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POLICY MEMO

Pipelines, Protest and Pluralism

Keith Cherry, PhD
University of Victoria, Centre for Global Studies,
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April 2020

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ECSA-C Research Group - Democracy
Lead by Oliver Schmidtke, director of the Centre for Global Studies(CFGS), University of Victoria

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Executive Summary

A recent controversy about plans to build a pipeline through unceded Indigenous territory catalyzed an unprecedented wave of national and international protest. The ensuing political debate represents an important opportunity to rethink Canada's approach to Indigenous law. This memo argues that transnational legal instruments, in particular the European model of "constitutional pluralism" can provide tools for re-imaging the relationship between Settler and Indigenous legalities.

The Issue: Pipelines, Protest and Pluralism

While most of Canada was at least nominally acquired from Indigenous peoples through treaty, the Wet'suwet'en Nation has never signed a document ceding ownership or jurisdiction over their lands1. Wet'suwet'en legal and governance systems continue to claim jurisdiction, yet Canadian governments also exert de facto control, often through force. This creates the potential for conflict between Wet'suwet'en and Canadian laws.

When Canadian and Wet'suwet'en law conflicted over pipeline construction, for example, Canadian authorities granted construction permits unilaterally. Wet'suwet'en members enforced their law by unilaterally denying pipeline workers access to their lands, setting up encampments and checkpoints on key roads. Canadian police responded through militarized raids and detentions. Last winter, after decades of spiralling conflict, this cycle culminated in a nation-wide series of protests, blockades and police actions that paralyzed the Canadian economy for weeks.

This memo contends that cycles of conflict like this one are a natural result of the fact that Canadian law provides few multilateral mechanisms for conflict resolution. I recommend that Settler treaty negotiators draw on transnational law to develop forms of dialog and negotiation between legal institutions. In particular, I suggest that the European Union and its system of "constitutional pluralism" might help Settler negotiators to engage in a much-needed re-imagining of their current approach to Indigenous law, opening up a more fruitful basis to negotiate from as their discussions with the Wet'suwet'en continue.

Background: Law(s) and Order(s)

At the heart of this winter's crisis, there is a surprisingly common problem – the problem of pluralism. In short, there are multiple overlapping demoi, both articulating law, and this creates the possibility that the two laws may conflict. Such a conflicts pits demoi against demoi, threatening the rule of law itself.

Settler institutions have responded to this ominous possibility by empowering themselves to resolve any conflicts between Indigenous and Canadian law through a unilateral process of "reconciliation". Thus, Canadian regulators consult with Indigenous peoples, hear their laws, but ultimately make decisions unilaterally – deciding on their own if, when and to what extent Indigenous law will be upheld. Moreover, the only avenue of appeal that Canadian officials recognize is through Canadian courts. There, Indigenous peoples can lodge a complaint, but a Canadian judge will ultimately decide the issue. In this way, Canadian officials try to manage conflicts between Indigenous and Settler law – but they do so through their own institutions and according to their own norms, without Indigenous participation or consent2.

1 Historical evidence from both Indigenous and Settler accounts frequently suggests that treaties were not understood by the parties as land sales, nor as extinguishing existing governance structures, but rather as commitments to share land and govern it together. Arguably then, even those areas of Canada that are under treaty remain subject to Indigenous title and governance.

2 Aaron Mills, "Miinigowiziwin: All That Has Been Given for Living Well Together" *One Vision of Anishinaabe Constitutionalism* (PhD. Diss., University of Victoria, 2019) especially at 35-37.

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Unsurprisingly, this process frequently fails to satisfy Indigenous concerns. This leaves many Indigenous peoples feeling that they have little choice but to assert their own laws unilaterally – on the land and in the streets. Sometimes, the resulting protests and disruptions create enough pressure to force Settler authorities to negotiate a solution. Too often, they simply trigger escalating cycles of enforcement, leaving 'reconciliation' to be carried out at the barrel of police riffle.

The current system of 'reconciliation', then, is one of Canadian unilateralism, which in turn provokes unilateral responses. This system is perpetually prone to crisis for the simple reason that it provides no mechanism for negotiated solutions that speak to the needs of both parties. Little wonder then, that the rallying cry of this winter's protests was "Reconciliation is Dead".

Methodology: A Transnational Law Approach

Thankfully, the issue of legal pluralism is not unique to Settler colonies. Indeed, in an era where transnational, subnational, and international legal regimes are proliferating, the issue of how different legal orders can relate to one another is a critical one for democratic institutions around the world. The European Union, for example, has long grappled with relationship between Union law, the law of the member states, and other sources of international law. Over time, European actors have developed a set of practices that allow for dialog between legal institutions, making the relationship between them an object of multilateral negotiation. Canadian policy makers would be wise to consider similar mechanisms as an alternative to the discourse of reconciliation and the reoccurring crises it creates.

Policy Options: Constitutional Pluralism as a Source of Inspiration

The European Union features a transnational legal system alongside the law of the member states. However, the founding treaties were silent on the relationship between these two legalities. Just as in Canada, this raised the spectre of conflict between the laws, a conflict which could threaten the integration process itself.

Much like the Canadian state, the European Court of Justice responded to this issue by declaring its own supremacy. In a string of controversial decisions, the ECJ ruled that EU law is supreme over national law – even over national constitutions3.

Much like Indigenous peoples, the courts of the member states felt compelled forward a variety of counter-claims. The German Constitutional Court, for example, ruled that EU law could not be allowed to violate certain core elements of the German constitution4. If an EU did violate those provisions, German courts would not treat it as Supreme.

In this way, the German court effectively placed conditions on their acceptance of EU authority. This strategy is euphemistically referred to as the "so-long-as" doctrine – so-long-as the EU doesn't do anything to offend Germany's most basic values and laws, Germany will accept EU authority.

From time to time, German courts use reference questions to the ECJ to signal that an EU law may be in violation of the German constitution, often with suggested solutions included. In order to preserve its own supremacy, the ECJ dutifully considers these suggestions in its ruling – effectively suggesting its own way to resolve the conflict. When the issue arises again in German courts, German judges have an opportunity to accept and apply the ECJ's solution or to signal that the conflict persists and suggest alternative approaches with another reference question. In this way, the two courts engage in a dialog, passing the issue back and forth until a mutually acceptable solution is found.

As a result, both parties must be responsive to multiple sources of law. German laws must meet German standards, but they also must avoid conflict with EU laws which are otherwise paramount. EU laws must meet EU standards, but they must also meet German conditions. Maduro terms this system one of "constitutional pluralism" because all actors are constrained by multiple sources of law at the same time5. The end result is a system which is not designed to articulate a single view of legitimate authority, but rather to satisfy multiple independent sources of law at once6.

Remarkably, this system has now endured for nearly 60 years, weathering such storms as the Euro crisis, Brexit, and refugee crisis without outright conflict between courts. In fact, legal cooperation has played an important role in pushing the integration process forward7.

3 *Costa v. ENEL*, ECJ Case 6/64, [1964] ECR 585; *Van Gend en Loos v. Netherlands*, ECJ Case 26/62, [1963] ECR 1.

4 *Solange I*, BVerfGE Case 37/271, [1974] 14 CMLR 540; *Solange II*, BVerfGE Case 73/339, [1987] 3 CMLR 225.

5 Maduro, Miguel. "Contrapuntal Law." In *Sovereignty in Transition,* ed. Neil Walker. Portland: Hart Publishing, 2003.

6 Lord, Christopher and Magnette, Paul. "E Pluribus Unum? Creative Disagreement about Legitimacy in the EU." *Journal of Common Market Studies* 42, no.1 (2004).

7 Stein, Eric. "Lawyers, Judges and the Making of a Transnational Constitution." American Journal of International Law 75, no.1 (1981).

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Recommendations

Constitutional Pluralism and Reconciliation
The European system of Constitutional Pluralism offers a helpful way to think about legal pluralism – rather than empowering a single party to resolve disputes unilaterally, it creates iterative processes of dialog that allows for multilateral negotiation between independent institutions, ensuring solutions speak to both legal traditions.

In pursuing such a system, it is crucial to note that the ECJ does not try to act as guardian of the German constitution. The Germans articulate their own laws, signal if and when they have been violated, and decide if and when the ECJ has offered an acceptable solution. Rather than treating Indigenous law as something internal to Canadian law, and thus regulated by Canadian courts, constitutional pluralism suggests that Indigenous law can only be justly articulated by independent Indigenous institutions.

Recognising this fact, modern treaties could be reimagined as recognizing conditional forms of authority for both parties. Federal and Provincial law could apply in agreed upon areas – but only provided that neither offend the core values and doctrines of Wet'suwet'en law. Likewise, Wet'suwet'en law could apply in some areas – but only provided that they not violate certain core provisions of the Canadian constitution. When conflicts occur, Canadian and Wet'suwet'en legal institutions could find forms of dialog that allow them to iteratively work towards solutions that satisfy both legal regimes – perhaps through reference questions, or perhaps using something similar to the co-decision bodies envisioned under BCDRIP S7(2), which is also modeled on international law8.

Crucially, such an approach would make the concept of reconciliation multilateral – rather than empowering Canadian courts to harmonize two sources of law unilaterally, it would provide a means for Indigenous peoples and Canadians to take part in a dialog wherein both parties would need to reconcile themselves to the democratic needs and aspirations of the other.

Obviously, such an approach imposes de jure costs on Canadian governments, who would no longer control the legal landscape unilaterally. On a de facto level, however, this winter's blockades make it clear that Canadian governments do not, in practice, control the legal environment anyway. Canadian institutions must already reckon with Indigenous laws. Whether Settler courts deny them or not, these laws make their presence felt on the land and in the streets. To the extent that recognizing this reality constitutes a concession, that concession is both long overdo and easily outweighed by the benefits of creating a way to manage conflicts before they become political and social crises.

Conclusions: Nation-to-Nation

Of course it would be foolhardy, not to mention deeply colonial, to think that European discourses can provide a ready-made roadmap to reconciliation. The mechanics of reconciliation must be negotiated in conversation with Indigenous nations, drawing on Indigenous concepts and institutional forms. Still, it is important recognize that the approaches Settler negotiators have been bringing to the table are deeply problematic. Transnational law offers an alternative body of ideas, precedents, and institutions that might make Canadian officials more fruitful negotiating partners moving forward.

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8 Bill C41, The Declaration on the Rights of Indigenous Peoples Act, intended to implement B.C.'s commitments under the United Nations Declaration on the Rights of Indigenous Peoples.

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Authors

Keith Cherry holds a PHD in Law and Society. He is a founding member of the Cedar Trees Institute and is also a fellow at the Centre for Global Studies at the University of Victoria. His research explores legal pluralism in two contrasting settings, settler/Indigenous relationships in Canada and member-state/Union relations in the European Union. During his time at the Center for Global Studies, Keith will be analyzing the role of the state and market in contemporary pluralism. Drawing on his studies of EU/State relations and Settler/Indigenous relations, Keith intends to argue that the most advanced models of pluralism actually exist at the non-state level - in grassroots communities, indigenous democracies, and emergent global networks which model a horizontal, participatory praxis based on mutual need and mutual aid.

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