THE ACT RESPECTING FIRST NATIONS, INUIT AND MÉTIS CHILDREN, YOUTH AND FAMILIES (AFIMCYF): EXAMPLE OF STATE MANAGEMENT OF LEGAL PLURALISM

Ghislain Otis PhD

Canada Research Chair in Legal Diversity

and Indigenous peoples

University of Ottawa

PART ONE

MANAGEMENT OF LEGAL PLURALISM

Definitions

Legal pluralism: a situation of normative plurality whose key feature is the autonomous/simultaneous application of state and non-state legal systems in the same space, in respect of the same subject-matter and for the same population.

Management of legal pluralism: measures taken by one system to determine and implement the consequences of one or more additional legal systems applying on the same territory, to the same people, in respect of the same matters

Definitions

Management by reception: Management by reception takes place when the managing system receives a principle, standard or process of another system and marshals its own institutions and resources to insure their implementation for its own purposes and on its own terms. Reception is typically partial and conditional.

Non-management: a common state of affairs when one system legally disregards the very existence of other systems, so that, from the former's point of view, no de jure consequences may flow from the latter.

PART TWO

THE AFIMCYF and state reception of Indigenous law

The vehicle for receiving aboriginal law: the inherent right under s. 35 C.A., 1982

- The vehicle of receipt under state law confirmed by law is the Aboriginal right to self-government within the meaning of sec. 35 C.A., 1982: **Sec. 8(a), 18(1)(2**)
- The existence of this constitutional right has not to date been confirmed by the Supreme Court and Parliament cannot simply decree the existence of a constitutional right. It is up to the judiciary to decide.
- The Quebec Court of Appeal ruled that this right exists: *Reference to the Quebec Court of Appeal on the Act Respecting First Nations, Inuit and Métis Children, Youth and Families,* 2022 QCCA 185
- The premise of this presentation is that the existence of this right will be confirmed by the Supreme Court, which is likely.

The scope of the inherent right

- An Indigenous people who hold the inherent right can first mobilize their own means of producing the right, including their own institutions to exercise this right, which includes the composition, functioning, internal management and control of these institutions.
- The inherent right includes normative jurisdiction over child and family services in relation to an Indigenous child, which includes such things as the definition of family and family ties, etc.
- Thus, Indigenous norms can be produced according to various processes according to the tradition or the legal system of each people: spontaneous normative practices of the community (customary law), structured deliberation, legislation, etc. **They can therefore be written or unwritten, legislated or not.**

Elements of reception confirmed by law

- It recognizes Indigenous constitutional jurisdiction over institutional matters (s. 1, definition of "governing body", not necessarily the band council)
- Prior jurisdiction with respect to the family institution (s.1, definition of family, care provider; 16(2.1) parent-child relationship, etc.)
- Normative jurisdiction in the provision of services (s. 8b, 18(1), 19 and 20).
- May be implemented by Indigenous institutions, s. 18(2)

Indigenous jurisdiction and the different ways in which the law is produced

- The law accurately reflects the scope of the inherent right in the way it defines Indigenous normative jurisdiction:

Section 18(1)

"The inherent right of self-government recognized and affirmed by section 35 of the Constitution Act, 1982 includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority"

. The term "including" indicates that Indigenous law arising from jurisdiction recognized by law does not necessarily take legislative form.

. This is consistent with Indigenous legal cultures that have traditionally produced law through non-legislative means. Furthermore, Aboriginal law does not necessarily take a written form.

A Predilection for the Legislative Mode of Production of Indigenous Law

- The Act tends to favour the legislative approach, which is a Western model.
- Sections 20 et seq. apply only to legislated Indigenous standards.
- The Act promotes legislative coordination (s. 20)
- It gives legislative force to the Indigenous text in federal law (s. 21 (1)) and affirms its primacy over many federal laws (s. 22(1)) and provincial laws (s. 22(3)).
- The hypothesis of a legislative text referring to unwritten law (combination of written and unwritten norms) must not be excluded.

The limits of reception

The receiver system filters and limits reception by setting limits and conditions.

1- The constitutional limits:

- Does the Canadian Charter apply to the exercise of Indigenous normative jurisdiction based on s. 35 C.A., 1982? How are sections 25 and 32 of the Charter to be interpreted? See (Quebec Court of Appeal/Yukon Court of Appeal in *Dickson v. Vuntut Gwitchin First Nation*, 2021YKCA 5).

2. The constitutionally valid legislative limits:

The law may restrict the exercise of jurisdiction if this limitation is justified on the basis of the test established by the Supreme Court (see R. v. Sparrow, [1990] 1 S.C.R. 1075 It subsequently refined it, in particular in *Nation Tsilhqot'in v. British Columbia*, 2014 SCC 44)

3. The limits under the AFIMCYF:

. Canadian Charter: s. 19 (without constitutional value)

. National Standards: Sections 10 to 15

. Canadian Human Rights Act (s. 22(1))

. Limits are subject to challenge under s. 35

PART THREE:

THE EFFECTS OF RECEPTION

EFFECTS OF RECEIVING INDIGENOUS LAW ON THE STATE SYSTEM

Hybridization	• Metabilization or domestication of exogenous elements (**principles, norms, processes…): an indigenous "state" right** • Writing: strong hybridization vector • Combined set of originally Indigenous and state principles and standards (national standards etc.)
Dualization	• The hybrid regime in addition to general common law • Effect of internal complexity of the state system
Customization	• Hybrid regime limited to one class of individuals (Indigenous children and families, personality of laws

Consequences and Challenges for Officials in the State System

- Indigenous law becomes a source of law for state institutions, including the courts, to identify, interpret and enforce relevant elements of Indigenous law when necessary, with a risk of deformation or distortion.
- Accessing written or unwritten Indigenous law (question of law or fact?)
- Willingness to overcome legal ethnocentrism (pluralistic openness)
- Resist the transposition of state law methods, principles or rules and understand/respect the endogenous logic of Indigenous law (the existential link between law and culture)
- Reconcile Indigenous law with the conditions set by state law while avoiding state hegemony (e.g., culturally appropriate interpretation of the best interests of the child, etc.)

Accessing Indigenous Law

- This law may be unwritten:

It is then necessary to access the law through verbal means (Indigenous knowledge keepers)

Showing deference to Indigenous knowledge keepers

- If the law is written:

The wording of the texts may differ from that prescribed by state drafting rules.

The courts tend to transpose to Indigenous texts the major principles of modern interpretation of laws (e.g., so-called “customary” electoral codes)

The text may, however, refer to unwritten customary norms.

Effect of reception on the individual (Indigenous children and families)

- An added complexity of the legal landscape through the addition of a legal regime, at least 3 regimes are possible according to the theory of legal pluralism
- The Legislative Option Issue
- If the individual opts for the hybrid state regime: shield effect and legal certainty under state law
- Personalization and legal capture of identity: must be "Indigenous"
- Interpersonal Conflict of Laws: Section 24(1)

Implications for non-state indigenous legal systems

- Under the pluralistic approach, state reception does not end the autonomy of the indigenous system outside the state
- This system can therefore continue to apply informally regardless of the provisions of the constitution and federal law if it has the capacity to do so (resources, legitimacy, etc.)
- Reception, however, can make the state system more competitive through an "attractive" hybrid regime (funding, legal certainty, social benefits, etc.)
- Competition with state law can cause the non-state indigenous system to adapt to remain competitive.