université Laval, pp. 38-187.
- Paden, William E. (1992), *Interpreting the Sacred. Ways of Viewing Religion*. Boston: Beacon Press.
- Palmer, Matthew (2008), *The Treaty of Waitangi and New Zealand's Law and Constitution*. Wellington: Victoria University Press.
- Payé, Jeanne (2001), *Du partage des compétences au partage de la souveraineté: de territoires d'outre-mer au "pays d'outre-mer"*. Aix-en-Provence: Presses universitaires d'Aix-Marseille.
- Peyrat, Didier & Gougis, Marie-Alice & Chine, Chow (1998), *L'accès au droit en Guyane*. Cayenne: Ibis Rouge Éditions.
- Pozzo, Barbara & Jacometti, Valentina, ed. (2006), *Multilingualism and the Harmonisation of European Law*. Alphen Aan den Rijn: Kluwer Law International, pp. 69-72.
- Purich, Donald (1968), *The Metis*. Toronto: James Lorimer.
- Rau, Éric (2005), *Institutions et coutumes Canaques*. Paris: L'Harmattan.
- Rau, Éric (2006), *La vie juridique des indigènes des Îles Wallis*. Paris: Harmattan.
- Rawls, John (1971), *A Theory of Justice*. Cambridge: Belknap.

- Regnault, Jean-Marc, ed. (2003), *François Mitterrand et les territoires Françaises du Pacifique 1981-1988. Mutations, drames et recompositions. Enjeux internationaux et la France des Françaises*, Paris: Les Indes Savantes, p. 23.
- Regnault, Jean-Marc & Fayaud, Viviane, ed. (2008), *New Caledonia, 20 Years on: 1988-2008. Political and Social Change in the French Pacific Island*. Paris: Société de l'histoire d'outre-mer, p. 155.
- Remwick, William, ed. (1991), *Sovereignty and Indigenous Rights. The Treaty of Waitangi in International Contexts*. Wellington: Victoria University Press, pp. 49-66, 122-129.
- Rey-Debove, Josette & Rey, Alain, ed. (2008), *Le nouveau Petit Robert. Dictionnaire alphabétique et analogique de la langue française*. Paris: Sejer, p. 182.
- Richardson, Benjamin J. & Imai, Shin & McNeil, Kent, ed. (2009), *Indigenous Peoples and the Law. Comparative and Critical Perspectives*. Portland: Hart Publishing, pp. 146-448.
- Riles, Annelise, ed. (2001), *Rethinking the Masters of Comparative Law*. Portland: Hart Publishing, pp. 54-55, 199.
- Ringold, Dena (2005), *Asserting for Diversity. Political Design and Maori Development in Aotearoa New Zealand*. Wellington: Fulbright New Zealand
- Ritchie, James (1995), *Becoming Bicultural*. Wellington: Huia Publishers
- Rouault, Marie-Christine (2007), *Droit administrative*. Paris: Gualino éditeur
- Roberts, Stephen H. (1963), *The History of French Colonial Policy 1870-1925*. London: Frank Cass & Co., Ltd.
- Roche, Jean & Pouille, André (1993), *Libertés publiques*. Paris: Éditions Dalloz.
- Rodriquez, Liliane (2006), *La langue française au Manitoba. Histoire et évolution lexicométrique*. Tübingen: Niemeyer.
- Rosen, Lawrence (2006), *Law as Culture. An Invitation*. Princeton: Princeton University Press.
- Rouland, N. & Pierré-Caps, S. & Poumarède, J. (1996), *Droit des minorités et des peuples autochtones*. Paris: Presses universitaires de France.
- Rousseau, Jean-Jacques, *Du contrat social ou principes du droit politique* (1960). Paris: Éditions Garnier Frères.
- Samson, Colin (2003), *A Way of Life which does not exist: Canada and the Extinguishment of the Innu*. St. Johns: Institute of Social and Economic Reseach. The Memorial University of Newfoundland.
- Sawchuk, Joe, ed. (1981), *Métis Land Rights in Alberta: A Political History*. Edmonton: Métis Association of Alberta, p. 166.
- Schmitt, Carl (1928), *Verfassungslehre*. Berlin: Duncker & Humblot, pp. 75-76.
- Scott, Colin H., ed. (2001), *Aboriginal Autonomy and Development in North Quebec and Labrador*. Vancouver: UBC Press, pp. 52-53,
- Sealey, D. Bruce & Lassier, Antoine S. (1997), *The Métis. Canada's Forgotten People*. Winnipeg: Pemmican Publishers Inc.
- Sem, G. (1996), *Introduction au statut juridique de la Polynésie française*. Paris: DDOM.
- Sharp, Andrew (1998), *Justice and the Māori*. Auckland: Oxford University Press.
- Sharp, Andrew & McHugh, Paul, ed. (2001), *Histories, Power and Loss: Voices of the Past of Aotearoa New Zealand*. Wellington: Bridget Williams Books, pp. 206-211.

- Sheff, Leon (2000), *The Future of Tradition. Customary Law, Common Law and Legal Pluralism*. London: Frank Cass.
- Sibille, Jean (2000), *Les langues régionaux*. Paris: Flammarion.
- Siikala, Jukka (1982), *Cult and Conflict in Tropical Polynesia. A Study of Traditional Religion, Christianity and Nativistic Movements*. Helsinki: Helsingin Liikekirjapaino Oy.
- Simpson, Jeffrey (1994), *Faultlines. Struggling for a Canadian Vision*. Toronto: HarperCollins Publishers Ltd.
- Sissons, Jeffrey (1999), *Nation and Destination: Creating Cook Islands Identity*. Suva: Oceania Printers Ltd.
- Smith, Philippa Mein (2005), *A Concise History of New Zealand*. Cambridge: Cambridge University Press.
- Smith, S. Percy (1993), *Niue: The Island and its People*. Suva: University of South Pacific
- Smith, Whitney & Neubecker, Ottfried (1981), *Wappen und Flaggen Aller Nationen*. München: Battenberg.
- Smits, Jan, ed. (2006), *Transnational Law. Encyclopedia of Comparative Law*. London: Edward Elgar Publishing, p. 744.
- Snow, Dean R. (1996), *The Iroquois*. Cambridge (Mass.): Blackwell.
- Spiliopoulou Åkermark, Athanasia (1997), *Justifications of Minority Protection in International Law*. Iustus Förlag, Uppsala 1997.
- Spiller, Peter & Finn, Jeremy & Boast, Richard, ed. (2001), *A New Zealand Legal History*. Wellington: Brookers, pp. 132-185.
- Steiner, Eva (2002), *French Legal Method*. Oxford: Oxford University Press.
- Strayer, Barry L. (1988), *The Canadian Constitution and the Courts. Function and Scope of Judicial Review*. Toronto: Butterworths.
- Suksi, Markku, ed. (1998), *Autonomy: Applications and Implications*. Hague: Kluwer International, pp. 7-45, 79-199.
- Summers, James (2004), *The Idea of the People. A Right of Self-Determination, Nationalism and the Legitimacy of International Law*.
- Taylor, Charles (1992), *Multiculturalism and "The Policies of Recognition"*. Princeton (N.J.): Princeton University Press
- Tennant, Paul (1990), *Aboriginal Peoples and Politics*. Vancouver: University of British Columbia Press.
- The European Charter for Regional or Minority Languages and the French Dilemma: Diversity v. Unicity – Which Language(s) for the Republic? (2004). Strasbourg: Council of Europe Publishing.
- Thwaites, Ruben Gold, ed. (1896), *Jesuit Relations and Allied Documents*. Cleveland: Burrows Bros., Vol. VIII, XII, XVIII, XXI, L.
- Titley, E. Brian (1986), *A Narrow Vision. Duncan Campbell Scott and the Administration of Indian Affairs in Canada*. Vancouver: University of British Columbia Press.
- Todorov, Tzvetan (1993): *On Human Diversity: Nationalism, Racism and Exotism in French Thought*. Cambridge (Mass.): Harvard University Press
- Tsagourias, Nicholas (2007), ed., *Transnational Constitutionalism. International and European Perspectives*. Cambridge: Cambridge University Press, pp. 17-43.
- Tuori, Kaarlo (2002), *Critical Legal Positivism*. Burlington: Ashgate Publishing Company.

- Twining, William (2001), *Globalisation and Legal Theory*. Evanston: Northwestern University Press.
- Varenes, Ferdinand de (1996), *Language, Minorities and Human Rights*. The Hague: Martinus Nijhoff Publishing.
- Venter, François (2000), *Constitutional Comparison*. Cape Town: Juta & Co., Ltd
- Vernier, Dominique (1993), *La justice en France*. Paris: Éditions la découverte.
- Vigne, Axelle (2000), *Les terres coutumières et le régime foncier en Nouvelle-Calédonie*. L'Université Paris II.
- Watson, Alain (1993), *Legal Transplants. An Approach to Comparative Law*. Athens: University of Georgia Press.
- Webb, Julian (2009), *Dictionary of Law*. London: Penguin Books.
- Weller, Marc, ed. (2010), *Political Participation of Minorities. A Commentary on International Standards and Practices*. Oxford: Oxford University Press, p. 649.
- White, Jerry P. & Maxim, Paul & Spence, Nicholas (2004), *Permission to Develop. Aboriginal Treaties, Case Law and Regulations*. Toronto: Thompson Educational Publishing, Inc.
- Williams, Raymond (1983), *Culture*. Glasgow: Fontana Paperbacks.
- Wilson, Frederica & Mullet, Melanie (2008), *Métis – Crown Relations: Rights, Identity, Jurisprudence and Governance*. Toronto: Irmin Law.
- Young, Grant & Belgrave, Michael & Bennion, Tom (2005), *Native and Maori Land Legislation in the Superior Courts, 1840-1980*. Auckland: Massey University.
- Zaslow, Morris (1988), *The Northward Expansion of Canada 1914-1967*. Toronto: McClelland and Stewart.
- Zweigert, Konrad & Kötz, Heinz (1998), *An Introduction to Comparative Law*. Oxford: Oxford University Press

## Articles

- Agniel, Guy (2008), *Statut coutumier Kanaque et juridiction du droit commun en Nouvelle-Calédonie*. *Revue aspects*, 3/2008, pp. 81-96.
- Aho, Linda Te (2006), *Contemporary Issues in Māori Law and Society*. *Mana Motuhake, Mana Whenua*. 14 *Waikato Law Review*, pp. 102-119.
- Aho, Linda Te (2007), *Contemporary Issues in Māori Law and Society*. *Crown Forests, Climate Change and Consultation for More Meaningful Relationships*. 15 *Waikato Law Review*, pp. 16-37.
- Aho, Linda Te (2008), *Contemporary Issues in Māori Law and Society*. *The Tangled Web of Treaty Settlements Emissions Trading, Central North Island Forests, and the Waikato River*. 16 *Waikato Law Review*, pp. 229-250.
- Ahu, Tui & Hoarc, Rachel & Stephens, Māmari (2011), *Utū: Finding a Balance for the Legal Māori Dictionary*. 42 *Victoria University of Wellington Law Review*, pp. 201-220.
- Aimot, Olivier & Tamole, Antonia (2007), *Traitement coutumier des problèmes fonciers à Wallis*. *Comparative Law Journal of the Pacific*, pp. 49-59.
- André, Sylvie (2004), *L'Union européenne et la zone du Pacifique*. 28 *Victoria University of Wellington Law Review*, pp. 595-610.

- Angelo, A.H. (1995), Tokelau Constitutional Development. 8 Otago Law Review, pp.
- Angelo, Tony (1999), Establishment of Nation of Kikilaga Nenefu. 30 Victoria University of Wellington Law Review, pp. 75-90.
- Arnoux, Irma (1996), Les Amérindiens dans le département de la Guyane: problèmes juridiques et politiques. *Revue du droit public et de la science politique en France et à l'étranger*, pp. 1615-1652.
- Baird, Natalie & Glazebrook, Susan & Holden, Sasha (2009), New Zealand: Country Report on Human Rights. 6 Victoria University of Wellington Law Review, pp. 215-236.
- Barsh, Russel Lawrence (1997), The Supreme Court's Van der Peet Trilogy: Naive Import and Ropes of Sand. 42 McGill Law Journal 9/97, pp. 993-1009.
- Bayefsky, A.F. (1982), The Human Rights Committee and the Case of Sandra Lovelace. 20 Canadian Yearbook of International Law, pp. 244-265.
- Bell, J.S. (1995), English Law and French Law – Not so Different? 48 Current Legal Problems, pp. 63-101.
- Benda-Beckmann, Franz von (2002), Who's Afraid of Legal Pluralism? 47 Journal of Legal Pluralism and Unofficial Law, pp. 37-82.
- Benoît-Rohmer, Florence (2001), Les langues officieuses de la France. *Revue Française du Droit Constitutionnel* 1/2001, pp. 3-29.
- Bernier, Chantal (1986), Les droits territoriaux des Inuit au large des côtes et le droit international. 24 *Annuaire canadien de Droit international*, pp. 314-334.
- Boage, L.J. (1952), Première législation Tahitienne. Le Code Pomaré de 1819. Historique et traditionnelle. *Journal de la Société des océanistes*, 8/1952, pp. 5-26.
- Boast, R.P. (2010), Contextualising the Decisions of the Native Land Court: the Chatham Islands Investigations of 1870. 41 Victoria University of Wellington Law Review, pp. 623-652.
- Braibant, G. (1994), Les problèmes actuels de codification, *Revue Française du Droit Administratif*, 1/1994, pp. 663-693.
- Cadoux, Charles (1989), L'accès de la Polynésie Française à l'autonomie interne. Point d'aboutissement ou nouvelle base de départ? *Revue de droit public et de la science politique en France et à l'étranger*, 2/1989, pp. 345-398.
- Christie, Gordon (2000), Justifying Principles of Treaty Interpretation. 26 *Queen's Law Journal*, pp. 143-224.
- Coyle, Michael (2006), Addressing Aboriginal Land Rights in Ontario: An Analysis of Past Policies and Options for the Future. 32 *Queen's Law Journal*, pp. 796-845.
- Croisat, Maurice (1999), Le fédéralisme asymétrique: l'expérience canadienne. *Revue française de droit constitutionnel* 37, pp. 29-48.
- Debbasch, Roland (1996) L'indivisibilité de la République et l'existence de statuts particuliers en France. *Revue française de droit constitutionnel* 30, pp. 361-376.
- Debène, Marc (2011), Les langues de Polynésie Française et la Constitution: liberté, égalité, identité. 42 Victoria University of Wellington Law Review, pp. 307-329.
- Dickson, Timothy (2004), Self-Government by Side Agreement? 49 McGill Law Journal, pp. 419-466.
- Donlan, Seán Patrick (2010), Remembering: Legal Hybridity and Legal History. *Comparative Law Review*, vol. 2, pp. 1-23.



- Durie, E.T. (1996), Will Settlers Settle? Cultural Conciliation and Law. 8 Otago Law Review, pp. 467-488.
- Elias, Dame Sian (2005), Equality under Law. 13 Waitangi Law Review, pp. 1-11.
- Fabbrini, Federico (2008), Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation. German Law Journal, vol. 9, pp. 1297-1312.
- Faberon, Jean-Yves (2001). Le projet de révision constitutionnelle relative à la Polynésie française et à la Nouvelle-Calédonie adopté par les assemblées parlementaires en 1999. Revue française du droit constitutionnel 63, pp. 381-396.
- Faberon, Jean-Yves (2006), Nouvelle-Calédonie et Polynésie Française: des autonomie différentes. Revue française de droit constitutionnel 68, pp. 691-712.
- Fabre, Michel-Henry (1982), L'unité et l'invisibilité de la République, réalité? fiction? Revue de droit public 98, pp. 603-619.
- Flanagan, Tom & Alcantara, Christopher (2004), Individual Property Rights on Canadian Reserves. 29 Queen's Law Journal, pp. 489-532.
- Goldstein, Gerald (1990), Perspectives canadiennes de droit international et privé relatives à la maîtrise du territoire. 28 Annuaire canadien de Droit international 1990, pp. 29-116.
- Griffiths, John (1986), What is Legal Pluralism? 24 Journal of Legal Pluralism, pp. 1-55.
- Groarke, Paul (2009), Legal Volumes from the Arctic College's Interviewing Inuit Elders Series. 47 Osgoode Hall Law Journal, pp. 787-805.
- Gründler, Tatiana (2007), La République française, une et indivisible? Revue du droit public 123, pp. 445-477.
- Guiselin, Emmanuel-Pie (2004), Les élections en Polynésie française: des nouvelles règles électorales. 19 Victoria University of Wellington Law Review, pp. 505-524.
- Hoecke, Mark van & Warrington, Mark (1998), Legal Cultures and Legal Paradigms: Towards a New Model for Comparative Law. 47 International and Comparative Law Quarterly, pp. 495-536.
- Husa, Jaakko (2003), Farewell to Functionalism or Methodological Tolerance? *Rechtszeitschrift für ausländisches und internationales Privatrecht* 67:3, pp. 419-447.
- Husa, Jaakko (2011), The Method is Dead, Long Live the Methods – European Polynomia and Pluralist Methodology. *Legisprudenc*, Vol. 5, pp. 249-271.
- Husa, Jaakko (2012), Legal Culture vs. Legal Tradition – Different Epistemologies? Maastricht European Private Law Institute Working Paper No. 2012/18.
- Hutchinson, Celeste (2007), Case Comment on R. v. Kapp: The Analytical Framework for Section 25 of the Charter. 52 McGill Law Journal, pp. 173-190.
- Joseph, Robert (2009), Recreating Legal Space for Fundamental Law of Aotearoa/New Zealand, 17 Waikato Law Review, pp. 74-97.
- Kingsbury, Benedict (2001), Reconciling Five Competing Conceptual Structures of Indigenous People's Claims in International and Comparative Law. 34 New York University Journal of International Law and Politics, pp. 189-250.
- Knight, Trevor (2001), Electoral Justice for Aboriginal People in Canada. 46 McGill Law Journal, pp. 1063-1116.
- Lampué, Pierre (1984), Le régime constitutionnel des territoires d'outre-mer. Revue du droit public et de la science politique en France et à l'étranger, 1/1984, pp. 7-20.

- Luchaire, François (1995), Le juge constitutionnel et le régime législatif des territoires d'outre-mer. *Revue du droit public et de la science politique en France et à l'étranger*, 4/1995, pp. 1621-1645.
- Luchaire, François (2000), Le Conseil constitutionnel devant la loi du pays en Nouvelle-Calédonie: commentaire de la décision du 27 janvier 2000. *Revue du droit public et de la science politique en France et à l'étranger*, 2/2000, pp. 553-562.
- Magallanes, Catherine Iorns (2011), The Use of Tangata Whenua and Mana Whenua in New Zealand Legislation: Attempts at Cultural Recognition. 42 *Victoria University of Wellington Law Review*, pp. 259-276.
- Magnet, Joseph Elliott (2001), National Minorities and the Multinational State. 27 *Queen's Law Journal*, pp. 207-236.
- Magnon, Xavier (2008), Juridprudence du Conseil constitutionnel octobre-décembre 2007. *Revue française de Droit constitutionnel* 74, pp. 283-310.
- Matutano, Edwin (2005), Actualité d'un notion en mutation: les << lois de souveraineté >>. *Revue française de droit constitutionnel* 63, 2005, pp. 517-537.
- McGuire, Jeremy (1993), The Status and Functions of the Maori Land Court. 8 *Otago Law Review*, pp. 125-143.
- McIntosh, Constance (2009), From Judging Culture to Taxing "Indians". Trying a Legal Discourse of the Indian Mode of Life. 47 *Osgood Hall Law Journal*, pp. 399-437.
- Michaels, Ralph (2010), The Functional Method of Comparative Law. *The Oxford Handbook of Comparative Law*, pp. 339-382.
- Michalon, Thierry (1982), La République française, une fédération qui s'ignore? *Revue du droit public et de la science politique en France et à l'étranger*, 5-6/1982, pp. 623-688.
- Milroy, Stephanie (2000), The Maori Fishing Settlement and the Loss of Rangatiratanga. 8 *Waikato Law Review*, pp. 63-86.
- Morris, Grant (2004), James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty during the Latter Half of the 19<sup>th</sup> Century. 35 *Victoria University of Wellington Law Review*, pp. 117-144.
- Otis, Ghislain (2009): La pluralité des cultures juridiques et des langues autochtones dans accords d'autonomie gouvernementale au Canada. 54 *McGill Law Journal*, pp. 237-256.
- Pastorel, Jean-Paul (2011), Paradoxes sur les communes dans les collectivités d'outre-mer et en Nouvelle-Calédonie. *Revue de droit public et de la science politique en France et à l'étranger* 3/11, pp. 605-636.
- Peres, Jean (2002), Application de lois et regulations en Polynésie Française – repartition des compétences. 33 *Victoria University of Wellington Law Review*, pp. 181-208.
- Potaka, Tama (1999), A Tribal Agendum for Local Government. 29 *Victoria University of Wellington Law Review*, pp. 111-138.
- Radan, Peter (2003), "You Can't Always Get What You Want": The Territorial Scope of the Independent Quebec. 41 *Osgoode Hall Law Journal*, pp. 629-663.
- Rayboud, Corinne (2001), Commentaires sur le premier code des lois de Huahine: E Ture No Huahine (1822-1823). 40 *Victoria University of Wellington Law Review*, pp. 767-802.
- Sage, Yves-Louis (2008), Observations sur la situation politique de la Polynésie Française au travers du quelques principes de bonne gouvernance énoncés par le PNUD 1997, et la PAC Plan 2006-2011. 34 *Victoria University of Wellington Law Review*, pp. 583-606.

- Stanley, George (1950), The First Indian 'Reserves' in Canada. 4 *Revue d'histoire de l'Amérique Française*, pp. 178-210.
- Stephens, Māmari (2001), A return to the Tohunga Suppression Act 1907. 40 *Victoria University of Wellington Law Review*, pp. 853-914.
- Stephens, Māmari (2011), Taonga, Rights and Interests: Some Observations on Wai 262 and the Framework of Protections for the Māori Language. *NZACL Yearbook* 16, pp. 63-82.
- Stokes, Evelyn (2000), Modern Treaty Making With First Nations in British Columbia. 8 *Waikato Law Review*, pp. 117-152.
- Stone, Thomas (1975), Legal Mobilisation and Legal Penetration: The Department of Indian Affairs and the Canada Party at St. Regis, 1876-1918. *Ethnohistory*, Vol. 22(4), pp. 375-408.
- Tamahana, Brian (2008), Understanding Legal Pluralism: Past to Present, Local to Global. 30 *Sydney Law Review*, pp. 375-411.
- Tate, John William (2005), Tamihana Korokai and Native Title: Hearin the Imperial Breach. 13 *Waikato Law Review*, pp. 108-144.
- Thibault, Pierre (1998), Le rapport Dussault-Erasmus et le droit à l'autonomie gouvernementale des peuples autochtones. Synthèse et commentaire. 9 *National Journal of Constitutional Law* 1997-1998, pp. 159-249.
- Tobias, John L. (1976), Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy. *Western Canadian Journal of Anthropology*, VI, 2, pp. 39-53.
- Toki, Valmaine (2005), Future Therapeutic Jurisprudence Provide a Public Forward for Maori? 13 *Waikato Law Review*, pp. 169-189.
- Townend, Andrew (2003), The Strange Death of the Realm of New Zealand: The Implication of the New Zealand Republic to the Cook Islands and Niue. 34 *Victoria University of Wellington Law Review*, pp. 571-608.
- Turcotte, Denis (1982), Politique linguistique et modalités d'application en Polynésie Française, pp.
- Twining, William (2009), Normative and Legal Pluralism: A Global Perspective. 20 *Duke Journal of Comparative and International Law*, pp. 473-518.
- Vannier, Catherine (2007), Les litiges fanceis en Tahiti: examen critique des problems. *Comparative Law Journal of the Pacific*, pp. 81-86.
- Walker, R.J. (1984), The Political Development of the Maori People of New Zealand. Conference of Comparative Models of Political Development and Aboriginal Self-Determination. Calgary.
- Weber, Lisa D. (2004), Opening Pandora's Box: Métis Aboriginal Rights in Alberta. 67 *Saskatchewan Law Review*, pp. 315-338.
- Webber, Jeremy (2009), The Grammar of Customary Law. 54 *McGill Law Journal*, pp. 579-626.
- Wilkins, Kerry (2000), "Still Crazy After All These Years": Section 88 of the Indian Act at Fifty. 38(2) *Alberta Law Review*, pp. 458-478.
- Williams, David V. (2006), Indigenous Customary Rights and the Constitution of Aotearoa-New Zealand. 14 *Waikato Law Review*, pp. 120-135.

- Wilson, Margaret (1997), *The Reconfiguration of New Zealand's Constitutional Institutions: The Transformation of Tino Rangatiratanga into Political Reality*. 5 *Waikato Law Review*, pp. 17-34.
- Yablon-Zug, Marcia (2008), *Gone but not Forgotten. The Strange Afterlife of the Jay Treaty's Indian Free Passage Right*. 33 *Queen's Law Journal*, pp. 565-616.

## **Other Sources**

- Adoption des enfants Polynésiens – DAP des enfants fa'a'amu. [ajpfadoption.blogspot.fi](http://ajpfadoption.blogspot.fi)
- CBC/Radio-Canada. [www.cbc.radio-canada.ca](http://www.cbc.radio-canada.ca)
- Comparison of Provincial and Territorial Governments. [www.assembly.gov.nt.com](http://www.assembly.gov.nt.com)
- Constitutional Advisory Panel. [www.cap.govt.nz](http://www.cap.govt.nz)
- Cook Islands Government. [www.cook-islands.gov.ck](http://www.cook-islands.gov.ck)
- Difference Between Canadian Provinces and Territories. [www.pco-bcp.gc.com](http://www.pco-bcp.gc.com)
- ESCAP Virtual Conference. [www.unescap.org](http://www.unescap.org)
- France la première. [www.france.la1ere.fr](http://www.france.la1ere.fr)
- Guide to Métis Hunting and Fishing. [www.environment.gov.sk.ca](http://www.environment.gov.sk.ca)
- Guyane Française: composition ethnolinguistique. [www.tlfy.ulaval.ca](http://www.tlfy.ulaval.ca)
- L'histoire des institutions à Wallis et Futuna. [www.ca-noumea.justice.fr](http://www.ca-noumea.justice.fr)
- Histoire du français. [www.tlfq.ulaval.ca](http://www.tlfq.ulaval.ca)
- History of the Indian Act (1978). [www.sicc.sk.ca](http://www.sicc.sk.ca)
- Home on Native Land, Dominion, 19 April 2006. [www.dominionpaper.ca](http://www.dominionpaper.ca)
- Indian and Inuit Elementary and Secondary Education (1991). DIAND.
- INSEE. Institut de la statistique et des études économiques. Gouvernement de la France
- ISEE. Institut de la statistique et des études économiques Nouvelle-Calédonie.
- International Work Group for Indigenous Affairs. [www.iwgia.org](http://www.iwgia.org)
- Judicial Committee of the Privy Council. [www.jcpc.gov.uk](http://www.jcpc.gov.uk)
- Keith, Sir Kenneth (2008), *On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government*. <http://cabinetmanual.cabinetoffice.govt.nz>
- Land Entitlement Fact Sheet. [www.aadnc-aandc.gc.ca](http://www.aadnc-aandc.gc.ca)
- Leclerc, Jean (2007), *Histoire de la langue française*. Université de Laval. [www.tlfy.ulaval.ca](http://www.tlfy.ulaval.ca)
- Levêques, Pierre (2005), *La separation Église – État: Loi 1905*. IUMF Dijon. <http://cpe.ac-dijon.fr>
- Les collectivités locales en chiffres 2008. [www.dgcl.interieur.gouv.fr](http://www.dgcl.interieur.gouv.fr)
- Métis National Council. [www.metisnation.ca](http://www.metisnation.ca)
- Ministry of Education. [www.minedu.govt.nz](http://www.minedu.govt.nz)
- Ministry of Foreign Affairs and Trade. [www.mfat.govt.nz](http://www.mfat.govt.nz)
- Ministry of Health. [www.health.govt.nz](http://www.health.govt.nz)
- Niue Government. [www.gov.nu](http://www.gov.nu)
- Nouvelle-Calédonie, Université de Laval. [www.tlfq.ulaval.ca](http://www.tlfq.ulaval.ca)

Nunatsiavut Government. [www.nunatsiavut.com](http://www.nunatsiavut.com)  
Office of Treaty Settlements. [www.ots.govt.nz](http://www.ots.govt.nz)  
PM cites “sad chapter” in apology to residential schools, Canadian Broadcast Company.  
11 June 2008. [www.cbc.ca](http://www.cbc.ca)  
Préfecture des Îles Wallis-et-Futuna. [www.wallis-et-futuna.pref.gouv.fr](http://www.wallis-et-futuna.pref.gouv.fr)  
Préfecture de la Région Guyane. [www.guyane.pref.gouv.fr](http://www.guyane.pref.gouv.fr)  
Recensement 2007 des langues (2008). Institut Statistique de la Polynésie française.  
Région Guyane. [www.cr-guyane.fr](http://www.cr-guyane.fr)  
Statistics Canada. [www.12.statcan.ca](http://www.12.statcan.ca)  
Statistics Canada. [www.40.statcan.ca](http://www.40.statcan.ca)  
Summary of Aajiiqatigiingniq (2000). [www.gov.nu.ca](http://www.gov.nu.ca)  
Supreme Court of Canada. [www.scc-csc.gc.ca](http://www.scc-csc.gc.ca)  
The Difference Between Provinces and Territories. [www.legassembly.gov.yk.ca](http://www.legassembly.gov.yk.ca)  
Tokelau Leaders Confident of Stronger Backing for Next Referendum on Self-  
Determination, 13 March 2007. [www.rnzl.com](http://www.rnzl.com)  
2006 Census Data. [www.stats.govt.nz](http://www.stats.govt.nz)  
Un peu d’histoire. [www.ca-papeete.justice.fr](http://www.ca-papeete.justice.fr)  
What is multiculturalism. [www.pch.gc.ca](http://www.pch.gc.ca)