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Indigenous Peoples' Self-Determination and the Broken Tin Kettle Music of Human Rights and Liberal Democracy

Dominique Legros

INDIGENOUS PEOPLES' SELF-DETERMINATION AND THE BROKEN TIN KETTLE MUSIC OF HUMAN RIGHTS AND LIBERAL DEMOCRACY

Dominique Legros[*]

"Legal experts are always under the decisionist pressure to discuss normative questions with cases to be decided." – Jürgen Habermas[1]

I. INTRODUCTION

Fortunately, anthropologists do not face too many such decisionist constraints. So to be really serious, what truly democratic and innovative transitions could be enacted in North and South American nation-states for the benefits of indigenous groups which remain not only poor, not only politically and economically marginal, but also culturally outcast no matter how "postmodern" some of them have become and yet rightly refuse to be so considered.[2]

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* Concordia University, Montréal.

1. Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, *in* CHARLES TAYLOR ET AL., MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutman ed., 1994).

2. *Cf.* Dominique Legros, *First Nation Postmodern Cultures: (Re)Constructing the (De)Constructed and Celebrating the Changes*, *in* MIRROR WRITING: (DE)CONSTRUCTION OF NATIVE AMERICAN IDENTITY 125-54 (Thomas Claviez & Maria Moss eds., 2000).

The answer is as obvious as it is difficult to implement: State laws and legal apparatuses should be reformed to allow indigenous people to perpetuate, reproduce and freely let flourish and evolve their various distinct languages, cultures and contemporary definitions of the good life.

The aim of this Essay is to illustrate what this could entail within the limits of the question of the distinctiveness of culture. To achieve this, I take one example only: that of the Tutchone Indians of the central Yukon Territory in Canada with whom I have worked since 1972.[3] This Essay indicates in which way Charles Taylor and Michael Walzer's democratic liberalism 2 could partially accommodate the reproduction of indigenous cultures within the Canadian federal nation-state.[4] However, I also use other examples from the Tutchone traditions to illustrate how some key cultural traits which involve questions of divergent morality would not be readily accepted by liberalism 2. Thus, in this respect even liberalism 2 is presented as remaining a fetter for world cultural democracy. Finally, taking into account the culturally defined morality of liberal democracies, I indicate in which way human rights, which are presented as the bedrock of any democracy, are not culturally neutral and rest, in fact, on a univocal definition of the good life, which, in turn, leads to ethnocentrism.

II. THE LIFEWORLD AND GOOD LIFE OF AN INDIGENOUS NATION

Today, the Tutchone nations live in three villages scattered in an area as big as half of England *stricto sensu*. They count about one thousand inhabitants. Very few Euro-Canadians are settled among them.

To be brief, I leave aside the few ethnonihilist Tutchone who reject their own culture, and I focus on something as elementary as the maintenance and reproduction of their traditional family laws. Can this part of their culture be protected and fostered within a federal state such as Canada?

To begin, the key feature of the Tutchone social world is that the entire population is divided into two exogamous clans: the wolves and the

3. At this late stage in my ethnographic career, I talk about the Tutchone first people from the vantage point of Horizont Verschmelzung — Hans Gadamer's concept that translates as "fusion of horizons." This stage is reached when everyone explicitly discusses his/her horizon during an encounter. I bring a horizon conditioned by things like the travail of getting to understand their horizon, and them by the travail of grasping the terms of mine, and by the reciprocal anxieties of yesterday, before horizons could be fused. *Cf.* HANS G. GADAMER, TRUTH AND METHOD (1960).

4. Liberalism 2 as opposed to the high minded moral absolutism of procedural liberalism 1.

crows.[5] Members of the same clan cannot marry each other, even if they prove that they are not genealogically related in any degree (this is a case of strict clan exogamy). Members of a given clan must marry someone from the other clan, and ideally, if possible, a close cousin belonging to the opposed clan.[6]

The rule of strict clan exogamy is essential to the system.[7] However, it has always been and still is hard to enforce in the case of individuals who are not genealogically related. Perhaps because it was always so, a century ago, individuals who were discovered to have broken the rule, were sentenced to death. Their respective maternal uncle executed them (one case known with a full description of the execution). As a result of clan exogamy, each camp and each household includes members of the crow and wolf clans (at least husband and wife).

Moreover, descent is strictly matrilineal. Children belong exclusively to their mother's clan — and in no way to that of their father's. Adult males have and exercise final authority only over their sister's children — never over their own children with whom, as fathers, they have a relation not unlike the lighter one we have, in North-Atlantic and Latin cultures (N.A.L.C.) with our own nephews and nieces. Within Tutchone culture, there was and there still is no policing across generations above the relations between maternal uncles and nephews and nieces. As mothers' brothers are present or called upon only for important occasions, this gives women a considerable autonomy in their daily lives within their conjugal family and with their husbands.[8]

When a woman, young or old, does not want to remain a widow but can find no one to remarry, her husband's brother has the duty to take her as a wife and to support her. This is somewhat similar to the Biblical custom known as the levirate (Genesis 38:8; Deuteronomy 25:5-10) which is still honored by a few orthodox Jews. When a widower wishes to be

5. When a population is divided into only two such clans, the anthropological technical term for these two clans is two moieties (from the French moitié, meaning half). To keep the text as jargon free as possible I use "clan," just as contemporary Tutchone do.

6. Such as a mother's brother's daughter or a father's sister's daughter. This is technically known as a bilateral cross-cousin marriage system, this institution is very common in indigenous cultures in many parts of the world, as well as in some modern nation-states like India (in the southern part where it takes a matrilateral form) and where it is perfectly legal.

7. In 1973, George Billy from the Little Salmon band, one of my main collaborators, commented on the importance of the exogamy rule as follows: "If you let them break it, it's gonna spoil the whole world — I mean the whole people. That's why we had to kill those who broke it." By "whole world," he was clearly referring to the societal structure.

8. In N.A.L. cultures where divorced parents and single mothers are becoming more common, such a structure of brother/sister rights and duties could have advantages to keep a role for males in the societal reproduction cycle . . . But let us leave that open for another debate.

remarried but cannot find a woman, his wife's sister has the duty to take him as a new and eventually as a second husband. In this case, there is no Biblical equivalent. These arrangements insure emotional and economic support as well as sexual gratification between members of opposed clans and, by the same token, between family members . . .

Obviously, when the husband's brother or the wife's sister is already married, this leads to polygamy — to polygyny in the case of a man inheriting a widowed sister of his current wife (in the early 1970s I was thus the guest of a man who was living with his wife and her older sister who had earlier become a widow); to polyandry in the case of a woman inheriting the brother of her present husband. Other forms of polygamy are also culturally perfectly legitimate. A man may be married to several women at the same time, even several sisters (polygyny and sororal polygyny in the latter case). Also, a woman may be married to several men at the same time, even brothers (polyandry and fraternal polyandry in the second case). During my fieldwork, one polyandrous marriage existed. It is worth mentioning how it was initiated for it demonstrates that some plural unions were the results of individual choices rather than the outcomes of simple socioeconomic imperatives. The story was volunteered in 1991 by a polyandrous woman, who was then around 85 years old, and widowed from her oldest husband. For the story her name will be Mary and the real Mary will remain anonymous as well as her husbands for whom I also use pseudonyms.[9]

> I am crow clan. I was twenty and married to Albert (wolf clan) who was about 35. Johnny, Albert's sister's son, was living with us. Johnny was wolf clan like my husband. He was then about 17. One winter when Johnny and I were coming back to camp with firewood, we made love on the loaded sleigh. I liked it so much that we kept doing it like that for quite a while. But Albert caught us and scolded us. He asked that we stop. Me and Johnny tried for a while. But a few months later we were back in business. You know . . . I loved it so much with him . . . ! Albert found out again and asked us to stop again. We told him we could not help it. He said: if it is going to be that way, then the three of us will get married. And, that's how it all started. After that we just lived in the same tent.

9. It is interesting to note that I have to protect the identity of those involved in this legal form of marriage which is not approved of in our culture. Notice too how you probably agree with my decision. Why? When another people's custom contradicts ours, it is better for the people in question if we do not tell who practices what we do not like. But, that it should not be so is the very topic of this Essay about Horizont Verschmelzung.

> Not to make my two men jealous, I hanged a blanket between their beds.[10]

Churches' admonitions and the federal state's criminal code have since then led other such marriages to hide underground . . . But on the main, most everyone still openly respects the rule of clan exogamy.

At this juncture, let us highlight the following: (1) Tutchone Indians have had their marriage system for at least three thousand years, (2) matriliny was already one of their cultural traits when their ancestors moved from Siberia to Alaska about nine thousand years ago,[11] and (3) numerous populations across the world have had similar kinship and marriage systems.[12]

Now, I turn to my main query: may a liberal state be democratic enough to enact legal measures which would ensure at last the reproduction and the flourishing continuation of such a lifeworld of clan exogamy, matrilineal descent, and plural marriage?

III. LIBERAL DEMOCRACIES

We must start by recognizing the existence of different forms of liberalism. Commenting on Charles Taylor's work, Michael Walzer suggests contrasting what amounts to two Weberian ideal types: liberalism 1 and liberalism 2. These two forms of liberalism cope with cultural variations in very different ways.

> *(Liberalism 1)* is committed in the strongest possible way to individual rights and, almost as a deduction from this, to a rigorously neutral state — that is to a state without cultural commitment or religious projects or, indeed, any sort of collective goals beyond the personal freedom and the physical security, welfare, and safety of its citizens . . .
> *(Liberalism 2)* allows for a state committed to the survival and flourishing of a particular nation, culture, or religion, or of a (limited) set of nations, cultures, and religions — so long as the

10. Dominique Legros, Field Notes from Pelly Crossing, Yukon, Summer 1991 (on file with author).

11. *Cf.* ISIDORE DYEN & DAVID F. ABERLE, LEXICAL RECONSTRUCTION: THE CASE OF THE PROTO-ATHAPASKAN KINSHIP SYSTEM (1974); M.E. Krauss & Victor K. Golla, *Northern Athapaskan Languages*, *in* 6 HANDBOOK OF NORTH AMERICAN INDIANS 67-85 (W.C. Sturtevant ed., 1981).

12. CLAUDE LÉVI-STRAUSS, LES STRUCTURES ÉLÉMENTAIRES DE LA PARENTÉ (Paris-LaHaye: Mouton 1967) (1949).

basic rights of citizens who have different commitments or no such commitments at all are protected.[13]

With regard to liberalism 2,[14] it should be added that minority cultural rights to be granted under its name would first have to be appraised through an evaluation of the worth of the minority lifeworlds or cultures.[15]

States comprising several nations need to be further distinguished. Following Jürgen Habermas[16] and Michael Walzer,[17] one may speak of two poles. The first one is that of the European multinational state with long-established territorial nations and/or territorial nationalities. Many contemporary states in Asia or Africa which are mentioned neither by Habermas nor Walzer, obviously belong to this landscape too. The second pole is the migrant multinational state model — countries belonging to this group have stemmed from the massive intercontinental population movements that took place in the last few centuries. Among them are Brazil, Argentina, Columbia, Australia, the United States, and Canada. These more recent states are dominated by the descendants of migrant populations and they differ from the European multinational type mainly in that their various migrant groups have not reconstituted localized nations or nationalities. A migrant state is more like a nation of dispersed nationalities, or in John Rawls' parlance, "a social union of social unions."[18]

Such portrayal of the typical migrant multinational state is, however, incomplete in one fundamental respect. It masks that its indigenous populations (who have been "parked" within reserves inside their former territories)[19] were not, and still are not, migrants, but long-established culturally homogenous and territorialized nationalities.

In Canada, this is so true, that indigenous first nations are the only people to be settled in every corner of the federation. They live in the South (East, West, and Center), and all over the Subarctic and the Artic.

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13. Michael Walzer, Comment, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 1, at 99.

14. However, it should be noted that Habermas differs from Taylor and Walzer in that he believes that liberalism 1 already incorporates the greater flexibility attributed to liberalism 2. For Habermas, social movements and struggles ensure the changes that Taylor and Walzer think possible only under a liberalism of the second type. Habermas, *Struggles for Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 1, at 113, 128-34.

15. *See* Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 1, at 70-73.

16. *Id.* at 117-19.

17. *Id.* at 101.

18. JOHN RAWLS, A THEORY OF JUSTICE (1971).

19. Very explicitly to make room for migrants from overseas.

They have been in these areas since time immemorial (the dates vary from geographical area to area but, according to the most conservative estimates, some are as old as nine thousand years or more and none is less than one thousand years old). No other nationalities in Canada can claim either that widespread geographical distribution or that historical depth. This is equally true in the United States, Central and South America, and in Australia.

As such, Canadian first nations clearly fall under Habermas's category of endogenous territorial minorities which "see themselves as ethnically and linguistically homogenous" and distinct[20] — much like long-established minority nationalities in the European nation-state model. However, in contradistinction to such European national minorities, Canadian indigenous first nations have to live within and compose with a federal state dominated by two dispersed majority of Francophone migrants and Anglophone migrants supported by new migrant dispersed minorities all arising through more recent transcontinental population movements (Ukrainians, Italians, Greeks, Haitians, Jamaicans, Pakistanis, East-Indians, Chinese, French, North Africans, Arabs, etc.).

From the European model standpoint and in the context of several U.N. declarations and conventions regarding the right to self-determination, some indigenous people living outside of Canada are groups with a reason/impetus for political action, and where numbers warrant it, to eventual independence. Were it not for the "liberal democracy" of the migrant multinational state within which they have to live, people like the Navaho in the United States with a population well over 150,000 members could very well claim their right to independence. This also holds true for some large first nations in South America, especially in the Andes. Their numbers compare quite favorably with the 33,000 inhabitants of Liechtenstein, the 32,000 in Monaco, or the 67,000 in Andorra).[21]

However, in Canada, first nations are much too small — a handful counts 20,000 members; many are well under this number; and most have less than 1,000 inhabitants.[22] Objectively, such nations have little choice but to remain under the umbrella of the existing Canadian federal migrant state. The only remaining crucial question is: with what status? Thus, the

20. *See* Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 1, at 118 (citing Jürgen Habermas).

21. All tax-shelter microstates which remain independent for reasons not as morally valid as everyone knows as those that indigenous people could put forward.

22. The total registered Indian population is 705,000 (in fact probably 30% more if it was counted according to Indian customs) and is divided into 614 politically autonomous bands. However, it must be noted that the federal government has always pushed for the greatest division possible. Some bands could easily be regrouped as representing a single nation.

problem of a transition to a multinational state democracy true to its endogenous localized first nation cultures — the theme of this Essay — is acute and will remain so.

IV. THE LIMITS OF PROGRESSIVE LIBERALISM 2

Canada's most original contribution to world political philosophy is an oxymoron: progressive-conservatism. For decades, this was the name and the philosophy of one of its two main federal political parties. Its position was somewhere between liberalism 1 and 2, but closer to 1. The philosophy of the other dominant party — the Liberal Party — is just a variant of progressive conservativism. Let us call it "conservative-progressivism." Its position is somewhere between liberalism 1 and 2, but closer to 2.

Today, as far as registered Tutchone Indians are concerned, liberalism 2 politicians could probably recognize, but reluctantly, some of the Tutchone's cultural distinctiveness in family laws. To start with, they might accept that all Tutchone marriages between opposed clan members (even between first degree cousins) become legitimate ones (the state already accepts the Catholic Church exemptions for similar marriages). Furthermore, it could still accept (but with more reticence), that any Tutchone marriage between members of the same clan is *ipso facto* invalid. As Canadian philosopher Charles Taylor, puts it, there would be good reasons for such legal changes at the local level:

> [I]t is reasonable to suppose that cultures that have provided the horizon of meaning for large numbers of human beings, of diverse characters and temperaments, over a long period of time — that have in other words, articulated their sense of the good, the holy, the admirable — are almost certain to have something that deserves our admiration and respect, even if it is accompanied by much that we have to abhor and reject.[23]

However, the present Canadian migrant state would most likely refuse death sentences or imprisonments for breach of Tutchone clan exogamy laws. It already rejects the death penalty for any crime, even the most heinous! However, to respect and support the reproduction of Tutchone culture and key points in its family laws, it would still have to accept some form of sanction for breach of Tutchone fundamental law. In that case, it

23. *See* Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 1, at 72-73.

could perhaps allow first nation governments to sever all links (rights and duties) with members not respecting Indian laws.

I would like now to consider a seemingly benign detail of contemporary Tutchone family life: children's report cards. What do report cards have to do with family law? Today, all Tutchone children attend primary school where they are taught by Euro-Canadian teachers (and by Tutchone elders only for Tutchone language). Their report cards are sent to their mothers and fathers. To follow Tutchone matrilineal culture they should instead be sent only to their mothers and to their mothers' brothers. The mother's role is mainly to support her children. Her brothers' role (real brothers or clan brothers) is to impose and enforce some discipline. In the past, the maternal uncle's control of his nephew's physically demanding puberty ritual confirmed this and inscribed it, in a Foucaldian sense, in the very flesh, body and mind of his sister's male children. Among the Tutchone and in similar matrilineal cultures, the father cannot play the role a father has in N.A.L. cultures. Instead, he has to take care of the discipline of his own sister's children. Therefore, the school should send a child's report card to the child's mother and her brothers (the child's maternal uncles).

Indeed, if such a measure were to be taken by the schools, this would greatly improve the level of discipline a child receives and would, in theory, lead to higher results. Maternal uncles were and still are the only figures that have actual authority over Tutchone youths. Presently, fathers are imposed by Euro-Canadian law as the main persons responsible for the care and discipline of a child. This has led and still leads to complete social anomy.

Liberalism 2 could certainly accept such a change and thus acknowledge the authority of maternal uncles. Liberalism 2 could even accept the fact that to honor the rule of matrilineal descent, a child's father be not officially informed at all of his own children's progress. Conversely, this father would have to be fully updated as to his sister's children's achievements.

Obviously, the problem of matrilineal inversions of roles is so pervasive that it even influences a simple question like where report cards should be sent. Yet, liberalism 2 can most likely accommodate such needs, and even pass special laws giving to Tutchone final control over children only to the mother and her brothers and in no case to the father. From a fusion of horizons vantage point, it is to be noted that N.A.L. cultures grant such right only to mother and father and not to the maternal uncles at all. Yet, this democratic advance on behalf of another people's definition of the good life would probably corner liberalism 2 into the last limits of its cultural entrenchment, or so it clearly seems if one reflects on

the dumbfounded reactions of non-specialists hearing of such a proposal for the first time.

What of fostering Tutchone polyandrous and polygynous marriages? I am not asking whether this may rightfully be part of the good life for any people. Between N.A.L. women and men there would only be a cacophony of grins and groans. My question is whether the Canadian liberal state could adopt laws that would allow Tutchone to preserve, reproduce, and let flourish this aspect of their culture (as we have seen, these plural relationships are not mere peccadilloes like those of former President Clinton).

Admittedly, for any government in North and South American migrant societies to even consider the possibility of accepting polygamous marriages as legitimate is to open that government up to a barrage of popular protests. To borrow briefly from "concerned" web sites, the N.A.L. migrant majority view would be any variant of the following: (From a man) "I always kinda viewed this practice as a way for dirty old men to legitimize their lust for young stuff. I'm sure somebody will raise up the issues of religious freedoms, other cultures, etc., but I'm dead against it."[24]

Recent developments in Columbia offer a good example. On July 24, 2001, it adopted a new civil code eliminating jail terms (up to four years) for bigamists, conceding pardons for former convicts and decriminalizing the practice. This set off a furor. Womens' rights activists and the Church protested.[25] The Colombian bishops said, "This is a green light to infidelity and promiscuity, and sends a wrong signal about the state's concern for the stability of the family."[26] Bishop Hector Gutierrez Pavon added: "This norm is disrespectful to women, who are usually the victims of this infamy..."[27] Florence Thomas, a well-known feminist leader from Bogota

24. Other interesting comments on the web. From a woman: "I was so appalled that in this day and age our law enforcers don't do anything to prevent this kind of thing to happen. Mormon people in Bountiful, BC and also in Colorado City are permitted to have 20 wives, 60 children!!!!! [sic]. I just can't believe this . . . Anyway, I would like to know how you guys feel about this . . . I really feel for those young girls . . ." Quotes from a popular forum on the web (on file with author). From another man: "The Child Tax Credit issue sure raises my hackles [sic]. In Canada we're taxed to death anyway and facing cuts left and right and here we are sponsoring people that abuse the law. As I said before, I am frustrated that polygamists can get away with that . . ." *Id.*

25. Javier Baena, *Revised Bigamy Law Upsets Colombia*, ASSOCIATED PRESS, June 12, 2001, *available at* http://www.polygamyinfo.com/intnalmedia%20plyg%2092ap.htm (last visited Oct. 1, 2004).

26. World Watch, Colombia, Bigamy No Longer a Crime, Catholic World Report Aug./Sept. 2001, *available at* http://www.catholic.net/RCC/Periodicals/Igpress/2001-09/wcolumbia.html (last visited Oct. 1, 2004).

27. *Id.*

National Universidad agreed: "The bishops are right about the consequences this will have in Colombian society. This is definitively a step backward for the cause of women in society."[28]

If the Canadian federal government were to consider accepting polygamous marriages, it would also have to start by re-examining its criminal code. The relevant article which would need changes is 293.1:

> Polygamy — Every one who (a) practises or enters into or in any manner agrees or consents to practise or enter into (i) any form of polygamy, or (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage; or (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.[29]

Obviously, for Euro-Canadians, polygamy is a very serious crime indeed. First nation people have been prosecuted and condemned under older versions of this article. As early as 1899, a Blackfoot married to two Blackfoot women was convicted of the "crime" of polygamy (yet, as the court recognized, he was married according to Blackfoot customs).[30]

Furthermore, would-be immigrants who have already entered into a polygamous marriage in countries where it is lawful to do so, are outright denied entry into the country.[31] Canadian citizens who contract a polygamous marriage in a country where such a practice is perfectly legal are also to be prosecuted and sentenced.[32]

Here, let us underline that the Canadian liberal democracy which would find it exaggerated to imprison same-clan Tutchone for intermarrying, has no qualm about giving a person with two spouses a five year jail term. Why is a jail term in the first case going too far? Why is a jail term in the second case justifiable? Could it be a question of cultural differences? Yes indeed, and this reveals how much state laws are also imbedded in rigidly set cultural norms.

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28. *Id.*

29. CAN. CRIM. CODE art. 293.1.

30. Regina v. Bear's Shin Bone (1899), 3 C.C.C. 329 (also reported: 4 Terr. L. R. 173) North-West Territories Supreme Court, Rouleau J., Mar. 9, 1899, *available at* http://library.usask.ca/native/cnlc/vol03/513.html (last visited June 28, 2004).

31. Bahig Mohamed Skaik Ali & Minister of Citizenship and Immigration. Order delivered from the Bench at Toronto, Ontario, Oct. 29, 1998, *available at* http://decisions.fct-cf.gc.ca/fct/1998/imm-613-97.html (last visited Oct. 1, 2004).

32. CAN. CRIM. CODE art. 290 (1) b.

Now, given the background of the criminal code, the precedents that have already been established, the importance of the penalties, N.A.L. cultures' core morality, N.A.L.C. feminists overwhelming opposition to polygamy,[33] it is very unlikely that defining plural marriages as fully legal might be feasible for federally elected officials (even if otherwise well-disposed toward first nations). In the Canadian context, the sole accommodation which could perhaps be achieved would be to use the constitutional "notwithstanding clause": i.e. to make the relevant article of the Criminal Code inapplicable in the case of the Tutchone population or other similar groups. But even in this case, there would be considerable opposition to the move — much more so than what is occurring as monogamous gay marriages are finally being made legal.[34]

Nevertheless, legally speaking, this could still be done, particularly in a federal state in which differing rights already exist from province to province.[35] A few liberal 2 type intellectuals might even enlist to support the project. However, and whatever the case, let us admit this at the outset: it would be a far cry from Taylor's call for the recognition of the equal worth of another people's culture. Instead of recognition, it would be more

33. But not so for some. EDWIGE FEUILLERE, LES FEUX DE LA MÉMOIRE (Paris: Livre de Poche, 1978) (the famous French actress writes "every woman should practice polygamy, just like men . . . Why should women not have the right to have one man for the joy given by the body and another one for the pleasure provided by the mind?").

34. From times immemorial, monogamy seems to have been an ideal among many Indo-European peoples. This may explain why in the mind of most people from today's N.A.L. cultures monogamous gay marriages are more acceptable than heterosexual polygamous marriages. However, Christians who refuse to allow a homosexual to marry by brandishing the threat that next will come worse requests such as to legalize polygamous marriages are out of sync: while homosexual relations, even monogamous ones, seem to be condemned in the Old Testament, polygamy certainly is not, and not even explicitly so in the New Testament.

35. Differing rights for indigenous people would obviously result in an even more complex checkerboard state. As Taylor writes: "So members of aboriginal bands will get certain rights and powers not enjoyed by other Canadians, if the demands for native self-government are finally agreed on, and certain minorities will get the right to exclude others in order to preserve their cultural integrity, and so on." *See* Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 1, at 39-40. Yet, problems stemming from different national affiliations could be settled like those for people with dual or triple citizenship between say France, Canada. or the United States (i.e., Euro-Canadian versus Mohawk; Euro-Canadian versus Tutchone). For countries where laws are different according to group membership, geographical areas, segmentation, inequality before the law, see J.A. Laponce, Switzerland: a Model for Canada? A Model for the EU?, Paper Presented Before the Conference Organized by the Institute for European Studies of the University of British Columbia to Mark the 150th Anniversary of the Swiss Constitution (Nov. 20, 1991), *available at* http://www.ies.ubc.ca/events/swiss/laponce.html (last visited June 28, 2004).

like a grudging assent to an intrinsic "primitiveness" in Indian cultures, a "primitiveness" which cannot be eradicated — at least for now.[36]

As many liberal 2 scholars would most likely agree to some polygamy only on this later ground, let us now examine how N.A.L. cultures cope with the problem of *de facto* simultaneous plural unions in their midst and let us consider if N.A.L. cultures' handling of the issue fundamentally differs from that of cultures that openly acknowledge polygamy as lawful. This will bring us back to the vantage point of "the fusion of horizons."

V. THE INDIGENCE OF LIBERAL DEMOCRATIC POLITICAL CORRECTNESS

To discuss the problem of N.A.L.C. *de facto* plural unions, I need to distinguish the situation around 1900 when N.A.L. cultures were strictly monogamous from the post 1970s period during which many liberal democracies changed the status of illegitimate children and, as we shall see, unwittingly compromised the reality of monogamy.

I take France as an example. In that country, illegitimate unions involved less than ten percent of the population. Of these illegitimate unions, only a fraction were *de facto* plural unions — a figure similar to that of any population, regardless of whether polygamy is permitted or not. This signifies that even in societies where polygamy is legally accepted, the vast majority of marriages are monogamous.

To conduct the analysis, I rely on a classical anthropological definition of marriage offered by Kathleen Gough.[37] This definition, elaborated over several decades, escapes ethnocentrism in that it takes into account world variations in the definitions of marriage. Gough's definition states that "[m]arriage is a relationship established between a woman and one or more other persons, which provides that a child born to the woman under circumstances not prohibited by the rules of the relationship, is accorded

36. At any rate, in the case of individuals from N.A.L. cultures, the equal value between marriage systems allowing polygamy and marriage systems with strict monogamy will always be denied for the simple reason that against all evidences, such culturally blinded individuals represent their societies as being strictly monogamous. For Habermas, Taylor's criteria of a presumption of equal value does not matter. *See* Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION, *supra* note 1, at 129-30, 137-38. Notwithstanding, note that he would limit minority collective rights to only self-administration, infrastructural benefits, and subsidies whereas, for him, the right of self-determination seems to include the right of a majority nation to affirm its identity vis-à-vis immigrants who could give a different cast to the majority's historically developed political-cultural form of life. He most likely never thought of the implications for the American context of dispersed migrant majorities holding back long-established indigenous territorial minorities.

37. Kathleen E. Gough, *The Nayars and the Definition of Marriage*, 89 J. ROYAL ANTROPOLOGICAL INST. GR. BRIT. & IR. 23-34 (1959).

full birth-status rights common to normal members of his society or social stratum."[38]

The phrasing "between a woman and one of more other *persons*" is meant to accommodate the fact that people like the Nuer (East Africa) allow a childless female to marry a female of child bearing age so that she, the childless woman, may become a parent through the children of her wife — children conceived through casual affairs with male lovers. There is no space here to discuss the implications of each wording, but the key point of the definition is clear: from an anthropological point of view, when a woman has a relationship with a person and when the children she has from or during this relationship are born with full birth-status rights, the relationship is to be defined as a marriage. Conversely, if the children are not granted full rights at birth, the relationship is not a marriage and, indeed, the society indicates its disapproval by imposing a bastard status to the children born from such illegitimate relations. Last, the definition does not require that there be right or duties between spouses, for in various cultures these do not exist and are not necessary to the definition of marriage.

So what of France and *de facto* plural unions? Here, reference to the specific articles in the French civil code and to the jurisprudence will have to be omitted for lack of space, but they may be found in my earlier study of the French case titled "Polygamy the French way or the West made exotic"[39] and in Alex Weill and Francois Terré[40] as well as Berthon and Hartwig.[41] Let me first focus on the case of a married man with a mistress.

Around 1900, children born from a married man and a mistress had no birth rights. For example, the law prohibited that the child receive the last name of its male genitor. I use the word genitor, for the latter was never allowed to legally become the father of his children with his mistress or mistresses. Moreover, the adulterine bastard child could not inherit from his genitor and genitor's family members,[42] even when the said genitor or his family members wrote a will in the child's favor (such dispositions were considered null and void at the outset). The bastard child could neither inherit from his genetrix's family members. He could only inherit from his genetrix (his biological female creator). It was further stipulated

38. *Id.* at 32.

39. Dominique Legros, *Polygamie á la Française ou L'Occident Exotisé*, 16 CULTURE 33-53 (1996).

40. WEILL ALEX & FRANCOIS TERRÉ, DROIT CIVIL: LES PERSONNES, LA FAMILLE, LES INCAPACITÉS (1983).

41. Berthon & Hartwig, *Les Droits du Couple: Mariage et Union Libre*, QUE CHOISIR: REVUE PUBLIÉE PAR L'UNION FÉDÉRALE DES CONSOMMATEURS (France) (1994).

42. Throughout this discussion the use of "he" for a child stands for he/she. No distinction is made between male and female children.

that such children could never "enter" into the families of their genetrix and genitor. What normally would have been their grandparents, uncles and aunts, cousins, half brothers and sisters, etc. were legal strangers to an adulterine child. In fact, the law specifically prohibited that he or she attempt to contact them. If the man divorced his wife and remarried with his mistress, he still could not recognize his previous children with her as his. During a Senate debate in 1904, it was stated that to allow a man to recognize his bastard children after he married their mother would be to legitimate polygamy *post-facto*. The case of a married woman with a lover is more complicated but, from the present vantage point, left the child with even less rights.

The status of the children of an unmarried man with one or several mistresses was the same as that of the adulterine bastards except that in such a case the children could receive the name of their father and inherit from both father and mother (but absolutely not from their father's and mother's family members). The children's status from an unmarried woman with one or several lovers was approximately the same.

Thus, given the 1900 legal context, plural concomitant unions were then in no way the equivalents of polygamous marriages. For an unmarried or married man (or woman), the first illegitimate union, the second or the third, etc., could never be marriages, not even common law, and not even marriage in the rather ecumenical anthropological sense. As David G. Maillu, an African social writer from Kenya, puts it, there was then no choice: "In the Whiteman's world, tradition and law, when a husband wants a second wife, he divorces his first wife in order to clear the ground for the second wife. If he wants a third wife, he divorces the second to make way for the third, and so on."[43]

Nevertheless, this attachment to strict monogamy had a social cost. As some legal experts have later commented, around 1900 the Civil Code made illegitimate children true pariahs of society. Each year, 8.5% of all French children were born with such a bastard status (obviously not all from *de facto* plural unions). The application of this sanction posed in turn a serious problem of collective morality. Children were paying for the "immorality" of their parents and, according to some, French culture was patently immoral in that it destroyed the lives of innocent children for no fault of their own. With time, these sanctions, and similar ones in Europe, came to be thought of as untenable, and following England and Germany who had acted in 1969, France revised its Civil Code in 1972. Further modifications followed later.[44] What then of illegitimate children and *de facto* plural unions nowadays?

43. DAVID G. MAILLU, OUR KIND OF POLYGAMY 29 (1988).

44. *Cf.* Legros, *supra* note 39.

Most striking is that the bastard concept or its equivalents are totally eliminated and that it is clearly specified that a child born out of wedlock "has, in general, the same rights and the same duties as legitimate children in his relationships with his father and mother."[45] The reservation signaled by "in general" concerns married men's or married women's children *not* born from their respective spouse. This will be discussed below.

The out of wedlock relationship between unmarried persons is presently called *union libre* (this is legally different from a common law marriage in that there are no duties and rights between a woman and a man in an *union libre*, just as it is so in some of the world marriage systems discussed by Kathleen Gough.[46] The child born from a "free union" now inherits from his parent as if he was a legitimate child. He receives the name of his genitor. More importantly, the child now "enters" into the respective families of his mother and father — his aunts are legally his aunts, his grandparents, his grandparents, etc. If his parents die while he is still young, he may be taken care of by his adult immediate genealogical relatives who today not only have rights, but also duties towards him. In case some estate is to be shared between cousins, he has exactly the same rights as his cousins born from legal marriages. Finally, as the Code does not prohibit that a man enters into several free unions at the same time, a man may very well have several children with full birth-status rights in a given year from, say, three different women. His female partners may even legally use his last name as their common name. Yet, their respective maiden names remain their legal names — but in France the same holds true for any married women too. For these children from three different women, he will receive family allowances, young child allowances, daycare allowances, etc. (and support from numerous other state programs which represent important amounts of money for a family). The same applies for a woman living in plural free union. The Code and some jurisprudence even explain how to assign paternity in case of disagreements between her and her partners or between her partners themselves.

Now a conclusion becomes obvious: by eliminating the bastard status and by making all children equal, France has unwittingly allowed French citizens to practice a form of polygyny in the case of men and of polyandry in the case of females. And to pastiche David Maillu, our Kenyan scholar quoted earlier, today an African polygynous man could very well reply to his Western critics:

45. FR. C. CIV. new art. 334, 1.

46. Gough, *supra* note 37.

> Nothing is wrong with us. What my tradition allows me to do is no different from what a Frenchman is now free to do with several women. All my children from my different wives are equally mine. None of them are to be regarded as bastards, just as the Frenchman's children born from several women at the same time are legally his. Even his government recognizes that. And his children are in no way bastards at all. So where is the difference with us here in Africa?

For the adulterine children born from the extramarital unions of married men or women, most of the above applies: right to their genitor as father and to their father's name and full membership in their father's and mother's family. But there are some differences. The extramarital children cannot be raised in the married partner's dwelling if the official spouse objects to it. They inherit only one half of what their legitimate half-siblings receive. In consequence, even if the children are no more mere pariahs, they are not accorded complete full birth-status rights common to normal members of their society. Thus, in this case, we should not speak of polygamy strictly speaking. However, as it is mainly this form of living arrangement which is first and foremost decried as polygamy in N.A.L. cultures, the extramarital relationships could perhaps be regarded as second order or *morganatic* marriages (after all the man becomes a full father of his mistress' children and the married woman can make her lover the father of her extramarital child while remaining married to her husband (one case known personally)). If this is accepted, we should then speak in this case of a form of *morganatic* polygamous families, a form of polygamy in which the different spouses and their children do not have equal rights – this being the full birth-status rights common to normal members of their social strata.

The fact that the relationships of a married man to his mistress/es or of a married women to her lover/s may also be regarded as marriages can be evidenced by looking at the very different way in which the law handles children born from strictly prohibited incestuous relationships.

Unlike the adulterine child of today, an offspring born from an incestuous relationship is still systematically denied "full birth-status rights common to normal members of his society . . ." To do so, the law states that "If between father and mother there exists an impossibility to marry because of a blood relationship between them, and that descent has been established between the child and one of his/her parents, it is prohibited to further establish descent from the second parent."[47] Thus,

47. S'il existe entre les père et mère de l'enfant un des empêchements à mariage pour cause de parenté, la filiation étant établie à l'égard de l'un, il est interdit de l'établir à l'égard de l'autre.

today as in the past, a child born from an incestuous relationship may only have one parent. He remains like the bastard child of yesteryears. The reason for this is obvious to any legal mind. To let both his genitor and genetrix recognize descent with him would amount to recognize that genitor and genetrix, say brother and sister, had been and may still be in a marital relationship. This is well illustrated by a case adjudicated in the highest court in France in 2004.

Brigitte and Gilles were born from the same father but from different mothers.[48] In 1990, a child, Marie, was born to them. This child was legally recognized by both Brigitte and Gilles shortly after birth. However, as the child was from an incestuous relationship, Gilles' acknowledgement of paternity (fatherhood) was legally annulled in 1992 by a *Tribunal de Grande Instance.* The reason given was that marriage is "prohibited between a brother and a natural or legitimate sister" and that for this reason the law also prohibits that the child be recognized by both parents. In 1998, Gilles found an indirect way to re-establish paternity with his child. He requested to adopt her. After all, he was the child's maternal uncle too and nothing in the law prohibited adoption by an uncle. A lower court refused claiming that while intra-familial adoption is legitimate and desirable, it would in the case at hand institute "a new relationship contrary to public order." In 2001, an appellate court upturned the lower court's decision and allowed Gilles to proceed with the adoption in the interest of the child. At this point, let us note that the child has above normal intelligence, knows the conditions of her birth, and supports her parents. However, the adoption proceeding were suspended for an *avocat général* from the *Court de Cassassion* (somewhat like the Supreme Court) appealed on the ground that adoption cannot be used as a legal device to make lawful an illegal relationship. On January 6, 2004, the *Cours de cassassion* agreed with the *avocat général* and denied Gilles the right to adopt his daughter. He will thus never become her legal father.[49]

Yet, it is to be noted that other European countries (Germany, Austria, Greece, Switzerland) do not prohibit full establishment of descent in the case of incestuous relationships. Blandine Grosjean, *Inceste: la Justice Reste Inflexible, la cour de Cassation Refuse qu'un Homme Adopte la Fille qu'il a eue avec sa Demi-Soeur*, LIBÉRATION (Paris), Jan. 7, 2004.

48. I use pseudonyms throughout the story.

49. For further details on this case, see 01-01.600, Arrêt n° 75 du 6 janvier 2004, Cour de cassation — Première chambre civile, Cassation, Paris, France, *available at* http://www.courdecassation.fr/agenda/default.htm (last visited Oct. 1, 2004); Blandine Grosjean, *Un Inceste Fraternel en Quête de Paternité: L'avocat Général a Demandé aux Conseillers de Rappeler que L'Interdit de L'Inceste est la base Absolument Fondamentale du Droit de la Famille et l'un des Piliers de Notre Société*, LIBÉRATION (Paris), Dec. 3, 2003; Nathalie Guibert, *L'adoption d'une Fillette née d'un Inceste en Cassation*, LE MONDE (Paris), Dec. 4, 2003; Grosjean, *supra* note 47.

This much becomes obvious: French courts were not willing to let a brother and sister relationship be recognized as a marriage, even if only *de facto*. To avoid this, they elected to deny the child born from this union full birth-status rights — even though, as the intermediate appellate court admitted, this would have been in the child's best interest. In turn, this reveals, albeit unintentionally, how crucial children's birth status rights remain in N.A.L. cultures for granting or denying a relationship the status of a marriage.

At this juncture, one may ask whether France could eliminate the forms of polygamy it unwittingly allowed by forbidding plural free unions and by proscribing extra-marital affairs. Not really, for in the first case it would have to decide that one free union is legitimate and the others not, and in the second one, that no extra-marital union whatsoever is legitimate, even if children are born out of it. This in itself would lead to the reintroduction of the notion of the illegitimate or bastard child, an immoral notion that the new Code was meant to forever eradicate.

The British, German, and French shifts about the illegitimacy of children have been followed by some liberal democracies in South and North America. What of the new civil code in Columbia for example? To be sure, the situation varies from country to country and thorough investigation should be made on a state by state basis. Nevertheless, it may be said that, in many nation-states, the wall of strict monogamy has now been cracked (and in some cases, like in Canada, widely breached) for reasons similar to the one that have affected France. Correlatively, some migrant majorities in the Americas also allow *de facto* true polygamy in one form or another, without having planned it. As details must differ from nation to nation, it would be an interesting research subject for experts in family law.

At any rate, the significance of this all too brief exploration into the world of legal words lies elsewhere. It leads to an inevitable question of ethic. What right do people in N.A.L. cultures have to claim loud and clear that polygamy, as it exists among some of their indigenous people, is a remnant form of "primitiveness," an affront to morality and therefore unacceptable and not to be tolerated? In turn, this lead to an embarrassing second question. Should people in N.A.L. cultures return to the infamous times when, for no fault of their own, hundreds of thousands of their illegitimate children were treated as true pariahs so that nobody in Western civilization could be said to practice *de facto* and, *a fortiori*, *de jure* polygamy?

The dilemma is real. Enforcing strict monogamy is at the cost of creating a class of citizens born bastards. To de-legitimize the notion of bastard births is at the cost of making polygamy possible again. If it is so,

and it is, people in indigenous cultures allowing for some polygamy would thus not be wrong to treat N.A.L. culture's political correctness as indigent an ethic as that of the man who shouts to his subalterns: "don't tell me what I am doing, keep doing what I say."

Now, cynics should attempt to have the last word by raising two questions which I have so far left aside. If polygamy is being *de facto* reinstituted through the eradication of the bastard child status, why should N.A.L. cultures grant their indigenous people special rights to practice polygamy? Are not these people also already granted *de facto* rights to do so within the terms of the newer family laws of the nation-states in which they live? These two objections are perfectly valid. But they also have the merit to force us into a last sobering admission: contemporary N.A.L. cultures have solved the problem of the bastard child by making him/her the equal of the legitimate child, yet they still grant the *free union/mother* a less recognized status than that of the *legal union/mother*; indigenous family laws do not so discriminate and honor each and every mother with a full wife status if such is her situation.[50]

VI. CONCLUSION

Liberal 1 scholars would probably have preferred it if this Essay had merely been about an individual right to be polygamous. This would have made it easy for them to attack it from a moral standpoint and, thus, to reject offhandedly some of the collective cultural rights of indigenous people like the Tutchone. But this Essay is not about the individual right to be polygamous. Indeed, I would be greatly disappointed if anyone had taken it along such lines. Here, disserting about polygamy is only meant to give, so to speak, an electroshock with what we "abhor in others" and yet "must respect," as Charles Taylor should have had it.

Its real question, the deeper one, the only one that truly preoccupies me, is that of the clash of cultures, and of the arrogance of N.A.L. cultures when such clashes occur. I have simply chosen some "ugly" legal realities from among ourselves to illustrate how modest we should be when dealing with people with divergent cultural traditions. This also illustrates how questions of democracy and human rights in N.A.L. cultures are in part embedded in a false image of hyper-modernity that we project upon

50. Incidentally, after the death of huge numbers of young men during World War I, serious debates in N.A.L. cultures were held about instituting legal polygamy so that widows and other women could find a fully legal husband and have their own respective families. *Cf. Misères et Tourments de la Chair Durant la Grande Guerre*, *in* LIRE (2002).

ourselves — or, to return the compliment we make to indigenous people, in part embedded into our own "primitiveness."

It is true that one finds no direct condemnation of polygamy in U.N. declarations and conventions while N.A.L. cultures clearly dominate in U.N. debates. However, could it be that many Muslim member countries would have opposed any outright criticisms, and that this probably explains that? Nevertheless, indirect pressures to conform to monogamy are visibly exerted in this institution by N.A.L. dominant cultures.

The 1948 *Universal Declaration of Human Rights* skirts the issue while attempting to address it. For example, it states that: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."[51]

But some state may interpret this as meaning "every woman has the same rights as every woman" and "every man the same as every man." Which is not the same as what was intended: "every man as the same rights as every woman." Article 29 (2) specifies that "everyone shall be subject only to such limitation as are determined by law solely for the purpose (among other things . . .) of meeting the just requirements of morality," etc. But once again, it all depends on how morality is locally defined, especially as far as female citizens are concerned.

The U.N. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 goes further. It specifies that States commit themselves to end discrimination against women in all forms, including: to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women. Article 16 (1) adds that: "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; etc."

This seems to undermine a Muslim state's claim to rightful polygyny. And indeed, this may have been one of the reasons for this article. Yet, the problem of the inequity of men's right to polygyny is also solved, among other means, from the point of view of gender balanced rights, if women are equally allowed polyandry (several husbands simultaneously) like they are *de facto* in contemporary France as well as elsewhere in N.A.L. cultures, and *de jure* in some parts of Sub-Saharan Africa, parts of India, Tibet and among some North and South American indigenous people.

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51. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 16.1, at 71, U.N. Doc. A/810 (1948).

At this juncture, mention must be made of a final enlightening human right paradox. The same Convention (Article 16, 1, d.) states that male and female have: "The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount."

Prima facie, this sounds fine. However, what of the cultural rights of matrilineal cultures in which the report cards should go to the mother as well as to her brother, but not to her husband and the father of her children. Such a definition of "the good life" never seems to have crossed the minds of the signatories to the Convention. Deep indigenous cultural differences were not and still are not part of the dominant states represented at the United Nations. Thus, what earlier in this Essay seemed an easy accommodation to make on behalf of indigenous cultures like that of the Tutchone appears now legally more difficult to put in place than allowing polygamous practices — no doubt in the case of report cards only because of a too culturally specific phrasing about parents. Clearly then, the dawn of a world cultural democracy has not yet arisen.

Can I thus be forgiven if, borrowing freely from Flaubert, I portray present-day liberal democracy and human rights as mere "broken tin kettles on which we hammer out tunes to make bears dance, when we long to move the stars." What a music! What a dance! But let us not be too ironic. When emergencies arise, we have no other songs to sing! No other dance to dance! And yet, let us not be too complacent either with "broken tin kettle music." Instead, "let resound deep thunder, peal on peal, afar."[52]

52. Lord Byron, *Childe Harold's Pilgrimage*, canto III, stanza 25 (1818).