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What Has Gone Before: Native Property and Jurisdiction in the Courts

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While a few nation-states have formally recognized Indigenous rights through constitutional or statutory mechanisms, formal recognition is only part of the story. Giving meaning to the relationship between Native and non-Native actors in the public sphere often takes place through the resolution of individual conflicts over specific resources or rights. The courts, frequently called upon to resolve such disputes, play an important role in calling public attention to indigenous rights, but have significant institutional limitations. This article compares recent court cases on indigenous rights in Canada, the United States, Australia and Sweden, and concludes that, despite the differences in political and legal systems in these countries, the outcomes for indigenous claimants have been incremental at best.

Tandis que quelques nations-états ont officiellement reconnu les droits autochtones dans leurs mécanismes constitutionnels ou légaux, une reconnaissance formelle n'est qu'une partie de l'histoire. Donner une signification aux rapports entre les Autochtones et les non- Autochtones dans la sphère publique se fait souvent par la résolution de conflits individuels portant sur des ressources ou des droits particuliers. Les tribunaux, fréquemment appelés à résoudre de telles disputes, jouent un rôle important dans la sensibilisation du public aux droits autochtones, mais ils ont des limites institutionnelles importantes. Cet article compare des procès récents sur les droits autochtones au Canada, aux États-Unis, en Australie et en Suède et il conclut qu'en dépit des différences de systèmes politiques et juridiques qui existent dans ces pays, les résultats pour les requérants autochtones ont été marginaux au mieux

In the present era of self-determination for Indigenous peoples we have seen new constitutional provisions, laws, settlements and self-governing arrangements by which national and sub-national governments formally recognize Aboriginal or Native rights. Formal recognition, however, is only part of the story. Giving actual meaning to the relationship between Native and non-Native actors in the public sphere generates a good deal of confusion and conflict. In some cases the boundary between different ethnic groups—Native vs. non-Native—may shift over time and become an entire topic of contention. Many issues are resolved in negotiations. A few issues reach the courts.

Native claimants in constitutional democracies with healthy, functioning court systems often face the question of whether to approach the courts for recognition of land and water rights or to take a political negotiation route for resolution of differences. Perhaps both form different aspects of the same strategy, i.e., negotiate first, then litigate if negotiations break down, or litigate first, then negotiate on the basis of the judgment.

Where no treaties exist to guide the parties or lay out the basis for Native rights, court claims rest on historical and constitutional arguments, and sometimes international legal norms regarding human rights. The question arises, how do Native claimants fare in the courts when there are no historical treaties specifically addressing the Native group's status or land/water rights? Where have such claims arisen in the late 20th-century and how have they been received?

This article samples recent court cases in Canada, the United States, Australia and Sweden to see how the courts of these countries resolved disputes about Native rights to land. These cases illustrate the difficulties of putting lofty statements about self-determination, Aboriginal rights, sovereignty and other principles into practice for specific Native groups with particular claims. It is not impossible but certainly a challenge to persuade a court that a tribe, band or village can be both traditional and modern, a sovereign and a proprietor, a private (market) actor and a public government. Further, the Native parties to disputes are asking courts to reject or re-evaluate the legitimacy of what has gone on before: the actions and non-ac-

tions of local and national governments that created the circumstances for the Native claim, be it homestead laws, fishing regulations, pastoral leases or hydroelectric development. Court pronouncements on past wrongs may have the effect of limiting future actions, so it comes as no surprise that judges—who, after all, are acting for state institutions—are reluctant to rule unambiguously for the Native parties. To do so, they would have to challenge the entire constitutional framework of the state.

Canada, the United States, Australia and Sweden were chosen for several reasons. First, all four countries have had relatively high-profile Native rights cases reach the courts in the 1990s. Second, each country constitutes a stable democracy with a comparatively admirable record of respecting civil and political rights. Third, despite their different histories, legal systems and methods of allocating authority between the centre and the regions (Canada, Australia and the United States are federal systems, though the specific formulas differ; Sweden is not a federal system), all of these countries have demonstrated that there are limits to satisfying Native claimants. The limitations stem from important political considerations (e.g., how judges are selected, which political party has dominated the legislature); and constitutional provisions (e.g., the constitutional position of the courts, definitions of property and other rights, framework of governmental decision-making); but also from the claims themselves (the nature of the evidence, the relationship between claimants' aspirations and present reality).

Native claimants have aspired to four different levels of recognition in the courts. The first level, and perhaps the most easily recognized by the nation-state, is that of priority use rights or Aboriginal rights. Aboriginal rights are priority rights to specific resources, such as fish, based on historical and traditional patterns of usage. These rights tend to be nonexclusive, that is, other groups of resource users have claims on the resources, yet they confer on the Aboriginal group a priority based on custom and tradition. The second level, Aboriginal title, consists of an exclusive right to land based on Aboriginal possession. However, certain limitations accompany Aboriginal title, importantly inalienability. The Aboriginal group cannot sell the

land or use the land in such a way as to destroy the traditional uses (e.g., hunting and fishing) of Aboriginal people. At the third level, fee simple title, the Aboriginal group has more than exclusive possession: the Aboriginal group may alienate the land through sale, gift or exchange. This pattern most aptly describes Alaska Native land holding. The fourth and final level is partial sovereignty (short of total independence as a nation-state) or jurisdiction over the land. This enables the Aboriginal group to make and enforce laws and adjudicate disputes within the territorial boundaries of jurisdiction. Self-government arrangements, including fee simple title and jurisdiction, include Nunavut in Canada, Greenland Home Rule and "Indian Country" in the United States. The latter arrangement is very difficult to obtain without protracted negotiations or a treaty-like settlement.

The article presents the comparison in two parts. Part 1 gives brief descriptions and backgrounds of the cases in each country. Part 2 compares different elements of the cases and the roles of the courts, noting that, the higher the level of the claim, the less useful litigation is and the more direct negotiations are needed.

I. Cases Before the Courts

A. Svegmålet *and the Saami*

The Saami people of northern Finland, Norway, Sweden and the Kola Peninsula of Russia have challenged the state in the courts on several occasions. The Soviet system severely limited their chances for action on the Kola, but in the other three countries the Saami have pursued claims in legal and political spheres.[1] For example, a Saami village from the Swedish side of the border won a major victory in the Norwegian Supreme Court in 1968.[2] This opinion confirmed the right of the Swedish Saami to pursue their livelihood of reindeer herding across the border into Norway according to time-immemorial rights. This was an important recognition of a "use" right that existed on its own merits. The court acknowledged that this right was not created by a government, but rather recognized by Norway and Sweden in their 1751 agreement on the boundary between the two realms. In 1981, in the *Taxed Mountains* case, the Swedish Su-

preme Court recognized that the Saami may have land rights superior to mere "use" rights, but the lengthy and complicated opinion did not mean a victory for the Saami claimants in this case.[3] The court merely questioned whether the dominant view that the Crown had clear title to the land on which the Saami herded, hunted and fished throughout the centuries prevailed in all Saami regions. As a result of lengthy consultations with the Saami after the muddy outcome of the *Taxed Mountains* case, the Swedish government modified reindeer herding legislation to declare that the Saami possess time-immemorial rights. The practical value of this statutory provision remains elusive.

The most recent case of *Sveg*, one brought against the Saami, not initiated by them, involves a contest between farmers and other landowners who claimed that they have exclusive title, and the Saami who claimed they have a right to use these lands as winter pasture for their reindeer herds. The district court ruled for the farmers, noting that they had been in the area for a longer period of time than the Saarni, that their intensive use of the land had evolved into property ownership, and that the Saami had exhibited less intensive, more sporadic land-use practices.

The *Sveg* case points up the ambiguity of ethnic history and prehistory in Fennoscandia.[4] Unlike the situation of Indigenous groups in the Americas, Saami history cannot be divided easily into pre- and post-contact eras. Areas now inhabited by Saami and Norwegians, Swedes or Finns were also inhabited thousands of years ago, but it is difficult to connect these earlier inhabitants with any single ethnolinguistic group. In the *Sveg* case, the Saami brought evidence of a burial site from the late Iron Age (about 500 B.C. to 550 A.D.), but the expert witness for the landowners explained this site (the only site he would accept as indisputably Saami in origin) as a brief migration of a few Saami during the Viking Age. The Saami could not convince the court that they met the unspoken requirements here: original settlement and continued occupation. Although Finnish, Swedish and Norwegian legal systems lack any concept similar to Aboriginal title, they do accept a notion of time-immemorial prescription, that is, continuous occupation over generations that leads

to recognized title. The requirements for prescriptive title, however, seem to shift over time and region. Even though the Swedish parliament declared the Saami to have time-immemorial rights, neither the courts nor elected officials have detailed actual content to those rights, particular to time, place and different groups of Saami.[5]

The Saami, then, do not have clearly recognized title to the lands they occupy for herding, hunting and fishing. They do have representation on local boards and political institutions in those few areas where they form a plurality of voters; in addition, they have national advisory bodies, referred to as "Saami parliaments."[6] The Norwegian constitution mentions the Saami; the Swedish reindeer herding law refers to time-immemorial rights.[7] As the outcome of *Sveg* and other cases show, however, recognized Saami rights do not necessarily include exclusive or superior rights to land and water.

B. Wik *and the Aboriginal Peoples of Australia*

If the Saami have been frustrated in the courts, they have made tremendous gains in political representation and public awareness, particularly compared with the situation of the Aboriginal Australians. The Aboriginal populations of Australia have only recently made modest gains in the courts, beginning with the *Mabo v. Queensland* decision of 1992.[8] The High Court in *Mabo* acknowledged the existence of Aboriginal title. The Meriam People, Melanesians, who probably had come from Papua New Guinea to settle the Murray Islands in the Torres Strait, claimed ownership and possession of the islands. The state of Queensland had annexed the islands in 1879 and countered in this case that the annexation had vested ownership in the Crown (in the form of the Queensland government). Queensland based its argument on the theory that the sovereign of a territory also owns all the land of that territory. The High Court rejected Queensland's argument, ruling that the mere acquisition of sovereignty does not extinguish Aboriginal title to land. Further, the Court declared that any exercise of power to extinguish Aboriginal title must show clear and plain intent to do so. However, where Queensland had granted leases over parts of the Murray Islands, and the purposes or activities provided by the leases were "inconsistent" with the Meriam people's

continued right to exercise Aboriginal title rights, then the granting of those leases would extinguish Aboriginal title over the leased lands.

The issue of leases arose again in 1996 in the combined action of *Wik Peoples v. State of Queensland* and *Thayorre People v. State of Queensland*. Known as *Wik*,[9] this case examined the effects of pastoral leases over huge expanses of territory in Queensland on Aboriginal title rights. The Queensland government and the leaseholders claimed that the act of granting the leases gave exclusive possession to the leaseholder and thus extinguished Aboriginal title. The Wik and Thayorre peoples claimed that they retained Aboriginal title rights because the leases did not give exclusive possession, nor were the leases inconsistent with the exercise of Aboriginal title. They allowed limited activities associated with grazing cattle, and the grantees practiced very limited occupancy. Some of the grantees never took possession of the land at all and forfeited their leases. The High Court, by a four-to-three majority, ruled that the leases did not necessarily confer the right of exclusive possession, therefore did not necessarily extinguish Aboriginal title. In other words, Native title rights may co-exist with leasehold interests.

Was this a major victory for Indigenous Australians, or did it merely state the obvious? The *Wik* decision certainly invited scorn among non-Indigenous Australians for creating legal uncertainty over the legal status of pastoral leases.[10] The colonization of Australia proceeded by the lease as a statutory instrument of property rights. In the common law of England, the lease generally did confer exclusive possession, as opposed to a license. However, in Australia, where large tracts of land were deemed unsuitable for residential settlement but suitable for grazing purposes, the lease became a "creature of statute," that is, a colonial adjustment to the local environment. Historical documents indicate that these leases were not intended to deprive the Aboriginal inhabitants of their right to hunt or subsist.[11] But what were the effects of the leases? As long as Indigenous inhabitants could continue to use the land, the leases did not extinguish their rights. In other words, the two types of land occupation were not inconsistent. If the pastoral leases had led to intensive occupation that precluded Indigenous use, the outcome of the case may have

been different.

Both *Mabo* and Wik reached comparatively tame results, just as the *Taxed Mountains* case in Sweden had found that the Saami may indeed have "stronger" rights to land than simple use-rights that could extend to anyone. These were not momentous findings as far as the Indigenous claimants were concerned. However, the cases led to political maelstrom. In Sweden, the government appointed a parliamentary commission to address the problem of Saami rights, following the example that Norway had set a few years earlier. In Australia, the government passed a law, the Native Title Act of 1993, to create a mechanism for Aboriginal claims to be heard and negotiated. The discussions leading up to the Native Title Act and the Native Title Amendment Act of 1998 consisted of "political storms and legal fog," according to constitutional scholar Peter Russell.[12] Aboriginal groups have not been satisfied with the Native Title Act for several reasons, one of which is that historical breaks with traditional practices (often necessitated as a consequence of colonization and racism) cause Aboriginal claims to fail. In addition, the 1998 amendments do not settle the issue of extinguishment; the courts may yet decide that inconsistent rights on pastoral leases do indeed extinguish Native title.[13]

Extinguishment of Aboriginal rights or Aboriginal title sounds like serious business. To extinguish a candle is to snuff out the flame. It is an irrevocable, final act. The High Court in *Wik* ruled that extinguishment requires clear and plain intent to extinguish. If Parliament desires to displace Aboriginal people, then it must state its intention to do so. However, the Court recognized another path to extinguishment: if the leases had resulted in sustained activity that had a negative impact on Aboriginal uses of the land, and the Aboriginal rights would not be able to survive the effects of the lease, then *de facto* extinguishment had taken place. In other words, if displacement had already occurred over a period of time, then what had gone before set the direction for future legal acts. This reasoning makes *Wik* and by implication the implementation of the Native Title Act less than clear victories for all Indigenous Australians. For example, the Native Title Act focuses on traditional activities such as hunting, fishing and gathering. What about commercial rights and economic de-

velopment? The linkage between Aboriginal title and Aboriginal traditions can be seen as an enabling force in persuading non-Aboriginal governments to respect property rights,[14] but it can also act as a source of restrictions on Aboriginal activity on the land. This issue arises in Canada as well, with the *Van der Peet* decision, among other court cases.[15] What constitutes traditional practice unique to the Aboriginal group? And is there a threshold beyond which modernized methods (e.g., of fishing, commerce and trade) make that activity non-traditional? Another issue is the continuity of occupation and tradition. Governments in Australia have rejected applications for Native title rights based on evidence of historical breaks with traditions. This hurdle applies to other Aboriginal groups and has had similar results.

C. Delgamuukw *and Canada*

In *Delgamuukw v. British Columbia*, the Gitksan and Wet'suwet'en hereditary chiefs claimed for themselves and their people about 58,000 square kilometres in British Columbia.[16] The chiefs claimed both ownership and jurisdiction, but the court translated the claim into Aboriginal title. The Canadian Supreme Court called for a new trial on the basis of procedural defects and the incorrect assessment of oral history evidence at the trial level. The trial judge had given little weight to oral histories and based his conclusion that the Gitksan and Wet'suwet'en had not demonstrated their historical occupation of the land on his dismissive view of oral historical evidence.

The Supreme Court issued a fairly definitive statement on Aboriginal title but did not comment on the jurisdiction or self-government aspect of the claim. The Chief Justice wrote that Aboriginal title

> Confers the right to use the land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation

> that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title.[17]

In other words, Aboriginal title does not equate with fee simple title, as claimed by the Gitksan and Wet'suwet'en chiefs and their houses, nor is it merely use and occupation of the land to engage in strictly "aboriginal" activities, as claimed by British Columbia. If the Aboriginal group were to build a golf course that interfered with the enjoyment of hunting rights, then that group has destroyed its unique bond to the land. To build a golf course is nearly equivalent to selling the land, removing it from access to traditional uses; therefore Aboriginal title does not permit every manner of economic development as does fee simple title.

The Supreme Court also set forth a test for proving Aboriginal title based on present occupation of the land. First, the Aboriginal group must establish that it occupied the land at the time the Crown asserted sovereignty over the land in question. Courts should take into account both evidence of physical occupation and the existence of Aboriginal laws or tenure systems to test for occupation at the time of sovereignty. Second, the Aboriginal group must show continuity between present and pre-sovereignty occupation. Interruptions are allowed, since many Europeans did not respect Aboriginal title, but the Canadian Supreme Court embraces the *Mabo* test from Australia: there must be a "substantial maintenance of the connection" between people and the land.[18] Finally, the Aboriginal group must show that their occupation at the time of sovereignty was exclusive. Even if other groups were present, the Aboriginal claimant has to show that their forebears upheld boundaries and required other groups to ask permission before crossing them.

The Supreme Court also addressed extinguishment, relying on a previous landmark case, *Sparrow*. Extinguishment requires clear and plain intent; laws that regulate or have an effect on Aboriginal title in such a way as to cause inconsistencies are not enough to extinguish Aboriginal title.

Overall, the Chief Justice emphasized the importance of recon-

ciliation between the Aboriginal societies and the broader political community. Compelling societal objectives, such as the conservation of fish, the pursuit of economic and regional fairness, or the recognition of other historical claims, may be used to regulate and limit Aboriginal rights. As a product of such a reconciliation process, the Nisga'a reached agreement with British Columbia and the federal government in August 1998. However, some authors have seen the claims negotiation process as establishing inherently unequal terms for the Aboriginal parties.[19] Reconciliation means that the Aboriginal group must give something up, generally a good portion of the land. However, as K. McNeil notes, the Canadian Supreme Court in *Delgamuukw* recognized for the first time the right of Aboriginal peoples to participate as equal partners in resource development. If the provincial and federal authorities take this legal pronouncement seriously, we may see a turning point in negotiated relationships, away from significant losses for Indigenous peoples to significant gains.[20] As we shall see below, the Alaska Natives gave up their claims to about 90 percent of the state when they engaged in a settlement process with the United States Congress. The Alaska Native Claims Settlement Act was an act of reconciliation, but left many claims unsettled.

D. Venetie *and the Alaska Natives*

Many authors trace the development of Western law on Aboriginal jurisdiction and title to jurisprudence in the early years of U. S. independence, particularly the decisions of the U.S. Supreme Court under Chief Justice John Marshall.[21] The United States certainly adopted a unique model of tribal sovereignty (jurisdiction) and land title, but applied the model sporadically and unevenly, creating both powerful legal tools to use in Native claims and countless tragedies of land loss and destruction. The *de facto* and *de jure* split between policy and law forms a gaping wound that tribes and their allies still seek to heal.

The *Venetie* case in Alaska illustrates the ongoing efforts to implement the tribal sovereignty model in a way that truly allows tribes to govern their own territory.[22] The Alaska Native Claims Settlement

Act (ANCSA) passed by Congress in 1971 took existing Alaska Native claims to title and turned them into a mechanism for creating a new model of land ownership by for profit regional and village corporations whose shareholders would be Alaska Natives. The settlement, a policy decision made in consultation with the Alaska Federation of Natives, did not speak of tribes, tribal governments or sovereignty, but rather of corporations, revenue sharing and royalties from oil and gas. The settlement act extinguished Aboriginal claims to Alaska lands in exchange for money and about 44 million acres of land to be held in fee simple by the new Alaska Native corporations. The Neets'aii Gwich'in Athabaskan people had one of these reservations that ANCSA revoked in 1971. Two years later, the village corporations of Venetie and Arctic Village took title to their former reservation lands and declined the monetary payments, an option included in ANCSA. The United States conveyed fee simple title to the land to the Venetie and Arctic Village corporations, and the corporations then transferred the land to the Native Village of Venetie Tribal Government. The Venetie Tribal Government then attempted to collect a business tax from a construction company that had a contract from the state of Alaska to build a school in Venetie. Both the contractor and the state refused to pay the tax. The tribal government attempted to collect the tax in tribal court, but the state of Alaska filed suit in federal court. The state claimed that the land in question was not "Indian Country," that is, land over which the tribe would have power to tax non-members of the tribe. The Supreme Court agreed. The lands that were transferred to the Venetie Tribal Government did not constitute "Indian Country."

Indian Country outside of reservations made by treaty consists of lands set apart for use by tribes, and these lands must be under federal (rather than state or local) superintendence. Venetie argued that the federal government offered services to the tribe under special Alaska Native or Native American programs, and thus the land was under federal superintendence. Further, the tribe argued that ANCSA and congressionally enacted amendments to ANCSA protected Alaska Native lands, setting them aside for use by tribes (in the Alaskan case, tribes are equivalent to villages).

The state of Alaska argued that Congress intended ANCSA to reject federal control and allow Alaska Natives the independence to run their own lives. The Supreme Court agreed, noting that ANCSA had ended federal control over Venetie lands and that ANCSA signaled Congress's intent to avoid Alaska Native dependence on the federal government. In other words, Congress explicitly rejected reservations and dependent Indian Country on the basis of a widely held belief that the reservation system resulted in poverty and marginalization. The Court relied on the declared intent and express wish of Congress, just as the High Court in *Wik* looked for the express intent of the Australian Parliament to extinguish Aboriginal rights. While the Alaska state government appointed a commission to look into "rural" (i.e., Alaska Native) issues of governance after the *Venetie* decision, it is not yet clear whether the commission has made progress in healing relations between the state government and the rural or Alaska Native governments. Again, the call for reconciliation relies on the willingness of all parties to accept the equality of Indigenous participants.

II. What Can Courts Do?

A. Courts as Stages For Historical Re-enactments

All of these recent cases show the limitations of courts in resolving Aboriginal claims. The time and expense of litigation makes it an unattractive option for claims settlement. However, courts can serve as platforms for presentations of self, unlike legislatures or closed-door meetings, because they permit the interplay between the symbolic and the factual, the past and the future. The court becomes a stage, the performance an historical narrative judged on its coherence and internal consistency. Identities clash as the litigants' stories contradict one another. At the trial or first-instance level, the judge faces the challenge of piecing together a single, linear narrative out of diverse genres: boxes of documents and hundreds of hours of oral testimony. While the resulting findings of the judgment seldom reflects the entire body of the Aboriginal version of events, the judges must account for the Aboriginal version in some way. The lower the level of the claim, the more likely the Aboriginal version will be

accepted. A claim for Aboriginal rights, priority rights to use certain natural resources based on tradition, relies on the history of use patterns in that particular stream, hunting ground or gathering area, so the judgment likely will reflect the Aboriginal version of historical use. However, when the claim involves actual ownership of property or sovereignty (jurisdiction over territory), a much higher level of authority than Aboriginal rights, the judgment likely leans toward the state's or province's version of history or simply leaves the question open for reconciliation, i.e., the political process.

The statements of rights made in constitutions, statutes and landmark cases run up against another coherent narrative of leases, land grants and licenses. What went before cannot be erased entirely. Brennan emphasized in *Mabo* that the job of Australia's High Court is not to rule on the legality of the acts of the state when it comes to important questions of acquiring sovereignty. Once the state has acquired sovereignty, however, the constitutional courts in a democracy, whether a presidential or parliamentary system, are supposed to keep the government on the constitutional path. The Supreme Court in the United States has exercised the power of judicial review for more than 200 years. The Supreme Court of Canada has taken this role in an increasingly visible way since 1982. In Australia, the High Court has adopted a comparatively conservative stance, as has the Swedish Supreme Court.[23] The Aboriginal litigants did not ask the courts to overturn any statutes. They simply asked for recognition of existing rights, using available statutory, constitutional and common law provisions. But this recognition, as simple as it sounds, entails a wholesale rejection of those earlier statutes that enabled the colonization of Aboriginal territory, statutes that conferred rights upon new leaseholders, landholders and groundbreakers. The business of government is entitlement and re-entitlement; the courts must determine which of those entitlements, when they conflict, is valid.

The outcomes of litigation, then, combined with the current extrajudicial controversies over Native rights, produce a fuzzy snapshot of contemporary realities shadowed by laws still enforced or hallowed as definitive. There are few clean slates on which to write legal history. We see this by looking at the content of Native rights

on each level: Aboriginal or use rights, Aboriginal title, fee simple title and jurisdiction.

B. The Limits of Aboriginal Rights

In each of the cases considered above, the courts accept that the Indigenous groups have had or continue to enjoy Aboriginal rights. The content of Aboriginal rights depends on the historical practices of the group. Building dams, operating sawmills or opening up tourist resorts do not qualify. Negotiations that result in exchanging Aboriginal rights for something else (e.g., fee simple title, as was done in the Alaska Native Claims Settlement Act) may lead to commercial activities, but these commercial uses themselves do not constitute the exercise of Aboriginal rights. Here, the situation of the Saami differs. Reindeer herding, sanctioned and regulated by the state for over a hundred years, is a commercial venture while at the same time it is seen as a right (some would call it a privilege since only a small minority of Saami can practice herding) unique to the Saami people. At the same time, uniquely Saami rights to hunt and fish have been eroded dramatically. The transformation of a time-immemorial practice into a narrowly based industry regulated by the state has complicated the Saami case for hunting and fishing rights.[24] Even Saami reindeer herding, however, resembles Aboriginal rights in Canada, Australia and the United States, in that state authorities have curtailed herding when non-Natives raise competing claims. As a whole, Aboriginal rights constitute the first and weakest level of rights. The assertion of Aboriginal rights is a starting place for negotiations, but sustained protection for hunting, fishing and gathering activities requires specific statutory, regulatory and management frameworks.

C. Aboriginal Title

Aboriginal title, or the exclusive right to land based on Aboriginal possession, also carries limitations. As the Canadian Supreme Court ruled in *Delgamuukw*, Aboriginal title permits a range of land uses that are not inconsistent with the underlying attachment to the land that established the title in the first place. This forces the holders of Aboriginal title to embrace an historical identity and balance the need for revenue-generating commercial activities with the need to main-

tain the conditions for traditional pursuits, such as trapping, hunting, fishing and gathering.

To establish Aboriginal title in the courts requires substantial evidence of continuity on the land and exclusive possession. Once an Indigenous group has passed the test for Aboriginal title, the land may be used for a variety of purposes. However, until it is proven in court, Aboriginal title may be in doubt.

D. Fee Simple Title

Various settlements in Canada and the United States, including the Alaska Native Claims Settlement Act, have included fee simple title as part of the arrangement. Fee simple allows Indigenous societies more flexibility in economic development strategies than does Aboriginal title. The danger, of course, is backlash. Non-Native society members may see the Native pursuit of wealth through resource development as an unfair privilege bestowed upon people who once claimed to have a unique identity and lifestyle.

For example, the Alaska Native Claims Settlement Act established regional and village corporations to hold the title. Corporate shareholders had to be Alaska Native. In twenty years, the requirement that the shares be held exclusively by Alaska Native shareholders would lapse, and the shares would be sold on the open market. In the "1991" amendments to ANCSA, proposed in the mid-1980s, Alaska Native leaders expressed the wish that the restrictions on Native shareholding be extended indefinitely; otherwise, non-Natives would have the chance to gain a majority and thus title to the land. Many non-Natives argued that the extension of the stock restrictions unfairly privileged the Alaska Native corporations, and that the latter should compete in the marketplace. The "1991 amendments" became law in 1988, but not without significant opposition.[25] Fee simple title, unless it is part of a comprehensive land claims settlement that includes territories for traditional use, is subject to serious challenges.

E. Self-Government

The comprehensive land claims negotiation process in Canada includes self-government arrangements. The self-governing territory

of Nunavut, carved out of the eastern Northwest Territories, emerged after decades of negotiations. The Nisga'a Final Agreement in British Columbia includes provisions for a Nisga'a government with broad authority. While the Neets'aii Gwich'in of Venetie took their claim to self-government to court, they found no satisfaction. In the wake of the *Venetie* decision, Alaska's governor appointed a Rural Governance Commission to work on improving relations between Alaska Native tribes and the state government. The commission issued a report with recommendations focused on local autonomy and control, but it remains to be seen if these recommendations will be put into practice. Similar commissions in Canada, Sweden, Norway and Australia have been tasked over the years (particularly following the ambiguous outcomes of contentious court battles) with working out the parameters for settlement with Indigenous groups, but ultimately the recommendations that emerge out of the commissions depend on the political will of the non-Native governments at the national and regional levels.

Conclusion

The courts provide a platform for Indigenous claims and a means to raise public awareness of an Indigenous group's history, culture and aspirations. The courts seldom provide a solution wholly beneficial to the Indigenous claimants, however. Courts belong to the nation-state's history and constitutional development. Their very existence testifies to the triumph of the victor: the dominant society's rule of law prevails. On the other hand, the ability of courts to recognize Aboriginal rights, to abandon the doctrine of *terra nullius*, and to rap the knuckles of the politicians and tell them to go negotiate, provides evidence of flexibility in law. Of course, the sources of law in a constitutional democracy depend on the elected representatives and the role they have assigned the courts. This overview of some of the most contentious issues involving non-treaty Indigenous rights in constitutional democracies has downplayed the role of the political context and argued that even when there are differences in political party and territorial divisions of power, the legal issues brought before the courts bring with them an inherent limitation on the extent

of Native rights. Where the courts have been assigned a role or have interpreted their own role as a strong arbiter of Indigenous claims against the state, they have balanced the claims alongside the actions of the very state that established the present configuration of property and jurisdiction in the regions under dispute.

What went before? The acts of state building—pastoral leases in Australia, resource-rich land grants to the new state of Alaska, farmland issued to veterans in British Columbia, homesteading in northern Sweden and Norway—proceeded under law, expanding and shaping the polity. These regions became the sites of contested histories, not only of who was there first, but also regarding what really happened in these once remote peripheries. Who pushed and who was pushed away? Who left a mark? Whose language covered the maps?

The courts can only begin to answer such questions, based on the evidence brought to them. When the evidence is predominantly oral rather than written, when claimants invoke sacred concepts to explain legal rights, the courts quickly reach their limits and direct the parties to the negotiating table. Once the negotiations result in new statutory or regulatory language, however, questions keep coming to the courts on the specific applications of the new arrangements. This iterative process eventually refashions political institutions or helps to create new ones designed to share power or to implement protective measures. Of the four cases examined here, the iterative process seems to have gone the furthest toward recognition of rights in Canada, where a recent court decision (*Marshall*) actually stated the specific nature of an Aboriginal right and treaty right rather than letting it be negotiated away at a later date.[26]

For the Indigenous peoples of Australia, Canada, Sweden (and Norway) and the United States, the late 20th century has been an era of negotiating and renegotiating relationships through a variety of means, including litigation. Generally, litigation has led the courts in these countries to recognize Aboriginal rights (or, in the case of Sweden and Norway, time immemorial rights). The higher the level of the claim, however, the less appropriate the tool of litigation and the more necessity for negotiation, because the question turns from who has the right to who has the power.

Notes

1 For more information on the history of the Saami, see H. Beach, "The Saami of Lapland," in *Polar Peoples: Self Determination and Development*, ed. Minority Rights Group(London: Minority Rights Group,1993),pp.147-205; K. Bergslund, *Samenes og sameområdenes rettslige stilling historisk belyst* (Oslo: Universitetsforlaget, 1977); T. Cramer, ed., *Samernas vita bok*, vols. 23 and 25 (Stockholm, photocopied manuscripts, 1987 and 1993); T. Thuen, ed. *Samene—urbefolkning og minoritet* (Tromsø, Oslo, Bergen: Universitetsforlaget, 1980).

2 *Altevannsskjønnet, Norsk Rettstidende*, 1968, pp. 429-42.

3 *Skattefjällsmålet, Nytt Juridiskt Arkiv*, 1981, pp.1-253; for an English translation of the court opinion, see B. Jahreskog, ed. The Saami National Minority in Sweden (Stockholm: Almqvist & Wiksell, 1982).

4 *Renbetesmålet*, Dom meddelad av Svegs Tingsrätt den 21 februari 1996.

5 The Swedish Parliament revised the Reindeer Herding Law that governs Saami herding in 1992 to read that the reindeer herding right (which includes hunting and fishing rights) belongs to the Saami people and is based on time-immemorial prescription. However, the actual law puts strict limitations on which Saami individuals are eligible to exercise this right. See *Regeringens proposition 1992/ 93:32, Samerna och samisk kultur* (Stockholm, 1992), p. 12; F.L. Korsmo, "Claiming Territory: The Saami Assemblies as Ethno-Political Institutions," *Polar Geography* 20, no. 3 (1996): 163-79.

6 F.L. Korsmo, "Claiming Territory: The Saami Assemblies as Ethno-Political Institutions," Polar Geography, 20, no. 3 (1996): 163-79.

7 C. Smith, "The Saami People's Legal and Political Status in Norway," in *Rettstenkning i samtiden*, ed. C. Smith (Oslo: Universitetsforlaget, 1991).

8 *Mabo v. Queensland*, 107 A.L.R. (1992) 1.

9 *Wik Peoples v. State of Queensland and Others; Thayorre People v. State of Queensland and Others*, 141 A.L.R. 129; the entire decision reprinted in G. Hiley, ed. *The Wik Case: Issues and Implications* (Sydney: Butterworths, 1997), pp. 129-296.

10 The decision prompted calls for legislation to extinguish Native tide on pastoral leases. One author argued that provisions of the Native Title Act of 1993 —a compromise between the Australian government and groups representing Indigenous Australians—already extinguished Native title on pastoral lease lands. Revisions to the Native Title Act in 1998, as a result of the *Wik* decision, addressed this problem only in part. The 1998 act—yet another compromise—introduced new provisions that made it more difficult for Native title holders to present their case in a claim hearing. See D. Gal, "Implications Arising from the Operation of the Native Title Act for the Existence of Native Title on Pastoral Leases," *s* 71, no. 6 (July 1997): 487-

90; Aboriginal and Torres Strait Islander Commission (ATSIC), "Detailed Analysis of the Native Title Amendment Act 1998," rev. ed. (October 1998), <http://www.atsic.gov.au/ issues/native_title/native/title_amendment/index.htm>.

11 See G. Hiley, ed., *The Wik Case*, p. 179.

12 P.H. Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence," *Saskatchewan Law Review* 61, no. 2 (1998): 265-69. For discussions of proposals to recognize Aborigines and Torres Strait Islanders in the Australian constitution, see P. Jull, "First Peoples, Late Admissions: Recognizing Indigenous Rights," conference paper for Fulbright Symposium, "Beyond the Republic: Modernizing the Australian Constitution," Griffith University, Brisbane, 29 September -1 October 1999.

13 Aboriginal and Torres Strait Islander Commission (ATSIC), "Detailed Analysis of the Native Title Amendment Act 1998," <http://www.atsic.gov.au/ issues/ native_title/native/title_amendment/index.htm>.

14 For example, the High Court affirmed that the Indigenous right to hunt is protected by the Native Title Act and is not extinguished by laws requiring hunting licenses. See *Yanner v. Eaton*, unreported decision, High Court of Australia, 7 October 1999, <http://www.austlii.edu.au/au/cases/cth/high_ct/1999.53.html>.

15 In *R. v. Van der Peet*, 1996, 2 S.C.R 507, the Supreme Court of Canada found that the sale of salmon by a Coast Salish woman violated the British Columbia fishery regulations, which prohibited the sale or barter of fish caught under an Indian food fish license. In other words, the Coast Salish Aboriginal right to fish did not include the right to engage in commercial trade of fish The existence of a treaty, on the other hand, can make a difference. In *R. v. Marshall*, the Canadian Supreme Court upheld the treaty right of the Mi'kmaq to trade commodities and allowed the appeal of a Mi'kmaq Indian who had been accused of selling eels without a license. *R. v Marshall*, File No. 26014, 17 September 1999. <http:// www. droit.umontreal.ca/doc/csc-scc/en/rec/html/marshal2.en.html>.

16 Numerous observers from law, anthropology, political science and related fields have written about the process of this case as it went from trial court to the appeals level to the Canadian Supreme Court. A few of these sources include F. Cassidy, ed., *Aboriginal Title in British Columbia* (Montreal and Lantzville: Institute for Public Policy and Oolichan Books, 1992); D. Culhane, *The Pleasure of the Crown* (Burnaby, B.C.: Talonbooks, 1998); K. McNeil, *Defining Aboriginal Title in the 90s*, Twelfth Annual Robarts Lecture (York: Ontario: Robarts Centre for Canadian Studies, 1998). The Canadian Supreme Court decision can be found at I C.N.L.R. 14 (1998) or at <http:/www.droit.umontreal.ca/doc/csc-scc/en/rec/html/delgamuu.en.html>.

17 Para. 111 of *Delgamuukw*.

18 Para. 153 of *Delgamuukw*.

19 For a critical treatment of the effects of Canada's comprehensive land claims

policy on the Innu of the Labrador-Quebec peninsula, see C. Samson, "The Dispossession of the Innu and the Colonial Magic of Canadian Liberalism," *Citizenship Studies* 3, no. I (1999): 5-25.

20 K. McNeil, "Defining Aboriginal Title in the 90s," p. 29.

21 Marshall's decisions are not entirely consistent on the question of the sovereignty of First Nations, but in *Worcester v. Georgia*, an 1832 decision, he wrote, "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial...." See J. Borrows' discussion of the differences between the development of U.S. and Canadian law regarding First Nations in his article, "Constitutional Law from a First Nation Perspective," *University of British Columbia Law Review* 28, no. I (1994): 33-35.

22 *Alaska v. Native Village of Venetie Tribal Government*, No. 96-1577, U.S. Supreme Court, 25 February 1998. The text can be found at <http://www.lw.bna.com/lw/199803031961577.htm>.

23 Some authors contend that the Australian High Court is becoming more activist, concerned with rights rather than legalism. See P.H. Lane, "The Changing Role of the High Court," Australian Law Journal 70 (March 1996): 246-51. On Swedish law, see S. Strömholm, ed., *An Introduction to Swedish Law*, 2nd ed. (Stockholm: Norstedts, 1991).

24 The Saami have appealed the restriction of their hunting and fishing rights to the European Commission of Human Rights, but had their appeal dismissed as inadmissible on procedural grounds. See European Commission of Human Rights, "Decision as to the Admissibility of Application No. 27033/95," 25 November 1996, reprinted and translated by Svenska Samernas Riksförbund (Umeå, Sweden).

25 F.L. Korsmo, "Evaluative Discourse, Tribal Sovereignty, and the Alaska Native Claims Settlement Act," in *Minority Group Influence: Agenda Setting, Formulation and Public Policy*, ed. P.D. McClain (Greenwood Press, 1993).

26 *R. v Marshall*, File No. 26014, 17 September 1999. http://www.droit.umontreal.ca/doc/csc-sec/en/rec/html/marshal2.en.html.