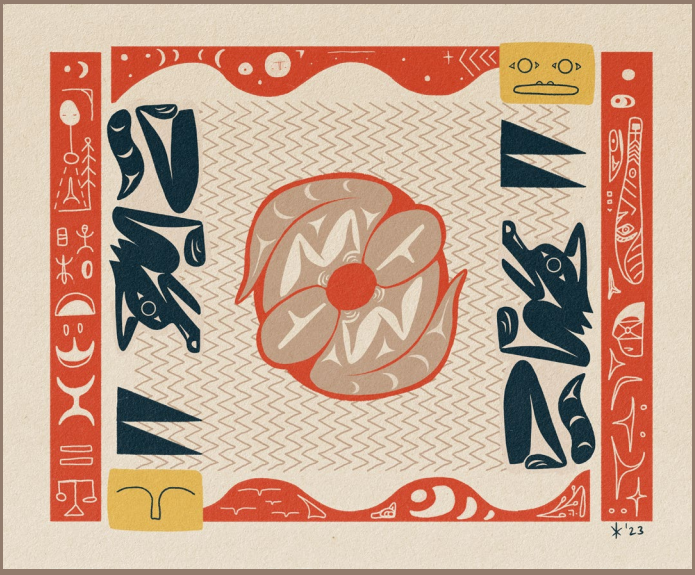
BRITISH COLUMBIA LAW INSTITUTE

Reconciling Crown Legal Frameworks Program | Primer 4

Legal Pluralism: Indigenous Legal Orders & Other State Jurisdictions



'Qa' (To be Together) / Interwoven Landscape, 2023

Artist Statement

This artwork is an abstract design that draws upon traditional Coast Salish forms in a contemporary way to tell a story. The story is told through deconstructed weaving patterns and figurative forms. It is about an interwoven landscape. As we follow the work of forming new systems from different traditions, what does that landscape look like? What teachings do we carry? How can we go about existing within this new space in a good way? The details and different aspects of this design remind us that in Indigenous knowledge systems, our teachings come from the land and they come from each other. It is critical to honour that.

~ Eliot White-Hill

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Overview

The British Columbia Law Institute ("BCLI") is BC's law reform agency. The 2019 *Declaration on the Rights of Indigenous Peoples Act ("Declaration Act")* requires the BC government to "take all measures necessary" to ensure the laws of BC are consistent with the *UN Declaration on the Rights of Indigenous Peoples*, in consultation and cooperation with Indigenous Peoples.[1] The BCLI Reconciling Crown Legal Frameworks Program supports the research and innovations required to implement this legislation. As part of our series of primers on the *Declaration Act*, the BCLI has prepared three primers that explore legal pluralism:

- **Primer 3** – Legal Pluralism in Canada
- **Primer 4** – Legal Pluralism: Indigenous Legal Orders & Other State Jurisdictions
- **Primer 5** – Legal Pluralism: Indigenous Legal Orders & Canadian State Law

The work of the BCLI primarily takes place on the unceded territories of the xʷməθkʷəy̓əm (Musqueam Indian Band), Skwxwú7mesh (Squamish Nation), and səlilwətaɬ (Tsleil-Waututh Nation).

Legal pluralism denotes a situation where two or more legal systems coexist in the same social field.[2]

Dr. Val Napoleon, Indigenous Law Research Unit (ILRU) Director & Law Foundation Chair of Indigenous Justice and Governance

There are a variety of ways that legal pluralism between state and Indigenous legal orders can be arranged. This primer surveys examples of other state jurisdictions that have built frameworks for the operation of legal pluralism as between state and Indigenous laws.[3] Below, we consider ways that legal pluralism is incorporated into state legal frameworks through 1) state constitutions, 2) state legislation, and 3) state court procedures.

[1] SBC 2019, c 44, s 3 [*Declaration Act*].
[2] Val Napoleon, "Legal Pluralism and Reconciliation" (2019) Māori L Rev 1 at 5.
[3] For background on legal pluralism in Canada and how implementation of the BC *Declaration on the Rights of Indigenous Peoples Act* engages legal pluralism, see Primer 3: Legal Pluralism in Canada.

These examples reflect some ways in which other state jurisdictions are building legal pluralist frameworks to facilitate the operation of Indigenous and state laws. The examples described here are not exhaustive. Nor do they necessarily reflect the practical implications of shared and separate jurisdiction. They are intended as a guide to potential reforms to support the work of coordinating multiple systems of law as BC implements the *Declaration Act* in consultation and cooperation with Indigenous Peoples. New approaches will depend upon the establishment and maintenance of respectful and productive relationships between governments as highlighted in the BC 2022-2027 Action Plan.[4]

1. State Constitutions

Some countries formally recognize the jurisdictions of Indigenous legal orders in their constitutions.[5] This approach can be quite varied in practice:

- **Bolivia's** constitution recognizes Indigenous Peoples' free determination over their territories, including the right to autonomy, self-government, culture, and recognition of their institutions.[6] State legislation also recognizes Indigenous judicial authorities as having equivalent jurisdiction to state courts.[7]
- **Ecuador's** constitution takes a limited approach and only recognizes Indigenous Peoples' jurisdiction over internal conflicts within Indigenous territories.[8]
- **Ethiopia's** constitution allows parties to choose between state and customary systems for disputes in the areas of family and civil law.[9]

In all three states, Indigenous exercises of jurisdiction must comply with guaranteed constitutional rights and international human rights standards.[10]

[4]See British Columbia, Ministry of Indigenous Relations and Reconciliation, Declaration on the Rights of Indigenous Peoples Act Action Plan, 2022-2027 at 10, online: https://bit.ly/3WhnZMQ [2022-2027 Action Plan].
[5]See Anna Barrera, "Turning Legal Pluralism into State-Sanctioned Law: Assessing the Implications of the New Constitutions and Laws in Bolivia and Ecuador" in Almut Schilling-Vacaflor & Detlef Nolte, eds, *New Constitutionalism in Latin America: Promises and Practices* (Abingdon, Taylor & Francis Group, 2012) at 371.
[6]Constitute Project, "Bolivia (Plurinational State of)'s Constitution of 2009" (27 April 2022), art 2, online (pdf): <https://www.constituteproject.org/constitution/Bolivia_2009.pdf>.
[7]Global Regulation, "Law of Jurisdictional Demarcation" (29 December 2010), art 4, online: <https://www.global-regulation.com/translation/bolivia/3094980/law-of-jurisdictional-demarcation.html> [Global Regulation].
[8]Barrera, *supra* note 5 at 373.
[9]*Ibid*; Susanne Epple, "Introduction" in Susanne Epple & Getachew Assefa, eds, *Legal Pluralism in Ethiopia* (Bielefeld, Germany: Transcript Verlag, 2020) at 11, online: <https://library.oapen.org/handle/20.500.12657/41792>.
[10]Global Regulation, *supra* note 7, arts 2 and 7; Barrera, *supra* note 5 at 379.

2. State Legislation

State legislation is another means to operationalize legal pluralism. Some examples include:

- **Papua New Guinea's** parliament enacted the *Underlying Law Act 2000* ("*Underlying Law Act*") which aims to develop a uniquely Papua New Guinean underlying law or common law (law developed in courts) that incorporates both customary law and British common law.[11] Section 6 of the *Underlying Law Act* specifies the prioritization of governing law in any particular case. Written law and underlying law, as formulated in previous cases, take precedence followed by customary law. If the subject matter of the proceedings cannot be resolved through the application of these sources of law, the court can then apply the British common law.[12] The *Underlying Law Act* not only prioritizes customary law over British common law, the legislation also clarifies that the existence or content of a rule of customary law is a question of law and not a question of fact. In addition, courts can take judicial notice of customary laws.[13] To ensure the appropriate application of customary law, counsel are under a duty to call evidence and obtain information to assist the court in determining the nature of the relevant rules of customary law and whether or not those rules apply in the particular proceeding.[14] Additionally, the *Underlying Law Act* outlines rules to aid courts in determining whether particular customary laws apply in any given case.[15]

- The **Danish** parliament passed the *Act on Greenland Self-Government* (the "*Act*") which recognizes the people of Greenland, who are primarily Inuit, as a people under international law with a right to self-determination. Greenland is one of three countries in the Kingdom of Denmark and has a populatiton that is approximately 90% Inuit. The *Act* leaves open the option for the people of Greenland to seek full independence and sovereignty over Greenland.[16] It is based on an agreement between Naalakkersuisut, the Greenland Government, and the Danish Government as equal partners. It also recognizes Naalakkersuisut as having sole authority over their resources and chosen mode of political organization.[17] Additionally, the *Act* recognizes the authority of Naalakkersuisut to negotiate and conclude agreements with

[11] *Underlying Law Act 2000*, Act no 13 of 2000, s 3, online: <http://www.paclii.org/pg/legis/consol_act/ula2000173/> [*Underlying Law Act*]; Jennifer Corrin "Getting Down to Business: Developing the Underlying Law in Papua New Guinea" (2014) 46:2 The Journal of Legal Pluralism and Unofficial Law 155 at 158.
[12] *Underlying Law Act*, *supra* note 11, ss 6 & 7.
[13] *Ibid*, s 16.
[14] *Ibid*, s 15(1).
[15] *Ibid*, s 17.
[16] *Act on Greenland Self-Government* (Denmark), Act no 473 of 12 June 2009 (English translation), online (pdf): <https://english.stm.dk/media/10522/gl-selvstyrelov-uk.pdf> at ch 8 "Greenland's Access to Independence" [*Greenland Self-Government Act*].
[17] Rauna Kuokkanen, " 'To See What State We Are In': Forest Years of the Greenland Self-Government Act and the Pursuit of Inuit Sovereignty" (2017) 16:2 Ethnopolitics 179 at 191.

foreign states over matters which exclusively concern Greenland.[18] The *Act* also establishes a dispute resolution board for resolving jurisdictional disputes. Indigenous parties and state authorities share control over the board, as it is co-appointed by Naalakkersuisut, the Danish Government, and the Supreme Court of the Kingdom of Denmark.[19]

- The government of **India** has adopted legislation that recognizes the jurisdiction and laws of traditional forest dwelling communities. The *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* ("*Forest Rights Act*") recognizes the jurisdiction of Indigenous customary institutions to determine the nature and extent of individual and collective rights within their respective territories.[20]

In *Orissa Mining Corporation v Ministry of Environment and Forest*, the Supreme Court of India upheld Indigenous jurisdiction consistent with the *Forest Rights Act* and declined to make determinations itself about traditional communities' rights due to lack of jurisdiction. The Court emphasized the communities' authority to characterize the nature of forest rights from their own cultural perspectives.[21]

[18] *Greenland Self-Government Act*, *supra* note 16, s 12.
[19] *Ibid*, s 19.
[20] Deva Prasad M & Suchithra Menon C, "Indian Forest Rights Legislation: Significance of Recognizing the Legal Pluralism for Indigenous Peoples Rights" (2020) 41:1 Statute L Rev 78 at 79 & 87.
[21] *Orissa Mining Corporation v Ministry of Environment and Forest*, [2013] 6 Supreme Court Reporter 881 (India).

3. State Court Procedures

Recognition of Indigenous legal orders by state courts is another component of legal pluralism. In resolving disputes that arise between state and Indigenous legal orders, such as jurisdictional disputes or disputes between states and Indigenous Peoples, some courts have adopted procedures that incorporate Indigenous laws and jurisdiction.

Approaches of state courts to issues arising out of legal pluralism can include deferring matters to Indigenous communities to adjudicate, adopting new interpretive principles, incorporating Indigenous legal perspectives, procedures and representation, and implementing specialized chambers.

State courts have recognized Indigenous jurisdiction by mandating compliance with Indigenous legal procedures. For example, courts in **Brazil**, **Colombia**, and **Peru** have all held that consultation with Indigenous Peoples regarding projects on their territories must be done in accordance with Indigenous Peoples' own laws to be valid under state law.[22]

The **Colombian Constitutional Court** interprets constitutional limits on Indigenous jurisdiction restrictively. Maximizing Indigenous autonomy is a guiding interpretive principle.[23] Additionally, the Court strives to characterize rights guaranteed in the constitution from the applicable Indigenous perspective in challenges to Indigenous jurisdiction. To do this, the Court factors in the cultural context in which the Indigenous laws operate.[24]

Bolivia's Plurinational Constitutional Court has a special chamber with expertise in Indigenous law for cases involving Indigenous parties. Additionally, two out of the seven members of the Plurinational Constitutional Court are required to come from an Indigenous justice system.[25]

The **Waitangi Tribunal in Aotearoa/New Zealand** operates with approximately equal Māori and Pakeha (settler) representation. It also follows both Māori and western legal procedures.[26] The Tribunal was created to hear claims brought by Māori against the Crown for breaches of the 1840 *Treaty of Waitangi*.

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[22]Cathal Doyle, Andy Whitmore & Helen Tugendhat, "Free Prior Informed Consent Protocols as Instruments of Autonomy", online (pdf): Forest Peoples Programme <https://www.forestpeoples.org/sites/default/files/documents/ENG%20final%20WEB%20FPIC.pdf>.
[23]Felipe Gomez Isa, "Cultural Diversity, Legal Pluralism, and Human Rights from an Indigenous Perspective: The Approach by the Colombian Constitutional Court and the Inter-American Court of Human Rights" (2014) 36:4 Human Rights Q 722 at 737.
[24]*Ibid* at 738–750, see e.g. the Court's analysis on whether an Indigenous council's choice to expel and exile a member of their community and his family as punishment was proportionate to the punishable conduct. The Court included the cultural viewpoint of the community in determining proportionality at 749–750.
[25]Barrera, *supra* note 5 at 380.
[26]IH Kawharu, "Biculturalism and Inclusion in New Zealand" (2008) 50:1 Anthropologia 49 at 50–51.

Conclusion

Different legal orders have different institutional arrangements, legal processes, and underlying worldviews. The experiences of other jurisdictions highlight that recognition of these differences comes in different forms. In relation to the three legal traditions of Canada – civil law, common law and Indigenous legal traditions – Canada's Chief Justice Richard Wagner has observed "the existence of different legal traditions is one of the strengths of the Canadian legal system. It allows us to draw on more than one perspective when addressing a legal problem."[27] In addition to Canadian examples of legal pluralism, models from other jurisdictions can support the creation of new tools and approaches for courts, tribunals and governments in BC.

Further Resources

For more information on the BCLI's Reconciling Crown Legal Frameworks Program, please visit: https://www.bcli.org/project/reconciling-crown-legal-frameworks/

[27]The Rt. Hon. Richard Wagner, P.C., Chief Justice of Canada, "Reflections on the Diversity of Legal Traditions in Canadian Law", (2022) 73 UNBLJ, 2022 CanLIIDocs 4159 at 4.

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The BCLI is BC's independent law reform agency. We have been bringing collaborators together to clarify and improve the law, develop just and innovative solutions, and increase access to justice for over 25 years.

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