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## DILEMMAS OF RE-NATIVIZATION OF INDIGENOUS LAW

### Abstract

The author in this study tests the applicability of basic categories of Leon Petrażycki's (1865–1931) socio-psychological theory of law, pointing at ambiguity of the concept of 'indigenous law', 'natives' law' and 'customary law'. First, however, the right to one's own law is followed through the history of colonization. It is essential for the plight of the indigenous people that already in 1537 Popes recognized that 'original inhabitants' had 'rights' and thus 'legitimate claims'. If, on the one hand, there are 'rights' and 'rightful claims' then, on the other, there are duties that include not only the negative refraining from appropriation but also the positive duty to protect in exchange for the impairing the indigenous sovereignty. But whenever the *nexus iuris* is recognized, i.e. the link of correlative rights and duties, there is a law (Petrażycki) and 'inherent – even if impaired, or as some say, abused – sovereignty of the indigenous people' (Justice Marshall). The pluralist notion of 'law', the distinction between the 'normative positive' reference and the 'normative intuition' and the distinction between the 'normative' and the 'factual' should allow one to organize systematically the multiple issues that one encounters when approaching the area of 'indigenous law'. From discussion of the official non-indigenous indigenous law exemplified by the federal Native American law of the United States the paper moves on to discuss the Navajo case of the official tribal law. It comes out that the native procedures and law are full of religious meaning so the 'cultural' sovereignty is much more fundamental and value-loaded than the secular philosophy of human rights incommensurable with the right to one's own law. This is not considered

when borrowing from native law into secular Western law (Greenland's Criminal Code; mediation procedures in North America). The meaning of cultural sovereignty is the right to develop one's law so that it fits one's needs and aims. But the full success story is when the antithesis of the 'indigenous' and 'dominant' law is settled through the feedback from the former to the latter, like when the law – not only of a country but also on the global level – becomes syncretic and embraces deeper universalization of the human rights.

## KEYWORDS

indigenous law, cultural sovereignty, human rights

## SŁOWA KLUCZOWE

prawo tubylcze, suwerenność kulturowa, prawa człowieka

*Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.*

(2007 United Nations Declaration on the Rights of the Indigenous Peoples, Article 34)

## 1. INTRODUCTION

The picture of the 'last wild Andamanese' shooting arrows towards an airplane (or hopefully a drone) trying to localize the remnants of an uncompromising young American missionary who, breaking the Indian government protective prohibition, bribed a fisherman and landed on the small island where a dozen or so people live their own culture disconnected from the global humankind might serve also as a motto for this paper.<sup>1</sup> The official law of the dominant people, the successor to the colonizing power, was broken, and the law of the indigenous people was applied. But another motto might be the recent shocking discovery of the remains of more than 200 indigenous children buried nameless in the grounds of a former forced 'integrated school' in Canada.<sup>2</sup>

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<sup>1</sup> *American 'Killed in India by Endangered Andamans Tribe'*, BBC, 21 November 2018, <https://www.bbc.com/news/world-asia-india-46286215>.

<sup>2</sup> *Canada Mourns as Remains of 215 Children Found at Indigenous School*, BBC, 29 May 2021, <https://www.bbc.com/news/world-us-canada-57291530>.

The strong urge for independence, the sense of sovereignty and the claim to remain under one's own law are practically universal over time and space. The paper deals mostly with the American aborigines, especially Northern Americans called 'Indians' and 'Eskimo' by the colonizers, who prefer to be called by the name of their own choice, a practice that involves sovereignty, though in its cultural aspect. The American examples are used most frequently as the geopolitical influence of the US doctrines, policies and practices is overwhelming. But one should bear it in mind that in reality, first, there are plenty of indigenous peoples scattered all over the globe; secondly, their political, legal and social positions differ; and thirdly, some general issues are common in the relationship between the indigenous periphery and the dominant centre. The major aim of the paper is to distil such generalities from the empirical heterogeneity.

Therefore, settling with European colonizers on the Atlantic coast of the Americas from the very beginning, we may observe 'law' as an asset of cultural sovereignty cherished for more than its purely political aspect. As described by Captain John Smith:

The Chicahamania desire friendship. (...) [In 1613] we became in league with our next neighbours, the Chicahamania, a lustie and a daring people, free of themselves. These people, so soon as they heard of our peace with Powhatan, sent two messengers with presents to Sir Thomas Dale, and offered him their service, excusing all former injuries, hereafter they would ever be King James his subjects, and relinquish the name of Chickahamania, to be called Tassauntessus, as they call us [the English], and Sir Thomas Dale there Governour, as the Kings Deputie; *onely they desired to be governed by their owne Lawes, which is eight of their Elders as his substitutes* [emphasis added, comments: JMK]. This offer he kindly accepted, and appointed the day he would come to visit them.<sup>3</sup>

Treaties, wars, land evictions, open fraud and administrative deceit followed as was the routine fate of the indigenous people in North America. 'Why Queen recognises a US tribe but US government does not?', asked BBC on 10 July 2013: 'Six Native American tribes in the US state of Virginia are campaigning to win formal recognition from the federal government. The tribes claim they have been denied their proper rights – enjoyed by 565 other tribes in the US which do have official status – since a 1920s state law on "racial integrity" decreed that people in Virginia were either "white or coloured". Yet the tribes are recognised in the UK thanks to a peace treaty signed in 1677 with the King of England.'<sup>4</sup> The Chickahominy were eventually recognized on 11 January 2018 when the Thomasina

<sup>3</sup> J. Smith, *The Generall Historie of Virginia, New England and the Summer Isles, Together with The True Travels, Adventures and Observations, and A Sea Grammar*, 1584–1624, The Fourth Booke, original spelling.

<sup>4</sup> *Why Queen Recognizes a US Tribe but US Government does not*, BBC, 10 July 2013, <https://www.bbc.com/news/av/magazine-23233104>.

E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017 was passed bringing to 573 the number of federally-recognized tribes in the US.

## 2. HOW THE 'INDIGENOUS' WERE BORN

The concept of 'indigenous law' is dynamic. In fact, its meaning has never been coherent as it has always crossed over concepts like 'customary law', 'traditional law', 'tribal law', and so on. But the mainstream current was linked for centuries with the Western colonialist rivalry of the modernizing nations wishing to find the new land open to their own population. In this sense, it was the modern version of the old wandering of the peoples. Our ancestors, starting from what is considered now as the cradle of the humanity in Africa dispersed over almost all the continents mixing with or eliminating the competing kin, such as the Neanderthals or even less well-known others. This process still continued on the frontiers like the Pacific seas or in the Arctic when the new demographic intra-human processes of a similar kind started with accompanying bloody or peaceful contacts between people on the move and those who had already dug in. The geographical ignorance of Europeans in the fifteenth and sixteenth centuries resulted, among other things, in the misnaming of Native Americans, with whom I mostly deal in this paper, as 'Indians'. Only now do I realize how harmful this wrong name is in that linguistically it deprives the natives of their indigeneity and puts them on a par with Europeans in relation to their land.

It is often forgotten, though, that before the Americas were 'discovered' there had been 'heathen' natives of North-Eastern Europe subject to a similar conquest under the surmise of conversion to Christianity. This led to the legal and armed confrontation between the Kingdom of Poland and the Grand Duchy of Lithuania with the Teutonic Order; the latter had resettled from Palestine via Transylvania into Poland and started its recovery in the neighbouring pagan Prussia, invited in 1230 by a local Polish duke to fight *Prutenos et alios Sarracenos*, a formula that for some time created 'Saracens' at the Baltic Sea<sup>5</sup> in a similar way to what happened later to the Natives of America being misnamed as 'Indians'. At the Council of Constance in 1416, Paweł Włodkowic (also known as Paulus Vladimiri) on behalf of the Polish-Lithuanian delegation stated that:

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<sup>5</sup> L. Chollet, *Croisade ou évangélisation? La polémique contre les Chevaliers Teutoniques à l'aune de témoignages des voyageurs français de la fin du Moyen-Âge*, 'Ordines militaries. Colloquia Torunensia Historica. Yearbook for the Study of the Military Orders' 2015, Vol. XX, p. 180: 'Pétris de l'esprit des croisades d'Orient, de nombreux auteurs français qui relatent ces expéditions contre les païens du Nord se mettent à appeler ceux-ci "Sarrasins", par analogie avec les Musulmans méditerranéens.'

The Teutonic Knights [*Cruciferi* in Latin: JMK] fighting against the peaceful infidels or rather attacking them never engaged in the just war against them. The Reason: as against the assaulting the ones who are willing to live in peace is all law, that is, natural, the Lord's, canon and civil. (...) Moreover, such attacks of the faithful on the infidel, are against the love of one's neighbour, for two contradictions cannot coexist, and *our neighbours, according to the Truth, include both the faithful and the infidel* [emphasis added: JMK].<sup>6</sup>

Here, the early history of human rights considered to be universal started, albeit some observe that the principle amounting to recognition of religious freedom itself was already well built into the official doctrine of the Church:

No one is to be brought to the Christian faith by force, proclaimed an ancient text incorporated into Gratian's *Decretum*, the first of the basic lawbooks of the medieval church. No unwilling person is to be compelled to come to baptism, proclaimed a famous letter of Pope Clement III incorporated into the *Decretals* of Gregory IX, the second of those same lawbooks. Persuasion, not force, was to be the medium by which the faith of Christ was to be spread throughout the world.<sup>7</sup>

This debate emerged as only the prologue to the larger-scale developments one hundred years later.

The policy of colonization in history was not as systematic as it looks today. There were various policies, various accidents and varying attempts. There were adventurous adventurers, state rulers, companies and religious orders involved. But the competing claims had to be regulated within what was considered Christendom and the Popes were asked to arbitrate in the Polish-Lithuanian versus the Teutonic Order dispute as in the perennial competition between the Catholic monarchies of Portugal and Spain. For centuries, Europe meant the Catholic Europe with the Bishop of Rome assuming supreme power over the emperor(s) and other monarchs. The various so-called Bulls of Donation included therefore the formula of a grant, such as: 'we gave, conveyed, and assigned forever to you and your heirs and successors (...) all islands and mainlands whatsoever, discovered and

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<sup>6</sup> 'Że krzyżacy z Prus walcząc ze spokojnymi niewiernymi, albo raczej napadając ich jako takich nigdy nie mieli sprawiedliwej wojny z nimi. Uzasadnienie: ponieważ przeciw napadającym tamtych, którzy chcą trwać w pokoju, jest każde prawo, mianowicie naturalne, Boskie, kanoniczne i cywilne. Naturalne, mianowicie: "co nie chcesz aby tobie się stało" itd. Boskie, mianowicie: "Nie będziesz zabijał", "Nie będziesz kradzieży czynił" (Wj 20), w których to słowach zakazany jest wszelki rabunek i wszelki gwałt. (...) Takie napadanie niewiernych przez wiernych nie tylko wyklucza miłość bliźniego, ale także przez tego rodzaju niedozwolone przywłaszczenie sobie rzeczy cudzej mieści w sobie kradzież i rabunek. Uzasadnienie: Bliźnimi bowiem naszymi są tak wierni, jak i niewierni, bez różnicy.'; see L. Ehrlich, *Pisma wybrane Pawła Włodkowica*, Vol. 1., Warszawa 1968, pp. 9, 57–60.

<sup>7</sup> R. H. Helmholz, *Fundamental Human Rights in Medieval Law*, 'Fulton Lectures' 2001, p. 10.

to be discovered, (...) that were not under the actual temporal dominion of any Christian lords.”<sup>8</sup>

These words, however, should be read in their historical context. The expedition of Columbus was undertaken between two major events during the permanent war between Christendom and Islam. On 29 May 1453 the Ottoman Turks took over Constantinople before conquering Buda(pest) in 1541; on 2 January 1492 the kingdom of Granada capitulated to the Spanish after seven centuries of the Islamic domination on the Iberian Peninsula. Geopolitical reasons necessitated the Papal search for co-religionist allies in the East and South – not without foundations as the history of Nestorian rulers in Turkestan and the legend of King John document – so the race for taking over the non-Christian ‘neutral’ areas was strategically needed, being as well a pious attempt at conversion of the indigenous ‘heathens’ all over the world (on this both contenders, Christians and Muslims, were in agreement). The Second Front materialized though in an unexpected and often ignored way, at the same time in the new incarnation of Constantinople, the Third Rome, i.e. the Orthodox Christian Muscovy, that successfully fought with Islamic powers in the South until the annexation of the Crimean Khanate in 1783, and in the East until the decisive victory by Cossacks under Yermak over the Siberian Kuchum Khan in 1582, which opened the way for the often bloody (considering, e.g. the armed resistance of the Daurians, the Itelmens and the Chukchees) and exploitive conquest of the indigenous population of Siberia and colonization of its land eastward up to the Alaska, accompanied by partially successful and, as it seems, mostly peaceful and sometimes forced<sup>9</sup> Christianization of the natives by the Russian Orthodox Church.

As for the Western Roman Catholics, however, the profane zeal for colonization and exploitation from the beginning prevailed leading to the necessity to defend the evangelical spirit of the endeavour. As the *defensor de los Indios*, Fray Bartolomé de Las Casas wrote in 1552:

I will only make this small addition to what I have said that the Spaniards, from the beginning of their first entrance upon America to this present day, were no more solicitous of promoting the Preaching of the Gospel of Christ to these Nations, than if they had been Dogs or Beasts, but which is worst of all, they expressly prohibited their addresses to the Religious, laying many heavy Impositions upon them, daily afflicting and persecuting them, that they might not have so much time and leisure at their own disposal, as to attend their Preaching and Divine Service; for they looked upon that to be an impediment to their getting Gold, and raking up riches which their Avarice stimulated them so boundlessly to prosecute. Nor do they understand any more of a God, whether he be made of Wood, Brass or Clay, then they did above an hundred years ago, New Spain only exempted, which is a small part of America, and

<sup>8</sup> *Dudum Siquidem*, Bull of Pope Alexander VI, 1493.

<sup>9</sup> L. Nestor, *Pravoslavie v Sibirii*, St Petersburg 1910, Otechestvennaya tipografiya, <https://dl.wdl.org/21435/service/21435.pdf> (accessed 15.05.2023), p. 42.

was visited and instructed by the Religious. Thus they did formerly and still do perish without true Faith, or the knowledge and benefit of our Religious Sacraments.<sup>10</sup>

Upon the news from Hispaniola, already in 1501, Isabella I, Queen of Castile, declared Native Americans to be both people and subjects of the Castilian Crown, and so subject to the same rights and obligations as any other subjects of the queen. She ordered her commissioner Nicolás de Ovando to convert the 'Indians' 'as quickly as possible' but 'without using any force against them', 'to ensure that all live always in peace and concord and justice, treating all equally without exception', paying for any forced work done but keeping the new territories free from foreigners and 'persons of suspect faith' as 'Moors, Jews, reconciled, heretics or persons newly converted'.<sup>11</sup> The later metropolitan legislation in vain attempted to suppress the continuing genocide of Native Americans first through *Leyes de Burgos* issued by King Ferdinand II of Aragon on 27 December 1512, until Pope Paul III in 1537 in his *Sublimis Deus* Bull stated that:

We, who, though unworthy, exercise on earth the power of our Lord and seek with all our might to bring those sheep of His flock who are outside, into the fold committed to our charge, consider, however, that the Indians are truly men [able to communicate with the Christianity: JMK] (...) the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in anyway enslaved; should the contrary happen, it shall be null and of no effect.<sup>12</sup>

That led to the New Laws, *Leyes Nuevas* (*Leyes y ordenanzas nuevamente hechas por su Mayestad para la gobernación de las Indias y buen tratamiento y conservación de los Indios*), of King Charles I of Spain (Charles V, Holy Roman Emperor), promulgated on 20 November 1542 in Barcelona, that slowly and only partially were applied in the colonies meeting with armed resistance and rebellion on the part of the colonizers, and after the 1550/1551 juridical debate in Valladolid the amended less protective law was issued in 1552.

These legal documents and then the chain of interpretation had to be recalled as they continue their legal relevance until today, as is well exemplified by the co-called Discovery Doctrine formulated by Justice John Marshall

<sup>10</sup> B. de Las Casas, *A Brief Account of the Destruction of the Indies* by Bartolomé de Las Casas (original title: *Brevísima relación de la destrucción de las Indias*), London 1689/2007, republished by Project Gutenberg, [http://www-personal.umich.edu/~twod/latam-s2010/read/las\\_casasb2032120321-8.pdf](http://www-personal.umich.edu/~twod/latam-s2010/read/las_casasb2032120321-8.pdf), p. 37.

<sup>11</sup> Queen Isabella I and King Ferdinand of Spain, *Instructions for the New World*, (1501) New York 2018.

<sup>12</sup> Pope Paul III, *Sublimis Deus. On the Enslavement and Evangelization of Indians*, 29 May 1537, [www.papalencyclicals.net](http://www.papalencyclicals.net).

in *Johnson v McIntosh*,<sup>13</sup> which is commonly considered a cornerstone of the US landownership law. Justice Marshall had no doubts as to the motives of the European colonizers, as seen at the beginning of his report:

[T]he character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. (...)

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.<sup>14</sup>

It also involved the recognition of the *terra nulla* as something uninhabited only when not belonging to anyone recognized as the legitimate owner. The official international law thus divided the globe into *terrae nullae*, either among two Catholic superpowers of the time under the jurisdiction of the Popes or as open to the competition between Western actors according to the principle of *potior est qui prior est*, with due deference to the other actors recognized on the *terra firma*. The recognition of the indigenous rights is based upon the same principle of justice but with different definitions of the legitimate subjects of the right to land (and some waters). The problem continues as seen in the today's global politics in the form of conflicts on rights to suboceanic earth, sovereignty over the seas and the incoming dispute on the exploitation of the outer space. So far it has been assumed that extraterrestrials do not exist but the lawyers must be ready to react if this were to suddenly become untrue, so the errors committed against terrestrial natives would not be repeated. But the reality is still that the indigenous population, when political and economic interests prevail, is often treated as non-existent: '[E]ver since the final decades of the last century, the Amazon region has been presented as an enormous empty space to be filled, a source of raw resources to be developed, a wild expanse to be domesticated. None of this recognizes the rights of the original peoples; it simply ignores them as if they did not exist, or acts as if the lands on which they live do not belong to them.'<sup>15</sup> All this has been accompanied 'by grave violations of human rights and new forms of slavery affecting women in particular, the scourge of drug trafficking used as

<sup>13</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>14</sup> *Johnson v McIntosh* (1823), p. 573.

<sup>15</sup> Pope Francis, *Querida Amazonia*, Post-Synodal Apostolic Exhortation, Vatican 2020, Ch. 1, para. 12.

a way of subjecting the indigenous peoples, or human trafficking that exploits those expelled from their cultural context.’<sup>16</sup>

On the positive side, the words of the *Sublimis Deus* Bull solidified – made it a positive normative fact – the official recognition that ‘original inhabitants’ had ‘rights’ and thus ‘legitimate claims’. If, on the one hand, there are ‘rights’ and ‘rightful claims’, then on the other, there are duties that included not only the negative refraining from appropriation but also the positive duty to protect in exchange for the impairing the indigenous sovereignty. Therefore, whenever the *nexus iuris* is recognized, i.e. the link of correlative rights and duties, there is a law. However, although Justice Marshall acknowledged also the ‘inherent – even if impaired, or as some say, abused – sovereignty’ of the indigenous people, the question remains unresolved to this day of whose law this is.

### 3. WHAT LAW? THEORETICAL PERSPECTIVES

What law are we speaking about? Not long ago, Barbara Oomen was studying the contemporary use of what is called customary law in the areas of the officially recognized ‘traditional chiefs’ – ‘indigenous’ if we forget for a moment about the Khoikhoi and San people – where jurisdiction in the Republic of South Africa arrived at a conceptual puzzle, best illustrated by a remark of her field research assistant versed in the tribal customs as taught in the Law School, who on watching the proceedings of a Village Court was astonished that this was distinct from his lectures. In light of such an experience, she observed:

It is useful (...) to distinguish four registers of law, each embedded in separate discourses and discernible through a distinct research methodology. First, there is South Africa’s common law, the composite of laws, legal precedents and doctrine, with the Constitution as its umbrella text. [Secondly] the ‘official’ customary law is a species of the generic common law, its recognition couched in a specific discourse but its substance essentially also discernible from the text. A third distinction is that of the ‘stated customary law’, the idealized rules often retrieved through interviews with traditional readers or village elders (...) more efficient than the participatory research of the *longue durée* associated with the fourth register, living law. This term, first coined by Ehrlich and with synonyms such as ‘local law’, ‘folk law’ and ‘law in action’, serves to indicate the law as lived in day-to-day life and the norms and values it draws on.<sup>17</sup>

Oomen’s four registers deserve a closer look. At least in Poland the tradition of sociology of law has been preserved, the forerunner of which was Leon Petraży-

<sup>16</sup> *Ibid.*, Ch. 1, para. 14.

<sup>17</sup> B. Oomen, *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era*, New York 2005, p. 201.

cki (1865–1931), a Russo-Polish scholar who taught the original socio-legal theory at St Petersburg University School of Law and, after the Bolshevik revolution, left Russia to join the re-established Polish University of Warsaw in the newly independent Poland. Some of his students, for instance Pitirim A. Sorokin, Nicolas S. Timasheff and Georges Gurvitch, after the escape from communist Russia developed each their own version of the socio-legal theory, while in the Soviet Union the theory was soon banned as decadent idealism. Petrażycki in 1905<sup>18</sup> defined law in terms of the normative emotions of duties to satisfy someone's rights and of correlative rights to such a duty to be performed by another (*nexus iuris*), what Leopold Pospíšil calls 'obligatio'<sup>19</sup> in distinction from 'obligation'. The same idea was later formulated as a more sociological paradigm by the Polish-British anthropologist Bronisław Malinowski as 'anthropological definition of law'.<sup>20</sup> In sum, the *nexus iuris* was accepted as a *sine qua non* criterion of 'law' by Bronisław Malinowski, Paul Bohannan,<sup>21</sup> Max Gluckman and Leopold Pospíšil, while Americans like E. Adamson Hoebel<sup>22</sup> preferred to refer to Hohfeld's classification of jural relations. Petrażycki's theory openly liberates the concept of 'law' from that of the 'state' and offers the wider, pluralistic perspective.<sup>23</sup> Moreover, this is not only 'pluralistic' but also multi-level (to use Pospíšil's phrasing) in its perspective. As it can be seen in the North American native justice context, Michael Barkun's theoretical concept of 'horizontal law without sanctions' has been often invoked as the conceptual instrument to legitimize the recognition of the conciliatory type of justice.

Barkun does not know Petrażycki – like the majority of Anglo-American writers – but curiously enough, he is silent on Malinowski, too. In his critique of command theory of law, he raises the same arguments about international law as Petrażycki but he stops at rejecting sanctions:

The command theory distinguishes law from other modes of social control solely by its ability to use or threaten to use centralized and legitimate physical coercion to

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<sup>18</sup> To date the only edition of his works in English has been the collection by H. W. Babb (L. Petrażycki, *Law and Morality*, Cambridge, MA 1955); see also R. Cotterell, *Leon Petrażycki and Contemporary Socio-Legal Studies*, 'International Journal of Law in Context' 2015, Vol. 11(1). See also E. Fittipaldi, A. J. Trevino (eds), *Leon Petrażycki: Law, Emotions, Society*, London 2023.

<sup>19</sup> L. J. Pospíšil, *Anthropology of Law: A Comparative Theory*, New York 1971.

<sup>20</sup> J. Kurczewski, *Bronisław Malinowski Misunderstood or How Leon Petrażycki's Concept of Law is Unwittingly Applied in Anthropology of Law*, 'Societas/Communitas' 2009, Vol. 7, pp. 47–62; *idem*, *Petrażycki in Melanesia: Where Pospíšil and Malinowski Meet*, (in:) T. Ledvinka et al. (eds), *Towards an Anthropology of the Legal Field: Critiques and Case Studies*, Prague 2012.

<sup>21</sup> P. Bohannan, *The Differing Realms of the Law*, Supplement to 'American Anthropologist' 1965, Vol. 67(6).

<sup>22</sup> E. A. Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics*, Cambridge: Harvard University Press 1954.

<sup>23</sup> J. Kurczewski, *Petrażycki's Two Dimensions of Law*, (in:) E. Fittipaldi, A. J. Trevino (eds), *Leon Petrażycki: Law, Emotions, Society*, London 2023.

secure obedience. We have already touched upon its widespread acceptance, but, this acceptance notwithstanding, severe logical and empirical difficulties militate against it and seem seriously to outweigh its cardinal virtue, simplicity. Physical coercion, of course, can be a powerful force for controlling human behaviour, and in specific situations it seems – and indeed is – paramount. But a careful examination of its very real limitations demonstrates that it is of much greater significance as a short-term expedient rather than as the foundation of a legal system. This question must necessarily be dealt with in the context of stateless societies, if for no other reason than their manifest inability to organize sanctions in the conventional sense. The demotion of physical coercion to subordinate status, however, must have profound effects on our understanding of law in the larger perspectives of both developed and primitive societies.<sup>24</sup>

Barkun also advocates the wider meaning of law through invoking the notion of ‘jural community’ defined as ‘an area in which all the actors recognize that a common method exists for resolving disputes between them [peaceably or not...]. Jural community, then, need not entail acceptance of a particular concept of law. Within the conventional usage of the terms, it allows for no distinction between “law,” “custom,” “etiquette,” and “morals.”’<sup>25</sup> It is fascinating to read how Barkun interacts with advocates of the *nexus iuris* theory of law without knowing of their existence. So, in contrast to Petrażycki and Malinowski, he writes: ‘Our definition also omits considerations of obligation, not because it is unimportant but because it is so difficult to get at. (“Obligation” has been a potent concept in legal and in political philosophy, but, on the whole, it is easier to treat as part of our discussion of norms, in a later chapter).’<sup>26</sup> He observes, nevertheless, ‘a subtle distinction between Easton and the ethnographers of jural community: between the subjective feeling of obligation and the identification of the procedures that are the object of obligation. In a sense, legal analysis seems in the end to turn inward, seeking the roots of law first in the community but ultimately in the individual.’<sup>27</sup> But as Pospíšil<sup>28</sup> will later critically note, the ‘obligatoriness’ is confused by Barkun with the ‘obligatio’, as he detours in reasoning by arguing that: ‘Ultimately, the law-abidingness of a group is explicable only in terms of the specific decisions of individual persons on the desirability and/or possibility of disobeying. Obligation, again, flows from subjective feelings of the “oughtness”, to arrive at a misleading, ambiguous and on the surface trivial formula that ‘Law states the patterns of obligatory behaviour’.<sup>29</sup>

<sup>24</sup> M. Barkun, *Law without Sanctions: Order in Primitive Societies and the World Community*, New Haven: Yale University Press 1968, p. 61.

<sup>25</sup> *Ibid.*, p.71.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, p. 87.

<sup>28</sup> L. J. Pospíšil, 1971, *op. cit.*

<sup>29</sup> M. Barkun, 1968, *op. cit.*, p. 89.

When taking into account the mechanism leading to the performing of a duty or claiming a right by someone, Petrażycki distinguished between the mechanism of feelings and actions (called by him the *legal emotion*), springing out as if intuitively, and the positive legal emotions contingent upon some externalized legitimizing reference, such as an officially promulgated law or a pattern of conduct by ancestors ('old custom') or by contemporaries (the new custom). However, the 'official' here was opposed by Petrażycki to the 'unofficial' statutes, e.g. of the mafia, while even the judge is often officially left with his conscience to decide intuitively the case. The 'official customary law' fits perfectly this cross-distinction and might be opposed to the 'unofficial' one. As for Eugen Ehrlich's concept of 'living law', developed in a totally different theoretical environment, the question remains open of how to describe it in reference to the 'anthropological definition of law'. Its usefulness is beyond doubt but its meaning remains ambiguous.

In the post-World War II generation, the Polish-Canadian sociologist of law Adam Podgórecki attempted to settle the issue by equating Petrażycki's 'intuitive law' with Ehrlich's 'living law' and opposing it as the real law to the 'positive' normative law.<sup>30</sup> This makes sense on condition that Petrażycki's concept of the 'normative fact' is understood widely as any external normative reference and not only the 'written law' or the 'written official law'. The customary 'living law' is thus any normative practice – here Pierre Bourdieu's analysis<sup>31</sup> of Kabyle law fits – but it might be as well 'official' in that it might be authorized by the given power state, church or company as 'unofficial' if unauthorized. Practices not enacted but observed may become the recognized normative reference, and then they are the 'positive customary law' that might be even written down, at least by a legal ethnographer. Therefore, the living law is the normative practice that is of intuitive versus positive nature, and may be officially recognized or not. We need to not subsume the 'intuitive' and the 'living' under the same generic category but we should use the opportunity that Ehrlich's simple conceptualization of the difference between practice and the normative provides. Contemporary official state law is mainly positive and written but its practice might include intuitively filled gaps and solved antinomies. There is not only 'people's living law' but the state's institutions and officials' living law that from time to time is drastically exposed to the public on occasion of sudden exploding affairs. The other way to explicate the opposition between law *not only* in the books but also in the observed practice of others and even in one's own conscience is to call it the law as the norm and to oppose it to law as performed. This distinction permeates all types of law as discerned by Petrażycki: official and unofficial, positive and intuitive, though in the latter it is the most hidden as in some border cases the very performance becomes automatically the normative. For instance, I punched the unruly drunk

<sup>30</sup> A. Podgórecki, *A Sociological Theory of Law*, Milan 1991.

<sup>31</sup> P. Bourdieu, *Outline of a Theory of Practice*, Cambridge 1977.

on my route, I did it – now I think that, despite all consideration to the contrary, I was right as I was in the right. The action was intuitive as it was unreflected. Upon reflection, it is intuitive as it was just in my conscience. If we keep up the distinction, however, the ‘intuitive law’ concept is reserved for this aspect of the ‘living law’ meant as ‘law in practice’ that refers to what was often called ‘legal consciousness’ but embraces the ‘legal subconsciousness’ as well.

Even if this short conceptual excursus helped to complicate rather than simplify the matters at hand, nevertheless one feels more secure in employing the concepts like ‘custom’ or ‘living law’ not in isolation but taken as a group of sensitizing instruments of inquiry. The pluralist notion of ‘law’, the distinction between the ‘normative positive’ reference and the ‘normative intuition’, and the distinction between the ‘normative’ and the ‘factual’ should allow one to organize systematically the multiple issues that one encounters when approaching the area of ‘indigenous law’.

#### 4. THE OFFICIAL NON-INDIGENOUS INDIGENOUS LAW

The least known is exactly the ‘living’ or pragmatic aspect of the law. However, as we can see, even the normative aspect is hard to study. As official state law is the easiest to approach, we should begin with it to search for possibly the official state indigenous law, that is – to quote Oomen – ‘a species of the generic common law, its recognition couched in a specific discourse but its substance essentially also discernible from the text.’<sup>32</sup> This is best illustrated with the federal Native American law of the United States.

As four main ‘hypotheses’ or ‘leading principles’ to summarize the relevant vast heterogeneous body of official federal law Nathan R. Margold listed: (1) the principle of the political equality of races; (2) the principle of tribal self-government; (3) the principle of federal sovereignty in Indian affairs; and (4) the principle of governmental protection of Indians.<sup>33</sup>

The Federal Indian law is considered ‘a distinct body of law that relates to the legal relationships between the federal government and Indian tribes. It is dynamic, evolving and encompasses several hundred years of federal policies and interaction with tribes. The sources of Federal Indian law include principles of international law, the United States Constitution, treaties with Indian tribes, federal statutes and

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<sup>32</sup> B. Oomen, 2005, *op. cit.*, p. 201.

<sup>33</sup> F. S. Cohen, *Handbook of Federal Indian Law with Reference Tables and Index*, Washington 1942, p. IX.

regulations, executive orders, and judicial opinions.’<sup>34</sup> It is ‘complex’ as it comprises ‘thousands and thousands of statutes, regulations, treaties, and court decisions’ that are often contradictory to themselves and that relate to the variety of tribal sovereign powers some of which have a specific status (e.g. Alaskan tribes, not to speak of Hawaiians whose sovereignty has been illegally neglected). Still, there are some general principles of this law that are commonly applicable, such as the following:<sup>35</sup>

(1) Tribes have ‘inherent sovereignty’, which is ‘based on the fact that tribes were already governing themselves before settlers came to America, and the United States recognizes those retained self-governing powers.’ Felix S. Cohen, in his *Handbook of Federal Indian Law*, summarizes inherent sovereignty in this quote: ‘Perhaps the most basic principle of all Indian law supported by a host of decisions (...) is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. (...) What is not expressly limited [by Congress] remains within the domain of tribal sovereignty.’<sup>36</sup>

(2) Tribes are ‘domestic dependent nations’: ‘Tribes are “domestic” because they are within the boundaries of the United States. They are “dependent” because they are subject to the power and responsibility of the federal government. They are “nations” because they exercise sovereign powers over their people, property, and activities that affect them.’

(3) The Indian Commerce Clause of the US Constitution (Article 1, Section 8, Clause 3: ‘The Congress shall have power to regulate commerce with foreign nations, and among the several States and with the Indian Tribes’) gives the US Congress plenary power over Indian nations limited only by the US Supreme Court’s review.

(4) The government-to-government relationship of federally recognized tribes with the federal government, which explains the continuing battle for federal recognition (as epitomized recently by the more than three decades-long process that led to federal re-acknowledgment of the Cape Cod’s Mashpee Wampanoag tribe in 2007, legally ‘non-existing’ for a long time).

(5) ‘Trust responsibility’ of the federal government, i.e. ‘an obligation to protect tribes, their way of life, and to provide services such as education, housing and health care to ensure their survival and welfare. (...) Through treaties and other settlements, tribes received only small parcels of their original land base. In exchange, the federal government promised to protect tribes and provide services. This federal obligation is known as the “doctrine of trust responsibility,” and applies to all tribes, not just treaty tribes.’

<sup>34</sup> See General Principles of Federal Indian Law, <https://uaf.edu/tribal/academics/112/unit-4/generalprinciplesoffederalindianlaw.php> (accessed 15.05.2023).

<sup>35</sup> *Ibid.*

<sup>36</sup> F. S. Cohen, 1942, *op. cit.*, Chapter 7: The scope of tribal self-government, p. 122.

(6) Inapplicability of the United States Constitution and its Bill of Rights to the activities of the tribal governments. 'This is because the sovereign powers of tribes predate the Constitution. However, Congress passed the Indian Civil Rights Act in 1968 which applies to all tribes in the United States. The Indian Civil Rights Act is very similar to the US Bill of Rights. The Act requires tribes to provide due process for anyone who falls under their jurisdiction and tribes may not impose cruel or unusual punishment. One difference from the Bill of Rights is that the Indian Civil Rights Act does not require tribes to separate church and state. Another difference is that the Indian Civil Rights Act limits sentencing options for all tribes.' (imprisonment for a term not more than of three years or a fine of up to \$15,000 or both).

(7) Recognition of 'Indian country' as the territorial area over which tribes have jurisdiction. It was defined by congressional statute in 1948 to include not only reservations, but also dependent Indian communities, and allotments. 'In general, tribes have more jurisdiction within Indian country than outside it.'

(8) Canons of construction: 'Over time, through many conflicts between tribes and the US government, guidelines for interpreting Indian law cases were developed. These types of guidelines are called "canons of construction." The three basic guidelines for interpreting Indian law cases are that ambiguities in treaties must be resolved in favor of the Indians; Indian treaties must be interpreted as the Indians would have understood them; and Indian treaties, agreements, and laws must be construed liberally in favor of the Indians.'

(9) Double jeopardy: 'When both tribes and the state or federal government have jurisdiction over a matter, a person may be tried for the same offense in both tribal and state court or federal court, and the double jeopardy clause of the US Constitution does not apply. This is because tribes are "separate sovereigns".'

(10) Absence of criminal and penal jurisdiction over non-Natives (based on the US Supreme Court decision in a case *Oliphant v Suquamish Indian Tribe* in 1978). However, tribes may regulate non-Natives, who affect the health, safety, and welfare of the tribe and tribal members, through civil actions.<sup>37</sup>

## 5. NATIVIZATION OF THE NON-NATIVE LAW: THE INUIT CASE

The spread of the 'global ethics',<sup>38</sup> including the rights of animals and the rights of nature, especially since the cultural revolution of the 1960s, intensified

<sup>37</sup> <https://uaf.edu/tribal/academics/112/unit-4/generalprinciplesoffederalindianlaw.php> (accessed 15.05.2023).

<sup>38</sup> A. Podgórecki, *Global Ethics – A Need for a New Synthesis*, (in:) *idem, Mega-Sociology*, Prace Katedry Socjologii Norm, Dewiacji i Kontroli Społecznej IPSiR UW, Warszawa 2016.

by the increasing real dangers of climate change, paradoxically helped to develop support for the ‘ecological’ native people who survived into the twenty-first century but also to popularize the philosophy that is derived from their way of life by the new generations of ethnographers and social activists.

Let us recall that political domination does not exclude acceptance of the law of those subdued: the indigenous Roman and Han legal institutions with time were taken over by the successive waves of ‘barbarian’ conquerors coming from North and West. The Inuit people by choosing in the old days the Arctic niche for their habitat helped themselves to survive relatively well until our days in contrast to the potential Euro-colonisers. The Danish in Greenland and Euro-Canadians in the Far North had to, pragmatically, recognize the living native law. But this led to a significant feedback when the official law of the exogenous origin accepted the indigenous legal implants. The apparently simple recognition of customary Inuit adoption practices may serve as a relatively recent example:

Inuit Customary Adoption Incorporated into Quebec’s Civil Code – ‘Historic’ say Makivik and Nunavik Regional Board of Health and Social Services (...). On Friday June 16, 2017 at the Quebec National Assembly, Bill 113 called ‘An Act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information’ was adopted with the unanimous consent of all parliamentarians. The Bill notably includes important new provisions related to Inuit customary adoption, which were developed in close collaboration with Makivik and the NRBHSS along with other Aboriginal partners (...) Jobie Tukkiapik, President of Makivik Corporation, stated: ‘Nunavik Inuit have consistently called for Quebec’s laws to legally reflect the effects of our customary adoption regime. Although recognition is offered by the Constitution Act and at the James Bay and Northern Quebec Agreement, a practical inclusion of the effects of our adoptions on the kinship of our Inuit children and their parents was considered crucial. We therefore wish to thank the Government of Québec and Minister of Justice Stéphanie Vallée for having recognized in respect and integrity this important customary regime.’<sup>39</sup>

But decades ago an adoption of the Inuit law was made on a much fuller and larger scale by the Polish-Canadian criminologist and penologist Tadeusz Grygier in his draft of the Social Protection Code.<sup>40</sup> Maria Łoś, Emeritus Professor of the University of Ottawa, notes that:

Grygier’s model code was consistent with his philosophy. All his life, he strived to minimize suffering rather than maximize happiness, to negotiate rather than impose, to promote sanctions that helped to heal and repair instead of avenging and punishing. His Model Code, like his life philosophy, combined the utilitarian imperative of pragmatic altruism with the Epicurean moral philosophy of common sense, friendship and internal harmony. The ideas behind the code were also influenced by his

<sup>39</sup> <https://www.makivik.org/inuit-customary-adoption-incorporated-quebecs-civil-code-historic-say-makivik-nunavik-regional-board-health-social-services> (accessed 15.05.2023).

<sup>40</sup> *Social Protection Code: A New Model of Criminal Justice*, New York 1977.

pioneering investigations of concepts of justice and law among the Inuit of northern Manitoba [!] (...). It is not often remembered that the now celebrated idea of 'restorative justice' was introduced and elaborated in 1962 by W. T. McGrath and Tadeusz Grygier at a national conference of criminal justice organizations.<sup>41</sup>

So, the Inuit, who were unique in surviving the European conquest (*pace* the extinct Viking colonists in Greenland!) and who taught the Europeans how to survive in the Arctic kayaking in an anorak with harpoon in hand, provided also the lesson of the civilized way of dealing with trespassers of the fragile order of mutual tolerance and cooperation in small groups.

Grygier's 'Code as a whole is influenced by Indian ideology and Eskimo (Inuit) practice that the author and his team studied in Far North in 1970. The aim of the study requested by the Canadian Ministry of Far North was to answer the question why there was so much criminality in this area. It came out later that the Indian criminality is strictly linked to the abuse of alcohol. In contrast to other societies, Indians did not keep their crime secret and its purpose was not for gain. Their offences had been open, manifest, rebellious, violent and destructive. They had been the reaction to the humiliation, lack of freedom, imposed economy and law, above all to depriving the men of their traditional social status. Hence, often their wives and kids had been the victims. Amongst the Eskimo there had been almost no crime. Such absence was indeed the most interesting, and thus the influence of the Eskimo customs and unwritten law on the Code was the greatest.<sup>42</sup> The Eskimo law did not recognize 'guilt' (a recurrent theme throughout this paper) but 'shame' and sanctions of ridiculing and contempt (this field observation prompted Pospíšil<sup>43</sup> to turn from Hoebel's<sup>44</sup> 'teeth of the law' to a wider definition of sanctions that would include the 'psychological' measures as well). The purpose was in both, Eskimo and Indian, cultures the personal, familial and social survival to which Grygier added peace, consensus and solidarity as the aim for Indians and practice amongst Eskimo. Grygier pointed also to John Braithwaite, who advocated shaming as the basis for restitutive justice under the influence of Australian Aboriginal peoples, and to Verner Goldschmidt's draft of the Greenlandic Criminal Code that in contrast to Grygier's influential but never fully promulgated Code had been partially accepted and adopted as the official law for Greenland.

At last we arrive at Verner Goldschmidt, a Danish sociologist of law and culture who as early as in 1950 was requested by the Danish government to draft the Criminal Code for Greenland following his participation in 1948 in field research

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<sup>41</sup> <https://sites.google.com/site/tadeuszgrygier/home-biography/criminology> (accessed 20.11.2022).

<sup>42</sup> T. Grygier, *Sprawiedliwość czyli istota moralności, zdrowia i prawa*, Toronto 2006, p. 14, translation by JMK.

<sup>43</sup> L. J. Pospíšil, 1971, *op. cit.*

<sup>44</sup> E. A. Hoebel, 1954, *op. cit.*

into the practices (Ehrlich's living law!) of Greenland under the Danish administration. In the past the Greenland population, typically for the colonial era, had been divided into two classes: natives under the Danish administration, which would issue particular ordinances later codified into the official 'Greenlandic law' and similar to the Federal Indian law of the US, and the Danes subject to the metropolitan Danish law. After World War II, the time came for the attempted unification of the law. 'Two methods were here imaginable – Goldschmidt wrote afterwards – A codification of Greenlandic legal practice might be undertaken, in such a way, however, as to create a code which was applicable not only to that part of the Greenlandic population who had hitherto been subjected to the criminal law described above, but also to such persons as had hitherto been under the Danish Penal Code. Another possibility was to introduce the Danish Penal Code into Greenland, applicable to that part of the population who had up till then been under Greenlandic jurisdiction, it being of course necessary to be prepared to introduce certain important qualifications in view of the special geographical and cultural conditions. I chose, not to attempt to introduce the Danish Penal Code into Greenland, but instead, at least in principle, to attempt a codification of Greenlandic practice.<sup>45</sup> The very name of the code had been the outcome of the ethno-socio-juridical research study that disclosed the dysfunctionality of 'penal' law when applied to the native Greenlanders. 'The Greenlandic legal practice reflected the fact that the Greenlandic legal authorities distinguished the determination of guilt from the determination of sanctions in a manner quite foreign to Danish criminal law. It looked as if the finding of guilt took place essentially on the same basis as in Danish criminal law, whereas the fixing of sanctions was to a far greater extent determined by a global assessment of the offender's individual and social situation at the moment of conviction.'<sup>46</sup> One should not assume that this involved the possibility of restitution of the original Eskimo native justice,<sup>47</sup> including tolerance towards sexual acts with children, polygamy, leaving the old disabled people to their death or procedural drum-and-song contests resolving any possible dispute as an alternative to bloody revenge.

Goldschmidt<sup>48</sup> himself stressed that: 'The Criminal Code makes no attempt at giving formalized expression to the Greenland population's conception of justice. The foundation on which the Code has been built does not comprise examinations of the behaviour and attitudes of the members of society. It has solely been based on systematic observation of concrete legal reactions and on information as to the geographical and social background of the decisions made. Thus the Code is an attempt at expressing the pattern of behaviour of the legal authorities

<sup>45</sup> V. Goldschmidt, *The Greenland Criminal Code and its Sociological Background*, 'Acta Sociologica' 1956, Vol. 1(1), p. 232.

<sup>46</sup> *Ibid.*, p. 232.

<sup>47</sup> See, e.g. E. A. Hoebel, 1954, *op. cit.*

<sup>48</sup> V. Goldschmidt, 1956, *op. cit.*, p. 250.

in legal terms.’ From our viewpoint, it means that Goldschmidt’s draft expressed the ‘official living law’, both ‘positive’ and ‘intuitive’, as observed in the practices of the Danish colonial administration. However, this practice included a compromise with the unofficial indigenous Greenlandic intuitive and customary justice that interacted with the administrative actions. ‘Throughout the eighteenth and nineteenth centuries the development was, in broad outline, that more and more actions were made criminal offences in accordance with Danish views, whereas it proved possible to a limited extent only to introduce Danish punitive measures.’<sup>49</sup> Though the expression ‘restitutive law’ does not appear, Goldschmidt described his intended reading of the past experience of colonial authorities through attempting to adapt as much as possible the official law to the native ideas that the damages are the most important issue. Nevertheless, the resistance from the conservative official metropolitan Danish legislators led to a compromise that: ‘to make the system of punitive measures complete it was contemplated in preparing the first draft to include provisions concerning the impositions of damages – on an analogy with the Italian 1921 draft of a penal code. Such provisions were, however, not inserted in the draft, above all because there were on the whole some doubts concerning the Greenlandic law of damages, and also because on traditional legal dogmatic grounds it was thought inadvisable to include provisions relating to civil law in the Criminal Code. In view of the fact that many Greenlandic cases, particularly concerning personality [!] offences, have been settled solely by means of damages, it would presumably have been most expedient if damages had been mentioned as a punitive measure in the Code. Here, as in so many other parts of the Code, it has, however, become necessary to compromise with Danish legal tradition. In section 86 it is laid down that the court, when establishing that the accused has committed a crime, must decide on one or several of the punitive measures of the Criminal Code to be used. When circumstances permit, the court may refrain from deciding on the use of any punitive measure. This provision emphasizes the separation of the establishment of guilt and the establishment of sanctions. The provision involves that in the sentence the court may, e.g. establish that a serious crime has been committed, and that it may at the same time in connection with the question of punitive measures state the reasons why a quite lenient measure has been chosen, or why none has been used at all. Here it is possible to establish that from a social point of view a certain action may be undesirable, while at the same time the authorities may refrain from using any measures against the offender out of consideration for his individual circumstances.’<sup>50</sup> The provision was absent from the Danish Penal Code in force at the time.

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<sup>49</sup> *Ibid.*, p. 220.

<sup>50</sup> *Ibid.*, p. 241.

In fact, Goldschmidt was not accidentally referring to the Enrico Ferri's idea of criminal justice as 'social defence'. It was elaborated on in the second half of the twentieth century as the 'therapeutic model'.<sup>51</sup>

The model generalized as 'restitutive', based upon damages derived from the traditional concept of many native peoples, thus came back to them from the reformist faction of the Western lawyers' culture. The idea that finally caught the global audience<sup>52</sup> meant, as Jessica Metoui rightly titled her paper,<sup>53</sup> 'returning to the circle'. The Canadian Manitoba Province report of the Aboriginal Justice Implementation Commission advocated the steps already taken in drafting the Greenland Criminal Code of 1954:

The strategy proposed by the AJIC is based on the principles of community justice. This is a community-based, restorative justice model. It views crime as an attack on the victim and as a disruption of community balance. It seeks to mend the harm done to the victim and the community. There is no single community justice program or set of policies that can be simply introduced into a community – by definition, different communities fashion their own approaches. It involves new approaches to how one defines a crime, the role of a police force and its relationship to a community, the role of the courts, the types of sanctions that are employed, the justice system's recruiting policies, and the system's obligations to the victims of crime. Most importantly, it envisions a much bolder and comprehensive role for the community in the ongoing operation of the justice system. One measure of progress towards a community justice system is the degree to which the measures taken reduce the involvement of the criminal justice system in the lives of individuals and communities, and increase community involvement in finding solutions for crime.

Where the current system is centralized, isolated, and focused on criminals, a community justice approach is rooted in neighbourhoods, requires collaboration among citizens, and is attuned to the situation of the victims and the community at large. The issues that the criminal justice system addresses are serious, complex, and persistent. The AJIC recognizes that community justice approaches will not cause these problems to disappear. While community and restorative justice approaches take a less punitive approach to the administration of justice, they must retain a strong appreciation of how crime affects victims and communities. A process that seeks to restore community balance cannot place victims at greater risk.<sup>54</sup>

Significantly, recommendations like the above were i.a. based upon consultations with representatives of all (except one) the First Nations and the Manitoba Métis People Federation (altogether 27 interviews). Regarding 'restorative/com-

<sup>51</sup> D. B. Wexler, *Therapeutic Justice*, 'Minnesota Law Review' 1972, Vol. 57, p. 290.

<sup>52</sup> H. Zehr, *Changing Lenses: A New Focus for Crime and Justice*, Scottdale 2005, pp. 268–269.

<sup>53</sup> See J. Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 'Journal of Dispute Resolution' 2007, Vol. 2007(2).

<sup>54</sup> Aboriginal Justice Implementation Commission, *Final Report*, 29 June 2001, [http://www.ajic.mb.ca/reports/final\\_toc.html](http://www.ajic.mb.ca/reports/final_toc.html) (accessed 15.05.2023).

munity justice', respondents were asked: 'There has been, in the last ten years or so, a movement toward "restorative justice" where more attention is paid to including victims and community members in meeting directly or indirectly with offenders. Is this an approach that makes sense to you?'. The findings were as follows: 'A strong consensus exists as to the suitability of restorative justice. Twenty-three answered in the affirmative while only one said "no" and another said "don't know"'. It was not clear why the one respondent said "no". Those who said yes specified it would depend on the severity of the offence. A surprising finding related to this question is that no one objected to victims and offenders meeting directly, despite the literature that indicates that indigenous people tend to prefer non-confrontational models such as shuttle mediation, where a mediator meets with parties separately and does not bring them together in the same room.'<sup>55</sup>

What is important, in this case Native people were not asked about the traditional native justice but about 'a movement toward "restorative justice"' over the last ten years. Hanne Petersen, a sociologist with considerable research experience of the 'living' Greenlandic law, observed that 'the local Greenlandic legal culture has been neither rights-oriented nor rule-oriented; it has rather been consensus-oriented and situationally-oriented'<sup>56</sup> and agreed with the findings of the Manitoba inquiry: 'According to Sinclair, the Aboriginal world view holds that truth is relative and always incomplete, whereas the Western justice system frowns upon an individual who appears uncertain about his or her evidence. Because determining the truth in Aboriginal traditions is not usually a prelude to punishment, those accused of wrongdoing are more likely to admit having done something wrong. This is also the case in Greenland, where cases are seldom appealed because of questions concerning guilt, but where the sanctions may be questioned.'<sup>57</sup> And the original work of Goldschmidt needs citing again, also because it refers to comments made by one of the founders of the modern sociology of law, Vilhelm Aubert (1922–1988):

Aubert sees the Greenlandic Criminal Code as an 'attempt at introducing control on the part of criminal law into the continuous social control of the small groups'.<sup>58</sup> *There is reason to assume that the frequency and strength of the reactions in primary group societies are often influenced by the fact that the reaction may contribute, to a larger extent than the offence committed, towards weakening the solidarity between the members of society and intensifying the feeling of uncertainty and discord caused by the offence* [emphasis added: JMK].<sup>59</sup>

<sup>55</sup> T. Lajeunesse, *Final Report: Consultation with Aboriginal Peoples*, Report prepared for the AJIC, 8 May 2001, section 3: Findings, e) Community Justice.

<sup>56</sup> H. Petersen, *Legal Cultures in the Danish Realm: Greenland in Focus*, (in:) K. Hastrup (ed.), *Legal Cultures and Human Rights: The Challenge of Diversity*, 2001, p. 70.

<sup>57</sup> *Ibid.*, p. 80.

<sup>58</sup> V. Aubert, *Om straffens sosiale funksjon* [On the Social Function of Punishment], Oslo 1954, p. 161 et seq., esp. p. 162.

<sup>59</sup> V. Goldschmidt, 1956, *op. cit.*, p. 249.

## 6. THE DIFFERENT WORLDS

The above-discussed 'return to the circle' meant, however, not only the procedure but also the basic substantive concepts behind the law. As Judge Murray Sinclair argues: 'The starting point is a difficult one for people raised with the liberal ideals of "civil rights" and "equality"; it requires one to accept the possibility that being Aboriginal and being not-Aboriginal involve being different. It requires one to come to terms with the concept that the Aboriginal Peoples of North America, for the most part, hold world views and life philosophies different from those of the dominant (...) society, and that these belief systems and approaches to life are so fundamentally different as to be inherently in conflict.'<sup>60</sup> These words resonate today with some of Central and Eastern European leaders like Viktor Orbán or Jarosław Kaczyński in their plea for illiberal democracy. We urgently need to dissect the neo-authoritarian trend and the 'old tradition' collectivism.

Some of the Westernization pressures involved from the beginning not only the practices considered repugnant (*sutee* or anthropophagy being the evident examples) but also the 'ideological' assumptions behind them. Danish merchants were empowered to punish the Inuit for contacts with *angakoks*, Pueblo Indians were forbidden to dance by Spanish missionaries and the Navajo by the US Army, the Kwakiutl were forbidden to practice the *potlatch*, and nobody was allowed to punish witchcraft as if the world with witches unrepressed were safer. The positive side meant conversion to Christianity (or to Islam where there were opportunities for the Islamic colonization in Africa, Europe or Asia). The pragmatic missionaries with time discovered that the new faith was more palatable if mixed with the native beliefs and more or less open syncretism prevailed everywhere. It was easier once the complexities of the new religion had been made known. A native would find in the alien religion the basic elements, which Lucien Lévy-Bruhl called *le mystique*: the plurality of spirits, the omnipresence of God, the trans-substantiation, the symbolic efficacy, etc.

Among the former Plains tribes this semi-revival took the form of the Native American Church (NAC) that fought for its legal recognition, despite its activities being curbed through the Code of Indian Offenses of 1883. The Church's legal incorporation took place in Oklahoma in 1913 but the ritual consumption of the hallucinogenic peyote led to a prolonged conflict between Native and non-Native authorities, continued also in the Navajo land. It was only in 1967 when the Native American Church of the Navajo land (since 2003: Azee Bee Nahagha of Diné Nation) successfully presented the 1st Amendment to the new Navajo Nation Bill of Rights titled 'Declaring the Freedom of Religion as a Basic Human Right,

<sup>60</sup> M. Sinclair, *Aboriginal Peoples, Justice and the Law*, (in:) J. Y. Henderson, R. Gosse, R. Carter (eds), *Continuing Poundmaker and Riel's Quest*, presentations made at the Conference on Aboriginal Peoples and Justice, Saskatoon 1994, p. 175.

Repealing Certain Tribal Council Resolutions and Legalizing Peyote as a Sacrament within Native American Church Services' that was passed on 11 October 1967 by a vote of 29–26 overturning the 1940 Navajo Anti-Peyote Law. At the national level the issue ended when the Federal Indian Religious Freedom Act of 1978, also called the American Indian Religious Freedom Act, was passed to provide legal protection for the Church's use of the plant.<sup>61</sup>

The above may serve as an example of influence of Native Americans on the US Federal law. More significantly, the incorporation helped to institutionalize within the new white-dominated world the non-white cosmogony of floral character as '[a] prominent belief amongst church members is that all plants are purposefully created by the Great Spirit most often equalled with Jesus Christ', including peyote which was created for medicinal, spiritual, and healing purposes. 'Disease and death are believed to be a result of an imbalance in the individual. Besides peyote, other sacred plants, prayer, and fasting are used to cure this imbalance. Use of peyote is never for recreational purposes and the hallucinogenic effects of the plant are considered spiritual visions. To most Native Americans, visions are a communion with the metaphysical. Members also believe in the importance of helping the world in order to create peace, health, and freedom. They seek guidance from the Great Spirit in protecting the earth, continuing the ways of their ancestors, and caring for future generations.'<sup>62</sup>

The membership in the NAC is estimated at a quarter of million people only, and this includes non-Natives but apart from them the traditionalists, like 'Ceremonials', among the Navajo are numerous in many Native tribes. They would agree with opposition to Genesis 1:28–30 as expressed in the Navajo or Ojibwa myth of Creation: 'Creation came about from the union of the Maker and the Physical World. Out of this union came the natural children, the Plants, nurtured from the Physical World, Earth, their Mother. To follow were Animalkind, the two-legged, the four-legged, the winged, those who swim and those who crawl, all dependent on the Plant Earth and Mother Earth for succour. Finally, last in the order came Humankind, the most dependent and least necessary of all the orders.'<sup>63</sup> According to the Navajo myth of origin, recreated each time in the ceremony known as 'blessing way', a baby found and raised by the first couple became the Changing Woman, who is the main deity (though not the only one) of the Navajo, epitomizing their matrilineal clan system and prevailing female ownership of land and livestock. 'The Navajo teaching that came to us through their spiritual beliefs says that there is need to stay with Mother Earth in harmony. The same relationship shall be with Sky and other elements of Nature includ-

<sup>61</sup> <http://www.abndn.org/history-of-abndn.html> (accessed 20.11.2022).

<sup>62</sup> [https://en.wikipedia.org/wiki/Native\\_American\\_Church](https://en.wikipedia.org/wiki/Native_American_Church) (accessed 25.05.2023).

<sup>63</sup> F. Ahenakew, C. King, C. I. Littlejohn, *Indigenous Languages in the Delivery of Justice in Manitoba*, research paper prepared for the Aboriginal Justice Inquiry, Winnipeg 1990, p. 23.

ing human beings, birds, and animals among others.<sup>64</sup> Similarly *Pacha Mama* (Mother Earth) continuing cult is undergoing official recognition in the Andean countries (Bolivia, Peru, Ecuador) and was recognized as reality of beliefs to be accommodated by the Catholic Church.<sup>65</sup>

Of the indigenous population of Amazonia Pope Francis writes that their beliefs embody Pope Benedict XVI's 'human' and 'social' ecology:

The wisdom of the original peoples of the Amazon region 'inspires care and respect for creation, with a clear consciousness of its limits, and prohibits its abuse. To abuse nature is to abuse our ancestors, our brothers and sisters, creation and the Creator, and to mortgage the future'. When the indigenous peoples 'remain on their land, they themselves care for it best', provided that they do not let themselves be taken in by the siren songs and the self-serving proposals of power groups. The harm done to nature affects those peoples in a very direct and verifiable way, since, in their words, 'we are water, air, earth and life of the environment created by God. For this reason, we demand an end to the mistreatment and destruction of mother Earth. The land has blood, and it is bleeding; the multinationals have cut the veins of our mother Earth'.<sup>66</sup>

And he adds that:

In this regard, the indigenous peoples of the Amazon Region express the authentic quality of life as 'good living'. This involves *personal, familial, communal and cosmic harmony and finds expression in a communitarian approach to existence* [emphasis added: JMK], the ability to find joy and fulfillment in an austere and simple life, and a responsible care of nature that preserves resources for future generations.<sup>67</sup>

Let us return to the aspect of guilt determination in the Western legal culture. 'In Aboriginal cultures, the guilt of the accused would be secondary to the main issue', Judge Sinclair claims, and continues:

The issue that arises immediately upon an allegation of wrongdoing is that 'something is wrong and it has to be fixed.' If the accused, when confronted, admits the allegation, (...) there is still a problem and the relationship between the parties must still be repaired. Because punishment is not the ultimate focus of the process, those accused of wrongdoing are more likely to admit having done something wrong. That is why, perhaps, we see so many Aboriginal people pleading guilty. At the same time, to deny an allegation which is 'known' by all to be true, and then to go through the 'white man's court' is often seen as creating more damage. The concepts of adversarialism, accusation, confrontation, guilt, argument, criticism and retribution are not in keeping with Aboriginal value systems. Adversarialism and confrontation are

<sup>64</sup> S. Trimble, *The People: Indians of the American Southwest*, New Mexico 1993, after Navajo Cultural Anthropology Research Paper exclusively available on IvyPanda: <https://ivypanda.com/essays/navajo-cultural-anthropology/> (accessed 25.05.2023).

<sup>65</sup> Pope John Paul II, Homily in Cuzco, Peru, 3 February 1985, [https://www.vatican.va/content/john-paul-ii/es/homilies/1985/documents/hf\\_jp-ii\\_hom\\_19850203\\_cuzco.html](https://www.vatican.va/content/john-paul-ii/es/homilies/1985/documents/hf_jp-ii_hom_19850203_cuzco.html).

<sup>66</sup> Pope Francis, *Querida Amazonia*, 2020, Ch. 3, para. 42.

<sup>67</sup> *Ibid.*, Ch. 4, paras 70, 71.

antagonistic to the high value placed on harmony and the peaceful co-existence of all living beings, both human and non-human, with one another and with nature.<sup>68</sup>

Judge Sinclair lists other conflicts ending with the basic statement: 'In acknowledging their powerlessness before the Creator, Aboriginal children would be taught to affirm their dependence upon the Creator and upon all of creation; to wait patiently and quietly, in a respectful manner, to receive the mercy of the Creator.'<sup>69</sup> Sinclair is both a Canadian judge and Ojibwa priest. Unsurprisingly, Sinclair ends demanding Aboriginal self-government in justice.

## 7. THE OFFICIAL TRIBAL LAW: THE NAVAJO CASE

Nobody seems better suited to the description of the varieties of 'tribal law' of the US Native Americans than the Navajo (or the Diné, 'The People' as they used to call themselves). Firstly, their legal system was called the 'flagship' of American Indian tribal courts.<sup>70</sup>

Secondly, 'Navajo Nation Becomes Largest Tribe in U.S. After Pandemic Enrollment Surge', as announced by 'The New York Times' on 21 May 2021. This is the largest Native American tribe living on the largest tract of 'Indian land' in the US. Recent research shows that 'Navajos all come from various peoples (some of whom no longer exist): some small groups of individuals joined existing clans and do not know their own history beyond what they learned from the clan they joined, and other groups were localized ethnic or clan groups who joined the coalition of what became identified as the Navajo (...). Each group that became Navajo brought its own knowledge of the land, ceremonialism, and social and economic life. This became part of the Navajo way of life, which is personified in the Blessingway ceremony and is referred to by terms such as *beauty*, *harmony*, or *balance*.'<sup>71</sup>

The modern legal history of Navajo is complex and might be divided into five stages discussed below.

(1) Until 1864 Navajo had followed their own 'customary' unwritten law of which nothing is known except that there were elders but no authoritative person to settle the disputes arising between members of different 'bands'. 'Way back there, the Navajo people didn't have any kind of law. They used to just talk it together, and the things straightened up by talking together – maybe three or four

<sup>68</sup> M. Sinclair, 1994, *op. cit.*, pp. 182–183.

<sup>69</sup> *Ibid.*, pp. 183–184.

<sup>70</sup> 'Navajo Times', 29 October 2010, [www.navajotimes.com/news/2010/1010/102910judges.php](http://www.navajotimes.com/news/2010/1010/102910judges.php).

<sup>71</sup> M. Warburton, R. M. Begay, *An Exploration of Navajo-Anasazi Relationships*, 'Ethnohistory' 2005, Vol. 52(3), p. 544.

people talking together.’<sup>72</sup> As a label of ‘lawlessness’ usually covers the different concept of order, we may need a more tangible image of what that means. Assuming the similarity of the social organization with the Comanche in the open Great Plains period, since their way of life and changes in mode of subsistence were alike, it might be as Hoebel described the latter: ‘The simple needs of Comanche society did not impose any great social pressure for governmental controls, and the high value placed upon individual freedom of action also worked to hold the government at a minimum.’<sup>73</sup> There were, like among the Navajo, the ‘peace chiefs’ and the ‘war-chiefs’, but the term ‘chief’ is misleading as they were leaders.<sup>74</sup> One of the most acute of Hoebel’s informants when asked about the peace chiefs had nothing more to say than ‘I hardly know how to tell about them; they never had much to do except to hold the band together’.<sup>75</sup> Certainly, ‘holding the band together’ has especially much to do with people who in time of war felt free to leave the party, pick up their arrows and go their own way. ‘In view of their basic values of individual supremacy and the related ambiguity of powers of the chieftains, it is not surprising that in this tribe there were no public officials endowed with law-speaking or law-enforcing authority. The law of the Comanche was neither legislative nor judge-made. It was (...) “hammered out on the hard anvil of individual cases by claimant and defendant pressing the issues in terms of Comanche notions of individual rights and tribal standards of right conduct.” Thus it was almost exclusively a system of private law: a system of individual responsibility and individual action; a law that was case made.’<sup>76</sup> And such, it seems, was the old law of the Navajo.

(2) Like the Comanche, the Navajos would raid their traditional enemies settled in the pueblos, i.e. they raided the Spaniards, fought with the Apache, the Mexicans and the Anglo-Americans who came after them until, in the 1860s, the US Army decided on a ‘final solution’ to the ‘Navajo question’: in 1864 about 8,000 of the surrendered and dismounted Navajo were forced to arrive through the Long Walk to Fort Sumner where the survivors were placed in a sort of a concentration camp. The adults were made to attempt farming they had never done on the soil that was never fertile enough, while the children were placed in the boarding school. About 200 people died on the way, and the interned Navajo entered disputes with the Apache interned there before. The overpopulated, with almost 10,000 Indians, Bosque Redondo ‘internment camp’ was poorly subsi-

<sup>72</sup> J. Ladd, *The Structure of a Moral Code*, Cambridge: Harvard University Press 1957, p. 204.

<sup>73</sup> E. A. Hoebel, 1954, *op. cit.*, p. 131.

<sup>74</sup> ‘Navajo peacemakers are *naat’aanii* in Navajo tradition, a term sometimes inaccurately translated as “peace chief”. Instead, a *naat’aanii* is a community leader whose leadership depends on respect and persuasion and not a position of power and authority’; see J. Zion, *The Dynamics of Navajo Peacemaking*, ‘Journal of Contemporary Criminal Justice’ 1998, Vol. 14(1).

<sup>75</sup> E. A. Hoebel, 1954, *op. cit.*, p. 132.

<sup>76</sup> *Ibid.*, p. 133.

dized and poorly managed until 1868 when the new treaty was signed with the Navajo granting them back the freedom to resettle in a part of their native land consisting of 3.5 million acres (14,000 km<sup>2</sup>) of the 'reservation' demarcated by the Four Sacred Mountains. In the camp, the US Army handled severe crimes, while petty crimes and disputes remained in the purview of the 'chiefs' of the twelve 'villages' that were set up by the US Army officers. It is often said that the trauma of the Long Walk and the final victory resulted in the forging of the Navajo Nation, as they call themselves.

(3) After the Navajo return from the Bosque Redondo in 1868, a completely new 'system' of authoritative centralized justice applied, which was handled by the Indian Agent (obviously, Euro-American) of the Federal Bureau of Indian Affairs (BIA) with the support of the US Army, while smaller disputes remained under the Navajo control. That certainly was not the previous 'traditional' Navajo system of justice, nor was it the constitutional US official system. The Native people were under the military rule of the US Army that not only engaged some other tribes into struggle with the Apache, the Comanche and the Navajo, but once the latter surrendered, forced them to collaborate in the disciplinary order, first in the camp and then in the reservation. In 1883, the US Supreme Court 'concluded that the federal government is without criminal jurisdiction to prosecute Indian-on-Indian crimes unless or until Congress authorizes such jurisdiction'. In response to the *Crow Dog* case (109 U.S. 556 (1883)), Congress enacted the Major Crimes Act in 1885, providing Federal courts with jurisdiction over the crimes of murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, assault with intent to commit rape, carnal knowledge, arson, burglary, robbery, embezzlement, and larceny committed by an Indian against another Indian or other person.<sup>77</sup> In 1889 that was supplemented all over the United States with the new system of 'Indian Courts' envisaged and supervised by the US administration and enforced on the Native Americans. For the Navajo, BIA Agent David L. Shipley established the Navajo Court of Indian Offenses and appointed judges. Previously, judicial authority was exercised by himself.

Eugene R. Fidell<sup>78</sup> calls such courts the 'fourth system of American law' that 'collectively (...) serve more people than several states' and that may encompass the private law as well: 'Roughly 300 of the 566 federally acknowledged Indian tribes have courts or dispute resolution systems. They dispose of thousands of cases every year. These courts are as varied as the tribes they serve: some tribes have traditional courts, some have courts pursuant to constitutions approved under the Indian Reorganization Act of 1934 (IRA), some rely on pre-IRA Courts of Indian Offenses, some share trial courts with other tribes, some participate

<sup>77</sup> See 18 U.S.C. §§ 1152-53 (No. 17-646 (2018):11).

<sup>78</sup> The case reported after E. R. Fidell, *Competing Visions of Appellate Justice for Indian Country: A United States Courts of Indian Appeals or an American Indian Supreme Court*, 'American Indian Law Review' 2016, Vol. 40(2), pp. 233-248.

in inter-tribal courts, and many have appellate courts (either their own or inter-tribal ones) (...). It is astounding that, as Professor Fletcher notes, “no one really knows how many tribal courts there are (...)”. These are colloquially known as “CFR courts”.<sup>79</sup> The courts were introduced not by the US Congress but based on the administrative decision of Hon. Hiram Price, the Commissioner of Indian Affairs, under the Rules of March 1883 and established with the ‘approval’ of the Secretary of the Interior on 10 April 1883.

The third stage continued, albeit with unknown ‘underground’ reality of the ‘living law’, after 1934 when the Indian Reorganization Act (IRA) gave the tribes all over the United States an opportunity to introduce their own constitutions.<sup>79</sup> In the summer of 1935, the Navajo people voted against the adoption of the IRA provisions that were part of Franklin D. Roosevelt’s New Deal. The vote was suspiciously interpreted locally as a referendum on the livestock reduction program presented by the Bureau of Indian Affairs in 1934 in order to improve grazing conditions.<sup>80</sup> In the US, 172 tribes accepted the act, and 73 rejected it. However, the IRA did not legitimize the Courts of Indian Offenses, nor did it list the establishment of Indian tribal courts among the powers of an ‘Indian tribe or tribal council’. The 1883 Code of Indian Offenses was finally amended when John Collier assumed the role of Commissioner of Indian Affairs in the administration of President Roosevelt in 1933. ‘He eliminated all references to the bans on dances, such as the sacred Lakota Sun Dance, and other customary Indian practices.’ The modern incarnation of the Code of Indian Offenses is found in the Code of Federal Regulations at Title 25 CFR Part 11 and it, unlike the original version,

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<sup>79</sup> Indian Reorganization Act of 18 June 1934 (48 Stat. 984, 25 U.S.C. 461 et seq.), Sec. 16: Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

<sup>80</sup> <https://navajopeople.org/navajo-history.htm> (accessed 15.05.2023).

provides for a basic criminal code for lesser crimes committed by Indians on reservations covered by these provisions.<sup>81</sup>

The list of criminal offences, purged of the anti-cultural components, has been in the meantime extended to include, e.g. the modern concerns with credit cards and violence against women. The 25 CFR § 11.500 Law applicable to civil actions provides that: (a) In all civil cases, the Magistrate of a Court of Indian Offenses shall have discretion to apply: (1) Any laws of the United States that may be applicable; (2) Any authorized regulations contained in the Code of Federal Regulations; and (3) Any laws or customs of the tribe occupying the area of Indian country over which the court has jurisdiction that are not prohibited by Federal law.<sup>82</sup>

(4) The present judicial system for the Navajo Nation was created by the Navajo Tribal Council on 16 October 1958. It established a separate branch of government, the 'Judicial Branch of the Navajo Nation Government', which became effective on 1 April 1959. The Navajo Court of Indian Offenses was dissolved, and the sitting judges became judges in the new system. The resolution established 'Trial Courts of the Navajo Tribe' and the 'Navajo Tribal Court of Appeals', which was the highest court and the only appellate court.

In 1978–1985, the Supreme Judicial Council established the Navajo Tribal Council, a political body rather than a court. On a discretionary basis, it could hear appeals as the Navajo Tribal Court of Appeals. Subsequently, the Supreme Judicial Council was criticized for bringing politics directly into the judicial system and undermining impartiality, fairness and equal protection.

(5) In December 1985, the Navajo Tribal Council passed the Judicial Reform Act of 1985, which eliminated the Supreme Judicial Council and renamed the other courts that are now governed by Title 7, Courts and Procedures, of the Navajo Tribal Code.

The Navajo Nation Peacemaking Program was introduced in 1988. This model is the original invention of the Navajo politicians. It is based upon the elements of the traditional (first-stage) practices that have preserved within the 'underground' living law of the generations after 1864 and became modernized under the influence of both the nativist and ADR movements gaining influence in the 1970s.

The Navajo (Diné) law includes, as a result of this historical development, several distinct components that are listed officially as coming from different normative sources: (1) the US Federal 'Indian' law; (2) the Diné 'common law', including the (a) official law of the Navajo Nation, and (b) the 'customs' to which the officers of law may refer; (3) the 'peacemaking' mechanism that is autonomous and works case by case; (4) the sacred Diné law that remains the esoteric

<sup>81</sup> *Code of Indian Offenses*, [http://robert-clinton.com/?page\\_id=289](http://robert-clinton.com/?page_id=289).

<sup>82</sup> CFR 25 Part 11, Courts of Indian Offenses and Law and Order Code, <https://www.law.cornell.edu/cfr/text/25/part-11>.

knowledge of the community sacral officers. Raymond D. Austin<sup>83</sup> proudly states that:

The Navajo Nation judges enjoy a solid reputation for utilizing extant Navajo customs and traditions as law (Navajo common law) and blending the old with the new, a process that meshes Navajo customs and traditions with relevant and beneficial parts of not only Anglo-American legal traditions, but also legal traditions from different parts of the world. The process of blending the old with the new uses a framework that gives primacy to Navajo philosophy and Navajo ways of doing things. The use of Navajo common law by the Navajo judges and Navajo Nation government, which has been described as a Navajo legal revolution, is really the Navajo people defining Navajo Nation sovereignty the Navajo way – by relying on their own customs, traditions, language, spirituality, and sense of place.

The skill of the Navajo Nation judges at using Navajo common law and at blending the old with the new has generated intense study and scholarship by those interested in American Indian methods of dispute resolution and the related topic of use of customs and traditions as law by the World's indigenous peoples. (...)

This statement does not mean, nor does it imply, that the Navajo Nation courts always blend Navajo common law with Anglo-American or other law. In some cases, the Navajo Nation courts have applied only Navajo custom to decide issues; in others, the Navajo Nation judges have applied only Anglo-American law. Moreover, the Navajo Nation courts have leeway to utilize the law or reasoning of other 'nations,' including Indian nations, to decide cases.

## 8. HARMONY OR PRUDENCE?

Short descriptions of the peacemaking process leave an impression that it is but another example of what is well known as the romanticization of the past and oversimplification that serves, i.a. political purposes. I have no doubts as to the technical aspects of the procedure but as to its ethical meaning, as it can be seen in the more detailed reports and studies. The process is democratic and collective but not necessarily communal in the ethical sense. Let us look into the authoritative analysis of the Navajo ethics as made by John Ladd.<sup>84</sup> On the one hand, one finds there statements that seem to support the model presented above; on the other hand, Ladd describes the Navajo (at least their ethical representative Bidaga) as 'egoistic' in a specific meaning of the term. 'The commission of a wrong act is attributed to a person not knowing what he is doing. (...) The con-

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<sup>83</sup> R. D. Austin, *Navajo Courts and Navajo Common Law*, PhD dissertation, Graduate College, University of Arizona, 2007, <https://turtletalk.files.wordpress.com/2010/05/ray-austin-dissertation.pdf>, p. 37, including note 76.

<sup>84</sup> J. Ladd, 1957, *op. cit.*

sequence is (...) that there is no place for anything resembling our Western notion of “sin”. It is therefore no mere coincidence that the Navajo interpreter speaks of wrong actions as mistakes, rather than as “sin”, “crime”, “guilt”. (...) If we conjoin the doctrine of almost the universal ethical competence with the belief that ethical knowledge is sufficient to effect right action, it follows that in principle coercion is never necessary. Every dispute can be settled by “talking it over”. The exception to this principle occurs only when a person is incompetent,<sup>85</sup> that is when drunk or a child. This is accompanied by a theory of ‘wind soul’ that enters the body at birth and leaves at death. Following Father Berard Haile, Ladd argues that this esoteric doctrine absolves an individual from responsibility so ‘events, not the actors or qualities, are primary’<sup>86</sup> and ‘[t]he main interest is in “straightening things up” by rectifying the trouble, and not by trying to change the criminal’s responsibility or to save his soul. (...) The ethics is individualistic and egalitarian: in the sense that it can be understood and learned by everyone; (...) a person’s character is determined by a supernatural dispatcher of “winds” [good, happy, bad, i.e. making mistakes, mean]; persuasion is the accepted means of influencing others, and coercion is neither necessary (...) nor sufficient.’<sup>87</sup>

Ladd calls the Navajo ethics ‘prudential’ (Native authors often use term ‘empirical’):

In general terms I shall contend that the Navajo moral code can be called ‘rationalistic’ [i.e. providing reasons for every prescription: JMK], ‘prudentialistic’, ‘egoistic’ and ‘utilitarian by derivation’. (...) By ‘prudentialism,’ I mean not only that their system is rationalistic but that it is oriented to the welfare of the individual agent. In other words, it is egoistic, although it differs from Western egoism in that the welfare of the agent is not subjectively defined in such terms as pleasure, self-assertion, self-realization, or sanctification. From the basic prudentialist prescription and by means of certain factual assumptions, the Navajo moralist derives particular moral prescriptions and rules which are, in effect, utilitarian, that is, they tend to promote the greatest good (happiness) of everyone.<sup>88</sup>

And the same ‘prudence’ is present already in the Goldschmidt’s comments to the Greenland Criminal Code of 1954:

As a curious example of the open-mindedness and imagination occasionally displayed in taking measures against psychically abnormal criminals I may mention a case tried in the court of Upernavik in 1935. The accused had raped an 8-year-old girl and had been previously warned by the local municipal council because he had sexual intercourse with dogs. He was sentenced to 12 months’ forced labour on probation, so that the sentence was to be enforced only in the case of renewed offences.

<sup>85</sup> *Ibid.*, pp. 272–273.

<sup>86</sup> B. Haile, *Legend of the Ghostway Ritual in the Male Branch of Shootingway*, Arizona 1950, after J. Ladd, 1957, *op. cit.*, p. 274.

<sup>87</sup> J. Ladd, 1957, *op. cit.*, p. 274.

<sup>88</sup> *Ibid.*, pp. 212–213.

It appears, partly from the case itself, partly from information given to the juridical expedition that the motivation of the binding over was that the local municipal council had induced the convicted person to marry a local feeble-minded erotomaniac woman who was sterile, on the ground that in this way it would be possible to lead the convict's abnormal sexual instinct along normal channels without any danger of issue afflicted with a hereditary taint. As far as is known, this measure has had the intended effect, since after his marriage the convict has not been charged with any crime. The number of unsettled cases is comparatively large. This is partly due to the vacillation with which the enforcement of the law took place under the previous Greenlandic legal system, partly to the fact that cases were often settled without legal proceedings when the offender pleaded guilty and showed repentance. In many cases it would also seem as if the legal authorities were not particularly interested in taking further steps when a committed crime had been cleared up.<sup>89</sup>

The lack of interest in punishing is linked with getting rid of trouble. In fact, the Upernavik case fits literally Charles Fourier's utopian community he called 'Harmony' in which also every sexual orientation will be satisfied by linking one willing participant with another. The 'harmony' means here 'lack of trouble' through maximum toleration and not unison cooperation for their common good. Similarly, Franz Boas described the 'law' among the Canadian Inuit in the following way: 'There was a good hunter who used to threaten physically the other until those under permanent threat decided he needs to be shot by one of them who then took the widow and her orphaned children "so that they shall be no burden on the company",<sup>90</sup> while later on he helped the community with a trouble caused this time by a very old woman who was provided for by her relatives so "although she resisted him, he took her out of her hut one day to a hill and buried her alive under stones".<sup>91</sup> The simplicity of these actions considered self-evident and left without any further reaction of others is part of the wide 'prudentialism' of the Inuit ethos exemplified also by a wife lending to accompany a 'friend' in his hunting expedition, lack of any formal recognition of the union between family partners, 'altruistic suicide' by the elderly, adoption of surplus offspring in times of plenty or freezing newborns in times of scarcity. This is not only the law of the small face-to-face group, as Aubert pointed out, but more than that, it is the law of the small group of people under permanent risk of death.

Austin, himself a Navajo, asks the question:

How do Navajos conceptualize *hozho*? At a higher level, or more appropriately the universal level, *hozho* describes a state (in the sense of condition) where every tangible and intangible thing is in its proper place and functioning well with everything else, such that the condition produced can be described as peace, harmony, and bal-

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<sup>89</sup> V. Goldschmidt, 1956, *op. cit.*, pp. 231–232.

<sup>90</sup> F. Boas, *The Central Eskimo*, Washington 1888, <https://www.scribd.com/doc/103891166/Boas-Franz-The-Central-Eskimo-1888>, note 4, p. 582.

<sup>91</sup> *Ibid.*, note 7, p. 615.

ance (for lack of better English terms). Moreover, at the highest level of Diné philosophical abstraction, *hozho* describes the abstract ‘perfect state,’ although this ideal condition is, quite frankly, imponderable, or, according to Navajo philosophy, a reality that is beyond human experience. The phrase ‘everything in the universe’ refers to the interconnected, interrelated, and interdependent elements (i.e., air, water, animals, birds, heavenly bodies, etc.) that form a unified whole, such that the resulting structure might resemble a web.<sup>92</sup>

In fact, this doctrine of ‘harmony’ perpetuated until today, found historically the most elaborate expression in the Confucian doctrine of the basic relations and of the form – *li* – that needs to be reproduced both at the micro- and macroscopic level under the ‘face’ covering all anti-social individual emotions and sentiments.

When applied to the disputed problem, it means that the settlement means re-establishing the proper state of affairs in the universe and not the harmony between the individuals. The interpersonal relation is just one of the relations that matter. In other words, the ‘harmony’ is the metaphysical state and, despite the misleading descriptions, peacemaking is the modern edition of the old sacred ritual aiming at achieving such state, not the secular mediation between individuals or a group therapy for individuals. The conciliation achieved is within the Living Whole, not (only) between the particular human individuals, though it is egoistic as it relates to the good of an individual. Simply, to follow the order of beings is good to us. But if all follow that for their own good, then the good of everyone as well as the common good are sustained in a collective contingency relationship.

A cautious review of the existing sources has recently led to the following conclusion:

The findings in this literature suggest that a diverse range of Indigenous nations in North America value non-interference in interpersonal interactions. However, prior to contact with Europeans, nations on the Northwest Coast, such as the Haida, Nuw’chah’nulth, Kwakwaka’wakw, and Tsimshian, had clearly defined class divisions and a hierarchy based on wealth and heredity. (...) As harmonious relationships seem to be essential to the survival of egalitarian societies, this begs the question of the merit that hierarchically organized Indigenous societies would place on non-interference in interpersonal relationships. (...) An understanding of the Indigenous concept of non-interference appears to be an integral part of competent cross-cultural practice with Indigenous peoples of North America. However, the key literature on the topic appears to be incongruent with the body of research on Indigenous peoples, customs and practices. In contrast to dominant discourse of non-interference as a rigid, overriding Indigenous value, a review of the literature reveals a cultural concept that is complex, fluid and influenced by context.<sup>93</sup>

<sup>92</sup> R. D. Austin, 2007, *op. cit.*, p. 83.

<sup>93</sup> J. Wark, R. Neckoway, K. Brownlee, *Interpreting a Cultural Value: An Examination of the Indigenous Concept of Non-interference in North America*, ‘International Social Work’ 2019, Vol. 62(1), p. 428.

And the self-description of the peacemaking model makes it clear that the 'harmony' is to be attained through the collective work with the individual that was sincerely described by James Zion:<sup>94</sup>

Modern sentencing trends, which tend to be increasingly punitive, drive criminal defense attorneys to offer new excuses for criminal behavior: involuntariness, reasonable deficiency, and non-responsibility in defenses such as brainwashing, 'rotten social background,' the battered spouse defense, the Vietnam veterans defense (i.e., post-traumatic stress disorder [PTSD]), and the cultural defense. The cultural or culture defense 'exempts an accused person from criminal liability when it is shown that the reason for the criminal act was that it was required to be done by the norms of a culture to which the accused belonged, that is, by a folk law to which the accused was subject.'<sup>95</sup> *Such defenses make us uncomfortable* [emphasis: JMK] because they seem to run against common sense and our feelings of outrage when there is a victim – particularly of acts of violence. Defendants offer excuses for their conduct – more often alcoholism or drug dependency – and we cannot adequately deal with them in adjudication. The self-incrimination privilege (although it is vital to civil liberties in an authority-based system), high caseloads, and formalized court procedures make it difficult to confront offenders, elicit their explanations for behavior, and deal with the underlying causes of their conduct. Whether such defenses are asserted by criminal defense counsel, the Navajo Nation judges recognize them (...). The growing concept of restorative justice gives an opportunity to deal with the dynamics that underlie those kinds of offenders, hear their excuses, and deal with them in context. That is why Navajo peacemaking works.

As for the functioning of the system in its beginnings, Zion<sup>96</sup> reports that most often Navajo courts deal with such misdemeanours as: (a) driving while intoxicated, (b) assaults and batteries, and (c) offenses against the public order (most often disorderly conduct). 'There are large numbers of domestic violence cases in the criminal justice system and in civil restraining order proceedings. Most crimes are associated with alcohol use, and most violent offenses involve people who are related by a family or Navajo clan relationship.'

The peacemaking process is a religious ritual:

*Hozhooji naat'aanii* is itself a ceremony. Navajo prayers are based on the concept that the processes of prayer and ceremony create *hozho* or harmony. (...) At the conclusion of the prayer, which ends a ceremony, individuals are again in their proper place, functioning harmoniously and in beauty with everything else. (...)

At the end of the process, *hozho* should be achieved, and people will describe it with the phrase *hozho nahasldi*. The translation is to the effect that now that the process has been completed, the individuals involved in it are in good relations and, indeed,

<sup>94</sup> J. Zion, 1998, *op. cit.*, pp. 58–74.

<sup>95</sup> G. Woodman, *Culture and Culpability: The Potential of the Cultural Defence*, 'Commission on Folk Law and Legal Pluralism Newsletter' 1993, No. 23, p. 46, after J. Zion, 1998, *op. cit.*

<sup>96</sup> J. Zion, 1998, *op. cit.*

all reality is in good relationship, with everything in its proper place and relating well with each other in *hozho*. This shows that Navajo dispute resolution is process-oriented and that the process is important of itself. (...) The process is closely related to Navajo concepts of illness and healing. When people are ill, they are out of harmony and must be restored to harmony to be well. (...) Navajo healing ceremonies are effective and use two major processes: suggestive words and symbols to purify the patient, and a reaffirmation of solidarity with the community and deities by making the patient the center of goodwill and reintegration with the group (...) the process of helping the patient return to harmony involves invoking supernatural powers for assistance, driving out evil forces, and utilizing the force of solidarity (*k'e*) to help the patient achieve a return to continuing relationships with the group. The peacemaker's role in the justice ceremony [JMK] is to guide the parties to *hozho* (...). A *naat'aanii* uses authoritative (not authoritarian) persuasion to lead and to guide others.<sup>97</sup>

These two extensive quotations should help illustrate the crucial point: peacemaking is not mediation nor psychotherapy, but this is the religious reconciliation of an individual with the group and with the metaphysical order through which the group re-enters the sacred harmony with the Living Whole, deities included.

Moreover, 'Navajo peacemaking is unique *and it is not mediation as practiced in the United States. That is, the person who presides is not neutral in the sense of a "mediator neutral"* [emphasis: JMK]. Navajo peacemakers are *naat'aanii* in Navajo tradition, a term sometimes *inaccurately translated as "peace chief"* [emphasis: JMK]. Instead, a *naat'aanii* is a community leader whose leadership depends on respect and persuasion and not a position of power and authority. As was pointed out above, words are powerful in the Navajo language, and the dispute resolution procedure is "talking things out." The word *naat'aanii* has a word root that relates to speaking. A *naat'aanii* is someone who speaks wisely and well, with the content of the speech being based in Navajo tradition, often the creation of scripture and associated songs and stories. A *naat'aanii* has an opinion about the dispute, but it is not expressed as a command. A *naat'aanii* peacemaker is a teacher whom participants in peacemaking respect, because the person is chosen by the community based on his or her reputation. The Navajo process is also unique because of the participants: They are not only the immediate disputants but their relatives as well. The relatives include persons who are related by clan affiliation as well as by blood. They participate in the process of "talking things out" and have significant input in the form of expressing an opinion about both the facts and the effects of the dispute, the parties' conformity to Navajo values, and the proper outcome of the dispute.<sup>98</sup>

In contrast to the official ADR method, which I could observe in the late 1970s in the practice of the Community Mediation Board introduced by Raymond

<sup>97</sup> P. Bluehouse, J. W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 'Mediation Quarterly' 1993, Vol. 10(4), p. 332.

<sup>98</sup> J. Zion, 1998, *op. cit.*

Shonholtz and which stressed non-judgmentality of the mediator communicating with parties to a dispute, here the judgmental statements and actions (or so significant silence in the native culture) are freely expressed by all the present. Taking also into account the finality of the consensus, it means that (to paraphrase Hoebel) the final agreement is hammered out by the majority on the anvil of a 'culprit'. 'It allows an offender to present his or her excuses for examination by other participants and by the peacemaker',<sup>99</sup> which makes it possible for him or her to escape the 'guilt' or any other 'responsibility', except for what is considered necessary for avoiding further 'troubles', be it just a solemn promise to change the behaviour with 'damages' incurred or not. The process ends when a 'trouble-maker' joins back what is the communal definition of the proper order.

The egalitarian bands are not the only form of native social organization in Americas. The Comanche or Navajo were nomads confronting the settled agricultures of the classical model that gave rise to systematic sociology in the works of its founder Ibn Khaldoun. Those were pueblos – rural communities engaged in corn cultivation – the equivalent of the European village communities so familiar that an American source described them as '[p]eaceable, industrious, intelligent, honest, and virtuous (...) Indian only in feature, complexion, and in a few of their habits'. Furthermore, '[t]he degree of civilization which they had attained, their willing submission to all the laws of the Mexican government (...) and their absorption into the general mass of the population (...) forbid the idea that they should be classed with the Indian tribes.'<sup>100</sup> These communities continuing until today, through the armed insurrection, forced the Franciscan order to start after the 1680s the policy of syncretism amounting to toleration of the indigenous religion, which is strong today and institutionalized as the complex system of esoteric organizations and rituals. The pueblos emerged under the Spanish rule as also well-structured secular systems with centralized power of the *gobernador* and the council that evolved with time.<sup>101</sup> In 1936 Constitution and Bylaws of the Santa Clara Pueblo, the judicial power is like the legislative power vested in the

<sup>99</sup> *Ibid.*

<sup>100</sup> *United States v Joseph*, 94 U.S. 614, 616-617 (1876) cited after K. Gutierrez-Conroy (2011:10 note 36) though, as she wryly notes, after almost forty years under the tutelage of the Bureau of Indian Affairs, in *United States v Sandoval*, 231 U.S. 28, 39-41 (1913), the same tribe was described as: 'sedentary rather than nomadic in their inclinations (...) dispossessed to peace and industry (...). Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstitions and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people.' Compared to other tribes the Court concludes that 'although industrially superior, they are intellectually, and morally inferior to many [other tribes]; and they are easy victims to the evils and debasing influences of intoxicants.'

<sup>101</sup> C. Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, 'Tribal Law Journal' 2001, Vol. 1, pp. 9–10.

Council.<sup>102</sup> As for Taos (Zuni) Pueblo, its contemporary judicial system is comprised of the 'modern' tribal court, the Governor's Office traditional court and the War Chief's Office traditional court that exercise collective jurisdiction over the Pueblo's affairs.<sup>103</sup>

The war society acted mostly in witchcraft cases, hanging the suspects just to get the confession and eventually hanging for death the convicted witches. 'Apparently by 1911 torture and the death penalty had been abandoned, and only "nagging" was applied to extort a confession.'<sup>104</sup> In Case 18 (ca. 1925) the chief Bow priest is cited as forbidding the lynching of a boy who confessed of the witchcraft resulting in cholera epidemic and saying 'it is the white man's fault (...). In the old days we could have hung these witches and stopped this disease. Now we can do nothing'.<sup>105</sup> As to the murder as such '[i]n the Zuni tradition, however, as in the older medieval laws of Europe and in rules of many other cultures, the essence of the offense was private'<sup>106</sup> in contrast to public homicide through witchcraft. Regarding the trial, the description by ethnographers (though not the direct observation) is strikingly similar to what one learns from the history of the Navajo law: '[O]ne of the functions of the Council and of its members individually is to seek private adjustment or compromise of disputes and thus to maintain general harmony in the society by preventing, insofar as possible, the overt eruptions of controversies at public hearings. In the majority of cases this method is probably successful. But even during the conduct of a trial the effort at conciliation is sustained. The judge will seek to persuade the parties to agree between themselves; and even after the case has gone to a decision, it is not final until both parties have accepted it by refraining from further appeal

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<sup>102</sup> BIA, Constitution and Bylaws of the Santa Clara Pueblo, New Mexico, <https://www.loc.gov/law/help/american-indian-consts/PDF/36026302.pdf>, Article IV, Sec. 2. *Judicial power.* – The pueblo council shall also adjudicate all matters coming before it over which it has jurisdiction. In all controversies coming before the pueblo council, the council shall have the right to examine all witnesses and ascertain full details of the controversy, and after the matter shall have been sufficiently commented upon by the interested parties, the council shall retire to a private place to make a decision. All of the members of the council except the Governor and the Lieutenant Governor shall have the right to vote upon a decision, and a majority shall rule. In the event of a tie, the Governor shall have the right to cast a vote, thereby breaking the tie. It shall be the duty of the Governor and the Lieutenant Governor to express to the members of the pueblo council their views regarding the case before a vote is taken.

Sec. 3. *Common law of pueblo.* – With respect to all matters not covered by the written constitution, bylaws, and ordinances of the pueblo of Santa Clara, nor by those laws of the United States of America which are applicable to the pueblo of Santa Clara, the customs and usages of the pueblo, civil, and criminal, as interpreted by the council, shall have the force of law.

<sup>103</sup> <https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1027&context=tlj>.

<sup>104</sup> W. Smith, J. M. Roberts, *Zuni Law. A Field of Values*, 'Peabody Museum Papers' 1954, Vol. 43(1), p. 48.

<sup>105</sup> *Ibid.*, p. 49.

<sup>106</sup> *Ibid.*, p. 50.

to higher authority or until the highest possible level of authority (the governor) has been reached.<sup>107</sup> Observing the frequency of physical aggression, researchers concluded, however, that ‘the Council rarely [in one recorded case] resorted to corporeal punishment in the enforcement of its judgments. This is consistent with the theory that most injuries, either to individuals or to society, are to be rectified by material payments for the compensation of the injured party, rather than by disciplinary or vindictive action against the offender’,<sup>108</sup> while in the few recorded cases of ‘public offense’, like drinking misbehaviour in public, the fines on behalf of the pueblo were imposed. Exceptions were two and both involved betraying the Zuni religion: the already-mentioned witchcraft using the religiously illegal powers, and revealing secrets of the *kachina* cult that in modern days was punished with flogging by masked members of the cult.

The insight into the ‘living indigenous law’ of Bolivia may add arguments to this caveat. In Andean countries the ‘natives’ for centuries has been underprivileged but they are in some areas a numerical majority and the democratization in politics at the end of the twentieth century introduced this minority to international geopolitics. The electoral victory of Evo Morales – himself a Native American – in Bolivia, the poorest country of Latin America with also the highest (61%) share of the indigenous population, ultimately gave Indians voice in national politics. This involved the recognition of the ‘traditional’ indigenous justice on a par with the Euro-justice that came here with the conquest. However, this included a specific version of the indigenous justice that was closer to the aforementioned Pueblo rather than Navajo (*pace* Comanches!) model: ‘There are elements of community justice that clearly violate human rights: the use of physical punishments, the subordination of women, and, potentially, invidious discrimination based on ethnicity, to name the most egregious.’<sup>109</sup> John L. Hammond then invokes the recognition of the international instruments of human rights as limiting the possible abuse to add that ‘[s]till, the recognition of indigenous justice is necessary to repair a history of oppression. Where conflicts arise, they must be resolved in a way that respects both the rights of the individual and those of the group.’

The already mentioned ‘harmony’ (*sumac kawsay* in Quechua, *suma qamaña* in Aymara translated as *buen vivir* into Spanish) is achieved through the concerted work of the community members who express all their feelings on a matter under the guidance of the leader or chief to effect the cooperation on the part of the ‘troublemaker’, expressed in the consensus that, once achieved, ends the matter. Here the Zuni add the principle of ‘fourfold affirmation’ that in theory secures the finality of the decision. Firstly, the living law as practiced in the rural areas of Bolivia (and some other Latin American states, like Peru or Ecuador) is

<sup>107</sup> *Ibid.*, p. 108.

<sup>108</sup> *Ibid.*, p. 122.

<sup>109</sup> J. L. Hammond, *Indigenous Community Justice in the Bolivian Constitution of 2009*, ‘Human Rights Quarterly’ 2011, Vol. 33(3), p. 679.

of religious nature. Secondly, this law is communitarian and is aimed at ‘re-establishing’ the local social order, i.e. maintaining the proper relations not only among people but also with other metaphysical and natural non-human beings. Thirdly, the order means lack of ‘troubles’ between people, and between people and the other beings, so the pressure is exerted on individuals to accept this order and assist in preserving it by restitution, damages and reconciliation. Fourthly, persuasion and other means of communal pressure make the ‘troublemaker’ think that to uphold the common definition is in his/her best interest.

#### Types of intervention in a dispute as to the decision-sharing between parties

| Types of intervention:                     |                                              | Third-party entrance into a dispute:       |                                              |
|--------------------------------------------|----------------------------------------------|--------------------------------------------|----------------------------------------------|
|                                            |                                              | Consent by the original parties: necessary | Consent by the original parties: unnecessary |
| Binding nature of the third-party judgment | Consent by the original parties: necessary   | I. Mediation                               | II. Reconciliatory justice                   |
|                                            | Consent by the original parties: unnecessary | III. Arbitration                           | IV. Authoritative justice                    |

Source: J. Kurczewski, *Spór i sądy*, Kraków 2020, p. 45

The table as above – even if based upon the ideal types of the dispute management – might be helpful in clarifying the difference between the empirical models. As an alternative to the Western European paradigm of the adversarial justice, one may approach a dispute as a problem that is based upon the full consensus of all participants concerning both the beginning and the final resolution (‘mediation’), where controversies in the social milieu are actively searched and then a solution is suggested by a third party (arbitration), and where the third party is invited to make the final settlement (‘arbitration’). The *hozho* model seems to be closer to the latter ‘reconciliation’ model than to ‘mediation’ in its stricter sense. Still, this requires loyalty towards the ideal of the non-conflictual cohabitation (i.e. cooperation) on the part of the people, which is unnecessary in the purely ‘mediation’ model where individual autonomy is at its greatest. In fact, Native Northern Americans have offered empirical examples that might fit in all the boxes in the above table, with authoritative solutions at the group level, at least in the face of the ultimate threat to survival.

## 9. REPUGNANCY OR HUMAN RIGHTS AS BASED UPON A HIGHER STANDARD?

What laws are the standard? Even Francisco de Vitoria listed among the legitimate reasons for subjecting the indigenes to the Spanish *los sacrificios humanos y la antropofagia*.<sup>110</sup> The ‘peaceful heathens’ were defended by Włodkowiec and de Las Casas. Tolerance has never been absolute. The notorious American Indian Code of Offenses of 1883 aimed at eliminating the practices (and beliefs behind them) that had been considered detrimental to pacification and assimilation of Indigenous Americans into the ‘melting pot’ of Euro-American dominant culture. This is aptly summarised by Robert N. Clinton:

By the time of the Code of Indian Offenses was promulgated most of the nomadic plains tribes had been corralled onto reservations, early examples of internment or concentration camps. Their traditional hunting lifestyles had been effectively destroyed by such confinement, as well as the deliberate federally sponsored eradication of the buffalo (bison) on which they depended. This forced change in tribal economies resulted in the nation’s first welfare state, in which the tribal members became completely dependent on federal rations (the development of Indian frybread being the most obvious and long lasting by-product of this change in subsistence habits). In this context, the penalty prescribed by the Code of Indian Offenses for practicing traditional and customary ways often involved the denial of rations. Thus, the federal government’s message to tribal Indians in the late nineteenth century was crystal clear – abandon your traditional culture and comply with the Code of Indian Offenses *or starve*. The Code of Indian Offenses therefore was not an early criminal code for Indian Reservations, as it is sometimes portrayed, but, rather, the clearest evidence of a deliberate federal policy of ethnocide – the deliberate extermination of another culture.<sup>111</sup>

As an example of the indigenous practices deemed to be eliminated suffice to cite Rule 4th of the Code:<sup>112</sup> ‘The “sun-dance,” the “scalp-dance,” the “war-dance,” and all other so-called feasts assimilating thereto, shall be considered “Indian offenses,” and any Indian found guilty of being a participant in any one or more of these “offenses” shall, for the first offense committed, be punished by withholding from the person or persons so found guilty by the court his or their rations for a period not exceeding ten days; and if found guilty of any subsequent offense under this rule, shall be punished by withholding his or their rations for a period not less than fifteen days, nor more than thirty days, or by incarceration

<sup>110</sup> B. Maldonado Simán, *La Guerra justa de Francisco de Vitoria*, ‘Anuario Mexicano de Derecho Internacional’ 2006, Vol. 6, <https://revistas.juridicas.unam.mx/index.php/derecho-internacional/article/view/166/269>, p. 695.

<sup>111</sup> *Code of Indian Offenses*, [http://robert-clinton.com/?page\\_id=289](http://robert-clinton.com/?page_id=289).

<sup>112</sup> *Ibid.*, *Rules Governing the Court of Indian Offenses*, <http://robert-clinton.com/wp-content/uploads/2018/09/code-of-indian-offenses.pdf>.

in the agency prison for a period not exceeding thirty days.’ The Code forbade also practices of ‘medicine-men’ (Rule 6th), plural marriages (Rule 5th, though for this not only Native Americans but Mormons were also censured), and the ‘bride price’ (Rule 8th).

To what degree the Navajo Tribal Court and police implemented these laws is not known but certainly the religious aspect survived, as well as the dances which the Navajo rightly take pride in also today. This cultural terror and repression was not peculiar to the US administration. At the insistence of the Prime Minister John A. MacDonald, the third section of the amended Canadian Indian Act of 1880, signed on 19 April 1884, proclaimed that: ‘Every Indian or other person who engages in or assists in celebrating the Indian festival known as the “Potlatch” or in the Indian dance known as the “Tamanawas” is guilty of a misdemeanor, and liable to imprisonment for a term of not more than six nor less than two months in any gaol or other place of confinement; and every Indian or persons who encourages (...) an Indian to get up such a festival (...) shall be liable to the same punishment.’

The ban on practicing traditions, criticized from the beginning by some Euro-Canadians – including the anthropologist Franz Boas – was finally lifted in 1951.

As for a similar purge of the indigenous normativity in other areas under the British colonial rule, Melissa Demian<sup>113</sup> has found that the earliest expression of the moral and aesthetic ‘repugnancy clause’ in this form, used in a comparable context, appeared in an 1849 ordinance of the Colony of Natal, where: ‘It was provided that customary law was to be preserved except where it was “repugnant to the general principles of humanity recognized throughout the whole civilized world”.’ [reference omitted: JMK]. Demian explains that:

Repugnancy clauses like that in the Natal ordinance appeared in numerous forms in the laws of most if not all British colonies in sub-Saharan Africa [references omitted: JMK], with the explicit purpose of placing limits on the applicability of practices categorized as customary law (or in an earlier formulation, ‘native law and custom’) where these were seen to conflict with the common law in particular and European values in general, coded variously as ‘natural justice,’ ‘morality,’ ‘equity,’ ‘accepted standards of ethics,’ and so on [reference omitted: JMK]. Allott,<sup>114</sup> in particular, demonstrates how the ordinary instrument of repugnancy may actually have acquired its moral value through colonial ordinances and their application in the case law of the then-British colonies.<sup>115</sup>

<sup>113</sup> M. Demian, *On the Repugnance of Customary Law*, ‘Comparative Studies in Society and History’ 2014, Vol. 56(2), p. 510.

<sup>114</sup> A. Allott, *New Essays in African Law*, London 1970.

<sup>115</sup> M. Demian, 2014, *op. cit.*, p. 510.

According to Demian,<sup>116</sup> ‘the moral usage of repugnance was no sooner introduced to the statutory landscape than it began to lose traction with the courts, which seemed peculiarly reluctant to apply the respective repugnancy provisions of their jurisdictions. Read<sup>117</sup> offers an array of reasons for this phenomenon, ranging from increasing liberalization of the colonial judiciary to a lack of interaction between the “traditional and the imported legal systems,” such that the latter had few opportunities to apply the repugnancy provision to the former. He prefers, however, the explanation that *customary law itself was changing so much under the conditions of the colonial era that the need for a repugnancy clause was obviated*’ [emphasis added: JMK].

Nevertheless, the issue reoccurs whenever the revitalization of the native culture is undertaken. Therefore, while stressing the respect for the indigenous cultures, Pope John Paul II on the 500th anniversary of the conquest reiterated a warning:

La tutela y respeto de las culturas, valorando todo lo que de positivo hay en ellas, *no significa, sin embargo, que la Iglesia renuncia a su misión de elevar las costumbres, rechazando todo aquello que se opone o contradice la moral evangélica* [emphasis added: JMK]. ‘La Iglesia – afirma el Documento de Puebla – tiene la misión de dar testimonio del “verdadero Dios y único Señor”. Por lo cual, no puede verse como un atropello la evangelización que invita a abandonar las falsas concepciones de Dios, conductas antinaturales y aberrantes manipulaciones del hombre por el hombre (Puebla, 405–406).’<sup>118</sup>

It is significant that such a statement came from the Pope who not once emphasized the validity of the human rights.

It is manifest that John Paul II’s understanding of human rights incorporated his appreciation for the Declaration as well as the Church’s teachings on human rights. In 1979, he gave his first address to the United Nations General Assembly, and he focused his remarks on the Universal Declaration, which he called ‘a true milestone on the path of the moral progress of humanity’ and the protection of fundamental human rights. During his second visit to the United Nations Headquarters in 1995, the Pope reiterated his 1979 remarks by stating that the Declaration is ‘one of the highest expressions of the human conscience of our time.’ (...) John Paul II advocat-

<sup>116</sup> *Ibid.*, p. 511.

<sup>117</sup> J. S. Read, *Customary Law under Colonial Rule*, (in:) H. F. Morris, J. S. Read (eds), *Indirect Rule and the Search for Justice: Essays in East African Legal History*, Oxford: Clarendon Press 1972, p. 180.

<sup>118</sup> Pope John Paul II, *Message to the Indigenous Peoples of the American Continent [Mensaje del Santo Padre Juan Pablo II a los Indígenas del Continente Americano]*, Santo Domingo, 12 October 1992, [https://www.vatican.va/content/john-paul-ii/es/messages/pont\\_messages/1992/documents/hf\\_jp-ii\\_mes\\_19921012\\_indigeni-america.html](https://www.vatican.va/content/john-paul-ii/es/messages/pont_messages/1992/documents/hf_jp-ii_mes_19921012_indigeni-america.html), para. 4.

ed the view that human rights preexist the instruments and legislation of both state and society.<sup>119</sup>

Not surprisingly, ‘a compelling case can be made that the medieval *ius commune* recognized a number of fundamental rights that protected the interests of individual men and women. It is also clear that those who held these rights were given the power to exercise them in courts of law. (...) [However] [t]he canonists did not think about them in the same way we do. In the medieval canon law, human rights were based upon a purportedly objective assessment of the teachings of natural law and the Christian religion.’<sup>120</sup> Richard H. Helmholz lists three rights, acknowledging that they are not absolute as in the contemporary reality the enjoyment of our rights has exceptions and limitations: religious freedom (or rather freedom from forced conversion), the right to social welfare and the right to due process of law. It has already been remarked that the right to one’s own law understood as the right of legal citizenship – of which law one is? – was regarded as obvious in the medieval official and living law. One may argue that this is not the individual right as individuals relate to their jural community, but this is the individual’s right as long as one refuses to be tried according to the alien law.

The modern human rights movement – more specifically the women’s rights movement, though in its beginnings stressing the Native American gender relations as the model for the white population (cf. Alice Fletcher talk on her studies of 1888) – entered later in conflict with the ‘native justice movement’ exactly on this point. Briefly, the human rights perspective assumes universality – as the very title of the UN Declaration indicates – but the Native Movement claims the universal right to collective particularity! This is well illustrated with the paradigmatic case *Santa Clara Pueblo v Martinez*<sup>121</sup> where the Supreme Court sustained a law passed by the governing body of the Santa Clara Pueblo that explicitly discriminated on the basis of sex, acknowledging the sovereignty of the pueblo. Feminist lawyer Catharine A. MacKinnon<sup>122</sup> asked then: Whose tradition is that? She said she understood that the tribe might want to defend their land by not allowing descendants of mixed (in this case a Santa Clara wife and a Navajo husband) marriage to be members of the pueblo but why this should be limited to the Santa Clara women and not to the Santa Clara men. MacKinnon then recognized the right to sovereignty and the need to defend it, requesting Native women to decide the native meaning of equality. But the respective legislative amendment was made in 1968 in a democratic way and MacKinnon was met with defence

<sup>119</sup> R. R. Martino, *John Paul II and the International Order: Human Rights and the Nature of the Human Person*, ‘Notre Dame Journal of Law, Ethics & Public Policy’ 2007, Vol. 21, pp. 61–62.

<sup>120</sup> R. H. Helmholz, 2001, *op. cit.*, pp. 15–16.

<sup>121</sup> 436 U.S. 49 (1978).

<sup>122</sup> C. A. MacKinnon, *Whose Culture? A Case Note on Martinez v Santa Clara Pueblo*, (in:) *eadem, Feminism Unmodified: Discourses on Life and Law*, Cambridge: Harvard University Press 1983, p. 63.

of the ruling on the part of a Santa Clara woman who, though her daughters are deprived of the pueblo's membership (and she also is in a relationship with a Navajo!), 'was relieved to hear the decision' that Santa Clara was to retain the ongoing conversation about who is a recognized member of the community. What is more, the Western world acknowledged a way of life which traditionally honoured nurturing and feminine qualities.<sup>123</sup> The conversation continued until on 1 May 2012 the 'Santa Fe New Mexican' journal brought the information that the Navajo in a referendum rejected the discriminatory amendment.<sup>124</sup>

What prevailed, in fact, was the sovereignty. The debate on the case brought important results, such as discovering the value of 'cultural sovereignty'. As Francine R. Skenandore<sup>125</sup> observed: '*Santa Clara* is a very difficult case to reconcile from both a sovereignty perspective and an equal rights perspective. Ultimately, the two positions cannot be reconciled', and then she advocated 'the cultural sovereignty paradigm' recently proposed by Indian law Professor Rebecca Tsosie and tribal advocate Wallace Coffey. According to Professor Tsosie and Coffey, '[it] is time to reconceptualize Native sovereignty from a model that treats sovereignty as a strategy to maintain culture to a model that analyzes culture as a living context and foundation for the exercise of group autonomy and the survival of Indian nations.'<sup>126</sup> According to Skenandore, based on this new cultural paradigm, sovereignty is not undermined or compromised, while a tribe may be responsive to its members and preserve cultural norms and values. She argued that:

Cultural sovereignty is maintaining the customs, traditions and values that define one tribe from another while simultaneously creating change from within to ensure an existence that the tribe defines itself. It necessarily implicates autonomy because the tribe's envisioned existence may not be consistent with the values of the larger society, and autonomy requires independence from the larger society. From autonomy emanates the freedom to define and maintain tribal identity, including the use of membership rules the larger society may disagree with but the tribe considers necessary when it envisions its continued existence in an ever-changing world.<sup>127</sup>

<sup>123</sup> R. Swentzell, *Testimony of a Santa Clara Woman*, 'Kansas Journal of Law and Public Policy' 2004/2005, Vol. 14, p. 99.

<sup>124</sup> [https://www.santafenewmexican.com/news/local\\_news/santa-clara-pueblo-vote-on-member-rules-leaves-loose-ends/article\\_3ea83343-5059-5f87-aa25-a473d336aac1.html](https://www.santafenewmexican.com/news/local_news/santa-clara-pueblo-vote-on-member-rules-leaves-loose-ends/article_3ea83343-5059-5f87-aa25-a473d336aac1.html) (accessed 20.11.2022).

<sup>125</sup> F. R. Skenandore, *Comment: Revisiting Santa Clara Pueblo v Martinez: Feminist Perspectives on Tribal Sovereignty*, 'Wisconsin Women's Law Journal' 2002, Vol. 17, p. 368.

<sup>126</sup> See after F. R. Skenandore, 2002: W. Coffey, R. Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 'Stanford Law & Policy Review' 2001, Vol. 12, p. 209.

<sup>127</sup> F. R. Skenandore, 2002, *op. cit.*, p. 370.

Cultural sovereignty can then be defined as ‘the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures.’<sup>128</sup>

The Catholic Church of today proposes an inter-cultural dialogue with the indigenes. Firstly, it recognized their culture.<sup>129</sup> Secondly, there is an appeal to interact:

Starting from our roots, let us sit around the common table, a place of conversation and of shared hopes. In this way our differences, which could seem like a banner or a wall, can become a bridge. Identity and dialogue are not enemies. Our own cultural identity is strengthened and enriched as a result of dialogue with those unlike ourselves. Nor is our authentic identity preserved by an impoverished isolation. Far be it from me to propose a completely enclosed, a-historic, static ‘indigenism’ that would reject any kind of blending (*mestizaje*). A culture can grow barren when it ‘becomes inward-looking, and tries to perpetuate obsolete ways of living by rejecting any exchange or debate with regard to the truth about man’. That would be unrealistic, since it is not easy to protect oneself from cultural invasion. For this reason, interest and concern for the cultural values of the indigenous groups should be shared by everyone, for their richness is also our own.<sup>130</sup>

This debate leads to the basic issue of the sovereignty of the rights-based polity versus the cultural sovereignty of its components. In political theory the concept of ‘nomos-group’ is sometimes used.<sup>131</sup> The N-group is one that is assumed to hold a jointly respected rules. Friedrich A. Hayek was more specific as for him *nomoi* are the universal rules of just conduct as opposed to *themis*, which are rules applicable to particular people, or serving the ends of the rulers.<sup>132</sup> A *nomos* has the advantage of not obliging individuals to perform particular actions; they can use for their own purposes knowledge which the rulers do not have. This sounds almost as the generalization of the Navajo and other natives’ experience under the dominant heterogeneous regime, while the distinction between *nomos* and *themis* roughly corresponds to that between public and private law. I believe that Hayek combines here the ‘intuitive law’ (of Petrażycki) or ‘living law’ (of Ehrlich) with universal law of nature. This is possible if one agreed with something apparently absurd: the universal law with changing contents. Yet this is not absurd but only

<sup>128</sup> *Ibid.*, p. 369.

<sup>129</sup> ‘[L]a Iglesia alienta a los indígenas a que conserven y promuevan con legítimo orgullo la cultura de sus pueblos: las sanas tradiciones y costumbres, el idioma y los valores propios. Al defender vuestra identidad, no sólo ejercéis un derecho, sino que cumplís también el deber de transmitir vuestra cultura a las generaciones venideras, enriqueciendo de este modo a toda la sociedad’; Pope John Paul II, *Message to the Indigenous People*, 1992, para. 4.

<sup>130</sup> Pope Francis, *Querida Amazonia*, 2020, Ch. 2, para. 37.

<sup>131</sup> See J. Cohen, *Pluralism, Group Rights and Corporate Religion: Reply to Critics*, ‘Netherlands Journal of Legal Philosophy’ 2015, Vol. 44(3).

<sup>132</sup> F. A. Hayek, *Law, Legislation and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy*, Vol. 1, London 1998.

the levels of analysis are mixed: the universality of rules as such and the variability of their contents. Almost all humans experience the obligation but the intuitions differ. The cultural conscience is what a social scientist must take into account when explaining a human activity. What is philosophically important is that even if external limiting conditions (cosmos) are universal in contrast to the politically binding rules (law of the lawyers), the individual sense of the obligation ought to be differentiated both from the former and from the latter. The human practice is then the outcome of all three: the assumed 'objective' order, human conscience and the external social pressure.

The issue of 'indigenous law' has entered the battleground on which the recent fundamental political controversy continues. The *Cruciferi* conquered the 'heathen' Prussians as well as the neighbouring Poles converted long before, but it was self-evident for them to allow both to live under their own law. In fact, the oldest written Polish law is the Polish customary law recorded before 1320 as translated into the Old German for the use of colonial administration of the Teutonic Order,<sup>133</sup> but also the *Iura Prutenorum* would be applied for the first centuries until 'most likely' at least the sixteenth century, when the conquered indigenous population was totally assimilated into the German-speaking society ruled by the Order.<sup>134</sup> The personal principle was universal throughout the Middle Ages until the modern states started to take shape. Brian Z. Tamanaha has observed that:

In the 17th and 18th centuries, a sharper distinction emerged between the public and private realms. State law became the pre-eminent form of law; international law and natural law were also recognised, but mainly in virtue of and on the terms set by state law. Customary norms and religious law were, in effect, banished to the private realm. They did not disappear, but a transformation in their status came about. Some of these norms and institutions continued to obtain recognition and sanction from state legal systems; other norms continued to be observed and enforced in strictly social or religious contexts. The key characteristic they lost over time was their former, equal standing and autonomous *legal* status. Once considered independently applicable bodies of *law*, owing to the takeover of state law they rather became *norms*, still socially influential, but now carrying a different status from that of official state law. Customary and religious norms, it must be emphasized, often were more efficacious than state law in governing every day social affairs, but the loss of legal status had significant implications that would bear fruit over time.<sup>135</sup>

Jean Cohen points to the political question: are N-groups to be recognized as sovereign, in fact, as N-sovereign within a wider sovereign polity to which they belong? The question might be as well framed as if other members of a sovereign

<sup>133</sup> J. Matuszewski, *Najstarszy zwód prawa polskiego*, Warszawa 1959.

<sup>134</sup> D. Makłła, *Prawa pogańskich Prusów. Stan i metodyka badań*, 'Czasopismo Prawno-Historyczne' 2020, Vol. 72(1), p. 20.

<sup>135</sup> B. Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 'Sydney Law Review' 2008, Vol. 30(3), pp. 380–381.

polity are obliged to respect the N-sovereignty of a subgroup within their political life sphere. This question then is usually broken into two: Does N-sovereignty of some hurt the overall sovereign polity and the other members, and what is the meta-rule of sovereignty when a conflict between two (or more) appears? She is willing to acknowledge the 'cultural' sovereignty but not the 'religious' sovereignty as inherently illiberal (!). Yet this is a speculative abstraction. As it has already been shown with the Navajo example, there is no separation between culture and religion. One cannot divert the indigenous Navajo (the Pueblo, the Ojibwa, the Aymara, the Inuit, etc.) legal culture from the religion of the Navajo and other peoples. The meeting of cultures was also the peaceful or bellicose meeting of religions, indigenous and heterogeneous, Christian, Islamic, Judaic, and thousands of others. But the sovereignty issue is in real conflict not with religion but with human rights, unless the rights are conceived also as collective rights and not only as individual ones. Here lies the crucial difference in the original Julia Martinez and Santa Clara Pueblo positions. Her rights were incommensurable with the pueblo's right of sovereignty.

It is not the task for this study to deal with the *arcana* of the permanent debate on the meaning of sovereignty in general and on the US Native American tribal sovereignty in particular, but a comment by Eric Cheyfitz deserves attention:

Simply put (...) what we might term Native, indigenous, or traditional sovereignty, which is neither tribally nor nationally located but rather kin-based, is subsumed in this case (as it is in the post-contact era), by that *sovereignty* generated within the legal vocabularies of Western nation-states. It is this subversion of traditional sovereignty by a tribal sovereignty generated within the colonial context that leads grassroots groups such as the HPL Navajos in the *Manybeads* case to invoke a language of individual rights (in this case the right to freedom of religion) in order to assert their traditional sovereignty. Thus, from the perspective of tribal councils opposing traditional grassroots movements, the language of sovereignty and the language of rights may be opposed (...). Yet from the perspective of grassroots resisters these two languages are one.<sup>136</sup>

The *Manybeads* case,<sup>137</sup> in fact, points to the inter-tribal relations that today, as in the pre-conquest times, oscillate between conflict and alliance. The case concerned the rights of some Navajo people who after relocations on both sides were living on the land allotted to the Hopi. Claimants – the Navajo residents of the Hopi Partitioned Land, or HPL – argued that the 1974 Federal law which required them to abandon the land violated their constitutionally protected right to freedom of religion. 'If they are required to move, they say they won't have access to ancestral land they consider sacred.' The metaphysics is revived again: the seemingly economic issue has actually the sacred, religious character, as very

<sup>136</sup> E. Cheyfitz, *The Colonial Double Bind: Sovereignty and Civil Rights in Indian Country*, 'Journal of Constitutional Law' 2003, Vol. 5, pp. 239–240.

<sup>137</sup> 760 F. Supp. 515 (D. Ariz. 1989).

often all over the globe the indigenous people claim back their access to the sacred sites though rarely located on the present land of another indigenous group (and here the legal concept of 'indigeneity' needs to be considered).

The real solution of the problems with 'sovereignty' is not so much in contrasting 'culture' with 'politics' and 'polity' but in considering the 'dynamics' as opposed to the 'statics'. The scholarly attempts to freeze the 'indigenous' law as 'customary' law, as distinct from the 'official' federal or 'official' tribal law, act against the real live development that is possible only if all normative elements are recognized as active in the ongoing development of the living law. Legal pluralism is the value that may be termed 'poli-normality'. Normative diversity is part of the bio-diversity. Let us realize that the moral 'evolution' might be observed without asserting its positive evaluation. While the change in morals makes us satisfied with the development that, for instance, led from mutilation, decapitation, etc. to suppression of death penalty, the change is objective but its consequences need to be studied *sine ira* (I must confess though to the sense of relief as I have not been convinced by anyone of the possible damage done to the humanity due to humanization of the penal law, despite attempts by many who in vain argue that this has led to the rise in crime, the argument unfounded and not necessarily decisive even were it true). The 'pluri-normativity' or 'poli-normality' needs not entail tolerating the practices that have been found repugnant. In fact, the custom does evolve and the rules are re-created not as the exact replica. The custom of today is different from the custom of yesterday and it shall change in future as well. And this includes also 'the written custom' or 'legislated custom'. In the area of gender discrimination, the exhaustive comparative research by Ann E. Tweedy<sup>138</sup> provided empirical ground for her general conclusion that:

There are numerous tribal protections against sex discrimination in force, ranging from equal protection guarantees, to explicit broad-based constitutional or statutory protections, to context-specific proscriptions against discrimination that apply in anywhere from fairly broad to quite narrow contexts. Although it is difficult to generalize, the wording of several statutory laws and some case law suggests a greater concern for disparate impact than inheres in federal anti-discrimination law. Moreover, all of these protections evidence tribal policies against sex discrimination. However, it is important to be realistic about the fact that all tribes do not have such protections in place, and, similarly to the United States, some tribes continue to make sex-based distinctions (including a few of the tribes that prohibit sex discrimination in some contexts). Nonetheless, the diversity of tribal approaches to the issue of sex discrimination and the breadth of existing legal protections are impressive.

More research is needed to better understand the scope, application, and frequency of these laws. As more tribes begin to make their laws available outside of their judicial systems, this research will become more feasible. (...) One thing that should

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<sup>138</sup> A. E. Tweedy, *Sex Discrimination under Tribal Law*, 'William Mitchell Law Review' 2010, Vol. 36(2).

be clear from existing information is that tribes collectively do not take a monolithic approach to sex discrimination and that many tribes have made a significant commitment to eradicating it.<sup>139</sup>

This illustrates well the blending process which the indigenous and non-indigenous ‘indigenous’ law is undergoing.

*Santa Clara Pueblo v Martinez* is not the only case, and gender equality is not the only area when the values conflict. Not so popular as the Pueblo and Navajo, other tribes sometimes provide for the ‘black stories’ in which the ‘tribal justice’ as such – or rather its performance – meets the challenge from the human rights defenders. One of such stories concerns the group of the Ojibwa peoples, *Ahnishinahbæōjibway* in Red Lake reservation in Northern Minnesota, inhabited by 5,162 residents in 2000, who strongly defended their identity and sovereignty, cutting themselves off the alliance with other Ojibwa tribes, refraining from using the 1934 IRA and retaining their clan structure with hereditary leaders until 1950. As they claim: ‘We are among the very few Aboriginal Indigenous people who still live on our own Sovereign land, which has been our land for many millennia. The *Ahnishinahbæōjibway* have always been Sovereign. The United States is aware that they have no legal jurisdiction at Red Lake; and that they had no right to come onto our land and destroy our forests and our food supply, and try to steal our land.’<sup>140</sup> This still isolated area is much poorer than that of the Navajo with \$8,372 annual income in 1999, ca. 40% of residents living below the poverty line and the unemployment rate near 60% accompanied by a high level of crime (in 2004, the tribal police filed 3,500 court cases).<sup>141</sup>

In the late twentieth century the Red Lake Indian court became a focus of public controversy, which illustrates some problems related to the issue of sovereignty versus human rights, and simultaneously the murky history and performance of the ‘official indigenous law’ already described above by means of the Navajo legal history. ‘In 1918, the Red Lake Band of Chippewa Indians was formally organized under a written constitution: that of the General Council, generally known as “Peter Graves’ council.” The governmental powers delineated by the 1918 constitution did not include the establishment of a court. In fact, the 1918 constitution grants only extremely limited governmental power to the General Council: conferring authority on the “several Chiefs” to “call a meeting,” deciding in “disputes as to Chiefs,” respecting and giving “proper consideration” to petitions “placed before them by any member of the Red Lake Band,” expend-

<sup>139</sup> *Ibid.*, pp. 445–446.

<sup>140</sup> Wub-e-ke-niew, *We Have the Right to Exist*, Black Thistle Press, [https://www.maquah.net/We\\_Have\\_The\\_Right\\_To\\_Exist/WeHaveTheRight\\_20-Chapter11.html](https://www.maquah.net/We_Have_The_Right_To_Exist/WeHaveTheRight_20-Chapter11.html).

<sup>141</sup> [https://en.wikipedia.org/wiki/Red\\_Lake\\_Indian\\_Reservation](https://en.wikipedia.org/wiki/Red_Lake_Indian_Reservation).

ing and accounting for funds – and very little else.’<sup>142</sup> Nevertheless, the official ‘Indian court’ continued to operate until new IRA regulations were adopted in 1935. But the story is complicated as there was strong resistance to what was considered machinations of the Federal Indian administration:

There are at least two stories about how the Indian Reorganization Act was put onto Red Lake *Ahnishinahbæó’jibway* land. One story, which circulated at Red Lake, is that ‘a “yes” vote meant a “no” vote.’ According to this story, the B.I.A. said, ‘we will do it in a democratic way, and let the people [sic] decide.’ The people voted ‘no,’ rejecting the Indian Reorganization Act. The bill went back to the United States Congress, which attached a rider saying that ‘a “no” vote meant a vote for the I.R.A.’ Then, the I.R.A. went back to the Reservation, and it ‘passed’ unanimously, that is, everybody voted ‘no.’ This story is a metaphor for the B.I.A.’s use of proxy votes under trusteeship.

Another story comes from the B.I.A.’s files in the National Archives. (...) The Bureau of Indian Affairs used Indian Trusteeship and the M.C.T. they had invented, to falsely imply that the Indian Reorganization Act had been accepted by their Chippewa, as well as the *Ahnishinahbæó’jibway* at Red Lake.<sup>143</sup>

In the summer of 1972, the ‘North Dakota Law Review’ published a paper by William J. Lawrence, *Tribal Injustice: The Red Lake Court of Indian Offenses*, detailing some of the legal, jurisdictional and procedural problems relating to the Red Lake Court. Lawrence described a ‘jurisdictional morass’ at Red Lake pointing out that in practice it was ‘ineffective in enforcing its judgments and (...) most band members receive little or no satisfaction in bringing civil cases before the court.’<sup>144</sup> He also touched on the issue of ‘tribal politics’ affecting the outcome of cases before the Red Lake Court of Indian Offenses. Lawrence discussed problems with that court, including that, ‘[t]he greatest shortcoming and most basic criticism of the court is its nearly total disregard for due process for law. The court is notorious for giving improper notice. There have been numerous cases in which judges have failed to allow parties to present testimony and evidence in their behalf. (...) It is this type of proceeding which (...) has prompted many to refer to it as a “Kangaroo Court”’.<sup>145</sup>

Lawrence concluded that although there is a way out of the present state of decadence defended in the name of sovereignty that would involve the setting up the Red Lake Court totally anew, ‘it is an ironic fist of fate that *a court which was originally designed to eradicate the historical way of life of the Indian people is*

<sup>142</sup> C. NiiSka, *Red Lake Tribal Council Plans Governmental Reorganization*, ‘Native American Press/Ojibwe News’, 7 February 2003, <https://www.maquah.net/clara/Press-ON/03-02-07a.html>.

<sup>143</sup> Wub-e-ke-niew, *op. cit.*

<sup>144</sup> W. J. Lawrence, *Tribal Injustice: The Red Lake Court of Indian Offenses*, ‘North Dakota Law Review’ 1972, Vol. 48(4), p. 645.

<sup>145</sup> *Ibid.*, p. 648.

*now defended by many as a preserver of the tradition. The only explanation of this dichotomy is that many Indian cultures are so diluted with non-Indian ways that what remains is a bastardized culture [emphasis: JMK].*<sup>146</sup>

The conflict exploded in the following years, and the suits followed, but in 2001 Clara NiiSka still was able to write that:

Despite its shaky legal foundations and its extremely problematic record of civil and human rights violations, the United States continues to maintain a court of Indian offenses at Red Lake. In 2001, the Red Lake B.I.A. Agency was allocated a quarter of a million dollars to operate the B.I.A.'s court of Indian offenses at Red Lake. The key problems described by William J. Lawrence in the North Dakota Law Review nearly thirty years ago persist at the Red Lake Court of Indian offenses, including lack of impartiality. As Lawrence wrote in 1979, 'A favorite tactic employed by the court to assure the outcome it desires is to notify only the party whom it feels should prevail, of the date and time of adjudication. Obviously, the lack of presence of the adversary allows the court to "resolve the dispute" in an amiable atmosphere.' In addition to defects in notification, the Red Lake Indian Court has recently ensured one-sided 'hearings' using intimidation, by jailing attorneys for opposing parties, and through exile. Furthermore, fuelled by gambling interests and Congressional policies of 'strong tribal government' – and the legal expertise that both Indian casino revenues and federal appropriations can buy – and federal legal actions to expand federal etc. jurisdiction on behalf of Indians under US 'trusteeship,' Indian court decisions are being filed with Minnesota courts – with the expectation that they will be accorded 'full faith and credit – with increasing frequency'.<sup>147</sup>

In the Andean region of South America where Native Americans are majority the institutionalized infraction of human rights in the indigenous justice concerns the use of physical penalties. The traditional law had 'the teeth' and continues so as the reports sympathetic to the indigenous sovereignty signalize. Though it is claimed by a field researcher that '[t]he sanctions have undergone substantial change in the last decades. From days when severity was a norm, today it has been substituted mostly by the economic fines and communal work. The former are allocated to the community welfare, such as buying something or paying the school. *El chicote (flogging) practically is not used as a sanction, only on decision of the authorities in an exceptional case, always signifying respect for the authority*' ['sin embargo su presencia sigue significando el respeto a la autoridad' – translation and emphasis: JMK].<sup>148</sup> Still, as one of the several functions of the indigenous peasant justice ('la justicia indígena originaria') René Escobar lists 'securing that offenders receive punishment consisting in financial fines, com-

<sup>146</sup> *Ibid.*, p. 658.

<sup>147</sup> C. NiiSka, 'Native American Press/Ojibwe News', 22 June 2001, <https://www.maquah.net/clara/Press-ON/01-06-22a.html>.

<sup>148</sup> R. G. Chuquimia Escobar, *Justicia originaria en tierras altas: comunidades de Patacamaya, Sulcata Colchani y Umala*, (in:) B. de Sousa Santos, J. L. E. Rodríguez (eds), *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia*, Abya-Yala 2012, p. 583.

munity work, *chicotazos*, supernatural sanctions'.<sup>149</sup> The field research conducted in 2010 in the North of the Department of Oruro concluded that there is the precise procedure of whipping depending on seriousness of the misdeed and sometimes the parents administer this punishment.<sup>150</sup> In the first draft of Indigenous Autonomy Area in one of the almost 100% Aymara's *ayullu* the special Article 21 described the said *chicotazo*. In general, Hammond<sup>151</sup> observed that:

The physical punishments of community justice may violate restrictions imposed by human rights norms. For example, violators are sometimes publicly whipped. In a case that became notorious, Marcial Fabricano, a former leader of the Trinitario Mojeño people of the department of Beni, was whipped in May 2009, in punishment for a number of alleged abuses of his office. Like lynching, whipping is especially controversial because physical abuse violates the integrity of the body. But lynching, as I have shown, is a perversion of community justice. Whipping, on the other hand, is indeed an accepted form of punishment within community justice. Defenders of the punishment argue that whipping is a symbolic act of authority, and the Constituent Assembly's Community Justice Sub-commission classified it not as a physical punishment but as a moral punishment. (...) But many outsiders find whipping inhumane and degrading, possibly qualifying as torture, violating the prohibitions of the ICCPR and the Convention against Torture.

Boaventura de Sousa Santos supporting the indigenous justice sees the solution through putting into practice the human rights and traditions in question:<sup>152</sup>

The values embodied in the [human] rights should be respected but the actual practices that are respecting or violating those not being ethically neutral should be subject to interpretations as to whether they conform to the cultural norms on which they are based. So for example, are *el hortigazo* (flogging with nettles), *el baño* (a forced bath), *los chicotazos*, the physical punishment in general, a torture? In what context and under what conditions? Are there other sanctions applied by the ordinary justice which from the perspective of the indigenous justice are more violent? For instance, the perpetual life imprisonment or long-term incarceration?

Another much controversial issue is the equality of men and women protected by the Constitution and the International Human Rights Law (DIDD). Do the indigenous concepts of complementarity of men and women, *el chacha-warmi*, contradict the equality principle in this meaning or, on the contrary, do they implement it in a different manner but are equally valid? In this area two questions should be emphasized. One is the equivalence or lack of it as to the two principles that originate

<sup>149</sup> *Ibid.*, p. 585, translation JMK.

<sup>150</sup> M. A. Mendoza Crespo, *Experiencias de justicia indígena en el departamento de Oruro – Bolivia*, (in:) E. Córdor Chuquiruna, M. A. Mendoza Crespo, E. Rivera Alarcón (eds), *Normas, procedimientos y sanciones de la justicia indígena en Bolivia y Perú*, Lima 2010, p. 57.

<sup>151</sup> J. L. Hammond, 2011, *op. cit.*, pp. 678–679.

<sup>152</sup> B. de Sousa Santos, *Cuando los excluidos tiene Derecho: justicia indígena, plurinacionalidad e interculturalidad*, (in:) B. de Sousa Santos, J. L. Exeni Rodríguez (eds), *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia*, Abya-Yala 2012, p. 41.

from different cultures. Are they incommensurable or it is possible to make intercultural translation and acknowledge both as in principle the two equally valid paths to safeguard the parity of men and women in all areas of public and private life? And the other question concerns the discrepancy between what the principles proclaim in abstract and the actual practices performed in their name. And this problem is not particular of the indigenous cultures and communities but, on the contrary, this is the universal problem.<sup>153</sup>

Yes, the problem is universal but it does not mean that one should escape from confronting the truth that the comeback of the indigenous justice in full would mean the resurgences of ethical issues that plagued the victorious 'Western' justice until the modern human rights movement got momentum at the level of the global international society to which the indigenous nations are entering and which recognizes their existence and their rights. Although these questions are undoubtedly hard to answer, the public debate and the practical struggle continue as to the possibility of compromising between the two values: the human right(s) and the (cultural) sovereignty, and the indigenous peoples as well as people of indigenous experience must have the equal rights in the debate and in this struggle.

## 10. FINAL COMMENTS

Using the wide concept of law that makes room for plurality and diversity of types, we have made a quick and a perhaps erratic tour through the problems that indigenous peoples have with the law, their own law and the problems alien people have with the law of the indigenous. The tragedy resulting from the conquest and the heroic resilience of those conquered are impressive. The survival and the renaissance of the indigenous law are one of the most edifying moments in the history of law. The history of indigenous law throughout the world should teach us a lesson.

The indigenous people in their permanent struggle for survival are facing three basic options. Firstly, assimilation into the dominant legal system and culture. The constitutions, codes and structure of justice administration established by some of the indigenous people may surprise us in their consistency and other parameters by which the official legal cultures judge themselves. Then the names of the people – often proudly re-nativized – remain the only signs of the diverse identity which no longer exists: the political sovereignty (though 'impaired') may even be strengthened or regained in full but the cultural sovereignty is lost. On the opposite pole of a strategic choice is *indigenismo*, understood as the attempt

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<sup>153</sup> *Ibid.*, p. 41, translation JMK.

at revival of the past. But even such technical elements of contemporaneity as the possibility of online proceedings or credit card shopping make the change necessary. The meaning of cultural sovereignty as borrowed from others for this paper is the right to develop one's law so that it fits one's needs and aims; it is law understood as a creative process. This involves both legal innovation and legal syncretism in which the indigenous tradition is blended with the borrowings from the dominant law. De Sousa Santos offered a bit different list of options: 'negation, co-existence at a distance, reconciliation and conviviality' ('la negación, la coexistencia a distancia, la reconciliación y la convivialidad'), a series ending in the *convivialidad* understood as the 'aspiration that the ordinary justice and indigenous justice recognize themselves mutually and enrich each other in the proper process of relationship respecting autonomy of each other and respective realms reserved for their jurisdiction.'<sup>154</sup> But the full success story is if the antithesis of the 'indigenous' and 'dominant' law is settled through the feedback from the former to the latter as when the law – not only of a country but at the global level – becomes syncretic. The winds of the ecological approach with which we are trying to cleanse our planet brought also indigenous seeds of the ecological law. What perfectly epitomizes that is the BBC news of 15 March 2017: 'A river in New Zealand has become the first in the world to be granted the same legal rights as a person. The New Zealand parliament passed the bill recognizing the Whanganui River, in North Island, as a living entity. Long revered by New Zealand's Maori people, the river's interests will now be represented by two people. The Maori had been fighting for over 160 years to get this recognition for their river, a minister said.'<sup>155</sup>

At the end, the words of the already cited here half-Ojibwa former Canadian senator, graduate in law from the University of Manitoba, holder of honorary degrees of many universities, a Fourth Degree Midewiwin member of the Native Three Fires Society, chairman of the Truth and Reconciliation Commission, Judge Murray Sinclair (alias Mizanay (Mizhana) Gheezhik, meaning 'The One Who Speaks of Pictures in the Sky') from the Truth and Reconciliation Commission on the history of the notorious 'residential schools' (something that recently the PRC has developed for Uyghurs and which had been widespread assimilationist practice from Soviet Siberia through Lapland up to Australia and South America) seem most appropriate:

Reconciliation is about atonement. It's about making amends. It's about apology. It's about recognizing responsibility. It's about accounting for what has gone on. But ultimately, it's about commitment to maintaining that mutually respectful relationship throughout, recognizing that, even when you establish it, there will be challenges to it. (...) For public servants, what's important is to understand, when the government

<sup>154</sup> *Ibid.*, pp. 34–35, translation JMK.

<sup>155</sup> *New Zealand River First in the World to be Given Legal Human Status*, <https://www.bbc.com/news/world-asia-39282918>.

makes a commitment like they have done to the United Nations Declaration on the Rights of Indigenous Peoples or to establishing a Nation-to-Nation relationship (...). Understanding what that means and what that means to government policy, government actions and government programs is very key. (...) In particular, the young Indigenous population today will still trot out the history of residential schools as a basis for claiming that more needs to be done. But more does need to be done. We mustn't forget that. Language programs need to be established to allow Indigenous people to recover their language. Culture revival programs are very important to Indigenous youth, survivors of residential schools and survivors of those survivors. They want to look at ways that they can bring their culture back so they can live in accordance with the teachings of their ancestors. Cultural revival is not something that's funded by existing program dollars in a significant way. It needs to be acknowledged as valid. It's in the United Nations Declaration on the Rights of Indigenous Peoples (...). Figuring out a way to make all of that happen in a cohesive, coherent manner is very important. (...) The Government (...) needs to have a vision about reconciliation. (...) Recognize that it's going to take a long time. We need to be patient with ourselves. We need to recognize that we're going to stumble, we're going to make mistakes and we're going to get things wrong initially because we're going down a whole new road here. We need to stay committed. As long as our hearts are aimed in the right direction and we're moving in the right way, we'll get there.<sup>156</sup>

But on this way to put the indigenous on a par with others of the human-kind the special treatment not abusing the other human rights seems necessary. 'Today, measures seeking to restore indigenous peoples to meaningful self-governance and economic health are challenged as violating prohibitions on equal protection. (...) Policies that seek to fulfill promises made to tribal governments, rebuild tribal lands, or restore tribes as political agents with the ability to provide for their people mitigate the effects of this state-sanctioned racial discrimination. These measures do not violate equal protection; they further it.'<sup>157</sup> Agreed. And one cannot but agree with Christine Zuni Cruz<sup>158</sup> when she claims that: '[A]n indigenous nation's sovereignty is strengthened if its law is based upon its own internalized values and norms' as the opposite means assimilation. And more so if we would finally agree that the human rights are neither tribal nor federal but universal and inborn even if our initial readings might differ in place and time. The problem is not the tribal police enjoying the sovereign right to arrest the non-Native for battery of a Native consort on tribal land, the problem is with cultural sovereignty as a defence for the right of *chicotazco*. 'Western law is based on the values and norms of Western societies', says Zuni Cruz<sup>159</sup> and then she asks: '[W]hy not to choose the law that reinforces our own values and norms?'

<sup>156</sup> <https://www.cspc-efpc.gc.ca/video/ssontr-eng.aspx> (accessed 15.05.2023).

<sup>157</sup> B. R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 'California Law Review' 2010, Vol. 98, pp. 1165–1198, at p. 1197.

<sup>158</sup> C. Zuni Cruz, 2001, *op. cit.*, p. 4.

<sup>159</sup> *Ibid.*, p. 21.

The honest answer is: Yes, one may, but then one risks being isolated as the last free Andamanese. The thing is how to remain loyal to one's own heritage, while acknowledging others as neighbours in the same position. This means to be reconciled within as well as between. So the recognition of the other's law should offer one an option of mutual accommodation. The changing content of the tradition makes accommodation processes inevitable; they should, nevertheless, be put to free debate of sovereign participants that would lead to the fuller universalization of the human rights.

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