

**INDIGENOUS STRUGGLES FOR LAND RIGHTS IN CANADA, JAPAN AND
MEXICO: *DELGAMUUKW*, *NIBUTANI DAM* AND *ZIRAHUÉN***

by

Naayeli Esperanza Ramírez Espinosa

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Abstract

This dissertation is an interpretive case study of the claims and decisions of three legal cases that were brought to the courts by Indigenous peoples with respect to their constitutional rights. The first is the *Delgamuukw* case in Canada; the second is the *Nibutani Dam* case in Japan; and the third is the *Zirahuén* case in Mexico. Even though, in these three cases, the courts seem to be sympathetic to the pleadings of the Indigenous plaintiffs, they all dismissed, rejected, or left their claims unresolved on procedural grounds.

The focus of the study are the procedural standards used by the courts for the review of the plaintiffs' claims in the three cases and focuses on four themes: 1) the paucity of suitable causes of action to challenge the interventions of the state and third parties by Indigenous communities; 2) the difficulties of proof; 3) the inadequacy of remedies corresponding to the rights established in national and international laws; and 4) legal language and uncertainty regarding the content and reach of the rights of Indigenous peoples in the three jurisdictions. The study also looks at the rationality behind such standards and the courts' concerns with fairness, coherence and autonomy.

This study indicates that the Indigenous plaintiffs' constitutional claims were extremely difficult to frame within the causes of action available for them. The actions were extremely difficult to use either because there were no causes of action to protect their rights at a proper moment, the causes of action disregarded crucial characteristics of the legal and material realities of the communities, or the causes of action lacked corresponding remedies. These difficulties suggest that there was a redundant tension between the notion of sovereignty that courts used in their decisions and the rights of Indigenous peoples. The analysis also suggests that the plaintiffs' constitutional rights are conditional to an issue of constitutional power that needs to be resolved.

Preface

All research and associated methods were approved by the University of British Columbia's Behavioural Research Ethics Review Board [Certificate Number H11-00625].

A version of Chapter 6 has been accepted for publication [Naayeli E. Ramirez Espinosa, “Juzgando los Derechos de Minorías Indígenas a su territorio: un estudio comparado de las tenicalidades procedimentales que frustraron las demandas en los juicios de *Delgamuukw*, *Nibutani*, y *Zirahuén*” (2014)].

I was the lead investigator, responsible for all major areas of concept formation, data collection and analysis, as well as the dissertation composition. This dissertation was pursued under the supervision of Professor Shigenori Matsui, with the collaboration of Professors Robin Elliot, Maxwell Cameron, and Steve Wexler.

Professors Shigenori Matsui, Robin Elliot, and Maxwell Cameron were members of the supervisory committee of this project and they were involved throughout the project in concept formation and manuscript composition. Professor Steve Wexler was involved in the concept formation and contributed to draft edits.

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List of Abbreviations

BC	British Columbia
BCCA	British Columbia Court of Appeal
BCSC	British Columbia Supreme Court
CONACyT	Mexican National Council for Sciences and Technology (Consejo Nacional de Ciencia y Tecnología)
COCOPA	Cooperation and Pacification Commission (Comisión de Concordia y Pacificación)
CONAI	Former-National Intermediation Committee (Comisión Nacional de Intermediación)
CONAPO	National Council of Population (Consejo Nacional de Población)
EU	European Union
GWES	Gitksan-Wet'suwet'en Education Society
HBC	Hudson's Bay Company
HEC	Hokkaido Expropriation Committee (北海道収用委員会)
ICCPR	United Nations International Covenant on Civil and Political Rights
ILO	International Labour Organization
NGO	Non-Governmental Organization
PROCEDE	Ejidal Rights Certification Program (Programa de Certificación de Derechos Ejidales y Titulación de Solares)
SCC	Supreme Court of Canada
SCJN	Supreme Court of Justice of Mexico (Suprema Corte de Justicia de la Nación)
SSSCJN	Second Chamber of the Supreme Court of Justice of Mexico (Segunda Sala de la Suprema Corte de Justicia de la Nación)
SFU	Simon Fraser University
UBC	University of British Columbia
UCEZ	Emiliano Zapata Comuneros Union (Unión of Comuneros Emiliano Zapata)
UN	United Nations
UNPFII	United Nations Permanent Forum on Indigenous Issues
US	United States of America

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To the Angel, the Flower, the Moon, the Sunrise, the Queen, and Home,
who let me love them every day in their own amazing way.

Chapter 1: Introduction

Fiat justitia ruat coelum¹

Indigenous peoples² face numerous social, political, and legal challenges in their aim of protecting their land and people, and securing the continuity of their way of living and their cultures. Among such challenges is the unavailability of suitable causes of action³ to protect their land rights. The Special Rapporteur on the rights of Indigenous peoples to the United Nations, Rodolfo Stavenhagen, wrote in his report in 2001 that:

...[I]ndigenous land rights can, and indeed are, in some cases protected by favourable legal and court action. Still, these are exceptional cases, because generally Indigenous community do not have easy access to the judicial system and in a number of countries these remedies are not available to the Indigenous at all. It therefore appears that in the future efforts must be made to improve access to the judicial system by Indigenous community and to reform the legal systems where Indigenous peoples are denied access to legal recourse.⁴

This dissertation is an interpretive case study about the judicial task of interpreting constitutional rights and granting remedies to Indigenous peoples. It contains a series of detailed explanations of three legal cases and the arguments presented in each case. It interprets the decisions rendered in the cases within their broader context and

¹ Latin phrase which is translated as “Let justice be done though the heavens fall.”

² The International Labour Organization provides that:

Indigenous and tribal peoples constitute at least 5,000 distinct peoples with a population of more than 370 million, living in seventy different countries. This diversity cannot easily be captured in a universal definition, and there is an emerging consensus that a formal definition of the term “Indigenous peoples” is neither necessary nor desirable. Similarly, there is no international agreement on the definition of the term “minorities” or the term “peoples”.

“International Labour Organization, Indigenous & Tribal Peoples’ rights in practice, A guide to the ILO Convention No. 169.” International Labour Standards Department (2009) Online:

<http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf>.

See also discussion on the notion of ‘Indigenous’ further ahead in page 14.

³ Bryan A. Garner (Ed.) Black’s Law Dictionary (St. Paul, MN: Thompson Reuters, 2009), at 251:

A cause of action refers to a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; a claim.

⁴ Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57 to the United Nations High Commission on Human Rights of the Economic and Social Council. UN Document: E/CN.4/2002/97, at para. 46 presented on February 4 2002. Online: <[http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/fe67856bf0a29aac1256ba000566817/\\$FILE/G0210629.pdf](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/fe67856bf0a29aac1256ba000566817/$FILE/G0210629.pdf)>.

concludes that the judicial resources available to the plaintiffs in these cases were inadequate mainly because they did not enable the courts to hear the plaintiffs' evidence, understand the political and cultural context of the claims, and grant the remedies needed to protect the rights of the Indigenous communities.

The cases

The three cases are contemporaneous and solved within the framework of the legal systems of Canada, Japan, and Mexico. All three cases were brought to the courts by Indigenous peoples seeking recognition of their rights to their ancestral territories. The Gitksan and Wet'suwet'en chiefs in British Columbia, Canada; two Ainu individuals in Hokkaido, Japan; and the Zirahuén Community in Michoacán, Mexico brought these cases to the courts. In the interest of clarity, in the following pages the cases will be referred to by the short titles of *Delgamuukw*, *Nibutani Dam*, and *Zirahuén* respectively (coincidentally, the alphabetical order is the same for the cases and the countries).

This study focuses on the final decision rendered in each of the three cases: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010; *Kayano et al. v Hokkaido Expropriation Committee*, [1997] 1598 Hanrei Jihō 33, 938 Hanrei Era 75 (Nibutani Dam); and *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002.⁵ All these decisions, as argued by the Indigenous communities, concern claims based on constitutional rights.⁶

⁵ The names of the cases have been adapted to conform the Canadian English format of citing cases. In Japan and Mexico, the parties are not cited in the name of the cases as it is done in Canada. The adaptation is somewhat incomplete as the data provided in the Japanese and Mexican cases are different, but the titles all contain the information required to find the cases. [See the bibliography for the original citations.]

⁶ The decisions are available on the following Internet websites. For *Delgamuukw*, on the SCC website, online: <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1569/index.do>>; (BCCA), online: <<http://www.courts.gov.bc.ca/jdb-txt/ca/93/04/1993bcca0400.html>>; (SCBC), online: <<http://www.canlii.org/en/bc/bcsc/doc/1991/1991canlii2372/1991canlii2372.html>>. The *Nibutani Dam*'s decision in Japanese can be found online: <<http://www.geocities.co.jp/HeartLand-Suzuran/5596/>>. A translation of the decision has been published by Mark A. Levin and can be downloaded from the SSRN website, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635447>. None of the *Zirahuén*'s decisions are available online but only available to request online. The complete data on the file can be found on the SCJN website. Online: <<http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=48614>>. [The *Zirahuén* decisions' translations provided in this dissertation are by the author.]

The claim at the center of all three cases is related to land rights and jurisdiction or the power to decide what happens to the claimants' territories. In the case of *Delgamuukw*, the plaintiffs asked the court to recognize their Aboriginal title and right to self-government over their ancestral territory. In the *Nibutani Dam* case, the plaintiffs fought an Administrative Confiscatory Ruling that expropriated their properties for the construction of a dam that destroyed their ancestral ceremonial sites and left their land under water. In the *Zirahuén* case, the plaintiffs argued that a constitutional reform that established new rights for Indigenous peoples to their territories was illegal because they were not consulted in its drafting. All claims in these cases were dismissed or rejected on procedural grounds. In *Delgamuukw*, the last court ruled that the plaintiffs altered their claims inappropriately —without a formal amendment to their pleadings. In *Nibutani Dam*, the court ruled there was no appropriate remedy to fix the government's illegal confiscatory ruling. In *Zirahuén* the last court ruled that the plaintiffs lacked a legal interest in the claim.

In the *Delgamuukw* case, there were three decisions rendered by different courts: the Supreme Court of British Columbia (SCBC), the British Columbia Court of Appeal (BCCA), and finally, the Supreme Court of Canada (SCC). Conversely, the *Nibutani Dam* case has only one decision, that of the District Court of Sapporo. The *Zirahuén* case includes two decisions: the first by the First Federal District Court of Michoacán and the final decision by the Second Chamber of the Supreme Court of Justice in Mexico (SSSCJN).

This dissertation focuses on the claims, the arguments, and the decisions regarding constitutional issues in each of the three cases. It also studies and explains many non-constitutional matters, subsidiary decisions, rules of judicial procedure, and the legal context of each claim. All of the legal decisions concern jurisdiction and related issues such as ownership, self-determination, cultural security and continuity, and the right of Indigenous peoples to be consulted. The study follows the path of the causes

of action selected by the plaintiffs and examines the cases through the characteristics of such causes of action.

This thesis gives details about the different procedural reasons that made the plaintiffs' claims untenable in the courts. The analysis of the three cases seems to point in the direction of similar problems when courts resolve Indigenous peoples' claims in these three countries. Among these problems is uncertainty in the law, a lack of appropriate remedies for the enforcement of Indigenous rights, and the need to reconcile Indigenous rights to land and to govern themselves with the legal concept of national sovereignty. These issues are interwoven and caused the plaintiffs' rights to remain only 'paper rights.'

The final decisions in these three cases are considered by some international organizations and lawyers as favorably interpreting many of the rights of Indigenous peoples in each country, but in all cases the plaintiffs lost. The courts seemed sympathetic to their claims, but the claims of the plaintiffs were dismissed or rejected and no remedies were granted to them. Central to this dissertation were two questions: Why is it that the decisions were considered successful even though, in all cases, the Indigenous peoples who acted as plaintiffs lost? Is it that their rights have only political meaning and no actual legal meaning?

It cannot be ignored that the decisions in these three cases reflect a tension between constitutional power and constitutional rights. They also reflect a tension between the need to adjudicate the plaintiffs' claims, the great difficulty of adjudicating the rights of a distinctive culture, and the limitations of the Judiciary. The plaintiffs' claims profoundly challenged the role of the courts in the three countries. This is not surprising. The issues argued by the plaintiffs reflect serious constitutional, political and legal contradictions in these three states. Such contradictions leave considerable space for uncertainty and contestation and leave people wondering whether Indigenous claims can be fairly and fully resolved through the judicial process.

Furthermore, the three cases examined are not everyday legal cases. These are cases brought to the courts by Indigenous minorities with particular legal expectations over land. The plaintiffs that brought these cases to the courts had a long history of coexistence and conflict with the states that govern them and they all sought recognition of their Indigeneity and rights to their territories. Each case reflects a particular and profound ideological struggle. There is immense difficulty and controversy in the examination of the questions put to the courts in these cases.

At the same time, the substance of Indigenous claims is of over-riding importance because, for some Indigenous peoples it is a matter of cultural survival. In these three cases, the plaintiffs had no channel to negotiate the title to their land or to express their opinions about many legal conditions that regulated them. Political and administrative channels were closed to them. The plaintiffs' lawyers tried their best in the courts since it was the only legal channel open to their clients.

The difficulties in the resolution of Indigenous peoples' rights has been recognized by academics and judges alike. In the recent decision of *William v British Columbia*,⁷ Judge Groberman of the BCCA wrote:

The technical difficulty of this area of law has exacerbated the problem, and has led to considerable frustration. The efforts of the Nisga'a in *Calder*, the Gitksan and Wet'suwet'en in *Delgamuukw*, and the Tsilhqot'in in this case (to this point) all consumed enormous amounts of resources, only to have the cases end inconclusively due to problems with the way they were commenced or pleaded. The courts have frequently emphasized the need for resolution of Aboriginal rights and title issues through negotiated agreements where possible... Negotiated resolution of issues, however, is not facilitated by uncertainty in the law.⁸

⁷ *William v British Columbia*, 2012 BCCA 285.

⁸ *Ibid.*, at para. 162 and 163.

While courts' decisions are always in dialogue with the political will of the state⁹ and the work of the judiciary is essential in shaping the legal framework of a state, the process of adjudication is considerably limited by the scope of the causes of action, the state's constitutional arrangements, judicial precedents, and the law. Moreover, the interpretation of Indigenous peoples' rights might result in different outcomes since constitutional law is usually formulated in general language and is seldom clear.¹⁰ Finally, judges ought to resolve issues seeking to balance their judicial role with established democratic principles.¹¹ In these three cases, judges made a noticeable effort to understand the legal reality of the communities and realized the importance of their decisions for the cultural survival of the plaintiffs, but they were unable to resolve the issues affecting the plaintiffs. But despite the various limitations of the process of adjudication by domestic courts courts hold tremendous power.

Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates his understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence... To obscure this fact is precisely analogous to ignoring the background screams or visible instruments of torture in an inquisitor's interrogation.¹²

If the role of courts is to give preeminence to one legal meaning and undermine others, the process by which this happens is crucial. Legal decisions ought to be convincing and ought to follow a logical reasoning that is coherent and provides certainty. When courts' decisions pertaining to politically and controversial issues

⁹ Gordon Christie, "Aboriginal Nationhood and the Inherent Right to Self-Government," (2007) *Research Paper for the National Centre for First Nations Governance*, at 2:

For better or worse, much of the success of the strategies developed will depend on what Canadian courts say about the inherent right of self-government. Canadian governments occasionally seem upset with 'judicial activism' (when they imagine judges are 'making new law' in their decisions, which legislatures see as their exclusive responsibility). But the fact remains that on contentious issues these governments often take their cues from what the courts say.

¹⁰ *Ibid*, at 3.

¹¹ Michael J. Perry, *The Constitution, the Courts and Human Rights* (New Haven: Yale University Press, 1982).

¹² Robert M. Cover, "Violence and the Word" (1986) 95 *Yale LJ* 1601, at 1607.

dismiss or reject claims for procedural reasons, they are seldom convincing and do not provide certainty. If courts' decisions are unconvincing, the violence of legal interpretation is overwhelmingly profound.

The significance of this dissertation

This dissertation uncovers rich avenues for further research and its objective is to provide knowledge to those in charge of applying the law in the shadow of coercion.¹³ The aim of this study is to collaborate in the effort towards establishing more pluralistic legal systems through examining how these three cases were decided. It is hoped that this study may prove useful for policy-makers, lawyers, and judges in their roles of establishing, applying, and adjudicating Indigenous peoples' rights. This effort tries to justify the need to reconsider the way in which Indigenous peoples' legal claims are studied and calls for more flexible and responsive legal recourses that use Indigenous legal perspectives.

Organization of the dissertation

The organization of the dissertation is as follows: the first chapter provides an introduction and briefly explains the objective of the study—its what and why; the second chapter discusses the methodology of the study—its how.

The main body of the thesis is divided in two parts: the first part includes chapters 3, 4, and 5, and the second part includes chapters 6, 7, and 8. Chapters 3, 4, and 5 describe these cases and provide the necessary context to understand the decisions. They are organized in alphabetical order and each deals with one case. Each of the chapters contains several sections as follows: the historical context of the communities, the claims, and the decisions. This material is crucial to understand the differences amongst the different legal systems, and also to explain the broader political and historical context of each claim. This frame of reference for each legal decision helps to explain why the claimants decided to plead their cases in the manner they did. The content provided about the claims discusses the legal expectations of

¹³ Robert M. Cover, "Foreword: Nomos and Narrative" (1983) 97 *Harv L Rev* 4, at 15.

each community and the legal difficulties they faced in bringing each case before the court. The last part concerning the reasons in each decision is important to understand the interpretation presented in this dissertation.

The second part of the dissertation, chapters 6, 7, and 8, discusses the decisions rendered in the cases together and explains my interpretation of them. In chapter 6, I explain in more detail the procedural reasons that impelled the courts to dismiss the plaintiffs' claims. The legal tone of this dissertation is set in this chapter and it is the most important chapter. Chapters 7 and 8 explain the legal principles used by the courts when deciding the cases. Chapter 7 briefly discusses the rules regarding evidence and representation that were applied in *Delgamuukw*, *Nibutani Dam*, and *Zirahuén* that are deaf to the realities of the Indigenous plaintiffs. It mainly discusses the consequences of the rationale of legal autonomy and the central position of the individual in the Canadian, Japanese, and Mexican legal systems. Chapter 8 mainly focuses on the notions of Indigenous peoples' rights to self-government and self-determination, title to their land, and rights to cultural security and continuity within the framework of stiff and obsolete understandings of national sovereignty. It is also about how the courts in these cases used the principles of 'public welfare' in Japan, and 'national unity' in Mexico.

Chapter 9 provides the conclusions of this study. In the conclusions, I advance the position that in these three cases, it was impossible for the plaintiffs not to fail on procedural grounds. Laws in Canada, Japan, and Mexico have been passed to protect Indigenous peoples but the process of adjudication fails to fairly examine their claims due to its inability to apply those procedural laws in relation to the larger context, reality, and legal understandings of Indigenous peoples. The courts in these cases subordinated Indigenous legal perspectives to a set of alien legal rights and principles and a dominant legal culture, unaware of the social function of all law.¹⁴

¹⁴ I echo the words of John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, (Toronto: University of Toronto Press, 2002), at 15.

Chapter 2: Methodology and Law

Introduction

In this chapter, I outline the perspective of this dissertation, the legal theory framework and the methodological practice that guided my research process.

In this dissertation, I examine concepts, mechanisms, and effects within the framework of what is considered law.¹⁵ Within the legal world, my perspective is that of a constitutional legal scholar.

Constitutional law is the law prescribing the exercise of power by the organs of a state.¹⁶

Constitutions express conceptions about social organization that affects all aspects of our lives and, in particular, our lives as members of a political society.¹⁷ They are laws (in the narrower sense) that best reflect how politics, culture, and law (in the broader sense) are inextricably intertwined.¹⁸ At the same time, constitutional law allows scholars to look at the sources of legitimation and validation of law in legal systems in ways that other legal areas do not. Constitutions are law but at the same time are political statements. Moreover, constitutional law is usually informed by

¹⁵ Law is a system of primary rules that direct and appraise conduct together with secondary social rules about how to identify, enforce, and change the primary rules. Laws are matters of human artifice; they are social constructions, mainly recreated through language. Leslie Green in H.L.A. Hart, *The Concept of Law* (Oxford University Press, Clarendon Law Series, 2012), at xv.

¹⁶ Peter Hogg, *Constitutional Law of Canada* (Scarborough, Ontario: Thomson Canada, Student Edition, 2008), at 1.

¹⁷ Bakan J. et al., *Canadian Constitutional Law* (Canada: Emond Montgomery Publication, 2003), at 3. The text continues explaining:

Constitutional law broadly engages the organization of our social life, we suggest that the constitution of a society is an assortment of important rules, principles, and practices relating to the governance of a society. Typically, constitutions deal with the structures, procedure, and powers of governmental institutions and the nature and scope of individual rights and responsibilities between collectivities and between collectivities and governments, such as the relationship between Aboriginal peoples and the Canadian state. In some countries, the constitution may also include protection for individual rights against the exercise of private power or impose economic and social obligations on the state, for example, a right to housing or a broader social charter... Constitutional provisions perform several different kinds of functions. In many cases, they establish legally enforceable obligations. They also serve to ground judicial decisions concerning the constitutionality of the exercise of power. Finally, constitutional provisions also perform a significant symbolic role, setting out fundamental values and aspirations of a country.

¹⁸ *Ibid*, at 3.

international human rights law. In certain countries, such as Mexico, human rights established in international covenants are considered constitutional law.¹⁹ Constitutional scholars discuss issues of legitimacy, power, ideology, and the underlying social norms of a legal system. “If law is a system of enforceable rules governing social relations and legislated by a political system, it might seem obvious that law is connected to ideology.”²⁰ This dissertation is deeply concerned with the ideology driving the decisions in the three cases.

The plaintiffs in these three cases brought claims based upon the constitutions of each jurisdiction. The decisions reviewed in this study express each jurisdiction’s constitutional principles, ideologies and politics regarding the constitutional rights of minorities and Indigenous peoples. This work explores the ways in which judicial institutions delivered decisions that define ‘Indigenous peoples’ rights’ within the constitutional framework of power and rights in each jurisdiction.

The study of law

Legal reasoning is mainly a process of justification²¹ and interpretation.²² A legal argument is most usually built to convince²³ and explains and adapts an *original* version of a rule to a certain situation.²⁴ This dissertation is an interpretation of interpretations and will look at the different explanations of the sources and forces shaping justifications and rulings by the courts.

¹⁹ Article 1 of the Constitution of Mexico, paragraph 2 establishes: The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the protection of people at all times. See also Jurisprudence 31/2011 of the Supreme Court of Justice of Mexico.

²⁰ Christine Synowich, "Law and Ideology", (Fall 2010 Edition), *The Stanford Encyclopedia of Philosophy* by Edward N. Zalta (ed.). Online: <<http://plato.stanford.edu/archives/fall2010/entries/law-ideology/>>.

²¹ Derrida, J., “Force of Law: The Mystical Foundations of Authority” (1990) 11 *Cardozo Law Review*, 919, at 985.

²² Julie Dickson, "Interpretation and Coherence in Legal Reasoning", *The Stanford Encyclopedia of Philosophy* (Spring 2010 Edition), Edward N. Zalta (ed.). Online: <<http://plato.stanford.edu/archives/spr2010/entries/legal-reas-interpret/>>.

²³ Peter M. Tiersma and Lawrence M. Solan (ed.) *The Oxford Handbook of Language and Law* (New York: Oxford University Press, 2012), at 63.

²⁴ Julie Dickson, *supra* note 22.

All legal studies are and need to be formalistic in the sense that they have to focus on ‘formal rules’ because the concept of law is intrinsically related to its formality.²⁵ Law is a professional field and it is fundamentally concerned with concepts and meanings that are only useful for practical purposes in a closed legal system, such as the Canadian legal system. A legal concept does not mean anything outside of its own legal system, and each system uses different formalities in the process of transforming rules into law.²⁶ The terminology is different in different jurisdictions, but everywhere terminology is a formality that establishes the field of law. The special wording used in the legal world is the most intrinsic characteristic of law.

The use of words is of ultimate importance to this dissertation. How do the courts use the words of the constitution and the words used by the claimants? How do the courts contextualize the claims of Indigenous plaintiffs and describe them? How and why do lawyers translate the claims and desires of Indigenous communities into the language of the law in order to build their cases? What wording is used to describe the context of the legal situation and rights of Indigenous communities? All these questions are at the heart of this thesis and, in my opinion, their answers could bring a better understanding of Indigenous peoples’ rights litigation.

In theory, the language of law is one that translates a certain conflicting situation into logical legal axioms in order to provide a solution to the controversy.²⁷ The legal vocabulary is expected to contain all possible wordings and meanings necessary to study some human controversies and to solve them. This dissertation’s conclusions are critical of this approach. Certainly, such an expectation is not accomplished in the three cases studied. This was partly because the Indigenous communities coming to the courts had a distinctive understanding of their legal situation, their rights, and the laws, and the courts disregarded such understanding.

²⁵ I refer to ‘formality’ in the terms of Pierre Bourdieu and not in the strict sense of the school of formalism. Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field” (1987) 38 *Hastings JL* 814.

²⁶ For example: the passing of a law in a congress, the signing of a treaty, or the establishment of a legal concept through common law.

²⁷ Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford: Clarendon Press, 1989).

The legal theory that guides this study is legal realism, which establishes that law should be studied as part of an entire social phenomenon. This school of thought has become highly influential in legal scholarship in North America, Japan, and Mexico. Legal realism is considered to give a functional perspective of law; it makes use of empirical study in its broadest sense and understands the study of law as an interpretive effort.²⁸ The approach taken in this study uses interviews, field trips, reviews of decisions and other legal documents, procedures at the courts, and a literature review.

Moreover, this study is based on the premise that law is a cultural phenomenon:

Law is a significant description of the way in which a society analyzes itself and projects its image to the world. It is a major articulation of a culture's self-concept, representing the theory of society within that culture.²⁹

I interpreted all of the laws and legal systems described in this study as having a broad social role that expresses the values and mores of a certain culture. Each of the three legal systems studied in this dissertation interprets power in different terms. The three legal systems have grown in three different cultural, geographical and historical contexts. This leads to the next important explanation of the perspective of this study: the case study.

Comparing

We understand words and we learn through comparing; comparisons are unavoidable. How we compare defines what we learn. Current comparative constitutionalism is still problematic in many ways, mainly because we do not yet have a “terminology which adequately reflects awareness of and sensitivity to the multiplicity of current-

²⁸ William W. Fisher, et al., *American Legal Realism* (New York: Oxford University Press, 1933), and V. Nourse and G. Shaffer, “Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?” (2009) 95 *Cornell Law Review* 61.

²⁹ J. C. Smith and D. N. Weisstub, *The Western Idea of Law* (Toronto: Butterworths, 1983), at vii.

state experiences and constitutional cultures.”³⁰ Few authors are committed to blending knowledge of national history, custom, religion, social values, and assumptions about government, positive law, economic force, and power politics to render a country’s constitutional life easily comprehensible for a foreign audience.³¹ Due to these issues, legal comparative studies have tended to reinforce the difference as deficit model, leaving little room for the validation of different ways of studying law, organizing law, legitimizing law, legislating, and deciding legal conflicts.³²

This dissertation presents historical, political, and social contexts mostly using local sources for their explication. A summary of the contexts of the cases is presented, followed by a discussion in which the commonalities are examined independently. This study does not seek to emphasize the differences among the cases; on the contrary, it focuses on similarities in the legal situations, problems, concepts, and principles behind the different rules and decisions of each case.

Furthermore, this study does not intend to compare the cases and draw causal inferences from their commonalities but to present each case separately. It does not seek to determine if particular regulations work better or worse than others but to find common dimensions observable regarding a certain legal phenomenon. I kindly ask readers to consider the language used in this dissertation broadly and to see it as inclusive of different realities and visions. I also ask them to be prepared to read about each case using different vocabulary that refers to marginally or considerably similar concepts as it will be more broadly explained below.

³⁰ Lawrence Beer, *Human Rights Constitutionalism in Japan and Asia* (Kent, UK: Global Oriental 2009) at 8. In other words, there are no theoretical abstractions for general analytical purposes that describe global empirical narratives, the perception of underlying patterns, the operation of power, or the latent affinity between apparently divergent institutional arrangements.

³¹ *Ibid.* at 4.

³² *Ibid.* Beer uses the term ‘residual chauvinism’ when reflecting the trend of the views of Europeans and Americans regarding constitutionalism in Asia.

2.1 Case studies

This research is a qualitative interpretive case study. “A case study is an in-depth study of a single unit (a relatively bounded phenomenon).”³³ Qualitative in-depth studies explain the features of a specific event: the what, where, when, why, and how it occurred.³⁴ They seek to understand or explain outcomes in single cases. This study aims to achieve an in-depth understanding of the cases of *Delgamuukw*, *Nibutani Dam*, and *Zirahuén*.

Interpretive studies pay careful attention to culturally embedded intentions of individual or group actors in the given settings under investigation.³⁵ Interpretive studies stand on the premise that the baseline realities for both the observer and the observed in the human sciences are practices and socially constituted actions,³⁶ and that such practices and actions, cannot be identified in abstraction from the languages used to describe them.³⁷ This dissertation interprets the decisions in these three cases as a multidimensional phenomenon, wherein mythic, dramatic, rhetorical, and philosophical elements play significant roles.³⁸

Interpretive case studies are more useful for generating hypotheses than for testing them.³⁹ This dissertation discusses the different concepts used in the decisions to generate informed interpretations about these legal cases, which could be useful in the creation of hypotheses regarding the litigation of Indigenous peoples’ rights in the world.

³³ John Gerring, “What is a Case Study and What is Good for?” (2004) 98 *American Political Science Review* 2, at 341.

³⁴ *Ibid.*

³⁵ Theda Skocpol, “Emerging Agendas and Recurrent Strategies in Historical Sociology,” *Vision and Method in Historical Sociology* (Cambridge: Cambridge University Press, 1984), at 368.

³⁶ *Ibid.* See also Charles Taylor, “Interpretation and the Sciences of Man,” in Paul Rabinow and William Sullivan, *Interpretive Social Science, a Second Look*, (Berkeley: University of California Press, 1987), at 53:

The object of a science of interpretation must have a sense distinguishable from its expression, which is for or by a subject.

³⁷ *Ibid.*

³⁸ J. C. Smith and D. N. Weisstub, *supra* note 29, at vii.

³⁹ Adam Przeworski and Henry Teune, *The Logic of Comparative Social Inquiry* (Pennsylvania, US; Krieger, 2001), at 69.

The study focuses on the phenomenon of Indigenous peoples' rights litigation through the legal interpretation of the why and how of the dismissal or rejection of the claims in these three cases. The dimensions of the study mainly regard legal issues that will be further explained in each section and are discussed in relation to each of the decisions studied. They include: legal recognition of Indigenous peoples' rights, cause of rejection of the claims, rules of dismissal, and legal strategy within the larger social movement.

The three cases are all legal cases that were well designed and pursued by the lawyers and activists who brought them to the courts. They are also cases thoroughly studied by courts in the three jurisdictions, and some very relevant information can be obtained and interpreted from this study. The focus of this study is to observe the process by which the decisions are achieved and to start exploring the possible existence of a pattern in the way the process is implemented. The methodological aim of this study is to interpret the legal reasoning of the decisions focusing on the language used by the courts and the political and legal environment in which these decisions were rendered.

The three cases are different from each other and happen in different social and legal environments, which presented a challenge in writing about them in one paper. The issues discussed in the cases studied in this dissertation record ideological conflicts and specific legal languages that are inherently different from each other.⁴⁰ The communities and the characteristics of the legal systems are also different from each other. The study of these three cases provides a challenging but interesting scenario for revealing their stories together.

⁴⁰ Relations des Jesuits, Reprint of the 1856 edition, Montreal: Editions du Jour, 1972, Vol 5, chapter 7, pp. 27-34, translated by Denys Delage in "Aboriginal Influence on the Canadians and French at the Time of New France" in Gordon Christie *Aboriginality and Governance, A Multidisciplinary Perspective from Quebec* (British Columbia, Canada: Theytus Books, 2006), at 56:

The world is full of variety and inconsistency. We never find solid ground. If someone climbed up a tower high enough to see all the nations of the earth, he would not be able to say which are wrong and which are right, which are crazy and which are wise among the variety and strange patchwork.

The differences among cases and the wording of this dissertation

There are a plurality of systems and regulations that continuously shape the different legal realities of Indigenous communities in the world. The cases studied in this dissertation emerged in such a variety of legal practices and institutions. The Canadian, Japanese and Mexican legal systems use different legal languages to refer to Indigenous peoples and claims, and the Indigenous communities in these three jurisdictions organize in various ways.

The colonization process in each of these regions happened under different legal paradigms, but all dispossessed Indigenous peoples of their land.⁴¹ Such dispossession happened within the international political context of a race amongst powers to obtain territories and a social context that discriminated against communities of Indigenous peoples living in many of the territories that were colonized.

British Columbia in Canada is a common law jurisdiction, while Japan and Mexico are civil law jurisdictions. Canada has an adversarial system of litigation, while Mexico has an inquisitorial system and Japan has a mix that leans more towards an inquisitorial system of litigation.⁴² In Canada and Mexico, constitutional law prescribes the scope of the protection of Indigenous peoples' rights, but not in Japan, where the constitution does not recognize the existence of Indigenous peoples, but only of minorities.

⁴¹ See Seamus Deane in Terry Eagleton, Frederic Jameson, and Edward Wadie Said, *Nationalism, Colonialism, and Literature* (Minneapolis, MN: University of Minnesota Press, 1990). The British, Spanish, and Japanese colonization processes happened under different political, economical, and social circumstances. The British colonization process was mainly based on the idea of law of common law and the British Crown, while the Spanish colonization process was very much based on a continental idea of law and followed a particularly Catholic character. The Japanese colonization process is different in that it is a mix of legal policies taken from European countries and the US. Still, the process of colonization is importantly a process of dispossession.

⁴² In the adversarial system, the parties produce the information or "evidence" that the trier of fact will use to make its decision as explained in David M. Paciocco and Lee Stuesser, *The Law of Evidence* (Toronto, Canada; Irwin Law 2008) at 1. In the inquisitorial litigation system, the investigation of the facts in a case does not depend solely on the parties. In this system it is also the responsibility of the court to make sure that all necessary evidence is examined. See John O. Haley, *The Spirit of Japanese Law* (Athens GA: University of Georgia Press, 2006) to understand more about the Japanese legal system in this regard.

The plaintiffs in these cases filed their claims according to the rules in each legal system and their own particular rules. In the *Delgamuukw* case, forty-eight individuals acting on behalf and as representatives of the members of their houses and nations presented the case. In the *Nibutani Dam* case, two individuals presented the claim as fee simple owners. In the *Zirahuén* case, the Zirahuén Community as a singular legal entity presented the claim.

The three countries define the extension of Indigenous peoples' rights in very different ways. A 'right' is understood as a "legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong."⁴³ "It may include a power, authority, privilege, benefit and remedy."⁴⁴ The notion of 'right' that I use in the following pages implies tenability in the courts. I usually refer to 'right' within the concept of Eurocentric⁴⁵ legal systems and as recognized by the states of Canada, Japan, and Mexico, unless noted.

Even though the constitution in each country is different from the others, when I use the term 'constitutional rights,' I am not only concerned with the rights as established textually in the Constitutions of each state, but also with the variety of 'rights' as interpreted by the different courts and at different moments in these cases as of 'constitutional importance.'⁴⁶

⁴³ Bryan A. Garner (Ed.) *Black's Law Dictionary* (St. Paul, MN: Thompson Reuters, 2009), at 1436.

⁴⁴ *The Dictionary of Canadian Law* (Toronto: Carswell, 2011), at 1136.

⁴⁵ I have decided to use the term 'Eurocentric' instead of 'Western' in most sections for the objectives of my dissertation. Both concepts are troubling for different reasons. The Gitksan and the Purépecha peoples are in what readers consider the 'West' but they are not usually included in the category of the 'West.' I also recognize that much of the Eurocentric legal culture was developed in the Middle East and other parts of Asia, and not only in Europe. I refer to the Eurocentric legal culture as the one that has evolved within the context of two highly distinctive traditions: the Judeo-Christian and the Greco-Roman. This legal culture includes the common law, and the civil law systems, which are among the most widely known and practiced. It had its beginnings as a dominant legal culture in Europe and has later developed in the US and other countries. I also recognize that each country has adopted their legal system to their own cultural and physical realities in a certain degree. The concept 'Eurocentric' refers to a legal system that is based in European tradition, history, and culture, and serves the European societies of this tradition, history, and culture best though it has been adopted in other states as well.

⁴⁶ I also use the term 'constitutional court,' which is any court that interprets the constitution (creates meaning using the wording of constitutions). Most usually, lower courts use the meaning that upper courts give to the constitution, but in some jurisdictions, sometimes, lower courts also interpret the constitutions. In such case, the thesis will also call them constitutional courts.

In British Columbia, Canada, Indigenous peoples' rights have been recognized since the end of the 18th century. In Japan, the regulation of the Ainu is specific to the Ainu as an 'ethnic minority,' and it is rather recent, after the decision in *Nibutani Dam*, and quite limited. Before that, the law labeled them as 'Former Aborigines.' In Mexico, Indigenous peoples' rights have existed since the Spanish arrived in Mexico in the 16th century, and have undergone an important development since the beginnings of the 20th century.

The legal labels are different in each jurisdiction. The Canadian term 'Aboriginal title,' which only pertains to Indigenous peoples, does not exist in Japan or Mexico. The Ainu people were only recognized in Japan in 2008 through a resolution of the Parliament,⁴⁷ and have not used communal forms of property since their lands were legally divided and distributed in the 19th century and the beginning of the 20th century.⁴⁸ In Mexico, there are communal forms of property (communal and ejido properties) that do not exist in Canada or Japan. The communal and ejido forms of property in Mexico are not exclusive to Indigenous peoples.

The label 'Indigenous' that I use in this dissertation requires explication. 'Indigenous peoples' is not a homogenous category. It is a category formed by very diverse and heterogeneous groups in all senses of the word. The plaintiffs studied in these three jurisdictions exemplify this reality. The Indigenous plaintiffs in these cases are considerably different from each other in their organization and legal cultures. 'Indigenous peoples' has been a term used to refer to peoples and their communities who lived in certain territories, such as the American continent, before Europeans arrived and formed colonies.⁴⁹ The United Nations (UN) recognizes the importance

⁴⁷ See the Japanese Upper House Resolution of June 6, 2008 (No. 169th Session). Online: <<http://www.sangiin.go.jp/japanese/gianjoho/ketsugi/169/080606-2.pdf>>. [Originally in Japanese, see bibliography for title in original language.]

⁴⁸ Through the *Hokkaido Land Estates Regulation*, 1872; *Hokkaido Land Sale and Lease Regulation*, 1872; and, the *Hokkaido Former Aborigines Protection Act*, 1899. [Originally in Japanese, see bibliography for title in original language.]

⁴⁹ The most cited definition is by Jose R. Martinez Cobo, the Former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his famous Study on the Problem of Discrimination against Indigenous Populations (New York: United Nations, 1987):

of allowing Indigenous peoples to self-identify as such, and thus no UN-system body or organ has adopted an official definition of ‘Indigenous.’⁵⁰ Different covenants and international institutions use different definitions according to their objectives and goals.

In this dissertation, I also use other terms that are used in Canada, Japan, and Mexico to refer to Indigenous peoples. In Canada, the terms ‘Aboriginals,’ ‘Natives,’ ‘First Nations,’ and ‘First Peoples’ are used to refer to communities who lived in what is now the Canadian territory long before Europeans first arrived. Other terms used in Canada are ‘Inuit,’ ‘Métis,’ and ‘Indian.’ In Japan, the most appropriate term is ‘Indigenous peoples.’⁵¹ In Mexico, the equivalent term is ‘Indigenous peoples,’ but historically the laws have used the terms ‘tribes’ and ‘communities.’

In all of these different countries, each band, community, or peoples is usually referred to by its name. In Japan, the word ‘Indigenous’ is barely used; ‘Ainu’ is the preferred word. There is a large volume of literature on the Indigenous movement in

Indigenous communities, peoples, and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors: a) Occupation of ancestral lands, or at least of part of them; b) Common ancestry with the original occupants of these lands; c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an Indigenous community, dress, means of livelihood, lifestyle, etc.); d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); e) Residence on certain parts of the country, or in certain regions of the world; f) Other relevant factors. On an individual basis, an Indigenous person is one who belongs to these Indigenous populations through self-identification as Indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.

⁵⁰ The UN system has developed a modern understanding of this term based on the following: 1) self-identification as Indigenous peoples at the individual level and accepted by the community as their member; 2) historical continuity with pre-colonial and/or pre-settler societies; 3) strong link to territories and surrounding natural resources; 4) distinct social, economic or political systems; 5) Distinct language, culture and beliefs; 6) form non-dominant groups of society; 7) resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities. See Factsheet of the 5th session of the United Nations Permanent Forum on Indigenous Issues. Online: <http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf>.

⁵¹ The concepts used in Japanese do not include the term ‘Native’ that could have a derogative meaning, which the term ‘Ainu’ also had for some time. This is why the Ainu Association of Hokkaido changed its name for some time to the ‘Hokkaido Utari Association.’

Mexico, but for better understanding in anthropological, ethnical, sociological, and legal terms, the proper names of each nation are used: Purépecha, Huichol, Zapoteco, Mixe, Tzotzil, Seri, etc. In many cases, the specific name of the community within the nation is required, as the Zirahuén Community.

There are many goals that most of these groups have in common. The best example is the effort of Indigenous communities from different parts of the world to create the UN *Declaration on the Rights of Indigenous Peoples* in 2007. This speaks not only of communities confronting similar issues but also of similar visions to solve those issues and a common belief in an idea of how to use the law to achieve their common ends.

These differences in the legal concepts and processes in each jurisdiction reflect the different efforts that have been carried out in different countries to protect Indigenous peoples' rights. They also reflect the political pressures put on the states' authorities regarding a shameful past that discriminated against Indigenous peoples and unilaterally took their lands.

The cases were selected mainly due to the fact that in each of them, the plaintiffs argued issues regarding their constitutional rights to their 'ancestral territories.' They all sought some kind of recognition of their 'Indigeneity' and the rights to their territories. Moreover, in all these cases, the courts gave procedural reasons for leaving their claims unresolved. All of the final decisions in them were important in each jurisdiction.⁵² They are contemporary cases, and were adjudicated within an

⁵² The decisions in the three cases have established important precedents to the litigation of Indigenous rights in the jurisdictions of Canada, Japan, and Mexico. They are all cases interpreting the rights of Indigenous peoples in these three countries today. *Delgamuukw* is the case that currently defines how Aboriginal title is to be proven in the courts. Although the definition is not completely settled, the definition of what is Aboriginal title is one of the contested issues in the *William* case (*William v British Columbia*, 2012 BCCA 285) reviewed in November 2013 by the SCC. The *Delgamuukw* case is among the most significant cases in Canada in the area of Aboriginal rights, particularly regulating Indigenous nations such as the Gitksan and the Wet'suwet'en that have not signed a treaty with the government regarding their land. This issue is not yet settled; *Nibutani Dam* is the first case that recognized Ainu as Indigenous peoples and the first to recognize their entitlement to certain rights to their culture. The legal landscape of Ainu rights in Japan changed significantly after the decision in the *Nibutani Dam* case; nevertheless, no other court after has gone as far (even by half) as the decision in *Nibutani Dam* and the decision is not considered legally binding. *Zirahuén* is the only amparo solved by the Second Chamber of the Supreme

international and national legal framework that seeks to protect their peoples' rights. In all cases, the plaintiffs relied upon constitutional, international, and secondary laws, which in their view protected them.

2.2 Interviews and visits

Each legal system serves each social system in ways that a foreign academic is able to observe only after careful study. Thus, all interpretive endeavors ought to be collaborative in principle. This kind of study is only possible thanks to the support of academics in the area in each jurisdiction studied and the support of the lawyers involved in the cases. The supervising committee of this dissertation is comprised of two constitutional law specialists on Canada and Japan and one political scientist specializing in Latin America. I have previously conducted research projects concerning the legal systems of Mexico and Japan, which has been useful in this study. I am able to speak the languages mainly used by the lawyers and courts in these three cases: English, Japanese, and Spanish.

This study included visits to each community and interviews with scholars and lawyers who have studied the cases and/or were engaged as counsel to the plaintiffs. The interviews complemented my perspective as a Mexican legal scholar studying the legal systems of Canada and Japan and enabled me to trace the processes of the cases. The set of interviews with lawyers and scholars bring their voices and opinions into this study and have been an important source of understanding.

The interviews have been essential in the assimilation of the legal systems and the case law studied, and the interviewees have all made significant contributions to guiding my perspectives, methodologies, and knowledge of each legal system. The persons interviewed for this study were selected from a list of lawyers working in the respective cases and a list of legal scholars who have studied the cases. The names of the lawyers interviewed were obtained from the decisions rendered, all public

Court of Justice in Mexico, among the many that were presented against the constitutional reform of 2001. From its resolution, several isolated theses (a kind of legal directive created through precedents) were produced interpreting the scope of Indigenous peoples' rights in Mexico that are now used for other cases by lower courts.

documents. I conducted interviews with four lawyers who worked on the cases. The fifth interview was with Professor Teruki Tsunemoto, a legal expert in Ainu issues in Japan. Professor Tsunemoto was contacted directly through the public email address on the website of the School of Law of Hokkaido University.

I also visited the communities. I visited the towns of Smithers, Ksan, Hazelton, Kispiox, and Kitwanga in British Columbia, the heartland of the Gitksan and Wet'suwet'en, in October 2012; the towns of Nibutani and Biratori in Hokkaido, Japan in August 2011 and August 2012; and the town and lake of Zirahuén in Michoacán, Mexico in June 2011.

I did one interview with Professor Michael Jackson in two sessions in November 2011 in an office in the University of British Columbia (UBC). Professor Jackson participated as counsel to the Gitksan in the case of *Delgamuukw* and has also published academic work regarding Indigenous law and the *Delgamuukw* case. He was the main drafter of the opening arguments of the Gitksan chiefs in the Supreme Court of Canada (SCC). He started working on the case on the invitation of Mr. Stuart Rush, lead counsel of the Gitksan and Wet'suwet'en in the case. The interview lasted three hours and was conducted in English.

In December 2011, I interviewed Mr. Stuart Rush in his office in Gastown, Vancouver. The interview lasted three hours. Mr. Stuart Rush started working with the Gitksan at the end of the 1970s mainly on criminal law cases regarding allegations of illegal hunting and fishing by community members. He was asked by the Gitksan and Wet'suwet'en leaders to advise them on how they could stop the occurrence of the large number of criminal law cases affecting the community for hunting and fishing activities, which is how he was brought in to advise them in the *Delgamuukw* case.

I have spent most of my research time in British Columbia in Canada; nevertheless, I have only visited a part of the territory claimed in the *Delgamuukw* case a couple of

times (May 2008 and October 2012). The first part of the *Delgamuukw* case was heard in the city of Smithers, which I visited in October 2012. Near Smithers, there are several museums and cultural centers of the Gitksan, such as the Ksan village and museum, which I also visited.

With respect to the *Nibutani Dam* case, I interviewed Mr. Kiyoshi Fusagawa, a counsel to the plaintiffs in the *Nibutani Dam* case (Mr. Kaizawa and Mr. Kayano) in August 2011. The interview was held in Japanese in one session of one hour and a half in his office in central Sapporo. Mr. Fusagawa started working on this case on the invitation of Mr. Takashi, who was invited to the working team by Mr. Hiroshi Tanaka, the main lawyer in the case. Mr. Fusagawa had never advised an Indigenous person before, and since the *Nibutani Dam* case, he has advised Indigenous plaintiffs in two other cases. I also had more informal conversations with Mr. Koichi Kaizawa, one of the plaintiffs in the *Nibutani Dam* case, and with Mr. Morihiro Ichikawa, another lawyer who participated in the case, during my attendance at a conference in Sapporo in August 2012.

In August 2011, I did an interview with Professor Teruki Tsunemoto, a legal scholar who has studied the case and is the author of many of the articles that have been published regarding it. This interview lasted in total three and a half hours and was held mostly in Japanese; also in attendance was Professor Ochiai, a constitutional scholar also studying Ainu cases.

During my visit to Hokkaido, Japan, I visited the museum established by Mr. Kayano, one of the plaintiffs in the case, and the research center that has been established in Nibutani regarding the impact of the Dam. I stayed with some Ainu people in a *ryokan* (a traditional Japanese small hotel) and had the opportunity to talk to some researchers, non-Indigenous, and Ainu people who were there when the case was decided. They all surprised me with very informed opinions on the case.

Regarding the *Zirahuén* case, I did one interview in two sessions in Morelia, the capital city of the state of Michoacán in June 2011 with Mrs. Eva Castañeda Cortés, the only surviving lawyer who participated in the making of the claim of the Zirahuén Community. The interview was held in Spanish. She is the widow of Mr. Efrén Capíz Villegas, the main lawyer of the Community from the late 1970s until his death in 2005 and the main drafter of the claims. She worked on the case assisting Mr. Capíz Villegas.

Mr. Capíz Villegas and his wife were founders of the Unión de Comuneros Emiliano Zapata (UCEZ), a union of Indigenous communities that collaborates with the Zapatista Indigenous Movement in Mexico. The Zirahuén Community is also a founding member of the Unión.

The interview took place in the lawyer's office/home and lasted one hour and a half. The lawyer also invited me to a meeting of the Zirahuén Community, which I attended after the last interview. I visited the town and lake of Zirahuén. I transcribed a large part of a meeting of the General Assembly of the Community for them. During the session, the members discussed the occupation of some pieces of land, the acceptance of new members of the Community, and the legal cases regarding complaints against the illegal taking of water from the lake and the cutting of trees in the surrounding area.

The places where I wrote and the language used to explain the issues below have defined importantly what this study is about. Even though I wrote some parts of the dissertation and discussed parts of my dissertation with Japanese and Mexican scholars in Sapporo, Hokkaido in Japan and in Mexico City, most of the writing was done in Vancouver, British Columbia, Canada. The purpose of this dissertation is to obtain an advanced degree in a Canadian university, and thus, the main audience of this text has been shaped by comments and discussions held in a Canadian legal academic environment. The writing is in English and mainly uses concepts and understandings within the Canadian legal academic environment. If I had written this

dissertation for a Japanese or Mexican university, most probably the approach and layout of the text would be different. This would be not only because language defines how and what are we able to convey but also because the expectations of this kind of study are different in different parts of the world. The cultural environments shape the studies in the most unexpected ways. I have noticed that in the end, this text is largely focused on the *Delgamuukw* case since I use it as a point of reference for much of what I explain to the audience who most commonly hears my work. This is why I think that this study is particularly useful in Canada.

I submitted the design of my methodology to the Human Ethical Review of the UBC Office of Research Ethics in May 2011, extended it in May 2012, and closed it in May 2013.

2.3 Literature review and other sources

The legal decisions were obtained from the Internet through a simple search in the websites of the courts that decided the cases. I made a request to the SCC for files that did not appear publicly on the Internet on the *Delgamuukw* case. Most of the information on the *Nibutani Dam* case was obtained from a compilation of written documents presented in the case that was published as a book by the plaintiffs and the main lawyer after the decision, and the publication of a talk given by Mr. Hiroshi Tanaka, the main lawyer in the *Nibutani Dam* case. The translation of a summary of the decision made by Mark A. Levin has been the text used when citing the decision in the *Nibutani Dam* case. In the case of *Zirahuén*, I made a formal request for the entire file of the case through the information portal of the Supreme Court of Justice of Mexico (SCJN). I have done all of the translations of this last decision in this dissertation.

I consulted several laws, proclamations, orders, resolutions, treaties, covenants, conventions, reports, and like documents during the research process for this study. Some of those laws have been abrogated or reformed, even before these three cases came to the courts, but have been consulted with the intent of understanding the legal

historical context of the communities involved in the cases and the broader context of Indigenous peoples in each country. At the beginning of the study and as I started to navigate through the different rules and rights regulating the relationships of Indigenous peoples, their territories, and the state, I started noticing that some laws were considered crucial while others were constantly disregarded in the courts. At the same time, certain laws shaped the legal options of the communities in manners that defined the translation of their political and cultural expectations into legal expectations.

For example, most of the cases brought to the courts in Canada have been solved using the decisions of previous cases and relying little on statutory law. This is in the nature of a common law system. At the same time, most of the decisions of cases in Japan have used many regulations on cultural rights due to the lack of regulations in other areas. It has been crucial to do preliminary research on the legal regulations because it is only then that an academic can start understanding the legal options for these groups.

The literature reviewed for this study is varied and very broad. I will only mention in this chapter the sources that have shaped my perspective or greatly contributed information on the cases and the constitutional relationships created by the state and minorities.⁵³

Regarding the *Delgamuukw* case, I have reviewed several PhD and Master's theses, including that written by Patricia D. Mills, who also has written a book on a similar topic, and the theses by Donald M. Smith, Russell J. Binch, and Joan Snape. The writings of Don Monet and Skanu'u (Ardythe Wilson), Bruce G. Miller, Robert Van Krieken, Dora Wilson-Kenni, Robin Ridington, Robin Fisher, Dara Culhane, and Julie Cruikshank have been very informative and have shaped the perspectives of this dissertation. The writings of John Borrows, Michael Asch, Gordon Christie, Bruce Ryder, and Kent McNeil are basic to this dissertation.

⁵³ Details of the sources are available in the Bibliography of this dissertation.

For a broader perspective of the Canadian legal and constitutional system, I have also consulted the works of Peter W. Hogg, Richard Devlin, Robin Elliot, Michael Perry, Guy Laforest, Patrick Monahan, and some sources on Canadian evidence law, such as the book by David M. Paciocco and Lee Stuesser.

For the *Nibutani Dam* case, I have examined most of the work of Teruki Tsunemoto, Mark Levin, Hitoshi Kikkawa, Hiroshi Maruyama, and Georgina Stevens. The article “*The decision of Nibutani Dam and afterwards*,” written by Hiroshi Tanaka and published in 2007 by the Academia Juris Booklet series in Japan, explains certain decisions taken while the claim was being studied in the courts and also the perspective of the plaintiffs and the lawyer and has been crucial for this dissertation.

Professor Tsunemoto’s perspective has been important for understanding how Japanese people see the need for reconciliation between the Ainu and the mainstream Japanese society. His legal perspective places the Ainu as a minority and his current main concern seems to focus on how the law can capture such a difficult concept as ‘identity.’ He has collaborated with the Committee on Ainu Policy Promotion established by the Japanese Parliament, he has served as director of the Center for Ainu and Indigenous Studies in Hokkaido University—the only one of its kind in Japan—and he is engaged with researchers from other parts of the world on Indigenous peoples’ issues.

In 2010, the Center of Ainu and Indigenous Studies of Hokkaido University published a report on the living conditions and consciousness of present-day Ainu, which has been an important source of information. The government had previously published similar reports that have also been useful for this dissertation. The municipality of Biratori has also published some of the results of the surveys and studies carried out for the construction of the Biratori Dam. These sources are mainly focused on environmental impacts, but the surveys and studies had a significant participation from the Ainu community in the area and thus were important when

looking at the process of consultation that is being carried out since the *Nibutani Dam* case was decided.

Both Mr. Kaizawa and Mr. Kayano, the plaintiffs in the *Nibutani Dam* case, published books that describe their perspectives on the several issues that Ainu people confronted daily and both have been interviewed by various scholars, such as Julian Kunnie. I have reviewed several sources on the Japanese legal system and constitutional law such as the ones written by John O. Haley, Shigenori Matsui, Hiroshi Oda, Yoichi Higuchi, and David Johnson.

Unlike the *Nibutani Dam* and *Delgamuukw* cases, there are no articles or books that analyze the case of *Zirahuén*. There are a few articles that study the phenomenon of the constitutional challenges made to the reform in 2001, such as the one written by Jorge A. González Galván. Most of the legal studies consulted for this dissertation are articles that analyze and study the reform, such as the ones written by Jose Ramon Cossio, Francisco Lopez Barcenas, Miguel Carbonell, Guillermo de la Peña, and María del Carmen Ventura Patiño.

I have relied heavily on a thesis written by Brenda G. Guevara Sánchez for the Universidad Michoacana de San Nicolás de Hidalgo. This dissertation is a historical study of the Zirahuén Community's legal claims for land. I have also consulted some sources by Margarita Zárate Vidal, Gunther Dietz, Eduardo N. Mijangos Díaz, David Spencer, Roseberry William, among other sources to enhance my understanding of the dynamics of social Indigenous movements in Mexico. Regarding Mexican constitutional law, the main sources used in the writing of this dissertation are those by Emilio Rabasa, Jose R. Cossio, and Luis C. Sachica.

Issues of philosophy and law and sociology and law shape the last two chapters of this thesis. The following writings have been most useful in helping me frame the issue and develop my conclusions: *Forms of Action in Common Law* by F.W. Maitland; all the works by Robert Cover; Hans Kelsen's *Theory of Law and State* and

the *Pure Theory of Law*; a few works by Foucault, particularly his interviews on power/knowledge; Pierre Bourdieu's *The Force of the Law*; J. Derrida's *Force of Law: The Mystical Foundation of Authority*; *Word of the Law* by Dennis R. Klinck; *General Theory of the State* by G. Jellinek; Will Kymlicka's *Multicultural Citizenship: A Liberal Theory of Minority Rights*; *Struggles for Recognition in the Democratic Constitutional State* by J. Habermas, completed with the reading of some of his previous work on law and the state; James McHugh's *Comparative Constitutional Tradition*; H.L.A. Hart's *Essays in Jurisprudence and Philosophy* and *The Concept of Law*; *European Legal History* by Robinson, Fergus & Gordon; the small text by R. Wacks on *the Introduction to Philosophy of Law*; Lawrence Friedman's works on sociology of law; all the works by John Borrows; and, Ian Haney Lopez' work on race and law.

Regarding methodology, I have reviewed the literature on comparative analysis and case study analysis by Adam Przeworski, Charles Taylor, Charles C. Ragin, Alexander L. George, Andrew Bennett, John Gerring, Henry Teune, Theda Skocpol, Anne Colby, Richard Jessor, Richard A. Shweder, Henry E. Brady, David Collier, Barbara Geddes, Andrew Bennet, Arend Lijphart, John S. Mill, and Sidney Verba.

For the historical summary of the development of the notions of sovereignty, legal autonomy, and the relevance of the central position of the individual in the law, I have used mainly the texts by David N. Weisstub, J.C. Smith, Ellen Goodman, Shirley R. Letwin, van Eikema Hommes, Ignacio Bernal, and S.F.C. Milsom.

2.4 About the researcher/author

After many years in school, asking questions and trying to learn different languages, the laws, and judicial procedures of different legal systems, I have come to realize that our ways of understanding others is always a reflection of ourselves and not really about the others.

Since this is an interpretive endeavour, the process of designing the methodology of this research has been intended to be reflexive;⁵⁴ I understand that the reflexive process of research is a continuing process of exploring the implications of our perspectives, assumptions, and beliefs in the research performed.

To write this dissertation I needed to deeply understand the cases; know the laws and the courts' structure of the three countries; the three languages used in the decisions; travel and find the required funding; communicate extensively with the interviewees and professors working with me; assessing and decide the format of the interviews; and, organize the dissertation in a way that made sense to the readers and at the same time explain the most of the three different cases and the decisions. There were also collateral issues that, in the process of writing this dissertation, preoccupied my mind. Among them was the process of becoming aware of my own assumptions; the necessary reflexive process of writing about other peoples' cultures and laws from my own perspective and position; the importance of recognizing that the writing of this thesis has been a matter of construction and not of discovery; and the continuous effort to be as honest and clear as possible about my construction of the text.

The following paragraphs outline my personal decisions regarding methodological issues during the designing and writing process of this dissertation. My main interest as a legal researcher is to imagine other ways of doing law. The questions that drive my research are: How could law evolve and perform less colonially? How could a constitutional system allow a variety of understandings about law, rights, and realities? How can courts better examine context in controversies regarding minorities? In my view, law could act less colonially if it were about how to adapt the system of resolution of conflicts for each controversy and were less charged with a system set of values and beliefs.

⁵⁴ Liz Stanley. *The Auto/Biographical I: The Theory and Practice of Feminist Auto/Biography*, (Manchester, UK: Manchester University Press, 1992). According to Liz Stanley, reflexivity is the process of critical reflection on the self as the research instrument.

This research is about many of those issues. Through the study of the selected three judicial cases, I have come to learn a good deal about how contrasting legal and cultural systems confront each other and how law acts upon the ‘different.’ I have also come to understand the crucial importance of the participation of Indigenous minorities in legal systems today. My motivation is to collaborate with the efforts of those who are trying to find better ways in which the law can be used in the interaction between communities of minorities and the state.

All lawyers interviewed for this study met me first to talk to me and get a sense of my interests. They all asked directly or indirectly about my views regarding the cases. I think that in all cases, the interviewees thought of me as an outsider. I did not identify myself as an Indigenous person, I had never participated actively in any Indigenous association or worked as a lawyer in any case that involves Indigenous issues, and in two thirds of the cases, I was not a national of the jurisdiction, I was a foreigner. Even in Mexico, Eva Castañeda Cortés thought of me as an outsider due to the fact that my research was being done in a foreign university and under foreign paradigms. Lawyers and scholars would explain the cases to me as if I knew nothing about the law in each jurisdiction. In all the meetings conducted in this research, I never identified myself as an Indigenous person, but explained that I felt certain identification with many proposals, claims, and struggles of different Indigenous peoples. I introduced myself as a researcher in Japan, Canada, and Mexico, and as a lawyer from Mexico. All interviewees were critical of my approach and my views, and did not hesitate in contrasting their opinions with mine. The dialogues were cordial and always informative in both directions because most interviewees were curious about the other cases in other jurisdictions.

There is no doubt that the process humbled me, which was a very enjoyable experience. The most important lesson I took during my field work was that there is no neutral or objective research or legal endeavor; I became fully aware that we are all ideological entities responsible for our work and the impact it can have in the lives of the peoples that we write about and argue about in the courts.

Part I: The Three Cases in Context

*I realize that we live in three worlds: the Eurocentric imposed world, the Aboriginal world and the world in between where there is some overlap or integration...that space that is sometimes fraught with misunderstandings and conflict but has potential for understanding and cross-cultural bridging.*⁵⁵

The first part of this dissertation includes the presentation and description of the context of the three cases. It includes chapters 3, 4, and 5. The second part discusses the cases together focusing on the reasons for rejecting or dismissing the plaintiffs' claims, and the principles behind the decisions in the cases; it includes chapters 6, 7, and 8. The following paragraphs introduce the first part of the dissertation.

Distinctive societies have been living in the territories of the now known states of Canada, Japan, and Mexico since long before such states were established. These distinctive societies vary immensely in population, values, rules, legal perspectives, and understandings of their realities, but the communities that have survived until now are generally grouped under the label of 'Indigenous.'⁵⁶ Culture and identity change every day. The identity, culture, social conditions, and cosmology of the Gitksan, Wet'suwet'en, Ainu, and Purépecha people change while state policies and laws are established, change, and are abrogated. The reader must bear in mind that the legal and state policies had and continue to have enormous consequences for the ways these Indigenous communities change as a culture, as a community, and as a legal entity, but that such laws and policies of the dominant cultures are not the only defining feature of their Indigenous identities. Laws and policies are only one of the many overlapping realities affecting Indigenous peoples. Indigenous peoples and their communities themselves are the key holders of the future of their identity and culture, and this work does not intend to say the contrary.

⁵⁵ Laara Fitznor, "The Power of Indigenous Knowledge: Naming and Identity and Colonization in Canada" in Julian Kunnie, *Indigenous Peoples' Wisdom And Power: Affirming Our Knowledge Through Narratives* (London: Ashgate Publishing, Ltd., 2006), at 53.

⁵⁶ See the discussion on the definition of this concept in pages 18-19.

The land dispossession and relocation of Indigenous peoples might be the most consistent of all colonial policies established by different states, including Canada, Japan, and Mexico.⁵⁷ Indigenous peoples in Canada, Japan, and Mexico have been relocated repeatedly during the 17th, 18th, and the 16th centuries, respectively. The dispossession of their lands seems, at times, to be lost in history and thus in the law, but has caused much illness, death, and loss. It is without doubt that the losses due to forced relocations cannot be calculated and hardly compensated for by the law. All cases studied in this dissertation are concerned with land dispossession and relocation of the plaintiffs. All the plaintiffs in these cases sought recognition of such land dispossession and relocations, and of their rights over their ancestral territories.

Indigenous communities in the three countries have started revolutions, established confrontational policies with governments, appealed to international organizations, sued the states in international courts such as the Inter-American Court of Justice, and consistently claimed their territories and land as their own. Nevertheless, their struggle is not only about having title over their lands but also reflects important ideological conflicts. These cases exemplify the broad scope of such struggle. The plaintiffs in these cases all hold different interpretations of the relationship between the people, their environment,⁵⁸ and different lifestyles in relation to the dominant market economy. In *Nibutani Dam* and *Zirahuén*, the plaintiffs did not ask for damages or monetary compensation. The plaintiffs in *Delgamuukw* originally claimed compensation but this claim was later withdrawn during appeal.⁵⁹

In Canada, there are a great many Indigenous peoples, among whom are the Gitksan and Wet'suwet'en peoples. The Gitksan and Wet'suwet'en peoples live in the northwest part of what is now known as the province of British Columbia. In Canada,

⁵⁷ See Seamus Deane in Terry Eagleton, Frederic Jameson and Edward Wadie Said, *Nationalism, Colonialism, and Literature* (Minneapolis, MN: University of Minnesota Press, 1990), at 10: Colonialism is a process of radical dispossession.

⁵⁸ See for example: Denys Delage "Aboriginal Influence on the Canadians and French at the Time of New France" in Gordon Christie, *Aboriginality and Governance, A Multidisciplinary Perspective from Quebec* (British Columbia, Canada: Theytus Books, 2006), at 48-68.

⁵⁹ See *Delgamuukw v British Columbia* [1993] 5 WWR 97, at para. 258:

Additionally, the parties have asked us not to deal with the question of the right to and amount of compensation, if any. Accordingly, I leave questions of compensation to future proceedings.

around 4 percent of the population is considered 'Indigenous.' The label 'Indigenous' in Canada includes three categories: 'First Nations' such as the Gitksan and Wet'suwet'en; the 'Inuit' (less than 5 percent of the Indigenous population), who are people living in the far north; and the 'Métis' (30 percent of the Indigenous population), who are people of mixed origins (Métis means half) with a distinctive culture.⁶⁰ The term 'First Nations' replaces in some instances the term 'Indian,' which is the term used in the *Constitution Act, 1867* section 91 (24) and the *Indian Act*. First Nations is a label that intends to recognize the communities that have, since time immemorial, inhabited the territories that now comprise the country of Canada.⁶¹ It is considered that there are more than 614 recognized First Nations communities in Canada.⁶²

The Canadian state is an ex-colony established using the legal principles that ruled and still rule England and France.⁶³ Canada is a constitutional monarchy, and the head of state is Queen Elizabeth II of England. It is a parliamentary democracy organized in a federation made up of ten provinces and three territories. The province of British Columbia is a common law jurisdiction while Canada is a jurisdiction where common law and civil law interact continuously.⁶⁴ Canada has two recognized official languages: English and French. The name 'Canada' was inherited from the

⁶⁰ Indigenous Peoples' Right to Adequate Housing: A Global Overview. Issue 7 of Report (United Nations Housing Rights Programme), United Nations Human Settlements Programme, United Nations. (Nairobi: UN-HABITAT, 2005) at 79. Online: <<http://books.google.ca/books?id=atFtIRj-cdAC&lpg=PA79&ots=QvpMunBUv6&dq=614%20indigenous%20nations%20canada&pg=PA79#v=onepage&q=614%20indigenous%20nations%20canada&f=false>>.

⁶¹ Administrative agencies, academics, and social institutions might also use the categories of Status Indians and Non-Status Indians. Status Indians are Indians as recognized by the *Indian Act*, the main law governing Indigenous issues in Canada. Non-Status Indians is an inclusive label used in some circles. Previously, it was understood that only Status Indians were entitled to a wide range of programs and services offered by federal agencies and provincial governments. See the Aboriginal Affairs and Northern Development Canada website. Online: <<http://www.aadnc-aandc.gc.ca/eng/1100100014433/1100100014437>>. Today according to *Daniels v Canada*, 2013 FC 6, Non-Status Indians and Métis are also Indians. According to Patricia D. Mills, "Reconciliation: Gitksan property and crown sovereignty" PhD Thesis, UBC Faculty of Law (Vancouver: University of British Columbia, 2005):

For the most part, over the last two hundred years of either indirect or direct contact, Gitksan people have accepted the presence of Lixs giigyet (newcomers).

⁶² The Aboriginal Affairs and Northern Development Canada. Online: <<http://www.aadnc-aandc.gc.ca/eng/1303134042666/1303134337338>>.

⁶³ Peter Hogg, *Constitutional Law of Canada* (Scarborough, Ontario: Thomson Canada, Student Edition, 2008), at 33-53.

⁶⁴ In Quebec, civil law predominates.

Huron-Iroquois people that used to live in what now is Quebec City and means ‘village’ or ‘settlement,’ and it first referred to that area.⁶⁵

Ainu people have lived in what is known as Russia and Japan since time immemorial. Ainu people lived in the northernmost part of the island of Honshu, the island of Hokkaido, and the smaller islands to the north of Hokkaido, the Kuriles and Sakhalin. At present, it is considered that less than 0.04 percent of the Japanese population is Ainu, the only group marginally recognized as ‘Indigenous’ by the state.⁶⁶

The Japanese state was granted a constitution heavily influenced by the United States of America (US) after the Second World War and most of their legal system is an adaptation of the German, US, French, and English legal systems. Japan is a civil law jurisdiction. It is a constitutional monarchy and has a parliamentary government. It is a unitary state divided into forty-seven prefectures and the official language is Japanese. The original name in Japanese is Nihon, or Nippon, which means ‘where the sun rises.’

Mexico was a territory populated by several Indigenous nations and societies before the Spanish arrived in the 16th century. The Purépecha were an independent people that inhabited a large part of what today is known as the state of Michoacán in the southwest part of Mexico.⁶⁷ Their *cazontzi* (king) surrendered certain rights to the Crown of Castille in the 1520s, which implied submission to the Crown but not

⁶⁵ ‘Canadian Heritage’ on the Government of Canada website. Online: <<http://www.pch.gc.ca/pgm/ceem-cced/symb/101/101-eng.cfm>>.

⁶⁶ There is no conclusive information regarding the Ainu population, most sources such as museums and NGOs consider that the number is between 30,000 and 50,000 people. The percentage and information provided here were obtained from the site of the Council for Ainu Policy Promotion of the Government of Japan. Online: <http://www.kantei.go.jp/jp/singi/ainusuishin/index_e.html#about>. No laws recognize the Ainu as ‘Indigenous.’ The court in the case of *Nibutani Dam* and an isolated resolution of the Upper House of the Parliament have recognized the Ainu as ‘Indigenous.’ See the Parliamentary Upper House Resolution of June 6, 2008 (No. 169th Diet Session), available on the Diet’s Upper House website. [Originally in Japanese, see bibliography for title in original language.] Online: <<http://www.sangiin.go.jp/japanese/gianjoho/ketsugi/169/080606-2.pdf>>.

⁶⁷ Ignacio Bernal, et al. *Mexican General History* (México, D.F.: El Colegio de México, 2000), at 280, and Felipe Castro Gutierrez, *The Tarascos and the Spanish Empire: 1600–1740* (Mexico, DF: Universidad Nacional Autonoma de Mexico, 2004) [Originally in Spanish, see bibliography for title in original language.]

conquest.⁶⁸ Nuño de Guzmán finally annexed Michoacán in the 1530s after the assassination of the *Cazontzi* Tzintzicha, the last king of the Purépecha.⁶⁹ Most of Mexico's population is a mix of cultures and heritages from different parts of the world, mainly Spain, the Indigenous nations living in the territory, and African peoples, who traveled to Mexico during the colonial era. Mexico's Indigenous population is numerically the largest in Latin America, estimated by the 2000 National Council of Population (CONAPO) Survey at 12.7 million, which is around 15 percent of the Mexican population.⁷⁰ The census, based on the parameter of language, considers that a little less than 8 percent of the population is Indigenous.⁷¹ There are sixty-two Indigenous nations in Mexico.⁷²

The Mexican state is an ex-colony of Spain, created under the idea of the law inherited from Continental Europe.⁷³ It is a federal republic made up of thirty-one states (provinces) and one federal district. Mexico is a civil law jurisdiction. The only official language recognized in Mexico is Spanish, but numerous Indigenous languages are taught in public schools. The official name is United States of Mexico, but in this dissertation only the name 'Mexico' will be used. The word 'Mexico' refers to the area of Mexico-Tenochtitlan and it is a Náhuatl sacred word.

⁶⁸ Ignacio Bernal, et al. *Mexican General History* (México, D.F.: El Colegio de México, 2000), at 281.

⁶⁹ *Ibid.*

⁷⁰ The Commission for the Development of Indigenous Peoples in Mexico considers that 9.5 percent of the population is Indigenous according to its own report to the United Nations published in 2010 within the United Nations Program Developments Program. On its website, it mentions that there are around 15 million Indigenous persons in Mexico. The International Labour Organization, *Indigenous & Tribal Peoples' rights in practice, A guide to ILO Convention No. 169*, International Labour Standards Department (2009), at 12 cites a 2000 National Council of Population (CONAPO) Survey that considered the Indigenous population in Mexico was 12.7 million and made up of sixty-two groups. Online: <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_113014.pdf>.

⁷¹ Most reports on Indigenous peoples in Mexico to the UN system records from 11 to 15 million people, which is around 13 percent of the total population. The number in the National Census of 2010, which is based in the language criteria, is of more than 6.5 million, accessible online at <<http://cuentame.inegi.org.mx/poblacion/lindigena.aspx>>.

⁷² Commission for the Development of Indigenous Peoples. Online: <http://www.cdi.gob.mx/index.php?option=com_content&view=article&id=1387&Itemid=24>.

⁷³ The Mexican legal system is based on the Napoleonic Code and it inherited paradigms and legislation from Spain after its independence from the Spanish Empire. Jorge A. Vargas, 'An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture and NAFTA,' (2004) 41 *San Diego L Rev* 1337, at 1342-1355.

Chapter 3: The *Delgamuukw* Case

Our Sovereignty is our Culture...

*We have waited one hundred years. We have been patient.*⁷⁴

The case of *Delgamuukw* was chosen for study among the many cases that have arisen from the many Indigenous nations in Canada because it is a particularly detailed claim to title and jurisdiction that has been studied carefully by the courts. The *Delgamuukw* case is remarkable in that the SCC made a significant effort to define and limit the concept of Aboriginal title and how it was to be proven. The decision in *Delgamuukw* is one of the defining decisions regarding Aboriginal rights and title in Canada. In this case, the nations' claims were broad and included many issues that had not been discussed as extensively in other cases. Such claims are at the core of Indigenous peoples' litigation in the country. There were and are numerous anthropological, legal, historical, and social sources of information regarding this case. *Delgamuukw* is a wide-ranging case that has allowed me to identify many substantive and procedural legal issues regarding cases of Indigenous peoples for this study.

The *Delgamuukw* case began with a statement of claim presented in the British Columbia Supreme Court (BCSC) in Smithers, British Columbia (BC) on October 24, 1984. Thirty-five Gitksan chiefs and thirteen Wet'suwet'en chiefs, as representatives of their communities (houses), presented the claims,⁷⁵ with the trial actually beginning on May 11, 1987.⁷⁶

⁷⁴ Gitksan-Carrier Declaration, Kispiox, BC, November 7, 1977. Online: <<http://www.upperskeena.ca/vmc/multimedia/sec1/1%20Fundamentals%20of%20Gitksan%20governance/2%20of%20easting/mm/2%20declaration.pdf>>.

⁷⁵ The statement of claim can be found in the Smithers Registry under number No. 00843/1984.

⁷⁶ After the presentation of the land claim in the BCSC in 1984, it took 3 years to define the scope of the claim. The precise nature and scope of the claim in common law jurisdictions are settled before trial differently from claims in many civil law jurisdictions. The issues in conflict in a common law trial are decided in a preliminary process that involves both parties and the court. This way of defining the scope of the claim and the discovery process is only seen in the Canadian case in this study.

The original claim that the chiefs made was for a declaration that the forty-eight chiefs had ‘ownership’ and ‘jurisdiction’ over 133 separate territories covering 58,000 square kilometers in the Skeena and Bulkley River watersheds in Northwestern BC. The plaintiffs also claimed unspecified Aboriginal rights to use the land, such as fishing and hunting rights, and compensation for lost lands and resources. Conversely, the defendant, the BC provincial government, argued that the plaintiffs had no right or interest in the land, and that their claim for compensation ought to be against the federal government.⁷⁷

The last day of the trial was held on June 30, 1990.⁷⁸ In his decision, the trial judge dismissed the plaintiff’s claims, considering much of their evidence as of low legal value, and in any event ruled that the BC provincial government extinguished Aboriginal title in the province before 1871.⁷⁹

The Gitksan and Wet’suwet’en chiefs appealed the trial court decision. During the appeal before the British Columbia Court of Appeal (BCCA), their claim was modified to a claim for ‘Aboriginal title’ and ‘self-government,’ and the individual claims by each house were amalgamated into two communal claims, one advanced on behalf of each nation. On June 25, 1993, a majority in the BCCA dismissed part of the appeal but still overturned significant aspects of the trial court decision. The court held that the plaintiff’s Aboriginal title had not been extinguished in BC, but did not grant them Aboriginal title, ownership, self-government, or jurisdiction. The court also recommended that there be negotiations between BC and the Gitksan and Wet’suwet’en.

⁷⁷ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC)

⁷⁸ The *Delgamuukw* case is among the longest trials ever in British Columbia (374 days).

⁷⁹ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC). The plaintiffs later withdrew their claims for damages.

The plaintiffs appealed again and the Province cross-appealed and in June 1994 the Supreme Court of Canada (SCC) granted leave.⁸⁰ Shortly thereafter, the judicial process was adjourned for approximately two years due to an effort by the parties to negotiate a solution to the dispute, as recommended by the BCCA. The negotiations were not successful and both parties left the negotiation table in 1996, returning to the judicial process at the SCC.⁸¹

In June 1997, the SCC heard the arguments by the parties and on December of the same year, the court allowed the appeal by the plaintiffs in part requiring a new trial and dismissing the cross-appeal.⁸²

The land claim of the Gitksan and the Wet'suwet'en peoples studied in this dissertation rests on the historical context explained below.

3.1.1 Context of the *Delgamuukw* case

According to the *Constitution Act, 1867* (formerly known as the *British North America Act, 1867*), jurisdiction over Crown-owned lands and resources was given to the provincial governments, while the national government assumed responsibility for Indians and the lands reserved for Indians.⁸³ The main law regulating Indians is known as the *Indian Act*, a federal law first enacted in 1876.⁸⁴

⁸⁰ 'Leave to appeal' refers to the permission the SCC must grant before it hears the case. Granting leave to appeal is a discretionary process. The SCC grants it if, in the opinion of a panel of three SCC judges, the case involves a question of public importance or if it raises an important issue of law (or a combination of law and fact) that warrants consideration by the SCC. See the 'Role of the Court' on the Supreme Court of Canada website. Online: <http://www.scc-csc.gc.ca/AboutCourt/role/index_e.asp>. Japan has a slightly similar notion related to non-constitutional matters that are appealed to the Supreme Court. In Mexico, there is no similar legal concept.

⁸¹ Ministry of Aboriginal Affairs, News Release, "Province Suspends Treaty Negotiations with Gitksan [sic]," 1 February 1996, according to the document prepared by Mary C. Hurley "Aboriginal Title: The Supreme Court of Canada Decision in *Delgamuukw v British Columbia*," available on the Parliament of Canada Information and Research Service website. Online: <<http://www.parl.gc.ca/content/lop/researchpublications/bp459-e.htm>>.

⁸² *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at paras. 184, 188, 208.

⁸³ *The Constitution Act, 1867*, 30 & 31 Vict, c 3, in VI. *Distribution of legislative powers, Powers of the parliament*:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative

Aboriginal Affairs and Northern Development Canada is the department of the federal government that negotiates and implements land claims and self-government agreements on behalf of the Government of Canada. According to its website, the department is responsible “for meeting the Government of Canada's obligations and commitments to First Nations, Inuit and Métis and for fulfilling the federal government's constitutional responsibilities in the North.”⁸⁵

3.1.1.1 Indigenous peoples

“Indians” are registered and are identifiable through a certificate given by the federal government. The *Indian Act* regulates the registration of “Indians.” There are, and have always been, complex rules governing Indian status, which are detailed in Section 6 of the *Indian Act*. According to the *Indian Act, 1876*, an “Indian” was: “any male person of Indian blood reputed to belong to a particular band; any child of such person; any woman who was lawfully married to such person.” Section 6 no longer mentions the word ‘blood’ but it establishes rules that go back to the first regulations of Indian status in Canada. The *Indian Act* has been amended several times due mainly to arguments of discrimination.⁸⁶

Being Indian was originally dependent on male lineage. This was marginally reformed through Bill C-31 in 1985, but the reform has not stopped the descendants

Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,... 24. Indians, and Lands reserved for the Indians...

⁸⁴ The current act is the *Indian Act* RSC, 1985, c. I-5. Due to the unitary legal system of Japan, the regulation of Ainu issues happens similarly through national organizations, nevertheless, since most of the Ainu population is in the province of Hokkaido, all the programs are run in this state with a large control of the province. This is different in Mexico, where the federal, state and municipal governments share the responsibility of regulating Indigenous issues and communal land.

⁸⁵ See the Aboriginal Affairs and Northern Development Canada website. Online: <<http://www.aadnc-aandc.gc.ca/eng/1100100010023/1100100010027>>.

⁸⁶ The *Indian Act* now establishes as Indian: a person who was registered or entitled to be registered immediately prior to April 17, 1985; and/or a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act; among other more complex rules that relate to people that had lost their status (or their parents had lost their status) due to reasons now considered discriminatory. For more information read on Indian women regulations in Canada see Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State*. (Toronto: UBC Press, 2000) and Joyce Green, “Canaries in the Mines of Citizenship: Indian Women in Canada” (2001) 34 *Canadian Journal of Political Science / Revue canadienne de science politique: Citizenship and National Identity / Citoyenneté et identité nationale*, 4, 715.

of women married to non-Indians from losing their Indian status.⁸⁷ Prior to Bill C-31 and previous reforms to the *Indian Act*, there were also many other ways in which Indians could lose their status, among them ‘enfranchisement,’ service in the armed forces and marriage.⁸⁸ In the past, non-status Indians were not provided with compensation or support, nor were they guaranteed access to their communities of origin since band membership would have been removed. Essentially, an Indian would lose some of his/her Indian rights upon losing his/her status, such as the right to live on his/her community’s reserve.⁸⁹ Once someone had lost their status, or was enfranchised, they were unable to pass along Indian status to their children.⁹⁰ These regulations were notoriously designed into assimilate Indians to mainstream Canadian society.⁹¹ Today it is more difficult to lose Indian status. In addition, there are recent judicial decisions that establish that Métis and non-status Indians are ‘Indians’ within the meaning of the *Constitution Act, 1867*, s. 91(24).⁹²

In 1969, the federal government proposed to abolish Indian status. The proposal is contained in a document known as *The White Paper 1969*.⁹³ Aboriginal leaders and

⁸⁷ John Borrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 3rd Edition (Canada: LexisNexis, 2007), at 637. See also *McIvor v Canada* (Registrar of Indian and Northern Affairs), 2009 BCCA 153, and Minister of Indian and Northern Development of Canada, *Re-assessing the Population Impacts of Bill C-31* (Ottawa: Minister of Public Works and Government Services Canada, 2004). Online: <<http://publications.gc.ca/pub?id=267840&sl=0>>.

⁸⁸ E.g., there was a time where any Indian who obtained a university degree and/or became a professional such as a doctor or lawyer would automatically lose their status. The same process could occur for any Indian who served in the armed forces, or any status Indian woman who married a non-status Indian man. There were also many cases where authorities ‘deleted’ Indians’ names from the registry because of probable white ancestors in their bloodline. There are many cases as the one of Lesser Slave Lake in Alberta in the 1940s and the enfranchisement of Treaty Indians in the Edmonton Agency in 1885 and 1886, when almost 43 percent of them lost status through the establishment of a policy that granted scripts to ‘half-breeds’ as then was the legal label used for Métis. See Douglas Sanders, “Aboriginal and Indian Rights in Law and Justice in a New Land” in Louis A. Knafla (ed.) *Law & Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986), at 110.

⁸⁹ Joyce Green, *supra* note 86.

⁹⁰ John Borrows and Leonard I. Rotman, *supra* note 87, at 598.

⁹¹ E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada*. (Vancouver: UBC Press, 1986), at 34:

In 1914, the Deputy Superintendent General of Indian Affairs Duncan Campbell Scott wrote: The happiest future for the Indian race is absorption into the general population, and this is the object of the policy of our government. The great forces of intermarriage and education will finally overcome the lingering traces of native custom and tradition.

⁹² *Daniels v Canada*, 2013 FC 6.

⁹³ Royal Commission on Aboriginal Peoples, “The White Paper 1969,” in The Report of the Royal Commission on Aboriginal peoples, vol. 1, part 1: The Relationship in Historical Perspective, Stage Four: Negotiation and Renewal. (Ottawa: The Commission, 1996).

organizations resisted the proposal. Those opposed to it claimed that Indian status acknowledged the distinctive history of Aboriginal peoples in Canada and that this legal recognition forced the Canadian government to legally acknowledge its obligations to Aboriginal peoples. The concern was that to abolish status would absolve the government of its commitments and assimilate Aboriginal peoples into mainstream Canadian society faster.⁹⁴

3.1.1.2 Aboriginal title in Canada and British Columbia

Ownership of land under Canadian law has its origins in the common law. Such ownership reflects an interest in the land and all interests are tenurial to those of the Crown.⁹⁵ Aboriginal title is also considered a burden to the Crown's title:

The theory of common law was that the Crown mysteriously acquired the underlying title to all land in Canada, including land that was occupied by Aboriginal people. But the common law recognized that Aboriginal title, if not surrendered or lawfully extinguished, survived as a burden on the Crown's title.⁹⁶

The first constitutional principle in the *Constitution Act, 1867* established that the constitution of Canada is similar in principle to the constitution of the United Kingdom, which established the concept of the Crown. The Crown refers to the sovereign; meaning to say that Canada is a country governed by democratic institutions that carry out their duties under the authority of the Crown.⁹⁷ Canada, unlike the United Kingdom, is a federation. For this reason, the expression of the principle of the Crown is different: the Crown acts separately as in right of each of the provinces and the federal government, while the British Crown serves Canada as a ceremonial Crown.⁹⁸

⁹⁴ *Ibid.*

⁹⁵ Donald M. Smith, "Title to Indian reserves in British Columbia: a critical analysis of order in council 1036" LLM Thesis, UBC Faculty of Law (Vancouver: University of British Columbia, 1988).

⁹⁶ Peter Hogg, *Constitutional Law of Canada* (Scarborough, Ontario: Thomson Canada, Student Edition, 2008), at 637.

⁹⁷ Parliament of Canada website. Online: <<http://www.parl.gc.ca/About/Senate/jubilee/crown-e.htm>>.

⁹⁸ *Her Majesty in Right of the Province of Alberta v Canadian Transport Commission*, [1978] 1 SCR 61, at 10-11; 1977 2 Alta LR (2nd) 72, at 79-80 (subnom. In re Pacific Western Airlines Ltd.).

The legal concept of the Crown is originally indivisible.⁹⁹ However, when the land is transferred from one order of government to another, it leaves virtually no interest in the land in the former ‘administrator’ or Crown.¹⁰⁰ When the division of the resources was made in Canada in 1867 (BC entered the agreement in 1871), title remained in the indivisible Crown but the control, benefit, use, and administration of resources were distributed. The government that has the beneficial use of the land is the only government that can ‘dispose’ of title to the land.¹⁰¹

The provinces controlled and administered the lands and used the revenues as public property. The property of the federal government in BC was acquired from the province. It is not clear when BC acquired control of all hereditary revenues by Imperial statute but it happened before it entered Confederation in 1871.¹⁰²

Treaties and the development of the concept of Aboriginal title

Under Canadian and BC laws, the Gitksan and Wet’suwet’en peoples have certain Indigenous rights in the reservations and Indigenous villages. For example, the *Indian Act* establishes that “the Ministry of Indian Affairs and Northern development can use reserve lands for certain purposes (schools and health centers) only with the consent of the band council; taxation is limited on real and personal property on reserve lands; reserve land is considered to be exclusively for Indians.”¹⁰³ This is the same for all recognized First Nations in Canada. Apart from these rights, First Nations can acquire or achieve recognition of other rights through treaties and through the courts.

⁹⁹ *R. v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta*, [1982] QB 892 (CA), at 909, 916-917. In this decision the court traced the transformation of the doctrine of the indivisibility of the Crown to the modern doctrine of divisibility. Lord Denning wrote:

...the obligations to which the Crown bound itself in the Royal Proclamation of 1763 are now to be confined to the territories to which they related and binding on the Crowns only in respect of those territories...

¹⁰⁰ Also referred as ‘the instantiation of the Crown.’

¹⁰¹ *Ontario Mining Co. v Seybold*, 1903 AC 73 and *Reference Re Saskatchewan Natural Resources*, [1931] SCR 263 as explained in Smith, *supra* note 95.

¹⁰² Gerard V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), at 31.

¹⁰³ Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission on Aboriginal peoples*, Vol. 1, Part 1: False Assumptions and a Failed Relationship, Chapter 9: The Indian Act, 8. The Indian Act and Indians: Children of the State (Ottawa: The Commission, 1996). Online at: <http://www.collectionscanada.gc.ca/webarchives/20071211051055/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg24_e.html#81>.

Since the arrival of Europeans to Canada, treaties have been signed between Indigenous peoples and Europeans. Some of the older treaties were signed with the intention of having Indigenous peoples as allies due to the wars between the English, the French, and then later with the US in the 18th century. Other treaties surrendered Indian land in exchange for other lands, goods, and the consideration that Aboriginal peoples would continue to rule their peoples and territories according to their own laws. These treaties used concepts such as ‘cession’ and ‘surrender’ of land,¹⁰⁴ assimilating Indian title to ownership. Many of these treaties are an example of how Indigenous’ self-government and jurisdiction were acknowledged at the end of the 18th century and also reflect the many ways in which they have not been respected. Treaties are still being negotiated in Canada and are central to the understanding of the laws regulating the relationships between the state and the Indigenous communities. Even though the concept of Aboriginal title is most usually understood within the framework of treaty-making, it is a concept (still being) developed by common law and the courts.

3.1.1.3 Judicial decision-making on the matter of Aboriginal title and rights in BC

In the last part of the 19th century, the SCC, influenced by decisions in the US,¹⁰⁵ adopted the concept of ‘Indian title’ in the case of *St. Catharines Milling and Lumber Company v The Queen*.¹⁰⁶ Even though this case was not about an Indian claim over land but a conflict between the provincial and the federal government regarding their

¹⁰⁴ E.g. Ratified Treaty # 7: Treaty of Fort Stanwix, or The Grant from the Six Nations to the King and Agreement of Boundary — Six Nations, Shawnee, Delaware, Mingoes of Ohio, 1768 (US). Online: <<http://earlytreaties.unl.edu/treaty.00007.html>>.

¹⁰⁵ In the 19th century, there were several decisions rendered by the Supreme Court of the United States in which the concept of ‘title’ was first used to refer to the right of Indigenous peoples’ over their land. See for example US Supreme Court, *Johnson & Graham’s Lessee v McIntosh* 21 US 543 (1823), *Cherokee Nation v Georgia* 30 US 1 (1831) and, *Worcester v Georgia* 31 US 515 (1832).

¹⁰⁶ *St. Catharines Milling and Lumber Company v The Queen* [1887] 13 SCR 577. Online: <<http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/3769/index.do>>. The Governments of Ontario and Canada, when arguing the case, borrowed the concepts of ‘Indian title’ and ‘Indian interest’ used in the US. See the argument of Mr. Blake, Counsel for Ontario in the case before the Privy Council, Open Library website. Online: <http://archive.org/stream/cihm_00164#page/n1/mode/2up>.

jurisdiction over land in Ontario, the decision had a large influence on the legal landscape of Indigenous peoples' rights over land in Canada.

In the same case on appeal, the Privy Council (UK) decided that the *Royal Proclamation of 1763* was the legal source of Indian title in Canada.¹⁰⁷ The Privy Council also decided that 'Indian title' was the source of the personal and usufructuary Indigenous rights to the land, which were dependent upon the good will of the sovereign.¹⁰⁸

The *Royal Proclamation of 1763* declared that the interests of the natives in their lands could not be disturbed, and demanded that they be respected. It did not use the concept of 'Indian title' but the concept of 'possession' of land. According to the principles of the *Royal Proclamation of 1763*, before the Crown could open any land for purchase and settlement, the interests of the Indigenous peoples had to be formally 'purchased,' or 'surrendered.' The proclamation prescribed that Indian land could only be purchased by the Crown. This view is still recognized by the common law, supporting the notion that Aboriginal title is a compensable right,¹⁰⁹ equivalent, in a certain degree, to the right to 'own.' The policy of the requirement of surrender or purchase of the Aboriginal title evolved during the years, mostly for the worst as it is reflected in some versions of the *Indian Act*, which even permitted the taking of reserve lands for public purposes without surrender.¹¹⁰

¹⁰⁷ *St. Catharines Milling and Lumber Company v The Queen* [1888] UKPC 70, 14 App Cas 46.

¹⁰⁸ *Ibid.*, Lord Watson, at p. 54, 58. The *Royal Proclamation of 1763* provides:
...And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them. or any of them, as their Hunting Grounds.-- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure... And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid. And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved without our especial leave and Licence for that Purpose first obtained.

¹⁰⁹ Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 *Canadian Bar Review* 727, at 751.

¹¹⁰ *Indian Act* RSC. 1970, C. I-6 as seen in Smith, *supra* note 95, at 37.

It has been disputed whether the *Royal Proclamation of 1763* is applicable in BC. In 1973, the SCC in *Calder et al. v Attorney-General of British Columbia* (*Calder*) divided on the issue, with three votes against and three votes in favor. In *Delgamuukw*, the trial judge and the BCCA held it did not apply, while the SCC did not address the issue of whether it was applicable in BC or not.

Courts did not hear Aboriginal title and rights cases in Canada for many years mainly due to a provision of the *Indian Act* that prohibited raising funds for Aboriginal land claims.¹¹¹ In 1965, the Supreme Court ruled in *R. v White and Bob* (*White and Bob*) upholding Aboriginal treaty hunting rights in BC in a criminal law case.¹¹² In 1973, in *Calder*, four judges of the SCC recognized that the Nisga'a peoples' Aboriginal title had survived until modern times.¹¹³ The decision marked a tremendous change in the legal and also political landscape of Indigenous claims in BC.¹¹⁴ The decision did not grant title to the plaintiffs but recognized that "Once aboriginal title is established, it is presumed to continue until the contrary is proven. When the Nishga people came under British sovereignty they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did the Parliament of Canada."¹¹⁵

After the *Calder* decision, the federal government entered a negotiation process with the Nisga'a, and established the first system to deal with comprehensive claims.¹¹⁶

¹¹¹ *Indian Act*, RSC, 1927, c. 98, section 141. The clause was repealed in 1951.

¹¹² *R. v White and Bob* [1964], 50 DLR (2d) 613 (BCCA), aff'd (1965), 52 DLR (2d) 481 (SCC).

¹¹³ *Calder et al. v Attorney-General of British Columbia*, [1973] SCR 313.

¹¹⁴ Department of Indian Affairs and Northern Development, "Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People," Communiqué, 8 August 1973. Online: <[http://www.specific-claims-law.com/images/stories/specific_claims_docs/05-Fed_Govt_Docs_INAC_etc/INAC_\(IAND\)_AINC/StatementChretienClaimsIndianInuitPeople.pdf](http://www.specific-claims-law.com/images/stories/specific_claims_docs/05-Fed_Govt_Docs_INAC_etc/INAC_(IAND)_AINC/StatementChretienClaimsIndianInuitPeople.pdf)>.

¹¹⁵ *Calder et al. v Attorney-General of British Columbia*, [1973] SCR 313, at 316.

¹¹⁶ Aboriginal communities are the only legal entities that can file "land claims". "Land claims" are about not only land but also about other Aboriginal rights and there are two kinds: Comprehensive and Specific. Most "land claims" are negotiated through treaty negotiations with state and federal authorities. "Comprehensive land claims"

This policy was revised in 1981 and a new plan titled “In all fairness: A Native Claims Policy”¹¹⁷ was launched. Such policy was designed to obtain consensual extinguishments of Aboriginal title and seemed to favour the recognition of inherent Aboriginal rights.¹¹⁸

By the 1980s the courts still had not explained what Aboriginal rights and title comprehended. In 1980, Mr. Justice Mahoney wrote: “Canadian courts have, to date, successfully avoided the necessity of defining just what an Aboriginal title is” in *Baker Lake v. Minister of Indian Affairs and Northern Development (Baker Lake)*.¹¹⁹ In 1984, the SCC established that the Indian interest in reserve land was similar to Aboriginal title in traditional tribal lands in the decision *Guerin v The Queen (Guerin)*.¹²⁰ In this decision, the court also established that the interest was of a unique nature, which is at least a right of occupation and possession similar to beneficial ownership. The judges were clear in establishing that the loss of their interest implied compensation.¹²¹ Moreover, the court established that the Crown is under the obligation to deal with the land on the Indian’s behalf. According to this decision, the government had a fiduciary duty to First Nations, a trust-like relationship.

In 1990, in *R. v Sparrow (Sparrow)* the SCC established that the courts must be careful “... to avoid the application of traditional common law concepts of property as they develop their understanding of ... the ‘sui generis’ nature of Aboriginal

are claims over land and rights that have never been negotiated. “Specific land claims” are claims over land and rights that have been addressed through treaties in the past. The presentation of a specific land claim entails an allegation that the treaty has been violated.

¹¹⁷ Aboriginal Affairs and Northern Development Canada website. Online: <<http://www.aadnc-aandc.gc.ca/eng/1100100014174/1100100014179>>.

¹¹⁸ Louis A. Knafla (ed.), *Law & Justice in a New Land: Essays in Western Canadian Legal History*, (Toronto: Carswell, 1986), at 25. The BC government joined the negotiations with the Nisga’a in 1990.

¹¹⁹ *Baker Lake (Hamlet) v Minister of Indian Affairs and Northern Development*, [1980] 1 FC 518 (TD). The paragraph continues in this manner:

It is, however, clear that the Aboriginal title that arises from the Proclamation is not a proprietary right. If the Aboriginal title that arose in Rupert’s Land independent of the Royal Proclamation were a proprietary right, then it would necessarily have been extinguished by the Royal Charter of May 2, 1670, which granted the Hudson’s Bay Company ownership of the entire colony.”

¹²⁰ *Guerin v The Queen* [1984] 2 SCR 335; 55 NR 161, at 171-174.

¹²¹ Donald Smith, *supra* note 95.

rights,”¹²² implying that Aboriginal rights were particular and different from any other property law concept in common law, and that recognizing such difference was important in the aim of protecting the culture and *nomos*¹²³ of Indigenous peoples.

The courts continue to define the meaning of Aboriginal rights and title and in explain how can those rights be proven. The process is slow mainly due to two reasons. The first is that the definition of Aboriginal title has to be established on a case-by-case basis. And, the second is that according to Canadian Aboriginal policy, the treaty process is critical to resolving uncertainty around Aboriginal rights.¹²⁴ This peculiarity of the definition of Aboriginal title is of the utmost importance of the study of the *Delgamuukw* case since it reflects the lack of expectation of a legislative effort in the area. The expectation is that the different nations will negotiate a treaty that will define, on a case-by-case basis, the nature of their Aboriginal title.

In my opinion, and in the opinion of many, including the courts, there is little legal certainty of what Aboriginal title is and how to prove it.¹²⁵ Until *Delgamuukw*, the courts were never clear as to how Indigenous peoples could prove their claimed legal interests in the land and the continuing and exclusive occupation prior to the arrival of the Europeans. At the time of the *Delgamuukw* case, the lawyers thought of Aboriginal title as a communal right to the land itself that stems from a pre-contact exclusive occupation that has continued until today.¹²⁶

¹²² *R. v Sparrow*, [1990] 1 SCR 1075, at para. 1112.

¹²³ Liddell & Scott, *Greek-English Lexicon* (Oxford: Clarendon Press, 2001), at 535: “Where custom becomes law.” It refers to anything assigned, a usage, custom, law, ordinance. I use the concept of *nomos* to express the system of rules that are agreed upon by a society to rule themselves. I use it similarly to how Robert Cover understands it: *nomos* is the normative universe, in Robert M. Cover “Foreword: Nomos and Narrative” (1983) 97 *Harv L Rev* 4, at 4.

¹²⁴ Department of Aboriginal Affairs and Northern Development website. Online: <<http://www.aadnc-aandc.gc.ca/eng/1100100016383>>.

¹²⁵ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 75:

Moreover, in my opinion, that ruling was correct because it was made against the background of considerable legal uncertainty surrounding the nature and content of Aboriginal rights, under both the common law and s. 35(1). [emphasis added]

¹²⁶ *Baker Lake (Hamlet) v Minister of Indian Affairs and Northern Development*, [1980] 1 FC 518 (TD)

Many of the landmark cases defining Aboriginal title in Canada have been brought to the courts in BC because BC has signed very few treaties with Indigenous peoples and because until recently the BC government had the policy of disregarding requests to negotiate with Aboriginal nations.

In 1976 the Canadian government adopted the first ‘comprehensive land claims policy’ which allowed only six land claims to be negotiated (only one per province) at any one time.¹²⁷ In the beginning of the 1980s, the BC government was negotiating with the Nisga’a, and rejected the requests to negotiate with the Gitksan and Wet’suwet’en. The federal and BC governments changed the policy in the 1990s.

Most of the people whom I interviewed during my research for this dissertation agreed that Indigenous peoples prefer to negotiate with the government versus filing lawsuits to the courts.¹²⁸ The plaintiffs in the *Delgamuukw* case however had no recourse available for settling the issue of their territory other than through the court process.¹²⁹

Constitutional regulation of Aboriginal title

There was no constitutional entrenchment of Aboriginal rights until the establishment of the *Constitution Act of 1982*, which establishes:

35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, ‘Aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada.

¹²⁷ See the Parliament of Canada Information and Research Center website. Online: <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb992-e.htm>>, which cites the Minister of Indian Affairs and Northern Development, Comprehensive Land Claims Policy, Minister of Supply and Services, Ottawa, 1987. While the new policy allowed Aboriginal parties to retain some rights to land, it did not resolve Aboriginal concerns about loss of other rights under the federal requirement that Aboriginal title to lands and resources be surrendered in exchange for defined rights set out in a land claim settlement.

¹²⁸ Eva Castañeda Cortés, QC, Co-counsel for the Appellants: Zirahuén Community, interview with author, 13 July 2011, and Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.

¹²⁹ Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.

(3) For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Any infringement of an Aboriginal right must be enacted by the competent legislative body (federal parliament) and must satisfy a test of justification.¹³⁰ Section 35 is not included in the Charter of Rights and Freedoms, which means that Aboriginal rights are not ‘Charter rights.’ Section 35 is exempt from the ‘notwithstanding clause’ that applies to a number of the rights in the Charter. In other words, the federal government cannot override Aboriginal rights on the same basis as some Charter rights. Aboriginal rights can be limited, but under different rules such as “compelling and substantive objectives related to development.”¹³¹

Most of the original drafts of the *Constitution Act of 1982* did not include any provision that protected Aboriginal rights. When the drafts were being prepared, several Aboriginal associations, networks, and governments campaigned to obtain the entrenchment of Aboriginal rights in the Constitution and worried that with the patriation of the constitution from Britain their recognized rights under the previous constitutional scheme would be ignored.¹³² During the campaign many Aboriginal leaders addressed the British Parliament and different forums of the UN soliciting

¹³⁰ Peter Hogg, *Constitutional Law of Canada*, *supra* note 96, at 641. The test sets the criteria that determine whether an Aboriginal right was infringed upon, and whether the infringement was justified. According to this test, an Aboriginal right is infringed upon if the infringement imposes undue hardship on the First Nation; is unreasonable; and prevents the nations from exercising their right according to their preferred means. An infringement to an Aboriginal right might be justified if: the infringement serves a ‘valid legislative objective,’ such as the conservation of natural resources; the infringement has been as minimal as possible in order to effect the desired result; fair compensation was provided for in the case of expropriation; and, the Aboriginal nation holder of the right was consulted or at the least informed. In summary, the *Sparrow* doctrine consists of three main issues: 1) Is there an or treaty fishing right?; 2) If so, does the regulation or legislation concerned infringe on this right?; and 3) If there is infringement of the right, is the infringement justified?

¹³¹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.

¹³² For more information in this regard consult the Constitution Express movement available on the Union of BC Indian Chiefs’ website. Online: <<http://constitution.ubcic.bc.ca/>>.

pressure on the Canadian government in accepting the recognition of their rights.¹³³ Their campaign was ultimately successful in that the Constitution includes the recognition of Aboriginal rights in Canada.

Aboriginal title in British Columbia

Kent McNeil argues that the constitutional framework of Aboriginal title has not been practical due to the competing and divided federal and provincial jurisdictions.¹³⁴ Historically, the *Constitution Act, 1867* gave the federal legislature the responsibility for Indians and lands reserved for the Indians (and by implication, the exclusive right to negotiate treaties) but at the same time, transferred the ownership and control of public lands to the provinces. The provinces were the beneficiaries of the surrendered Crown land but there was no automatic process to follow to transfer the land to the Dominion for reserves. It was difficult to fulfill the terms of the treaties while negotiating with the provinces for the land. In the case of British Columbia, there were no treaties negotiated between the federal government and Indigenous nations, except *Treaty Eight* for lands in the border between today's British Columbia, Yukon, and Alberta.¹³⁵

Long before, the colonial governments in BC applied two different policies regarding the Indians before joining Confederation in 1871. During the first years (1850–1854), the colony's government of Vancouver Island (and before that the Hudson's Bay Company) negotiated a series of treaties or deeds of conveyance with different Indigenous communities on Vancouver Island. All those agreements had the same format and provided for the retention of "village sites and enclosed fields and for

¹³³ *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, Ex Parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians* (1981), 2 All ER 118 (UK); 4 CNLR 86 (rendered January 28, 1982).

¹³⁴ Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 *Sask L Rev* 431.

¹³⁵ N.D. Banks, "Indian Resource Rights and Constitutional enactments in Western Canada, 1871–1930" in Louis A. Knafla (ed.) *Law & Justice in a New Land: Essays in Western Canadian Legal History*, *supra* note 118, at 162.

hunting and fishing on unoccupied lands as carried on formerly.”¹³⁶ The province could not continue this policy due to a lack of funding to pay for the surrender of lands.¹³⁷

After 1871, the BC provincial government did not recognize Aboriginal title; therefore, they argued, there was no need to negotiate treaties in order to extinguish it.¹³⁸ Indian reserves in BC were not established pursuant to treaties, as in some other parts of Canada. They were established according to provincial policies and laws. The province adjusted the size of many of the few previously established reserves to “meet appropriately what was considered to be the actual requirements of the Indians” and established the measure of ten acres per household as the standard size.¹³⁹ The amounts of land for Indian reserves were the smallest amounts given in Canada (past and future).

¹³⁶ Wilson Duff, “The Fort Victoria Treaties” (1969) 3 *BC Studies* 3, where you can see the text of one of the treaties (Teechamitsa):

Know all men, We the Chiefs and People of the "Teechamitsa" Tribe who have signed our names and made our marks to this Deed on the Twenty ninth day of April, one thousand eight hundred and Fifty do consent to surrender entirely and for ever to James Douglas the Agent of the Hudsons Bay Company in Vancouvers Island that is to say, for the Governor Deputy Governor and Committee of the same the whole of the lands situate and lying between Esquimalt Harbour and Point Albert including the latter, on the straits of Juan de Fuca and extending backward from thence to the range of mountains on the Sanitch Arm about ten miles distant.

The Condition of, or understanding of this Sale, is this, that our Village Sites and Enclosed Fields are to be kept for our own use, for the use of our Children, and for those who may follow after us; and the land, shall be properly surveyed hereafter; it is understood however that the land itself, with these small exceptions becomes the Entire property of the White people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

We have received as payment Twenty-seven pound Ten Shillings Sterling. In token whereof we have signed our names and made our marks at Fort Victoria 29 April 1850. Done in the presence of...

¹³⁷ Donald Smith, *supra* note 95, at 6.

¹³⁸ See Aboriginal Affairs and Northern Development Canada website. Online: <<http://www.aadnc-aandc.gc.ca/eng/1100100016383>>.

¹³⁹ According to Donald Smith *supra* note 95, at 8, during the leadership of Joseph Trutch, the Province adjusted the Kamloops-Shuswap and Lower Fraser River reserves. According to the website of Indigenous Foundations of the University of British Columbia. Online: <<http://indigenousfoundations.arts.ubc.ca/?id=8356>>, reserve acreage varied across the country. Treaties 1 and 2 (mainly in Manitoba, 1871) allotted 160 acres per family of five, whereas Treaties 3 to 11 (1871–1921) granted 640 acres per family of five. In British Columbia, reserves were considerably smaller, with an average of 20 acres granted per family.

When BC joined Confederation in 1871, it agreed to give lands to the federal government to be used as Indian reserves in the province.¹⁴⁰ Not surprisingly, when BC conveyed the reserves to Canada, the province was determined to give up as little land as possible.¹⁴¹

Reserve lands and Aboriginal interests were agreed upon between the federation and the province without the participation of Indian communities. In 1875, the federal and provincial governments started negotiating the question of the size and allocation of reserves, establishing several ‘commissions,’ the first one called the BC Reserves Commission. The BC government participated in the federal/provincial joint commissions on the condition that no recognition would be given to an underlying Indian title.¹⁴² The final report of the McKenna-McBride Commission¹⁴³ was confirmed through legislation in both levels and is the basis for how the process of allocating reserves was done in BC.¹⁴⁴ The federal and provincial governments agreed upon the size of twenty acres per family, which did not apply to established reserves but only to future reserves.¹⁴⁵

¹⁴⁰ British Columbia "Terms of Union" being a schedule to an Order of Her Majesty in Council admitting BC into the Union of May 16, 1871, RSC 1970 Appendix II, 279. The O/C 1036 and Privy Council Order 208 conveyed most of the reserves in BC to the Dominion. This agreement is part of the Constitution of Canada.

¹⁴¹ Donald Smith, *supra* note 95, cites Keith Thor Carlson, "Indian Reservations," in Kate Blomfeld et al., *A Stó:lo; Coast Salish Historical Atlas*, (Vancouver: Douglas & McIntyre, 2001), at 94.:

Historian Keith Thor Carlson calls reserve creation in British Columbia: 'the government's attempt to skirt its political and legal obligation to negotiate with Aboriginal people and to provide compensation for alienated land and resources. In effect, it was an effort to extinguish Aboriginal title through administrative and bureaucratic means.

¹⁴² Richard C. Daniel, *A history of Native Claims processing in Canada 1867–1979* for Research Branch, of the Department of Indian & Northern Affairs, February 1980, at 206.

¹⁴³ *Ibid.* This Commission was established in 1913 and had five members: two members appointed by the province, two members appointed by the Dominion and one to be appointed by the commissioners themselves and settled a large number of the reserves in BC. The final report was given in 1916.

¹⁴⁴ N.D. Banks, *supra* note 135, at 140.

According to the Union of BC Indian Chiefs' website, online: <http://www.ubcic.bc.ca/files/PDF/app_b.pdf>, and Donald Smith, *supra* note 95, at 24, some years later in 1929, the federal and provincial government signed the Scott-Cathcart Agreement affecting particularly, but not only, the reserves in the Railway Belt and Peace River Block.

¹⁴⁵ *Ibid.*, at 37:

When the federal government compared the Indian reserve policy of BC to other parts of the country, BC's "ten acre per family" measure was far below what the federal government considered to be reasonable. The disagreement on the measure prompted several periods of tension between the Federation and BC. The negotiations on the size of the reserves continue until this day. BC formally transferred to Canada the lands for the already established reserves for Indigenous peoples in 1938.

One acre is equivalent to 4,047 square meters and 0.4 hectares.

According to the agreements between the federal and provincial governments, the Crown in right of BC gave administration and control over certain lands to the Crown in right of Canada, in trust for the use and benefit of the Indians.¹⁴⁶ The province kept the right to resume a portion of reserve land for public purposes.¹⁴⁷ The *Indian Affairs Settlement Act* gave the provincial executive the flexibility to conduct further negotiations and enter into further agreements.¹⁴⁸

In 1992, the province established the BC Treaty Commission, a provincial government agency in charge of negotiating treaties with Indigenous peoples, which started working in 1993.¹⁴⁹ The BC Treaty Commission has successfully achieved the completion of two agreements since 1993: Tsawwassen and Maa-nulth.

Today, Aboriginal title is considered to be “the right to the exclusive occupation of land, which permits the Aboriginal owners to use the land for a variety of purposes,”¹⁵⁰ like hunting, fishing and harvesting. It is not the only scheme that exists to own land communally in Canada, but is the scheme exclusively in use for Indigenous peoples. In principle, Aboriginal title cannot be sold to third parties. Certain Indigenous land rights can be sold through special means but always with the consent of the federal government.

There are many uncertainties about the reach of Aboriginal title but according to the courts, it is an Aboriginal right. Aboriginal rights are integral to the distinctive culture of an aboriginal society.¹⁵¹ Aboriginal rights vary according to the extent of the pre-existing interest of the relevant individual, group, or community. The precise nature

¹⁴⁶ *British Columbia Order-in-Council* No. 1036, July 29, 1938.

¹⁴⁷ Section 35 of the *Indian Act* RSC., 1985, c. I-5.

¹⁴⁸ *Indian Affairs Settlement Act*, Chapter 32 of the Statutes of British Columbia, 1919.

¹⁴⁹ BC Treaty Commission website. Online: <<http://www.bctreaty.net/files/quickfacts.php#commission>>.

¹⁵⁰ Peter Hogg, *Constitutional Law of Canada*, *supra* note 96, at 637.

¹⁵¹ *R. v Van der Peet*, [1996] 2 SCR 507.

and content of the right, and the area within which the right was exercised are questions of fact.¹⁵²

Even though the courts have been the most active in describing the legal label of Aboriginal title, and Aboriginal title is mainly regulated by common law, no Canadian court has ever granted Aboriginal title. The closest attempt has been by Judge Patrick Mahoney (federal court) in 1979, who declared that particular lands “are subject to the Aboriginal right and title of the Inuit to hunt and fish thereon” in the *Baker Lake* decision.¹⁵³ The question of title was not decided in detail in the decision. The question of title in *Baker Lake* was settled later in the *Nunavut Land Claims Agreement*, which is the largest Aboriginal land claim settlement in Canadian history. Aboriginal title has only been agreed upon in treaties signed between the provinces, the federal government, and the Indigenous nations in Canada.

3.1.1.4 The Gitksan and the Wet’suwet’en peoples

In the suit, the Gitksan and Wet’suwet’en argued that their ancestral territory includes 58,000 square kilometers of the province of BC. This claim was not based on a document, but on their own oral records, their *adawaak* (owned stories), and their laws. Up to that point, no authority in Canada or abroad had recognized the territories of the Gitksan and the Wet’suwet’en peoples as theirs.

According to Chief Justice McEachern of the BCSC, the territory claimed by the Gitksan and Wet’suwet’en chiefs included several towns, cities, villages, sixty-two reservations (that in total were 45 square miles¹⁵⁴), municipalities, federal areas (railways, etc.), provincial and national parks, and privately owned properties. The

¹⁵² Courts have also described aboriginal rights as site specific. This is not yet settled; it is one of the contested issues in the case of *William v British Columbia*, 2012 BCCA 285 reviewed in November 2013 by the SCC.

¹⁵³ *Baker Lake (Hamlet) v Minister of Indian Affairs and Northern Development*, [1980] 1 FC 518 (TD)

¹⁵⁴ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at Part 12, 184. 45 square miles are equivalent to 116 square kilometers.

territory was populated by around 4,000 to 5,000 Gitksan, 1,500 to 2,000 Wet'suwet'en people, and more than 30,000 non-Indigenous peoples.¹⁵⁵

Gitksan peoples are Tsimshanic-speaking Aboriginal peoples who are located primarily on the north and central Skeena River and its tributaries above Kitselas Canyon, and the Nass and Babine Rivers and its tributaries. Most of them now live in villages along the Skeena River. There are six Gitksan communities: Kitwangak, Gitanyow (Kitwancool), Kitseguekla, Gitenmaax (Hazelton), Kispiox, and Glen Vowell.¹⁵⁶ It is important to note, however, that the Gitksan houses of Kitwancool did not participate in the case. They decided to claim separately their own territories, which are in the drainage areas of the Cranberry and Nass Rivers between areas claimed by the Nisga'a and the rest of the Gitksan.

The Wet'suwet'en are an Athabaskan-speaking Aboriginal people who claim areas mainly in the watersheds of the Bulkley and parts of the Fraser-Nechako Rivers systems and their tributaries, east and south of the Gitksan. Most of the Wet'suwet'en peoples live in two villages alongside the Bulkley River, Hagwilget, and Moricetown.¹⁵⁷

The Gitksan and Wet'suwet'en peoples came to the courts dressed in regalia with their *ayuks* (crests, symbols) and many gave their evidence in their own language. Most of their evidence was the telling of their stories. They explained to the courts their social organization, their laws, their rules, and their way of understanding their reality in ways that the two Ainu plaintiffs and the community of Zirahuén did not in the *Nibutani Dam* and *Zirahuén* cases. This was mainly because these latter plaintiffs were not required to do so, because their character as Indigenous peoples was not as contested as it was in *Delgamuukw*, where the provincial government questioned that their ancestors were members of an organized society, as required by the test in the

¹⁵⁵ *Ibid.* at Part 2, 10-11.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

Baker Lake decision.¹⁵⁸ Moreover, the plaintiffs in *Delgamuukw* arrived in the courts not using the institutions for representation established by the *Indian Act*, the band councils, but using their traditional institutions of representation, the houses' chiefs.

History

According to Richard Daly, the Gitksan and Wet'suwet'en peoples have been organized in houses and clans since before the first European settlers arrived at their territories.¹⁵⁹ They have chiefs who decide, with the participation of their communities, on how to administer certain hunting, gathering, fishing and trapping sites. The main resource of the people is salmon and the rivers that divide, surround, and comprise their territories. The communities traded with each other and with neighboring nations for goods. They had large and small villages in the territory and celebrated feasts on certain important occasions (such as marriage, funerals, and thanking ceremonies), where goods, social capital, and resources were distributed and quarrels resolved. The Gitksan and Wet'suwet'en have rich expressive forms of art, which share certain similarities mainly due to the fact that they are very closely connected to each other.¹⁶⁰

The first European explorers that arrived in British Columbia landed in the 18th century and were from Russia, Spain, and England.¹⁶¹ In 1670, the Hudson's Bay Company (HBC) was granted a monopoly of the trade of a large part of North America, and was the owner of more than 40 percent of what is now known as Canada.¹⁶² In 1821 HBC, which had been merged with the North West Company,

¹⁵⁸ *Baker Lake (Hamlet) v Minister of Indian Affairs and Northern Development*, [1980] 1 FC 518 (TD) In this decision, Judge Mahoney established that the elements which the plaintiffs must prove to establish an Aboriginal title cognizable at common law are: 1. That they and their ancestors were members of an organized society; 2. That the organized society occupied the specific territory over which they assert the Aboriginal title; 3. That the occupation was to the exclusion of other organized societies; and 4. That the occupation was an established fact at the time sovereignty was asserted by England.

¹⁵⁹ Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005).

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*, at 228.

¹⁶² The Royal Charter for incorporating The Hudson's Bay Company, AD 1670 (online: <http://www.solon.org/Constitutions/Canada/English/PreConfederation/hbc_charter_1670.html>). In 1821, when the Company merged with the North West Company, the Charter was renewed for a period of 21 years and its

started running several trading posts in what now is British Columbia.¹⁶³ The first governor of the colony of British Columbia, and of Vancouver Island, was a high-ranking officer of the HBC named James Douglas. In the first years of contact, Indigenous nations traded with the European settlers. HBC and other explorers were particularly interested in fur, but also in fishing, canning, lumber, and mining. Indigenous peoples traded mainly fur for different goods such as metal tools, copper sheets, clothes, blankets, etc.

It is usually considered that in the first years of contact there were good relations between the European settlers and the Gitksan and Wet'suwet'en peoples.¹⁶⁴ The HBC established the first trading post, Fort Kilmaurs, close to Gitksan territory at Babine Lake in 1822.¹⁶⁵ In 1826, the HBC established a second post in the territory, Fort Connolly at Bear Lake. William Brown, one of the first fur traders in the area, wrote records of his encounters with the societies with which he traded that were used during the trial.¹⁶⁶ The records of Daniel Williams Harmon, who was also a fur trader in the area, were also used at trial and referred mainly to the Wet'suwet'en.¹⁶⁷ According to both records, Indigenous leaders of both nations had control of certain areas and access to those areas had to be granted.¹⁶⁸ The leaders also determined the amount of hunting and trapping allowed. The records also mentioned the existence of properties owned individually, reflecting a certain degree of individual control over the land.¹⁶⁹

monopoly extended from Labrador to the Pacific, from the Pacific Northwest to the Arctic Ocean, an area approximating one twelfth of the Earth's land mass. See also the Deed of Surrender of 1869. The National Archives of the UK, ref.CO42/694.

¹⁶³ Hudson's Bay Company's website, online: <<http://www2.hbc.com/hbc/history/>>.

¹⁶⁴ Patricia D. Mills, "Reconciliation: Gitksan property and crown sovereignty" PhD Thesis, UBC Faculty of Law (Vancouver: University of British Columbia, 2005), at 11.

¹⁶⁵ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR(4th) 185; 5 CNLR5; CanLII 2372 (BCSC), at 25.

¹⁶⁶ Proceedings of the Supreme Court of British Columbia 1990-04-20, volume 326, 24890-24904. Submissions by Mr. Adams in the *Delgamuukw* trial, which also contained explanations of the materials by Brown made by Professor Arthur Ray, one of the experts offered by the plaintiffs. Dara Culhane, "Delgamuukw and the People without culture: Anthropology and the Crown" PhD Thesis, SFU Department of Sociology and Anthropology (Vancouver: Simon Fraser University, 1994), at 248-249.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

European contact with the Gitksan and Wet'suwet'en peoples was not as broad as the contact with the Haida and other nations that lived further south or on the coast of BC. Even after the arrival of European traders in their territory, the Gitksan and the Wet'suwet'en continued to trade mainly through their usual networks. William Brown considered that it was difficult to establish profitable direct commerce with them.¹⁷⁰ In the late 1860s, trails and the telegraph line were constructed in Gitksan territory using Indigenous labour.¹⁷¹ A little later, canneries and sawmills were established where mainly Indigenous peoples worked.¹⁷² It is considered that the extended families and communities had a say in who would work and for how long, with the aim of balancing the many activities and the wealth of the communities.¹⁷³ Subsequently, in 1880s, gold was found in Omenica and many people traveled across Gitksan territory, increasing contact.¹⁷⁴

Several diseases such as smallpox and measles destroyed or weakened entire communities in the Canadian Northwest and in other parts of North America, such as Mexico.¹⁷⁵ According to some sources, the first important epidemics occurred in the center and north of British Columbia in the 1830s.¹⁷⁶ It is believed that smallpox killed several thousand people following an especially bad epidemic in 1862, when smallpox claimed 30 percent of the Gitksan population.¹⁷⁷ In the 1860s and 1870s, several villages were abandoned, such as Gitsaex and Gitlaxdzawk. Eventually, due to the increased number of settlers in the territories, the epidemics, and the imposition

¹⁷⁰ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at Part 4, 25-26. Chief Justice McEachern also mentions that Brown also recognized that beaver returns were never what he hoped they would be, and that he had great difficulty getting the Indians in his area to be as industrious in their trapping as he wished they would be.

¹⁷¹ Richard Daly, *supra* note 159, at 129.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, at 130.

¹⁷⁴ *Ibid.*

¹⁷⁵ Bradley R. Howard, *Indigenous Peoples and the State: The Struggle for Native Rights* (USA: Northern Illinois University Press, 2003), at 39-40; estimates that by the end of the 19th century, over 94 percent of all Aboriginal people in the Americas had died as a result of war or disease. This is a very contested number.

¹⁷⁶ R. Boyd, "Smallpox in the Pacific Northwest, The First Epidemics" (Spring 1994) *BC Studies* No. 101, at 6 and 40. Chief Justice Allan McEachern in *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC) recognized this fact in the case, at Part 4, 25. Richard Daly, *supra* note 159, at 108 does not mention a number but writes about lethal epidemics.

¹⁷⁷ Robert S. Grumet, "Changes in Coast Tsimshian Redistributive Activities in the Fort Simpson Region of British Columbia, 1788-1862" (1975) 22 *Ethnohistory*, 4, at 294-318.

of reserves, the first conflicts between the Gitksan and the Wet'suwet'en and the new immigrants occur.

According to James A. McDonald and Jennifer Joseph's text on "Key Events in the Gitksan encounter with the Colonial World,"¹⁷⁸ in 1861, the Legislative Assembly of Vancouver Island petitioned for the last time to extinguish Aboriginal title in BC.¹⁷⁹ The Assembly was not successful in declaring the extinguishment of Indigenous title in the province due to a lack of funds to pay for the surrender of land. In late 1860s, BC established its system of Indian reservations giving ten acres per Indigenous family and a land policy that allotted 160 acres of land to any British subject willing to use and improve the land, explicitly excluding Indigenous peoples.¹⁸⁰ Timber policy between 1864 and 1888 allowed the sale of timber leases to European loggers in the colony, which also excluded Aboriginal people.¹⁸¹ In 1884, the federal government outlawed the feasts (also called *potlatch*), a major social, economic, and political institution of Pacific North Coast First Nations.¹⁸²

The first recorded dispute between the Gitksan and the European immigrants was the Skeena River blockade in 1872. The Gitksan blockaded the Skeena River to protest the destruction of eleven village longhouses and thirteen totem poles by traders and miners in Gitsegukla. The government feared that the protest would prevent river transport and Lieutenant Governor Joseph Trutch visited the Gitksan accompanied by several naval vessels.¹⁸³ Gitksan chiefs met with Trutch to resolve the dispute and successfully negotiated compensation for the families.

¹⁷⁸ In Margaret Anderson and Marjorie M. Halpin (Eds.), *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks* (Vancouver: UBC Press, 2000).

¹⁷⁹ James A. McDonald and Jennifer Joseph cite Peter A. Cumming, Neil H. Mickenberg, Indian-Eskimo Association of Canada, "Native rights in Canada" (Chicago: Northwestern University, 1972) *Volume 2687 of Native American legal materials collection*, at 177.

¹⁸⁰ M.A. Ormsby, *British Columbia: A History* (Toronto: Macmillan, 1958), at 179.

¹⁸¹ G.K. Ainscough, "The British Columbia Forest Land Tenure System" in W. McKillop and W. Mead, *Timber Policy Issues in British Columbia* (Vancouver: UBC Press, 1976), at 35.

¹⁸² *Indian Act, 1884* Section 3. Many Gitksan chiefs openly held feasts and as a result were arrested by the Royal Canadian Mounted Police with the help of Indian agents during the many years that that law was in force (until 1951).

¹⁸³ Patricia D. Mills, *supra* note 164, at 19.

The first reserves in Gitksan territory, mainly around the Skeena villages, were established in 1891. The reserve commissioners found hostility in the area during their surveys and studies. During the settlement of the reserves, the Indigenous peoples were informed by the commissioners that these processes would not interfere with their Aboriginal rights or prejudice their claims¹⁸⁴ which were expected to be dealt with later by the courts.

In 1909, Gitksan chiefs met with Special Commissioners Stewart and Vowell (appointed by the Department of Indian Affairs) and expressed their concerns with their rights over their land.¹⁸⁵ In 1910, the chiefs sent a petition to Prime Minister Wilfrid Laurier protesting against the dispossession happening in their unceded land and requesting their recognition of the ownership and rights over their territory.¹⁸⁶ The chiefs did not obtain any recognition of their title and jurisdiction, but more surveys were done in their territories.

From 1909 to 1920, Gitksan chiefs continuously stopped surveyors and road building in their valley, leading to the arrest of many of their leaders.¹⁸⁷ In the following years, more land was taken for the railway and the size of the reservations was decreased while protests continued. As a result, in 1915, many First Nations groups formed the Allied Tribes of BC. This association pursued legal cases on Aboriginal rights.

In the late 1920s, the House of Commons and Senate inquired into some of the claims by Indigenous nations in BC but rejected them.¹⁸⁸ From that moment forward, it

¹⁸⁴ Proceedings of the Supreme Court of British Columbia 1989-05-18, volume 228, 16533 – 16536, which include a section of the testimony of R. Galois in the *Delgamuukw* case.

¹⁸⁵ Richard Daly, *supra* note 159, at 199. Patricia D. Mills, *supra* note 164, at 46 cites a piece in the papers: “Indian Unrest,” [Vancouver] *Province* (16 July 1909).

¹⁸⁶ *Ibid.* at 49.

¹⁸⁷ Don Money and Skanu’u (Ardythe Wilson) *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet’suwet’en Sovereignty Case* (BC: Gabriola Island New Society, 1991), at 11.

¹⁸⁸ Appendix to the Journals of the Senate of Canada, First Session of the Sixteenth Parliament 1926–1927, Special Joint Committee of the Senate and House of Commons Appointed to Inquire in the Claims of the Allied Tribes of British Columbia, as set forth by their Petition submitted to Parliament in June 1927, Report and Evidence, at 219 and 250.

became obvious that government institutions were disregarding the First Nations' claims and petitions, denying them any interest in the lands. In 1927, an amendment to the *Indian Act* was passed prohibiting the raise of funds for court cases.¹⁸⁹

In 1931, different nations, including the Gitksan and Wet'suwet'en peoples, formed the Native Brotherhood of British Columbia, which succeeded the Allied Tribes of BC.¹⁹⁰ In 1968, the Gitksan-Carrier (Carrier is a former name used by the Wet'suwet'en Nation) Tribal Council is established, which, in 1977, issued a declaration of sovereignty and rights and demanded land claims negotiations.¹⁹¹ Neither the provincial nor federal government agreed to negotiate.

According to the lawyers interviewed for this study, constant and increasing prosecutions and confiscation of hunting and fishing tools were common in Gitksan and Wet'suwet'en territory, which prompted the community to frequently seek legal advice. These prosecutions and confiscations were the main cause behind the filing of the *Delgamuukw* claim by Wet'suwet'en and Gitksan chiefs in 1984.¹⁹²

It seems that the rejection is due to a certain degree of deference to the provincial government and its policies, and stands on an interpretation of Section 109 of the *Constitutional Act* of 1867, which states: *British Columbia, Ontario, Québec, New Brunswick, and Nova Scotia are given constitutional control over their land and natural resources*, in connection with article 13 of the Terms of the Union, which stated that the Dominion (Canadian) government held responsibility for Indians and the trusteeship and management of lands reserved for Indians. At the moment, the interpretation of what 'reserved lands' meant was contested, and the Committee seems to defer to the interpretation of the provincial government that 'reserved lands' meant lands already set as reserves by the provincial government.

¹⁸⁹ Royal Commission on Aboriginal Peoples, "Indian Act 1927," in *The Report of the Royal Commission on Aboriginal peoples, vol. 1, part 1: The Relationship in Historical Perspective, Stage Three: Displacement and Assimilation*. (Ottawa: The Commission, 1996). Online at: <http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html>.

¹⁹⁰ See the Native Brotherhood of British Columbia website. Online: <<http://nativebrotherhood.ca/wp-content/uploads/2011/07/constitution.pdf>>.

¹⁹¹ See Gitksan Chiefs Office website. Online: <<http://www.gitksan.com/our-history/history-of-resistance.html>>.

¹⁹² Stuart Rush, QC, Counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 14 December 2011. According to Mr. Rush and Prof. Jackson, legal advice was and continues to be expensive. The cost of the lawyers' fees for the case of *Delgamuukw* was partly provided by a fund (Test Case Fund) of the federal government to which the communities could apply at that time, but is not available any longer. The lawyers of the Hereditary Chiefs received considerably lower fees than those received by the federal and provincial governments' lawyers. Michael Jackson mentioned that their fees only covered for one week of work of four in one month. Prosecutions and confiscations are still very common in the territories.

Moreover, Gitksan and Wet'suwet'en peoples organized blockades and protests from the beginning of the 20th Century against timber, construction, and fishing licenses. The protests continued after the presentation of the *Delgamuukw* case. Large and continuous protests and blockades happened in 1985, 1986, 1988, 1989, 1990, 1991, 1993, and 1995 while the *Delgamuukw* case was being prepared and on appeal.¹⁹³ The blockades and protests caused many members of the communities to be imprisoned and reflect many of the issues that were at stake in the case of *Delgamuukw*.

In 1989, when the Department of Indian Affairs closed its Hazelton office, the nine band councils organized themselves into three main organizations: The Office of Hereditary Chiefs, The Gitksan-Wet'suwet'en Education Society, and the Gitksan-Wet'suwet'en Government Commission.¹⁹⁴ Since the beginning of the 1990s, chiefs can exercise jurisdiction over minor criminal cases involving their house members.¹⁹⁵ These organizations succeeded the band councils, institutions established through the *Indian Act*.¹⁹⁶ Today, both nations are struggling with internal divisions while the question of their land claims continues to be unresolved.¹⁹⁷

3.1.2 The claims at trial

Several chiefs of the Gitksan and the Wet'suwet'en, both individually and on behalf of seventy-one houses, sought the recognition of their ownership of, and jurisdiction

¹⁹³ See the Native Brotherhood of British Columbia website, *supra* note 190. Richard Daly, *supra* note 159, at 56.

¹⁹⁴ See Neil J. Sterritt and Robert Galois, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998) and Wilson Duff, *Histories, Territories and laws of the Kitwancool* (Royal British Columbia Museum, 1989). See also James MacDonald, *People of the Robin* (Edmonton: CCI Press, 2003).

¹⁹⁵ See the program called "Unlocking aboriginal justice." Online: <<http://www.wetsuweten.com/departments/human-and-social-services/wetsuweten-unlocking-aboriginal-justice>>. James McDonald and Jennifer Joseph, "Key Events in the Gitksan encounter with the Colonial World" in Margaret Anderson, *supra* note 178, at 213.

¹⁹⁶ James McDonald and Jennifer Joseph, *supra* note 178. See also Antonia Curtze Mills (ed.) *Hang Onto These Words': Johnny David's Delgamuukw Evidence* (Toronto: University of Toronto Press, 2005),

¹⁹⁷ See, for example, the continuous issues that arise among the Gitksan such as the blockade to the Gitksan Treaty Society, reported by the Globe and Mail website. Online: <<http://www.theglobeandmail.com/news/british-columbia/judge-perplexed-that-illegal-gitksan-blockade-is-still-in-place/article4105794/>>; the Treaty Commission of British Columbia website, online: <<http://www.bctreaty.net/nations/gitksan.php>> and <<http://www.bctreaty.net/nations/wetsuweten.php>>. Other government websites in British Columbia, online: <<http://www.gov.bc.ca/arr/firstnation/gitksan/#negotiations>>. See also the recent decision *Gitksan Treaty Society*, 2012 BCSC 452.

over, 133 territories. They claimed costs of the action and a legal declaration from the court that established the following:¹⁹⁸

1. That the plaintiffs have a right to own the land and a right to have jurisdiction over the territory;
2. That these rights include the right to use, harvest, manage, conserve and transfer the lands and natural resources, and make decisions in relation thereto;
3. That these rights include the right to govern the territory, themselves, and the members of the Houses represented by the plaintiffs in accordance with Gitksan and Wet'suwet'en laws, administered through Gitksan and Wet'suwet'en political, legal, and social institutions as they exist and develop;
4. That these rights include the right to ratify conditionally or otherwise refuse to ratify land titles or grants issued by the defendant province after October 22, 1984, and licenses, leases, and permits issued by the defendant province at any time without the plaintiffs' consent;
5. That their rights are recognized and affirmed by Section 35 of the *Constitution Act, 1982*;
6. That the Province's right over the lands, mines, minerals and royalties within the plaintiffs' territory is subject to the plaintiffs' rights pursuant to Section 109 of the *Constitution Act, 1967*;
7. That the Province's ownership and jurisdiction over the territory of the plaintiffs, and members of the houses represented by the plaintiffs is subject to the plaintiffs' right to ownership and territory, and that BC cannot interfere with the rights of the plaintiffs;
8. That the plaintiffs are entitled to govern the territory by Aboriginal laws which are paramount to the laws of BC; and
9. That the plaintiffs are entitled to damages from BC for the wrongful appropriation and use of the territory, or by its servants, agents, or contractors, without the plaintiffs' consent since 1858, as well as damages for any harm to,

¹⁹⁸ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5CNLR5; CanLII2372 (BCSC), at 41.

or resources removed from, the territory by or under the authority of the Crown since that date.” (The amount of damages was not dealt with at trial.¹⁹⁹)

The plaintiffs also claimed the right to terminate all less than fee simple legal interests in the territory, such as logging, mining, and other licenses, and a *lis pendens* against BC over an area of the territory.²⁰⁰

The main argument of the original claim was that the Gitksan and the Wet’suwet’en had been living on the land since time immemorial, that they had never ceded their rights over the land, and thus, according to the common law, they owned the land and had jurisdiction over it.

According to the lawyers, the plaintiffs did not see their legal expectations covered by the existing concept of Aboriginal title, and considered that ‘fee simple ownership’ was the closest legal scheme to that of each nation’s concept of Aboriginal right in the land. In other words, the plaintiffs argued that their Aboriginal right –as claimed– was equivalent to ownership in fee simple.²⁰¹

Fee simple ownership means that the Crown does not have any beneficial interest, administration or control over the land.²⁰² The province may keep the right to regulate certain uses of the land but it no longer benefits from that land.²⁰³ The plaintiffs argued that the main difference between their concept of Aboriginal right in the land and the legal concept of fee simple ownership was that the plaintiffs cannot

¹⁹⁹ *Ibid.*, at Part 16, 255:

The plaintiffs did not press these claims in argument and I understand the rights asserted against the Indians arose under what I must assume was valid Canadian or British Columbia legislation. I am satisfied the plaintiffs have not established any claims for damages in this action.

²⁰⁰ *Ibid.*, at Part 6, 43. For the territory see also pages 6 -9, Schedule ‘A’, and the delineated map in Schedule ‘B’.

²⁰¹ Stuart Rush, QC, Counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 14 December 2011 and Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.

²⁰² *Ibid.*

²⁰³ *Ibid.*

alienate their lands by sale, transfer, mortgage, or other disposition except to Canada by treaty concluded at a public assembly.²⁰⁴

They also argued that their ownership of the territory entitled them to govern the territory free of provincial control in all matters where their traditional laws conflicted with provincial law.²⁰⁵ This exclusive governance and control over the land and the members of their houses was what they claimed as ‘jurisdiction’ over the territory.²⁰⁶

The plaintiffs requested from the courts a declaration that they could govern their peoples and territories without intervention from the provincial government. According to the trial judge, this plea had the aim that if any of their house members decided not to obey any provincial law and proceedings were brought to force compliance, such a member could plead their traditional laws and the declaration of the court in their defense.²⁰⁷

The plaintiffs acknowledged the underlying title of the Crown to the lands, but asserted that their claims constituted a burden upon that title. According to the trial judge, the plaintiffs could not avoid this reasonable admission.²⁰⁸ It sets the legal basis for any discussion of title. The plaintiffs claimed that the BC provincial government had been violating their rights (ownership and jurisdiction over their land) by imposing its jurisdiction on their communities.²⁰⁹

During trial, the court allowed a *de facto* amendment to permit “a claim for Aboriginal rights other than ownership and jurisdiction.”²¹⁰ The courts considered the

²⁰⁴ *Ibid. Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at Part 3, 15.

²⁰⁵ *Ibid.*, at Part 3, 16.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*, at Part 10, 79.

²⁰⁹ *Ibid.*, at Part 3, 16.

²¹⁰ *Ibid.*, at Part 6, 40.

plaintiffs' claim not to be a typical collective or communal claim. The *Delgamuukw* case was not a joint claim to the whole territory but claims of specific Houses of both peoples.²¹¹ Each chief claimed one or more territories as his/her own or on behalf of the rest of the members of their houses. This presented an obvious challenge for the trial judge, who did not understand why they did not use the organs of representation established by law (band councils), since in his perspective it would have made it easier to advance their claim.²¹² Nevertheless, the judge did recognize that in the long term this decision had positive consequences for the maintenance of the Gitksan and Wet'suwet'en cultures.²¹³

The Gitksan and Wet'suwet'en peoples are divided into clans and houses. There is not a chief of the entire community but a group of chiefs of the different Houses that resolve in council issues that involve the entire or a part of the community. Each chief is responsible for her/his own houses and territories. The houses follow a matrilineal line and organize feasts and councils for public-accounting and decision-making.²¹⁴ The view of the Gitksan and Wet'suwet'en was that in order to correctly share and prove their laws to the courts, they had to come to court following their own laws, institutions, and rules of etiquette. They came as an entire community that interacts with each other upon the same laws, institutions, and rules; but could only attest for each territory individually, because there is no high institution or chief that knows the reasons behind all the boundaries of their different communities. For them to 'know' the reasons behind the boundaries is to 'own' the boundaries.²¹⁵ Public accounting and decision making happens in the feasts and reunions that have been held and continue to happen to socially recognize these laws.²¹⁶

²¹¹ *Delgamuukw v British Columbia* [1993] 5 WWR 97, at para. 73

²¹² *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at Part 5, 37.

²¹³ *Ibid.*, at Part 5, 31- 37.

²¹⁴ *Ibid.*, and Richard Daly, *supra* note 159.

²¹⁵ Stuart Rush, QC, Counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 14 December 2011 and Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.

²¹⁶ Richard Daly, *supra* note 159, at 57.

The plaintiffs came as representatives of their houses and of their communities with two objectives. They came as representatives of their houses so that they could prove the laws and boundaries of their respective territories, and they came as representatives of their entire communities so that they could obtain a legal decision that affects them equally as inhabitants of a territory with a homogenous legal system that has existed since before the arrival of the European settlers.²¹⁷

The defendant's argument

The Province, as the defendant, counterclaimed that the Gitksan and Wet'suwet'en had neither right nor title to the Claim Area or the resources thereon, thereunder, or thereover.²¹⁸ The Province also counterclaimed that, if any declaration was made regarding the plaintiffs' action, it should be for compensation from Her Majesty the Queen in right of Canada (the federal government), and not in right of British Columbia.²¹⁹

One of the arguments used by the Province was that the Gitksan and Wet'suwet'en were not an organized society.²²⁰ Only an organized society could 'have' a concept of land ownership that could be protected today. Moreover, the Province argued that there were no Aboriginal interests similar to what the plaintiffs meant by 'ownership' and 'jurisdiction' in the territory to which the Gitksan and Wet'suwet'en were entitled.²²¹

²¹⁷ Stuart Rush, QC, Counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 14 December 2011 and Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.

²¹⁸ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at Part 6, 43.

²¹⁹ *Ibid.*

²²⁰ As it has been explained above, this was requirement imposed in the previous Aboriginal right case of *Baker Lake (Hamlet) v Minister of Indian Affairs and Northern Development*, [1980] 1 FC 518 (TD)

²²¹ Trial transcript of hearing at the British Columbia Court of Appeal in the case of *Delgamuukw* in session on Friday, June 5, 1992, 2:00 p.m., at 1651.

Furthermore, the Province argued that Aboriginal title in BC had been extinguished.²²² The Province argued that the policy of the colony had been that the territory was open for settlement with the exception of Indian villages and the surrounding hunting and farming fields.²²³ According to the Province, the colony and later the province had ruled that Indigenous peoples could use the rest of the vacant public lands, just as everybody else could, and thus there was no room for Aboriginal interests in the land.²²⁴

The Province also argued that the *Royal Proclamation of 1763* had no application in BC because BC was not part of Canada at the time.²²⁵ Another argument was that Aboriginal rights were settled with the allocation of reserves and subsidies.²²⁶ Moreover the defendants argued that many of the areas claimed had been abandoned by long periods of non-Aboriginal use.²²⁷

The claims and counterclaims changed considerably in form and substance during the trial and the appeals. It seems that there were eight amended statements of claim during the trial proceedings alone.²²⁸ The original claims changed from ‘ownership’ and ‘jurisdiction’ to that of ‘Aboriginal title’ and ‘self-government.’²²⁹ In my perspective, the changes reflected a constant need in the part of the plaintiffs to adapt to the rules that were being defined (in the trial process) regarding Aboriginal title, the ways to prove it, and the impossibility of claiming according to their own perspectives. This is not unusual in Canada, where courts often re-characterize

²²² *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at Part 15, 233.

²²³ *Ibid.*, at Part 15, 242.

²²⁴ *Ibid.*, at Part 10, 81.

²²⁵ *Ibid.*, at Part 10, 84-98.

²²⁶ *Ibid.*, at Part 13, 187.

²²⁷ *Ibid.*

²²⁸ *Ibid.*, at Part 6, at 40. Most of the statements were to add or delete plaintiffs who had changed (died) during the course of the trial. Stuart Rush, QC, Counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 14 December 2011.

²²⁹ According to Stuart Rush, no case had found ‘ownership’ and ‘jurisdiction’ but previous cases (such as *Calder*) had recognized the right of ‘Aboriginal title.’ Stuart Rush, QC, Counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 14 December 2011.

Aboriginal constitutional claims.²³⁰ In this case, the claims of the Gitksan and Wet'suwet'en had to be fitted into a particular 'box' or else they would not be reviewed.

3.1.2.1 Study of evidence

To prove that the nations of the Gitksan and Wet'suwet'en existed, were organized, had a distinctive culture, language, and traditions, and lived in the claimed territory since before contact, the plaintiffs called twenty-four witnesses and twenty-one experts, filed fifty-three territorial affidavits and 9,200 exhibits, and presented around 3,000 pages of commission evidence.²³¹

Several chiefs and elders attested to the oral histories (*adaawk* and *kungax*) that establish their territories, which are a large part of their law.²³² Some of the testimony was given through commission evidence in the homes of elders due to their inability to travel.²³³ The experts called were historical geographers, anthropologists, linguists, genealogists, archeologists, fishery scientists, and cartographers.²³⁴ They were used to confirm (and translate in a way) the testimonies of the many members of the community and the elders. Another piece of evidence was an aerial overview of the territory in helicopter trips, where several community members explained their views about the use of the land.²³⁵

The oral histories provided by the elders presented a huge challenge because this kind of evidence falls within the category of hearsay (their stories had been told to them) by Canadian evidence law.²³⁶ In the beginning of the trial, the Province's lawyers

²³⁰ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 265.

²³¹ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at 2.

²³² *Ibid.*, at Part 1, 1.

²³³ *Ibid.* Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ Hearsay is an out-of-court statement (or implied statement) that is offered to prove the truth of its contents. The essential defining features of hearsay are: 1) the fact that an out-of-court statement is adduced to prove the

attempted to have the oral tradition ruled not suitable for presentation as evidence but Chief Justice McEachern exempted oral tradition from the hearsay rule and allowed the testimony of the elders to proceed.²³⁷

Nevertheless, the testimonies were given little weight by the court. McEachern CJ stated that:

I remain persuaded that oral declarations of a reputation of ownership made by deceased persons, whether included in an *adaawk* or otherwise, is admissible on a question of an interest related to land. But I would be going outside the confines of law if I were to accept, as proof of ownership or title, evidence of statements: (a) made or imputed to deceased persons who purported to pronounce upon this question of title or ownership instead of giving evidence of a reputation of ownership; or (b) made by presently living persons either in the form of a pronouncement or of a reputation... There is a great deal of evidence, which falls into each of these categories, and I cannot possibly identify it all. As best I can, I must decide these questions relying only upon admissible evidence. Probably because of my ruling on admissibility and weight, counsel in argument did not specifically direct my attention to many such matters.²³⁸

I am driven to conclude... that much of the plaintiffs' historical evidence is not literally true... much evidence must be discarded or discounted ... because the evidence fails to meet certain standards prescribed by law... If I do not accept their evidence it will seldom be because I think they are untruthful, but rather because I have a different view of what is fact and what is belief.²³⁹

truth of its contents and 2) the absence of a contemporaneous opportunity to cross-examine the declarant as explained in David. M Paciocco and Lee Stuesser, *The Law of Evidence*, (Toronto: Irwin Law Inc., 2008), at 103

²³⁷ Dara Culhane, "Delgamuukw and the People without culture: Anthropology and the Crown" PhD Thesis, SFU Department of Sociology and Anthropology (Vancouver: Simon Fraser University, 1994).

²³⁸ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at Part 7, 47.

²³⁹ *Ibid.*, at Part 7, 49.

McEachern CJ considered that in the testimonies heard there was a mix of factual and cultural perspectives: “It was obvious to me, however, that very often they were recounting matters of faith which have become fact to them.”²⁴⁰

Moreover, the court concluded the chiefs made overlapping claims.²⁴¹ Chief Justice McEachern concluded, “the weight of evidence was overwhelmingly against the validity of the internal boundaries.”²⁴² In his opinion, there were too many uncertainties regarding the internal and external borders of the territory.²⁴³ For him, the claimed territory more likely represented trapping areas which ancestors of the present claimants had probably used for trapping and Aboriginal purposes for the past one hundred years or so.²⁴⁴ He considered that the many conflicting claims with other Indigenous peoples (Tsimshian, Nishga, Kitwankool, Tahltan/Stikine, Tsetsaut, Kaska-Dene, and Carrier-Sekani) also supported this conclusion, even though the validity of those conflicting claims was not studied or examined in the case.²⁴⁵

Chief Justice McEachern considered it proper to divide up the cultural, scientific, and factual evidence and review it from such perspective.²⁴⁶ Due to this, he was able to disregard everything that he considered not legally material and relevant to a communal claim. For example, he wrote:

²⁴⁰ *Ibid.*

²⁴¹ Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011. Some chiefs that had not visited their territories in a very long time could not precisely declare the boundaries of their territories, a situation that prompted some confusion regarding such borders.

²⁴² *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at Part 17, 273.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*, at Part 17, 266:

With regard to overlapping claims by other Indian peoples, the evidence discloses conflicting claims both along the external boundary, and indeed into the very heartland of the territories claimed by the Gitksan and Wet'suwet'en peoples in this action. These claims are advanced by Tsimshian, Nishga, Kitwankool, Tahltan/Stikine, Tsetsaut, Kaska-Dene, and Carrier-Sekanni peoples. It was not made clear to me what position the Babine people take with respect to this matter, but there seems to be much uncertainty about the Bear Lake area. The position of the Cheslatta Bands is also uncertain, but they and the Babine Indians have many reserves in the southern part of the territory claimed by the Wet'suwet'en. The validity of these conflicting claims has not been proven, but the very fact such claims have been made cannot be overlooked in any discussion about a certain reputation for "undisputed" ownership or occupation of lands.

²⁴⁶ *Ibid.*, at Part 8, 54.

Indian culture also pervades the evidence at this trial for nearly every word of testimony, given by expert and lay witnesses, has both a factual and a cultural perspective. For example, when a witness described how his grandparents were dispossessed by pre-emptors in the early years of this century from land they were using in the Bulkley valley they described a specific event which is relatively easy to analyze. I can regret the occurrence, but I must categorize it as a wrong not actionable in a communal claim.²⁴⁷

The judge recognized that his view was different from that of the plaintiffs but did not recognize that the Canadian legal systems and laws were also embedded in a certain culture. Still, he considered it was legally proper to impose the standards of the state's legal system when considering the legal systems of others. He supported his rejection of the evidence as follows:

Murdock (1959a:43) has claimed (without documentation) that African oral traditions concerning the origins of a tribe that are over a century old are correct less than 25 percent of the time... The scientific study of oral traditions is obviously an exacting task and requires a careful evaluation of the reliability of sources, the identification of stereotyped motifs that may distort historical evidence...Used in this way, oral traditions may supply valuable information about the not too distant past. Used uncritically, however, they can be a source of much confusion and misunderstanding in prehistoric studies.... In a case such as this, the Court may not be the best forum for resolving such difficult and controversial academic questions. ... I have no doubt they are truly distinctive people with many unique qualities.²⁴⁸

Moreover, McEachern stated, "I must assess the totality of the evidence in accordance with legal, not cultural principles..."²⁴⁹ I conclude from these passages that in the perspective of McEachern, facts and law needed to be empty of culture, or

²⁴⁷ *Ibid.*, at Part 7, 49.

²⁴⁸ *Ibid.*, at Part 7, 48.

²⁴⁹ *Ibid.*

in other words ‘autonomous’ from culture. For him, most of the stories were like fairytales, or as he stated, “supernatural.”²⁵⁰

This aspect of the claims and the corresponding evidence was also challenging to the lawyers acting as counsel for the plaintiffs. It seems that on some occasions the lawyers had difficulty in attesting to the legal value of a story of a mythical giant bear while making their arguments in court.²⁵¹

The plaintiffs brought several experts to support their claims, and to confirm and to translate the oral histories in the courts. McEachern concluded that the evidence provided by the archeologists brought in by the plaintiffs was not directly connected to the ancestors of the plaintiffs and that the experts’ evidence was biased towards the plaintiffs and “did not conduct their investigations in accordance with accepted scientific practices.”²⁵² The Chief Justice mentions several times in his Reasons for Judgment phrases like: “While I have considerable reservations about some of the archeological evidence...”²⁵³

In his decision, McEachern expresses the following about some of the experts: “...apart from urging almost total acceptance of all Gitksan and Wet'suwet'en cultural values, the anthropologists add little to the important questions that must be decided in this case...This is because, as already mentioned, I am able to make the required important findings about the history of these people, sufficient for this case, without this evidence.”²⁵⁴ Anthropologists argue that it was not the role of the judge to

²⁵⁰ *Ibid.*, at Part 7, 46.

²⁵¹ Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.

²⁵² *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at 50. Chief Justice McEachern continued:

... the plaintiffs and their ancestors have been actively discussing land claims for many years, long before the McKenna-McBride Commission in 1914. This has been a very current issue with the plaintiffs for a very long time. The collection of evidence in such a climate deprives it of the independence and objectivity expected for reputation evidence. It may even render the declarations inadmissible for the authorities suggest the declaration, not just the reputation, must have been made before the controversy in question arose: Phipson, (13th ed.) para 24-28.

²⁵³ *Ibid.*, at 51.

²⁵⁴ *Ibid.*

understand and evaluate anthropological, archeological, and historical studies as he did.²⁵⁵ In the view of some anthropologists and archeologists, the materials submitted by historians and anthropologists were improperly utilized and badly understood by the court that heard the case.²⁵⁶

Experts are brought to the courts to “assist the trier of fact.”²⁵⁷ In the courts, all facts are established through the trial process, they do not simply exist. All science is ‘opinion,’ the reliability of any body of knowledge is always open to the court’s critical scrutiny, and what any expert is actually an expert of is a matter for the court to decide, guarding the boundary around the territory which belongs to the ‘trier of fact.’²⁵⁸ The knowledge produced in fields outside the juridical has effect within law only to the extent that it can be rescued from being mere ‘opinion’ and reconstructed as ‘fact.’²⁵⁹

Finally, the trial judge characterized the chronicles written by the traders in the area such as Brown as “one of our most useful historians.”²⁶⁰ Then later he wrote of the collections provided by historians as “marvelous collections that spoke for themselves.”²⁶¹ According to the judge, and thus the law, those sources were the ones holding the truth in the *Delgamuukw* case. This treatment of Mr. Brown’s piece of evidence also reflects the ways in which the trial judge understood a written ‘reporting-format’ document authored by people with more similar assumptions and cultural understandings to his. He thought that those collections could be used as autonomous sources of law in ways that other evidence could not.

²⁵⁵ Dara Culhane, Julie Cruikshank, Robin Fisher and Robin Ridington in Bruce G. Miller (ed.), “Anthropology and history in the courts” (Autumn 1992) 95 *BC Studies* (Vancouver: UBC Press).

²⁵⁶ *Ibid.*

²⁵⁷ David. M Paciocco and Lee Stuesser, *The Law of Evidence*, (Toronto: Irwin Law Inc., 2008), at 192 and following.

²⁵⁸ *Ibid.*

²⁵⁹ Robert van Krieken, “Law’s Autonomy in Action: Anthropology and History in Court” (2006) 15 *Social & Legal Studies* 574, at 576 and 579.

²⁶⁰ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at Part 4, 24.

²⁶¹ *Ibid.*, at Part 7, 52.

3.1.2.2 The trial decision

Chief Justice McEachern rejected all of the claims made by the plaintiffs (ownership, jurisdiction, and Aboriginal rights).²⁶² He concluded that Aboriginal title had been extinguished in British Columbia before it joined Confederation, and declared that Indigenous peoples had the right to use vacant Crown land for Aboriginal purposes within the limits of the laws.²⁶³ In his opinion, the *Royal Proclamation of 1763* had never applied to BC nor had any force in the colony or province of British Columbia.²⁶⁴ In his opinion, Indians did not live under the Crown's protection, and they owed the Crown no actual, legal or notional allegiance in the time of the Proclamation. He concluded saying that the policy of BC was liberal and generous because it allowed Indians the free use of all vacant Crown lands, even though he recognized that it did not always work out that way.²⁶⁵ He also recognized that there are voluminous historical records of the province, but little and only recent records regarding Indigenous peoples.

The judge considered that the interest of plaintiffs in the territory was nothing more than the right to use the land for Aboriginal purposes.²⁶⁶ He decided that the Aboriginal rights of the plaintiffs did not include commercial practices, as some of the plaintiffs claimed.²⁶⁷ Regarding the claim for jurisdiction McEachern CJ stated clearly:

[N]either this nor any Court has the jurisdiction to undo the establishment of the Colony, Confederation, or the constitutional arrangements which are now in place. Separate sovereignty or legislative authority, as a matter of law, is beyond the authority of any Court to award. ... This is not to say that some form of self-government for Aboriginal persons cannot be arranged. That, however, is

²⁶² *Ibid.*, at Part 21, 297.

²⁶³ *Ibid.*, at Part 15, 254.

²⁶⁴ *Ibid.*, at Part 10.

²⁶⁵ *Ibid.*, at Part 10, 97-98 .

²⁶⁶ *Ibid.*, at ix.

²⁶⁷ *Ibid.*, at Part 14, 231.

possible only with the agreement of both levels of government under appropriate, lawful legislation. It cannot be achieved by litigation.²⁶⁸

Regarding the issue of the extinguishment of Aboriginal title in BC, the Chief Justice considered that the intention to extinguish Aboriginal rights can be clear and plain without being stated in express statutory language or even without mentioning Aboriginal rights.²⁶⁹ According to McEachern, the ordinances, enactments, and reports (also called colonial instruments in the cases) which asserted British sovereignty during the colonial period extinguished all Aboriginal title and interests in the land. He based most of his arguments on thirteen of these instruments.²⁷⁰ In his judgment, when BC joined Canada in 1871, the province obtained all of the Crown lands of the colony under s. 109 of the *British North America Act, 1867*.²⁷¹ This meant that before this, all of the other interests had been extinguished.²⁷²

With respect to damages, the trial court decided that the claim for communal damages was to be dismissed.²⁷³ Chief Justice McEachern mentioned that the plaintiffs did not advance claims or provide evidence for damages for reduced reserves, or for interference with Indian use of vacant Crown land, and thus he did not rule on the matter.²⁷⁴ He mentioned that whether the plaintiffs should be compensated for any of the matters mentioned in the evidence was a matter for the Crown, not for the Court, to decide.²⁷⁵ Finally, he did not make any order for costs, so that each party paid for their own conduct in the case.²⁷⁶

McEachern CJ considered that the constitutional questions of ownership, sovereignty, and rights in which the Indigenous communities had invested so many of their legal

²⁶⁸ *Ibid.*, 225.

²⁶⁹ *Ibid.*, ix.

²⁷⁰ *Ibid.*, at Part 11, 116-127.

²⁷¹ *Ibid.*, at Part 15, 245.

²⁷² *Ibid.*

²⁷³ *Ibid.*, at Part 16, 255.

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*, at 256.

²⁷⁶ *Ibid.*, at Part 21, 297.

expectations, were indeed fascinating legal issues that, in his opinion, cannot solve the underlying and urgent economic and social problems of the communities.²⁷⁷ He considered that Indigenous peoples have had many opportunities to join Canadian economic and social mainstream life, but that some Indians do not wish to join.²⁷⁸ He considered the dialogue created by this polarization “cacophonous” and the arguments used in the court “exaggerated.”²⁷⁹ He finished his reasons for judgment recommending a new arrangement of the relationship between the state and Indigenous peoples and the recognition that “the worst thing that has happened to our Indian people was our joint inability to react to failure and to make adjustments when things were not going well.”²⁸⁰

The lawyers interviewed for this study were surprised at the tone of the decision and the conclusions of the Chief Justice McEachern.²⁸¹ Some believe that the judge obviously “was a prisoner of his own cultural perspectives.”²⁸² I think that apart from being a prisoner of his own cultural perspectives, the judge was a prisoner of the cultural perspectives of the Canadian legal system, an idea that will be further elaborated in following chapters.

3.1.2.3 The British Columbia Court of Appeal’s decision

A panel of five BCCA judges heard the first appeal in *Delgamuukw* for thirty-five days. Justice MacFarlane wrote the majority decision, Justice Taggart concurred, Justice Wallace also concurred in the decision but wrote a separate opinion, Justice Hutcheon dissented in part, and Justice Lambert dissented.²⁸³ Canada participated as

²⁷⁷ *Ibid.*, at Part 22, 299.

²⁷⁸ *Ibid.*, at Part 22, 299.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ Stuart Rush, QC, Counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 14 December 2011 and Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.

²⁸² Robin Ridington, “Fieldwork in Courtroom 53: A Witness to *Delgamuukw v B.C.*” in Bruce G. Miller (ed.), *Anthropology and History in the Courts* (Autumn 1992) 95 *BC Studies*. Michael Jackson argues also that Judge McEachern might have considered that the chiefs were unrepresentative of the Indigenous population in British Columbia, considering that most Indigenous peoples were undeveloped and in need of assistance and help.

²⁸³ *Delgamuukw v British Columbia* [1993] 5 WWR 97.

an intervenor.²⁸⁴ There were many other intervenors and *amici curiae* that were appointed to help resolve the issues in the case.²⁸⁵

The Gitksan and Wet'suwet'en appealed the trial decision mainly claiming that, "they have unextinguished Aboriginal rights which include a right of ownership, or in the alternative, a proprietary interest in the lands and resources within the claimed territory, and a right of self-regulation, with respect to such lands, resources, and people."²⁸⁶ They also claimed that there had been no extinguishment of Aboriginal rights in BC by 1871; that the trial judge erred in his findings of fact for failing to give effect to evidence that proved their title; and that the trial judge's *sui generis* categorization of their rights was wrong.²⁸⁷ The defendant changed its position during the appeal, asking the court to consider the issue of extinguishment of Aboriginal rights from a different perspective. The Province came to the BCCA claiming that "there had been no blanket extinguishment of Aboriginal rights, pre- or post-confederation in BC."²⁸⁸ This shift happened due to a change in the party governing the province.²⁸⁹

The Province argued that the trial court's findings that the plaintiffs had failed to establish a right of ownership or a proprietary interest in lands in the territory ought not to be disturbed, and that the plaintiffs had failed to establish a right of self-regulation with respect to lands and resources.²⁹⁰ The Province contended that the Chief Justice was correct in his analysis of the oral histories evidence and in the *sui generis* characterization of the Aboriginal rights claimed by the plaintiffs.²⁹¹

²⁸⁴ *Ibid.*, at para. 16.

²⁸⁵ *Ibid.* at para 13. The *amici curiae* were Charles F. Willms, P. Geoffrey Plant and Thora A. Sigurdson.

²⁸⁶ *Ibid.*, at para. 8.

²⁸⁷ *Ibid.*, at para. 9.

²⁸⁸ *Ibid.*, at para. 9, a).

²⁸⁹ Parliamentary Research Brand, Parliament of Canada, "The Nisga'a Final Agreement (PRB 99-2E)," Online: <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb992-e.htm>>:

The newly-elected New Democratic Party (NDP) government recognized Aboriginal title and Aboriginal peoples' inherent right of self-government.

²⁹⁰ *Delgamuukw v British Columbia* [1993] 5 WWR 97, at para. 9, b) and c).

²⁹¹ *Ibid.*, at para. 39, e).

During the appeal, the plaintiffs' main claims changed to Aboriginal title and self-government and they were advanced as communal claims instead of individual claims. These changes were not formal and happened *de facto*.²⁹² The appeal court divided the claim into three main issues. The first concerned the extinguishment of Aboriginal interests in the province of BC. The second related to the existence of the Aboriginal rights of the plaintiffs to the territory, and its resources. The third was the Aboriginal rights of the plaintiffs of ownership and jurisdiction with respect to the territory, its resources and their people.²⁹³ No appeal was made against the dismissal of the actions against Canada and so no examination of this part of the original counterclaim was made.²⁹⁴ The BCCA also did not examine the issue of compensation, declaring that: "Additionally, the parties have asked us not to deal with the question of the right to and amount of compensation, if any. Accordingly, I leave questions of compensation to future proceedings."²⁹⁵

The analysis of the case gave great attention to the issue of what could be considered a 'custom, practice or use of the tribal land in a manner integral to the plaintiffs indigenous way of life.'²⁹⁶ The court analyzed whether the plaintiffs' practices were integral to their distinctive cultures, whether there were any existing at the time when sovereignty was asserted, and whether their rights to those practices had been extinguished before 1982.²⁹⁷

The BCCA determined that they would not interfere with the assessment of the evidence made by the Chief Justice.²⁹⁸ In the view of the majority in the court, the Aboriginal law-making competence was superseded when the legislative power of the

²⁹² *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 in its introductory part.

²⁹³ *Delgamuukw v British Columbia* [1993] 5 WWR 97, at para. 11.

²⁹⁴ *Ibid.*, at para. 12.

²⁹⁵ See *Delgamuukw v British Columbia* [1993] 5 WWR 97, at para. 258:

²⁹⁶ *Ibid.*, at para. 48.

²⁹⁷ *Ibid.*, at para. 48 and 51.

²⁹⁸ *Ibid.*, at para. 127 and 124:

Given the length of the trial, the number and variety of witnesses (some lay and some expert), and the immense volume of evidence, I think it would be inappropriate (if not dangerous) for this court to intervene and substitute its opinions for those of the trial judge.

sovereign was imposed in 1858 and the governor of BC was empowered to make laws for the colony.²⁹⁹ Moreover, the law-making capacity of Indigenous peoples was also not consistent with the constitutional framework established since the *Constitution Act of 1867* and the establishment of the province in 1871.³⁰⁰ Justice MacFarlane concluded that “[n]o court has authority to make grants of constitutional jurisdiction in the face of clear and comprehensive statutory and constitutional provisions.”³⁰¹ The claim to the right to control and manage the use of lands and resources in the territory was considered not successful because the plaintiffs failed to establish the necessary ownership needed to support such a jurisdiction.³⁰²

Justices Lambert and Hutcheon wrote in dissent concluding that the plaintiff’s rights to ‘self-regulation’ had not been extinguished by the assertion of British or Canadian sovereignty.³⁰³ These two justices discussed self-regulation and differentiated it from the idea of self-government presented in the case by the plaintiffs.³⁰⁴

All five judges were of the opinion that extinguishment could be implicit and did not need a piece of legislation to be proven. But all five judges also agreed that the thirteen colonial instruments considered as the substantial evidence of the extinguishment of Aboriginal title in BC by Chief Justice McEachern, did not manifest a clear and plain sovereign intention.³⁰⁵ The court decided that the purpose of the thirteen colonial instruments was to establish a management framework of the colony. For them there was no inconsistency between the recognition of the burden of Aboriginal title in BC and the assertion of British sovereignty in BC established in those documents.

²⁹⁹ *Ibid.*, at para. 210, 483.

³⁰⁰ *Ibid.*, at para. 168.

³⁰¹ *Ibid.*, at para. 175.

³⁰² *Ibid.*, at para 174.

³⁰³ *Ibid.*, at para. 1073-1081 (Justice Lambert) and 1177-1178 (Justice Hutcheon).

³⁰⁴ *Ibid.*, at para. 853 (Justice Lambert) and 1163 (Justice Hutcheon).

³⁰⁵ *Ibid.*, at para. 221.

The BCCA held that the *Royal Proclamation of 1763* did not apply to Indian lands in BC and also held that no consent prior to 1982 was necessary for the extinguishment of Aboriginal interests in the land.³⁰⁶ The court also held that the fiduciary obligation of the Crown to Indigenous peoples was a principle that guided the application of the *Constitution Act 1982*, and was evidence that the honour of the Crown is engaged in the relationship with Aboriginal peoples.³⁰⁷ Thus, according to the court, the honour of the Crown and the fiduciary obligation required a clear and plain test to extinguish Aboriginal rights, and as it had been established in *Sparrow*, the intention to limit the exercise of a right cannot suggest that the right had been extinguished.³⁰⁸

According to the BCCA decision, there is a special constitutional scheme that protects Aboriginal interests since 1982 through section 35 of the *Constitution Act* of the same year.³⁰⁹ Nevertheless the framework of Aboriginal interests before 1982 is considered very different, particularly in regards to extinguishment because before 1982 extinguishment was possible but not after.³¹⁰

The BCCA concluded that the plaintiffs' Aboriginal rights were not extinguished before 1871.³¹¹ It also resolved that the Gitksan and Wet'suwet'en have unextinguished non-exclusive Aboriginal rights other than a right to ownership or a property right in a certain area. It issued a declaration that the plaintiffs had Aboriginal rights of occupation and use over part of the claimed territory.³¹² Most of the details that were discussed in the trial case, such as the boundaries of the territories and the characteristics of the recognized set of rights and freedoms, among other crucial definitions, were left for negotiation.³¹³

³⁰⁶ *Ibid.*, at para. 495.

³⁰⁷ *Ibid.*, at para. 194-197.

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*, at para. 667-670.

³¹⁰ *Ibid.*, at para. 241-259.

³¹¹ *Ibid.*, at para. 292.

³¹² *Ibid.*, at Part XV.

³¹³ *Ibid.*, at para. 234, 264, 467.

Both the plaintiffs and the defendant appealed the decision but at the same time, engaged in negotiations as recommended by the BCCA. After the SCC granted leave to appeal, the process was adjourned (for two years) with the intention of negotiating a treaty to settle the dispute. The effort failed due to “fundamental differences” between the parties’ views of the nature and scope of Aboriginal rights and jurisdiction and the parties resumed the case before the SCC.³¹⁴

3.1.2.4 The Supreme Court of Canada’s decision

The SCC decided to grant leave to appeal in June 1994 but it was not until June 1997 that the court heard the arguments. Both parties claimed and counterclaimed in the appeal. The Gitksan and Wet’suwet’en claimed they had Aboriginal title in the territory and governance rights in their territories.³¹⁵ They argued that the majority in the BCCA and the trial court wrongly disregarded the evidence that attested to their occupation, use, and rights over their territory.³¹⁶ The Province cross-appealed because it disagreed with the BCCA statement that the province did not have the legal authority to extinguish Aboriginal title according to the constitution.³¹⁷

BC argued that there was no evidence to sustain the appellants’ claim that they had Aboriginal title over the territory.³¹⁸ BC also argued that the claim for an Aboriginal land system implied Aboriginal sovereignty and could not be reconciled with the sovereignty of the Crown.³¹⁹ Still, the Province did recognize that the plaintiffs had Aboriginal rights of some kind in the entire area (58,000 square kilometers) that

³¹⁴ See *supra* note 81.

³¹⁵ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ Transcript of cassettes of hearing at the Supreme Court of Canada on appeal from the British Columbia Court of Appeal in the case of *Delgamuukw* in session on Monday, June 16, 1997, 9:47 a.m. at 126.

³¹⁹ Transcript of cassettes of hearing at the Supreme Court of Canada on appeal from the British Columbia Court of Appeal in the case of *Delgamuukw* in session on Monday, June 16, 1997, 9:47 a.m., at 130, and in 141 Joseph J. Arvay, counsel for the defendants argued that:

the way to reconcile the Aboriginal perspective with the Crown sovereignty...you cannot have two (2) sovereign, you just cannot...Then, you really do have a clash of sovereigns. Then, it is no longer about self-government. Then, it is the Aboriginal law determining who owns land in the province, who gets to take interest in land in the province.

ought to be defined not by the court but through negotiation.³²⁰ In the words of Counsel for BC, Joseph J. Arvay, to declare the Gitksan and Wet'suwet'en Aboriginal title in the area, as claimed by the plaintiffs, would mean that the "area or indeed all of British Columbia is now *prima facie* immune from provincial and federal laws."³²¹ Canada argued that there was no way to reconcile the communal Aboriginal title right over the territories that were argued and advanced as owned individually.³²²

The SCC judges unanimously agreed on its conclusions.³²³ The court allowed the appeal in part, ordered a new trial and dismissed the cross-appeal.³²⁴ The SCC allowed the plaintiffs' appeal regarding the examination and evaluation of evidence, but dismissed the rest of the appeal and decided that there was a need for a new trial in order to determine if the appellants had Aboriginal title over the territory.³²⁵ They also recommended that the Houses and the government negotiate the issues in the claims.³²⁶ No remedies were granted and no order for costs was made.³²⁷ All judges agreed that there was insufficient evidence before the Court to make any determination regarding the issues of self-government in the case.³²⁸

The main reasons to not consider the merits of the Gitksan and Wet'suwet'en collective claims on appeal were:

Given the absence of an amendment to the pleadings, I must reluctantly conclude that the respondents suffered some prejudice [as a result of the change from individual to collective]. The appellants argue that the respondents did not

³²⁰ Transcript of cassettes of hearing at the Supreme Court of Canada on appeal from the British Columbia Court of Appeal in the case of *Delgamuukw* in session on Tuesday, June 17, 1997, 9:48 a.m. at 172.

³²¹ Transcript of cassettes of hearing at the Supreme Court of Canada on appeal from the British Columbia Court of Appeal in the case of *Delgamuukw* in session on Monday, June 16, 1997, 9:47 a.m., at 131.

³²² Transcript of cassettes of hearing at the Supreme Court of Canada on appeal from the British Columbia Court of Appeal in the case of *Delgamuukw* in session on Tuesday, June 17, 1997, 9:48 a.m. at 174-180.

³²³ *Ibid.*

³²⁴ *Ibid.*, at para. 184.

³²⁵ *Ibid.*, at para. 187-188.

³²⁶ *Ibid.*, at para. 186, 207.

³²⁷ *Ibid.*

³²⁸ *Ibid.*, at para. 165-171, 205.

experience prejudice since the collective and individual claims are related to the extent that the territory claimed by each nation is merely the sum of the individual claims of each House; the external boundaries of the collective claims therefore represent the outer boundaries of the outer territories. Although that argument carries considerable weight, it does not address the basic point that the collective claims were simply not in issue at trial. To frame the case in a different manner on appeal would retroactively deny the respondents the opportunity to know the appellants' case.³²⁹

All SCC judges agreed that there were defects in the pleadings that prevented them from properly considering the merits of the case:³³⁰ “the amalgamation of the appellants' individual claims represents a defect in the pleadings and, technically speaking, prevented the court from considering the merits of the case.”³³¹ Justices La Forest and L'Heureux-Dube stated that the pleadings' problem was that the original claims were for ‘ownership’ and ‘jurisdiction’ but the plaintiffs made their case with evidence and arguments conducive to prove ‘Aboriginal title.’³³²

The SCC concluded that the pleadings changed in two substantial ways and were not formally amended. The first change was the change from ‘ownership’ and ‘jurisdiction’ to ‘Aboriginal title’ and ‘self-government.’ The second is the amalgamation of the individual houses' claims into collective claims. The court held that the first change in the claims was to stand while the second change in the pleadings could not stand. This seems unreasonable to me since both changes follow the same logic, which was to adapt the plaintiffs' pleadings to the prescribed causes of action suitable to them. Besides, the *de facto* change in the pleadings from individual to collective claims did not have a significant effect on the substance of the claims of the plaintiffs.

³²⁹ *Ibid.*, at para. 76.

³³⁰ *Ibid.*

³³¹ *Ibid.*, at para 188.

³³² *Ibid.*

The claims for ownership and jurisdiction were considered far beyond what common law prescribes as Aboriginal rights. In the SCC, Justices La Forest and L'Heureux-Dube quoted Judge Dickson in the *Guerin* decision:

[a]ny description of Indian title which goes beyond these two features (Aboriginal title is a personal sui generis interest in the land, inalienable except to the crown, and it stems from the fiduciary obligation to treat Aboriginal peoples fairly) is both unnecessary and potentially misleading.³³³

The judges also agreed in dismissing the cross-appeal that the province had no authority to extinguish Aboriginal rights either under the *Constitution Act, 1867* or by virtue of s. 88 of the *Indian Act*,³³⁴ which reads:

Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation, or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

The court expressly said that the provinces do not possess the jurisdiction to extinguish Aboriginal rights held by First Nations and thus no Aboriginal title had been extinguished before 1982 in British Columbia.³³⁵ That jurisdiction, according to the court, belongs only to the federal government under section 91(24) of the *Constitution Act, 1867*.³³⁶ The court concluded that Aboriginal title was not extinct in British Columbia.

The court recognized the constitutionality of the concept of Aboriginal title in Canada and British Columbia. Nevertheless, it did not specifically recognize the Aboriginal title of the Gitksan and Wet'suwet'en. The court affirmed Aboriginal title as an

³³³ *Ibid.*, at para. 190, citing Judge Dickson's conclusions at p. 382 of *Guerin v The Queen*, [1984] 2 SCR 335; 13 DLR (4th) 321 (SCC).

³³⁴ *Ibid.*, at para. 184, 208.

³³⁵ *Ibid.*, at para. 206.

³³⁶ *Ibid.*, at para. 173, 181.

“existing Aboriginal right”³³⁷ in section 35 of the *Constitution Act, 1982*, which confers a right in land. The court also held that “Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves Aboriginal rights.”³³⁸ The court also mentioned that Aboriginal title encompasses,

the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures; and... that those protected uses must not be irreconcilable with the nature of the group's attachment to that land³³⁹ and that Aboriginal title encompasses within it a right to choose to what end a piece of land can be put.³⁴⁰

The court also added:

The land has an inherent and unique value in itself, which is enjoyed by the community with Aboriginal title to it. The community cannot put the land to uses which would destroy that value.³⁴¹

The SCC concluded that a First Nation asserting Aboriginal title must satisfy the following criteria:

1. The land must have been occupied prior to the assertion of sovereignty (in British Columbia, 1846);
2. If present occupation is relied on as proof of occupation pre-sovereignty, then there must be a continuity between present and pre-sovereignty occupation; and
3. At sovereignty, that occupation must have been exclusive.³⁴²

³³⁷ *Ibid.*, at para. 2.

³³⁸ *Ibid.*, at para 111.

³³⁹ *Ibid.*, at para 117.

³⁴⁰ *Ibid.*, at para 168.

³⁴¹ *Ibid.*, at para. 130.

³⁴² *Ibid.*, at para. 143.

The court unanimously held that Aboriginal title consists of the right to exclusively use and occupy the land including the right to choose how the land can be used, reasoning as well that Aboriginal title has an ‘inescapable economic component.’³⁴³

The court established the conditions under which the justifiable infringement of that right can happen. The first such condition is the existence of a substantive and compelling legislative objective and the second is that the infringement be consistent with the fiduciary relationship between the crown and First Nations.³⁴⁴ The SCC expressly mentioned that the fiduciary relationship between the Crown and Aboriginal peoples might be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands, which is akin to a right to be consulted.³⁴⁵

This decision is considered a victory for Indigenous peoples in Canada because the SCC recognized the great difficulties of proving Aboriginal title and Aboriginal rights and established that oral histories were to be given due evidentiary weight.³⁴⁶ The decision eased the great burden that Indigenous people had when gathering evidence with the aim of proving their title to a certain area of land.³⁴⁷

The Court allowed the communities’ appeal, in part, because Chief Justice McEachern had not afforded the oral history evidence called at the trial appropriate weight, and therefore, his treatment of the oral history did not conform to evidentiary principles applicable in Aboriginal rights cases as enunciated in the SCC's decision in *R v Van der Peet*,³⁴⁸ and ordered a new trial.

³⁴³ *Ibid.*, at para. 166.

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*, at para. 168.

³⁴⁶ *Ibid.*, at para. 99-108.

³⁴⁷ John Borrows “Sovereignty’s Alchemy: An Analysis Of Delgamuukw V. British Columbia” (1999) 37 *Osgoode Hall Law Journal* 3, at 542 and 543 cites some of the reactions.

³⁴⁸ *R. v Van der Peet*, [1996] 2 SCR 507.

The order for a new trial required that a court hear the case again and do a better assessment of the evidence in determining if the plaintiffs had a right or interest in the land they were claiming. The SCC continued:

[it is] not necessary for courts to have conclusive evidence of pre-sovereignty occupation. Rather, Aboriginal peoples claiming a right of possession may provide evidence of present occupation as proof of prior occupation...[T]here is no need to establish an unbroken chain of continuity and ...interruptions in occupancy or use do not necessarily preclude a finding of 'title.'³⁴⁹

The issue of overlapping claims seems to be very important in all the decisions rendered in the case of *Delgamuukw*. The SCC stated that it was advisable that the Aboriginal nations with overlapping claims intervene in any new litigation on the issues advanced by the Gitksan and Wet'suwet'en.³⁵⁰ It is notable that none of these nations intervened in the case. Moreover, none of the intervenors in the case that represented organizations of Indigenous peoples in Canada and British Columbia advanced any overlapping claim or questioned the Gitksan and Wet'suwet'en claim.

The Supreme Court recognized the importance of reconciliation between First Nations and the broader community and found justification of a right such as the right of Aboriginal title within the framework of achieving reconciliation.³⁵¹ The court emphasized that the purpose of the new constitutional order established in the *Constitution Act, 1982* and s. 35(1) was "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown."³⁵² The SCC emphasized that the accommodation of Indigenous peoples must always be in accordance with the 'honour' and 'good faith' of the Crown.³⁵³ The court concluded that accommodation, "was not a simple matter of asking whether licences have been fairly allocated in one industry, or whether conservation measures had been properly implemented for a

³⁴⁹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 198.

³⁵⁰ *Ibid.*, at para. 185.

³⁵¹ *Ibid.*, at para. 186.

³⁵² *Ibid.*

³⁵³ *Ibid.*, at para. 203.

specific resource, but broader in scope regarding the rights that serve as framework of such licenses and conservative measures.”³⁵⁴ In their view, accommodation entails such additional things as notifying and consulting Aboriginal peoples with respect to the development of the affected territory and fair compensation.³⁵⁵

The emphasis of the court on reconciliation was only matched with the emphasis on negotiation. According to the SCC, the Crown is “under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith.”³⁵⁶ This recommendation was not a legal remedy.³⁵⁷

Today, after more than twenty years of trial and appeals, and many more spent on negotiation, the issue of Gitksan and Wet’suwet’en title to their lands remains unresolved.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*, at para. 186.

³⁵⁷ In *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 and *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650; there is more emphasis on negotiation as a legal duty and not only a moral duty. A remedy is still very difficult to obtain by the communities due to all the surrounding circumstances and rules in the courts.

Chapter 4: The *Nibutani Dam* Case

*Our land was a forest.*³⁵⁸

Ainu people have no particular Indigenous rights to their ancestral territories. At the time of the case *Kayano et al. v Hokkaido Expropriation Committee*, [1997] 1598 Hanrei Jihō 33, 938 Hanrei Era 75 (Nibutani Dam), the government did not recognize the Ainu as a different cultural or ethnic group. According to government agencies and authorities Ainu were ‘former aborigines.’³⁵⁹ No mention of ‘Indigenous rights’ or ‘Indigenous peoples’ is made anywhere in any law in Japan.³⁶⁰ Article 14 of the Constitution, which establishes equality rights for Japanese, does not mention the word ‘Indigenous’ or ‘minorities.’³⁶¹

The case of *Nibutani Dam* was chosen for study among the many cases that have arisen from Japan because it is the case with the most positive resolution rendered about Indigenous peoples rights in Japan. Furthermore, it is a particularly detailed claim that was carefully studied by a court. In this case, the plaintiffs’ claims were broad and included many issues that had not been discussed as extensively and in such a detailed manner in other cases and are issues at the core of Indigenous peoples’ litigation in the country. *Nibutani Dam* is a remarkably important case that has allowed me to see many substantive and procedural legal issues regarding cases brought by Indigenous peoples in Japan.

In this case, two Ainu individuals, Koichi Kaizawa and Shigeru Kayano, owners of parcels of land expropriated for the construction of a dam (the Nibutani Dam) in the

³⁵⁸ Shigeru Kayano and Mark Selden, *Our land was a forest: an Ainu memoir* (Colorado: Westview Press, 1994).

³⁵⁹ *Hokkaido Former Aborigines Protection Act*, Law No. 27, March 2, 1899. [Originally in Japanese, see bibliography for title in original language.]

³⁶⁰ See *supra* note 66, at page 35. The first time the Ainu people were recognized as an Indigenous minority by the Japanese government was in 2008 by the Japanese Parliament, long after the case of *Nibutani Dam* was decided: Parliamentary Upper House Resolution of June 6, 2008 (No. 169th Diet Session).

³⁶¹ Article 14 of the Constitution of Japan establishes:

All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

This translation is from the English website of the Prime Minister and the Cabinet. Online:

<http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html>.

Saru River by the Nibutani village in Hokkaido, Japan, challenged the order and the process of expropriation. Their practical aim was to stop the construction of the dam, which would cover their lands with water and destroy the traditional Ainu ceremonial places surrounding the river.

The *Nibutani Dam* case rests on an ‘Administrative Appeal Claim Process.’³⁶² The administrative appeal process was begun with an administrative claim filed by the father of Koichi Kaizawa, Tadashi Kaizawa, the then owner of the Kaizawa property, and Shigeru Kayano against the orders of expropriation (dated February 3, 1989) in March 4, 1989.³⁶³ The Ministry of Construction finally resolved their administrative examination claim four years later on April 26, 1993 denying their claims.³⁶⁴ Before the end of May of the same year, the eldest son of Tadashi Kaizawa, Koichi Kaizawa, who had inherited the land from his father at his death, and Shigeru Kayano filed a lawsuit in the Sapporo District Court against the Hokkaido Expropriation Committee (HEC)³⁶⁵ and the Ministry of Construction. The construction of the dam started in 1988³⁶⁶ and was completed in April 1996.³⁶⁷ The construction did not stop during the administrative appeal process and the trial because there were no injunctions that the plaintiffs could use to stop the construction.³⁶⁸

The lawsuit against the HEC sought the invalidation of the orders of expropriation arguing that they were illegal because the expropriation orders violated article 29 (3)

³⁶² 審査請求 (*Shinzaseikyū*) in Japanese, other authors also use the label of ‘administrative appeal’ for this concept. The base of this court case is an administrative process and so, the case is largely examined in terms of Japanese Administrative law, an area of Public law.

³⁶³ Hiroshi Tanaka and Shigeru Kayano, *The Rebellion of two Ainu, record of the Nibutani Dam trial*, (Tokyo: Sanseido, 1999), at 3. [Originally in Japanese, see bibliography for title in original language.]

³⁶⁴ *Ibid.*, at 4.

³⁶⁵ *Ibid.*, at 4. The Hokkaido Expropriation Committee (HEC) was an independent administrative government agency, under the responsibility of the Ministry of Construction.

³⁶⁶ Hiroshi Tanaka and Shigeru Kayano, *The Rebellion of two Ainu, record of the Nibutani Dam trial*, *supra* note 363, at 3.

³⁶⁷ Hiroshi Tanaka and Shigeru Kayano, *The Rebellion of two Ainu, record of the Nibutani Dam trial*, *supra* note 363, at 4.

³⁶⁸ The plaintiffs could have made a request to the Prime Minister, which was not a realistic choice. No recourse was available to the plaintiffs according to Mark A. Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan” (2000–2001) 33 *NYU J Int'l L & Pol* 419.

of the *Constitution*,³⁶⁹ and article 20 (3) and (4) of the *Land Expropriation Law*, which refer to the requirement of an appropriate and rational use of the land to be expropriated and the consideration of public welfare when expropriating land.³⁷⁰ They argued that the reasons accompanying the expropriation orders did not comply with these requirements and thus, were illegal.³⁷¹ They also argued that the process that produced the orders was illegal because it failed to do a careful study of the consequences of the dam in the Ainu community of the area.³⁷²

The plaintiffs came to the court fully invested in their role as Ainu leaders and argued in front of the judges, issues such as inequality, language use, protection of their culture, minority rights, and international rights of Indigenous peoples.³⁷³ Many of these arguments were disregarded, such as the use of Ainu language in the court, but many others, such as the importance of protecting the culturally important sites, were reflected in the decision.³⁷⁴

The Sapporo District Court heard the case in around twenty-five sessions and gave its resolution on March 27, 1997.³⁷⁵ The court found that the government of Japan was bound to the duties established in Article 27 of the *United Nations International Covenant on Civil and Political Rights* (ICCPR)³⁷⁶ and Article 13 of the *Constitution*

³⁶⁹ Article 29. Private property may be taken for public use upon just compensation therefore. This translation is from the English website of the Japanese Prime Minister and the Cabinet. Online: <http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html>.

³⁷⁰ Article 20. (3) of the Land Expropriation Law: A project plan shall contribute to the appropriate and rational use of the land and (4): The land expropriated shall be put to use for the public welfare. This translation is by the author.

³⁷¹ Hiroshi Tanaka and Shigeru Kayano, *The Rebellion of two Ainu, record of the Nibutani Dam trial*, *supra* note 363, at 168-180.

³⁷² *Ibid.*

³⁷³ *Ibid.* at 128-146. See also Hiroshi Maruyama “Ainu Landowners’ Struggle for Justice and the Illegitimacy of the Nibutani Dam Project in Hokkaido Japan” (2012) 14 *International Community Law Review*, 1, at 70-72.

³⁷⁴ *Kayano et al. v Hokkaido Expropriation Committee* [1997] 1598 Hanrei Jihō 33, 938 Hanrei Era 75

³⁷⁵ Hiroshi Tanaka, “The decision of Nibutani Dam and afterwards” (2007) 25 *Academia Juris Booklet*. [Originally in Japanese, see bibliography for title in original language.]

³⁷⁶ Article 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

of Japan.³⁷⁷ It ruled that the orders of expropriation were illegal according to the *Land Expropriation Law*. Nevertheless, the judges also ruled that the revocation of the orders would entail an extraordinary burden on public welfare and rejected the plaintiffs' claims³⁷⁸ according to Article 31(1) of the *Administrative Case Litigation Law*.³⁷⁹

Since the plaintiff's claims were rejected, the defendants (HEC) decided not to appeal and, since the content of the decision was the first official act in which the reality of the relationship between the Ainu and the Japanese state was recognized by any government authority, the plaintiffs also decided not to appeal.³⁸⁰ Thus, the decision of the Sapporo District Court stands in this case.

The plaintiffs were unable to succeed in obtaining the remedy they sought in this case because there was no injunction that they could use against the construction of the dam. The claims filed by Koichi Kaizawa and Shigeru Kayano, and the judicial decision rendered in this case rest on the context explained below.

4.1.1 Context of the *Nibutani Dam* case

Since in Japan there is no particular legal regime for Indigenous rights to land, the Sapporo District court examined the case mainly on the basis of property law in Japan. In Japan, property law is understood from a theoretical base that stands on the

³⁷⁷ Article 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs. This translation is from the English website of the Prime Minister and the Cabinet. Online:

<http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html>.

³⁷⁸ *Kayano et al. v Hokkaido Expropriation Committee* [1997] 1598 Hanrei Jihō 33, 938 Hanrei Era 75

³⁷⁹ Article 31 (1) of Japan's Administrative Case Litigation Law: If a court finds that an administrative disposition, decision or order is illegal but considers that the revocation thereof would produce an extraordinary burden on the public interest and public welfare, (pondering the degree of damage suffered by the plaintiff, the compensation, the measures taken to prevent such damages, etc.), and deems that revocation would not conform to the public welfare, the court may reject the plaintiff's demand. In such cases, the court shall declare that the disposition or decision is illegal in the formal judgment text of the decision. This translation is by Mark A. Levin.

³⁸⁰ Mark A. Levin "Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan" *supra* note 367, at 466; and Hiroshi Maruyama, "Ainu Landowners' Struggle for Justice and the Illegitimacy of the Nibutani Dam Project in Hokkaido Japan," *supra* note 373, at 66.

division between rights in *rem* and rights in *personam*.³⁸¹ If a right in *rem* is infringed the holder of the right may ask the court to stop the infringement through causes of action such as recovery, elimination of the infringement and prevention of infringement.³⁸² Possession gives rise to a presumption of ownership and ownership can be acquired through prescription.³⁸³ There are also rights that can limit the ownership right such as the usufruct, servitude, and pass rights. Among these rights is the *irai* right or *Iriaiken*³⁸⁴ in Japanese, which is understood as a communal right that acts as a burden. Real rights are considered absolute, in that nobody can arbitrarily change the content of such rights. Registration of real rights is usually considered important for the absolute protection of a right but not a requisite for certain transactions. There are many schemes of property: individual, collective, joint, and associational.³⁸⁵

Property is regulated in article 29 of the Japanese Constitution, which establishes that: “1) “The right to own or to hold property is inviolable. 2) Property rights shall be defined by law, in conformity with the public welfare. 3) Private property may be taken for public use upon just compensation therefor.”³⁸⁶ Due to section two of the article, scholars, and courts consider that the constitutional protection of private

³⁸¹ Hiroshi Oda. *Japanese Law* (Oxford: Oxford University Press, 2011), at 164.

³⁸² *Ibid.*

³⁸³ *Ibid.*, at 165-170.

³⁸⁴ The most traditional collective right recognized by the law (Civil Code Art. 294) is the *Iriaiken* (*irai*- request or ask and *ken*- right), which is a scheme that has been maintained from feudal times in Japan. *Iriaiken* allows a group of right holders to use and administer the resources of a certain land together (there might be a formal owner of the land with whom the administration of the land is negotiated). The right is based on customary law. This kind of property is no longer being established in Japan, but only protected in certain ways. This right has been mainly preserved for the administration of forestry resources. Today, many holders of this right are changing the legal scheme towards new neighborhood schemes established by the municipalities.

³⁸⁵ Hiroshi Oda, *supra* note 381, at 17:

Collective housing and joint ownership are very relevant in large cities where people share the property of buildings and flats. Under this type of housing or ownership, the owner is entitled to use and dispose of the whole property in proportion to her/his share but cannot change the state of the property until the consent of all the owners is obtained. Most of collective ownership in Japan regards buildings, flats and similar.

³⁸⁶ This translation is from the English website of the Prime Minister and the Cabinet. Online: <http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html>.

property is highly limited in Japan.³⁸⁷ All rights and freedoms can be restricted for the purpose of public welfare.

The justiciability of human rights issues under a system of constitutional review in Japan only appeared after the enactment of the current Japanese Constitution, which abrogated the *Meiji Constitution* in 1947.³⁸⁸

4.1.1.1 Ainu people and Japan.

The most recognized theory of the origins of the Ainu argues that they are descendants of the Jomon people.³⁸⁹ The proven fact is that the Ainu people have populated the islands of Hokkaido, Sakhalin, and the Kuriles since the Jomon Era, long before the Japanese came to populate the north of what is now considered Japan (northern part of Honshu, Hokkaido, and the southern part of Sakhalin and the Kuriles).³⁹⁰ The Ainu are usually divided into three large regional groups,³⁹¹ but they all share a similar cosmology and living traditions.³⁹²

At the beginning of the 19th century, Ainu people were organized in groups not larger than seven families.³⁹³ Each family would live in their own house within the community. Each community would live in a certain area (*ioru* in Ainu) and would engage in hunting, fishing, collecting resources from the surroundings, and trade. There were groups that would move their residence during the year in order to fish and hunt, and there were other groups that had only one residence through the entire

³⁸⁷ Mutsuo Nakamura “Economic and Property Rights in Japan” in Percy R. Luney and Kazuyuki Takahashi (ed.) *Japanese Constitutional Law* (Tokyo: University of Tokyo Press, 1993).

³⁸⁸ Ashibe Nobuyoshi, Lawrence Beer and Masami Ito, “Japan” in Lawrence Beer (ed.) *Constitutional Systems in Late Twentieth Century Asia*. (Seattle and London: Asian Law Series, University of Washington Press, 1992), at 224.

³⁸⁹ N.S. Ossenberg, “Isolate conservatism and hybridization in the population history of Japan: the evidence of cranial nonmetric traits,” in Akazawa T. and Aikens C.M. (eds.), *Prehistoric Hunter-Gatherers in Japan*. (Tokyo: Tokyo University Press, 1986) 27, 199-215 and Junko Habu, *Ancient Jomon of Japan*, (Cambridge University Press, 2004), at 50 and following.

³⁹⁰ *Ibid.*, at 96

³⁹¹ The Ainu Association of Hokkaido website. Online: <<http://www.ainu-assn.or.jp/english/eabout05.html>>.

³⁹² Toru Onai (ed.) *Report on the 2008 Hokkaido Ainu Living Conditions Survey: Living Conditions and Consciousness of Present-day Ainu* (Sapporo: Center for Ainu & Indigenous Studies at Hokkaido University, 2010).

³⁹³ The word for ‘village’ is *kotan* in Ainu language, according to the exhibition at the Museum in Shiraoi.

year. The hunting for bear, deer, and certain birds was particularly important for the Ainu as was fishing for salmon and other fish.³⁹⁴

Kamakura era

The Ainu and the Japanese started to consistently trade in the Kamakura era (1192–1333).³⁹⁵ Japanese records from this era describe the Ainu living in Hokkaido as barbarians, which is a discriminatory label used for centuries by the Japanese.³⁹⁶ It was also during this time that the Ainu living in the Northern Part of Honshu started to be removed or assimilated.³⁹⁷ Some time later, Japanese forts were established in Hokkaido. The first battle recorded between Japanese and Ainu is the battle of Koshamain in 1457. Koshamain, an Ainu leader, and the Ainu took control of two Japanese forts in the south of Hokkaido.³⁹⁸

From the 16th century on, there were three different stages of the state's relationship with the Ainu. The first is the establishment of the Matsumae Clan trade monopoly (1593–1867). The Matsumae clan had a stable trade with the Ainu.³⁹⁹ This clan forced several policies upon the Ainu, such as the requirement of living separately from the Japanese, and relocated several Ainu communities in the south of Hokkaido.⁴⁰⁰ In this first stage, Ainu people could engage in most of their traditional activities (though some were forced to work in fishing and canning locations) and maintained their life style largely intact.⁴⁰¹ The second stage (1869–1997) began after the introduction of the Colonization Commission. During this stage, many of the Ainu's traditional ceremonies and activities were banned, and Japanese education and

³⁹⁴ Shigeru Kayano and Mark Selden, *Our land was a forest: an Ainu memoir* (Boulder: Westview Press, 1994).

³⁹⁵ Brett Walker, *Conquest of Ainu Lands: Ecology and Culture in Japanese Expansion, 1590–1800* (Berkeley: University of California Press, 2001), at 26.

³⁹⁶ The term used is *emishi*; Japanese are called also *wajin* or *shamo* when contrasted with Ainu people. According to Kayano, *shamo* is from a japanized pronunciation of the Ainu word *sam* that means 'neighbor;' according to Maruyama the term *shamo* is usually understood as a derogatory term for Japanese people.

³⁹⁷ Brett Walker, *supra* note 395, at 26.

³⁹⁸ The Ainu Association of Hokkaido, *supra* note 391: the forts taken were Mobetsu and Hanazawa.

³⁹⁹ Mark A. Levin, "Kayano et al. v Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'" (1999)

38 *International Legal Materials*, 394, at 30.

⁴⁰⁰ *Ibid.*, at 31.

⁴⁰¹ *Ibid.*

use of the Japanese language was enforced.⁴⁰² These policies were first implemented in Japan in the second half of the 19th century and were later reinforced through the *Hokkaido Former Aborigines Protection Act, 1899*.⁴⁰³ The third stage began after the repeal of the *Hokkaido Former Aborigines Protection Act* in 1997, which established a new relationship between the Ainu and the government, and the recognition of their existence as an ethnic minority.

The Matsumae Clan

There was a certain amount of trade between the Ainu and the Japanese that was not regulated by the Japanese state and that lasted until the establishment of the monopoly to trade in the Edo era by the Matsumae Clan. Different from the *daimyos*⁴⁰⁴ (and their *han*⁴⁰⁵) in the Edo period, the Matsumae Clan had income from taxation on trade, instead of the usual rice.⁴⁰⁶ Thus, they were largely independent from the central state authority. The establishment of the Matsumae Clan control of the area meant a large immigration of people from Japan and collaterally the ‘assimilation’ of Indigenous peoples living in the areas.⁴⁰⁷ The Matsumae Clan not

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*, at 32-33.

⁴⁰⁴ *Daimyo* were territorial lords. They were the ones who “owned” the land and administrated it. They were subordinate to the *Shogun*, who were military lords that controlled certain areas and *daimyos*. Japan was mainly controlled by *shogunates* from 1192 until the Meiji restoration in 1867.

⁴⁰⁵ *Han* was the term used for the territories administrated by the *daimyo*.

⁴⁰⁶ The trade monopolies of the Matsumae Clan in Hokkaido and the Hudson’s Bay Company in Canada were each supported with the aim of expanding the territories of Japan and the British Empire respectively. The trading posts paved the way for establishing sovereignty over the territories of the Ainu and the Gitksan and Wet’suwet’en, before other countries. The trade was in the interest of the clan and the company because they profited from it but it was also in the interest of the “sponsoring” state because this contact was necessary not only to obtain necessary and precious goods (salmon, fur) from those areas for the ‘mainland’ and obtain knowledge regarding the area, but also to attract the first and necessary immigrants to the area because of having acquired the land peacefully for such settlement. At that time, such peaceful methods for establishing sovereignty (in the fierce race amongst colonial powers) were the least costly. This method seen in these two examples shows that sovereignty is, without doubt, one of the main legal concept used by many colonial powers in the Enlightenment period and the following eras to expand their territorial domains.

⁴⁰⁷ David L. Howell, *Geographies of Identity in Nineteenth Century Japan*, (Berkeley: University of California Press, 2005), at 144. The policies that eradicated the Matsumae Clan’s monopoly aimed to establish sovereignty in the territories against other colonial powers (mainly Russia and US) through settlement of Japanese and British peoples. This could also be said of the eradication of the HBC in Canada.

only traded with the Ainu, they also established many fishing areas. The fishing spots established by the Matsumae Clan had Ainu people as the main work force.⁴⁰⁸

During the Tokugawa rule (1600–1868), which ‘allowed’ the trade monopoly of the Matsumae Clan, the Japanese empire annexed the island of Hokkaido and the first assimilation policies were established.⁴⁰⁹ The first policies were established during a short suspension (1799/1807–1821) of the monopoly of the Matsumae Clan, which was finally abolished in 1855.⁴¹⁰

It is during this time that records show the occurrence of two important battles between the Ainu and the Japanese: the war of Shakushain in 1669 over the rights to fish and hunt in several areas of the south of Hokkaido, and the battle of Kunashiri Menashi in 1789, a rebellion that sought to improve the conditions of work for Ainu people in the fishing industries established in the south of Hokkaido by the Matsumae Clan.⁴¹¹

The Meiji period

When the Tokugawa government ended in 1868 and the Meiji government came to power, the assimilation policies in relation to the Ainu grew in strength through the establishment of a Colonization Commission.⁴¹² The island of Hokkaido was considered a faraway land that needed to be tamed, just like Okinawa (and also later Taiwan) before the end of the Second World War, and similar to the far west in North

⁴⁰⁸ The Japanese people maintained these fishing spots through the centuries. During the Matsumae Clan period, many Ainu communities died, were dispossessed of their lands and relocated somewhere else. The Japanese would relocate the Ainu living in good areas for fishing salmon, establish rice paddies, logging, sending them to remote areas where there was no salmon, no good arable land or/and logging was difficult. The relocations were forced through violent means. Shigeru Kayano argues that the Ainu working in the locations were nothing but slaves because they were mostly forced to work in these spots and many times not paid or badly paid. See Shigeru Kayano and Mark Selden, *Our land was a forest*, *supra* note 358, at Chapter 4.

⁴⁰⁹ Susumu Emori, *History of the Ainu*, (Sofukan, 2007), at 39-40. [Originally in Japanese, see bibliography for title in original language.]

⁴¹⁰ David L. Howell, *supra* note 407, at 144- 145; and, The Ainu Association of Hokkaido, *supra* note 391.

⁴¹¹ Susumu Emori, *supra* note 409, at 37.

⁴¹² The term ‘colonial’ is seldom used by the Japanese government, which prefers to use the term ‘development’ but it is still sometimes found. See for example: The website of Hokkaido Development Bureau. Online: <<http://www.hkd.mlit.go.jp/eng/02hoduh.html>>.

America.⁴¹³ In 1872, the *Land Regulation Ordinance* stated that “the mountains, forests, rivers and streams where formerly the natives fished, hunted and gathered wood shall be partitioned and converted to private or collective ownership.”⁴¹⁴ It is in this way that all land in Hokkaido was annexed by the Japanese government.⁴¹⁵

Many Japanese people and foreigners were brought to Japan to develop the area and to promote farming and other industries (e.g. Horace Capron and William S. Clark⁴¹⁶). Starting in the mid 1880s, waves of settlers moved to the island of Hokkaido and the Ainu reported less salmon and deer to hunt in the beginning of the 20th century.⁴¹⁷

The assimilation policies forced the Ainu to acquire Japanese names and be registered with a special note that distinguished them as ‘Former Aborigines.’ The policies also banned several of their traditional social activities: the use of tattoos, the burning of houses after someone’s death, their conflict-resolution rituals, hunting in many areas, fishing in many areas, the bear ceremonies, among others.⁴¹⁸ Ainu people were also forced to farm, to work for Japanese fishing companies, to go to Japanese schools, and to speak Japanese. Due to the legal and practical obstacles to hunt, fish, and maintain their way of living, many Ainu fell into poverty.⁴¹⁹

By the end of the 1880s, the situation of the Ainu was growing difficult. Many died of starvation and diseases such as smallpox and tuberculosis, and social problems

⁴¹³ Mark A. Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan’s Indigenous Ainu People to Inform Understandings of the United States and Japan” *supra* note 367.

⁴¹⁴ Richard Siddle, “Former Natives” in *Meiji Japan* by P. F. Kornicki (London: Routledge, 1998), at 141-143.

⁴¹⁵ Hiroshi Maruyama, “Japan’s post-war Ainu policy. Why the Japanese Government has not recognized Ainu Indigenous rights?” (2013) 49 *Polar Record* (249) 204, at 204.

⁴¹⁶ William S. Clark was hired as a foreign advisor of the Japanese Meiji Government in 1876. He helped in the foundation of the Sapporo Agricultural College, now Hokkaido University. Horace Capron was also hired as a foreign advisor of the Japanese Meiji Government in 1870 to work in the Hokkaido Development Commission. He was instrumental in some of the policies established to assimilate Ainu people and also in the establishment of large-scale agriculture in Japan.

⁴¹⁷ Shigeru Kayano and Mark Selden, *Our land was a forest*, *supra* note 358.

⁴¹⁸ The ceremony of Iomante, or sending off a bear, is a ceremony in which a bear, that had been raised by the community, was sacrificed with the intention of communicating with the other world and send *good*. Bears are considered protecting gods among the Ainu.

⁴¹⁹ Shigeru Kayano and Mark Selden, *Our land was a forest*, *supra* note 358.

such as alcoholism and violence sprang up in their communities.⁴²⁰ In 1899, the *Hokkaido Former Aborigines Protection Act* was enacted with the aim of easing their situation.⁴²¹ This law granted land to ‘Former Aborigines,’ expecting them to become farmers, established Japanese schools, and provided welfare assistance to them.⁴²² Mr. Shigeru Kayano stated that most of the land granted in several areas was among the worst available.⁴²³ The Japanese language was forced upon the Ainu in schools where the Ainu language was forbidden. Welfare was so meager that it had no impact.

The tenure of the lands was conditional upon cultivation.⁴²⁴ Since many of those lands were unsuitable for farming and Ainu people did not know much about farming, many lost their lands.⁴²⁵ Some children were forced to receive a Japanese education and were separated from their families for work.⁴²⁶

In 1922, a study carried out by the Japanese government stated that the population of Ainu was 18,821 (data from 1916).⁴²⁷ This shows that in less than 100 years, the Ainu population had barely been maintained, while the Japanese population had

⁴²⁰ David L. Howell, *Geographies of Identity in Nineteenth Century Japan*, *supra* note 407, at 174.

⁴²¹ The preamble of the *Hokkaido Former Aborigines Protection Act*, Law No. 27, March 2, 1899, established:

The Ainu are an unenlightened people. They are ignorant, and their profits are being taken away by immigrants so that they are gradually losing their means of survival. Therefore we the Japanese ...have to protect them by all means.

1. Those former aborigines of Hokkaido who engage or wish to engage in agriculture shall be granted free of charge no more than 15,000 tsubo (49,573 square meters) per household.

2. The land granted according to Article 1 is subject to the following conditions: a. It must not be transferred except by inheritance; b. No right of pledge, mortgage, superficies, or perpetual lease can be established; c. No servitude can be established without the approval of the Governor of the Hokkaido Local Government; d. It cannot be object of alienation... the act of transferring land or establishing real rights upon it shall not come into force without the approval by the Governor of the Hokkaido local government. This however, shall not apply after the right of ownership is already transferred due to any inheritance.

The Act was amended in 1919, 1937, 1946, 1947, and 1968 (Law No 94 10 June 1968) and was finally abrogated in 1997 through the enactment of Law for the Promotion of the Ainu Culture and for the Dissemination and Advocacy for the Traditions of the Ainu and the Ainu Culture, Law No. 52, May 14, 1997 amended through Law No. 160, Dec. 22, 1999.

⁴²² *Ibid.*

⁴²³ Shigeru Kayano and Mark Selden, *Our land was a forest*, *supra* note 358.

⁴²⁴ *Hokkaido Former Aborigines Protection Act*, No. 27 of March 2, 1899: 3. Any part of the land granted by Article 1 shall be confiscated if it has not been cultivated after 15 years from the date of grant.

⁴²⁵ Shigeru Kayano and Mark Selden, *Our land was a forest*, *supra* note 358.

⁴²⁶ As it was the case of Shigeru Kayano, who to support his family had various works. His older brothers died young working away from home.

⁴²⁷ Toru Onai (ed.) *supra* note 392, at 127 cites a Hokkaido Government Study of 1922 (at 114-5) which also stated that the composition of the population was as follows: 13,557 (72 percent) were pure-blood Ainu, 4,550 (24.2 percent) were of mixed parentage and 714 (3.8 percent) were Japanese.

increased exponentially in Hokkaido.⁴²⁸ After the Second World War, scholars, politicians, and institutions considered the Ainu a ‘dying race,’ enhancing the vision of Japan as a homogeneous society.⁴²⁹ It is difficult to say when the concept of ‘dying race’ was first used regarding the Ainu. The label of ‘Former Aborigines’ used by the government in the registry of the Hokkaido population at the end of the 19th century and the act of 1899 expresses, without doubt, the same idea. The fact is that many Ainu started rejecting their ancestry and traditions during the first part of the 20th century.⁴³⁰

In the 1930s, the *Ainu Kyokai*, one of the ‘informal’ predecessors of the Hokkaido Ainu Association, considered that the Ainu were mostly assimilated into the Japanese society. Kaori Tahara contends that “[t]he Ainu's positive attitude towards assimilation at this time appears to have been based on their desire to benefit from economic development and avoid subordination under the Japanese.”⁴³¹ In March 1946, the first formal organization of Ainu people was established in Hokkaido: the Hokkaido Ainu Association.⁴³²

The Second World War and afterwards

During the Allied Occupation, many Ainu lost their land (previously granted to them by the *Hokkaido Former Aborigines Law*) through the land reforms established by the *Agricultural Land Adjustment Act for Landed Estates*, first promulgated in

⁴²⁸ Richard Siddle, “Former Natives” *supra* note 414, at 144. Brett Walker, *supra* note 395, at 181-182: It is believed that in the 1670s the Ainu population was between 20,000 and 40,000. In the late 18th century, more accurate data became available, as officials grew alarmed of the Ainu demographic decline. In 1807, officials estimated the population in 26,256 and in 1854, the number was in 17,810. The decline has been explained importantly by epidemics, among them smallpox. In 2008, the population of Ainu was calculated in between 30,000–50,000 people. The Japanese population in 1873 was of 94, 924, in 1903 it was 1,059,497 and in 2008 it was of more than 5 million people. See also Christopher J. Frey, *Ainu Schools and Education Policy in Nineteenth-century Hokkaido, Japan* (Indiana: ProQuest, 2007), at 115. Notice that the most recent number do not exclude the Ainu population from the Japanese population.

⁴²⁹ Mark A. Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan,” *supra* note 367, at 438.

⁴³⁰ Julian Kunnie, *Indigenous peoples' Wisdom And Power: Affirming Our Knowledge Through Narratives*, (London: Ashgate Publishing, Ltd., 2006), at Chapter 10.

⁴³¹ Kaori Tahara, “The Ainu of Japan: an Indigenous People or an Ethnic Group?” (2005) 4 *Public Archaeology*, 95-102, at 97.

⁴³² The Hokkaido Ainu Association changes its name to the Hokkaido Utari (in English: compatriot) Association in the 1960s to later be renamed in 2009, to the Ainu Association of Hokkaido.

October 21, 1946. This act came into force on December 29, 1946, was revised in 1949, and was repealed in October 21, 1952. This law took ‘unused’ land away from its owners, putting pressure on them to increase their agricultural production levels.

Through this reform, 34 percent of the land owned by Ainu people was lost.⁴³³ According to Mark A. Levin there were many Ainu leaders that organized themselves for the purpose of demanding that their lands be exempted from the application of these laws and that their ancestral lands be protected.⁴³⁴ The Hokkaido Ainu Association rejected this law due to the negative effects it had in their communities.⁴³⁵ Their efforts were all unsuccessful.⁴³⁶

Following the labeling of Ainu culture as a ‘dying culture’ and while the continuous assimilation of the Ainu into the Japanese society grew in force and permeated the larger Japanese society, the Ainu social movement launched protests for the first time in the 1960s, following many social movements around the world.⁴³⁷ In 1961, the Japanese government provided special funding for welfare measures for Ainu people through the Health and Welfare Minister’s subsidies as a response to the growing demands of Ainu people and the Hokkaido provincial government.⁴³⁸ These measures included the construction of community centers that would promote cultural activities in areas with Ainu residents.

Those efforts continue today, but most scholars consider that the measures have failed to fill the gap in living standards between the Ainu and residents of Hokkaido

⁴³³ Mark A. Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan’s Indigenous Ainu People to Inform Understandings of the United States and Japan,” *supra* note 367, at 439, note 72.

⁴³⁴ *Ibid*

⁴³⁵ The Ainu Association of Hokkaido, *supra* note 391.

⁴³⁶ *Ibid*.

⁴³⁷ *Ibid*.

⁴³⁸ Ryoko Tsuneyoshi, Kaori H. Okano, Sarane Bookcock (Ed.) *Minorities and Education in Multicultural Japan: An Interactive Perspective* (Taylor & Francis, 2010), at 32 citing Richard Siddle, *Race, Resistance and the Ainu of Japan*, (Taylor & Francis, 1996).

as a whole.⁴³⁹ Not only do the living standards of Ainu people remain below the average of Japanese people, there are also issues of discrimination and loss of cultural heritage.⁴⁴⁰

Current situation

There have been six surveys conducted by the government with the aim of learning more about the living conditions of the Ainu. The latest survey is the one conducted by the Center for Ainu and Indigenous Studies at Hokkaido University in 2008.⁴⁴¹ The report of the survey of 2006 established that there were around 23,000 Ainu individuals across seventy-two municipalities in Hokkaido.⁴⁴² The total number of Ainu in Japan has been calculated to be considerably larger; the real population might be more than twice that number,⁴⁴³ because many Ainu people have moved to cities such as Tokyo⁴⁴⁴. The 2006 study considered as Ainu those individuals that had an Ainu bloodline, those who lived with Ainu people and those whom the municipal governments considered Ainu.⁴⁴⁵ Ainu people are approximately 0.04 percent of the Japanese population.⁴⁴⁶

In the survey carried out by the Center for Ainu and Indigenous studies in Hokkaido University, the results confirm that Ainu people have continued to stop participating in the maintenance of Ainu cultural heritage. The latest report of 2008 shows that around 70 percent of the Ainu surveyed (around 5,700 individuals) had never

⁴³⁹ Toru Onai, *supra* note 392, at 124.

⁴⁴⁰ Hiroshi Maruyama, "Japan's post-war Ainu policy. Why the Japanese Government has not recognized Ainu indigenous rights?" *supra* note 415.

⁴⁴¹ Toru Onai, *supra* note 392.

⁴⁴² Report on the 2006 Hokkaido Ainu Living Conditions Survey (Sapporo: Hokkaido Prefecture, 2006). Online <<http://www.pref.hokkaido.lg.jp/ks/ass/grp/H18houkokusyo.pdf>>. [Originally in Japanese, see bibliography for title in original language.]

⁴⁴³ Teruki Tsunemoto has quoted the Ainu Association of Japan saying that some 50,000 Ainu live in Hokkaido in "Rights and Identities of Ethnic Minorities in Japan: Indigenous Ainu and Resident Koreans" (2001) 2 *Asia-Pac J on Hum Rts and L* 1, at 119-141.

⁴⁴⁴ Report on the 2006 Hokkaido Ainu Living Conditions Survey *supra* note 442. The 2006 study calculates 2,400 people in that city alone. There is an important issue of a large population denying their ancestry due to discrimination.

⁴⁴⁵ *Ibid.*, at 3.

⁴⁴⁶ The percentage and information provided here were obtained from the site of the Council for Ainu Policy Promotion of the Government of Japan. Online: <http://www.kantei.go.jp/jp/singi/ainusuishin/index_e.html#about>.

participated in any Ainu cultural activity.⁴⁴⁷ These numbers might be even larger than the number 25 years before due to the large number of programs created after the *Nibutani Dam* case decision was rendered.⁴⁴⁸ At the same time, fewer people every day identify themselves with their Ainu heritage. According to the Report of the survey of 2008, 66.8 percent of all those respondents under 30 years old said that they never felt particularly aware of being Ainu, while 38 percent of the people over 70 years old stated the same.⁴⁴⁹

In the 1970s and 1980s, many leaders of the Hokkaido Ainu Association started sharing information with other movements in Japan, other minorities' and Indigenous movements in the world, and started adapting some of these other movements' discourses into their own struggle.⁴⁵⁰ During this time, the Japanese government denied the existence of any distinctive ethnic and cultural population in the country. In 1980, the Japanese government submitted a report to the UN⁴⁵¹ claiming that in Japan there were no ethnic minorities.⁴⁵² The policies of the government have often been based on an ideology of homogeneity that is reflected in various comments by many prime ministers (Miki in 1975, Nakasone in 1986, and Aso in 2005).

It was during the 1970s and 1980s that the Ainu movement and claims gradually changed from an 'ethnic' status to that of 'Indigenous' status to strengthen their position. According to Kaori Tahara, the Ainu started demanding recognition of their Indigenous status after 1980.⁴⁵³

⁴⁴⁷ Toru Onai, *supra* note 392, at 113.

⁴⁴⁸ *Ibid.*, at Chapter 8 concludes that the numbers have actually increased.

⁴⁴⁹ *Ibid.*, at 26.

⁴⁵⁰ Mark A. Levin "Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan" *supra* note 367.

⁴⁵¹ Initial Report of Japan to the Human Rights Comm. (HRC), at 12, UN Doc CCPR/C/10/Add.1 (1980) to the UN regarding article 27 of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations (19 December 1966) and the Optional Protocol to the above-mentioned Covenant, adopted by the General Assembly of the United Nations on the same date to the UN.

⁴⁵² It is not until 1991 that the government recognizes the particularity of the Ainu in their report submitted to the Human Rights Committee.

⁴⁵³ Kaori Tahara, *supra* note 431, at 97.

In the 1980s and 1990s, the Ainu movement gained public space through an initiative that sought to repeal the *Hokkaido Former Aborigines Protection Act* and the enactment of a new law. At the same time, the Indigenous international movement was gaining momentum in the UN and other international forums. Ainu representatives started to exercise pressure through the UN committees on Human Rights and Civil and Political Rights.⁴⁵⁴ In 1997, the *Hokkaido Former Aborigines Protection Act* was abrogated through the entry to force of the *Law for the Promotion, Dissemination and Advocacy for the Traditions of the Ainu and the Ainu Culture*, also called *Ainu Culture Promotion Law*.

Today, all regulations, funds, and institutions established for the protection of Ainu culture are operative only in the province of Hokkaido.⁴⁵⁵ The current position of the government seems to be reflected in the following paragraph quoted from the report of the Experts Meeting Concerning Ainu Affairs of 1996:

Concerning the Right of Self-determination and the Land Rights that remain a primary concern for indigenous peoples rights, 'it is impossible to put the right of self-determination, which relates to the decision of political status like separation/independence from our country, and to the compensation/restoration of resources and land of Hokkaido, into the basis of the implementation of new measures for the Ainu people.'⁴⁵⁶

The Province of Hokkaido

Hokkaido⁴⁵⁷ is the northernmost prefecture in Japan; it is the only province not labeled as *ken*, *fu* or *to*, which mean 'province' and 'city' (also can be translated as 'metropolitan areas'). The literal translation of the word *Hokkaido* (北海道) is 'the

⁴⁵⁴ UN Documents such as the report of the Human Rights Committee to the General Assembly in 1982 in the matter: A/37/40, at para 75 and A/43/40 (1988), at para 630. The reports to the Committee on Civil and Political Rights: CCPR/C/115/Add.3 (1997), CCPR/C/79/Add.102 (1998) and CERD/C/350/Add.2 (2000).

⁴⁵⁵ There is a proposal to establish certain programs in other cities such as Tokyo, where many Ainu people also live.

⁴⁵⁶ Foundation for Research and Promotion of Ainu Culture, Experts Meeting Concerning Ainu Affairs Report (1998). Online: <<http://www.frpac.or.jp/english/Report/Report.html>>, at 244.

⁴⁵⁷ The island of Hokkaido was called Ezo (also Yezo) before 1868, when Japan formally annexed it.

way to the north sea.’ The *kanji*⁴⁵⁸ of *hoku* (北) means ‘north,’ *kai* (海), means sea and *do* (道) means ‘way,’ ‘path.’ *Do* has a connotation of ‘growth,’ ‘development’ and ‘progress.’ At the time of the *Nibutani Dam* case, Hokkaido and Okinawa were the only two provinces largely administered by ‘Development Agencies.’⁴⁵⁹

The Hokkaido Development Bureau, an agency that inherited many of the tasks first performed by the Colonization Commission, was in charge of the design and carrying out of the project of the Nibutani Dam. This agency is a cabinet-level national agency charged with the supervision of the development of these provinces. They are part of the National government.⁴⁶⁰ The agency challenged in the case of *Nibutani Dam*, the Hokkaido Expropriation Committee, is an independent institution established by the national law of land expropriation, which conducts its activities partly under the direction of the Hokkaido Development Bureau. Today, this bureau is part of the Ministry of Construction, now called the Ministry of Land, Infrastructure, Transportation, and Tourism.⁴⁶¹

According to the Ainu Museum at Shiraoi, more than 90 percent of all the place names in Hokkaido are originally Ainu. The sound of the names of the places was ‘Japanized’ and given *kanji* writings. However, many names of places such as mountains are still written in *katakana*, the Japanese syllabary used for foreign languages.

⁴⁵⁸ Kanji (漢字) are the adopted logographic Chinese characters that are used in the modern Japanese writing system along with hiragana (ひらがな, 平仮名), katakana (カタカナ, 片仮名), Hindu-Arabic numerals, and the occasional use of the Latin alphabet. The Japanese term *kanji* for the Chinese characters literally means ‘Han characters.’

⁴⁵⁹ See Japan’s Ministry of Land, Infrastructure, Transportation, and Tourism website. Online: <http://www.mlit.go.jp/hkb/develop_e.html>. Mark A. Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan’s Indigenous Ainu People to Inform Understandings of the United States and Japan” *supra* note 367, at 450, note 109.

⁴⁶⁰ Japan is a unitary country, thus the line that divides provincial from national governments is not as sharp as it is in federal governments.

⁴⁶¹ Japan’s Ministry of Land, Infrastructure, Transportation, and Tourism website, *supra* note 459.

4.1.1.2 The Nibutani area and the dam

Recent studies have revealed that Nibutani is the most densely Ainu populated area in Japan.⁴⁶² Most probably, it was also the most Ainu populated area in the late 1970s and 1980s, when the dam project was announced and the first claims in this case were filed.⁴⁶³ The Sapporo District Court stated in its decision that in 1993, 80 percent of the population in the area was Ainu.

The name of Nibutani is the Japanese version of Niputay, the original Ainu name for the place. The name is considered to originate from the word Nitay which means woods or forest in the Ainu language.⁴⁶⁴ Ainu people believe that the Saru river (Shishirimuka in Ainu) is the place where *Okikurmi-kamuy* was born. *Okikurmi-kamuy* is the god that taught Ainu their wisdom and their culture. Thus the areas surrounding the river have special significance to the Ainu people.⁴⁶⁵ The Ainu living in the area are known as *Sarunkuru Ainu*.⁴⁶⁶

History

During the rule or monopoly of the Matsumae Clan, many Ainu people in the area were forcibly taken as workers to fishing locations. This policy was continued in the Meiji era, when many Ainu living in Nibutani were taken to Atsukeshi, which is around 300 kilometers away. Mr. Kayano stated that most of the Ainu living in the area had ancestors that were forced to work in Atsukeshi and that many Ainu people from Nibutani died of mistreatment and work-related deaths in Atsukeshi.⁴⁶⁷

⁴⁶² Toru Onai, *supra* note 392; and The Ainu Association of Hokkaido website *supra* note 391.

⁴⁶³ The Sapporo District Court's decision in Nibutani considered that 80 percent of the residents of Nibutani in April 1993 were Ainu and that by December 1995, 70 percent were Ainu and considered that the "proportion of Ainu in Nibutani is remarkable high." The translated version has been published: Mark A. Levin, "Kayano et al. v Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'" *supra* note 399, at 18.

⁴⁶⁴ Shigeru Kayano and Mark Selden, *Our land was a forest*, *supra* note 358.

⁴⁶⁵ Julian Kunnie, *supra* note 430, at 166.

⁴⁶⁶ Mark A. Levin, "Kayano et al. v Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'" *supra* note 399, at 18.

⁴⁶⁷ Shigeru Kayano and Mark Selden, *Our land was a forest*, *supra* note 358.

The Ainu living in the area of Nibutani received their Japanese names in the last years of the 19th century. The sounds of the Ainu language are different from Japanese but when people were registered, all their names are changed to fit the Japanese format. Most of the Ainu living in the area were named Kaizawa, Nitani, and Hiramura, which do not necessarily mean that people with these names were related. Mr. Kayano explains that the official in charge of doing the registry chose the names based on the names of the areas in which they lived, which was not an unusual practice in Japan.⁴⁶⁸ Mr. Kayano's parents were actually Kaizawa but since he was given for adoption, his name is different.⁴⁶⁹

Some time before 1935, police were posted in the area of Nibutani to apply the laws related to fishing and hunting. Ainu people that caught even a few salmon in the pre-spawning season and hunted bear and deer were given sentences of imprisonment.⁴⁷⁰ Such laws were aimed at protecting the return of the salmon each year and for other environmental reasons. Mr. Kayano argues that the indiscriminate Japanese fishing caused the decrease of salmon, but that most of those imprisoned for violations to this law were the Ainu.⁴⁷¹

The land in the area of Nibutani was distributed among Ainu and non-Ainu people in the last part of the 19th century and until the first years of the 20th century.⁴⁷² Most of the land expropriated in Nibutani at the end of the 1980s was originally granted to the Ainu and Japanese people during the first years of the Meiji rule through the *Hokkaido Former Aborigines Protection Act* and other regulations established to promote agricultural and infrastructure development in Hokkaido. The area is one of the few in Hokkaido where Ainu people were able to maintain the lands first granted

⁴⁶⁸ *Ibid.* Most of the people in the area of Nibutani were called Nitani, most of the people in Piratur (Biratori) were called Hiramura (which in Japanese means Pira village, the original Ainu meaning), and most people in the village of Pipaus (*pipaus* means place where shellfish are found) were called Kaizawa (shellfish in Japanese). These three villages were the three main villages in the area.

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.*, at 59.

⁴⁷² Hiroshi Tanaka, "The decision of Nibutani Dam and afterwards" *supra* note 375.

to them.⁴⁷³ Nibutani enjoyed better weather and better areas for cultivation than most of the other areas in Hokkaido, where a harsh climate and unsuitable lands for cultivation made it impossible for Ainu people to farm and thus more Ainu were able to maintain their lands. At the time of the claim, the land in the Nibutani area expropriated for the construction of the dam was all owned privately and was used mainly for farming and dwelling.⁴⁷⁴

The dam

The first steps towards the construction of the Nibutani Dam were taken in 1973 with the aim of providing water to an industrial park that was expected to be amongst the largest in the world: the Eastern Tomakomai Industrial Park.⁴⁷⁵ The park was first proposed in 1973 and was planned to host many heavy industries. Two dams, the Nibutani dam and the Biratori dam, were expected to provide 250,000 tons of water to the industrial park every day.⁴⁷⁶

According to Hiroshi Tanaka, due to the 1970s oil crisis, and the enormous quantity of resources necessary for the Industrial Park, the provincial authorities realized the impossibility of the project and dropped it as first planned.⁴⁷⁷ Nevertheless, the plan for the construction of the two dams that were supposed to supply water for the park was not dropped. The reasons behind this decision have never been addressed publicly by the government and remain uncomprehensible to me.

The national government provides a budget for the development of Hokkaido, which is mainly invested in projects such as dams and roads, and is expected to improve the

⁴⁷³ As explained above, many lands held by Ainu people were taken through the *Hokkaido Former Aborigines Act* and the *Agricultural Land Adjustment Act for Landed Estates, 1946* after many of them were unsuccessful in cultivating the land. These two laws had as their objective to increase agricultural production and took many lands that were not being cultivated to encourage more and better farming.

⁴⁷⁴ Hiroshi Tanaka, "The decision of Nibutani Dam and afterwards" *supra* note 375.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ Mark A. Levin, "Kayano et al. v Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'" *supra* note 399, at 16.

⁴⁷⁷ *Ibid.* The project is explained online on the website of the Ministry of Land, Infrastructure, Transportation, and Tourism of the government of Japan. Online: <http://www.mlit.go.jp/hkb/hkb_tk7_000003.html>. [Originally in Japanese, see bibliography for title in original language.]

economy of the province. As with many projects in the province of Hokkaido, the provincial and national authorities worked together in the development of the Eastern Tomakomai Industrial Park and the dams.

Between 1978 and 1983, the purpose for the construction of the dam (and the Biratori Dam) changed several times, including ‘water supply,’ ‘house water supply,’ and ‘flood prevention.’ The Hokkaido Development Commission finally settled the purpose of the Nibutani dam to be ‘flood control.’ The dam could not prevent floods, but it could make floods less likely.⁴⁷⁸

From the beginning, there were certain concerns with the project of the construction of both dams. Among them was that the authorities soon realized that the dam was to be constructed on land that would not be obtained voluntarily but would need to be expropriated.⁴⁷⁹

Usually, public state projects such the Nibutani Dam obtain the necessary land by negotiating a price with the owners. The development-friendly laws regarding expropriation in Japan mean that very few people choose not to surrender their lands voluntarily. According to Levin, land expropriation awards are deemed tax-free only if accepted within three years; after three years, the awards become taxable as current income.⁴⁸⁰ The above tax liability accrues after three years, regardless of whether or not the compensation was received.⁴⁸¹ Thus, hold-outs almost certainly lose significant percentages of the awards to taxes due to the long administrative and judicial processes that people use to fight the expropriations.⁴⁸² Moreover, compensation offered pursuant to Japan’s Land Expropriation Law escheats to the government ten years after tender is refused; neither administrative appeals nor

⁴⁷⁸ Hiroshi Tanaka, “The decision of Nibutani Dam and afterwards” *supra* note 375, at 6.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Mark A. Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan’s Indigenous Ainu People to Inform Understandings of the United States and Japan” *supra* note 367, at 452, note 114.

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.*

litigation stay the process.⁴⁸³ Since litigation in Japan can easily continue for more than ten years, individuals fighting the government jeopardize their entire awards.⁴⁸⁴

There were also other concerns with the project for the construction of the dam. Mr. Koda Kiyoshi, who was in charge of an environmental impact assessment requested by the Biratori Town in the middle of 1970s, indicated an important problem with the Nibutani Dam project due to its position, which is 20 kilometers downstream from the mouth of the river.⁴⁸⁵ In general, flood control requires the construction of a dam upstream. The Nibutani dam is in the downstream part of the Saru River because it was initially planned to supply water, and thus could not be considered to control flooding.⁴⁸⁶ According to Mr. Koda, the Hokkaido Development Bureau did not thoroughly examine the problem of deposit of sediments for a flood control dam in the lower part of the river.

The latest data from the Hokkaido Development Bureau indicates that 41.1 percent of the whole volume of the dammed reservoir has been already filled with sediment between 1998 and 2008.⁴⁸⁷ As Mr. Koda feared, the levels of sediment was considerably higher than expected. The Nibutani dam is therefore unlikely to work in a few years due to the deposit of sediments. This issue was considered in the decision but the court did not make any remarks about it.⁴⁸⁸

From 1982 until 1984 the Hokkaido Development Commission negotiated with the affected landowners about the purchase of their lands. Most of the landowners agreed

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*

⁴⁸⁵ Hiroshi Maruyama, "Ainu Landowners' Struggle for Justice and the Illegitimacy of the Nibutani Dam Project in Hokkaido Japan" *supra* note 373, at 75.

⁴⁸⁶ Japan Broadcasting Corporation, documentary film "The history of a Dam" produced and aired in February 2010 cited by Hiroshi Maruyama, "Ainu Landowners' Struggle for Justice and the Illegitimacy of the Nibutani Dam Project in Hokkaido Japan" *supra* note 373. [Originally in Japanese, see bibliography for title in original language.]

⁴⁸⁷ Hiroshi Maruyama, "Ainu Landowners' Struggle for Justice and the Illegitimacy of the Nibutani Dam Project in Hokkaido Japan" *supra* note 373, cites Yosuke Kosaka, "The issue of the Flood Control of the Biratori Dam," *The Hokkaido Shimbun* (10 October 2009) [Originally in Japanese, see bibliography for title in original language.]

⁴⁸⁸ Mark A. Levin, "Kayano et al. v Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'" *supra* note 399, at 16.

voluntarily to the purchase; only Tadashi Kaizawa and Shigeru Kayano refused to sell.⁴⁸⁹ The Ainu landowners were given 20 percent more than the price paid to Japanese landowners and more than the usual amount in this kind of expropriation in Hokkaido. The main lawyer in the case does not know why, although he asked government officials several times without obtaining a response. He guesses it was a hypocritical gesture, a token effort to placate the Ainu community in the area.⁴⁹⁰

In March 1986, the Hokkaido Development Commission asked the Ministry of Construction for authorization for the dam project. After some visits carried out in the area of Nibutani, the project authorization was given in December 1986.⁴⁹¹ In February 1987, the Ministry of Construction started the process towards the expropriation of the plaintiffs' land. In July 1988, the first stone of the Nibutani dam was placed.⁴⁹² In February 1989, and after a couple of hearings and one site visit, the Hokkaido Land Expropriation Committee issued instructions against Mr. Kayano and Mr. Kaizawa expropriating their lands and ordering them to vacate. Mr. Kayano and Kaizawa filed an administrative examination request to the Ministry of Construction in March 4, 1989. The Ministry denied their claim in April, 1993 and the next month both submitted their lawsuit. The first time water ran through the dam was in April 1996, when the first tests were performed. In August, the dam was opened to allow the celebration of the Ainu *Chipusanke* ceremony.⁴⁹³ In March 1997, the Sapporo District Court rendered its decision on *Nibutani Dam*. The ceremony of completion of the dam was celebrated in October 1997.⁴⁹⁴

⁴⁸⁹ Sixty of the affected landowners were Ainu according to Hiroshi Tanaka and Shigeru Kayano, *The Rebellion of two Ainu*, record of the *Nibutani Dam* trial, *supra* note 363, at 3.

⁴⁹⁰ Hiroshi Tanaka, "The decision of Nibutani Dam and afterwards" *supra* note 375.

⁴⁹¹ Hiroshi Tanaka and Shigeru Kayano, *The Rebellion of two Ainu*, record of the *Nibutani Dam* trial, *supra* note 363, at 3.

⁴⁹² *Ibid.*

⁴⁹³ The Japanese Dam Association website. Online: <<http://damnet.or.jp/cgi-bin/binranB/TPage.cgi?id=251>>. The Chipusanke ceremony is a ceremony to launch a new canoe. In the area of Nibutani, Mr. Kayano and other Ainu leaders revived the tradition of celebrating this ceremony in 1972. The ceremony is also celebrated in other areas.

⁴⁹⁴ *Ibid.*

4.1.1.3 The plaintiffs

Koichi Kaizawa and Shigeru Kayano both owned lands that had been granted to their ancestors during the establishment of the policy of development of Hokkaido and had been inherited from their fathers. Mr. Kayano owned a property that was about 9200 square meters, where he had a farm and some buildings, and Mr. Kaizawa owned about 8200 square meters of land, where he had his family home and crops field.⁴⁹⁵

The grandparents of the plaintiffs in this case made a great effort to become good farmers and raised their children to become successful Japanese farmers. By the time of the *Nibutani Dam* case, there were very few Ainu without Japanese ancestry; both plaintiffs have mixed Japanese and Ainu ancestry. Tadashi Kaizawa (Koichi's father), Koichi Kaizawa and Shigeru Kayano experienced discrimination because of their ancestry. They all also experienced personal rejection of their Ainu background when young. The three of them sought better living conditions for the Ainu people in Hokkaido and decided to use their situation to express their discontent with the Japanese policies that continuously took the land of the Ainu away "selfishly."⁴⁹⁶

They all were recognized leaders in the community of Nibutani and had served as directors of the board of the Hokkaido Ainu Association.⁴⁹⁷ Tadashi Kaizawa was a very successful farmer in the area and had acted as the vice president of the Ainu Association of Hokkaido. He had established relations with many leaders of marginalized sectors of Japanese society, such as the *Burakumin*, and *Ryukukan* (Okinawan) associations, and Indigenous peoples from other parts of the world, particularly in Asia and the US (Alaska). Koichi Kaizawa participated with his father in many of the activities and became a member of the committee that drafted the *Ainu Culture Promotion Law of 1997* (the project got its first start in 1988).

⁴⁹⁵ Hiroshi Tanaka, "The decision of Nibutani Dam and afterwards," *supra* note 375, at 8.
9200 square meters are equivalent to 2.3 acres.

⁴⁹⁶ *Ibid.*, at 9.

⁴⁹⁷ Mark A. Levin "Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan" *supra* note 367, at 442.

Mr. Kayano had worked as a logger, craftsman, in canneries, trading goods, etc. and began to be interested in the protection of Ainu heritage after he started to live more comfortably in the 1960s. He established the first Ainu Culture Museum in Nibutani in July 1972,⁴⁹⁸ and became involved in politics, participating in the Biratori Town assembly from 1975 to 1992. In August 1994 (a year and three months after filing the demand in this case), Mr. Kayano became a member of the Upper House of the Japanese Parliament. He became the first person to speak the Ainu language before all members of the Parliament.⁴⁹⁹

The plaintiffs enjoyed a better economic situation than most of the other farmers and Ainu people in the locality. They were debt free at the time and could afford to go through the expropriation process, though they did not pay any fees to most of the lawyers who represented them.⁵⁰⁰ In the cases of *Nibutani Dam* and *Zirahuén*, the lawyers received only token payments.

The claims in the *Nibutani Dam* case were formulated entirely by the lawyers with very little input from the plaintiffs, who only traveled to Sapporo to attend the court hearings. Hiroshi Tanaka, the main lawyer, expressed in a conference in July 2000 in Hokkaido University that a very difficult part of his job was to reframe legally the original plaintiffs' claims, which contained many ethical, moral, and political issues.⁵⁰¹

The plaintiffs came to the lawyers seeking some recognition of their Indigeneity and Indigenous rights, arguing the unfairness of the construction of the dam in their ancestral territories, and seeking to have the government address them and

⁴⁹⁸ Shigeru Kayano and Mark Selden, *Our land was a forest*, *supra* note 358.

⁴⁹⁹ Julian Kunnie, *supra* note 430.

⁵⁰⁰ According to Mr. Fusagawa, Shigeru Kayano paid an initial first payment for the main lawyer in the case but no other payments were made. The lawyers worked for free. Mr. Fusagawa, the lawyer interviewed in August 2011 for this study, never received any payment for the work he did for the case. Kiyoshi Fusagawa, QC, Co-counsel for the Appellants: Shigeru Kayano and Koichi Kaizawa, interview with author, 23 August 2011.

⁵⁰¹ Hiroshi Tanaka, "The decision of Nibutani Dam and afterwards" *supra* note 375, at 12.

apologize.⁵⁰² The lawyers knew Ainu people had not been recognized by the government and that to seek recognition *per se* would not be adjudicated in the courts; therefore, they challenged the construction of the dam in the way they did.⁵⁰³

The plaintiffs and lawyers in *Nibutani Dam* used the trial as part of a strategy to support the Indigenous movements in Japan. Their own communities considered both plaintiffs, during and after the litigation of the Nibutani Dam case, ‘troublemakers’ and at times undesirable.⁵⁰⁴

4.1.2 The claims in the *Nibutani Dam* case

In their plea, the plaintiffs argued that the expropriation ruling violated article 29(3) of the *Constitution*,⁵⁰⁵ and articles 20(3) and (4) of the *Land Expropriation Law*⁵⁰⁶ and requested the reversal of the rulings that confiscated the plaintiff’s lands, and the orders to vacate and surrender. They argued that the project’s authorization, the ruling to expropriate, the orders to vacate and surrender, and the process that led to such decisions were illegal because the Expropriation Committee failed to consider the detrimental effects of the project on the Ainu plaintiffs.⁵⁰⁷

Using a precedent handed down by the Tokyo High Court (*Toshogu Shrine Religious Organization v Minister of Construction*) that struck down and labeled as illegal an

⁵⁰² Hiroshi Tanaka and Shigeru Kayano, *The Rebellion of two Ainu, record of the Nibutani Dam trial*, *supra* note 363, at 126 and following.

⁵⁰³ Kiyoshi Fusagawa, QC, Co-counsel for the Appellants: Shigeru Kayano and Koichi Kaizawa, interview with author, 23 August 2011.

⁵⁰⁴ My personal experience talking to people in the community. According to Levin as the litigation wore on, the plaintiffs were often shunned and rejected by their Ainu neighbors for bringing unwanted attention to the village and jeopardizing the economic boom associated with the dam construction and related public works spending. Mark A. Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan’s Indigenous Ainu People to Inform Understandings of the United States and Japan” *supra* note 367, at 506.

⁵⁰⁵ Article 29. (3) Private property may be taken for public use upon just compensation therefore. This translation is from the English website of the Prime Minister and the Cabinet. Online: <http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html>.

⁵⁰⁶ Article 20 (3) of the Land Expropriation Law: A project plan shall contribute to the appropriate and rational use of the land and (4): The land expropriated shall be put to use for the public welfare. This translation is by the author.

⁵⁰⁷ Hiroshi Tanaka and Shigeru Kayano, *The Rebellion of two Ainu, record of the Nibutani Dam trial*, *supra* note 358, at 268 and following, and Hiroshi Tanaka, “The decision of Nibutani Dam and afterwards” *supra* note 375, at 13.

order to cut certain very old cedars that surrounded a shrine in the province of Tochigi for the construction of a road,⁵⁰⁸ the plaintiffs argued that the discretionary authority of the Hokkaido Expropriation Committee had exceeded its legal limitations when it failed to consider the detriment to the interests of the plaintiffs due to the construction of the dam in the area. This failure meant that the Committee did not properly evaluate (compare, balance) the negative (detrimental) and positive (beneficial) effects of the public project, and without such proper evaluation, the necessary requirements of an ‘appropriate’ and ‘rational’ use of the public project could not be achieved.⁵⁰⁹

The precedent used by the plaintiffs was the only final decision in which a court had declared illegal the actions of a governmental agency in respect of a public project.⁵¹⁰ The decision in the *Nibutani Dam* case became the second one to stand in the history of Japan.

The legal process of expropriation follows three steps. In the first, government officials obtain the project authorization; in the second step, the government officials process the orders of expropriation; in the third, expropriation is carried out and compensation is paid. The plaintiffs did not file any administrative appeal against the Dam Project Authorization issued by the Ministry of Construction, but only against the expropriation orders. During the trial case, they argued that the Expropriation orders perpetuated the illegalities of the dam Project Authorization (DPA).⁵¹¹

The reason behind not challenging the project authorization seems to have been that the plaintiffs did not want to cause delay to the compensation payments that were

⁵⁰⁸ *Toshogu Shrine Religious Organization v Minister of Construction*, 710 Hanrei Jiho 23 (Tokyo High Court of July 13, 1973), and 556 Hanrei Jiho 23 (Utsunomiya District Court, of Apr. 9, 1969).

⁵⁰⁹ Hiroshi Tanaka, “The decision of Nibutani Dam and afterwards” *supra* note 375, at 13-14.

⁵¹⁰ *Ibid.*

⁵¹¹ Project Authorizations are not communicated directly to each of the affected people; they are only displayed in public areas near where the land will be expropriated. Mark A. Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan” *supra* note 367, at 453.

being processed for the rest of the affected people in the town.⁵¹² They had decided not to begin the challenge against the expropriation process until the rest of the people affected by the construction of the dam in their communities had finally received their compensation payments for the voluntary surrender of their land.⁵¹³

The defendant counter argument

The Hokkaido Expropriation Committee argued that they had considered Ainu culture through the establishment of Nibutani Dam Area Environmental Investigation and Design Committee, which was comprised of experts in agriculture, anthropology and economics and Biratori Township Council members.⁵¹⁴ This Committee submitted a report that was, according to the defendants, considered in the drafting of the Project Authorization. They also argued that the authorities constructed a fish ladder in the Nibutani dam for salmon also in consideration of Ainu culture.⁵¹⁵

The defendant accepted that the plaintiffs were Ainu and so, this fact did not become an issue in the dispute, as it did in the *Delgamuukw* case. The defendants argued in the following way in respect of the plaintiffs' identity:

...assuming arguendo that a minority's rights to enjoy its culture should be respected, there was no basis to interpret those rights as deserving a higher position than any of the other issues that are required to be considered under the Land Expropriation Law.⁵¹⁶

The Government of Japan participated in the trial in support of the defense position as an intervenor.⁵¹⁷

⁵¹² Hiroshi Tanaka, "The decision of Nibutani Dam and afterwards" *supra* note 375, at 13-14.

⁵¹³ Hiroshi Maruyama, "Ainu Landowners' Struggle for Justice and the Illegitimacy of the Nibutani Dam Project in Hokkaido Japan" *supra* note 373.

⁵¹⁴ Mark A. Levin, "Kayano et al. v Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'" *supra* note 399, at 23.

⁵¹⁵ *Ibid.*, at 24.

⁵¹⁶ *Ibid.*, at 26.

⁵¹⁷ Mark A. Levin "Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan," *supra* note 367, at 454.

4.1.3 The Sapporo District Court's decision

The Sapporo District Court (Chief Justice Kazuo Ichimiya, Judge Akira Horiuchi, and Judge Kazuto Ohara) found that the Ministry of Construction failed to consider many important consequences of the construction of the dam for the members of the Ainu population of Nibutani, neglected to conduct the necessary investigations to assess the priority of the competing interests regarding the design and execution of the Project, and left all of the consequential losses suffered by the Ainu without remedy.⁵¹⁸ Since the Ministry of Construction did not consider these many issues of importance when assessing the propriety of the construction of a dam in Nibutani, it failed to perform its duties. The court then concluded that the Ministry of Construction's discretionary authority exceeded the administrative discretion given to the authorizing agency, "reflecting the majority's careless and selfish policy-making," and was illegal.⁵¹⁹

The court considered that strict judicial scrutiny was in order in keeping with the direction of other Japanese courts when establishing that government actions that infringe on individual civil liberties should receive stricter judicial scrutiny than economic, social, and property rights (this is referred to as the principle of Double Standard of constitutional protection).⁵²⁰

The court did not recognize any group rights in the decision as their entire decision was based on protecting individuals, as members of a minority. The decision aimed to attain the difficult balance that all government actions must accomplish regarding the protection of the rights of the individual members of certain minority groups and the public welfare. The principle of Public Welfare is central to constitutional interpretation in Japan.⁵²¹ It has been found to limit individual rights in most

⁵¹⁸ Mark A. Levin, "Kayano et al. v Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'" *supra* note 399.

⁵¹⁹ *Ibid.*, at 36.

⁵²⁰ Hiroshi Oda, *supra* note 381, at 91.

⁵²¹ *Ibid.*

constitutional (and many non-constitutional) cases decided by the courts.⁵²² Relying on Article 31 (1) of Japan's *Administrative Case Litigation Law*,⁵²³ the court rejected the plaintiff's claims and denied them any relief. The following paragraphs will explain how it reached this decision.

The Sapporo District Court rejected the constitutional argument of the plaintiffs. The judges declared that the proper method to examine the validity of the project authorization, the orders to vacate and surrender, and the rulings to expropriate was through an examination of the conformity of these with the *Land Expropriation Law* and not directly with article 29 of the *Constitution of Japan*. In their opinion, since there was no argument of unconstitutionality regarding the *Land Expropriation Law*, there was no possibility to argue the direct unconstitutionality of those rulings, orders, and authorization due to their lack of consistency with the content of Article 29 of the Constitution.⁵²⁴

The court found that the illegalities of the Project Authorization were inherited by the expropriation rulings. They considered that the project authorization and the expropriation rulings were steps in a sequence of administrative acts that aimed to confiscate land for a particular public project.⁵²⁵ Moreover, since the Expropriation Committee is the one that issues the expropriation ruling but not the one that issues the project authorization (which is issued by the Ministry of Construction), and cannot examine the propriety of the project authorization, it is important that the sequence of acts be examined as a whole.⁵²⁶ This way, if there is any illegality in the Project Authorization that is perpetuated in the process leading to the expropriation, the court is able to examine also the Project Authorization. The possibility of disputing the ruling to expropriate means that they must be understood as two parts of

⁵²² *Ibid.* at 91, 92, and 107.

⁵²³ See *supra* note 379.

⁵²⁴ Mark A. Levin, "Kayano et al. v Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'" *supra* note 399, at 7.

⁵²⁵ *Ibid.*, at 8.

⁵²⁶ *Ibid.*, at 9.

a whole.⁵²⁷ It is with respect to these issues that they considered it proper to study the illegality of the process of expropriation from the time when the Project Authorization occurred.

The judges stated in the decision that the proper evaluation (comparison) of the benefits and the detriments of the construction of the Nibutani Dam had to consider the background of the Project Plan enactment process, the details of the Project Plan, the costs and the detrimental effects of the execution of the project, and the arguments raised in response to those costs and detrimental effects caused by the execution of the project.⁵²⁸

The court considered that there were many benefits from the construction of the dam, including flood control, maintenance of the correct functioning of the river flow, water supply for irrigation, industrial and municipal use, and the generation of electricity (enough to supply 1,000 homes a day).⁵²⁹ The court considered that among the benefits of the dam was that it could save many lives and keep safe the properties around the river (the court enumerated the many cases in which typhoons, rains and storms have provoked floods that have caused many deaths, and the destruction of a large number of properties).⁵³⁰

The court then went on to examine the detrimental effects of the construction of the Nibutani Dam. The judges first established that the Ainu people living in the Nibutani Area had the legal status of a ‘minority,’ according to article 27 of the *International Covenant on Civil and Political Rights (ICCPR)* as recognized by the Government of Japan in its third report submitted to the UN Human Rights Committee in 1991.⁵³¹

⁵²⁷ The court also considered that since the Project Authorization is only posted in a public space that may or may not be in the vicinity of the domicile of the affected people while the rulings for expropriation are given to each individual, landowners are more prone to understand their affectation until they receive the rulings.

⁵²⁸ Mark A. Levin, “Kayano et al. v Hokkaido Expropriation Committee: ‘The Nibutani Dam Decision’” *supra* note 399, at 10.

⁵²⁹ *Ibid.*, at 12-17.

⁵³⁰ *Ibid.*

⁵³¹ *Ibid.* It states that Ainu people have their own religion and language, and because the uniqueness of their culture is being preserved, etc., they may be fairly described as a minority.

They considered the large percentage of Ainu residents in the area and recognized their distinct culture.⁵³² They also considered the large amount of their lands that was to be submerged, and the large number of residences that would need to be evacuated, and concluded that:

[W]e can easily confirm that accomplishment of the ‘Project Plan’ will impose hardship on the Ainu people living in the Nibutani area or, even if that is not the case, it will greatly impact their lifestyle and culture.⁵³³

In this part of the decision, the court examined the cultural characteristics of the Ainu in general and the Ainu in Nibutani, the history of the colonization of the Ainu and the importance of the *ioru* and their surroundings to the maintenance of the Ainu culture.⁵³⁴ Regarding the area of Nibutani, the judges labeled Nibutani as the birthplace of Ainu cultural scholarship.⁵³⁵ They considered the relevance and importance of the *Chipusanke* ceremony (a ceremony to “bless” a new canoe), the *Chashi* archeological sites, (the court identified 27 such places that used to be Ainu forts, fences, castles, lookouts, etc. in the area, of which several would be completely destroyed through the construction of the dam) the many areas where Ainu considered the existence of *kamuy*, the *yukar* (Ainu’s folkloric narrative and poetry), and the *Chinomishir* (Ainu sacred place for worship) in Ainu culture.⁵³⁶ According to their evaluation, the *Chipusanke* and the *Chashi* are irreplaceable resources.

The court first examined how the authorities had evaluated the consequences of the construction of the dam for the sites mentioned above, considering them cultural assets. This part of the decision quotes several communications among the Muroran Development Construction Division Chief, the Hokkaido Development Bureau, the Hokkaido Board of Education, the Mayor of Biratori and a non-profit organization

⁵³² *Ibid.*, at 17-18.

⁵³³ *Ibid.*, at 18.

⁵³⁴ *Ibid.*, at 19.

⁵³⁵ *Ibid.*, at 19.

⁵³⁶ *Ibid.*, at 19-21.

called Hokkaido Buried Cultural Assets Center.⁵³⁷ The court then considered that none of these communications seemed to have been referenced in the Project Authorization Application submitted, the Construction Implementation Plan, or the Project's Fundamental Plan.⁵³⁸ The court concluded that there was not enough evidence to conclude that there were any remedial measures devised by the authorities to address the impact of the Nibutani dam construction on Ainu culture in the Nibutani area.⁵³⁹

They also examined the actions after the Project Authorization. The court considered the joint efforts of the authorities in charge of the construction and the Biratori Township to preserve a portion of one of the *Chashi*, the *Yuoy Chashi*, and to conduct the *Chipusanke* ceremony on the riverside grounds below the dam.⁵⁴⁰

Then the court established that the Ainu have the right to enjoy their own culture on the basis of two laws: Article 27 of the *ICCPR* and Article 13 of the *Constitution of Japan*.⁵⁴¹ According to the court, the *ICCPR* guarantees to all individuals belonging to a minority the right to enjoy that minority's distinct culture. Together with this, there is an obligation imposed upon all contracting nations to exercise due care with regard to this guarantee when deciding upon and executing national policies which have the risk of adversely affecting a minority's culture, etc. Thus, the Ainu people as a minority, which has preserved the uniqueness of its culture, are guaranteed the right to enjoy their culture according to the provisions of the *Constitution of Japan*, Article 98 (2).⁵⁴² At the same time, the court concluded that Article 13 of the *Constitution of Japan* establishes a justiciable obligation on the part of the state:

⁵³⁷ *Ibid.*, at 22.

⁵³⁸ *Ibid.*, at 23.

⁵³⁹ *Ibid.*, at 24-25.

⁵⁴⁰ *Ibid.*

⁵⁴¹ Article 13 of the *Constitution of Japan*: All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs. This translation is from the English website of the Prime Minister and the Cabinet. Online: <http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html>.

⁵⁴² 98.2. The treaties concluded by Japan and established laws of nations shall be faithfully observed) of the Constitution, our nation has a duty to faithfully observe this guarantee...

Diversity exists in an unmistakable fashion as the respective differences in the particulars faced by each individual (gender, ability, age, wealth, etc.). Premised upon this diversity and these differences, Article 13 demands meaningful, not superficial, respect for individuals and the differences arising between them. And when, in any given social setting, stronger persons take care of those weaker with humility and grace, a diverse society through which the entire community can prosper is established and preserved. There are no other means to pursue happiness... we agree that article 13 of the Constitution guarantees to the plaintiffs the right to enjoy the distinct ethnic culture of the Ainu people, which is the minority to which the plaintiffs belong.⁵⁴³

The judges considered that any restriction on the rights established in article 27 of the *ICCPR* and article 13 of the *Constitution of Japan* should be only to the narrowest possible degree. Thus, the authorities have the duty to grant generous consideration to the interests associated with a minority group's culture to ensure that no improper infringement of these rights occurs when determining or executing policies which risk an adverse effect upon a minority's culture.⁵⁴⁴

The Sapporo District Court then continued describing the history of the relationship between the Ainu people and the Japanese state, and finally concluded that the Ainu people were 'Indigenous peoples' to the island of Hokkaido.⁵⁴⁵

The court emphasized the indigenesness of the Ainu in their decision, establishing that the degree to which cultural integrity should be guaranteed is higher for Indigenous peoples including the Ainu because of their Indigenesness, in contrast with migrants and other minorities.⁵⁴⁶ Nevertheless, the court did not recognize any particular right of the Ainu due to their 'Indigeneity.' The court decided:

⁵⁴³ Mark A. Levin, "Kayano et al. v Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'" *supra* note 399, at 27-28.

⁵⁴⁴ *Ibid.*, at 35.

⁵⁴⁵ *Ibid.*, at 32.

⁵⁴⁶ Teruki Tsunemoto, "The Ainu as an Indigenous People: The Significance of the Diet Resolution and Protection of their Culture" in *Traditional Wisdom and the Public Sphere, Proceedings to protect Aboriginal*

This notion [that indigenous peoples' circumstances warrant greater consideration] clearly follows with a growing international movement towards seeing indigenous peoples' culture, lifestyle, traditional ceremonies, customary practices, etc., as deserving respect regardless of whether or not such recognition goes so far as there being so-called indigenous rights, meaning indigenous peoples' right of self-determination with regard to land, resources, political control, etc.[emphasis added]⁵⁴⁷

According to Professor Tsunemoto, in this paragraph, the court “clearly avoids the recognition of any legal rights of Indigenous peoples apart from those that are guaranteed to ethnic minorities generally under international law.”⁵⁴⁸

The decision found that stronger members of the community ought to protect weaker members of the community (as individuals), such as the Ainu.⁵⁴⁹ This approach can also be seen in many decisions in Canada and Mexico, where the courts have found that governments have a fiduciary duty and the duty to guarantee the wellbeing of their ‘weaker’ societies. The main difference of the Japanese approach is that it is based on individuals and not on communities/groups.

In the last section of the decision, the court reflected on the issues presented above and compared the beneficial and the detrimental effects of the construction of the dam. The decision followed the line of the *Toshogu Shrine Religious Organization v Minister of Construction* decision by the Tokyo High Court.⁵⁵⁰ The judges concluded that the detriment associated with the construction of the dam upon the Ainu Indigenous culture, and thus on Ainu individuals, had not been sufficiently

Traditional intellectual creation by Huang Ju Zheng, Qiu Peng (ed.) (Republic of China: Learning and Digital Archives Application and Promotion of Academic and Social Programs, 1998), at 18. [Originally in Chinese, see bibliography for title in original language.]

⁵⁴⁷ Mark A. Levin, “Kayano et al. v Hokkaido Expropriation Committee: ‘The Nibutani Dam Decision’” *supra* note 399, at 28.

⁵⁴⁸ *Ibid.*, at 28, citing Teruki Tsunemoto.

⁵⁴⁹ *Ibid.*, at 28.

⁵⁵⁰ *Toshogu Shrine Religious Organization v Minister of Construction*, 710 Hanrei Jiho 23 (Tokyo High Court of July 13, 1973), and 556 Hanrei Jiho 23 (Utsonomiya District Court, of Apr. 9, 1969)

considered and concluded that the exercise of the government administrative discretion was excessive and thus illegal.⁵⁵¹

When doing the study of such detriment associated with the construction of the dam, the court in the *Nibutani Dam* case used the concepts of *jinkakuteki kachi* (value of all persons as individuals) and *jiko no jinkakuteki sonzai* (existence of a person's individuality) as the objects of protection of article 13 of the *Constitution of Japan*.⁵⁵² The court recognized that there is certain value that is given subjectively to the identities of individuals through their cultural ties with their communities (minority's group).⁵⁵³ Using these concepts, the court established that the individuality of all persons depends on the heritage and cultural beliefs of their communities. Thus, it was of ultimate importance that the government respect the sources of their identities: the cultural heritage of their Ainu communities.⁵⁵⁴

In the translation of the decision provided by Mark A. Levin, the words seem to attain the following character: the judges believed that the guarantee of the right to enjoy a distinct culture is democratically achieved only when the majority comprehends the circumstances faced by the socially weak and there is a meaningful respect of each member of a minority (as an individual). In their view, the minority's distinct ethnic culture was essential to sustaining the individual's ethnicity without being assimilated into the majority. For the members of an ethnic group, the right to enjoy their distinct ethnic culture is a right that is needed for their survival as a person.⁵⁵⁵

Near the end of the decision, the court noted that contact between the Japanese culture and the Ainu culture presented a great opportunity for Japanese people and

⁵⁵¹ *Ibid.*, at 25 and 29.

⁵⁵² Mark A. Levin "Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan," *supra* note 367, at 485.

⁵⁵³ *Ibid.*

⁵⁵⁴ Mark A. Levin, "Kayano et al. v Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'" *supra* note 399, at 26, 29.

⁵⁵⁵ *Ibid.*, at 28.

could contribute to fostering more diverse values and a better understanding of ethnic diversity.⁵⁵⁶

According to Japanese law, when government decisions (rulings, orders, authorizations) are found to be illegal, the remedy is to reverse such decisions.⁵⁵⁷ Nevertheless, by the time of this decision the dam had already been completed. The court considered that the reversal of the rulings and orders would mean that the dam would become a useless object.⁵⁵⁸ The dangers of having such a construction not functioning properly in the area would only increase and the residents would have to go without the benefits of the completed dam and be put at risk.⁵⁵⁹ Finally, the many cultural assets in the area had already been demolished and destroyed and could not be restored. Thus, there were no legal consequences for the defendants, who obviously did not appeal, while the plaintiffs were so overjoyed by the substance and overall purport of the decision that they did not want to risk losing their gains at a higher level with an appeal.⁵⁶⁰ Accordingly, the plaintiffs and their counsel decided to allow their appeal rights to lapse letting the decision by the Sapporo District Court stand.⁵⁶¹

⁵⁵⁶ *Ibid.*, at 35.

⁵⁵⁷ *Ibid.*, at 39.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid.*

⁵⁶⁰ Mark A. Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan” *supra* note 353, at 466; and Hiroshi Maruyama *supra* note 367, at 66.

⁵⁶¹ Scholars such as Ramseyer have studied the ‘conservatism’ of Japanese judges and have hinted that it may be due to a system that punishes those judges that do not abide strictly by the precedents established by superior courts. Thus, being conservative is better for their careers. J. See Mark Ramseyer, Eric B. Rasmusen, “Why Are Japanese Judges So Conservative in Politically Charged Cases” (2001) 95 *American Political Science Review*, 331. The decision makes me wonder if the judges thought of this solution in order to be able to say what they really thought of the problem in Nibutani, without having upon them the consequences of writing such a decision.

Chapter 5: The Zirahuén Case

This is not a message of resignation, it is not of war...

*Our message is one of struggle and resistance.*⁵⁶²

The Zirahuén case was begun with an amparo plea⁵⁶³ presented in the Federal District Courts office in Morelia, Michoacán in September 26, 2001.⁵⁶⁴ This amparo plea received file number 646/2001 in the First Federal District Court of Michoacán on November 15, 2001.⁵⁶⁵ The claims sought the protection of the *Political Constitution of the United States of Mexico (Mexican Constitution)* and the law against the process of reform of articles 2 and 4, and the additions to articles 1, 18, and 115 of the *Mexican Constitution* published in August 14, 2001.⁵⁶⁶ The Zirahuén Community argued that the reformed articles deprived them of their property, usufruct, use, and enjoyment rights over their lands, water, territory, and resources.⁵⁶⁷

Their argument was that the Federal Congress had the duty to consult them under the International Labour Organization (ILO) *Indigenous and Tribal Peoples Convention*, 1989 (No.169), an international treaty ratified by Mexico and thus above federal law, regarding any policies, laws and government actions that could affect their interests

⁵⁶² Open letter by the Ejercito Zapatista de Liberacion Nacional, dated December 30, 2012, signed by the Subcomandante Marcos. Communiqués of the Indigenous Revolutionary Clandestine Committee –General Command of the Zapatista Army of National Liberation, Mexico [December 2012 – March 2013]. Online: <<http://www.elkilombo.org/wp-content/uploads/LittleSchool-English-booklet.pdf>>, at 3.

⁵⁶³ The action of the community of Zirahuén is called ‘amparo,’ an ‘indirect amparo.’ Amparo means ‘protection’ in Spanish. There are two kinds of amparo in actual Mexican legislation: direct and indirect. Direct amparos (DA) are instruments used against the ruling of a lower court and are reviewed by higher courts (an appeal); indirect amparos (IA) are instruments that can challenge any order, act, law, or decision made by any authority on constitutional grounds. In this sense indirect amparos are instruments used with the aim of protecting/enforcing constitutionalism. Indirect amparos usually run parallel to the “original” legal process, which in most cases, is suspended while the constitutionality of a procedure is considered and decided by the federal courts in Mexico. The Zirahuén trial did not originate from a parallel procedure but was a challenge against the process of constitutional reform of August of 2001. Nonetheless, the Zirahuén case ran parallel to an existing legal claim for extension of their communal property in the agrarian courts and was born within the context of that legal claim.

⁵⁶⁴ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 1.

⁵⁶⁵ *Ibid.*, at 13.

⁵⁶⁶ *Ibid.*, at 2-3.

⁵⁶⁷ *Ibid.*, at 7.

and rights as Indigenous peoples.⁵⁶⁸ The ILO *Indigenous and Tribal Peoples Convention, 1989* (No. 169) provides:

In applying the provisions of this Convention, Governments shall: (a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly...⁵⁶⁹

The Indigenous Zirahuén Community argued that the government did not consult them regarding the constitutional reform decree of August 14, 2001, which regulates Indigenous peoples and communities.⁵⁷⁰

The decision of the trial judge denied the amparo and dismissed the claims of the plaintiffs.⁵⁷¹ In December 4, 2001, the Community presented a *Recurso de Revision*⁵⁷² against that decision, which was allowed and given the file number 123/2002 in the Second Chamber of the Supreme Court of Justice of Mexico (SSSCJN).⁵⁷³ On October 4, 2002, the SSSCJN changed the reasons for dismissal but decided the case in the same way as the First Federal District Court of Michoacán. The court decided that the Community had not proven any harm or detriment to their rights and thus, did not have legal interest and standing.⁵⁷⁴ The claims were rejected and no relief was granted to the plaintiffs.⁵⁷⁵ The amparo trial of the Zirahuén Community studied in this dissertation rests on the context explained below.

⁵⁶⁸ *Ibid.*, at 12.

⁵⁶⁹ *Indigenous and Tribal Peoples Convention, 1989* (No. 169) established by the General Conference of the International Labour Organization, Article 6.

⁵⁷⁰ *Ibid.*, at 24.

⁵⁷¹ *Ibid.*, at 13.

⁵⁷² Review of Amparo, which is a kind of appeal.

⁵⁷³ The SCJN organizes itself in three organs: the First Chamber, which is in charge of reviewing cases of Criminal and Civil juridical nature; the Second Chamber, which is in charge of reviewing cases of Administrative and Labour juridical nature; and the Full Bench which reviews cases that are considered of particular importance.

⁵⁷⁴ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v. of the Union et al.*, [2002] Amparo Review 123/2002, at 135.

⁵⁷⁵ *Ibid.*

5.1.1 Context of the *Zirahuén* case

In Mexico, there is no registry of Indigenous peoples. The authorities that carry out the census usually consider language as an important characteristic that distinguishes Indigenous peoples from non-Indigenous peoples, but in practice, the authorities look more at self-identification issues on ‘indigeneity.’⁵⁷⁶ The courts consider that a ‘consciousness of Indigenous identity’ is sufficient to have legitimacy to begin or appeal procedures in order to protect their Indigenous rights and freedoms.⁵⁷⁷ The *Mexican Constitution* and laws regulating land and Indigenous peoples have changed a lot over time with the latest constitutional reform on the matter of Indigenous peoples’ rights occurring in August 2001.

The historical larger picture

The first European explorers arrived at what is now known as the Mexican territory in the 16th century.⁵⁷⁸ Even though there were many other Indigenous empires and communities that were conquered or simply ‘annexed’ later on, it is usually considered that the conquest of Mexico by the Spanish occurred in 1521, when Mexico-Tenochtitlan fell.⁵⁷⁹ Mexico-Tenochtitlan is now Mexico City and was the capital of the Aztec empire. Mexico-Tenochtitlan became the capital of the Spanish colony known as the Nueva España (New Spain in English). The Viceroyalty of the New Spain covered from what today is Canada to Panama, islands in the Pacific (such as the Philippines), and some areas of what today is Venezuela and Colombia.⁵⁸⁰ Mexico was a colony from 1521 to 1821, the year it became independent.⁵⁸¹ The Spanish Crown claimed ownership of the land in what we now know as Mexico mainly through Papal bulls.⁵⁸²

⁵⁷⁶ International Labour Organization, *Indigenous & Tribal Peoples’ rights in practice, A guide to the ILO Convention No. 169*. International Labour Standards Department (2009). Online:

<http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_113014.pdf>.

⁵⁷⁷ Electoral Tribunal of the Judiciary, *Jurisprudence 4/2012*. [Originally in Spanish, see bibliography for title in original language.]

⁵⁷⁸ Ignacio Bernal, et al. *Mexican General History* (México, D.F.: El Colegio de México, Centro de Estudios Históricos, 2000), at 237. [Originally in Spanish, see bibliography for title in original language.]

⁵⁷⁹ *Ibid.*, at 241-242.

⁵⁸⁰ *Ibid.*, at 289.

⁵⁸¹ *Ibid.*, at 527. The Plan de Iguala establishes the agreements to achieve peace in Mexico in February of 1821 and the signature of the *Independence Act of the Mexican Empire* in September 28 of 1821. The Independence

The War of Independence started in 1810.⁵⁸³ More wars followed over the next fifty years. Some of the most relevant international conflicts were against France in 1838–1839, the US in 1846–1847 and again France in 1861–1867.⁵⁸⁴ Apart from these conflicts, there were numerous upheavals and civil wars in different parts of the country. Since then, many internal conflicts (such as the Mexican revolution) have had at their center Indigenous communities and peoples and their claims for land.⁵⁸⁵

Indigenous communities in Mexico, as in other places, suffered from policies of dispossession, genocide, slavery, and assimilation. Some Indigenous populations maintained varying control over parts of their territories throughout Mexico. The large majority of Indigenous communities that still exist today survived plagues and epidemics, converted to Catholicism, and lived on land that was not close to the main pre-Hispanic and later Mexican cities.⁵⁸⁶ In Mexico, as in most of Latin America, few Indigenous forms of law preceded the emergence of the modern nation-state and continue to coexist alongside state law in many areas.⁵⁸⁷ For example, communal territories existed long before the arrival of the Spanish.⁵⁸⁸

War lasted 11 years. Mexico was originally established as an empire but this only lasted two years, when the Mexican Republic was established. From 1864 to 1867, the French establish the Second Mexican Empire. Maximilian I, from the Habsburg house ruled Mexico during this time. Maximilian I was killed in 1867 under the orders of Benito Juárez, considered to be the first and only Indigenous president of Mexico. Benito Juárez has been among the most distinguished leaders and presidents of Mexico. Among many of his policies was the division of the church and the Mexican state. The Catholic Church has been since colonial times an important institution with great influence in the Mexican society and government.

⁵⁸² E.g. Pope Alexander VI Bull *Inter Caetera*, May 4, 1493.

⁵⁸³ Ignacio Bernal, et. al., *supra* note 578, at 511.

⁵⁸⁴ *Ibid.*, at 543, 577, and 629.

⁵⁸⁵ Margarita del Carmen Zárate Vidal, *Seeking the Community: Recreated Identities and Peasant Organization in Michoacán* (Mexico: El Colegio de Michoacán, Universidad Autónoma Metropolitana, 1998), at 19-21. [Originally in Spanish, see bibliography for title in original language.] Prof. Zárate Vidal is of the opinion that in many occasions, the rebellions were part of a larger movement that in the end would opaque the Indian claims.

⁵⁸⁶ This is an ambitious statement; it is contested from different perspectives. Many people that self-identify as Indigenous peoples might have lived near the main cities, and not converted to Catholicism, e.g. many Huichol communities. The Yaqui people were always against the Spanish and afterwards against the Mexican. Professor Zárate Vidal also explains how several Indigenous peoples had control of the Sierra Gorda until late 1810s.

⁵⁸⁷ Rachel Sieder, “Legal Cultures in the (Un)Rule of Law: Indigenous Rights and Juridification in Guatemala” (2011) in Lawrence M. Friedman, Rogelio Pérez-Perdomo, and Manuel A. Gómez (eds.), *Law in Many Societies. A Reader*, 152-8, at 153.

⁵⁸⁸ E.g. The Aztecs had different kinds of communal possession of land. Among them were the *tlalmilli* (given to certain families that could give the land as inheritance but could not be leased or sold) and *altepetlalli* (worked by the entire community to cover public expenses), which belonged to the *calpullis* (the unit of social organization in

In Michoacán, the scheme of communal property established during the colonial period was different from the scheme that existed before the arrival of the Spanish but it maintained the communal right over an area in a similar way.⁵⁸⁹ In this province, even in the cases in which the land was given to the church or Spanish landlords, most of the towns (and their territories) were still led by the Indigenous leaders who would agree with the Spanish, Mestizo, or Indigenous landlords and the church on how profits would be shared.⁵⁹⁰

In the province of Michoacán, the title of many communities was recognized during the colony,⁵⁹¹ including Zirahuén,⁵⁹² but after independence many communities lost such recognition. In the first years of Mexico as a state, many laws were established organizing land tenure and taxes, that from one day to the other allowed third parties to claim communities' land. These new laws did not establish causes of action to obtain again land entitlements.⁵⁹³

the Aztec society). See Jose Kohler, "The Aztecs' Law," in Ruben Delgado Moya (comp.) *Mexican Juridical Antology*, (Mexico: UNAM-III, 1992), at 58. [Originally in Spanish, see bibliography for title in original language.]

⁵⁸⁹ Carlos Salinas de Gortari, Proposal of Constitutional Reform of Article 27, dated November 7, 1991 and addressed to the Deputies Chamber of the Congress of the Union:

Since 1567, Indigenous communities were assimilated to communal land in Spanish towns which had a limit of around 100 hectares. In this way the Republic of Indians were established with their own territories and authorities, subordinated to the *alcalde* (a kind of municipal authority, judge, parish, sheriff) and the Spanish local *corregidores* (similar to *alcalde* but for larger towns and of larger authority than the *alcalde*).

[Translation by author. Originally in Spanish, see bibliography for title in original language.]

⁵⁹⁰ This is not true about other areas such as Chiapas and Sonora, and many other places where Indigenous communities organized and used the land differently.

⁵⁹¹ Alejandro de Humboldt, *Political Essay of the New Spain Kingdom*, (1822) Volume 1. [Originally in Spanish, see bibliography for title in original language.]

⁵⁹² Amparo with royal number 1607, conceded to the naturals of Zirahuén on February 20, 1733, executed by the Captain Juan Andrés de Arza, *alcalde* of the city of Pátzcuaro. The Amparo can be read and consulted in the Appendix section of Brenda Griselda Guevara Sánchez, "Community and Conflict: Zirahuén 1882–1963" Bachelor in History Thesis, Faculty of History (Morelia, Michoacán: Universidad Michoacana de San Nicolas de Hidalgo 2010). [Originally in Spanish, see bibliography for title in original language.]

⁵⁹³ The *Constitution of 1857* did not recognize communities. Jurists, lawyers and courts sustained that they were legally non-existent. The *Wasteland Law of June of 1856*, also called '*Ley Lerdo*' took away large portions of land from communal properties. [Originally in Spanish, see bibliography for title in original language.]

During the government of Porfirio Díaz (1877–1910), the authorities sought to divide communal properties and promote private property to enhance productivity.⁵⁹⁴ The Mexican state encouraged legal regimes that allowed land division, larger profits and an easier system to transfer and organize land, which ended up creating *latifundios* (large parcels of land owned only by one person).⁵⁹⁵ Porfirio Díaz was not the first or the last that intended to dismantle communal property in Mexico. According to many scholars most regimes also aimed at this.⁵⁹⁶ Many communities that saw themselves threatened were not happy with the government policies, leading to many rebellions throughout the country.⁵⁹⁷

The Mexican Revolution started in 1910 and ended in 1921.⁵⁹⁸ In 1917, a congress of different peoples from different states established the current *Mexican Constitution*.⁵⁹⁹ The original text of the Constitution does not mention the word ‘Indigenous’ but had the ambitious aim to protect and return the land and water to “communities” and “tribes.”⁶⁰⁰ After the Revolution, many communities requested the restitution of their lands and the recognition of their communities. It was a slow process with most of the restitution happening after 1934 when Lazaro Cardenas

⁵⁹⁴ The *Law about the Occupation and Sale of Wasteland of the United States of Mexico* (March 26, 1894) and the *Decrees about the Colonization and Demarcation Companies* (1880–1889) also took all land not used for agriculture from communities. [Originally in Spanish, see bibliography for title in original language.] There were also many rebellions against the legal impositions, e.g. the Yaqui people uprisings start in 1825, and end up until recently. The Mayas in different parts of the country also had several uprisings; among the most famous is the rebellion of 1840 in Yucatán.

⁵⁹⁵ José G. Zúñiga Alegría and Juan A. Castillo López, “The Revolution of 1910 and the Mexican Myth” (May/August 2010) 75 *Alegatos*, 497, at 502-503. [Originally in Spanish, see bibliography for title in original language.] Latifundios are very large pieces of land owned only by one person or family.

⁵⁹⁶ Margarita Zárate (1998), Daniela Marino (2001), Sergio Mayet (1984), among others.

⁵⁹⁷ Ignacio Bernal, et. al., *supra* note 578, at 759-783.

⁵⁹⁸ *Ibid.*, at 759. The Revolution in Mexico had two strong causes/ideas that boosted the movement. The first was the combination of the overturn of the last dictator in Mexican history, Porfirio Díaz, and the establishment of a prohibition against the re-election of governors and presidents. The second was the restitution and/or establishment of traditional communal properties.

⁵⁹⁹ *Ibid.*, at 808. The *Constitution of Mexico* has been reformed considerably since 1917. See the number and content of reforms by the Congress of the Union (Federal Congress). Online: <<http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm>>.

⁶⁰⁰ For example, the original article 27 (paragraph 3) considered that:

The towns, ranchs, and communities that lack of land and water, or do not have enough land and water for their population, have the right to be provided with them. The state will take land and water from the immediate properties, respecting small private properties. [Emphasis added, translation by author]

The Constitution also declared null the orders, and dispositions transfer and disposal that had partially or completely alienated lands, forests and water to towns, joint land, ranchs, congregations, tribes and other corporations that existed since the law of June 25, 1856, providing land back to communities.

became president and the first reform was made to article 27 of the *Mexican Constitution*, which established the *ejido* (a communal property regime).⁶⁰¹ Most of the demands for recognition and restitution of communal territory were denied and the government granted endowments or extensions of *ejido* properties to Indigenous communities. This is how most of the Indigenous communities in Mexico were pushed to use the *ejido* regime, a new legal regime that sought to organize ancestral communal properties under a different paradigm. Nevertheless the distribution gave less than enough land to most communities, giving around five hectares of land per *ejidatario* (member of an *ejido*).⁶⁰²

Communal property in Mexico

According to the *Mexican Constitution*, the Mexican territory belongs to the Mexican Nation,⁶⁰³ which recognizes public, private and communal ownership of the land. In Mexico, there are two schemes of communal ownership: *ejido* and ‘communal property.’⁶⁰⁴ *Ejido* property can be divided and transferred and certain legal terms such as prescription run against the members’ rights. Still, *ejido* is communal land; it is shared.⁶⁰⁵ In contrast, communal property is ‘inalienable,’ ‘imprescriptible’ and ‘inembargable,’ which means that the property cannot be exchanged, sold, seized and there are no legal terms that run against the community regarding their rights to use the land.⁶⁰⁶ Communal property is the scarcest kind of property in Mexico. The

⁶⁰¹ First Reform to Article 27 of the *Constitution of the United States of Mexico* published in the Official Federal Gazzette on the January 10, 1934. *Ejido* is a legal figure created after the Mexican Revolution, and it was created for restoring land to some communities that had been dispossessed, most commonly by latifundistas (owners of large amounts of land). The distribution of land went in decline in 1945. José López Portillo, the president at the moment, established the end of the distribution (*el fin del reparto*) in the 1970s.

⁶⁰² Carlos Salinas de Gortari, *supra* note 589. According to the proposal, private properties are considerably larger, between 100-300 hectares, depending on the type of land and the cultivation, and the size of ejidos makes it impossible to be productive enough to provide the members of the ejidos and communities with profits and growth of their operations. 5 hectares are equivalent to 12 acres and 50,000 square meters.

⁶⁰³ *Mexican Constitution*, Art. 27, first paragraph.

⁶⁰⁴ *Ibid.* Art. 27, VII.

⁶⁰⁵ *Ejido* property was originally, as communal property, *inalienable*, *imprescriptible* and *inembargable*, which meant that the property could not be exchanged, sold, seized and there were no legal terms that ran against the community as regards their use and possession of the land. In 1992, the Constitution was reformed to change the character of *ejido* property. Since then, the *ejido* is not *inalienable*, *imprescriptible* and *inembargable*. The only exception to this rule is land of communal use of ejidos, which still is *inalienable*, *imprescriptible* and *inembargable*. Grenville Barnes, “The evolution and resilience of community-based land tenure in rural Mexico” (2009) 26 *Land Use Policy*, 393–400, and *Agrarian Law*, Art. 74.

⁶⁰⁶ *Agrarian Law*, Art. 99. [Originally in Spanish, see bibliography for title in original language.]

Zirahuén case was initiated by the Zirahuén Community, which owns its property under the scheme of communal property.

Communal property is different from the *ejido* in that it is mainly considered for dwelling and growing goods for the consumption of the community, and not for large agricultural production. This difference is more symbolic than real; both *ejido* and communal properties can be organized and administered with the goals that the community decides. *Ejidatarios* (members of an *ejido*) are able to divide the land and obtain a certain individual right over the earnings and use of the piece of land that they obtain without the agreement of fellow *ejidatarios*. They can even sell or lend their rights. The state has implemented programs (e.g. PROCEDE⁶⁰⁷) to ease the process of selling land among *ejidatarios*.

According to Mexican law, the agrarian authorities (federal authorities) are in charge of the organization and legal supervision of, and resolution of conflicts concerning, communal and *ejido* property (Indigenous and non-Indigenous).⁶⁰⁸ The members of the communities and ejidos that hold property together are registered with the agrarian authorities. The *comuneros*, joint-holders of the communal property,⁶⁰⁹ have shared rights and duties over land with other members of their community. According to the law, the list of comuneros needs to be updated in community assemblies and registered before the Agrarian National Registry.⁶¹⁰ Indigenous *comuneros* are considered to be the descendents of those Indigenous families that have been living in the area since before Spanish colonization but there is not a legal or customary requirement regarding such ancestry in most communities.

⁶⁰⁷ Program for Certification of Ejidal Rights; in Spanish: el Programa de Certificación de Derechos Ejidales y Titulación de Solares.

⁶⁰⁸ *Agrarian Law*, Art. 40, 47, and 65, among others.

⁶⁰⁹ *Comunero* is a Spanish term literally meaning member of a community. Usually the term refers to the individual members of a community that share the property, profit and use of it; in shorter words: the joint owners of the land.

⁶¹⁰ *Agrarian Law*.

The prescribed set form of the *ejido* and communal government body was intended to diminish the constant trouble that comes from having a communal right over a certain piece of land. The rules specified by law that govern these entities organize mainly two aspects of the communities: decision-making and leadership. The main bodies responsible for decision-making in the *ejido* and communities are the General Assembly (*Asamblea*), the Commission (*Comisariado*) and the Supervisory Council (*Consejo de Vigilancia*).⁶¹¹ All community members participate in the General Assembly, which is the ultimate authority of the community. Decisions in the General Assembly are passed by a majority vote.⁶¹² The Commission is the leadership body of the entities, and consists of three members that are elected by the Assembly for three years.⁶¹³ The Supervisory Council is in charge of ensuring that the Commission carries out the decisions taken by the General Assembly.⁶¹⁴ All communities must have an internal regulation (*reglamento interno*) by which the communities are able to decide their own ways of administrating the resources and land.⁶¹⁵ This internal regulations intended to reflect traditional institutions and practices. However, the actual bodies that organize each *ejido* and community are the same even though Indigenous communities are very different from each other in their political and legal traditions.

5.1.1.1 The Zirahuén Community

There is a large amount of available information regarding the community of Zirahuén. There have been various anthropological and historical studies made of the community. It is also one of the most active Indigenous communities in Mexico in the protection of communal properties,⁶¹⁶ and has a long and notorious recorded history of judicial and legal conflicts regarding its land.

⁶¹¹ *Ibid.*, Art. 21 and following.

⁶¹² *Ibid.*, Art. 27.

⁶¹³ *Ibid.*, Art. 22.

⁶¹⁴ *Ibid.*, Art. 35-36.

⁶¹⁵ *Ibid.*, Art. 35-36.

⁶¹⁶ Margarita del Carmen Zárate Vidal, *supra* note 585.

Zirahuén is a very small community with around 250 comuneros (at the moment of writing there was a motion to increase the number of comuneros to around 550 people) and only 604 hectares of land surrounding the lake of Zirahuén.⁶¹⁷ It is one of the founding communities of the Unión of Comuneros Emiliano Zapata (UCEZ),⁶¹⁸ a very popular and active organization that works intensely to maintain the communal properties of Indigenous communities in México. The UCEZ is one of the most supportive communities outside of Chiapas of the Zapatista movement in Mexico.⁶¹⁹ Zirahuén was the first self-declared autonomous municipality (Caracol Zapatista) in Mexico⁶²⁰ and has been used recently as a model for other Indigenous communities, such as Cherán, which is also located in Michoacán. The sessions of the Zirahuén assembly are carried out in Spanish and I was told that most of the members only speak Spanish.⁶²¹

In the claims in this case, the Zirahuén Community argued that it was the original owner of 21,183 hectares.⁶²² This claim is based on a Spanish colonial document of 1733, also called *amparo*, numbered Real Registry Title 1607.⁶²³ *Amparo* means ‘protection’ in Spanish, and in this document, it also means ‘title.’ In broad terms, an *amparo* is a document that grants protection of certain rights against other parties, including the government. The document contained the boundaries of the territory at the time, without counting the hectares completely but only in sections, and clearly described the territories that the Indigenous community of Zirahuén possessed and controlled at the time.⁶²⁴

⁶¹⁷ 604 hectares are equivalent to 1492 acres and 6 square kilometers.

⁶¹⁸ Margarita del Carmen Zárate Vidal, *supra* note 585.

⁶¹⁹ *Ibid.*

⁶²⁰ Rosa Rojas, “CNI joins the Zapatista declaration,” (2005.06.22) *La Jornada*. Online: <<http://www.jornada.unam.mx/2005/06/22/index.php?section=politica&article=013n1pol>> [Originally in Spanish, see bibliography for title in original language.]

⁶²¹ Eva Castañeda Cortés, QC, Co-counsel for the Appellants: Zirahuén Community, interview with author, 13 July 2011.

⁶²² 21,183 hectares are equivalent to 52,344 acres and 211.83 square kilometers.

⁶²³ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 4.

⁶²⁴ Eva Castañeda Cortés, QC, Co-counsel for the Appellants: Zirahuén Community, interview with author, 13 July 2011. According to Eva Castañeda Cortés, in 1733, the legal representative of the community was the priest

History of the Community and its territorial claims

According to Brenda G. Guevara Sánchez, in 1868 the Zirahuén Community conducted an internal division of land among the comuneros.⁶²⁵ The division responded to policies that sought to divide communal lands by imposing taxes to them.⁶²⁶ This division was never registered before the Agrarian Registry and thus the land remained legally and formally communal.⁶²⁷

However, the internal division of the property carried out in 1868 did have consequences for the community. After 1870, several *comuneros* gave away their lands or were forced to sell their lands to outsiders.⁶²⁸ Since comuneros did not have deeds of title, there were no titles given in these transactions.⁶²⁹ This is why, until now, many possessors of land do not hold any legal title.

It has been established in interviews done by different researchers that in the late 19th century and early 20th century some *comuneros* were forced to sell their lands by having them perform certain duties for the church that required them to borrow money from rich outsiders.⁶³⁰ Others, who were late with payments on loans taken out until their crops were sold, had their lands taken. Large owners such as Felipe Ayala and Andrés Sandoval are said to have acquired lands from the Zirahuén Community in this way.⁶³¹ This kind of ‘buyer’ also tried to use the *Law of Wastelands of 1894*, which allowed people to report unused land (assumed not to

of the area, a very common phenomenon at the time, who solicited the *amparo* to the authorities in behalf of the Zirahuén Community.

⁶²⁵ Brenda Griselda Guevara Sánchez, *supra* note 592, at 40. This phenomenon was not rare, other scholars as Katz and Margarita del Carmen Zárate Vidal have also discussed it. See Friedrich Katz (Ed.) *Riot, rebellion, and revolution: rural social conflict in Mexico* (Princeton, NJ: Princeton University Press, 1988), at 50; and Margarita del Carmen Zárate Vidal, *supra* note 585.

⁶²⁶ Brenda Griselda Guevara Sánchez, *supra* note 592, at 34-35, and Margarita del Carmen Zárate Vidal, *supra* note 572, at 22.

⁶²⁷ Brenda Griselda Guevara Sánchez, *supra* note 592, at 35 and 38.

⁶²⁸ *Ibid.*, at 56.

⁶²⁹ *Ibid.* at 46.

⁶³⁰ *Ibid.*, at 44-45; and Margarita del Carmen Zárate Vidal, *supra* note 585, at 67-68.

⁶³¹ *Ibid.*, 39 and following.

have an owner) and claim it.⁶³² Most of the attempts to report Zirahuén land as unused were unfruitful but the pressure felt by the Community was indeed considerable at that time.

In 1902, the prefect, a political chief that acted as representant of the central government in the district of Pátzcuaro,⁶³³ asked the Zirahuén Community to divide and privatize their properties, threatening to seize their lands.⁶³⁴ Seeing what had happened after the internal division of 1868, most of the members of the Community were against a division. Nevertheless, due to the pressure, the Community agreed to partially and formally divide a small part of the territory.⁶³⁵ The cause for the seizures was that the Community owed taxes.

Many Indigenous communities owed taxes. During the 19th century, Mexico had huge external debt and had fought several wars. The regime of Porfirio Díaz intended at the beginning of the 20th century to divide the land for a better administration of taxes and thereby enable the government to pay all the debts. It established different laws that would tax property.

Later, the community of Zirahuén replied to most of the requests for tax payments by arguing that the Community had been internally divided and that even though most of the land was still affected by the decisions of the Community, it was private property

⁶³² *Ibid.*, 56 and following.

⁶³³ Prefects were political chiefs. Their main function was to act in representation of the central government in local communities. They acted as mediators between the central and the local authorities. The village of Zirahuén belonged for many years to the district of Pátzcuaro; it was not until several years after the Mexican Revolution that Zirahuén became a municipality.

⁶³⁴ According to Brenda Griselda Guevara Sánchez, *supra* note 592, some historians, such as Roseberry, are of the opinion that this was a smart move on the part of the community because those communities in the same province of Michoacán, that rejected all the attempts of the authorities to divide their lands, finally lost them due to seizure by the authorities; those that accepted the requests by the government for division, such as the community of Quiroga, were dissolved a bit later. Roseberry affirms that most of the communities that agreed to partially divide their lands survive until today. W. Roseberry "Neoliberalism. Transnationalization, and Rural Poverty: A Case Study of Michoacán, Mexico" (1998) 25 *American Ethnologist* 1.

⁶³⁵ *Ibid.*, at 35:

They stated that as soon as they divided their lands, divisions among the community would start and some would be forced to sell their shares and end up in misery.

and thus, minimum or no tax was to be paid.⁶³⁶ No registration of any division was ever finalized in Mexico City and the Community was able to later argue that the division had never been completed.

The government increased the taxes for forests, pastures and marshy areas at the beginning of the 20th century.⁶³⁷ This added more pressure on the communities owning large communal properties and forced them to divide and sell large areas of communal land.⁶³⁸ Due to an increase in the number and intensity of the conflicts between some owners, and between the authorities and the Community, the division was still not concluded by 1910.⁶³⁹ When the Mexican Revolution started, the pressure for division changed.

The Mexican Revolution

During the revolution many large owners of land were scared of losing money and/or properties and some sold large areas.⁶⁴⁰ The Community took advantage of the pressure and bought some of the land cheap but could not expel some large owners that maintained a low profile and argued that they owned small properties.⁶⁴¹

In 1916, the Community requested a restitution and recognition of land under the new regime (after the Revolution). The request was specifically regarding the section of the Hacienda El Jujacato, a private property in the area.⁶⁴² The authorities responded that since the Community was not legally recognized by the Mexican state, there was

⁶³⁶ Brenda Griselda Guevara Sánchez, *supra* note 592, at 53.

⁶³⁷ *Ibid.*, at 45-46 and 50-52: After 1903, a representative of the community (Florentino Casías) asked large landowners in the community, such as Felipe Ayala and Andrés Sandoval, to show their land titles before the authorities and the courts. Only Felipe Ayala presented two titles of the many lands that he hold. By 1904, there had been gunshots between people that worked for Sandoval and the people of Zirahuén. The governor of Michoacán tried to impose a new representative and measure the land so that it could be divided.

⁶³⁸ *Ibid.* Moreover, the person in charge of conducting the division of the land and doing the registrations had to be paid by the community. In the case of *Zirahuén*, the community refused to pay these amounts, delaying the procedures for several years.

⁶³⁹ *Ibid.* at 61.

⁶⁴⁰ *Ibid.* at 64.

⁶⁴¹ *Ibid.*, at 67.

⁶⁴² *Ibid.*, at 66.

no possibility to rule in its favor.⁶⁴³ The authorities recommended to the Community to use the new *ejido* laws and request a grant of land to create an *ejido*.⁶⁴⁴ By then, the number of *comuneros* without a portion of land was very large (due mainly to family growth) and the conflicts within the Community had increased significantly. Some of those *comuneros* without land decided to make the request for a grant of *ejido* land.⁶⁴⁵

In 1921, the authorities granted provisional title to 706 hectares to the *ejido* of Zirahuén.⁶⁴⁶ In 1925, the Zirahuén Ejido received a definitive grant of 1200 hectares,⁶⁴⁷ most of which was taken from the surrounding haciendas.⁶⁴⁸ In this way, the community regained some of their ancestral territory but regained it under a different legal scheme, as *ejido*.

In 1933, the demand for recognition and restitution of communal lands was denied but the community filed another request of restitution of land. This request stated that the authorities would conduct the identification of the claimed area, which consisted of 6,748 hectares, divided as follows: 1,328 were the lake, 1,072 were occupied by the town or urban area, and 628 were enjoyed communally by the *comuneros* and outsiders.⁶⁴⁹ Some of the rest were private property and some were already the ejidos of Copandaro, Turiam, and Agua Verde.⁶⁵⁰ The process took a long time, having the

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid.*

⁶⁴⁶ *Ibid.*, at 71.

⁶⁴⁷ *Ibid.*, at 78. 1200 hectares are equivalent to 12 square kilometers and 2965 acres.

⁶⁴⁸ The Mexican Revolution of 1910 and the Cristero War of 1926 were crucial for the community. The Mexican Revolution stopped the pressure from the government for the division of the community's lands and defined the *ejido* as the way the community should maintain their lands. During the Cristero War, the community sided with the church, denying the government the service of civil defense. The government then put immense pressure on Indigenous communities struggling with land issues. According to Margarita del Carmen Zárate Vidal, *supra* note 585, at 23, the Cristero movement, which was against the anti-Catholic policies of the government after the Mexican Revolution, had an anti-agrarian character, opposing agrarian policies and peasant organizations. The peasants that would go against the movement were ex-comulgated (excommunication) by the Church in Michoacán.

⁶⁴⁹ Federal Official Gazette of May 17, 1933 cited in Brenda Griselda Guevara Sánchez, *supra* note 592, at 89.

⁶⁵⁰ *Ibid.*, 91, 93-98 and 101: The enlargement of the *ejido* would mean that the haciendas would be divided and their lands expropriated. The owners of the neighboring haciendas defended the property of their lands, by arguing that the land was actually owned by several members of the family (small properties could not be subjected to division), by registering it as family property (also not subjected to division), or by declaring smaller areas of property (using a system of equivalences that depended on the kind of irrigation and other characteristics of the

authorities and the community collaborating to finalize a resolution.⁶⁵¹ The final decision was to deny communal land.

In 1939, the Zirahuén Ejido asked for an extension of their land, which was also denied.⁶⁵² The community kept applying for communal and *ejido* land.⁶⁵³ By then, some of the hacendados had already prepared legal defenses to protect their land. For example, Ramona Perez Mora, an hacendada in the area, obtained a certificate of agrarian non-affectability from president Manuel Avila Camacho.⁶⁵⁴ In 1946, the authorities denied the recognition of the community's title due to a lack of information regarding the ways the community had been deprived of their lands.⁶⁵⁵ In 1950 the resolution argued that there was no land that could be affected in the surrounding areas of the town of Zirahuén, and thus, the federal government could not grant them land.⁶⁵⁶

Due to the unsuccessful procedure and the increasing number of *ejidatarios-comuneros* without land, the leadership of the community grew weaker.⁶⁵⁷ The lack

land). Using these systems of equivalences, the owners were able to state that their lands were considerably smaller than their actual size. These legal tricks by the neighboring haciendas, and the unavailability of officers to conduct the measurement and division of the land, delayed the process until 1941, when the authorities intended to conclude the process of extension of the ejido.

⁶⁵¹ *Ibid.*, at 99-100: In late 1933, the community of Zirahuén (which at the time included also the ejido of Zirahuén) wrote a letter to the governor of the state of Michoacán, to support its request for restitution of the lands of Zirahuén, specifically mentioning seven haciendas and their owners. The authorities responded that the request would be taken as a request to extend the land of the ejido. In 1941, the Agrarian Commission (the Agency of the Federal Government in charge of solving Agrarian requests of land, disputes, among other issues) retook the procedure and requested again that the town of Zirahuén (ejidatarios and comuneros together) supply information about the land they claimed to have been dispossessed of, how, when, and who had taken illegal possession of it. In order to grant the land, the Commission requested that the community prove despoliation by the private owners. The community was unable to prove the ways in which the land was taken and so several large properties owned by outsiders were left as they were. The agrarian registry and other authorities were unable to provide them with any information at all. During the search for this information, the community finally obtained a certified copy of their colonial title of 1733, but they were unable to obtain all the information requested by the Agrarian Commission and the process was stopped again.

⁶⁵² *Ibid.*, at 101

⁶⁵³ *Ibid.*

⁶⁵⁴ *Ibid.*, at 99.

⁶⁵⁵ *Ibid.*, at 100.

⁶⁵⁶ *Ibid.*, at 101.

⁶⁵⁷ *Ibid.*, at 114: The authorities started having trouble differentiating between the community and the ejido, which had acted together until then. In 1954, the title of 1733 was again challenged, studied, and declared authentic. In 1955, the conflict for the leadership of the community peaked and no authorities or members of either the community or the ejido knew who represented either organization. The Department of Indigenous

of enough land and an important difference in the opinions about the future of the community contributed to the weakening of the community, as it also happened in many other Indigenous communities in Mexico. In 1950, the Ejido and the Community broke apart.⁶⁵⁸ The community has not been able to recover from this important division. Some time later the Zirahuén Ejido and Community, started to have internal divisions.⁶⁵⁹ In 1957, the Zirahuén Ejido claimed a piece of land that the *comuneros* were using.⁶⁶⁰

In 1959, the authorities gave private owners in the area ten days to present documents that proved their possession and property. It seems that only one person presented a title.⁶⁶¹ Nevertheless there were no legal consequences for those possessors. In 1961, the President requested an explanation of the long and tedious conflict from the agrarian authorities. The authorities responded that, due to the divided leadership in the community, it had been difficult to identify and conduct the studies necessary to continue the process of recognizing the communal property. In the report, the agrarian authorities confirmed that the community had in its possession 840 hectares and recognized that some of the private surrounding properties were actually large properties.⁶⁶² In 1963, the Zirahuén Community was again recognized as a legal entity, and in October 1970, the title of the Community was published in the Official Gazette, recognizing 604 hectares as the original territory of the Community.⁶⁶³ The grant of the land was considered a big event and the Federal Minister of Agrarian

Affairs decided to name a representative. Obviously, many members of the community did not like the imposed representative. Some testimonies established that the person named by the federal authorities was corrupt and was receiving money from the hacendados. The confusion grew, there was not enough land for all the *comuneros*, and the authorities that were supposed to help in the solution of internal conflicts were unable to distinguish the groups involved in the problem. In 1956, the community asked for the president's intervention, which never occurred.

⁶⁵⁸ *Ibid.*, at 103-105.

⁶⁵⁹ *Ibid.*, at 119. In the 1960s there were two leaders.

⁶⁶⁰ Eva Castañeda Cortés, QC, Co-counsel for the Appellants: Zirahuén Community, interview with author, 13 July 2011. Eva Castañeda Cortés also mentioned that there is the 'other community,' whose leaders have relations with the owners of large properties and a different vision of Zirahuén and its future. See also Brenda Griselda Guevara Sánchez, *supra* note 592, at 112-113.

⁶⁶¹ Brenda Griselda Guevara Sánchez, *supra* note 592, at 117-118.

⁶⁶² *Ibid.*, at 119-120: The government has requested in several occasions to the private owners the information about their properties. Many owners argued that their properties were small family properties, sending measurements that were considerably smaller than the actual size.

⁶⁶³ *Ibid.*, at 121-122.

Issues went to Zirahuén to deliver the document, but the ceremony did not go as smoothly as expected.⁶⁶⁴

The day that the recognition of the territory was declared in the town of Zirahuén, the comuneros denounced the very small amount of land given.⁶⁶⁵ In 1978, the Zirahuén Community submitted a formal request for the complementary process of recognition and entitlement to the remaining territories.⁶⁶⁶

Recognition of their property

All the technical mappings had to be done again in the beginning of the 1990s, an extremely expensive and slow procedure.⁶⁶⁷ In 1992, there was a reform of article 27 of the *Mexican Constitution* that established the current communal property regime. The same year, the *Zirahuén* file was labeled as ‘rezago agrario.’⁶⁶⁸ This label, created by the agrarian authorities, means ‘agrarian delay’ and comprises cases or files of requests for restitution, endowment or extension of land, forests and water; creation of new *ejidos*; recognition and entitlement of communal properties; and segregation of small properties within larger communal land that, by 1992, were in process of resolution. Most of those files had not been resolved for different reasons; for example, the unavailability of ‘affectable’ land.

The community has had a running and continuous legal process of requesting the restitution of their lands for almost a hundred years. To this day, authorities have not been able to resolve the Zirahuén Community’s request for an extension of land.

⁶⁶⁴ Eva Castañeda Cortés, QC, Co-counsel for the Appellants: Zirahuén Community, interview with author, 13 July 2011.

⁶⁶⁵ *Ibid.*

⁶⁶⁶ *Ibid.* According to the lawyer of the Zirahuén Community Eva Castañeda Cortés, from 1982 to 1988, the period in which Mr. Luis Martínez Villicaña was in power (first as the Secretary of Agrarian Reform and then as the Governor of the state of Michoacán), the process was maintained on hold and all the technical mappings of the area done in 1978 were lost.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Ibid.*

The community today

The *ejidatarios* of the Zirahuén Ejido decided to make use of the government program called PROCEDE (Ejido Rights Certification Program), which allowed them to divide and sell their lands and granted property titles to each of the *ejidatarios*.⁶⁶⁹ Those *ejidatarios* have been selling their lands little by little, mainly to private owners interested in the touristic development of the area.⁶⁷⁰

In the process before the Agrarian authorities, the Zirahuén Community only claims 6,000 hectares of land, instead of the original 12,000 that were requested in 1978, or the 21,500 hectares requested in 1916 before the Agrarian authorities. The community recognizes that 15,000 hectares have been given to the ejidos of Zirahuén, Santa Rita, Santa Ana, Agua Verde, and Copándaro, whose members were members of the ancestral Indigenous communities living around the lake.⁶⁷¹ The 6,000 hectares of land claimed by the Community are now in the possession of many small and large private possessors. In order to give the extension of communal property to Zirahuén, the Agrarian authorities would have to take those lands from their private possessors.⁶⁷² This will not be easy to do.

The ‘conflictive’ community

Presently, even those that live in the town of Zirahuén consider the Community to be a very conflicted and disfunctional organization. The Community now has trouble with neighbors (in Spanish they are called *avecindados*), the caciques or large owners of land in the area, the environmental and water authorities that seem unable to protect against the exploitation of the resources of the area (particularly the water in the lake), the Public Education authority, which claims to be the owner of the building that is used as the public school in the town. The Community also has conflicts with the peasant neighbors who are troubled by the constant watch of the

⁶⁶⁹ *Ibid.*

⁶⁷⁰ *Ibid.*

⁶⁷¹ *Ibid.* 6,000 hectares are equivalent to 14,826 acres and 60 square kilometers.

⁶⁷² *Ibid.*

police that visit the town every day. It is not uncommon that *comuneros* denounce illegal actions of their neighbors regarding the use of the water in the lake and the cutting of trees in the surrounding forests. This too leads to police intervention. Just recently one of the neighbors was ordered to stop cutting trees on her property, due to a request presented by the Zirahuén Community.⁶⁷³

The Zirahuén Community seems to be isolated from its neighbors, who turn against its members every day. This is not unusual in this kind of case. In the *Nibutani Dam* case, the plaintiffs, two persons held in very high respect in their community, also came to be considered ‘troublemakers’ and were at times ostracized by their own communities.⁶⁷⁴ The neighbors and even families within the community contest decisions made by the leaders. The authorities have bemoaned the difficulty of resolving their requests due to internal conflicts of leadership on several occasions. The identity of the Indigenous community of Zirahuén is continuously contested in all spheres.⁶⁷⁵

5.1.1.1.1 The Zapatista Movement, the *San Andrés Accords*, and the constitutional reform of August 14, 2001

The amparo plea was an idea that did not arise within the Zirahuén Community, but a case designed by lawyers using the legal profile of the Community to attack a constitutional reform within the broader landscape of the movement of Indigenous peoples in Mexico.⁶⁷⁶

⁶⁷³ *Ibid.*

⁶⁷⁴ According to Levin as the litigation wore on, the plaintiffs were often shunned and rejected by their Ainu neighbors for bringing unwanted attention to the village and jeopardizing the economic boon associated with the dam construction and related public works spending in Mark A. Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan,” (2000–2001) 33 *NYU J Int'l L & Pol* 419, at 506.

⁶⁷⁵ Margarita del Carmen Zárate Vidal, *supra* note 585, at 63-83, 132-140.

⁶⁷⁶ Eva Castañeda Cortés, QC, Co-counsel for the Appellants: Zirahuén Community, interview with author, 13 July 2011.

Efrén Capiz Villegas, the Zirahuén Community's former principal lawyer, designed the amparo of the Community.⁶⁷⁷ The Community supported the making and presentation of the plea in the federal courts of Michoacán, deciding in a Community assembly to present the amparo plea. The current main lawyer of the community and one of the co-drafters of the document, Eva Castañeda Cortés told me in an interview that the Zirahuén Community decided to support the legal actions taken by several Indigenous organizations against the reform: "They decided to support us in this quest" is the literal translation of the words used by the lawyer and activist.⁶⁷⁸ The following paragraphs seek to explain what the 'quest' was and why it was undertaken.

The Zapatista revolution

On the last day of 1994, an armed group called the Zapatista Army of National Liberation took the municipality of San Cristobal in the state of Chiapas and declared war on Mexico.⁶⁷⁹ This revolutionary group is mainly formed of Indigenous peoples from the state of Chiapas, the southernmost state of Mexico. Its main goals are the recognition of Indigenous peoples and their rights. According to its own statements, its activities are mainly non-violent and only defensive against the military forces of Mexico.⁶⁸⁰ A large network of organizations, institutions and NGOs around the world now support the Zapatista Army, organized into what I will call the 'Zapatista movement.'

The federal and provincial governments started peace negotiations with the Zapatista Army in 1995. In February 1996, the Federal Government and the Zapatista Army signed the *San Andrés Accords*.⁶⁸¹ The Accords summarized a joint effort of the

⁶⁷⁷ *Ibid.*

⁶⁷⁸ *Ibid.* Eva Castañeda Cortés affirms that the lawyers have not received any payment for their work and advice. She is still only paid with some meals when she visits the community.

⁶⁷⁹ Ignacio Bernal, et. al., *supra* note 578, at 940.

⁶⁸⁰ Declarations of EZLN militants in San Cristóbal de las Casas, January 1, 1994. To hear some of these declarations, and/or to read them, see the following websites' archives: the website of Enlace Zapatista, Online: <<http://enlacezapatista.ezln.org.mx/>> has also translations to different languages. The website: <<http://palabra.ezln.org.mx/>> has all the communications of the army organized by date. One of the most relevant and recent declaration of the Zapatista Army is the Sixth Declaration of the Lacandona Jungle of 2005. [Originally in Spanish, see bibliography for title in original language.]

⁶⁸¹ *San Andrés Accords*, February 1996. [Originally in Spanish, see bibliography for title in original language.]

parties to achieve peace and included a set of compromises by the federal government towards the Indigenous peoples in Mexico.⁶⁸² One of those compromises was to work on a constitutional reform that considered the opinion of Indigenous peoples in Mexico. Using most of the agreements discussed in the table of the *San Andrés Accords*, the Comisión de Concordia y Pacificación⁶⁸³ (COCOPA, Cooperation and Pacification Commission in English) drafted a constitutional reform proposal. This proposal, which I will call the COCOPA proposal, was accepted by the Zapatista Army, but rejected by the Federal Government.

Most Indigenous nations participating in the negotiation process were very disappointed when the Federal Government started ignoring several of its commitments made in the *San Andrés Accords*. In 1998 there were several attempts to resume the negotiations through the Comisión Nacional de Intermediación⁶⁸⁴ (CONAI, National Intermediation Committee) but the Zapatistas rejected all of them, arguing that the federal government was disregarding the *San Andrés Accords*.

The constitutional reform of August 14, 2001

In 2000, the party controlling the Federal Government changed for the first time in more than 60 years. President Fox presented the COCOPA proposal to the Senate, in

⁶⁸² The *San Andrés Accords* contain four parts and hold a commitment of the federal government to establish a new relationship with Indigenous peoples based on pluralism, sustainability, the participation of Indigenous peoples, free self-determination of Indigenous communities, and integrality. Among the commitments is the promotion and openness towards the participation of Indigenous peoples in the daily and continuous construction of Mexico; betterment of the quality of life of Indigenous peoples; recognition of Indigenous peoples in the Constitution and other laws; guarantee for the access to justice; promotion of the cultural expressions of Indigenous peoples; education and job opportunities. The last part of the document is a commitment of both parts to send the proposals and agreed documents to the different assemblies in Mexico for their debate and decision-making.

⁶⁸³ The COCOPA was a commission of the Congreso de la Unión (Congress of the Union). The Congreso de la Unión is the Federal Legislature of Mexico, integrated by an Upper Chamber, the Senate, and the Lower Chamber, and the Deputies. The COCOPA was integrated by deputies and senators of all parties represented in the Congress and had as objective to support the process of negotiation and dialogue between the Federal Government and the Zapatista Army. The COCOPA was established in 1995 and ceased its negotiating activities shortly after President Ernesto Zedillo rejected its constitutional proposal.

⁶⁸⁴ The CONAI was an institution lead by Bishop Samuel Ruiz and integrated by intellectuals, artists and recognized leaders of the larger civil society. The aim of the Committee was to act as the mediator between the Zapatista Army and the Federal Government. The CONAI was formally established in 1994, but Bishop Samuel Ruiz had already been acting as a mediator.

one of his first acts as President of Mexico.⁶⁸⁵ The Senate and the Federal Congress worked on the draft and changed several of the proposed articles in ways that were not agreeable to a large portion of the Indigenous population in Mexico, including the Zapatista Movement. The Senate finalized a project of reform on April 25, 2001 and approved the project on July 18, 2001, while the Permanent Commission of the Federal Congress was in recess.⁶⁸⁶ The reform was published on August 14, 2001 in the Official Gazette.⁶⁸⁷

The constitutional reform as finally approved by the congress added two paragraphs to article 1 of the *Mexican Constitution* that prohibit all kinds of discrimination and slavery in Mexico for any person entering the Mexican territory. Article 2 was significantly reformed, providing more precise rights to Indigenous communities.⁶⁸⁸

⁶⁸⁵ Vicente Fox Quesada, Constitutional Reform Proposal on Indigenous Issues submitted by the Ministry of Internal Affairs (Secretaría de Gobernación) to the Senate on December 5, 2000. Accessible through the website of the Mexican Senate. Online: <http://www.senado.gob.mx/index.php?ver=sp&mn=3&sm=3&lg=58&ano=1&id=9438>. [Originally in Spanish, see bibliography for title in original language.]

⁶⁸⁶ United Commissions of Constitutional Issues; Indigenous Issues, and of Legislative Review, *Project of decree that reforms several articles of the Political Constitution of the United States of Mexico on Indigenous Issues*, Second Ordinary Period, 58th Legislature, April 25, 2001, Diary 13, and Permanent Commission, *Declaratory of the Decree that reforms several articles of the Political Constitution of the United States of Mexico on Indigenous Issues*, Second Recess, 58th Legislature, July 18, 2001, Diary 13.

⁶⁸⁷ Chamber of Federal Deputies website. Online: http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_151_14ago01_ima.pdf

⁶⁸⁸ The article prescribes as follows:

The Mexican Nation is unique and indivisible. It is a multicultural nation that originates from its Indigenous tribes, it is essentially integrated by descendants of those inhabiting the country before colonization, who preserve their own social, economic, cultural and political institutions, or some of them.

A consciousness of Indigenous identity is the fundamental criteria that determine to whom apply the provisions on Indigenous people. Indigenous communities are communities that constitute cultural, economic and social units, settled in a territory and recognize their own authorities, according to their own customs and traditions. indigenous peoples' right to self-determination shall be exercised within the framework of a constitutional autonomy ensuring national unity. The recognition of indigenous peoples shall be done in States' and Federal District's Constitutions and laws, taking into account the general principles established in the Constitution, as well as ethno-linguistic and land settlement criteria.

A. This Constitution recognizes and guarantees the indigenous peoples' right to self-determination and, consequently, the right to be autonomous, so that they can:

I. Decide their internal forms of coexistence, as well their social, economic, political and cultural organization. II. Apply their own legal systems to regulate and solve their internal conflicts, subject to the general principles of this Constitution, respecting constitutional guarantees, human rights and, taking special consideration of the dignity and safety of women. The law shall establish the way in which judges and courts will validate the decision taken by the communities according to this article. III. Elect, in accordance with their traditional rules, procedures and customs, their authorities or representatives. Exercise their own form of government, guaranteeing women's participation under equitable conditions before men, and respecting the federal pact and the sovereignty of the States and the Federal District. IV. Preserve and enrich their languages, knowledge and all the elements that constitute their culture and identity. V. Maintain and improve the environment and protect the integrity of their lands, according to this Constitution. VI. Attain preferential use of the natural resources of the sites inhabited by their indigenous community, except for the strategic resources defined by this Constitution. The foregoing rights shall be exercised respecting the forms of property ownership and land possession established in this Constitution and in the laws on the matter as

Article 18 was modified to promote the incarceration of prisoners in prisons closer to their communities. And finally, article 115 was changed to add legislation regarding the association of Indigenous communities or organizations.

The reform classified Indigenous communities as entities of ‘public interest’ instead of as entities of ‘public law,’ implying tutelage of the state over the communities and a hierarchy that subordinates the communities to provincial and federal authorities and its legislation.⁶⁸⁹ Moreover, the changes limit the access of Indigenous communities to their property in consideration of neighbors and the state authorities while the original COCOPA proposal was that many territories would be collectively used and enjoyed.⁶⁹⁰

The approved constitutional reform also disregarded a proposed reorganization of the state and municipal territories in consideration of Indigenous communities.⁶⁹¹ This issue had been broadly discussed in the negotiations during the 1990s. At the same time, the approved reform declared that the law can “establish limits to the association of Indigenous communities at the municipal level,” disregarding proposals to allow free association of Indigenous organizations and communities at all levels.

well as respecting third parties’ rights. To achieve these goals, indigenous community may form partnerships under the terms established by the Law. VII. Elect Indigenous representatives for the town council. The constitutions and laws of the States shall regulate these rights in municipalities, with the purpose of strengthening indigenous peoples’ participation and political representation, in accordance with their traditions and regulations. VIII. Have full access to the State’s judicial system. In order to protect this right, in all trials and proceedings that involve natives, individually or collectively, their customs and cultural practices must be taken into account, respecting the provisions established in this Constitution. Indigenous people have, at all times, the right to be assisted by interpreters and counsels familiar with their language and culture. The constitutions and laws of the States and the Federal District shall regulate the rights of self-determination and autonomy looking for the best expressions of the conditions and aspirations of indigenous peoples, as well as the rules, according to which indigenous community will be defined as public interest entities.

The article continues on establishing the obligations of the state towards Indigenous peoples. Among the obligations is to provide health services, education, and consult Indigenous communities in the drafting and preparing the development plan of the federal and state governments.

⁶⁸⁹ Transcript of the Work Session of the United Commissions of Constitutional and Indigenous Issues of the Federal Congress with delegates of the Zapatista National Liberation Army and the Indigenous National Congress, Second Ordinary Period, 58th Legislature, March 28, 2001, Diary 13. See also See Constitutional Controversy 365/2001.

⁶⁹⁰ The text of the COCOPA proposal can be accessed online through the Center of Documents about Zapatism. Online: <<http://www.cedoz.org/site/content.php?doc=404&cat=6>>. [Originally in Spanish, see bibliography for title in original language.] The word ‘territory’ was taken out of the final constitutional proposal completely.

⁶⁹¹ See documents 3.1 and 3.2 of the *San Andrés Accords*. A source available on the internet is: Center of Documentation of Zapatism, online: <<http://www.cedoz.org/site/content.php?doc=367&cat=6>>.

On April 30, 2001, the Zapatista movement publicly expressed its rejection of the reform, contending that it betrayed the *San Andrés Accords* and did not respond to the needs and demands of Indigenous peoples in Mexico. Several Indigenous peoples' organizations in Mexico were outraged and challenged the reforms. Indigenous communities all over Mexico campaigned through the media, held blockades and protests, and organized a large walk that crossed the country. The Zapatista Army representatives presented an argument in favor of the COCOPA proposal in the Federal Deputies Chamber of the Congress on March 28, 2001 urging the Chamber to pass that proposal.⁶⁹²

The reform challenged by the Zirahuén Community is among the most contested constitutional reforms in Mexican history.⁶⁹³ Of thirty-two federal entities (thirty one provinces and one federal district), eight provinces rejected it (Baja California Sur, Guerrero, Hidalgo, México, Oaxaca, San Luis Potosí, Sinaloa, and Zacatecas) and seven abstained from voting on it, in an unprecedented record of rejection of the proposal.⁶⁹⁴ Municipal governments, state legislatures, and Indigenous communities presented legal actions against the reforms. *Zirahuén* is one of those cases.

Controversias constitucionales,⁶⁹⁵ a different juridical instrument, which can only be used by government authorities, were presented by hundreds of municipalities in

⁶⁹² Transcript of the Work Session of the United Commissions of Constitutional and Indigenous Issues of the Federal Congress with delegates of the Zapatista National Liberation Army and the Indigenous National Congress, Second Ordinary Period, 58th Legislature, March 28, 2001, Diary 13.]

⁶⁹³ Constitutional reforms in Mexico are not uncommon; the Mexican Constitution has been reformed on more than 200 occasions. Online: <http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm>.

⁶⁹⁴ Manuel González Oropeza, "Recent Problems and Developments on the Rule of Law in Mexico" (2004–2005) 40 *Tex Int'l LJ* 577 at 578 and Angeles Mariscal & Victor Ruiz, "Repudiation of the Reforms on Indigenous issues in Oaxaca, Chiapas and Tlaxcala" (Aug. 15, 2001) *La Jornada, Política*, at 7. [Originally in Spanish, see bibliography for title in original language.]

⁶⁹⁵ Constitutional controversy is the literal translation of 'controversia constitucional.' Constitutional controversy is a cause of action to solve conflicts of competency, power or jurisdiction between authorities. It is a claim of unconstitutionality of actions of an authority. It does not comprehend electoral or territorial issues. The SCJN is the only court that reviews this kind of action. The authorities that can bring this claim are the Federal Government, provincial governments, the Federal District government, the municipalities, the Congress, and the powers and organs of government of the provinces and of the Federal District. Only those decisions that are voted with a supermajority of eight Ministers make the acts challenged invalid with general effects.

Oaxaca, Chiapas, Tabasco, Veracruz, Michoacán, Hidalgo, Puebla, and Guerrero.⁶⁹⁶ The legislatures and state executives of Oaxaca and Chiapas also challenged the reform. The Supreme Court of Justice of Mexico (SCJN) dismissed all these challenges as “notoriously out of order.”⁶⁹⁷ These challenges were happening at the same time that indirect amparos were presented by Indigenous communities in different parts of the country.

Zirahuén was among the communities with the best chance to succeed. The community had a huge, old and very complete file in the Secretary of Agrarian Reform requesting restitution, extension and entitlement to their lands, so the amparo suited them best. The *Zirahuén* case was the only one resolved by the Second Chamber of the SCJN and served as a model for lower courts when solving other amparos.⁶⁹⁸

The phenomenon of one group litigating on behalf of a movement can be seen in other cases regarding Indigenous issues all over the world. The *Nibutani Dam* case was also a court case brought on behalf of the Indigenous movement in Japan. In the *Nibutani Dam* case, the plaintiffs’ main objective was not only to protect just their particular assets, it was also to protect the cultural and traditional assets of the Ainu people and make a legal statement of the situation of the Ainu in Japan.⁶⁹⁹ This can also be partly seen in *Delgamuukw*, where two First Nations joined forces for litigation. All three cases were brought as part of a broader social movement, as one

⁶⁹⁶ See constitutional controversies with the following file numbers: 47/2001-51/2001, 329/2001-361/2001, 365/2001.

⁶⁹⁷ The Supreme Court of Justice in Mexico had a press conference (No. 066/2002) on September 6, 2002 regarding her decision on the constitutional controversies. The plenary resolved by 8 votes against 3 that all constitutional controversies against the reform were to be considered improper or out of order (*improcedente*). The reason given was that the court did not have the power to review processes of reform of the Constitution. Many constitutional controversies were presented. The audience in which this issue was solved was not a public one. Francisco López Barcenas, Abigail Zúñiga Balderas and Guadalupe Espinoza Saucedo, “Indigenous peoples before the Supreme Court of Justice of the Mexican Nation” (Mexico: Centro de Orientación y Asesoría a Pueblos Indígenas, Convergencia Socialista, Agrupación Política Nacional, Comisión Independiente de Derechos Humanos de Morelos, 2002). Online: <<http://www.lopezbarcenas.org/doc/pueblos-indigenas-ante-suprema-corte-justicia-nacion>>. [Originally in Spanish, see bibliography for title in original language.]

⁶⁹⁸ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002.

⁶⁹⁹ Hiroshi Tanaka and Shigeru Kayano, *The Rebellion of two Ainu, record of the Nibutani Dam trial*, (Tokyo: Sanseido, 1999), at 136-146. [Originally in Japanese, see bibliography for title in original language.]

of the strategies implemented to pursue the goal of protecting the rights and freedoms of their communities but also of Indigenous peoples more generally.

5.1.2 The claims

The Zirahuén Community's main claim was that the process of reform did not comply with the duty to consult Indigenous peoples as established in an international treaty signed by Mexico, the *Indigenous and Tribal Peoples Convention, 1989* (No. 169) established by the General Conference of the ILO, articles 6 and 7, among others.⁷⁰⁰ The plaintiffs argued that this international convention had constitutional weight and ought to be observed by the Mexican authorities in charge of the process of reform according to precedents that established the importance of international treaties in the Mexican legal system.⁷⁰¹ The claims brought to the courts by the Community sought the remedy of stopping the constitutional reform from being applicable to them.⁷⁰²

The claims challenged the actions of the Congress of the Union, the congresses of the provincial states, the President, and the Ministry of Internal Affairs (*Secretaría de Gobernación*), which participated in the process of creation of the reforms.⁷⁰³ The Zirahuén Community also claimed all factual and legal consequences derived from such actions. The Community claimed that the harm caused by the reform regarded:

...the temporary or permanent, total or partial privation of their property, possession, dominion, use, and enjoyment rights over their lands, their territory, waters, mountains, trees, houses, natural resources, and other agrarian rights due to the arbitrary REDUCTION of those rights due to the decree of reform and its execution.⁷⁰⁴

⁷⁰⁰ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 1-13. [Originally in Spanish, see bibliography for title in original language.]

⁷⁰¹ *Ibid.*

⁷⁰² *Ibid.*

⁷⁰³ *Ibid.*

⁷⁰⁴ *Ibid.*, at 1-4. The translation is by the author. I understand that there are many alien concepts to Canadian readers, the translation intends to keep the spirit of the claims, maintaining most of the wording used by the plaintiffs. The emphasis in capital letters remains as originally done by the plaintiffs.

The plaintiffs described in detail the background of their claims. The background is explained in several points, which follow the order of the oldest to most recent. These points discuss: their title over their territory, first granted in the 18th century; the later grant of land for the community in 1970; their request for an extension of the territory granted in 1970; the problems caused to their request of extension due to the constitutional reform of 1992, such as the labeling of their file as ‘rezago agrario;’ the struggle of the Indigenous peoples in Chiapas; the making of the *San Andrés Accords*, and the commitments agreed to by the federal government; and, the COCOPA proposal, its importance, and the complete disregard⁷⁰⁵ of its text by Congress when preparing the decree of reforms of 2001.⁷⁰⁶

Usually claims against the Constitution, a constitutional reform or the process of constitutional reform are not allowed in the courts. This kind of case is complicated due to issues related to what in many civil law jurisdictions is called ‘legitimization’ issues. In September 1999, the SCJN had established an isolated precedent that allowed citizens to challenge the legality of the process of reform of the Constitution.⁷⁰⁷ This isolated precedent considered the following issues as relevant

⁷⁰⁵ The literal translation is closer to “complete unfounded disregard without reasonable motivation” of the COCOPA proposal.

⁷⁰⁶ *Ibid.*, at 5-13.

⁷⁰⁷ *Amparo en Revision* 1334/98, filed by Manuel Camacho Solís and resolved on September 9, 1999. The trial deals with the political rights of citizens. In this case, due to a sudden constitutional reform, the plaintiff became unable to run for office (Governor of Mexico City). [Originally in Spanish, see bibliography for title in original language.] In this case, the SCJN established a guideline that allowed an indirect amparo challenge to the process of constitutional reform. This principle was established in the context of the case of Manuel Camacho Solís who challenged a constitutional reform that established new rules that did not allow him to compete for office as the Mexico City governor in 1997. He argued that the process of reform was illegal for several reasons. Among those reasons was that the presenters of the proposal in Congress were senators, who cannot present proposals in the Federal Congress. The court allowed his argument establishing a new thesis (guideline) that allowed the process of reform of the Constitution to be challenged by an indirect amparo. Supreme Court of Justice of the Nation in Mexico in the Isolated Thesis [TA Constitutional]: P/LXII/99, the 9th. Period; plenary; SJF and Gazette, Volume X, September 1999, page 11 (193249) This thesis establishes that when challenging the constitutional reform process is not the Constitution, but acts up the legislative process culminating in its reform, which is challenged. In this kind of case, the responsible authorities are the authorities involved in this process, from which the act emanates. These authorities have to adjust their actions to the legal regulations and framework established to protect the principle of legality. The court also established that the fact that while the reform process had as result law elevated to the status of supreme law, the protective efficacy of amparo as a means of constitutional control had the aim of ensuring the legality of all processes and acts of the authorities. To do not allow an action against the process of reform would leave without remedy violations of the formalities and regulations established in Article 135 of the Constitution. See also: [TA Constitutional]:

when reviewing the legality of the process of reform of the Constitution: whether the process did not fulfill the necessary requirements such as the approval of two thirds of the Federal Congress; whether the legislatures of the different states had been consulted for their approval; whether the provinces had not approved by absolute majority the reform, or that the act of homologation of the law would not have been declared; whether the proposal of reform had been brought to the Federal Congress by the appropriate authorities; and whether other requisites regarding the formal procedure (in the sense of procedural requisites of the reform) of the reform of the Constitution were complied with.⁷⁰⁸

All evidence provided by the Zirahuén Community was in the form of written documentation. The Community brought their title from 1733 as evidence to the court, the documents that proved their actual application for extension of their territory, other documents such as assembly decisions, and documents that proved the ratification of the ILO *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*. No oral evidence was given at trial.⁷⁰⁹

The trial court also requested documentation from different authorities regarding their participation in the process of reform of the Constitution. The most relevant ones concerned the reports of the actions by the state legislatures regarding the voting process of the reform.

5.1.3 The decisions rendered in the case

There were two decisions rendered in this case: the first by the First Federal District Court of Michoacán and the final by the SSSCJN. Both decisions dismissed the claims of the plaintiffs. In both decisions, the reason for dismissal was that the

P/LXIV/1999, the 9th. Period; plenary; SJF and Gazette, Volume X, September 1999, Page 8 (193251). [Originally in Spanish, see bibliography for title in original language.]

⁷⁰⁸ [TA Constitutional]: P/LXIV/1999, the 9th. Period; plenary; SJF and Gazette, Volume X, September 1999, Page 8 (193251). [Originally in Spanish, see bibliography for title in original language.]

⁷⁰⁹ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002.

plaintiffs did not prove they were seeking to protect or advance a ‘legal interest,’ but on different grounds.

5.1.3.1 The Federal District Court’s decision

In its decision, the judge dismissed the claims and denied the amparo (protection of the law). He denied the amparo because he considered that the argument made by the Zirahuén Community regarding the constitutionality of the process due to the infringement of an international treaty was incorrect.⁷¹⁰ The judge concluded that the plaintiffs did not demonstrate the unconstitutionality of the process of reform. He considered that the ILO *Indigenous and Tribal Peoples Convention, 1989 (No. 169)* did not regulate the process of reform of the *Mexican Constitution* and thus was not binding. He also considered that the *Mexican Constitution* prevails over any other regulation, including an international treaty. In his opinion, there was no conflict between the treaty and the constitution, and even if there was a conflict, the constitution had preeminence over the international treaty and thus, the amparo could not be granted.⁷¹¹

The *Mexican Constitution* and *Amparo law* prescribe that judges have the duty to investigate all possible arguments of unconstitutionality in cases regarding claims of violations to the rights over communal and *ejido* land. This is called *suplencia de la queja*, which in English is translated as the courts’ inquisitorial supplementary function.⁷¹² This task of the judiciary in agrarian amparo cases is meant to protect weaker parties in the judicial process and avoid the application of unconstitutional laws to communities and *ejidos*. This task includes the mending of omissions, errors

⁷¹⁰ *Ibid.*, at 29-32.

⁷¹¹ *Ibid.*, at 29-30:

the process of reform is not regulated by international treaties or federal laws since the legislative will of the constitutional power cannot be subject to any other rules in any other legal or political system but only subject to the formalities established in the Constitution itself. ...under this premise, there is of no relevance that an international treaty, part of the Mexican legal system was not abided by because ...the Constitution is the apex of the Mexican legal system over which there is not other law.

⁷¹² In Spanish this is called ‘suplencia de la queja,’ and has as objective to protect weaker parties in judicial processes. It consists of correcting any errors and requesting the necessary information and evidence if there are any omission or deficiency in the pleadings. This is an obligation of all courts and tribunals reviewing amparo claims regarding Agrarian issues (the judge has similar obligations in other areas of law). This obligation does not include the formulation of claims that were not made by the plaintiffs but only to support the claims made.

or deficiencies in the claims and requesting evidence that the plaintiffs could not supply. The court did not refer to this duty in its decision in *Zirahuén*. However, the trial judge did state that the process of reform was constitutional until the contrary was proven, implying that the standard to prove the unconstitutionality of an act or law was higher than the usual: the plaintiffs had to demonstrate the unconstitutionality of the process of reform beyond any doubt without him acting accordingly to the court's supplementary function.

The plaintiffs appealed the decision arguing that the trial judge did not comply with the courts' duty of *suplencia de la queja*. They also argued that he erred in his analysis of the binding power of the international treaty, which should have been considered 'supreme law' (constitutional level law). In addition, they argued that he did not correctly assess the issue of the detriments to the rights of the community. In the plaintiffs' view, the detriment to their right to be consulted ought to be considered in regard to the standards set by the international treaty which are considerably higher than those contained in the constitutional reform.⁷¹³ They also argued other procedural issues such as the lack of notification of the hearing times to the plaintiffs and the lack of sufficient reports regarding the final votes for the approval of the reform in certain state legislatures.

5.1.3.2 The Second Chamber of the Supreme Court of Justice's decision

The SCJN only resolves cases of "ultimate importance for the society, and cases that have not already been interpreted by high courts."⁷¹⁴ There were many amparos relating to the constitutional reform of August 14, 2001 but the SSSCJN only heard the case of *Zirahuén*, most probably because it was a strong case and among the most complete and sound suits and appeals. The rest of the cases were heard and reviewed by *Tribunales Colegiados* (Federal High Collegiate Tribunals) in different parts of the country following the direction set by the *Zirahuén* case decision. Handwritten

⁷¹³ In the claims, the plaintiffs make a comparison of certain words used in different sections of the treaty, the COCOPA proposal and the decree of reform, e.g. the word 'territory' in comparison to 'place.'

⁷¹⁴ SCJN website. Online: <<http://www.scjn.gob.mx/conocelacorte/Paginas/atribucionesSCJN.aspx>>.

notes in the file of the case made by the secretary who worked on the decision⁷¹⁵ express the high degree of difficulty the court had in drafting the decision.⁷¹⁶ The two drafters of the decision were two veteran members of the court, Lourdes Ferrer MacGregor Poisot, Secretary of the Court, and Justice Mariano Azuela Güitrón.⁷¹⁷

The SSSCJN decided that the Zirahuén Community did not have standing because it had not been affected detrimentally in its rights by the reform. The court concluded that the rights established in the reform were favorable to Indigenous communities, and interpreted the rights established in the *Mexican Constitution* to be minimum standards that could be extended by the legislatures of the states.⁷¹⁸ Thus, it was not legally appropriate to protect them from the constitutional reform.

On page 129 of the decision, the SSSCJN stated that there are no precepts or rules in the reform that could result in the privation of the property or possession of communal Indigenous land as argued by the plaintiffs. The judges stated that, on the contrary, section V of Part A of the Article 2 of the reformed *Mexican Constitution* establishes “the right of Indigenous communities and peoples to preserve and improve the environment (habitat) and protect the integrity of their lands.”⁷¹⁹

The judges held that since there were no partial or total privations of their lands consequent to the reforms of the Constitution, then, it was legally logical to state that the reforms had not affected the plaintiffs’ rights. Thus, according to sections III and V of the corresponding articles 74 and 73 of the *Amparo Law*, which provide that no

⁷¹⁵ ‘Secretary of the Court’ is the literal translation of the position in Spanish: *Secretario de la Corte*. The *secretarios* work with the justices in the drafting of the decision. They are professionals very well prepared who sometimes act as law professors, and who could become justices themselves.

⁷¹⁶ File of the *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 122. [Originally in Spanish, see bibliography for title in original language.]

⁷¹⁷ *Ibid.*, at 1.

⁷¹⁸ [TA] 2a CXXXIX/2002, 9a. Época; 2a. Sala ; SJF y su Gaceta; Tomo XVI, Noviembre de 2002; Pág. 446 (185566). See also: [TA] 2a CXL/2002, 9a. Época; 2a. Sala; SJF y su Gaceta; Tomo XVI, Noviembre de 2002; Pág. 446, (185565). This guideline also seems to suggest that the freedom of association in the national level can be expanded through legislative means in the state level.

⁷¹⁹ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 67-75.

amparo can proceed when the acts challenged in the claim do not affect the rights of the plaintiffs.⁷²⁰

In the decision of *Zirahuén*, the court rejected a precedent and ruled that no constitutional reform could be challenged through an amparo action. The SSSCJN abrogated a guideline established in 1999 that allowed amparo actions to challenge the legality of the process of constitutional reforms.⁷²¹ The current ruling principle, therefore, is that there are no judicial resources to challenge the process of constitutional reform on any basis.

The court then concluded that, if it had continued to hold the principle that constitutional reform procedures were challengeable through amparo, the problem would have been to choose an appropriate remedy for the Zirahuén Community. The court ruled that to undo the process of reform requiring the legislature to consult the Community would mean to give general effects to a decision that by law should only affect the plaintiff.⁷²² Neither the constitution nor any law provides any cause of action that could grant Indigenous communities such a remedy.

The Zirahuén Community argued that their rights were violated according to international law. It asked the courts to interpret international law. The First Federal District Court judge and the SSSCJN commented only briefly⁷²³ on the issue of the hierarchy of the *Mexican Constitution* and international treaties concluding that if there were any conflicts, the *Mexican Constitution* would prevail.⁷²⁴ Today, this interpretation is obsolete because the current article one of the Constitution provides

⁷²⁰ *Ibid.* at 133-135. The new guideline was established in a case presented by the municipality of San Pedro Quiatoni in Oaxaca challenging the same reform in almost the same sense as the *Zirahuén* case. The municipality did not use an amparo but a controversia constitucional (constitutional controversy in English). See the Constitutional Controversy 82/2001. Municipality of San Pedro Quiatoni, Oaxaca state, September 6, 2002.

⁷²¹ [J]: P./J. 39/2002 9a. Época; Pleno; SJF y su Gaceta; Tomo XVI, Septiembre de 2002; Pág. 1136 (185941). This is a Jurisprudence (precedent) that is legally binding. [Originally in Spanish, see bibliography for title in original language.]

⁷²² *Ibid.*, at 123.

⁷²³ The SCSCJN did not review these arguments because the judges decided to dismiss the case on procedural grounds.

⁷²⁴ [TA]: P. LXXVII/99, 9a. Época; Pleno; SJF y su Gaceta; Tomo X, Noviembre de 1999; Pág. 46 (192867).

that all human rights established in international treaties ratified by Mexico are to be enjoyed and protected as constitutional guarantees and rights.⁷²⁵

The decision that resolved this case created what in México are called ‘isolated theses,’⁷²⁶ which are legal guidelines. Higher courts establish ‘isolated theses’ for lower courts to use when resolving cases. One of the theses established through the examination of the *Zirahuén* case established the “territorial principle of the Indigenous peoples” as a principle now enshrined in the *Mexican Constitution* (even though the Constitution never uses the word territory).⁷²⁷

The most progressive feature of the guidelines set up in the resolution to this case is a thesis that interprets article 2 of the *Mexican Constitution* as establishing the unit of Indigenous territory. This guideline considers such a unit to be an expression of the autonomy of the Indigenous community. Such autonomy regards the capacity to decide how to exploit the resources of its territory and the freedom of the Indigenous community to associate with other Indigenous communities at the municipal level.⁷²⁸

However, the guidelines established by the SSSCJN also emphasized that ‘National Unity’ is an aim of the constitutional reforms.⁷²⁹ This emphasis follows the text of the first line of the reformed article 2 of the Constitution, which establishes that “the Mexican Nation is unique and indivisible.” Professor Jorge A. Gonzalez has criticized such approach by the legislature because it suggests that the aim of the reform was to maintain national unity and not to promote a multicultural state.⁷³⁰

⁷²⁵ See Art. 1, para. 2 of the *Political Constitution of the United States of Mexico*, last reformed June 10, 2011.

⁷²⁶ Kind of rules created through precedents, they act as legal guidelines that can become jurisprudence or law.

⁷²⁷ See [TA] 2a. CXXXVIII/2002, 9a. Época; 2a. Sala; SJF y su Gaceta; Tomo XVI, Noviembre de 2002; Pág. 445 (185567) [TA] 2a. CXLI/2002, 9a. Época; 2a. Sala; SJF y su Gaceta; Tomo XVI, Noviembre de 2002; Pág. 455 (185509), among others. None of these theses can be used to create jurisprudence, which means they are not a source of law but mere standards to be used by lower courts receiving similar cases. [Originally in Spanish, see bibliography for title in original language.]

⁷²⁸ *Ibid.*

⁷²⁹ Second Chamber of the SCJN, [TA]; 9a. Época; 2a. Sala CXL/2002; SJF y su Gaceta; Tomo XVI, Noviembre de 2002; Pág. 446 (185565).

⁷³⁰ Jorge A. González Galván, “The Constitutional Reform on Indigenous Issues” (Julio—Diciembre 2002) in *Cuestiones Constitucionales* 7, at 255. [Originally in Spanish, see bibliography for title in original language.]

Part II: Uncertainty, Misunderstanding and Subordination

*We are sure that the governments and the considerable number of white men have for many years had in their minds a quite wrong idea of the claims which we make, and the settlement which we desire. We do not want anything extravagant, and we do not want anything hurtful to the real interests of the white people. We want that our actual rights be determined and recognized. We want a settlement based upon justice. We want a full opportunity of making a future for ourselves. We want all this done in such a way that in the future we shall be able to live and work with the white people as our brothers and fellow citizens.*⁷³¹

The second part of this dissertation discusses the three cases together and includes chapters 6, 7, and 8. This part uses the context and description of the cases summarized in previous chapters and explains my interpretation of these three cases. My interpretation of the decisions in these cases is that they all subordinate the Indigenous plaintiffs' rights to a set of externally imposed legal rights and principles, and the predominant legal culture in each country. This subordination leads to a legal situation that leaves the plaintiffs' rights unprotected from the interference of the state and third parties.

Chapter 6 explains in detail the rules used by the courts for dismissing and rejecting the plaintiffs' claims in the three cases. The detailed explanation might sound a bit repetitive because it looks at the reasons for dismissal or rejection of each of the claims from different angles. The discussion in this chapter is divided into four themes: the paucity of suitable causes of action, the difficulties of proof, the inadequacy of existing remedies, and the uncertainty and contestation in the law governing their claims. In this chapter I argue that there were no appropriate causes of action to protect the rights and expectations of the Indigenous plaintiffs.

⁷³¹ Resolution of Interior Tribes agreed upon the 6th of December of 1917 at Spence's Bridge, as seen in the Appendix to the journals of the Senate of Canada, First Session of the Sixteenth Parliament, 1926–27.

Chapters 7 and 8 expand the discussion in chapter 6, looking at the rationales, principles, and legal culture used by the courts to decide the three cases. In these two chapters, I explain further those legal rights and principles. The themes discussed in chapter 7 are the rationales of ‘legal autonomy’ and ‘individualism.’ Chapter 8 focuses on the relevance of the notion of ‘sovereignty’ in the dismissal and rejection of the plaintiffs’ claims in the cases. It also discusses the principles of ‘public welfare’ in Japan and ‘national unity’ in Mexico.

Recapitulation of the previous chapters

In the previous chapters I explained the three cases, their decisions and the broader context of their claims. The conclusions in each decision are different from each other due to the differences in the governing land regulations, the structure of the legal systems, and the nature of the claims. Nevertheless, the results in all cases here studied are similar to each other in that, while the decisions appear to grant certain favorable interpretations of the rights of Indigenous peoples, they do not grant the plaintiffs any remedies and ultimately reject their claims. The actions remained unfruitful to the plaintiffs either because there were no causes of action available to them, because the available causes of action disregard crucial characteristics of the legal and material realities of the plaintiffs, or because the available causes of action lacked corresponding remedies. Moreover, the level of uncertainty and contestation in the law made it difficult for the courts to fully resolve the many issues affecting these communities.

Another common thread observed in the three cases is that none the plaintiffs had been able to negotiate or settle the question of their rights, title or ownership to their land and the regulation of their people with the corresponding state authorities. They brought these claims to the courts because there was no other channel through which to raise such issues with the governments of British Columbia and Canada, Japan, and Michoacán and Mexico.⁷³²

⁷³² Eva Castañeda Cortés, QC, Co-counsel for the Appellants: Zirahuén Community, interview with author, 13 July 2011. Kiyoshi Fusagawa, QC, Co-counsel for the Appellants: Shigeru Kayano and Koichi Kaizawa,

The Gitksan and Wet'suwet'en had been asking the British Columbia and Canadian governments to discuss the scope of their rights over their land and the jurisdiction over their people for more than a hundred years.⁷³³ Both governments continuously disregarded their requests for negotiation and excused themselves through policies that notoriously put the communities at a disadvantage. In Japan, land was taken from the Ainu without consulting the Ainu people. The state unilaterally transformed the Ainu to 'former aborigines' by law and then later, simply did not recognize either their character as 'Indigenous peoples' or any particular rights over their ancestral territory.⁷³⁴ The Zirahuén Community in Mexico has requested the recognition of their ancestral territory since the beginnings of the 20th century without success.⁷³⁵ Their current request for extension of their territories is still pending. Moreover, no proper consultation was carried out regarding the constitutional reform on Indigenous peoples' rights in 2001.

At the same time, the claims in these three cases go beyond what courts usually expect in a claim. The Gitksan and Wet'suwet'en originally claimed the recognition of their 'ownership' and 'jurisdiction' over 58,000 square kilometers in British Columbia. Mr. Kayano and Mr. Kaizawa came to the courts just as the construction of a dam had started, knowing that most probably, they would obtain a resolution long after their lands had been covered with water.⁷³⁶ The Zirahuén Community came to the courts challenging the process of a constitutional reform, arguing an international treaty as the source of their right to be consulted in the drafting of such reform.⁷³⁷ None of them, in the end, claimed monetary compensation; they claimed something that they would not sell.⁷³⁸

interview with author, 23 August 2011. Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011. Stuart Rush, QC, Counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 14 December 2011.

⁷³³ See discussion in pages 61-62.

⁷³⁴ See page 102-103.

⁷³⁵ See page 142-144.

⁷³⁶ The Japanese Court System used to be known for its lengthy delays. Hiroshi Oda, *Japanese Law* (Oxford: Oxford University Press, 2011), at 66.

⁷³⁷ The lawyers in Nibutani and *Zirahuén* knew well that their chances to win were slim. They intended the trial as part of a larger Indigenous social, political and legal movement in both jurisdictions. A lawyer in *Delgamuukw*

I conclude that the courts in these cases were strict and conservative in their rulings notwithstanding the particularity of the plaintiffs' legal situation.⁷³⁹ These decisions affected communities that had suffered from hundreds of years of social and legal discrimination but still left the plaintiffs' claims unattended, did not grant any remedies and no solution to the situation of the ineffective dialogue between the communities and the corresponding state authorities was given. I argue that the decisions are conservative mainly due to two reasons. The first one is that the courts use legal concepts and principles that were created in the past,⁷⁴⁰ through a system of laws that aimed at centralizing the will in one sovereign, at conquering territories, and colonizing the different. The second reason is that the courts deferred on crucial issues in the claims to certain legal and political principles such as sovereignty, autonomy, individualism, public welfare and national unity that are closely connected to the broader social and political cultures of the three countries. Both reasons interrelate.

According to Dennis R. Klinck, legal concepts and principles created in the past continue to be in use today, and continue to have a similar effect to that in the past.⁷⁴¹ I have not and will not delve into discussing the establishment of legal categories and concepts that have been used to legally discriminate against Indigenous peoples (such as 'primitive',⁷⁴² and 'blood quantum'⁷⁴³) or have been used to justify taking over

told me that they really thought they would win (Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011).

⁷³⁸ An argument could be made that this fact left the cases in the periphery of the market economy, which could also be an important issue in these cases that was not studied sufficiently in this dissertation.

⁷³⁹ Aquinas considered that since the lawmaker cannot imagine every possible case, she creates the law according to what happens most frequently, directing her attention to the common good. The more particular the question at issue, the more flexible the interpretation should be, for the more particular is always subordinate to the less particular, cited Shirley Robin Letwin and Noel B. Reynolds.(ed.), *On the History of the Idea of Law*, (Cambridge: Cambridge University Press, 2005), at 85.

⁷⁴⁰ Dennis R. Klinck, *The Word of the Law, Approaches to Legal Discourse* (Ottawa: Carleton University Press Inc., 1992) writes that the legal language is conservative, it tends to use words and meanings of an earlier time, synchronized with the past. This does not mean that law cannot consider a certain new phenomenon and introduce it to its 'world.' This has happened in great measure in what regards science and technology, such as the Internet, genomic science, and reproductive technologies. Still, changes and additions to the legal language occur slowly and usually employ previously used concepts adapted to the new circumstances.

⁷⁴¹ *Ibid.*

⁷⁴² See the *Hokkaido Former Natives Protection Act* of 1899 in Japan.

Indigenous peoples' ancestral territories (such as 'the doctrine of discovery' and 'terra nullius'⁷⁴⁴). These legal labels have been established through policies that have profoundly hurt or destroyed communities of Indigenous peoples all over the world. The policies have been applied using laws that have killed, removed, isolated, and discriminated against Indigenous peoples; have taken their lands, and prohibited their ways of living, sustenance, and ceremonies; and have made their traditional way of living difficult to obtain if not unavailable.⁷⁴⁵ Many new legal concepts, laws, rights, and remedies existent today are efforts to correct previous bad policies, laws and legal concepts. My opinion is that those efforts were still insufficient in these cases.

In order to move forward to the analysis of these cases, the following paragraphs summarize the conclusions of the decisions in the cases of *Delgamuukw*, *Nibutani Dam*, and *Zirahuén*.

Summary of the conclusions of the courts in the three cases

Delgamuukw

The decision of the Supreme Court of Canada (SCC) in *Delgamuukw* focused on the following principal issues, enumerated here as questions, and concluded as follows:

- i. Did the pleadings preclude the SCC from entertaining claims for Aboriginal title and self-government?

The SCC entertained this issue because the original claims were made by individuals but had a communal nature. The court concluded that the amalgamation of the individual claims was a defect in the pleadings that

⁷⁴³ See the *Indian Act*, RSC. 1927, c. 98.

⁷⁴⁴ See the Papal bull *Inter Caetera*, 1493, the Treaty of Tordesillas, 1494, and Francisco de Vitoria, *De Indis et de ivre belli Relectiones – Theologicae XII* Ernest Nys (Ed.) and John Powley Bate (Trans.). Online: <http://www.constitution.org/victoria/victoria_4.htm>.

⁷⁴⁵ John Borrows "Sovereignty's Alchemy: An Analysis Of *Delgamuukw* V. British Columbia" (1999) 37 *Osgoode Hall Law Journal* 3, at 546.

In 1872, when Aboriginal peoples outnumbered the settler population approximately 4:1 in the province, and more than 15:1 on the north coast, one of the new province's first legislative acts was to exclude Indians from voting as reflected in An Act to amend "The Qualification and Registration of Voters Amendment Act, 1871," 1872 (BC), 35-38 Vict., No. 39, s. 13. In 1888, in the case of *St. Catharines Milling and Lumber Company v The Queen* [1887] 13 SCR 577, the SCC used for the first time the term Indian title, influenced by cases in the US using this term.

prevented the court from considering the merits of the appeal.⁷⁴⁶ Moreover, all courts agreed that the original claims ('ownership' and 'jurisdiction') were unfortunate and that the claims should have been for 'Aboriginal title' and 'self-government'.⁷⁴⁷

- ii. What was the ability of the SCC to interfere with the factual findings made by the trial judge?

The SCC found that the trial judge had assessed the evidence incorrectly and held that it could not correct his wrongful assessment. It limited its judgment to sending the case back for a new trial.⁷⁴⁸

- iii. What is the content of Aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof?

This question needed to be addressed because there is a lack of legal certainty on this matter in Canada. I argue that, for the most part, the SCC examined this issue without linking it directly to the demands of the Gitksan and Wet'suwet'en peoples, making it an abstract study of the necessary requirements to prove Aboriginal title.

- iv. Did the appellants make out a claim to self-government?

The SCC concluded that it could not rule on the question of whether a claim for self-government was made out or not. It held that the appellants made their claim in overly broad terms and thus not in a sense cognizable under s. 35 (1). They held that the parties did not give them enough submissions "to grapple with such

⁷⁴⁶ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 76:

Given the absence of an amendment to the pleadings, I must reluctantly conclude that the respondents suffered some prejudice. ...To frame the case in a different manner on appeal would retroactively deny the respondents the opportunity to know the appellants' case.

⁷⁴⁷ *Ibid.*, at para. 32.

⁷⁴⁸ *Ibid.*, at para. 75: Usually the SCC is reluctant to interfere with findings of fact made at trial, particularly when those findings of fact are based

...on an assessment of the testimony and credibility of witnesses. Unless there is a 'palpable and overriding error,' appellate courts should not substitute their own findings of fact for those of the trial judge.

difficult and central issues,” which in my opinion was a statement that does not pay sufficient tribute to the efforts of the plaintiffs.⁷⁴⁹

- v. Did the province have the power to extinguish Aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*?

The province had for a long time contended that Aboriginal rights in BC had been extinguished. The SCC concluded that the province did not have the power to extinguish Aboriginal rights in BC.⁷⁵⁰

As a result, the SCC concentrated on procedural issues and left aside the substantive claim: whether the Gitksan and Wet’suwet’en communities were entitled to the territory they claimed, and to govern themselves (the central claims of the plaintiffs). The last issue (v) is the most substantive issue discussed in the SCC’s decision but it is about the powers of the province and not the rights of the communities. Several counter-arguments raised by the provincial government, such as the one that there was no Aboriginal title in British Columbia, led the courts to go in directions that, in the end, were unfruitful for the plaintiffs.

Nibutani Dam

The Sapporo District Court recognized the plaintiffs as Indigenous peoples and did entertain the claims of the plaintiffs in the *Nibutani Dam* case and found that the expropriation carried out by the Hokkaido Expropriation Committee was illegal. However, the judges concluded that an extraordinary harm to the public interest would arise from reversing the Confiscatory Administrative Rulings issued for the construction of the Nibutani Dam. Since the dam had already been completed, the judges deemed that a revocation of the rulings would not conform to the public welfare and decided to reject the plaintiffs’ claims.⁷⁵¹ The judges also said that the

⁷⁴⁹ *Ibid.*, at para. 171.

⁷⁵⁰ *Ibid.*, at para. 40.

⁷⁵¹ See *supra* note 379 about Article 31 (1) of *Japan’s Administrative Case Litigation Law*.

Ainu's cultural sites in the area were already destroyed and could not be restored. In other words, though there was an illegality, nothing could be done about it.

The plaintiffs had no available injunction or cause of action to stop the construction of the dam while their case was under review. Moreover, the court did not give any compensation to the plaintiffs because they did not request any.⁷⁵²

Zirahuén

In *Zirahuén*, the Second Chamber of the Supreme Court of Justice (SCJN) found that the Community did not have 'legal interest' in the claim and no standing to come to the courts to challenge the process of reform. The court concluded that the constitutional reforms did not affect any of the plaintiffs' rights in the land.⁷⁵³ The conclusion by the Second Chamber of the SCJN in *Zirahuén* stemmed from one main and one collateral consideration. The main reason was that the plaintiffs did not prove that any harm would be done to them by the reform. The collateral reason was that the process of reforming the Constitution was held not to be challengeable in the courts.⁷⁵⁴

The Second Chamber of the SCJN also emphasized that, in any event, no amparo could be granted to the community because the law did not contemplate any remedy to grant to the Community in such a case. To undo the process of reform requiring the legislature to consult the Community would mean to give general effects to a decision that, by law, should only affect the plaintiff.⁷⁵⁵

⁷⁵² Hiroshi Tanaka, in "The decision of Nibutani Dam and afterwards" (2007) 25 *Academia Juris Booklet* at 17, argues that the plaintiffs decided not to ask for further compensation (damages) because they did not have interest in money but in the recognition of the Ainu and Ainu peoples' rights. Moreover, after the presentation of the legal suit against the expropriation of their land they started suffering from unpopularity in the community, who accused them of being troublemakers and money seekers. The plaintiffs did not want to feed the feeling that they had gone to the courts to obtain money. [Originally in Japanese, see bibliography for title in original language.]

⁷⁵³ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 134.

⁷⁵⁴ *Ibid.*, at 122.

⁷⁵⁵ *Ibid.*

Chapter 6: Examining the Issues of Procedure in the Three Cases

*So great is the ascendancy of the Law of Actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure.*⁷⁵⁶

Introduction

This chapter's main objective is to explain the rules of procedure applied to each case together. The discussion is divided into four themes. The four themes are related to each other; they are all intrinsically relevant to the difficulty of using the causes of action that are available for Indigenous peoples in the three jurisdictions in question. The division in four themes is only meant to help me explain such difficulties in the three cases using straightforward labels.

The first theme concentrates on the unavailability of suitable causes of action to challenge the interventions of the state and third parties in Indigenous territories and communities. The second theme is the difficulty of proving in these cases. The third theme concerns the paucity of remedies for the rights established for Indigenous peoples. And, the fourth theme pertains to the contested meaning of Indigenous peoples' rights and the uncertainty of the law in the three countries.

6.1 The paucity of suitable causes of action

Causes of action largely define what is possible and impossible in the world of the law. Maitland emphasized that:

... 'a form of action' has implied a particular original process, a particular mesne process, a particular final process, a particular mode of pleading, of trial, of judgment... Each procedural [form of action] contains its own rules of substantive law... [the plaintiff] may make a bad choice, fail in his action, and take such comfort as he can from the hints of the judges that another form of action might have been more successful. The plaintiff's choice is irrevocable; [she] must play the rules of the game that she has chosen. Lastly, [she] may find that, plausible as

⁷⁵⁶ Henry Sumner Main, *Early Law and Custom* (London: Murray, 1890), at 389.

her case may seem, it just will not fit any one of the receptacles provided by the courts and [she] may take to herself the lesson that where there is no remedy, there is no wrong...⁷⁵⁷

The discussion in this chapter relates to the particular mode of pleading, trial, and judgment in *Delgamuukw*, *Nibutani Dam*, and *Zirahuén*. Among the themes of discussion are the way in which the processes defined and identified Indigenous peoples, the ways in which Indigenous communities were represented, and the process of translating the *nomos*, concepts and practices of Indigenous peoples into legal claims. In all three cases, the rules that were used to dismiss and reject the plaintiffs' claims are general rules that apply to everyone and not only to Indigenous peoples. I argue that the application of these general rules to Indigenous peoples' claims is more burdensome to Indigenous plaintiffs than to other kinds of plaintiffs. It requires them to perceive their grievances and ask for remedies in terms that are not their own and subordinate their views.

The reasons behind the paucity of suitable causes of action are tremendously complex. Without doubt, the lack of legal actions to fulfill the legal expectations of Indigenous peoples stems from a lack of participation of Indigenous peoples in the state decisions regarding their land and people. This is related to a lack of political will to allow so.⁷⁵⁸ The plaintiffs and their communities did not have jurisdiction, or any responsibility to participate in the drafting of policies and laws that govern the analysis of their particular claims and legal situations. These reasons will not be discussed because it is not the aim of this dissertation. However, it is crucial for this study and the interpretation of the decisions in these three cases to explain that at the moment of the decisions, the plaintiffs did not have any opportunity to negotiate their

⁷⁵⁷ F.W. Maitland, "The Forms of Action at Common Law: A Course of Lectures" by A.H. Chaytor and W.J. Whitaker (ed.) 1936 (Cambridge, UK: Cambridge University Press, reprinted 1987), at 3 and 4.

⁷⁵⁸ Some as David Yarrow would explain the lack of political will in terms of the colonial aims of the state, others like Jorge Gonzalez might explain it in terms of a fear of division within the state. See David Yarrow, "Law's infidelity to its Past: The Failure to Recognize Indigenous Jurisdiction in Australia and Canada," in Louis A. Knafla and Jaijo Jan Westra, *Aboriginal title and Indigenous peoples: Canada, Australia and New Zealand*, (Vancouver: UBC Press, Law and Society Series, 2010) and Jorge A. Gonzalez Galvan, "The Constitutional Reform on Indigenous Issues" (July–December 2002) in *Cuestiones Constitucionales* 7, at 255. [Originally in Spanish, see bibliography for title in original language.]

rights with the state, and were not consulted regarding the constitutions, laws and administrative acts that affected them.

Delgamuukw

In Canada, the courts characterize Indigenous plaintiffs' actions on a case-by-case basis. When courts characterize a claim, they 'identify,' 'translate' or 'adapt' the original claims to fit Canadian law.

To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an Aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right.⁷⁵⁹

The courts decided in *Delgamuukw* that the plaintiffs could not claim 'ownership' and 'jurisdiction' of and over their lands as they initially did. Their claims were characterized as 'Aboriginal title' and 'self-government.' The courts held that 'Aboriginal title' could not be equated to fee simple ownership.⁷⁶⁰ They said that 'Aboriginal title' cannot be described with reference to traditional property law concepts.⁷⁶¹ The courts also said they did not have the power to grant 'jurisdiction.'⁷⁶² In my opinion, the courts' characterization of their claims did not match their original claims and changed the very question the plaintiffs were attempting to litigate.⁷⁶³

In the case of *Delgamuukw*, the cause of action available to the communities did not allow them to change their pleadings without formal amendments, which might seem obvious to any lawyer. However, the lawyers in *Delgamuukw* were surprised by the

⁷⁵⁹ *R. v Van der Peet*, [1996] 2 SCR 507, at para. 53.

⁷⁶⁰ *Delgamuukw v British Columbia* [1993] 5 WWR 97, at para. 908, and *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at 15, 32, 115 and 190.

⁷⁶¹ *Ibid.*

⁷⁶² *Ibid.*, at 34.

⁷⁶³ I think it is very relevant that the courts did not elaborate in the terms of 'Ownership.' They elaborated their study in the terms of 'Aboriginal title.' I use the words by John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster", (1997/1998) 22 *American Indian Law Review* 1, 37, at 47. According to him, the issue of characterization of claims changing the very question plaintiffs intend to litigate does not seem unusual in Canada.

emphasis the SCC put on the change in the pleadings because it happened ‘naturally’ through the adjudication process.⁷⁶⁴

The change followed the courts’ characterization of the plaintiffs’ claims. The change followed the need to ‘fix’ the plaintiffs’ claims into a cause of action that was ‘acceptable’ in the courts. In *Delgamuukw*, the courts characterized their claims as for ‘Aboriginal title’ and ‘self-government.’ And both ‘Aboriginal title’ and ‘self-government’ are communal rights.⁷⁶⁵ The SCC recognized that:

Although the claim advanced at trial was advanced by individual chiefs on behalf of themselves or their House members, the trial judge held that since Aboriginal rights are communal in nature, any judgment must be for the benefit of the Gitksan and Wet’suwet’en peoples generally.⁷⁶⁶

However, even though the courts characterized the claims as for Aboriginal title and self-government, the SCC was not willing to change the pleadings to fit such claims without a formal amendment. I wonder why if the characterized claims were communal, their pleadings required a formal amendment? Why this matter was not identified earlier and resolved properly? Why spend millions of dollars and more than ten years in courtrooms, to arrive at an inconclusive result?⁷⁶⁷

Failing to formally amend pleadings in a timely manner to properly reflect the precise nature of the claims being made has been shown to be very problematic for Indigenous peoples’ cases in Canada.⁷⁶⁸ The plaintiffs in *Delgamuukw* were surprised by the ruling because it was uncertain when and how they were required to do a

⁷⁶⁴ Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.

⁷⁶⁵ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at 15. See also *Delgamuukw v British Columbia* [1993] 5 WWR 97, at para. 23, the British Columbia Court of Appeal also recognized that:

Although the pleadings were confined to individual claims for declarations relating to ownership and jurisdiction the trial judge decided he would entertain a communal claim for Aboriginal rights other than ownership and jurisdiction on behalf of the Gitksan and Wet’suwet’en people generally (p.120, 157).

⁷⁶⁶ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at 16.

⁷⁶⁷ I echo the words of Kent McNeil, “Reconciliation and Third-Party Interests: Tsilhqot’in Nation v British Columbia,” (2010) 8 *Indigenous Law Journal*, 1, 8, at 9.

⁷⁶⁸ *Ibid.*

formal amendment of the pleadings. Still today, the limits of the discretion of the courts in characterizing Aboriginal claims remain uncertain. In a more recent decision, the SCC established that the characterization of the claims is to be based on the pleadings.⁷⁶⁹ Nevertheless, according to Constance MacIntosh and Gillian Angrove, the courts in Canada have aggressively re-characterized claimed rights in Indigenous peoples' cases not only based on the pleadings.⁷⁷⁰ In the latter case of *Lax Kw'alaams* the court ruled:

First, at the characterization stage, [courts] identify the precise nature of the First Nation's claim to an Aboriginal right based on the pleadings. If necessary, in light of the evidence, [courts are required to] refine the characterization of the right claimed on terms that are fair to all parties...⁷⁷¹

This practice has attracted considerable criticism.⁷⁷² Constance MacIntosh and Gillian Angrove argue that if the re-characterization is to take place after the right is found to exist, Indigenous plaintiffs are forced into an uncertain adjudication process that will keep them roaming without obtaining a substantive decision.⁷⁷³

Even though from the beginning the substance of the *Delgamuukw* plaintiffs' claim was a collective claim, the courts considered that changing the claim from 'individual houses' claims to 'two nations' collective claims without formal amendments was unfair to the respondents. A change in the pleadings during the appeal was considered to be improper because,

⁷⁶⁹ *Lax Kw'alaams Indian Band v Canada* (Attorney General) [2011] 3 SCR 535, at para. 46. In this case, the plaintiffs were the Lax Kw'alaams Indian Band and several other Coastal Tsimshian First Nations from the Northwest coast of BC. The plaintiffs sought a declaration that they had an Aboriginal right to engage in a commercial fishery. During the course of trial, the plaintiffs made also the claim for 'lesser' rights, sufficient to sustain their communities, accumulate and generate wealth and maintain and develop their economy, or alternatively to a food, social and ceremonial fishery.

⁷⁷⁰ Constance MacIntosh and Gillian Angrove, "Developments in Aboriginal Law: The 2011–2012 Term – Charter Rights, Constitutional Rights, Taxation and Sentencing," (2012) 59 *SCLR* (2d), at 9., at 14.

⁷⁷¹ *Lax Kw'alaams Indian Band v Canada* (Attorney General) [2011] 3 SCR 535, at para. 46.

⁷⁷² Constance MacIntosh and Gillian Angrove, *supra* note 770, at 9.

⁷⁷³ *Ibid.*, at 13-14.

[t]he collective claims were simply not in issue at trial and to frame the case on appeal in a different manner would retroactively deny the respondents the opportunity to know the appellants' case.⁷⁷⁴

This opinion about the significance of the change speaks of the problematic situation of translating the legal understandings of Indigenous communities claims in the Canadian legal context. In the case of *Delgamuukw*, it seems problematic to have had individual houses representing nations and claiming communal rights.

Nibutani Dam

In the case of *Nibutani Dam*, the plaintiffs did not have any cause of action that could be used to stop the construction of the dam while their grievances were reviewed by the administrative authorities and the court. The Japanese legal system did not contemplate an injunction or action that could be used by the plaintiffs to revoke authorizations given for administrative actions.⁷⁷⁵ This is because before the amendment in 2004, according to the law in Japan, suits against the actions of administrative agencies were not admissible.⁷⁷⁶

Moreover, as has been established in a previous chapter, in Japan there were no particular statutes or constitutional rights to protect communities of minorities against probable harmful decisions of the state. Only individuals could bring a claim against

⁷⁷⁴ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010. Similarly, in *Lax Kw'alaams Indian Band* *supra* note 489, Justice Binnie argued:

...[the change without formality] defies the relevant rules of civil procedure. Pleadings not only serve to define the issues but give the opposing parties fair notice of the case to meet, provide the boundaries and context for effective pre-trial case management, define the extent of disclosure required, and set the parameters of expert opinion. Clear pleadings minimize wasted time and may enhance prospects for settlement.

⁷⁷⁵ Tsunemoto, Teruki. Professor and Director at the Center for Ainu and Indigenous studies in Hokkaido University, interview with author, 22 August 2011. There are some resources available such as *a request* to the Prime Minister but all of them were unavailable to the plaintiffs according to Mark A. Levin "Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan" (2000–2001) 33 *NYU J Int'l L & Pol* 419.

⁷⁷⁶ *Administrative Case Litigation Law*, 1962. This law has been reformed several times. The reform of 2004 was part of a broader reform to the judicial system in Japan. Today injunctions are available but they are still not widely used.

administrative rulings such as the ones in this case. A suit for damages was available for the plaintiffs but they did not seek this remedy.⁷⁷⁷

The lack of causes of action to stop the construction of the dam in Nibutani defines the losses of the community today.⁷⁷⁸ The dam has had considerable impact on how the community relates to the river, with which their culture has been closely associated for thousands of years.

Despite the precariousness of the situation of the Ainu, the law still does not provide any protective measure for the Ainu, as Indigenous peoples.⁷⁷⁹ Until this day, there are no causes of action for the Ainu, as Indigenous peoples, to protect their ways of life and culture by establishing communal Ainu territories, obtaining title to their ancestral land, governing themselves, protecting their ceremonial sites, or obtaining special fishing, hunting or trapping rights, etc.⁷⁸⁰

⁷⁷⁷ They did not seek this remedy because they did not want their community to think they were doing it for the money, according to Hiroshi Tanaka, “The decision of Nibutani Dam and afterwards” (2007) 25 *Academia Juris Booklet*. The larger community was very critical of their efforts according to Mark A. Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan” *supra* note 775, at 506.

⁷⁷⁸ Many Indigenous communities are in the same situation in other parts of the world today. There are some actions that have been established by international law using institutions such as the Inter-American Court and Commission on Human Rights, but such actions are difficult to enforce. For example, Indigenous peoples of the Xingu River in Brazil were granted a precautionary measure against the construction of the Belo Monte dam by the Inter-American Commission on Human Rights, but the courts and authorities in Brazil at the time disregarded the order. See *Inter-American Commission, Precautionary Measures, PM 382/10 by the Indigenous Communities of the Xingu*, April 2011 modified on July 2011. See also *Escher et al. v Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Series C. No. 200 (July 6, 2009).

⁷⁷⁹ The reasons behind the unavailability of causes of action for Indigenous communities are various and broad. The most important is the definition of judicial jurisdiction in the landscape of political power and structure of the state. The different historical struggles for jurisdiction in each state define the causes of action available. Maitland *supra* note 757 noted that throughout the early history of the causes of actions, there is a struggle for jurisdiction:

In order to understand them [causes of actions] we must not presuppose a centralised system of justice, an omni-competent royal or national tribunal; rather we must think that the causes of action, the original writs, are the means whereby justice is becoming centralised, whereby the king's court is drawing away business from other courts.

Maitland of course refers here to the law of England, which is certainly distinctive in European Law, nevertheless the element of struggle for jurisdiction has shaped the causes of actions and the courts' systems around the globe, common law jurisdictions and civil law systems equally. Courts are divided into federal and state jurisdictions; into labor, civil, family, criminal, and administrative procedures; into district, high and supreme courts, etc. Each one of these allows only certain causes of actions.

⁷⁸⁰ Since the *Nibutani Dam* case in Japan, a law has been promulgated particularly focused on the protection of the cultural assets of the Ainu. Moreover, a Committee has been created to study the parameters under which, any laws, regulations or causes of action will protect the rights of minorities in Japan. Still there are no particular actions that could be used by the Ainu to protect their land from alien uses that could affect their communities and culture.

Zirahuén

The Zirahuén Community did not have any legal recourse to challenge the process of constitutional reform of 2001 on Indigenous peoples rights except for the one it chose, an indirect *amparo*, which ultimately failed. It was a cause of action with significant challenges mainly because it contested a constitutional reform. An indirect *amparo* claim against a reform to the Constitution was a complicated legal strategy that was available when the community presented its appeal (*amparo en revision*) to the Supreme Court (SCJN) but that became inadmissible days before the ruling of the Second Chamber of the SCJN (SSSCJN) in the case of *Zirahuén*. The SSSCJN established that the process of reform was as much a part of the Constitution as the content,⁷⁸¹ thus no action is allowed against the process of constitutional reform.

The court ruled that even though the plea was not against the content of the reform but only against the process of reform, the complainant needed to demonstrate that the content of the reform harmfully affected its juridical sphere.⁷⁸² This posed a tremendous challenge for the plaintiffs. An adjectival matter, the legality of the process of constitutional reform, had to be proven through the effect of the substantive law created through the reform.

If a plaintiff challenges the substance of a law then the plaintiff should prove the infringement in his/her rights due to that substance. But if a plaintiff is allowed to challenge the legality of the process of reform of a law, the effect of the substance of the law on the plaintiff should be irrelevant; the detriment in her/his rights ought to be proven by the mere fact that the legal requirements of the process of reform were not fulfilled; it is a problem of due process. The plaintiff, as a citizen, is affected due to the lack of legality of a process. In this case, an international treaty prescribed that the legislature was required to consult Indigenous peoples on the reforms. The failure to consult should have been detriment enough to prove the harm in the rights of the

⁷⁸¹ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 122.

⁷⁸² *Ibid.*

community. The failure to consult should have invalidated the reform, regardless of the content of the reform.

Moreover, in this case the reforms had not been applied at the time of the challenge. To require the plaintiff to prove a detriment to their rights due to the content of the reform was to ask for something that could have been impossible to prove. This will be examined in the next section.

6.2 The issue of proof

Rules of evidence are facilitative, secondary, or ‘adjectival,’ in the sense that they are meant to assist in the correct application of the substantive rules of law.⁷⁸³ While “adjectival,” rules of evidence are of great importance. They perform a variety of functions. They control what information the trier of fact may receive, how that information must be presented, and what use can be made of it.⁷⁸⁴ “Rules of admissibility of evidence will often, if not invariably, determine the success or failure of litigation.”⁷⁸⁵

Proof is central to the law; it is important in all stages of the judicial process.⁷⁸⁶ Plaintiffs must prove certain facts to establish their standing, their claim, the violation (or harm) of which they complain, and the propriety of certain remedies. Depending on the kind of action and the nature of the case, the requirements of proof vary. All causes of action follow certain paths, with each having a defined set of boundaries and limits that establish a burden of proof that claimants have to meet. Failing to meet the burden of proof results in the plaintiff losing her/his case.⁷⁸⁷

The issue of the difficulties of proof in these three cases will be discussed through the examination of some of the stages of the trial process in each of the cases. They are:

⁷⁸³ David M. Paciocco and Lee Stuesser, *The Law of Evidence, 5th edition* (Toronto, Canada; Irwin Law, 2008), at 1-2.

⁷⁸⁴ *Ibid.*, at 2

⁷⁸⁵ *Ibid.*

⁷⁸⁶ *Ibid.*, at 15-22.

⁷⁸⁷ *Ibid.*, at 2.

proof of entitlement to obtain legal standing; proof of harm; and, proof of the appropriateness of the remedy sought.

In all cases it was challenging for the plaintiffs to meet the burden of proof. I argue that this was mainly because the standards set in the legal systems of Canada, Japan, and Mexico regarding the format of the evidence, the relevance and materiality of the evidence,⁷⁸⁸ and the weight of the evidence, did not make room for the particularities of the situation and legal perspectives of the communities in the cases. In these three cases and their decisions, the courts found it challenging to capture the plaintiff's understandings about life, harm, good, and the logic of their claims. Judges looked at whether evidence was relevant and material to the issue or matter at hand according only to their own legal culture. Such relevance and materiality depends upon the cultural background of the legal system and the courts had great difficulty in evaluating and assessing a legal culture that was not their own.

Delgamuukw

The *Delgamuukw* case takes in almost all aspects of the issue of the difficulty of proof, from the simplest aspect such as the format of the evidence (oral or written) to the most complex aspect such as the significance, logic, and relevance of evidence brought by a different legal culture. Evidentiary problems appeared all through the case due to the requirements (which in some regards were particularly uncertain) to prove Aboriginal title, and the several procedural rules that did not adapt well to the cultural differences between the Canadian legal system and that of the Gitksan and Wet'suwet'en houses legal system.

In Canada, in order to claim title, the law required the plaintiffs to prove that their claimed right was integral to a distinctive culture. It also required an exclusive and continuous occupation of the claimed area since before the arrival of the settlers. In *Delgamuukw*, during trial, the Province questioned the existence of the communities

⁷⁸⁸ Relevance is whether the evidence offered tends to prove (as a matter of logic and human experience) the fact, which is introduced to prove; materiality goes to the significance of the evidence when proving the fact at issue.

as organized entities and the exclusive and continuous use (and title) of the territory since before contact with Europeans.

The allegations of the Province meant that it was necessary to prove the existence of the Gitksan and Wet'suwet'en as organized entities with a legal system that comprehended an ownership system and an interest in land that could be protected through the concept of Aboriginal title. Without doubt, to prove such issues was the biggest challenge in *Delgamuukw*.⁷⁸⁹ Adding to the difficult scenario, the Province also argued that Aboriginal title in British Columbia had been extinguished since before 1871,⁷⁹⁰ and thus, the communities did not have any rights in the land.

The Gitksan and Wet'suwet'en Houses were able to bring their oral histories, experts, documents, and community members as evidence of their existence, their interest in the land and the borders of their territories.⁷⁹¹

Oral evidence was basic to their case. Oral evidence was provided to prove their borders and the plaintiffs' knowledge about the territories. The Province argued that much of the oral evidence was hearsay.⁷⁹² The trial judge concluded that the

⁷⁸⁹ In *Zirahuén* and *Nibutani Dam*, the issue of proof went in a different direction because the Indigenous identity of the plaintiffs was never questioned by anyone on any grounds. The law in Mexico recognizes Indigenous communities usually based on self-identification standards and so the problem in *Zirahuén* was not related to the consideration of the 'indigeneity' of the community members, nor its rules, nor the organs of representation that appeared in the courts. In *Zirahuén*, the court recognized the community's title. In *Nibutani*, the authorities never questioned the Ainu background of both plaintiffs and even though the plaintiffs came as Japanese citizens to the court, the court recognized their cultural background as one of a minority, an Indigenous minority, and recognized without hesitation or debate the written ownership titles of the plaintiffs.

⁷⁹⁰ The position of the Province changed during appeal. See discussion in page 79.

⁷⁹¹ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at Part 8, 55. See discussion in page 72. The costs of the case rose to millions of dollars according to Michael Asch and Catherine Bell "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*" (1994) 19 *Queen's Law Journal* 2, 503, at 533.

⁷⁹² Hearsay is defined as an out of court statement, which a party tries to use as proof of its contents. Adrian Keane, *The Modern Law of Evidence*, 2d ed. (London: Butterworths, 1989), at 8. R. J. Delisle, Don Stuart, David M. Tanovich, *Evidence: Principles and Problems* (Thomson/Carswell, 2004) at 202, note 16:

Hearsay is generally considered to be inadmissible as evidence. The rule against hearsay has three justifications. Witnesses testifying in court take an oath; theoretically, this guarantees that they will be worthy of trust. Also, when witnesses testify in court, the decision maker has an opportunity to assess the demeanour of witnesses and make inferences about their trustworthiness. Most importantly, in-court testimony affords the opposite party an opportunity for cross-examination.

Since *Delgamuukw*, the SCC has modified the rules regarding hearsay evidence in Canada.

evidence that the plaintiffs presented was insufficient to prove their claims, giving limited weight to oral evidence.⁷⁹³

Oral evidence was not allowed or given limited weight in Canada, an issue that speaks of subordination of one legal perspective to the other.⁷⁹⁴ Legal rules regarding proof differentiate between evidence that if believed resolves a matter in issue (direct evidence), from evidence which if believed, requires additional reasoning to reach the proposition to which it is directed (circumstantial evidence).⁷⁹⁵ Social context might determine which is direct and which is circumstantial.⁷⁹⁶ For example, the Gitksan telling the stories of a territory was direct evidence of the responsibility of the teller over the territory, but it was considered circumstantial and insufficient evidence by the judge.

Most of the evidentiary issues were not assessed and/or resolved by the final judgment. There was only one important issue that the SCC resolved in the case, namely, the admissibility of oral history as evidence. The SCC recognized that the law might impose impossible standards for proving Aboriginal rights.

Otherwise, an ‘impossible burden of proof’ would be put on peoples who did not have written records, which would ‘render nugatory’ any rights that they might have.⁷⁹⁷

...Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents⁷⁹⁸ ...These errors are particularly worrisome because oral histories were of critical importance to the appellants’ case...Had the trial

⁷⁹³ See discussion in pages 72-74.

⁷⁹⁴ *Ibid.*

⁷⁹⁵ David M. Paciocco and Lee Stuesser, *supra* note 784, at 30-31.

⁷⁹⁶ Bruce G. Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts*, (Vancouver, Canada: UBC Press, 2011), particularly at 135-137.

⁷⁹⁷ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 87.

⁷⁹⁸ *Ibid.*, at para. 87.

judge assessed the oral histories correctly, his conclusions on these issues of fact might have been different.⁷⁹⁹

The change of paradigm is a first step. Nevertheless, the existing guidelines with respect to the admissibility of oral evidence fail to show how the courts might handle such evidence.⁸⁰⁰ In his last book, Professor Miller argues that the early process in which experts and researchers transmit oral material from the communities to the courtrooms is fraught with challenges and problems that the courts are not fully prepared to deal with.⁸⁰¹ According to him, in many cases, researchers need to find relevant legal information within a structure of recorded information that contains historical fact mixed with myth, family history and other material. In this and other cases, researchers end up cherry-picking information, which is a very controversial practice. Moreover, there are cases in which Indigenous bands would restrict the use of certain oral narratives as evidence in the courts, forcing researchers to cherry-pick information on the edge of what they are allowed.⁸⁰² Different parties in a judicial case can handle oral narratives in different ways. And in many cases there is no way to know the methodology used by researchers to understand the oral histories used in a case due to the various rules protecting privileged and confidential information.⁸⁰³

Moreover, “expert witnesses are often pushed or pulled towards the boundaries of currently acceptable historical interpretation.”⁸⁰⁴ Professor Miller agrees with this opinion stating that “the legal system [in Canada] has rejected informed and thoughtful versions of how to understand oral narratives, in favour of less informed but simple versions” of them.⁸⁰⁵

⁷⁹⁹ *Ibid.*, at para. 107. There are precedents of this tendency, among them *R. v Taylor and Williams* [1981] 3 CNLR. 114.

⁸⁰⁰ Bruce G. Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts*, *supra* note 796, at 2.

⁸⁰¹ *Ibid.*, at 74.

⁸⁰² *Ibid.*, at 76.

⁸⁰³ *Ibid.*, at 74.

⁸⁰⁴ Arthur J. Ray, “Native history on trial: Confessions of an expert witness” (2003) 84 *The Canadian Historical Review* 2, 255, at 273.

⁸⁰⁵ Bruce G. Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts*, *supra* note 796, at 164.

Proving a different legal culture

In *Delgamuukw*, the trial court ruled that:

...much evidence must be discarded or discounted...because their evidence fails to meet certain standards prescribed by law...⁸⁰⁶

The trial court considered Indigenous laws to lack a certain level of autonomy from spiritual dogmas and social mores. The Gitksan and Wet'suwet'en 'laws' brought as evidence by the plaintiffs in *Delgamuukw* were not recognized as laws in Canada. The court heard the testimonies, arguments, and anthropological experts, but the judge could not recognize or allow those views to be laws that could be accommodated by Canadian law and thus could not be law.⁸⁰⁷ In his perspective, the plaintiffs' laws and rules about their borders and control of their territories were social mores and 'cosmovisions' that looked like religious or social standards and rules. It seemed that in the view of McEachern CJ, a network of rules that is not autonomous from the social system (in the way the Eurocentric legal systems are) cannot be considered law in the Canadian legal system. This view disregards the fact that the Canadian legal system is also not autonomous from the dominant social system in ways that do not allow the judges to see the laws of others.

Moreover, the systems of rules of Indigenous societies pursue values that are contrastingly different to the values that the state legal system pursues. Their systems of rules are imbedded in a view of reality and social relationships that contrasts strikingly with the views of the legal systems of most states. The trial judge in *Delgamuukw* considered that all legal perspectives in Canada had to fit within the idea of law in Canada in order to be treated as law. He stated:

I am satisfied that the lay witnesses honestly believed everything they said was true and accurate. It was obvious to me, however, that very often they were recounting

⁸⁰⁶ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at Part 7, at 49.

⁸⁰⁷ *Ibid.* According to the Chief Justice, the anthropologists did not conduct their investigations in accordance with accepted "scientific standards," even though those standards were the ones set by the scientists themselves.

matters of faith which have become fact to them. If I do not accept their evidence it will seldom be because I think they are untruthful, but rather because I have a different view of what is fact and what is belief.⁸⁰⁸

In *Delgamuukw*, the courts tried to immerse themselves in the culture of the claimants in order to be able to know if the communities were organized, held a concept of property that was recognized by law, and ‘existed’ before Europeans arrived in BC. The courts not only heard evidence on culture, tradition, ceremonies and language but also were asked to consider the laws of the Gitksan and the Wet’suwet’en people. The plaintiffs in *Delgamuukw* brought to the courts explanations of when and how they had jurisdiction over their territories. They presented their systems of social regulation at the time of contact with the colonizers and today. The courts were also presented with other views of how people understand a legal system, and it was explained that persons are agents of law and not only subjects of law. The courts also heard the perspective of the Gitksan and the Wet’suwet’en people regarding the relationship between people and land. It seems that such understandings demonstrated a different organizing pattern regarding relationships among people, between people and land, and between people and other beings.⁸⁰⁹

In essence, the legal system of the Gitksan and Wet’suwet’en was presented as a living (changing) system that ought to be protected (through the remedies of declarations of jurisdiction or self-government and ownership or Aboriginal title). Conversely, the trial judge in this case seemed to have expected to rule on a case that treated the Gitksan and Wet’suwet’en legal systems also as a relic to be protected or as evidence of their distinctive Indigenous identities.⁸¹⁰ The plaintiffs presented the views and values that set the direction of Indigenous legal systems. And, the courts found it very difficult to recognize these values as evidence and even more difficult to recognize their legal systems as living legal systems, struggling to survive.

⁸⁰⁸ *Ibid.*

⁸⁰⁹ *Ibid.*

⁸¹⁰ *Ibid.* See also Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005).

In my view, in the case of *Delgamuukw*, the plaintiffs, judges, and the Crown discussed law very differently from each other. They came from different backgrounds that regard the law and the rules of legitimization and responsibilities in different ways. Culture, manner of living, and customs often define the chain of inferences used to support an ultimate conclusion when examining evidence. Inferences are based on assumptions about certain situations with which we are familiar. Most inferences are not conclusive. Each has probative weight, but rarely one single inference is enough to determine an ultimate outcome. However, in the assessment of the evidence in the trial of *Delgamuukw*, there is one assumption that pervades the reasoning of the judge and it is the one that sees the Gitksan and Wet'suwet'en laws as primitive in comparison with common law.⁸¹¹

Proving that the plaintiffs were representatives of the two nations

The Gitksan and Wet'suwet'en peoples used their traditional way of representation when coming to the court. The chiefs of the different houses of the different clans of the two nations were the plaintiffs, representing their nations. They did not use the band councils (organs established by the *Indian Act*) to represent them. The reason for this was not only that these councils were organs of representation created by the Canadian state that did not fully reflect the traditional leadership in the community, but also because using their own traditional organs of representation made it easier to communicate, explain and prove their laws and their territories (as required by the courts), and maintain a higher degree of unity of their people.⁸¹²

The territorial boundaries of the plaintiffs in *Delgamuukw* were defined according to houses. A member of a certain house does not know about the area of other houses even though they are part of one nation, speak the same language, and relate to each other using the same rules for social interaction. A member that does not know a

⁸¹¹ See discussion in pages 72-75.

⁸¹² The Kitwano cool houses of the Gitksan did not join the rest of the Gitksan people in this case. In the case of *Nibutani Dam*, the plaintiffs were two individual owners of a piece of land and so, this issue never became important. In the case of *Zirahuén*, the community used the organs of representation imposed by the law when coming to court, which eased their path in the judicial system.

territory cannot be responsible (own) for such territory.⁸¹³ The network of territorial borders between the houses is what establishes the responsibility and control of the Gitksan and Wet'suwet'en territory.

The use of this more traditional conception of representation and leadership led each plaintiff to claim the territory or territories for which she or he was responsible. Each plaintiff came to prove in court the responsibilities over each territory and thus together to prove ownership of the entire territory claimed. Even though Delgamuukw was not only the name of a person in this case; it was also the name of a house and the name of an extended family,⁸¹⁴ the use of their traditional way of representation was translated into 'individual plaintiffs and houses claiming communal rights' in the courts.⁸¹⁵

The issues of representation became crucial to the case. All the courts that examined this case on trial and on appeal commented on the peculiarity of the way in which the pleadings were presented but neither the trial court nor the court of appeal seemed to have anticipated correctly the procedural hurdle that this issue would become in the future.⁸¹⁶

The inability of the SCC in *Delgamuukw* to make sense of the relevance of the amalgamated individual claims demonstrates the negative impact of the rules about the characterization of Indigenous claims. Through these rulings, courts requested that communities come to the courts, not as themselves but as communities that can be culturally and legally understood (and thus heard) in the legal system of Canada.

⁸¹³ Richard Daly, *supra* note 810, at Chapter 7, 260.

⁸¹⁴ Neil Sterritt, in "The Trials and legacies of Mabo and Delgamuukw: Converting Rights into outcomes for Australian and Canadian First Nations Peoples," (December 19, 2012) *National Native Title Conference 2012: Echoes of Mabo, Honour and Determination*. Australian Institute of Aboriginal and Torres Strait Islander Studies, at 17. Online: <<http://www.aiatsis.gov.au/ntru/documents/NeilSterritt.pdf>>.

⁸¹⁵ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.

⁸¹⁶ *Ibid.*, at 210:

... there is no reason why the named plaintiffs should not represent the Gitksan and Wet'suwet'en people on whose behalf these actions have been brought... It will be for the parties to consider whether any amendment is required in order to make the pleadings conform with the evidence, the Courts' findings, and the law as I understand it. As presently advised, I would consider it sufficient to make the named plaintiffs' representation "clear and plain" by recitals in the formal judgment of the Court.

Forcing this structure upon the communities is highly destructive for them. It forces a transformation of the communities' leadership and normative systems that may change the communities forever and further the process of their disintegration. The consequences of such transformation might be already seen in many communities in Mexico. For example, in the case of *Zirahuén*, the Community lost its traditional normative system, and is now trying to find its own communitarian normative voice again.⁸¹⁷

Proving the borders

Chief Justice McEachern found that the plaintiffs did not prove the individual Houses' territories and borders. He, like the other two courts that reviewed the case, was seeking evidence of exclusive use and control over land, which was not proved by the plaintiffs.⁸¹⁸ He concluded that there were inconsistencies among the testimonies and oral histories.

The provincial government also advanced as one of their arguments the issue of conflict of borders with other Indigenous communities. This issue was never properly discussed in the case because no third party Indigenous communities came to the court to oppose the claimed boundaries.⁸¹⁹ The SCC regretted this situation and stated in the final paragraphs of its conclusion:

[m]any Aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of Aboriginal title for the Gitksan and Wet'suwet'en will undoubtedly affect their claims as well.⁸²⁰

⁸¹⁷ This can be seen in their self-declaration as an autonomous municipal community.

⁸¹⁸ *Ibid.*, at para. 185:

...Aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-Aboriginals and members of other Aboriginal nations. It may, therefore, be advisable if those Aboriginal nations intervened in any new litigation.

⁸¹⁹ *Ibid.*

⁸²⁰ *Ibid.*

In my opinion, the lack of intervention of third parties added a level of complexity that the courts could not overcome. It also speaks of an ambiguous dialogue among Indigenous nations in Canada and with the government.

Nibutani Dam

In the *Nibutani Dam* case, the court discussed the importance of the *Chinomishiri*, *Chipusanke*, *Shiepe*, *Kamy*, and the importance of fish, salmon and *shiitake* but only translated them as ‘something (objects, relics) to be protected.’ The court in *Nibutani Dam* did not recognize other rights attributable to the Indigeneity of the plaintiffs and thus, the consideration of the evidence as an essential part of Ainu culture was rather formalist. The decision does not appear to recognize how these objects and relics are part of a culture, a living culture that adapts and changes with time. The importance of the cultural wealth was only examined in terms of the two plaintiffs as individuals and not as important for a larger community.

Of the three cases studied in this thesis, proving the legal standing⁸²¹ of the plaintiffs was least complex in *Nibutani Dam* because the plaintiffs were owners of the properties expropriated by the Hokkaido Expropriation Committee. The plaintiffs, moreover, did not purport to represent any Indigenous community. They brought to the courts evidence and arguments based on their knowledge of Ainu cultural assets and ceremonies celebrated in the area but came to the court as two fee simple individual landowners.

Even though in Japan there is no communal property as there is in Mexico, and no legal concept of Aboriginal title as there is in Canada, the *Nibutani Dam* case may be the most successful of the three cases discussed here because it is the only one in

⁸²¹ Peter Hogg, *Constitutional Law of Canada* (Carswell, 1992), at 1263:

Standing is a question about whether the person has a sufficient stake in the outcome to invoke the judicial process.

The Law Reform Commission of British Columbia, Report on Civil Litigation in the Public Interest (Victoria, BC: Queen’s Printer for British Columbia, 1980) at 31 has also explained:

An individual’s ‘standing’ denotes a legal capacity to institute proceedings and is used interchangeably with terms such as ‘locus standi’ and “title to sue.” The question of standing, however, precedes the determination of a case on its merits, and in the result of finding of no locus standi can prevent any judicial investigation into the substantive issue presented for determination.

which the court carefully reviewed the merits of the claims made by the plaintiffs. In *Nibutani Dam*, the plaintiffs received no relief but at least their claims were entertained and won on the merits.

The decision in *Nibutani Dam* is now used as a ‘non-binding’ precedent and it has been influential to varying degrees in the recognition of the Ainu. It has assisted, for instance, in the establishment of more museums and programs for the growth of the Ainu language and culture and in the establishment of a process of consultation. I agree with Professor Tsunemoto’s opinion in that this influence originated mainly from pressure from international organizations such as the UN, scholarly research and the social movement gaining momentum and not because of the decision’s legal value.⁸²² Even though there is now an on-going process of consultation in the nearby town of Biratori, the cancellation of the construction of the dam in this town has not been discussed.

Since “rules of standing of our legal system apply to everyone identically even although some people are not in an equal position,”⁸²³ most jurisdictions have created laws and rules for particular (singular, uncommon) cases in which plaintiffs are disadvantaged, either economically or socially. General rules tend to produce better results for plaintiffs, because there is more certainty and few irregular requisites. In my opinion, the result in the *Nibutani Dam* case stems from many exceptional characteristics that can hardly be found in other situations the Ainu people confront every day. The plaintiffs in the *Nibutani Dam* case were leaders of the Ainu community and happened to own pieces of land in the expropriated area. They had the economic and social resources to litigate, but the reader must be aware that most of the Ainu do not enjoy the same social, economic and legal resources that these two

⁸²² Teruki Tsunemoto, Director of the Center for Ainu and Indigenous Studies, interview with author, 22 August 2011.

⁸²³ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 152, 56 DLR(4th) 1.

leaders enjoyed.⁸²⁴ No case since the *Nibutani Dam* case has been as positive for the Ainu community and this case is now fifteen years old.

No one disagrees that the lack of legal opportunities to protect their ways of living and their lands has played a part in marginalizing the Ainu culture.⁸²⁵ Moreover, the decision in *Nibutani Dam* was issued by a lower court and thus, its influence is limited. Professor Levin was of the opinion that,

...[t]he court's decision unmistakably implicates rights held by all Ainu, but one wonders whether, for example, a future court will recognize legal standing for any Ainu person concerning all future expropriation rulings in Hokkaido.⁸²⁶

Zirahuén

In *Zirahuén*, the lawyers thought the legal situation of the plaintiff was particularly good for proving their legal standing and interest in the conflict. The 18th century written titles that proved the ancestral and current 'ownership' of the land would demonstrate the plaintiff's legal interest and standing, and allow the courts to look at the substantive issues of the case.⁸²⁷ However, their title and the use of the established institutions to represent them did not confer standing because the court considered that the plaintiffs did not prove a detriment to their legal interests.⁸²⁸

Amparo rules establish that only material evidence directed to prove the constitutionality and unconstitutionality is admissible in Amparo actions. In Mexico, both courts, the Federal District Court and the SSSCJN had the obligation to solicit

⁸²⁴ Hiroshi Maruyama "Ainu Landowners' Struggle for Justice and the Illegitimacy of the Nibutani Dam Project in Hokkaido Japan" (2012) 14 *International Community Law Review*, 1, 63-80, at 66.

⁸²⁵ Toru Onai (ed.) *Report on the 2008 Hokkaido Ainu Living Conditions Survey: Living Conditions and Consciousness of Present-day Ainu* (Sapporo: Center for Ainu & Indigenous Studies at Hokkaido University, 2010).

⁸²⁶ Mark A. Levin "Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan" *supra* note 775, at footnote 275. Today after almost 20 years since the *Nibutani Dam* case, no case has been as positive to an Indigenous plaintiff in Japan.

⁸²⁷ Eva Castañeda Cortés, QC, Co-counsel for the Appellants: Zirahuén Community, interview with author, 13 July 2011.

⁸²⁸ The court based its ruling on the Amparo Law, Article 73.V., which indicates that no amparo can be granted against acts which do not affect the legal interests of the petitioner and Art. 74.III., which establishes that dismissal of the case is in order in such cases.

and acquire the evidence necessary (and not provided by the plaintiffs) for the resolution of this kind of case.⁸²⁹ Still the SSSCJN ruled there was not enough evidence to prove harm.

In my opinion, in *Zirahuén* there was no way in which the plaintiffs could have proven the detriment to the plaintiffs' rights and obtain standing due to three issues. The first is that notwithstanding that the central issues argued by the plaintiffs were adjectival and not directed at the substance of the law, the court considered that the substance of the law had to produce a prejudice to the plaintiff. This has been explained in the previous section.⁸³⁰ The second is that the legal action used by the plaintiffs was against auto-applicable laws.⁸³¹ 'Auto-applicable laws' is the literal translation of the concept in Mexico for *ley autoaplicativa*.⁸³² This concept is used for amparo actions that challenge the constitutionality of laws as soon as they are promulgated. It is a recourse that can be used against future but certain government actions. This legal recourse leaves the courts with the discretion of deciding if such actions are indeed certain and if they would have an undesirable effect in the constitutional rights of the plaintiffs. The third issue is that the plaintiffs argued a comparison of standards between the *San Andrés Accords*, the COCOPA proposal, the ILO *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, and the reform to the Constitution, which the SSSCJN disregarded completely.

Proving in an amparo action against auto-applicable laws

Amparo law recognizes two time periods with which to submit a claim of unconstitutionality of a law.⁸³³ The first term is within the first thirty days after the promulgation of the challenged law and the second one is fifteen days after the first act of application of the challenged law to the plaintiff. In the first situation, the plaintiff need not prove that a law has affected her or him but that it will plausibly

⁸²⁹ See discussion in page 156, and *supra* note 712.

⁸³⁰ See discussion about this issue in pages 180-181.

⁸³¹ *Amparo Law*, 1936, at Chapter III, Articles 21-22.

⁸³² See also the current *Amparo Law*, 2013, at Chapter III, Article 17.

⁸³³ *Ibid.*

affect her/him due to her/his legal situation/status. For example, a corporation that pays income taxes can challenge a law that changes the regulation of income taxes just because the laws will certainly affect it. The Zirahuén Community challenged the process of reform within the first thirty days of its promulgation, considering it a ‘auto-applicable law’ because the Community is Indigenous and the challenged constitutional reform regulates Indigenous peoples.

The court resolved that the plaintiff did not prove that the content affected the Community’s rights,⁸³⁴ mainly because it was convinced that the reform could not plausibly affect the Community’s rights. In the end, the court’s assumptions, inferences and understandings with respect to the rights of Indigenous peoples determined an impossible burden of proof for the plaintiffs.

Comparing standards that were not law

It was also a juridical impossibility for the Zirahuén Community to prove a harm to their rights because such harm could only be understood and proven in terms of a comparison of the standards set in the *San Andrés Accords*⁸³⁵ and the COCOPA proposal, with the standards set in the constitutional reforms of 2001.⁸³⁶ For the plaintiff there was a lower degree of Indigenous communities self-determination⁸³⁷ and a higher degree of subordination to federal and provincial authorities in the constitutional reform compared to the self-determination granted in the *San Andrés Accords* and the COCOPA proposal. These arguments were dismissed because the

⁸³⁴ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 129-135.

⁸³⁵ See discussion in pages 150 and 154. As explained above, these are political instruments agreed to by several authorities (among them members of congress from different parties) and several Indigenous communities (among them the Zapatista Indigenous communities).

⁸³⁶ See discussion in pages 150. For the Indigenous community there was a lower level of ‘autonomy’ (a concept similar to self-determination) granted in the Constitutional reform compared to the ‘autonomy’ granted in the *San Andrés Accords* and the COCOPA proposal. But these agreements were not considered comparable to the Constitution; they are not considered sources of law or legal standards.

⁸³⁷ Autonomy is a concept related to the idea of self-determination. The concept of autonomy implies the right that Indigenous peoples have to control their territories and natural resources. It also regards their right to govern themselves. Marco Aparicio Wilhelmi, “The Self-Determination And Autonomy Of Indigenous peoples: The Case Of Mexico,” (2009) 124 *Mexican Comparative Law Journal* 1. Online: <http://www.juridicas.unam.mx/publica/rev/boletin/cont/124/art/art1.htm#N*>. [Originally in Spanish, see bibliography for title in original language.]

SSSCJN did not consider the COCOPA proposal and the *San Andrés Accords* as legally binding.

The plaintiffs also argued their harm on the basis of a comparison of standards between the regulation of the duty to consult as established in the ILO's *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, and the content of the constitutional reforms in Mexico. For example, while the ILO's *Indigenous and Tribal Peoples Convention, 1989 (No. 169)* establishes that the duty to consult is triggered whenever consideration is being given to legislative or administrative measures which may affect Indigenous peoples directly, the constitutional reform establishes that the duty to consult is triggered when the government defines and develops education programs for the communities and in the elaboration of the national development plans. In the end, there were no standards higher than the Constitution itself for the court.

Proving harm

The SSSCJN resolved that the content of the reform benefited the plaintiffs,⁸³⁸ and that granting the amparo would cause the plaintiffs harm.⁸³⁹ From the text of the decision, it seems that the court could not see any wrong by the state in violating the international treaty. This way of considering harm or detriment suggests that there is a special standard of proof on Indigenous communities in Mexico. The judges could not perceive harm in *Zirahuén*, as they could in *Nibutani Dam*, or as in the 'Chevron' case in Ecuador.⁸⁴⁰ The Zirahuén Community could not prove the harmfulness of the reform process, due to issues of relevance, as opposed to materiality.

The court did not consider the background explained in the demand and appeal as relevant to the consideration of what was harmful in the perspective of the plaintiff. It disregarded the context of the claim completely. Proving detriments to communities

⁸³⁸ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 122.

⁸³⁹ *Ibid.*, at 125.

⁸⁴⁰ See the British Broadcasting Company (BBC) website. Online: <<http://www.bbc.co.uk/news/world-latin-america-12460333>>.

that have suffered hundreds of years of discrimination, inequality, and cultural assimilation may entail having to examine actions of people who are no longer alive and government policies not longer in place but whose consequences are still affecting populations. This is why positivist and formalist approaches are extremely harmful in Indigenous peoples' actions. Judges also consider certain cultural and material conditions of the plaintiffs as underdeveloped and in need of change. Issues that are argued by Indigenous plaintiffs might also seem unrealistic and thus, judges may consider them irrelevant. A community can come to court and argue that the community will lose its main means of sustenance, that certain sites will be destroyed, or that its culture will suffer a major loss but ultimately its perspective is examined under the perspective of the courts, which in the end decide whether government interventions in their territories and Indigenous peoples for 'development' or other purposes are positive or harmful for Indigenous plaintiffs.⁸⁴¹

If the judges cannot understand how a policy, law, or administrative action causes harm to Indigenous communities, then the Indigenous communities are left without legal recourse, as was the case in *Zirahuén*.⁸⁴²

6.3 The lack of suitable remedies⁸⁴³

The "aim of justice is to protect expectations," which is the only thing that "men mean, if they mean anything...when they appeal to the first principles of justice."⁸⁴⁴ James E. Fisher has explained that,

It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded. The linking of a remedy for the invasion of rights brings forth several important legal

⁸⁴¹ Most commonly these arguments happen because certain areas where the communities live are licensed or expropriated and 'taken' for a certain exploitative aim.

⁸⁴² Another possibility is that the courts consider that the harm inflicted on Indigenous peoples is outweighed by the benefits to the larger community. This consideration depends on the priority given to the constitutional intent of protecting Indigenous minorities and also leaves Indigenous communities without defense. See *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439 (1988).

⁸⁴³ Daphne A. Dukelow, *Dictionary of Canadian Law* (Toronto, Ontario: Carswell, Thomson Reuters, 2011) at 1104: "A remedy is a mean by which one prevents, redresses or compensates the violation of a right."

⁸⁴⁴ Shirley Robin Letwin and Noel B. Reynolds.(ed.), *On the History of the Idea of Law*, (Cambridge: Cambridge University Press, 2005), at 172.

consequences. First, we should note the emotive value of the statement. A wrong will be rectified in fact, not just in principle. Yet, what does it mean to say that a wrong will be rectified? The essential elements of rectification are to undo the injurious effects of the wrong. It must be kept in mind, however, that it is not the injury that gives rise to the remedy, but the legal wrong. An injury accomplished without the infliction of a legal wrong does not give rise to a right to remediation. Some injuries are tolerated, such as the harm a lawyer may inflict on a non-client when the lawyer is acting within the adversarial system. Other harms are encouraged and promoted, such as the economic harm that is the inevitable consequence of competition. Some harms are seen as beyond the ability of courts to redress, usually for reasons of deference and discretion...[The objective of a remedy is to return or restore] the plaintiff to the position he would have occupied had the wrong not occurred...Placement of the plaintiff in the position he would have occupied but for the wrong is, by necessity, an inexact science given the vagaries of proof and the imprecision of forecasting. Any construction of a plaintiff's rightful position is also compromised by competing interests and values that claim a place at the decisional table. These interests and values influence the extent to which the legal system may return or restore the plaintiff to the position he would have occupied but for the wrong. It is these competing interests and values that ultimately dictate the rules, principles, and standards that constitute the law of remedies.[emphasis added]⁸⁴⁵

Maybe the most obvious legal problem in the cases studied in this dissertation is the issue of remedies: courts appear to be unable to grant Indigenous peoples remedies that correspond to the rights established by the laws in these three jurisdictions.

All the courts in these cases commented on the inappropriateness of granting the remedies requested by the plaintiffs. In *Delgamuukw*, the court concluded that it was through negotiated settlements that issues such as the ones brought by the plaintiffs in *Delgamuukw*, which regard the reconciliation of the pre-existence of Aboriginal

⁸⁴⁵ James M. Fischer, *Understanding remedies*, Legal Text Series (MA: Matthew Bender & Co. Inc., 1999), 1-2, Online: <<http://www.lexisnexis.com/lawschool/study/understanding/pdf/remch1.pdf>>.

societies with the sovereignty of the Crown, could and should be achieved.⁸⁴⁶ In *Nibutani Dam*, the court stated that to grant the corresponding remedy in the case would not conform to the public welfare.⁸⁴⁷ In *Zirahuén*, the court resolved that there was no remedy to fix the situation challenged by the plaintiffs.⁸⁴⁸

Delgamuukw

Scholars and others have argued that, in the case of *Delgamuukw*, when seeking a declaration of Aboriginal title and jurisdiction, the lawyers asked the court for too much.⁸⁴⁹ They asked the courts to solve too many ambiguities, such as the nature and scope of Aboriginal title. At the same time the plaintiffs asked the courts to grant ‘ownership’ and ‘jurisdiction’ over 58,000 square kilometers, which represents around 6 percent of the area covered by British Columbia. To grant the Gitksan and Wet’suwet’en nations ownership and jurisdiction over such a vast territory would require a major political, social, geographical, and legal change in the Province, and in Canada as a whole. This is undeniable, and such a change would perhaps be better accomplished through the use of political resources. Nevertheless, as it has been explained above, the plaintiffs’ requests to negotiation were consistently rejected until 1993.

The SCC ruled that the correct remedy for the defect in pleadings was a new trial.⁸⁵⁰

The court also ruled that:

By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) “provides a solid constitutional base upon which subsequent

⁸⁴⁶ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 186. La Forest J. also stated:

On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.

⁸⁴⁷ Mark A. Levin, “Kayano et al. v Hokkaido Expropriation Committee: ‘The Nibutani Dam Decision’” (1999) *International Legal Materials*, Vol. 38, at 40.

⁸⁴⁸ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 123.

⁸⁴⁹ Brian Slattery (1991). “The Delgamuukw Case: A Legal Analysis,” Conference Proceedings, Delgamuukw and the Aboriginal Land Question, September 10 & u, 1991, Victoria, British Columbia cited by Dara Culhane, “Adding Insult to Injury: Her Majesty’s Loyal Anthropologist,” (1992) 95 *BC Studies*, 66.

⁸⁵⁰ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 77.

negotiations can take place”. Those negotiations should also include other Aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, supra, at para. 31, to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.⁸⁵¹ [Emphasis added]

Nevertheless, the court did not give the parties any directions regarding such negotiations. The phrase “a moral, if not a legal duty” sounds like encouragement; it provides no certainty to authorities and Indigenous communities.

At the same time, the reconciliation prescribed by the court did not recognize that Aboriginal legal and political rights could not be diminished without Aboriginal authorization.⁸⁵² According to John Borrows, the court chose to find that the ‘reconciliation of Aboriginal prior occupation with the assertion of the sovereignty of the Crown,’ displaces the fuller pre-existent rights of the land’s original occupants.

Moreover, the SCC defined the right of Aboriginal title by defining its limitations.⁸⁵³ According to the court, the range of legislative objectives that can justify the infringement of Aboriginal title is fairly broad:

In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of Aboriginal title. Whether a particular measure or

⁸⁵¹ *Ibid.*, at para. 186.

⁸⁵² John Borrows “Sovereignty’s Alchemy: An Analysis Of *Delgamuukw v British Columbia*” (1999) 37 *Osgoode Hall Law Journal* 3, at 565.

⁸⁵³ *Ibid.*

government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.⁸⁵⁴

In my opinion, the way in which the court explains reconciliation and Aboriginal title in Canada undermines Aboriginal land rights⁸⁵⁵ and makes it extremely difficult for Indigenous claimants to obtain the remedies that the plaintiffs sought in *Delgamuukw* in any court.

Sometimes, Canadian courts seem to know the direction they must take. The SCC also established in its decision in *Delgamuukw* that “the common law should develop to recognize Aboriginal rights as they were recognized by either de facto practice or by Aboriginal systems of governance.”⁸⁵⁶ However, until now, they have not found any remedies for the particular injuries Indigenous peoples have suffered and still suffer. Maybe the judges are not as creative as they need to be, or maybe, the legal systems do not allow them to be.

Nibutani Dam

In *Nibutani Dam*, the court could not find a remedy for the wrong committed to the plaintiffs that would not cause harm to the public welfare. It concluded that the Confiscatory Administrative Rulings should have been reversed *ab initio* but did not order such a remedy because of concerns about putting at risk the larger community. Moreover, the court explained that it was proper to deny relief because the plaintiffs’ lands were already covered by water and because the many Ainu cultural assets had already been demolished and destroyed and could not be restored. The court considered that:

the reversal of the rulings and orders would mean that the dam would become a useless object. The dangers of having such a construction not functioning properly

⁸⁵⁴ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 165.

⁸⁵⁵ John Borrows “Sovereignty’s Alchemy: An Analysis Of *Delgamuukw v British Columbia*” (1999) 37 *Osgoode Hall Law Journal* 3, at 537. This way of interpreting Indigenous peoples rights is seen also in the more recent decision in the *Tsilqot’in* case, as it will be discussed in the next chapters.

⁸⁵⁶ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 159.

in the area would increase and the residents would have to go without the benefits of the completed dam and be put at risk⁸⁵⁷... Taking these and all of the other circumstances of the instant matter into consideration, we find that reversal of the Confiscatory Administrative Rulings would not correspond to the public welfare.⁸⁵⁸

The superior position of the principle of ‘public welfare’ in the Japanese constitutional system contrasts considerably with the lack of constitutional protection of minorities. Moreover, no laws in Japan recognize the existence of Indigenous peoples.

Given that the plaintiffs did not ask for compensation, the court in *Nibutani Dam* could not find a remedy for the wrong committed to the plaintiffs and the Ainu community in the area. This meant that the law and Ainu peoples’ rights remained without practical meaning. Even though the Ainu plaintiffs in this case were able to prove an illegal and unfair treatment of the government, they still did not receive relief.⁸⁵⁹

Zirahuén

In *Zirahuén*, the court built its argument for dismissing the case on the ground that if it granted the amparo, the remedy would go against the law. The SSSCJN in *Zirahuén* stated:

...the lack of legal interest of the plaintiffs to bring this amparo case is evident if we hypothesize that if a decision gave constitutional protection against the challenged reform process, such decision would be detrimental for the community instead of benefiting it, because the favorable constitutional norms included in the

⁸⁵⁷ Mark A. Levin, “Kayano et al. v Hokkaido Expropriation Committee: ‘The Nibutani Dam Decision’” *supra* note 847, at 39.

⁸⁵⁸ *Ibid.*, at 40.

⁸⁵⁹ I would have liked to think of a remedy that destroyed the dam, requiring also enormous amount of work and investment in the area (the main preoccupation of the people living there and the political leaders is about the creation and maintenance of jobs for the communities), protecting the natural flow of the river, the community living the area, and building what could be useful in cases of typhoons and floods. I am certain that the actual advancement of technology and knowledge would allow Japan to engage itself in such a challenge, but I may be wrong.

reform could not be applicable to the community. Moreover, attending to the relativity principle of all amparo decisions (according to articles 107, fr. II of the Amparo Law), such hypothetical decision could not force the reforming organ of the Constitution to redo the process of reform because that would be like giving general effects to the decision instead of only protecting the plaintiff in the case [emphasis added].⁸⁶⁰

The remedies of an amparo action must be of relative effects (relative means affecting only the plaintiff). An absolute effect remedy is a remedy that affects the entire population or a broad section of the population. Absolute remedies can be granted in some cases by the Supreme Court of Justice in Mexico but only for certain causes of action: acciones de inconstitucionalidad (actions of unconstitutionality)⁸⁶¹ and controversias constitucionales (constitutional controversies).⁸⁶² The greatest number of challenges against the constitutional reform of 2001 in Mexico were controversias constitucionales. This was a cause of action available for Indigenous communities who could be represented by municipal governments. But *Zirahuén* could not use this cause of action because it is not a municipality. Moreover, as has been discussed above, all controversias constitucionales against the reform of 2001 were also all considered out of order and dismissed.

The plaintiff in this case requested immunity from the reform. However, since the Community argued that the wrong committed to it was that it had not been consulted

⁸⁶⁰ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 123. [Translation by author.]

⁸⁶¹ There are three legal actions established for the ‘control of constitutionality of legal norms:’ amparo, controversias constitucionales and actions of unconstitutionality. Action of unconstitutionality is an action to challenge the constitutionality of a law. It is only available to the General Prosecutor of the Republic, political parties registered (against electoral laws in the federal and provincial level), the National Commission of Human Rights, one third of the members of the Federal Deputies (against federal laws, and laws passed by the Federal Congress), one third of the members of the Senate Chamber (against federal laws and laws passed by the Federal Congress and international treaties), one third of the members of provincial deputies chambers (against laws passed by the provincial legislature), and one third of the members of the Federal District Legislative Assembly (against laws passed by the Assembly). If unconstitutionality is found, the laws become void. The Supreme Court is the only court in Mexico with jurisdiction to review actions of unconstitutionality. The Constitution requires a supermajority of eight votes in order to declare a law unconstitutional through this action.

⁸⁶² Municipalities representing Indigenous peoples used this latter cause of action against the reform. The controversias constitucionales were dismissed on the basis that the process of reform of the Constitution was not susceptible to constitutionality challenges. See Jurisprudence 39/2002 and 40/2002 of the Supreme Court of Justice of Mexico.

regarding the constitutional reform of 2001, the court considered that the proper remedy would have been to re-do the process of reform and consult it, affecting not only the Community but the entire Mexican population. Thus, what Zirahuén was asking for was legally impossible for the court to give.

Why did the plaintiffs in *Delgamuukw*, *Nibutani Dam*, and *Zirahuén* bring those claims and asked for such remedies?

The Gitksan and the Wet'suwet'en never ceded or surrendered any of their territories, and never negotiated any arrangement on behalf of their peoples with the Canadian or the British Columbia government. The fact that the Gitksan and Wet'suwet'en nations could not negotiate their rights to their territories at the time the *Delgamuukw* case was filed reflects the lack of viable legal channels open to Indigenous communities to resolve their conflicts with the states of BC and Canada.⁸⁶³ If the Gitksan and Wet'suwet'en peoples had had other channels open for the negotiation of the recognition of their territories, their claims might have been different or settled long before.⁸⁶⁴

By ignoring their requests, allowing larger settlements of migrants to establish in their lands, and licensing the exploitation of their resources by private and public companies, the state has continuously taken away from them what is their most precious responsibility: their land and the jurisdiction over their people.

Similarly, the plaintiffs in *Nibutani Dam* had no other venues in which to discuss the construction of the dam in their communities. When Mr. Kayano and Mr. Kaizawa appealed to the Administrative agency in charge of the construction, the agency took as long as it could to answer their appeal, disregarding them completely. Ainu people have also been consistently disregarded in relation to the creation and application of policies towards them. According to Georgina Stevens, the *Ainu Culture Promotion*

⁸⁶³ Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.

⁸⁶⁴ The BC Treaty Commission was established in 1992 and started working in 1993. Since then only two treaties have been achieved. In my opinion this reflects the unsuitability and ineffectiveness of the processes taken by the Commission.

Act was not the legislation Ainu leaders had been actively campaigning for since 1984.⁸⁶⁵ The proposal by the Ainu Association of Hokkaido included Indigenous rights such as Ainu fishing rights, a self-reliance fund, special seats in local and national legislative assemblies, an Ainu consultative body, and policies to support and promote Ainu primary industries and employment opportunities.⁸⁶⁶

In the case of *Zirahuén*, several Indigenous communities, including Zirahuén, protested the reform and the actions of the federal congress towards such reform. They were not allowed to present their concerns to the Senate, the main drafter of the reforms. The dearth of effective procedures for the consultation of Indigenous peoples and the paucity of actions to force the state to consult Indigenous peoples in Mexico is also a reflection of this very important issue. Indigenous communities in Mexico are scarcely consulted regarding the laws, regulations, and agreements that affect their interests and there are few remedies for such occurrences.⁸⁶⁷ In addition, although agreements have been reached, because there are no causes of action to secure the compliance of such agreements, most of them remain of little or no effect. In *Zirahuén*, the federal government and congress members negotiated a peace treaty with several Indigenous communities and concluded an accord that sought a constitutional reform (*San Andrés Accords*). Key parts of these accords were disregarded when drafting the final constitutional reform on Indigenous rights in Mexico. The courts did not think such accords set obligatory standards for the state and the content of the accords continues to be disregarded by the federal judicial system and the government.

In the three cases studied in this thesis, the plaintiffs decided to argue these respective issues before the court because the Indigenous communities had no other avenues to pursue in order to discuss issues of title to their land, harm through state activity,

⁸⁶⁵ Georgina Stevens, in “Ogawa v Hokkaido (Governor), the Ainu Communal Property (Trust Assets) Litigation” (Fall 2005) 4 *Indigenous Law Journal* 219, at 221.

⁸⁶⁶ *Ibid.*

⁸⁶⁷ Mexican Commission of Human Rights, Recommendation Number 56/2012, September 28 2012, at para. 116-140. Online: <<http://www.business-humanrights.org/media/documents/recomendacion-cndh-wirikuta-mexico.pdf.pdf>>.

jurisdiction and law-making powers. From my perspective, the claims in these three cases reflect the absence of a system of checks and balances as between the state and the Indigenous nations, which would provide a healthy limitation of the authority exercised over Indigenous communities. Moreover, in my opinion, if there was a proper dialogue about Indigenous rights in the three jurisdictions, the claims brought by the plaintiffs in these cases would not have appeared as excessive or irrational.

The lack of meaningful dialogue between the Indigenous communities of the plaintiffs and the authorities also led to ‘misunderstandings’ in relation to the content and nature of their rights. The plaintiffs in these three cases contended that their rights carried a meaning that the courts ruled inappropriate or erroneous.

Remedies are the places in the law where meaning and practice come together. A legal word has a meaning and a practice. The Indigenous plaintiffs sued for a remedy that could not be given. In summary, in these three cases, the courts talk about a meaning of legal words that they say cannot be practiced.⁸⁶⁸

6.4 The contested meaning of Indigenous peoples’ rights and uncertainty in the law

In this section, I contend that due to a high level of ‘contestations’ and ‘uncertainty’ regarding the relevant way of substantive law in these three jurisdictions, procedural hurdles got in the way of the plaintiffs. There were at least two interrelated ways in which the language of the law was difficult to use for the vindication of the rights of the communities in these three cases. First, the interpretations of their rights and the legal concepts related to them were one-sided; they did not take the views of Indigenous peoples into account. Second, the meaning, nature, and scope of such

⁸⁶⁸ At the same time the meaning of Aboriginal right in the Canadian Constitution seems to be one different from that in the decision in *Delgamuukw*, and different from the meaning also used in the negotiation tables. In agreements, a particular ‘Aboriginal right’ is granted or not but the words ‘Aboriginal rights’ does not arise (See the Nunavut Land Agreement and the Nunavut Act). The meaning of the words ‘ethnic minority’ in the ICCPR is contrastingly different from the one used in the *Nibutani Dam* decision and also different from the one used in the Biratori Dam consultation process. While in the decision in *Nibutani Dam*, there is an emphasis in the indigeneity of the Ainu to Hokkaido, the Biratori Dam consultation process do not use such concepts. In Mexico, the meaning of consultation in the Constitution is contrastingly different from that barely discussed in the decision in *Zirahuén* and in the way it is used by administrative authorities that need to consult Indigenous peoples.

rights were unknown, in different degrees, for the authorities, the courts, and the plaintiffs.

Delgamuukw

As it has been explained briefly above, there was uncertainty about the need to formally amend the pleadings to two communal pleadings. This was caused by the fact that Indigenous claims in Canada are characterized (and re-characterized) by discretion of the courts.⁸⁶⁹ Moreover, when the claims in *Delgamuukw* were examined at trial, the content and nature of Aboriginal rights and Aboriginal title was uncertain.⁸⁷⁰ McEachern CJ was also uncertain about the requirement for exclusivity.⁸⁷¹ Other important legal issues were also uncertain, such as the issue of how the courts ought to admit and weigh oral evidence and the issue of the blank extinguishment of Aboriginal rights in British Columbia before 1871.

Though particular legal rights have been created to deal with the realities of Indigenous peoples, since ‘Indigenous peoples’ are not a homogenous category, judicial interpretations depend largely upon the particular circumstances of each community, claims, and case (which can vary in great degree). The legal categories and terms are adapted to each case. Aboriginal rights are *sui generis* and decided on a case-by-case basis. This also causes uncertainty regarding the rights of Indigenous peoples.

The SCC established in its decision on *Delgamuukw* that the features of Aboriginal title cannot be fully explained under the common law rules of real property. Aboriginal title needs to be explained also under Aboriginal law rules,⁸⁷² giving equal place and weight to each perspective;⁸⁷³ nevertheless, in this case the judges did not do that. The decisions in this case subordinated one perspective to the other. This

⁸⁶⁹ *Sui generis* means ‘of its own kind; unique or peculiar’ according to *Black’s Law Dictionary* (St. Paul, MN: Thompson Reuters, 2009).

⁸⁷⁰ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 75.

⁸⁷¹ *Ibid.*, at para. 21.

⁸⁷² *Ibid.*, at para. 112-115.

⁸⁷³ *R. v Van der Peet*, [1996] 2 SCR 507, at para. 50.

added an important level of uncertainty: the SCC decision in *Delgamuukw* seems to hint that there is a limit to giving equal place and weight to both perspectives, the limit of Crown sovereignty. The SCC decision undermined the Indigenous perspectives of ownership. To explain this point, the following paragraphs will discuss the notions of exclusivity and continuity provided in the decision of the SCC.

Exclusivity and continuity

In *Delgamuukw*, the plaintiffs alleged in their statement of claim that:

The plaintiffs represent all the Gitksan people (except those in the Houses of the Kitwancool Chiefs), and all the Wet'suwet'en people, and each nation shares a common territory, language, laws, spirituality, culture, economy, and authority [emphasis added].⁸⁷⁴

No court denied that the plaintiffs had been 'sharing' the claimed territory since before the Europeans came to BC. Still, 'sharing' was not enough to prove 'control' over the territory and Aboriginal title. To obtain title, plaintiffs had to prove exclusivity and continuity of control over their territory.⁸⁷⁵ The Province, arguing via Judith Bowers, QC, argued before the SCC in *Delgamuukw*:

...The unwillingness or inability of a claimant group to exclude others from the land and to prevent interference with the practice of the Aboriginal right related to the alleged title would be a clear indicator that their connection with that particular land was not of central significance to their distinctive culture.⁸⁷⁶

The term 'exclusive' has been used in relation to the right of Aboriginal title but has been difficult for the courts to assess.⁸⁷⁷ According to Canadian law, 'exclusivity'

⁸⁷⁴ The Statement of Claim at paras. 52 and 54.

⁸⁷⁵ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 143:

In order to make out a claim for Aboriginal title, the Aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

⁸⁷⁶ Transcript of cassettes of hearing at the Supreme Court of Canada of appeal from the British Columbia Court of Appeal in the case of *Delgamuukw* in session on Tuesday, June 17, 1997, 9:48 a.m., at 190.

⁸⁷⁷ *Ibid.*, at para. 111:

The content of Aboriginal title, in fact, lies somewhere in between the positions of the parties.

must be proven when claiming Aboriginal title, but until now, assessing the reach of 'exclusive use' has been mostly unfruitful for Indigenous' plaintiffs. This term is more complicated than it appears; firstly because 'exclusive use or ownership' changes when people die, resources are found or exhausted. The use of a certain area might have changed due to the weather, natural changes, diseases, and migration. Moreover Indigenous peoples might not have the same idea of 'exclusivity,' and 'continuity,' that Canadian law requires for Aboriginal title.⁸⁷⁸

The fact that Indigenous peoples have to come to the courts and speak of their land in terms of exclusivity might be more than enough to assimilate their cultural understandings of what land is and how it is to be used or shared. To request plaintiffs to prove an extreme of the term exclusivity seems inappropriate in the process of understanding and recognizing a different social entity and protecting its culture. It subordinates their understanding to the understanding of common law.

In this same sense, the concept of 'continuity' cannot protect the cultures of Indigenous peoples in Canada because the concept requires Indigenous peoples to

⁸⁷⁸ In *R. v Marshall* [2005] 2 SCR 220, the Mi'kmaq failed in a claim for Aboriginal title because they were not able to establish sufficiently regular and exclusive use of the land in question (para. 72) to satisfy the requirement of pre-sovereignty occupation. The court considered that the claimed-land was extensive, their numbers were small, and their lifestyle partially nomadic. The degree to which ownership is "exclusive" always varies. For example, I can own a house with a mortgage that my father has a right to use until he dies. Common legal system can consider such a house, my house, but I do not have the exclusive use of it. Also an exclusive right to hunt in a certain area for a certain kind of prey could have belonged to a certain person, family or house, but it might have been that another person, house, or family also had the right to hunt other kind of prey and pick up certain fruits or goods or use the trees in the same area. There might have been enough berries or deer for many but there was perhaps the need to limit the hunt of beaver more carefully and thus the right to hunt beaver would be restricted differently.

E.g. in page 179 of the Transcript of cassettes of hearing at the Supreme Court of Canada of appeal from the British Columbia Court of Appeal in the case of *Delgamuukw* in session on Tuesday, June 17, 1997, 9:48 a.m.:

Brown's evidence indicates that the Chief's control of the individual properties was not exclusive, but was limited in some instances to beaver exploitation. It might have been true that the right to hunt only belonged to one person but it might also have been true that it belonged to an entire family or family line. In the case of *Delgamuukw*, the territory was used by these two nations in a way agreed upon among themselves and with other communities, but the ways the courts assessed "exclusivity" seemed at times extreme. This is notorious in the constant worry expressed by all courts in all stages regarding certain overlaps of "ownership" among several communities.

Delgamuukw v British Columbia [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at 674, explains:

... and in view of the fact that Indians have always had access to all vacant Crown land, it is difficult to understand how, apart from the question of priorities, an Aboriginal sustenance right in such a remote land could be an exclusive right. If it was exclusive originally, it has been changed throughout history in the same way the Fraser River fishery is no longer exclusively an Aboriginal fishery.

freeze their culture, cosmovision, and traditional ways of using their lands in time.⁸⁷⁹ In the case of *Delgamuukw*, the provincial government spent weeks ‘proving’ that people, including chiefs, had TVs in their homes and lived in a culture that in no way resembled the culture of a hundred years ago.⁸⁸⁰ They used these facts to support their argument that the Gitksan and Wet’suwet’en peoples could not be entitled to Aboriginal title because the continuity of their culture in relation to the territory was questionable.

Moreover, in *Delgamuukw*, Lamer CJ considered that land held in Aboriginal title could only be put to a limited set of uses that were reconcilable with the nature of the attachment to the land which forms the basis of the particular group’s Aboriginal title.⁸⁸¹ Peter Hogg considers that this means that land occupied for hunting purposes could not be converted to strip mining.⁸⁸²

Nevertheless, cultural continuity is very difficult to prove. According to many archeologists and anthropologists there is no way of proving the continuity of a culture in rigorous scientific terms.⁸⁸³ Certainly, this way of using evidence and understanding an entitlement to Indigenous rights is bound to be fatal to the ends of minorities.

Finally the reach of the duty to consult and accommodate Indigenous peoples is still uncertain in Canada. Academics, judges and Indigenous communities alike still

⁸⁷⁹ Culhane, Dara. “Delgamuukw and the People without culture: Anthropology and the Crown” PhD Thesis, SFU Department of Sociology and Anthropology (Vancouver: Simon Fraser University, 1994), 284. Arthur Ray also discusses this issue in Arthur Ray, “From the US Indian Claims Commission Cases to Delgamuukw: Facts, Theories, and Evidence in North American Land Claims,” in Louis A. Knafla and Haijo Jan Westra, *Aboriginal title and Indigenous peoples: Canada, Australia and New Zealand* (Vancouver: UBC Press, Law and Society Series, 2010).

⁸⁸⁰ Don Money and Skanu’u (Ardythe Wilson) *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet’suwet’en Sovereignty Case* (BC: Gabriola Island New Society 1991).

⁸⁸¹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 111.

⁸⁸² Peter Hogg, *Constitutional Law of Canada*, (Scarborough, Ontario: Student Edition -Thomson Carswell, 2008), at 640. Later in *Pamajewon*, (*R. v Pamajewon* [1996] 2 SCR 821) the court decided that the Aboriginal right of self-government extends only to activities that took place before European contact, and thus only to those activities that were an integral part of the Aboriginal society. In this case the court decided that the power to regulate high-stakes gambling on reserves was beyond the broad right to manage the use of their reserve lands (as part of the right of self-government).

⁸⁸³ Ian Scharlotta, Bruce G. Miller, and Dana Culhane.

wonder whether the duty to consult and accommodate includes the duty to achieve agreements with the communities and whether it is enough that governments make sure that they hear the Indigenous communities concerns and adapt their policies as they consider it necessary.⁸⁸⁴

Nibutani Dam

In order to understand the level of legal uncertainty in the case of *Nibutani Dam*, we ought to imagine the lawyers and the plaintiffs standing in front of a court of three judges that had never learned anything about the legal rights of Indigenous peoples in Japan. When Mr. Kayano and Mr. Kaizawa brought their claims to the Sapporo District Court, the legal status of the Ainu people was contested. The plaintiffs argued they were Indigenous peoples but no Japanese law provided such recognition. Moreover, the government had denied that status before the UN in several reports.⁸⁸⁵ The plaintiffs thought of the *Nibutani Dam* decision as a victory only because the decision was the first time that a court in Japan had recognized them, the Ainu, as Indigenous. They also did not know if they had particular rights to land or rights to protect their culture.

They argued their case in a way that nobody had argued a case in the courts in Japan before them. The plaintiffs' constitutional arguments were considered partly incorrect because they were based on equality rights, and not on the right to the pursuit of happiness held by all individuals. They came as two individuals but argued a case very much based on the rights of their Ainu community.

Zirahuén

The SSSCJN rejected a precedent that allowed amparo actions against constitutional reforms on adjectival matters in the case of *Zirahuén*.⁸⁸⁶ The plaintiff based its cause of action on this precedent. Without the rule established in that precedent, the

⁸⁸⁴ Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23 *Canadian Journal of Administrative Law & Practice* 93, at 101.

⁸⁸⁵ See discussion in page 105, *supra* note 451.

⁸⁸⁶ See discussion in pages 154 and 159, *supra* note 707.

plaintiff did not have any cause of action against the constitutional reform of August 2001. The insecurity about the status of this rule was of major relevance to the conclusion of this case.

Moreover, the rules regarding consultation of Indigenous peoples in Mexico were and remain considerably uncertain. In Mexico, no law or regulation regarding the consultation and participation of Indigenous has been promulgated. Even though the ILO has provided in the *Indigenous and Tribal Peoples Convention, 1989 (No. 169)* that governments are required to conduct genuine consultations in which Indigenous peoples have the right to express their views and influence the decision-making process,⁸⁸⁷ Indigenous communities are seldom consulted and government authorities and communities alike largely ignore the requirement to consult.⁸⁸⁸ The consultation process is decided and performed by administrative authorities as they see fit due to a lack of administrative regulations.⁸⁸⁹

The uncertainty in this area did not decrease through the decision in *Zirahuén*. In *Zirahuén's* decision, the SSSCJN reversed a precedent and affirmed the duty to consult Indigenous peoples, ruling that, when applicable, the recommendations and proposals that they bring to the Development Plans at municipal, state and national levels, are protected by the Constitution.⁸⁹⁰ Words such as 'when applicable' are the ones that create uncertainty for governments and communities alike. Government agencies tend to excuse themselves from finding it 'applicable' or 'reasonable' to introduce the recommendations and proposals of Indigenous peoples. In the recent case of *Wirikuta*, the Ministry of Economy excused itself from consulting Indigenous communities on the basis of the lack of laws and regulations in the matter.⁸⁹¹

⁸⁸⁷ International Labour Organization website, The Basic Principles of the ILO Convention No. 169. Online: <<http://www.ilo.org/Indigenous/Conventions/no169/lang--en/index.htm>>.

⁸⁸⁸ Mexican Commission of Human Rights, Recommendation Number 56/2012, September 28 2012, at para. 116-140. Online: <<http://www.business-humanrights.org/media/documents/recomendacion-cndh-wirikuta-mexico.pdf>>.

⁸⁸⁹ *Ibid.*, at para. 127.

⁸⁹⁰ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 74.

⁸⁹¹ *Ibid.*

6.5 Conclusions

In this chapter I interpreted the application of the procedural rules that impelled the courts to dismiss and reject the plaintiffs' claims in a broader context.

In the first part of the chapter I discussed the most evident issues that made it difficult to the plaintiffs to use the causes of action available to them. In the case of *Delgamuukw*, the strictness of the court in requiring a formal change in the pleadings was not consistent with how courts characterized the plaintiffs' claims. In *Nibutani Dam*, there were no injunctions available to the plaintiffs to stop the construction of the dam while their arguments were under review. And in the case of *Zirahuén*, the only cause of action available for the community to challenge the lack of consultation in the process of the reform of the constitutional rights of Indigenous peoples did not allow them to prove harm as the courts required. I concluded that the application of the general procedural rules in these three cases was more burdensome to the Indigenous plaintiffs than to other kinds of plaintiffs. These rules required the Indigenous plaintiffs to perceive their grievances and ask for remedies in terms that were not their own.

In the second part of the chapter, I discussed the issues of proof in the three cases. All courts' seemed unable to recognize the context of Indigenous peoples and their claims due to their evidentiary rules and systems. The courts were unable to adapt the rules to the particularities presented in the cases. In *Delgamuukw*, the message of the courts was that the law could not perceive Indigenous peoples' rights as Indigenous peoples themselves do. In *Nibutani Dam*, the court did not recognize the communitarian character of land rights attributable to the Indigeneity of the plaintiffs. In *Zirahuén*, the courts decided that they knew what caused harm to the Community better than the Community itself, disregarding the reality of Indigenous communities in Mexico, the Zapatista Revolution, the *San Andrés Accords*, and the COCOPA proposal.

There is a real challenge in translating the cultural base of Indigenous legal systems, which happens through the rules of evidence. In these cases, the rules of evidence and the courts assumptions and inferences established a standard of what life, harm, good and logic means, imposing upon the Indigenous plaintiffs the culture of the dominant legal systems that exist within the state. The overall effect of the use of procedural rules to deny substantive relief is that the particularity of the legal situations of the plaintiffs and their communities is unrecognized or unseen by the courts and the law.

This is partly due to how legal language recognizes certain meanings and disregards others. The legal language used by the courts has been created within a certain cultural context and the judges did not recognize this when they assessed the perspectives of the communities and their culture.⁸⁹² If the courts do not fully recognize the equal footing of Indigenous legal perspectives and use these perspectives as sources of law, then the law and legal systems will remain colonial and undiversified. Diversity requires that legal systems open the door to the ‘different’ and act on that openness in all senses. They must allow Indigenous peoples’ sense of harm, their need to regulate themselves, and their sense of the world and rules to enter the courtroom and the law. If the law is to be ‘the great leveler,’ it cannot arbitrarily impose a unique way of seeing the world through the use of concepts that only reflect a certain set of customs, historical context and manner of living.

In the third part of the chapter I explored the issue of remedies in the three cases. In all three cases, the courts could not reconcile the ways the claims were presented with a proper remedy and thus, the plaintiffs were left without relief. In *Delgamuukw*, the

⁸⁹² Dennis Klinck has written that there is a broader problem with an account of language, which sees it as potentially corresponding to “objective” reality: supposing such reality to exist, we know it only through our perceptions and thoughts. When we give something a name, therefore, it is not to something that is objectively real, but only to our concepts. Moreover, the world of the law is mainly a moral world, and moral categories are not “discovered” (in contrast with scientific objects and phenomena) but “invented/created”. John Locke insisted that our classification of things is the result of human conceptualization, which is built upon certain customs, manners of life, etc. Since most legal concepts have been created within certain customs, and manners of life, (what we have called the “Western” legal tradition) legal concepts do not encompass the understandings, rules, remedies, and rights of other cultures. Dennis R. Klinck, *The Word of the Law, Approaches to Legal Discourse* (Ottawa: Carleton University Press Inc., 1992).

SCC emphasized solutions that were not legal remedies such as negotiations;⁸⁹³ in *Nibutani Dam*, the court decided that if it were to grant a remedy to the plaintiffs, it would impose a tremendous burden on the public welfare; and in *Zirahuén*, the court considered that under the cause of action initiated by the Community, they could not grant the remedy that could fix the lack of consultation with Indigenous peoples. In all three jurisdictions, the law was unable to give Indigenous peoples what they yearned for. Their requests were considered out of order due to the priority of the legal autonomy of the process, a concern with the public welfare, and because the remedies sought were unavailable.

The courts considered that what the plaintiffs in these three cases asked for was excessive or impossible. Nevertheless, the contexts of the cases indicate that the communities have not had the venues to discuss their objectives with the broader community or be consulted by the state authorities regarding what affects their land and their people. This is a situation fundamentally at odds with our sense of justice.

The remedies requested seem to be the ultimate objective of the communities in these cases, and the ultimate objective of the rights expressed in the Constitutions, declarations, international treaties and legislation cited,⁸⁹⁴ but courts seem unable to

⁸⁹³ Aboriginal title has never been fully granted by a court in Canada. In my opinion, this is a remedy issue because the courts have not been able to decide what is Aboriginal title and how can it be proven due to the variety of the societies of Indigenous peoples living in Canada, which bring different kinds of claims due to their different characteristics.

⁸⁹⁴ See the *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, and that entered into force in 23 March 1976; the *ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, Convention concerning Indigenous and Tribal Peoples in Independent Countries (Entry into force: 05 Sep 1991) Adoption: Geneva, 76th ILC session (27 Jun 1989) (Technical Convention); and, *the Royal Proclamation of 1763* in Canada. See also the recently achieved *United Nations Declaration on the Rights of Indigenous peoples* in June 2006 (Resolution 61/295 of the General Assembly), which establishes:

Art. 3. Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
Article 8.2. States shall provide effective mechanisms for prevention of, and redress for:
(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
(d) Any form of forced assimilation or integration;
(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

grant them. The remedies available do not meet the legal and real expectations of the Indigenous communities in these three cases. This mismatch speaks of a conflict of the principles that underlied the decisions. Some of the principles that are mentioned in the decisions in these three cases will be studied in the following two chapters.

In the last part of the chapter I discussed the issues of the contested meaning of Indigenous rights and the lack of legal certainty in the area of Indigenous law. The findings of this study indicate that there was much uncertainty in the substance and form of many legal concepts and rules of procedure. I argued that due to such a high level of ‘uncertainty,’ the plaintiffs found themselves trapped in a procedural labyrinth. This was not helped by the lack of proper guidance in statutes or legislative policies.

The central questions about the rights and remedies for Indigenous peoples were unsettled. In particular the answers to the following questions were highly controversial in the jurisdictions of Canada, Japan, and Mexico: What does Aboriginal title comprehend? How do courts need to characterize Aboriginal claims and how can plaintiffs adapt properly their pleadings and arguments to such characterizations? Are Ainu people ‘Indigenous peoples’? What rights do Indigenous peoples enjoy in Japan? What are the procedures that authorities need to follow in order to fulfill their duty to consult Indigenous peoples in Mexico? What is the meaning of self-determination in Mexico?⁸⁹⁵

Article 11.2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with IndigenousIndigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 19 States shall consult and cooperate in good faith with the IndigenousIndigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

⁸⁹⁵ See *William v British Columbia*, [2012] BCCA 285, a case that awaits resolution by the SCC and which speaks of the controversies regarding the concept of Aboriginal title in Canada. See also Michael Weiner, *Japan's Minorities: The Illusion of Homogeneity*, (New York: Routledge, 2009), at 21 has a discussion on the controversy regarding the Ainu as Indigenous. See also the Mexican Commission of Human Rights, Recommendation Number 56/2012, September 28 2012, which contains a discussion of the uncertainty of the reach of the duty to consult in Mexico. Most of those questions remain controversial in the corresponding jurisdictions.

At the same time, the existing legal categories were ‘insufficient’ for capturing the meaning of the broad set of claims brought by Indigenous communities in these cases and their historical and current legal situation. The particularity of the claims brought to the courts by these Indigenous communities did not match the categories existent in the law.

Since the first colonizers started to settle in the countries of Canada, Japan, and Mexico, Indigenous peoples have sought the European settlers’ recognition of their title to their lands. Nevertheless, none of the legislatures in these jurisdictions have established comprehensive policies and statutes to help resolve these questions and have not appropriately included Indigenous communities and their perspective in the establishment of such policies and statutes. In the cases of *Delgamuukw*, *Nibutani Dam*, and *Zirahuén*, even the simple duty of the government to make themselves available to hear Indigenous communities’ concerns seems to be unsettled, leaving not only the communities but also the courts in a precarious position.

The decisions in these three cases did not sufficiently resolve the issue of certainty in this area of law. The plaintiffs in the three cases brought their cultural values to the courts to explain why they deserved the remedies that they requested, not only according to their perspective, but also according to the perspectives of the legal systems of Canada, Mexico, and Japan. The courts understood such values and the Indigenous plaintiffs’ claims in these cases to be attacking the most essential presumptions of the Canadian, Japanese, and Mexican legal systems, which is an erroneous approach. In my opinion, judges must confront these presumptions and seek to reconcile them if there is a true interest in examining Indigenous peoples’ claims and harms, and protect Indigenous peoples.

Without doubt, the courts’ interpretations of Indigenous peoples’ rights and the legal concepts related to them were one-sided; they failed to sufficiently include the plaintiffs’ Indigenous legal perspectives. This is mainly because many of the expectations of Indigenous peoples are still not fully reflected in the categories

concepts created by legislators and interpreted by courts in these three countries. Indigenous peoples have scarcely participated in the creation and establishment of such rights, and state authorities, including the courts, have disregarded Indigenous peoples' legal perspectives, or the results of the negotiations with Indigenous peoples.⁸⁹⁶

The words we use in law are mostly notions of nominal essences, which entail a kind of relativism.⁸⁹⁷ Cases brought to court by Indigenous minorities challenge the ways in which we use the language of the law in ways that other cases may not. In my opinion, while the legal expectations of Indigenous peoples are not properly analyzed and discussed at negotiating tables, the issue of legal certainty will remain unresolved. The solution to this problem has been recognized to be to establish effective and fair channels for negotiation and consultation with Indigenous communities that make use of Indigenous laws, customs and traditions.⁸⁹⁸

However, such channels will only properly address uncertainty and misunderstanding if the courts interpret the rights of Indigenous peoples in a way that forces the government to recognize the equal footing of Indigenous legal perspectives. The SCC in *Delgamuukw* could have resolved to recognize Aboriginal title for the Gitksan and Wet'suwet'en without being specific about the precise location and nature of the rights. This happened before in the *Baker Lake* decision, where a federal court judge declared that the Inuit held Aboriginal title without being specific about the particular location and content of the right. Such issues were later resolved through a negotiation process between the federal government and the Inuit and resulted in the *Nunavut Land Claims Agreement*. The Sapporo District Court could have ordered the government to dismantle the dam in a way that minimized risk and harm to the broader public interest. And the SSSCJN could have granted the amparo to the

⁸⁹⁶ This does not happen in the establishment of Charter rights, which have general application. Minorities are granted rights by a majority, which is a contrastingly different situation from what happens in cases of constitutional rights of general application.

⁸⁹⁷ Dennis Klinck *supra* note 892.

⁸⁹⁸ BC Treaty Commission website. Online: <<http://www.bctreaty.net/files/quickfacts.php#commission>>.

Community, providing it with immunity from the application of the reform obliging the Congress to reconsider the reform. Such remedies are not uncommon in Mexico in cases in which amparos are granted in response to challenges against taxation legislation. Moreover, judges must be prepared to understand and apply Indigenous laws, customs, principles and traditions if a truly pluralistic legal system is sought. Such effort would force the government to know and argue in terms of Indigenous legal perspectives.

Furthermore, the fact that the concepts established in the laws that protect Indigenous communities and individuals are far from being accurately and consistently applied also seems to indicate a broader problem in the three jurisdictions.⁸⁹⁹ The continuous violations of Indigenous peoples' rights, or disregard of their rights, are also evidence of this broader problem.⁹⁰⁰ The governments, which still disregard and infringe on Indigenous peoples' rights in the jurisdictions of Canada, Japan, and Mexico, do not help the efforts of the courts. The Ontario Superior Court of Justice ruled in 2006:

Despite repeated judicial messages [compelling the federal and provincial Crowns to address their fiduciary duty in all Crown decisions that affect the rights of Aboriginal peoples] delivered over the course of 16 years, the evidentiary record available in this case sadly reveals that the Provincial Crown has not heard or comprehended this message and has failed in fulfilling this obligation. One of the unfortunate aspects of the Crown's failure to understand and comply with its obligations is that it promotes industrial uncertainty to those companies, like Platinex, interested in exploring and developing the rich resources located on Aboriginal traditional land.⁹⁰¹

⁸⁹⁹ For Canada, see the cases of *MiningWatch Canada v Canada (Fisheries and Oceans)*, (2010) 1 SCR 6, and *Haida Nation v British Columbia (Minister of Forests)* (2004) 3 SCR 511. For Japan compare the cases of *Nibutani Dam to the Ogawa v Hori*, Heisei 11 (Gyo U) No. 13 (Sapporo D. Ct. Mar. 7, 2002) and see also the UN documents that refer to reports requiring Japan to follow up on issues regarding Ainu people: CCPR/C/115/Add.3 (1997), CCPR/C/79/Add.102 (1998) y CERD/C/350/Add.2 (2000). For Mexico see the cases of the Huetosachi Indigenous community in the Amparo en Revisión 781/2011, of March 14, 2012, and the case of Wirikuta in the Mexican Commission of Human Rights, Recommendation Number 56/2012, September 28 2012.

⁹⁰⁰ Department of Economic and Social Affairs of the Division for Social Policy and Development Secretariat of the Permanent Forum on Indigenous Issues of the United Nations, "State of the World's Indigenous peoples" (ST/ESA/328), (New York, 2009), at 19, 20, 23, and 24.

⁹⁰¹ *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation et al*, 272 DLR (4th) 727; [2006] 4 CNLR 152, at para. 95-96.

The procedural difficulties discussed in this chapter reflect the contradictions and failures of the three legal systems in relation to protecting Indigenous peoples' culture, territories and people. The decisions seem to point out that there is a deeper rationality underlying the courts' decisions to dismiss, reject or leave unresolved the claims in these three cases. The following chapters will expand on this idea by looking at the rationales that drive the system of adjudication employed in Canada, Japan, and Mexico, through the study of the cases of *Delgamuukw*, *Nibutani Dam*, and *Zirahuén*.

Chapter 7: The Rationale Behind the Law in *Delgamuukw*, *Nibutani Dam*, and *Zirahuén*

*Judges are not confined to a mechanical deduction from rules with predetermined meaning. Often their choice is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one...*⁹⁰²

The problems faced by the communities studied in these three cases are deeper than procedural issues. While substantive law in Canada, Japan, and Mexico emphasizes the protection of the culture, territories and wellbeing of Indigenous peoples as minorities, the application of such law is considerably constrained through commitments to a cultural background and a particular form of rationality. This chapter explains an interpretation of the rationality that was translated into the procedural hurdles discussed in the previous chapter.

Legal reasoning is done within a certain system of rules, a certain hierarchy of authorities and institutions, and reflects certain ideology, which together create a distinctive reality and language made by and for law in each jurisdiction.⁹⁰³ Chapter 7 focuses on explaining some of the ways in which the rationality of the Canadian, Japanese, and Mexican legal systems⁹⁰⁴ has been translated into procedural hurdles that inhibited the protection of the rights of the plaintiffs in the three cases.

⁹⁰² Hart, H.L.A., *The Concept of Law* (Oxford University Press, Clarendon Law Series, 2012), at 204.

⁹⁰³ Brian H. Bix “Chapter 43: Law as an Autonomous Discipline” in Peter Cane and Mark V. Tushnet (ed.) *The Oxford Handbook of Legal Studies* (New York: Oxford University Press, 2003), at 977. For example in common law, the use of precedents and analogical reasoning seems to be equated to the reason of the law and has been distinguished from natural reason.

⁹⁰⁴ The legal systems of the world are very different from each other. Nonetheless, the modern idea of law has been mainly developed in Europe and spread through the entire world. This idea of law has traveled mainly as a condition for loans and trade but also as a popular idea (in the sense of convincing) that frames the aspirations of many people: for example, the idea that people are “appreciated” and “protected” as individuals, not as members of a distinguishable tribe, nation, gender, or country. This idea of law, that has traveled the entire world, was created within a certain cultural and historical context that is intrinsically part of it.

Lawrence W. Beer, *Human Rights Constitutionalism in Japan and Asia* (Leiden: Global Oriental, 2009), at 8:
Western constitutionalism developed slowly and often painfully over millennia within the parameters of the Greco-Roman, Judaeo-Christian, and Enlightenment traditions; it was latterly affected by such phenomena as scientific, industrial, and political revolutions and war. None of that is true of other parts of the non-Western world. Western powers superimposed principles and practices derived from their own governmental experience and reflection about law on the Asian constitutional cultures they dominated.

Adam Przeworski has also commented in *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge University Press, 1991), at 26 that:

7.1 'Reason'

The idea of law has been constantly equated to 'reason.'⁹⁰⁵ But what is reason? 'Reason' changes in time and has been understood differently in different places. To achieve good laws and a working system of government, Athenians based their decisions on 'reason.'⁹⁰⁶ 'Reason' was considered to differentiate humans from animals and the source and medium of law. It has also been considered a process that involved observation, experimentation, repetition, logic and consistency.

Greek philosophers distinguished law from custom, decrees, commands, or any rules made with reference to a single case and a particular outcome. The development of the word *nomoi* in Greece also shows how the idea of distinguishing custom from law developed in the fifth century.⁹⁰⁷ Demosthenes (384 BC–322 BC) argued that “laws were laid down by [a court] before the particular offences were committed, when the future wrongdoer and his victim were equally unknown.”⁹⁰⁸ These ensured for every citizen the opportunity of obtaining redress if he was wronged: “Therefore, when you punish a man who breaks the laws you are not delivering him over to his accusers; you are strengthening the arm of the law.”⁹⁰⁹ Distinguishing law from custom, decrees and the rule of an individual, is among the first historical developments of the idea of legal autonomy.⁹¹⁰ To be ruled by law is the opposite of being ruled by tradition, by orders of a ruler, by a tyrant, and/or by religious beliefs.

...intellectual maps of constitutionalism... marginalize the experience of the developing world because scholars believe that new democracies should copy the best practices of consolidated or well-established democracies. Democracies become consolidated when citizens come to believe it is the 'only game in town.'

⁹⁰⁵ Marcus Tullius Cicero, *De Legibus* II. IV. 8; II. IV. 10-11 in Cicero: *De Republica, De Legibus*, ed. T.E. Page, (trans.) Clinton Walker Keyes (Cambridge, MA: Harvard University Press, 1928). St. Thomas Aquinas also found that law was based on reason.

⁹⁰⁶ J. C. Smith and D. N. Weisstub, *The Western Idea of Law* (Toronto: Butterworths, 1983), at 265-274.

⁹⁰⁷ See Kevin Robb, *Literacy and Paideia in Ancient Greece* (Oxford University Press, 1994) at 147-149, for an explanation of how the development of the word *nomoi* reflects the change in meaning of 'law.'

⁹⁰⁸ Demosthenes Vol II. (Against Meidias 188) J.H. Vince (trans.) (Cambridge MA: Harvard University Press, 1935), 28-30.

⁹⁰⁹ *Ibid.*

⁹¹⁰ It is usually considered that the current idea of law has its roots in ancient Greece and the writings that have been preserved from that time period. The *Crito* (written by Plato around 360 BC) mentions that the law shapes a polis, which is a formal association. This association is not formed to achieve any particular substantive objective, but simply by subscription to a common set of rules. The association was not based on kinship. Thus, the idea of law was disassociated from the idea of belonging to the same tribe, or family; or having a certain status. Of course,

During the Hellenistic Era, the Roman Empire Age and the Middle Ages that followed, many of the beliefs of people living in what is now Europe changed and spread faster and wider. A certain degree of peace, and the religious and legal tolerance of the Roman governments facilitated the spread of religions and Roman Culture.⁹¹¹ Christianity, in particular, grew and spread in the Roman Empire rapidly and consistently. The Western Roman Empire fell in 476 AD, but Christianity continued to spread in Europe and with it a belief in a superior law, a merciful God and equality.⁹¹² As beliefs spread, the Christian normative order became more uniform and the sources of ‘reason’ transformed.⁹¹³

Little by little, the set of beliefs and ideologies of the Christian Church became essential to the European normative consciousness. The lack of dominance of one secular authority in the west of Europe made the growth of the normative system of

many categories of people remained outside this system, among them slaves, women, etc. Nevertheless, the principle of such association emphasizes the individual citizen in ways that other contemporaneous normative systems did not. The idea of law became closer to the idea of contract. The members of the polis agree to observe the law, making true what Socrates argued: that the life of the city does not depend on the citizens liking the same things but on them obeying the laws (because they aspire to a certain kind of order that only the rule of law can provide). Greek philosophies and knowledge survive today mainly because of the wide ranging conquests of Alexander the Great. Even though his life was short, the consequences of his conquests and policies were crucial in the spread of Greek culture, language, religion, etc. According to J.C. Smith and D.N. Weisstub, Greek philosophies of law were inseparable from general theories of society being developed at the time and, indeed, from general theories of society being developed at the time and, indeed, from general theories of society subsisting until the nineteenth century, when the technological era began. See J. C. Smith and D. N. Weisstub, *The Western Idea of Law*, *supra* note 906, at vii.

⁹¹¹ Ellen Goodman, *The Origins of the Western Legal Tradition: from Thales to the Tudors* (NSW, Australia: The Federation Press, 1995), at 58.

⁹¹² Harold J. Berman, “The Interaction of Law and Religion” in J. C. Smith and D. N. Weisstub, *The Western Idea of Law*, *supra* note 906, at 387 mentions that under the influence of Christianity, the Roman law of the postclassical period reformed family law, giving the wife a position of greater equality before the law, requiring mutual consent of both spouses for the validity of a marriage, making divorce more difficult; abolishing the father’s power of life or death over his children; reformed the law of slavery, giving the slave the right to appeal to a magistrate if his masters abused his powers and even, in some cases, the right to freedom if the master exercised cruelty; and introduced a concept of equity into legal rights and duties generally, thereby tempering the strictness of general prescriptions.

⁹¹³ Shirley Robin Letwin, and Noel B. Reynolds (Ed.), *On the History of the Idea of Law* (Cambridge: Cambridge University Press, 2005), at 45 and 62-65. Philosophers such as Cicero and St. Augustine represent some of the legal philosophical thought of the time, and reflect a ‘new rationalism.’ Cicero (106 BC–42 BC) believed that *true law is right reason in agreement with nature* and St. Augustine (354–430 BC) considered that there was a superior law (eternal law) that ought to be followed by human law. St. Augustine considered that individuals could not control their own destiny because perfection could not be achieved on earth; that the ultimate truth was hidden from humans. He believed that the human condition was a tragedy and that order and peace were aims of all individuals on earth.

the time an exceptionally mixed system. In this system both secular and religious authorities exercised their 'jurisdiction' at the same time and place.⁹¹⁴

The entire body of Graeco-Roman thought became an important object of study in Europe and surroundings regions again in the 12th century due to Jewish, Arabic and Catholic scholars.⁹¹⁵ Using their work, Aquinas (1225–1274), aimed to accommodate the thought of Aristotle to the doctrine of the Church⁹¹⁶ and establish the basis of what we now call 'Natural Law.'⁹¹⁷ The reconciliation of these diverse doctrines was crucial to the growth and strengthening of the system of law in Europe and a defining feature of what 'reason' meant in the law for a long time. Moreover, the subsequent enormous effort to carve religion out from law has importantly influenced the way in which the autonomy of law and its rationality have been studied and practiced in later years.⁹¹⁸

⁹¹⁴ Ellen Goodman, *The origins of the western legal tradition: from Thales to the Tudors*, *supra* note 911, at 194. During the Middle Ages, the Pope and ecclesiastical authorities ruled the people with the other many authorities in the area. The relationship of the Church and the secular authorities in Europe was complex. The Church benefited ideologically and materially through a facilitated propagation of faith, and certain revenues collected and remitted to the Church. The Emperor depended on the administration and support of bishops, especially when nobles were unruly.

⁹¹⁵ The discovery of the Digest of Justinian (534) in the year 1088 and the studies of Jewish and Arab scholars (Ibn Sina, Ibn Roschd, Solomon Ibn Gebirol, Moses ben Maimun, among others), who were not only very knowledgeable in the rules and laws of different religions but also discussed Greek classical thought, had an important influence in this renaissance of the study of law and the development of a different rationality for law.

⁹¹⁶ H. J. van Eikema Hommes, *Major trends in the history of legal philosophy* (Amsterdam: North-Holland Pub. Co., 1979), at 49.

⁹¹⁷ *Ibid.*

⁹¹⁸ Ellen Goodman *supra* note 911, at 175. The first attempt of division was maybe the Gregorian Reform in 1075. This reform sought to rid the Church of the secularisation, worldliness and corruption endemic at the time. The reform was stricter regarding the life of the clergy (e.g. about celibacy) and established the preponderance of the papacy over the clergy. At the same time the reform sought the "freedom" of the church, monasteries, etc. from the influence and control of secular rulers (who had control of most religious centers until then, e.g. appointment of clergy, etc.). The Holy Roman Emperor opposed the reform and it remained unsuccessful in curtailing the influence of secular rulers over the Church. Nevertheless, the reform is an important precedent of the doctrines and changes that followed and sought a separation of Church and State and also because during this process the parties involved in the controversy (Pope and Emperor) resorted to law in the search for means to resolve it. Both parties used the many treatises on law that had been recorded by then. Such treatises were only written for doctrinal and scholarly studies; the legal system at the time remained preeminently a system of customary law rather than enacted law. It was in this manner that the normative system started acquiring written sources.

In 1455, Pope Nicholas V issued the papal bull *Romanus Pontifex*.⁹¹⁹ The bull allowed Portugal to claim and conquer lands in West Africa. In 1493, Pope Alexander VI gave a similar right to Spain in the papal bull *Inter Caetera*.⁹²⁰ In 1494, a treaty called Tratado de Tordesillas was signed by Spain and Portugal dividing up much of what is now known as the American Continent.⁹²¹ The view of such treaties was that the Portuguese and Spanish monarchs could claim all non-Christian ‘new’ lands according to the limits decided by the Pope.⁹²²

Similar views were adopted by other European nations. The concepts of ‘terra nullius,’ and the ‘doctrine of discovery,’ were crucial in the establishment of the colonies, the occupation of lands in Australia, the North and South American continents, many Pacific islands, etc. These concepts were in many ways not only law but also a philosophy, part of an ideology, a mentality. Andrew Fitzmaurice argues that this mentality informed the formal legal system at the same time that it informed and reflected Europeans' thinking more generally about their relations to each other and to the wider world.⁹²³ The rationale behind the law during the years of European imperialism was part of this mentality and this mentality informed such rationale.

The Renaissance, Enlightenment, and encounter with America set a new legal and political landscape that established a renovated sense of ‘reason.’ Little by little, European legal systems became largely independent of the tremendous influence of the Christian Church through the ‘secularization’ of the sources of law.⁹²⁴ At the same time, this secularization happened, and continues to happen, as a result of the

⁹¹⁹ Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990), at 71.

⁹²⁰ *Ibid.*, at 80.

⁹²¹ *Ibid.*

⁹²² *Ibid.*, at 71-80.

⁹²³ Andrew Fitzmaurice “The genealogy of Terra Nullius” (2007) 38 *Australian Historical Studies*, 129, at 2.

⁹²⁴ H. J. van Eikema Hommes, *supra* note 916, at 71. Harold Berman, “The Interaction of Law and Religion,” in J. C. Smith and D. N. Weisstub, *supra* note 912, at 301. Harold Berman argues that “the secularization is accompanied by a sanctification of property and contract.”

growing influence of science and scientific development.⁹²⁵ Different scientific discoveries and progresses marked the tone of the development of legal theory in Europe.

Such changes are reflected in the theories developed in the following centuries. In the 17th century, the philosopher Thomas Hobbes (1588–1679) refused to discuss law as linked to an unknown eternal law and issues of the spirit and soul, and considered persons to be “intelligent substances that acted in her own or another’s name, or by her own or another’s authority.”⁹²⁶ By doing this, Hobbes rejected the ‘unknown’ as the premise of law and claimed that law should rely on verifiable truths. He concluded that order in human life must rest on abiding by rules made by an authorized legislator. Some time later, John Austin (1790–1859) and Jeremy Bentham (1748–1832) both concluded that a law was a law, in the end, if it was created by the authority with the power to create it, a command of a sovereign (body, person, institution, etc.).⁹²⁷ Hans Kelsen (1881–1973) came to the same conclusions, and affirmed further that law was necessarily pure law, unadulterated by any non-legal elements.⁹²⁸ In the opinion of these positivist philosophers, law is distinguished from other rules only by the supreme ability of a sovereign to compel obedience.⁹²⁹ From their perspective, it is inseparable from coercion and is in essence an exercise of power.⁹³⁰ Through legal positivism, “the idea of law went from an unwitting

⁹²⁵ F.S.C. Northrop, “The Comparative Philosophy of Comparative Law,” in J. C. Smith and D. N. Weisstub, *supra* note 906, at 111.

⁹²⁶ Shirley Robin Letwin, and Noel B. Reynolds (Ed.), *supra* note 913, at 92. This idea of certainty has been basic to the ‘Western’ idea of law since before Socrates. According to J. C. Smith and D. N. Weisstub, *supra* note 906, at vii, Socrates attacked the dramatic, the gods, and poetry; in short he attacked everything which was uncertain.

⁹²⁷ *Ibid.* S. Letwin, *supra* note 913, at 162. Letwin explains that Bentham (1748–1832) discussed law as an experimental science founded on careful observation of legal realities. He and Austin believed that a body of law cannot grow from a set of *a priori* assumed general principles, but must be founded on the experience of the subjects and objects with which the law is conversant:

The signs of purpose of making known to the people that such or such a discourse is expressive of the “will of the legislator” was what in the end gave such experience the character of law

⁹²⁸ H. J. van Eikema Hommes, *supra* note 916, at 235-243.

⁹²⁹ *Ibid.*, at 226. S. Letwin, *supra* note 913, at 164.

⁹³⁰ *Ibid.*, at 166-167.

repudiation of the idea of authority to the conclusion that the only way to preserve justice is through the rule of law.”⁹³¹

The two World Wars shook the foundations of this school of thought in the 20th century. After the Second World War, there was a rapid development of international law, which emphasized human rights and sought a different rationale for the practice of law. The rationale, since then, is that the wellbeing of the individual is the basis of law’s reason. It is based on the “faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women [emphasis added].”⁹³²

7.2 Individualism

Individualism has allowed us to see the value in each of us independently, not as members of a community, due to our socially inherited status, nor as nationals of a determined state; it has allowed us to connect in many ways, and see how similar we are to each other across the many realities of our societies, environments and political structures. Today, we do not speak of nations as we did before the Second World War, rather we speak of nations thinking of their citizens/individuals. According to many liberal scholars, the recognition of social and cultural diversity is not a discourse that contradicts the idea of equality but an idea that stemmed from the principle of equality.⁹³³

From the 14th century to the 18th century, the Renaissance and the Enlightenment movements sought to recover the individualism and cosmopolitanism that had characterized the Greek Hellenistic Age.⁹³⁴ The Renaissance was a significant change

⁹³¹ *Ibid.*, at 181.

⁹³² Preamble of the UN Universal Declaration of Human Rights. Many, such as Micheline R. Ishay consider that the Law of Nations and Human Rights developed from the natural law theory of the Renaissance and the Enlightenment; they are considered a secularized version of Judeo-Christian ethics. Micheline R. Ishay, *The History of Human Rights* (Berkeley: University of California Press, 2004), at 64-75.

⁹³³ Will Kymlicka, *Multicultural Citizenship : A Liberal Theory of Minority Rights: A Liberal Theory of Minority Rights*. (Oxford Political Theory Series, Oxford University Press, 1995).

⁹³⁴ Ellen Goodman *supra* note 911, at 58; J. C. Smith and D. N. Weisstub, *supra* note 906, at 7; and, H. J. van Eikema Hommes, *supra* note 916, at 69-71.

in the cultural landscape of Europe. This movement, which many considered a religious movement, places the individual, his or her consciousness of existence and freedom, and her or his abilities, in a very important position and had tremendous influence in the political thought of the time.⁹³⁵ These ideologies of Europe and its surroundings (north of Africa, Middle East) leaned towards what we now call an individualistic perspective.⁹³⁶

The humanistic movement that permeated the Renaissance and the Enlightenment has been important in the definition of law in Europe. Hugo Grotius (1583–1645), Thomas Hobbes, Jean Bodin (1530–1596), and John Locke (1632–1704) distinguished themselves from previous legal scholars in the way they discussed human beings and their agency. In the same line, Immanuel Kant's (1724–1804) contribution to the idea of law emphasized the consideration of a person as an end and not as a means.⁹³⁷

The concept of individual choice or consent is essential in building modern systems of laws. This concept is closely connected to the concept of a democratic society directed by an elected and open government. An open, representative government is, by definition, a freely chosen legal system;⁹³⁸ not an inherited, imposed, or immanent system but one produced by the actions and agreements of the individuals living in a society.⁹³⁹

⁹³⁵ H. J. van Eikema Hommes, *supra* note 916, at 69.

⁹³⁶ *Ibid.*

⁹³⁷ *Ibid.*, at 70.

⁹³⁸ Lawrence M. Friedman, *The Republic of Choice: Law, Authority and Culture* (Cambridge: Harvard University Press, 1990), at 23.

⁹³⁹ *Ibid.*, at 2, Friedman writes that the behavior and language of people in Western societies could be said to disclose certain underlying premises and notions:

...first, the individual is the starting point and ending point of life; second, a wide zone of free choice is what makes an individual. Choice is therefore vital, fundamental: the right to develop oneself, to build up a life suited to oneself uniquely, to realize and aggrandize the self, through free, open selection among forms, models, and ways of living. This view of how law transformed the system of rules from one based on "status" to one based on "contract," from a choice-less reality unto choice reality, is based on a mass of individuals that act as agents and not only as subjects. Nevertheless, the evolution from one kind of law to the other is considered in terms that refer to aspects of governance or authority. Where there is authority, true choice is largely absent; yet the matter of choice is necessarily guaranteed by or assumed by law.

Many thinkers have discussed the paradoxical problems that the centrality of the individual in our normative systems poses.⁹⁴⁰ Among them is the conflict between a normative system where the human being is placed at its center and a normative system that places the human being in an equal position to that of earth, animals and spirits, as it is in the normative systems of many Indigenous peoples.

Another problem regarding the issue of the centrality of the individual in the law regards the Eurocentric paradigm of property. “[Aboriginal peoples] did not generally regard land as something to be owned as Europeans did. Rather they viewed land as something to be used and ‘cared for.’⁹⁴¹ In the Eurocentric paradigm of law, the meaning of ownership implies the “need to secure the means of subsistence as individuals against other individuals.”⁹⁴² Under this paradigm, the concept of ownership is opposite in all senses to the concept of sharing.⁹⁴³ The regulation of how to share was crucial to many Indigenous communities, but has scarcely been recognized by many legal systems around the world, which focus on the regulation of how to own.

Another example of the contradictions inherent in the centrality of the individual in the law is the balance between the priority of the wellbeing of individual citizens and that of the state as a whole. On one side, the individual is depicted as the primary focus of the law and legal systems. On the other side, public welfare sets limits to the liberties and options of the individual.

The aim of this discussion is not to say that individualism as a principle is wrong or cannot be reconciled with the idea of communal rights, but to discuss some ways in

⁹⁴⁰ Will Kymlicka, John Locke, Karl Marx, among others.

⁹⁴¹ John Borrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 3rd Edition (Canada: LexisNexis, 2007), at 1.

⁹⁴² Dara Culhane, “Delgamuukw and the People without culture: Anthropology and the Crown” PhD Thesis, SFU Department of Sociology and Anthropology (Vancouver: Simon Fraser University, 1994), at 353.

⁹⁴³ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, (Toronto: University of Toronto Press, 2002), at 154.

which the principle of individualism that directs many of the actions of the courts has made it difficult for Indigenous peoples to claim their rights.⁹⁴⁴

7.3 Law as an Autonomous discipline

Brian Bix, in his chapter *Law as an Autonomous Discipline*, emphasizes that:

...since law is intended as a practical guide for action, there is a pressure in the interpretation and application of legal norms towards consistency, coherence, stability, predictability and finality. Those pressures are sometimes in tension with the desire that the outcomes be fair and just (justice referring to those aspects of justice that go beyond 'following the rules laid down', that is, going beyond meeting reasonable expectations and reasonable reliance).⁹⁴⁵

Coherence, certainty, stability, predictability, and finality are usually assisted by the many rules of procedure in legal systems, which are particularly focused on how to coordinate a legal system with its social, political, and physical environment. Professor Rubin has explained that every operation in the legal system – procedure, interpretation, judgment – is both normatively or operationally closed and cognitively open at the same time, the first supporting the self-referential reproduction of the system, the second its coordination with its environment.⁹⁴⁶ Rules of procedure, particularly rules of evidence, aid legal systems and courts in achieving coordination with the environment while maintaining a system of meaning and rules. Luhmann argues that law is a self-reproducing or 'autopoietic' system⁹⁴⁷ of meaning and communication.⁹⁴⁸ The idea of being ruled by law and only law lies behind the idea of legal autonomy and legal reasoning.

⁹⁴⁴ Many Indigenous nations also consider individual autonomy as a major directing principle in their normative lives. The priority of communal harmony and good in some Indigenous nations is similar to the preponderant concept of public welfare in many legal systems. See the Tsilhqot'in case: *William v British Columbia*, 2012 BCCA 285.

⁹⁴⁵ Brian H. Bix, *supra* note 903, at 977.

⁹⁴⁶ Edward L. Rubin, "Law and the Methodology of Law," (1997) *Wis. L. Rev.* 521 and Robert van Krieken, "Law's Autonomy in Action: Anthropology and History in Court," (2006) 15 *Social & Legal Studies* 574, at 576.

⁹⁴⁷ Autopoiesis (from Greek αὐτο- (auto-), meaning "self", and ποίησις (poiesis), meaning "creation, production") refers to a closed system capable of creating itself.

⁹⁴⁸ Niklas Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004) and Niklas Luhmann, "Law as a Social System" (1988-1989) 83 *Nw UL Rev* 136.

Law has been considered an autonomous field within the many social fields in which people interact.⁹⁴⁹ The degree of autonomy varies among the many existing legal systems but the aim to be autonomous remains a pivotal force in law.⁹⁵⁰ Legal autonomy is thought to be necessary for the pursuit of justice and for maintaining the legitimacy of legal institutions.⁹⁵¹ The ‘autonomy of law’ or ‘legal autonomy’ refers to various claims such as: “1) legal reasoning is different from other kinds of reasoning; 2) legal decision-making is different from other forms of decision-making; 3) legal reasoning and decision-making are sufficient unto themselves, and they neither need help from other approaches nor would they be significantly improved by such help; and 4) legal scholarship should be about distinctively legal perspectives and is not or should not be about other perspectives.”⁹⁵²

Scholars, lawyers, and judges recognize the value of acknowledging that law is not a totally autonomous discipline.⁹⁵³ However, in order to achieve certainty,⁹⁵⁴ which is considered to be conducive to the common good and justice, judges and lawyers

⁹⁴⁹ Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field,” (July 1987) 38 *Hastings LJ* 805, at 807: Law has its own incomplete but quite settled autonomy.

⁹⁵⁰ These principles and their ideology have been mainly shaped in a European cultural and historical context and serve best this culture and context. This is why I say that these principles are Eurocentric. The concept is misleading because much of the Eurocentric legal culture was developed in what we now call the Middle East and other parts of Asia, and later in America. Here I refer to the Eurocentric legal culture as the one that has evolved within the context of two highly distinctive traditions: the Judeo-Christian and the Greco-Roman. This legal culture includes the common law and the civil law systems that are among the most widely known and practiced. It had its beginnings as a dominant legal culture in Europe and has later developed in the US and other countries. The concept ‘Eurocentric’ refers to a legal system that is based in what is considered European tradition, history and culture but is applied to other cultures as well.

⁹⁵¹ Here I take the view that human beings are both subjects of systems of law and agents in the re-creation and establishment of the ways in which we do law. This is why it is always crucial to assess and understand the degree to which a certain population is an agent of the system that it is governed by. Populations of minorities are at a notorious disadvantage in the realm of law in comparison to other sectors of the population because minorities act notoriously more as subjects but not as agents of the systems of norms that regulate them. I agree with P. Bourdieu *supra* note 949, that law is a ‘field’ of practices pursued by competing actors mobilizing different forms of capital and constructed within a particular legal habitus.

⁹⁵² Brian H. Bix *supra* note 903, at 975.

⁹⁵³ Lawrence M. Friedman, *supra* note 938, at 3.

⁹⁵⁴ I would say that the most powerful force of law is certainty. Legal certainty is what has allowed a network of societies such as the Canadian, Mexican and Japanese, to produce innumerable kind of goods and services and exchange them in a free market, which sustain our daily lives.

closely adhere to the procedural rules that aim theoretically for an autonomous system.⁹⁵⁵

At the same time, the reliance of legal systems on the standards and rules of evidence is meant to achieve rational results. The kinds of evidence admissible today are considered best suited to comply with the standards of the autonomy of law and with its rationality; they are the most legitimate sources recognized.

The Federal Code of Civil Procedure in Mexico recognizes in article 93 the following kinds of proof: “I. Confessions; II. Public documents; III. Private documents; IV. Expert-directed evidence; V. Judicial inspection; VI. Witnesses’ testimonies; VII. Photographs, writings and shorthand notes, and in general, all those elements provided by the discoveries of science; and VIII. Presumptions.” The same tendency is reflected in most countries. Moreover, legal rules establish that in order to prove standing, cause of action, harm and the suitability of remedies, evidence offered must be a) relevant to the issue; b) material to the issue; c) plausible; and d) proven individually but relate to each other logically.⁹⁵⁶

Professors Paciocco and Stuesser consider that the development of the law of evidence has been the product of the continuous balancing of competing considerations.⁹⁵⁷ They emphasize that the omnipresent tension between ‘justice’ and ‘certainty’ is felt in the law of evidence and will inevitably pull it in different directions as its new rules mature.⁹⁵⁸

⁹⁵⁵ John Dewey in “Logical Method and Law” (1924) 33 *The Philosophical Review* 6, 560 at 564 and 569, wrote on how people have a need for certainty that is provided effectively through law:

Experience shows that the relative fixity of concepts affords men [and women] with a specious sense of protection, of assurance against the troublesome flux of events... Men (and women) need to know the consequences which society through the courts will attach to their transactions, the liabilities they are incurring, the fruits they may hope to enjoy in security, before they enter upon a course of action. Justice Holmes has written that: The language of judicial decision is mainly the language of logic, and the logical method and form flatter that longing for repose and certainty which is in every mind. But certainty in general is an illusion.

⁹⁵⁶ David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 5th edition (Toronto: Irwin Law, 2008), at 2.

⁹⁵⁷ Douglas Walton, *Legal Argumentation and Evidence* (University Park: Pennsylvania State University Press University, 2002), at 15-23, 121.

⁹⁵⁸ *Ibid.*, at 6.

Evidence rules can only be understood by paying close regard to the interests at stake. These rules protect the legal environment from being influenced by status, social and moral prejudices, and belief-based arguments. Today, to protect the ‘will’ of the individual, the rules of evidence try to strip out as much of the influence of the ‘indemonstrable’ as possible. To rule based on that which cannot be demonstrated would create less certainty and injustice. The rationality and logic of what is and is not verifiable is contested, but certain standards, such as scientific standards, are considered more reliable than others.

7.4 Autonomy and the decision in *Delgamuukw*

The Supreme Court of Canada (SCC) established in *Delgamuukw*:

While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no [palpable and overriding] error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial. The same deference must be accorded to the trial judge’s assessment of the credibility of expert witnesses: see *N.V. Bocimar S.A. v Century Insurance Co. of Canada*, [1987] 1 SCR 1247. The policy reason underlying this rule is protection of “[t]he autonomy and integrity of the trial process, which recognizes that the trier of fact, who is in direct contact with the mass of the evidence, is in the best position to make findings of fact, particularly those which turn on credibility [emphasis added].”⁹⁵⁹

Professor Borrows considers that this position of the SCC (considering the trial judge findings) “subjects Aboriginal traditions to non-Aboriginal authentication.”⁹⁶⁰ This subordination means that the interpretation of facts is not actually autonomous from the cultural perspective of the state legal system, which was applied in the case.

In *Delgamuukw*, the examination of the evidence at trial had significant deficiencies. Among them was that Chief Justice McEachern considered himself able to make the

⁹⁵⁹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 78 and 79. See also *Schwartz v Canada*, [1996] 1 SCR 254.

⁹⁶⁰ John Borrows “Sovereignty’s Alchemy: An Analysis Of *Delgamuukw v British Columbia*” (1999) 37 *Osgoode Hall Law Journal* 3, at 549.

required findings about the history of the plaintiffs without being assisted by experts.⁹⁶¹ At the same time, the trial judge relied on certain written sources such as records, which also presented serious deficiencies. Among those deficiencies were the biased perspective of their creators and the lack of written records created by Indigenous peoples.⁹⁶²

Most Indigenous communities, such as the Gitksan and the Ainu, have not recorded their history in documents. And most of the many records that were created by some Indigenous communities, such as the Aztecs and the Purépecha, have been destroyed. Their title to their land has also been ignored and purposely not recognized through public or private documents. Moreover, non-Indigenous scholars and experts have drafted the available sources of information; thus the perspective, context and history of Indigenous peoples are not included in such sources.⁹⁶³ The perspective of Indigenous peoples is usually provided in the courts in other formats, such as oral evidence, which has been considered of low legal value in many jurisdictions.

This is changing rapidly in Canada, particularly after *Delgamuukw*. Chief Justice Lamer wrote in *Delgamuukw*: “ordinary rules of evidence must be approached and adapted in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims.”⁹⁶⁴ More and more Indigenous oral histories are now considered useful in many jurisdictions for reaching decisions and agreements. The Canadian Specific Claims Tribunal receives and accepts oral historical evidence as it sees fit, whether it is admissible before a court or not.⁹⁶⁵

⁹⁶¹ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at 51.

⁹⁶² *Specific Claims Tribunal Act*, 2008, c.22, s 13(1b) cited by Bruce G. Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts*, (Vancouver, Canada: UBC Press, 2011), at 2.

⁹⁶³ Bruce G. Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts*, (Vancouver, Canada: UBC Press, 2011), discusses the issue, which he mentions is sometimes called ‘problem of contamination,’ at 19, 85 and Chapter 3.

⁹⁶⁴ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 105.

⁹⁶⁵ Dara Culhane, “Delgamuukw and the People without culture: Anthropology and the Crown” PhD Thesis, SFU Department of Sociology and Anthropology (Vancouver: Simon Fraser University, 1994), at 254-258.

Still, the study of oral histories becomes more difficult every day due to such issues as researchers' cherry picking techniques, contested identity, contested ends of Indigenous peoples, and unavailability of knowledge of the ancestral territories.⁹⁶⁶ Indigenous peoples in these three cases have been suffering from continuous dispossession of their lands and disintegration of their communities since the 16th century. The disintegration has caused and continues to cause many difficulties in the study of Indigenous peoples' claims in the courts. Almost all the elders that came to the court in *Delgamuukw* have now passed away. When many of them gave their testimony, many years had passed since they last visited their territories due to age, sickness or other causes. Their testimonies were found sometimes contradicting with each other due to their lack of accuracy.⁹⁶⁷ The deceased father of Mr. Kayano (the plaintiff in *Nibutani Dam*) was one of the three people alive in his community who knew all the ceremonies of the Ainu and could relate to the world entirely in the Ainu language.⁹⁶⁸ The passing of Mr. Kayano and other elders has also left the community weaker in its knowledge about its ancestral territories, language and laws. The main leaders of the Zirahuén Community have also passed away, and today, the leadership of the Community is more and more contested.⁹⁶⁹

Some problems of scientific evidence

Science and scientific approaches used in law have not always been helpful to the trial judge in his fact-finding function. Most of the evidence rendered and accepted in communal cases claiming Aboriginal rights or title relies on scientists and experts' testimonies and experience. To examine the existence of Aboriginal rights or title, many courts, particularly courts in New Zealand, Canada, the United States, and

⁹⁶⁶ Bruce G. Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts*, (Vancouver, Canada: UBC Press, 2011) and Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.

⁹⁶⁷ Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.

⁹⁶⁸ Shigeru Kayano and Mark Selden, *Our land was a forest: an Ainu memoir* (Boulder: Westview Press, 1994).

⁹⁶⁹ Eva Castañeda Cortés, QC, Co-counsel for the Appellants: Zirahuén Community, interview with author, 13 July 2011.

Australia,⁹⁷⁰ have resorted to the assistance of experts in the fields of archeology, anthropology, history, cartography, hydrology, wildlife ecology, ethnoecology, ethnobotany, biology, linguistics, forestry, and forest ecology.⁹⁷¹ These experts are considered very important in explaining to the courts the lives and normative systems of Indigenous communities.

However, expert-directed approaches are not as scientifically conclusive as judges might expect them to be. Such disciplines had, until very recently, an approach based on two premises and two assumptions that are the product of historical, social, economic, and power-related circumstances.

Those two underlying and interrelated ideas are that: the notion that Indian cultures were primitive vis-à-vis those of Europeans, and the belief that these cultures would soon disappear. Thus, anthropologists and archaeologists did their fieldwork to collect vestiges of Indian cultures that researchers believed were characteristic of precontact life. Furthermore, there were two important assumptions that informed this research, the belief that Native cultures had been largely static in precontact times, and the idea that European culture had been the main catalyst for change after contact. This had consequences in how anthropologists focused in studying language versus focusing on political and land tenure systems.⁹⁷²

More recent studies try to move away from these assumptions but most of those provided and utilized by the trial judges in *Delgamuukw* and *Nibutani Dam* were done under this approach and many courts continue to use such studies.⁹⁷³ This remains a crucial issue because anthropology, history, and archaeology have been

⁹⁷⁰ *R. v Pamajewon* [1996] 2 SCR 821, at para. 19: *The success of a claim to any more specific right of self-government will depend on the historical evidence regarding the Aboriginal community of the particular claimant.*

⁹⁷¹ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at 51.

⁹⁷² Arthur Ray, "From the US Indian Claims Commission Cases to *Delgamuukw*: Facts, Theories, and Evidence in North American Land Claims," in Louis A. Knafla and Haijo Jan Westra, *Aboriginal title and Indigenous peoples: Canada, Australia and New Zealand* (Vancouver: UBC Press, Law and Society Series, 2010), at 38.

⁹⁷³ *Ibid.*, at 43-49. According to A. Ray, the "frozen rights" theory and a speculative approach towards the cultural history of the Gitksan and Wet'suwet'en significantly directed some of the litigation and rendering of evidence in *Delgamuukw*.

widely used by courts in deciding whether certain nations have or do not have the right to be considered Aboriginal and whether they have rights or not. Thus, not only does the language of the law retains meanings that are discriminatory and colonial, but the evidence used by the courts is also considerably influenced by a discriminatory and colonial mentality. If such a mentality continues to influence the evidence, such sources cannot be considered autonomous.

7.5 Individualism and the *Nibutani Dam* case

The legal system in Japan only allows causes of action brought by individuals. There are no causes of action for communities. This means that the only way to examine the harm, the merit of the claims, or the illegality of administrative procedures such as an expropriation, is to look at an issue in terms of an individual entity and his/her reality.

The court in *Nibutani Dam* examined the case using the standard of Article 13th of the *Constitution of Japan* and Article 27 of the *ICCPR*. These two articles protect individual rights. Article 13 of the *Constitution of Japan* is considered the article that protects individualism:

The provision [in Article 13th] demands the highest regard for the individual in his or her relationship with the state. It manifests the principles we call individualism in his or her relationship with the state. It manifests the principles we call individualism and democracy as the recognition of the particular worth of all citizens, who collectively constitute the state, in the state's exercise of governance.⁹⁷⁴

Diversity exists in an unmistakable fashion as the respective differences in the particulars faced by each individual, e.g. gender, ability, age, wealth, etc. Premised upon this diversity and these differences, Article 13 demands meaningful, not superficial, respect for individuals and the differences arising between them.⁹⁷⁵

⁹⁷⁴ Mark A. Levin, "Kayano et al. v Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'" (1999) 38 *International Legal Materials*, at 26. Online: <<http://ssrn.com/abstract=1635447>>.

⁹⁷⁵ *Ibid.*, at 27.

The court concluded that:

The minority's distinct ethnic culture is an essential commodity to sustain its ethnicity without being assimilated into the majority. And thus, it must be said that for the individuals who belong to an ethnic group, the right to enjoy their distinct ethnic culture is a right that is needed for their self-survival as a person.⁹⁷⁶

The decision in *Nibutani Dam* seems to point out that minorities' rights can only be discussed in Japanese courts in terms of individual claimants. This means that regulations that affect entire minorities, including Indigenous minorities, have to be challenged by each individual affected in order to obtain redress.⁹⁷⁷

As has been established above, the individual plaintiffs in the case of *Nibutani Dam* had opportunities that very few Ainu have in Japan.⁹⁷⁸ To only recognize causes of action by individuals disregards the legal, historical, social and economic realities of the Ainu and disregards the reality that many hundreds or thousands of people are in the same or in a worse position than the plaintiffs in this case.

7.6 The presumptions of the court in *Zirahuén*

In these three cases, the judges were not critical of their own cultural background and legal inferences when assessing the claims in the three cases. The deference towards certain political principles such as 'national unity,' and the lack of will to regard the larger legal and political context of the claims, made it impossible for the courts to assess correctly the relevance of the evidence in the cases. For example, in the case of

⁹⁷⁶ *Ibid.*, at 28, the paragraph continues:

We believe the guarantee of that right fulfills the basic tenets of democracy by meaningfully respecting the individual while striving for the majority's comprehension of and respect for the circumstances faced by the socially weak.

⁹⁷⁷ In Japan actions concerning several claimants can be brought as joint claims, or by representatives but these kinds of claims are mainly in the area of civil law, which restrict considerably how the Ainu can use them. Class Action for consumers in Japan is rather recent (2008) and only functions through organizations that represent consumers. See *Consumer Contract Act*, *Code of Civil Procedure* (Art. 30).

Similarly in *Delgamuukw*, the plaintiffs asked for 'ownership' but 'ownership' could not be granted to a community. Ownership is a right that can only be exercised by individuals. No existing cause of action could grant the plaintiffs in *Delgamuukw* what they sought.

⁹⁷⁸ See discussion in pages 187-189.

Zirahuén, the Second Chamber of the Supreme Court in Mexico (SSSCJN) concluded that the content of the reform benefited the plaintiffs and that granting the amparo to them would cause the plaintiffs harm.⁹⁷⁹ This conclusion meant that the judges did not examine thoroughly the context of the claims in *Zirahuén* and the differences between the *San Andrés Accords*, the COCOPA proposal and the constitutional reform. The court was unmindful of the presumptions under which they examined the claims.

This lack of awareness or mindfulness was amplified by the fact that the court in *Zirahuén* carried out its task inquisitorially (the courts in Mexico have the duty to act for the plaintiffs in this kind of case in the provision of evidence that could help the case of the plaintiffs), which means it did not depend on the submissions of the parties.⁹⁸⁰ The inquisitorial system in Mexico rendered no better results than the adversarial system in Canada. The lack of consideration of the context in the *Zirahuén* case led the court to misconceive the claims of the plaintiffs, and conclude that there had been no adverse effect of the legal interests of the Community. The study of the claims and the case remained formalistic in all senses.

I do not think this is unusual. The courts seem to see the evidence and arguments of Indigenous peoples in these three cases as largely irrelevant, and in some cases as immaterial, to their causes of action, the issues and the remedies provided by the law.⁹⁸¹

7.7 Conclusions

The task of the courts in these three cases was tremendously difficult. The courts were overwhelmed by the wrongs that had been committed against the communities

⁹⁷⁹ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 122 and 125.

⁹⁸⁰ See discussion in page 156, *supra* note 712.

⁹⁸¹ *Hupacasath First Nation v The Minister of Foreign Affairs Canada and the Attorney General of Canada*, 2013 FC 900, *R. v Pamajewon* [1996] 2 SCR 821 *Lax Kw'alaams Indian Band v Canada* (Attorney General) 2011 SCC 56, [2011] 3 SCR 535, among others. *Ogawa v Hori*, Heisei 11 (Gyo U) No. 13 (Sapporo D. Ct. Mar. 7, 2002).

and the correspondingly far-reaching claims brought by them. The plaintiffs provided the best available evidence to support their claims. Their legal arguments were logical, legally sound and the plaintiffs used precedents efficiently. The courts seemed to understand the connection between the wrongs and the claims, but still refrained from granting a solution to the issues. The procedural rationales that the courts considered hampered the plaintiffs' claims were about enhancing certainty, coherence, fairness protecting the autonomy of the trial process, and promote an environment of accountability. Nevertheless, it is evident that in these three decisions, the courts did not foster certainty, coherence, fairness, autonomy or accountability.

The Indigenous plaintiffs, the government authorities of British Columbia, Canada, Hokkaido, Japan, and Michoacán, Mexico still do not know the reach and scope of many rights, duties and responsibilities of Indigenous communities in relation to their territories. In Canada, Indigenous peoples and courts still are uncertain of the procedure that needs to be followed when characterizing claims and the scope and nature of many Aboriginal rights such as Aboriginal title, among other issues. The courts in *Delgamuukw* did not achieve fairness because they were unfair to the plaintiffs: they re-characterized the plaintiffs' claims into claims for two rights that were communal and did not provide that there was the need to formally change the pleadings accordingly. They let the process go by without making sure there was certainty in the process for all the parties. In *Nibutani Dam*, the courts left many issues unanswered such as the protection of land rights of the Ainu, due to their indigeneity. In *Zirahuén*, the courts had the obligation to support the plaintiffs to obtain evidence, nevertheless they did not study and carefully examine the *San Andrés Accords*, the COCOPA proposal or the content of the ILO *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, in order to understand the issue of harm alleged by the plaintiffs. Until this day, the legal weight of these three instruments remains uncertain in Mexico.

Due to the uncertainty in this area of the law, the governments in these jurisdictions continue to apply policies that disregard their duty to consult Indigenous peoples,

violate the rights of Indigenous peoples, and continue to ignore past agreements or requests for negotiation on certain issues. This uncertainty and the lack of remedies in these three cases did and do not enhance accountability. The authorities in Canada have not been found accountable for establishing negotiation policies that are considerably limited in their mandate and do not allow Indigenous communities to express their grievances, laws and expectations in their traditional ways. The authorities in Japan have not be held accountable for continuing to develop areas without properly assessing Ainu people, or for not performing their duties as trustees of Ainu property. The authorities in Mexico seldom consult Indigenous peoples and have not been held accountable to their responsibilities and compromises agreed upon in the *San Andrés Accords*.

At the same time, the uncertainty about the reach of Indigenous peoples' rights, the procedure to examine the evidence and the direction of the Indigenous policy in each jurisdiction enhance a fear of arbitrariness in the three states.⁹⁸² The claims in these cases might have been different if the landscape of Indigenous rights in each jurisdiction had been more certain and the authorities had been found more accountable regarding their actions in Indigenous territories and communities.

The courts also did not achieve coherence because even though domestic and international instruments, court decisions and policies use the language and wording of reconciliation and responsibility for the illegal, unjust and immoral actions carried out since colonial times in relation to Indigenous peoples in these three jurisdictions, no practical remedies were given to these plaintiffs.

Moreover, the complex and far-reaching claims in these three cases put to the test the institutional limitations of the judiciary. All decisions discussed the limitations of the capacity and competence of the judiciary and deferred to such limitations. The courts

⁹⁸² In my view the claim in *Hupacasath First Nation v The Minister of Foreign Affairs Canada and the Attorney General of Canada*, 2013 FC 900, exemplifies this fear of arbitrariness and uncertainty. In this case, the Hupacasath Nation brought a suit against the federal government for lack of consultation regarding the ratification of the Foreign Investment Promotion and Protection Agreement signed between Canada and China in 2012.

in *Delgamuukw* presumed that Crown title diminished Aboriginal title and Aboriginal sovereignty. They also provided that negotiations were the way to achieve the purpose of section 35 of the *Constitution Act, 1982* ('the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown'). The court in *Nibutani Dam* deferred to the principle of public welfare arguing that the community would be put in risk and restricted considerably the effects of its own ruling. The SSSCJN in Mexico moved away from a precedent that allowed it to review constitutional reforms.

More importantly, all decisions were based on a rationality that allowed the courts to subordinate the Indigenous plaintiffs legal perspectives to their own legal perspectives. The notion that Indian cultures are primitive vis-à-vis those of Westerners, and the belief that these cultures will soon disappear or need to change considerably in order to survive seems to anchor much of the reasoning of many judges.⁹⁸³ The judges examining these three cases expressed the dominant position of the cultural paradigms of the Canadian, Japanese, and Mexican legal systems in confrontation with the cultural paradigms of the normative systems, views and realities of Indigenous peoples. None of the courts treated the claims presented in these cases or the perspectives of the plaintiffs as equal to their own perspectives. All courts in these cases expressed the view that governments have the responsibility to take care of Indigenous peoples and implied that the governments know best what is good for them. The courts did not allow different visions of the relationships among people, between people and the land, and between people and other things to find expression. The judges, limited by their own cultural background and that of Eurocentric law, seemed not to comprehend how the trial process and its rules prevented them from rendering a decision that could be considered truly enhancing of legal diversity.

⁹⁸³ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at 300:

There must, of course, be an accommodation on land use which is an ongoing matter on which it will not be appropriate for me to offer any comment except to say again that the difficulties of adapting to changing circumstances, not limited land use, is the principal cause of Indian misfortune.

It is not only that courts in these three cases were not ‘open’ enough to hear the cultural, historical, and social contexts of the claims of Indigenous peoples. In my opinion, all the decisions reflect ignorance about Indigenous legal traditions, and a fear of having Indigenous peoples own, use, develop, and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. They also demonstrate an unwillingness of the three states to give legal recognition and protection to these lands, territories, and resources with due respect to the customs, traditions, and land tenure systems of the Indigenous peoples concerned. All three final decisions in these cases illustrate the challenging environment of obtaining judicial decisions that protect Indigenous peoples’ rights to their lands.

The idea of the law and its structure in the three jurisdictions must evolve to allow judges to separate themselves from their own assumptions. Judges must realize that we all are prisoners of our legal culture’s colonial ideology.⁹⁸⁴

⁹⁸⁴ A concept by Robin Ridington, “Fieldwork in Courtroom 53: A Witness to Delgamuukw v B.C.” in *Anthropology and History in the Courts* (Autumn 1992) 95 *BC Studies*, at 21.

Chapter 8: The Principles That Guided the Decisions in *Delgamuukw*, *Nibutani Dam*, and *Zirahuén*

*WE HAVE given, granted and confirmed, and by these Presents, for Us, Our Heirs and Successors, DO give, grant, and confirm, unto the said Governor and Company, and their Successors, the sole Trade and Commerce of all those Seas, Streights, Bays, Rivers, Lakes, Creeks, and Sounds, in whatsoever Latitude they shall be, that lie within the Entrance of the Streights commonly called Hudson's Streights, together with all the Lands and Territories upon the Countries, Coasts and Confines of the Seas, Bays, Lakes, Kivers, Creeks, and Sounds aforesaid, that are not already actually possessed by or granted to any of our Subjects or possessed by the Subjects of any other Christian Prince or State, with the Fishing of all Sorts of Fish, Whales, Sturgeons, and all other Royal Fishes, in the Seas, Bays, Inlets, and Rivers within the Premises, and the Fish therein taken, together with the Royalty of the Sea upon the Coasts within the Limits aforesaid, and all Mines Royal, as well discovered as not discovered, of Gold, Silver, Gems, and precious Stones, to be found or discovered within the Territories, Limits, and Places aforesaid, and that the said Land be from henceforth reckoned and reputed as one of our Plantations or Colonies in America, called Rupert's Land.*⁹⁸⁵

This chapter discusses the legal and political principles that guided the decisions in the three cases. It focuses on one principle in particular because it was relevant in all three of the cases, the principle of sovereignty. It discusses the implications of the notion of 'sovereignty' used by the different courts in the three cases. I argue that the notion of 'sovereignty' used by the courts in the three cases contradicts the aim of protecting the culture, territory and wellbeing of Indigenous peoples. The discussion below is not deeply concerned with the details of how the notion of sovereignty came to be. Rather, the main purpose of the chapter is to argue that the notion of sovereignty used and assumed by the courts in the cases of *Delgamuukw*, *Nibutani Dam*, and *Zirahuén*, is overly strict, outdated, and idealized. I argue that the meaning

⁹⁸⁵ Royal Charter of the Hudson's Bay Company, 1670. Online: <<http://www.hbcheritage.ca/hbcheritage/collections/archival/charter/charter.asp>>.

of this notion bears no relation to the aim of securing the continuity of the culture of Indigenous peoples today and no relation to the expectations of Indigenous peoples in the three jurisdictions. I also discuss the principles of ‘public welfare’ in Japan and ‘national unity’ in Mexico, which directed the decisions in the cases of *Nibutani Dam* and *Zirahuén*. I draw the conclusion that Indigenous peoples need to be granted jurisdiction or legal power to make possible their cultural security and continuity.⁹⁸⁶

8.1 The notion of sovereignty

Sovereignty is among the most important presumptions in all three cases in this study. No argument could overcome this presumption. According to the courts, no court can touch it. It is a pillar of the law that is not law; it is a notion that resides outside of the autopoietic system of law according to the decisions in these three cases.⁹⁸⁷

The concept of sovereignty embodies the notion of an entity that is self-governing and independent of external control, and is the supreme normative power within that entity itself.⁹⁸⁸ Many scholars, such as Immanuel Kant, Hans Kelsen, Carl Schmitt, John Austin, and Jeremy Bentham wrote extensively about the philosophical need for the existence of a supreme normative power (legal term) and an untrammelled power of the rulers over those they rule (political term).

Thomas Hobbes’ *Leviathan* is one of those works.⁹⁸⁹ In this paper, Hobbes recognized that there was an element of arbitrariness in the rule of law.⁹⁹⁰ He wrote that if we recognize that an obligation to obey cannot be justified in reference to a universal truth, then all humans are obliged by reason to accept the order of some

⁹⁸⁶ The concept of cultural security and continuity is taken from *William v British Columbia*, 2012 BCCA 285, at para. 236. See also *R. v Sappier; R. v Gray*, [2006] 2 SCR 686. The sought-for internal connection between popular sovereignty and human rights lies in the normative content of the very mode of exercising political autonomy, a mode that is not secure simply through the grammatical form of general laws but only through the communicative form of discursive processes of opinion- and will-formation.

⁹⁸⁷ See supra note 947 in page 226 for the definition of autopoietic system of law.

⁹⁸⁸ *Black’s Law Dictionary* (St. Paul, MN: Thompson Reuters, 2009).

⁹⁸⁹ S. Veitch, E. Christodoulidis, and L. Farmer, *Jurisprudence: Themes and Concepts*. (London, UK: Routledge-Cavendish, L., 2012), at 208:

Leviathan is an important text that discusses the philosophical justification for a strong unitary sovereign state using the opposite fictional notions of the ‘state of nature’ and the ‘social contract.’

⁹⁹⁰ *Ibid.*

institution, or a person.⁹⁹¹ Kant considered that the sovereign must recognize the ‘original contract’ as an idea of reason that forces the sovereign to “give his laws in such a way that they could have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will.”⁹⁹²

The current modern political concept of sovereignty varies in many ways from the older versions, e.g. where a monarch held sovereignty⁹⁹³ or where just by a decree, sovereignty could be claimed over lands.⁹⁹⁴ A more current notion of sovereignty implies that no one can claim sovereignty without the consent of the people of the area, and implies that the rule of law limits the ways in which sovereignty may be exercised.⁹⁹⁵ The preeminence of the rule of law is basic to the modern concept of sovereignty, where none is above the law.

This current notion seems to be disregarded in the decisions in these cases. The courts’ use of the concept of sovereignty proved to be a tremendous obstacle to the reconciliation of Indigenous interests and the broader community. The communities of Indigenous peoples that went to court in these three cases did not seek independence from the state. They asked for a healthier way to relate with the authorities that regulate their territories and their state-identities. In these three cases,

⁹⁹¹ Shirley Robin Letwin and Noel B. Reynolds.(ed.), *On the History of the Idea of Law*, (Cambridge: Cambridge University Press, 2005), at 96.

⁹⁹² Frederick Rauscher, "Kant's Social and Political Philosophy" (Summer 2012 Edition) *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.); online: <<http://plato.stanford.edu/archives/sum2012/entries/kant-social-political/>>. This original contract, Kant stresses, is only an idea of reason and not a historical event. Any rights and duties stemming from an original contract do so not because of any particular historical provenance, but because of the rightful relations embodied in the original contract. No empirical act, as a historical act would be, could be the foundation of any rightful duties or rights. The idea of an original contract limits the sovereign as legislator. No law may be promulgated that “a whole people could not possibly give its consent to.”

⁹⁹³ Today, there are many states where no ‘supreme’ sovereignty exists, but only notions of shared jurisdictions such as the European Union (EU) system. The EU has moved beyond a concept of sovereignty (some argue this is post-sovereignty) because the EU is a ‘sui generis’ legal order, certainly not characterized by the existence of a sovereign.

⁹⁹⁴ E.g. *The Royal Proclamation of 1763* and the papal bull *Inter Caetera* establishes sovereignty without obtaining consent in ways that would not be acceptable in today’s international legal landscape.

⁹⁹⁵ S. Veitch, E. Christodoulidis, and L. Farmer, *supra* note 675, at 15:

In the moment of exercise, absolute popular sovereignty transforms itself into limited constitutional sovereignty.

the plaintiffs identified themselves as Canadians, Japanese, and Mexicans at the same time that they identified with their Indigenous heritage. I recognize that this is not true of all communities of Indigenous peoples, but in these three cases, the Indigenous plaintiffs came to the courts not asking for complete independence, but for some kind of shared jurisdiction, some kind of enhanced self-control or power to participate in the protection of their cultural continuity, their title, and the right to decide for themselves their future.

8.2 The decisions in *Delgamuukw*, *Nibutani Dam*, and *Zirahuén* and ‘sovereignty’

Canada

In 2001, Justice Binnie ruled in *Mitchell v Minister of National Revenue (Mitchell)*, that “only Aboriginal claims compatible with the exercise of Crown sovereignty could continue on into the common law world.”⁹⁹⁶ Thus, Professor Gordon Christie argues that the common law in Canada is built around the notion of “sovereign incompatibility.”⁹⁹⁷ I think that such incompatibility was ruled also in *Delgamuukw* many years before. In the *Delgamuukw* case, Chief Judge McEachern (trial) wrote:

No Court has authority to make grants of constitutional jurisdiction in the face of such clear and comprehensive statutory and constitutional provisions. The very fact that the plaintiffs recognize the underlying title of the Crown precludes them from denying the sovereignty that created such title. ... [N]either this nor any Court has the jurisdiction to undo the establishment of the Colony, Confederation, or the constitutional arrangements which are now in place. Separate sovereignty or legislative authority, as a matter of law, is beyond the authority of any Court to award. ... This is not to say that some form of self-government for Aboriginal persons cannot be arranged. That, however, is possible only with the agreement of both levels of government under appropriate, lawful legislation. It cannot be achieved by litigation. In my view,

⁹⁹⁶ *Mitchell v Minister of National Revenue*, [2001] 1 SCR 911.

⁹⁹⁷ Gordon Christie, “Indigenous Authority, Canadian Law, and Pipeline Proposals” (2013) 25 *Journal of Environmental Law and Practice* 189, at 204.

it is part of the law of nations, which has to become part of the common law, that discovery and occupation of the lands of this continent by European nations, or occupation and settlement, gave rise to a right of sovereignty.⁹⁹⁸

Chief Justice McEachern said that the law of nations, the doctrines of discovery,⁹⁹⁹ and the occupation of the land gave rise to the Crown's sovereignty; that the plaintiffs were could not deny such sovereignty; that a grant of sovereignty was beyond the authority of any Court; but that some form of self-government for Aboriginal persons could still be arranged. Wallace JA of the British Columbia Court of Appeal (BCCA) held in *Delgamuukw* that the plaintiffs' claim for jurisdiction was incompatible with parliamentary sovereignty:

A claim of self-government of the nature which the plaintiffs advance; namely, a right to govern the territory, themselves and the members of their Houses in accordance with Gitksan, and Wet'suwet'en laws, and a declaration that the Province's jurisdiction is subject to the plaintiffs' jurisdiction, is incompatible with every principle the parliamentary sovereignty, which vested in the Imperial Parliament in 1846.¹⁰⁰⁰

Macfarlane JA also agreed with the trial judge with respect to his analysis of the jurisdiction or sovereignty issue.¹⁰⁰¹ Wallace JA agreed that the claim for 'jurisdiction' was for an undefined form of government relative to the land and people in the territory, which would be paramount as against provincial laws in the case of a conflict.¹⁰⁰²

⁹⁹⁸ *Delgamuukw v British Columbia* [1991] 3 WWR 97; 79 DLR (4th) 185; 5 CNLR 5; CanLII 2372 (BCSC), at 81.

⁹⁹⁹ The end of the Eastern Roman Empire, the Black Death, and the fall of the Mongol Empire prompted Europeans to look for other commercial and trade routes with India and Asia in the 15th century. Spain and Portugal were particularly successful in finding lands, which, in the end, were not very close to India and Asia. This era of exploration led to the era of the European colonial empires. Explorers were usually funded by European monarchs, and in exchange would claim the lands for the correspondent crowns. The doctrine of discovery established that Christian European states could claim lands upon "discovery." This doctrine has been used to establish sovereignty over Indigenous lands all over the world.

¹⁰⁰⁰ *Delgamuukw v British Columbia* [1993] 5 WWR 97, at para. 480.

¹⁰⁰¹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 34.

¹⁰⁰² *Ibid.*, at para. 45.

The Supreme Court of Canada (SCC) did not go in a different direction. The SCC asserted in the *Delgamuukw* case that the aim of Section 35 was to “reconcile the prior presence of Aboriginal peoples with the assertion of Crown sovereignty.”¹⁰⁰³ The SCC used the word ‘presence’¹⁰⁰⁴ (sometimes, courts also use the word ‘occupation’) to describe the position of Indigenous peoples in comparison with the sovereignty of the Crown. The court did not discuss self-government, sovereignty or the jurisdiction of Indigenous peoples except to specify how the moment of the assertion of sovereignty by the British Crown was crucial in defining whether a community had Aboriginal rights or not;¹⁰⁰⁵ and to say that the parties had not provided them with the arguments and evidence to rule on the matter of self-government. Moreover, the court cited itself in the earlier case of *R. v Pamajewon* [1996] (*Pamajewon*), where the court held that rights to self-government, if they existed, could not be framed in excessively general terms.¹⁰⁰⁶

The view in Canada about this incompatibility is best explained in the decision of *Mitchell*, where the majority of the SCC judges agreed that:

English law, which ultimately came to govern Aboriginal rights, accepted that the Aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation... At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown. With this assertion arose an obligation to treat Aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as “fiduciary” in *Guerin v The Queen*... S. 35(1) of the *Constitution Act, 1982* extends constitutional protection only to those Aboriginal practices, customs and

¹⁰⁰³ *Ibid.*, at para. 142.

¹⁰⁰⁴ According to Stuart Rush, the concept of presence used by the court is explained by Justice Lamer as encompassing ‘occupation’ and ‘social organization.’

¹⁰⁰⁵ In the ‘Background’ section of the *Campbell* decision (*Campbell et al v AG BC/AG Cda & Nisga’a Nation et al*, [2000] BCSC 1123 at para. 68), the BCSC asserts:

[t]he British imperial policy, reflected in the instructions given to colonial authorities in North America prior to Confederation, recognized a continued form, albeit diminished, of Aboriginal self-government after the assertion of sovereignty by the Crown. This imperial policy, through the preamble to the *Constitution Act, 1867*, assists in filling out “gaps in the express terms of the constitutional scheme.

¹⁰⁰⁶ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 170.

traditions that are compatible with the historical and modern exercise of Crown sovereignty.¹⁰⁰⁷

Even the most recent court decisions are conservative in their views and interpretations of sovereignty, jurisdiction and self-government. In 2012, the BCCA decided a case brought by one former chief of the Tsilhqot'in Nation.¹⁰⁰⁸ In this case, *William v British Columbia (William)*, the claimant sought among other things, a "declaration that British Columbia does not have jurisdiction to authorize forestry activities within the Claim Area."¹⁰⁰⁹ The BCCA found that the main sticking point in the relationship between the provincial government and the Indigenous community was the "control of forestry activities."¹⁰¹⁰

The decision in *William* by the BCCA concentrated largely not on issues of jurisdiction but of infringement of Aboriginal rights, and procedural issues such as representation and evidence. The decision concluded that the appellants were wrong in framing their claims in a 'territorial' approach of Aboriginal title.¹⁰¹¹ Judge Groberman considered that Aboriginal title should be given on a site-specific basis. He stated in paragraph 239 of the decision:

It seems to me that this view of Aboriginal title (site specific approach) and Aboriginal rights is fully consistent with the case law. It is also consistent with broader goals of reconciliation. There is a need to search out a practical

¹⁰⁰⁷ *Ibid.*, at para. 9. Gordon Christie, "Aboriginal Nationhood and the Inherent Right to Self-Government,"

(2007) Research Paper for the National Centre for First Nations Governance, at 11 considers that, Canadian courts seem to imagine that when the Crown asserted sovereignty over Aboriginal nations Aboriginal rights of self-determination left the scene and rights of self-government were the only residual rights remaining...If 'self-determining' means that an Aboriginal nation would have had the power to determine its own destiny, largely free of external influence, then the courts in Canada have suggested that the assertion of Crown sovereignty brought an end to this, as the Crown became an external power enjoying authority over a wide range of essential matters that have a significant effect on whether Aboriginal nations could control their own futures. The Court also seems to be suggesting that in exerting its control over Aboriginal nations the Crown removed the ability of these nations to ever again assert a right to regain this power of self-determination. The Supreme Court is suggesting that at the moment that the Crown asserted sovereignty the only sorts of jurisdictional powers an Aboriginal nation could continue to enjoy would be 'internal,' limited to matters that were directly related to (a) what remained of their lands, and to (b) their own people.

¹⁰⁰⁸ *William v British Columbia*, 2012 BCCA 285.

¹⁰⁰⁹ *Ibid.*

¹⁰¹⁰ *Ibid.*, at para. 18.

¹⁰¹¹ *Ibid.*, at para. 219.

compromise that can protect Aboriginal traditions without unnecessarily interfering with Crown sovereignty and with the wellbeing of all Canadians. As I see it, an overly-broad recognition of Aboriginal title is not conducive to these goals. Lamer CJC's caution in *Delgamuukw* that "we are all here to stay" was not a mere glib observation to encourage negotiations. Rather, it was a recognition that, in the end, the reconciliation of Aboriginal rights with Crown sovereignty should minimize the damage to either of those principles [emphasis added].¹⁰¹²

The claimants asked for the recognition of their title over a broad area and not specific sites. Such a strong emphasis on a site-specific approach reflects the view that granting the right to participate in the decision of whether there is to be logging or not in an area, which has been considered under the responsibility of the Tsilqhot'in nation since before the first migrants from Europe arrived, would damage the principle of sovereignty and well being of all Canadians. It also reflects a high level of uncertainty regarding the concept of Aboriginal title in British Columbia.

The judge seems to jump from a premise to a conclusion without weighing the many possibilities for resolution (and reconciliation) that lie in the middle. The grant of some jurisdiction does not *per se* convey sovereignty, even the heavy concept of sovereignty from colonial times that the courts seem to be using.

Many from within the legal community have opposed this position, among them some judges. Justices Binnie and Major agreed in their concurring opinion in *Mitchell* that Canada ought to start affirming its 'collective sovereignty,' one that recognizes the jurisdiction of provinces, the federal government and Indigenous peoples. In paragraph 129 of the decision, Justice Binnie wrote:

If the principle of 'merged sovereignty' articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea

¹⁰¹² *Ibid.*, at para. 239.

that Aboriginal and non-Aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort.¹⁰¹³

The *Royal Commission on Aboriginal Peoples* had also stated in its 1996 Report that:

It is clear to the Commission that if Aboriginal peoples are to exercise their self-governing powers within the context of Canada's federal system, then federal and provincial governments must make room for this to happen. Instead of being divided between two orders of government, government powers will have to be divided among three orders. This is a major change, and one that will require goodwill, flexibility, co-operation, imagination and courage on the part of all concerned.

Aboriginal people are not a homogeneous group, and it seems unlikely that any one model of self-government will fit all First Nations, Métis people and Inuit. The basic principles, however, should be settled by negotiation; the flexibility should be in their application.¹⁰¹⁴

The Report of the Royal Commission on Aboriginal Peoples and many of the reports of the UN, including the Special Rapporteur on the rights of Indigenous peoples and the Permanent Forum on Indigenous Issues, discuss broadly the sovereignty and jurisdiction of Indigenous peoples. Aboriginal title has appeared to encompass the right of choosing to what uses land can be put,¹⁰¹⁵ and the right to have jurisdiction in relation to certain issues.¹⁰¹⁶

The decision of the SCC in *Delgamuukw* recognizes that Aboriginal title arises from the prior occupation of Canada by Aboriginal peoples and that that prior occupation

¹⁰¹³ *Mitchell v Ministry of National Revenue* [2001] 1 SCR 911, at para 129.

¹⁰¹⁴ Government of Canada Web Archive, online: <http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html>, Volume 2, Introduction, Treaties section.

¹⁰¹⁵ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 166.

¹⁰¹⁶ Through negotiation. See British Columbia Treaty Commission, Newsletters, "Supreme Court Decision Underlines Need for Negotiation," Vancouver, February 1998. Available online at the BC Treaty Commission website. Online: <http://www.bctreaty.net/files/pdf_documents/update_feb-1998.pdf>.

is relevant in two different ways: “first, because of the physical fact of occupation, and second, because Aboriginal title originates in part from pre-existing systems of Aboriginal law.”¹⁰¹⁷ In this sentence, the court recognizes not only the importance of allowing the continuity of the occupation of certain areas by Indigenous peoples but also the importance of the continuity of Aboriginal jurisdiction over the land.¹⁰¹⁸ At moments, courts in Canada seem to be one step away from recognizing some ‘kind of power’ or ‘jurisdiction’ for Indigenous peoples but the pull of the obsolete notions of sovereignty and jurisdiction leaves them as far from doing it as previous courts were.

The SCC seems to agree that some form of self-government for Indigenous people could be arranged but they certainly have not been able to grant it.¹⁰¹⁹ Most of the decisions have until now concentrated on how a right needs to be proven in order to be granted, in limiting the concept, and in situating it within jurisdictions of the federal government and provinces.

For example, in *Campbell v British Columbia*,¹⁰²⁰ the British Columbia Supreme Court (BCSC) decided that there was no sovereignty in the Nisga’a, but limited rights to self-government and limited powers for legislating remained after the assertion of the Crown’s sovereignty in British Columbia. The BCSC decided that the right to

¹⁰¹⁷ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para. 126.

¹⁰¹⁸ David Yarrow, “Law’s infidelity to its Past: The Failure to Recognize Indigenous Jurisdiction in Australia and Canada,” in Louis A. Knafla and Haijo Jan Westra, *Aboriginal title and Indigenous peoples: Canada, Australia and New Zealand*, (Vancouver: UBC Press, Law and Society Series, 2010), at 85 argues that in Canada (and Australia)

...there has been little or no unambiguous recognition of Indigenous sovereignty compared to USA, where it seems that there is a recognition of the potential for a greater degree of Indigenous legal autonomy.

¹⁰¹⁹ The plaintiffs in *Delgamuukw* even considered to soften the language related to their claim of self-government according to Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011, min 11.

¹⁰²⁰ *Campbell et al v AG BC/AG Cda & Nisga’a Nation et al*, 2000 BCSC 1123. This case is different from the great majority of cases. In this case, non-Nisga’a appellants argued that the Nisga’a Treaty was contrary to the Constitution because parts of it purport to bestow upon the governing body of the Nisga’a Nation legislative jurisdiction inconsistent with the exhaustive division of powers granted to Parliament and the Legislative Assemblies of the Provinces by Sections 91 and 92 of the *Constitution Act, 1867*. They also argued that the legislative powers set out in the treaty interfere with the concept of royal assent. Finally, they argued that by granting legislative power to citizens of the Nisga’a Nation, non-Nisga’a Canadian citizens who reside in or have other interests in the territory subject to Nisga’a government are denied rights guaranteed to them by Section 3 of the Canadian Charter of Rights and Freedoms. The BCSC decided that the self-government provisions of the Nisga’a Treaty (initiated in 1998) were constitutionally valid because Aboriginal nations have an inherent right to self-government that is protected by section 35 of the *Constitution Act, 1982*.

Aboriginal self-government, after the assertion of sovereignty by the Crown, must take into account that: (1) the Indigenous nations of North America were recognized as political communities; (2) the assertion of sovereignty diminished but did not extinguish Aboriginal powers and rights; (3) among the powers retained by Aboriginal nations was the authority to make treaties binding upon their people; and (4) any interference with the diminished rights which remained with Aboriginal peoples was to be 'minimal.'¹⁰²¹

The current view of the courts in Canada, like the view in Mexico, seems to be that the law recognizes Aboriginal autonomy, which is not equal to jurisdiction; and, that both legal notions are consistent with each other. Nevertheless, in both Mexico and Canada, there are many uncertainties in the legal meaning of the concept of Indigenous autonomy and how can it be achieved. The courts are not helping, in the cases of *Delgamuukw*, *William* and *Zirahuén*, the courts decided to emphasize that the plaintiffs' claims for autonomy were incompatible with state sovereignty.

Law is a language and the use of words is crucial to these cases. The tension between the notions of 'sovereignty' or 'jurisdiction' and 'land rights' is obvious in these cases. The use of the terms 'Indian title' and 'Aboriginal rights' is also part of a language in the law that intends to limit the 'sovereignty,' and the 'jurisdiction' of Indigenous communities. I consider it highly relevant that the courts that established such terms are contemporaneous with those governments that excluded Indigenous people from voting,¹⁰²² did not allow Indigenous people to buy and own land as fee

¹⁰²¹ *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123at 86:

The continued existence of Indigenous legal systems in North America after the arrival of Europeans was articulated as early as the 1820s by the Supreme Court of the United States. But the most salient fact, for the purposes of the question of whether a power to make and rely upon Aboriginal law survived Canadian Confederation, is that since 1867 courts in Canada have enforced laws made by Aboriginal societies. This demonstrates not only that at least a limited right to self-government, or a limited degree of legislative power, remained with Aboriginal peoples after the assertion of sovereignty and after Confederation, but also that such rules, whether they result from custom, tradition, agreement, or some other decision making process, are 'laws' in Dicey's constitutional sense.

¹⁰²² John Borrows "Sovereignty's Alchemy: An Analysis Of *Delgamuukw V. British Columbia*" (1999) 37 *Osgoode Hall Law Journal* 3, at 546:

In 1872, when Aboriginal peoples outnumbered the settler population approximately 4:1 in the province, and more than 15:1 on the north coast, one of the new province's first legislative acts was to exclude Indians from voting as reflected in *An Act to amend "The Qualification and Registration of Voters Amendment Act, 1871," 1872 (BC), 35-38 Vict., No. 39, s. 13*. In 1888, in the case of *St. Catharines Milling and Lumber Company v*

simple owners, and restrained the access of Indigenous peoples to the court system. It is no secret that the use of the word ‘jurisdiction’ might reflect a kind of power that the word ‘self-government’ does not. And while there is a lack of will to define the scope and nature of ‘self-government’ by all the parties interested in defining it, courts will remain importantly handicapped to rule on cases about this right.

Japan

In 1996, the Ainu Affairs Experts’ Meeting concluded that:

Concerning the Right of Self-determination and the Land Rights that remain a primary concern for indigenous peoples rights, ‘it is impossible to put the right of self-determination, which relates to the decision of political status like separation/independence from our country, and to the compensation/restoration of resources and land of Hokkaido, into the basis of the implementation of new measures for the Ainu people.’¹⁰²³

No other discussion can be found about this topic in Japan. Moreover, as it has been stated above, the political discourse has mostly recognized the Ainu as an ‘ethnic’ minority but not as an ‘Indigenous’ minority. The use of the word ‘Indigenous’ might reflect an *a priori* right to the land while the meaning of the word ‘ethnic’ does not.¹⁰²⁴ The decision in *Nibutani Dam* was the first time a Japanese authority recognized the Ainu as ‘Indigenous’ people. Some time later, the government enacted a special resolution that recognized them as ‘Indigenous.’¹⁰²⁵ The law enacted to protect the ‘*culture and pride*’ of the Ainu does not use the word ‘Indigenous.’

According to Kaori Tahara, the word ‘ethnic’ was used to reflect the fact that Hokkaido is part of Japan’s inherent territory, and the word ‘Indigenous’ might

The Queen [1887] 13 SCR 577, the SCC used for the first time the term Indian title, influenced by cases in the US using this term.

¹⁰²³ Foundation for Research and Promotion of Ainu Culture, Experts Meeting Concerning Ainu Affairs Report (1998). Online: <<http://www.frpac.or.jp/english/Report/Report.html>>, at 244.

¹⁰²⁴ Kaori Tahara, “The Ainu of Japan: an Indigenous people or an ethnic group?” (2005) 4 *Public Archaeology* 2/3, at 95-102.

¹⁰²⁵ Parliamentary Upper House Resolution of June 6, 2008 (No. 169th Diet Session). Online: <<http://www.sangiin.go.jp/japanese/gianjoho/ketsugi/169/080606-2.pdf>>.

threaten this view.¹⁰²⁶ The use of the word ‘Indigenous’ might imply a right of restitution in these communities that the Government of Japan seems to consider unimportant and not responsible for. Since the Report issued by the Experts Meeting Concerning Ainu Affairs (EMCAA) in 1996, the Ainu people are considered a minority without rights in Hokkaido and its natural resources.¹⁰²⁷

The decision in the *Nibutani Dam* case was surprising in that it took a different path from the path usually used by the Japanese government, stating that the “Ainu people have lived in Hokkaido and its adjacent areas, and constructed a distinct population before Japan extended jurisdiction over their land ... Their land was incorporated by the Japanese government and they suffered from economic and social dispossession under the policies imposed by the Japanese majority. Even under these circumstances, the Ainu still maintain their distinct identity as an ethnic group. Thus, they should be regarded as Indigenous people.”¹⁰²⁸ Nevertheless, the court did not recognize any rights attributable to the Ainu’s Indigeneity, different from the rights of ethnic minorities. This is key.

The court in *Nibutani Dam* did not use or relate the claims to any issue related to ‘sovereignty,’ leaving that word without mention in the decision. The court only mentioned the word ‘jurisdiction’ once, citing the *ICCPR*. However, it does mention once the word ‘self-determination:’

The notion [that Indigenous peoples' circumstances warrant greater consideration] clearly follows with a growing international movement towards seeing Indigenous peoples' culture, lifestyle, traditional ceremonies, customary practices, etc., as deserving respect regardless of whether or not such recognition goes so far as there being so-called Indigenous rights, meaning Indigenous

¹⁰²⁶ Kaori Tahara, *supra* note 1024, at 95-102.

¹⁰²⁷ *Ibid.*

¹⁰²⁸ *Ibid.* This is from her own translation of the decision.

peoples' right of self-determination with regard to land, resources, political control, etc. [emphasis added].¹⁰²⁹

This paragraph of the decision in *Nibutani Dam* is the second one introducing the section about the Indigenous character of Ainu people, and clearly sets the tone of the court's perspective about the Ainu as Indigenous peoples. The court "clearly avoids the recognition of any legal rights of indigenous peoples apart from those that are guaranteed to ethnic minorities generally under international law."¹⁰³⁰

In this sense, the decision remained formalistic. The plaintiffs in this case could not have obtained the recognition of their ancestral rights in land. The court only went as far as to say that they had a right to enjoy their culture.

Public Welfare

The court in *Nibutani Dam* decided to not grant any remedy in the case even though it found the actions by the authorities illegal. It argued that to reverse the illegal orders would not correspond to the 'public welfare.'

The principle of 'public welfare' is of tremendous importance in Japan. Article 12 of the Constitution states that the rights and freedoms guaranteed by the Constitution shall not be abused. It also states that people shall always be responsible for utilizing their rights and freedoms for the public welfare. Article 13 specifies that "the right to life, liberty, and the pursuit of happiness shall be guaranteed insofar as it is not inconsistent with public welfare." Article 29 provides that "property rights shall be defined by law in conformity with the public welfare [emphasis added]."

Hiroshi Oda questions whether it is appropriate to use a vague and general term such as 'public welfare' in order to restrict fundamental rights.¹⁰³¹ In his opinion, most

¹⁰²⁹ Mark A. Levin, "Kayano et al. v Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'" (1999) 38 *International Legal Materials*, at 28. Online: <<http://ssrn.com/abstract=1635447>>.

¹⁰³⁰ *Ibid.* Mark A. Levin cites Teruki Tsunemoto as the source of this information.

¹⁰³¹ Hiroshi Oda. *Japanese Law* (Oxford: Oxford University Press, 2011), at 91.

laws can be construed as promoting public welfare in one way or another, so excessive reliance on this clause promotes the idea that the government acts as if it had *carte blanche* to restrict fundamental rights.¹⁰³² His critique does not stand alone. The UN Human Rights Commission's 1998 report on the state of human rights in Japan criticized the approach of the courts in resorting to the public welfare clause in restricting human rights.¹⁰³³ The Commission goes as far as to say that the language of 'public welfare' was not in conformity with the *ICCPR*:

The Committee reiterates its concern about the restrictions which can be placed on the rights guaranteed in the Covenant on the grounds of "public welfare," a concept which is vague and open-ended and which may permit restrictions exceeding those permissible under the Covenant. Following upon its previous observations, the Committee once again strongly recommends to the State party to bring its internal law into conformity with the Covenant.¹⁰³⁴

Mexico

In Mexico, the SCJN has used the language of a 'decrease of national sovereignty,' to explain its concern with broad interpretations of the right to self-determination within the sovereign nation state.

...the Constitution recognizes and guarantees the fundamental right of all populations, among them Indigenous populations and communities, to self-determination; the autonomy to decide their internal ways to socialize and their economic, political, cultural and social organization; and decide their fate. Nonetheless, such right is not absolute; meaning that such autonomy is to be exercised within the limits of the principle of National Unity ... the recognition of their rights does not in any way imply a diminished national sovereignty and does not imply the creation of a state within the Mexican state. The recognition of the power of self-determination of Indigenous peoples does not imply their

¹⁰³² *Ibid.*, at 91-92.

¹⁰³³ United Nations Document, Concluding observations of the Human Rights Committee: Japan. 11.19.1998 CCPR/C/79/Add.102 (1998).

¹⁰³⁴ *Ibid.*

political independence and sovereignty but only the possibility to freely elect their situation within the Mexican state [emphasis added].¹⁰³⁵

The Second Chamber of the Supreme Court of Justice of Mexico (SSSCJN) interpreted the rights established in the reformed article 2 of the Constitution on the premise that any interpretation of the constitutional rights of Indigenous peoples in Mexico (as any constitutional article) must be made in consideration of the principle of national unity.¹⁰³⁶ It also held that the rights of Indigenous peoples to elect their own representatives, and give effect to their own practices of political organization are limited by the principles of gender equality, the federal pact and provincial sovereignty.¹⁰³⁷

The term ‘national unity’ established in the constitutional reform of 2001 in article 2, is now the most important principle limiting the self-determination and autonomy rights of all Indigenous communities in Mexico.

In his critique to the constitutional reform of 2001, Professor Jorge Alberto González Galván wrote that to add that ‘Mexico is a single and indivisible nation’ in the article regarding the recognition of Mexico as a multicultural society was unnecessary.¹⁰³⁸ In his opinion, it was unnecessary because Indigenous peoples’ claims arise within the state: they do not intend to sever or divide. He also concluded that to recognize Indigenous peoples as ‘entities of public interest’ while recognizing the right to self-determination, promotes uncertainty, and is ambiguous. According to him, to grant

¹⁰³⁵ Supreme Court of Justice of Mexico (SCJN), [TA Constitutional]: 1a. XVI/2010; 9a. Época; 1a. Sala; SJF y su Gaceta; Tomo XXXI, Feb 2010; Pág. 114. The isolate thesis above considers articles 2, 40 and 41 of the Constitution. Article 2 has been quoted in the previous chapter as the one that establishes the rights of Indigenous communities. Article 40 and 41 are part of Chapter I of the Constitution, which refers to issues of National Sovereignty and Forms of Government. Article 40 establishes that the Mexican state is a Democratic Republic organized in a Federation of Sovereign States and article 41 establishes that the sovereignty resides in the people, who exercise it through the Powers of the Union and the states.

¹⁰³⁶ *Indigenous Community of Zirahuén, Salvador Escalante Municipality, Michoacán v Congress of the Union et al.*, [2002] Amparo Review 123/2002, at 67.

¹⁰³⁷ *Ibid.*, at 70.

¹⁰³⁸ Jorge A. González Galván, “The Constitutional Reform on Indigenous Issues” (Julio– Diciembre 2002) in *Cuestiones Constitucionales* 7 at 255. [Originally in Spanish, see bibliography for title in original language.]

autonomy rights is to regard Indigenous peoples as state authorities and not as bodies under the tutelage of the state.¹⁰³⁹

The courts did not examine the social and historical context of *Zirahuén* claims and avoided ruling on the plaintiffs' arguments regarding their harm, focusing on the fact that the plaintiffs obtained a 'benefit' from the government. In this sense, the SSSCJN in *Zirahuén* remained formalist, uncritical of its own assumptions. The SSSCJN only relied exclusively on their own views and perspectives about the good of the constitutional reform regarding Indigenous rights. This approach assumes that the government is the only one with the jurisdiction to decide what is good for a community. The court seems to be saying that the sovereign considered the reform a benefit for the plaintiffs, and thus it was good. The decision had no discussion about how the lack of jurisdiction and a subordinate position of Indigenous communities would affect their rights to protect their continuity, culture, and the possibility of their survival as a community.¹⁰⁴⁰ This is what this notion of sovereignty means to the communities: that they cannot decide for themselves what is good for themselves and what is not.

"I take care of you and your culture"

Most courts around the world have resorted to a language of 'honour' and 'responsibility' towards Indigenous peoples. This language resembles the language used in colonial times when many laws and policies were created to colonize and assimilate Indigenous peoples. For example, the *Hokkaido Former Aborigines Protection Act* provided:

The Ainu...[are] ignorant, and their profits are being taken away by immigrants so that they are gradually losing their means of survival. Therefore we the Japanese...have to protect them by all means.¹⁰⁴¹

¹⁰³⁹ *Ibid.*

¹⁰⁴⁰ The reform classified Indigenous communities as entities of "public interest" instead of as entities of "public law," implying tutelage of the state over the communities and a hierarchy that subordinates the communities to the state.

¹⁰⁴¹ Preamble of the *Hokkaido Former Aborigines Protection Act*, 1899.

These notions have been used with the aim of achieving assimilation and later, reconciliation. They have been useful for some Indigenous communities asking for restitution but they have not been useful in settling the meaning of Indigenous peoples' jurisdiction or obtaining meaningful interpretation of their rights in the courts.

In Canada, the common law is understood to have established a fiduciary duty owed to Indigenous peoples by the government in certain circumstances, and other duties that stem from the 'honour' of the Crown. In *Guerin v The Queen*, the Chief Justice of the SCC wrote that since 1867:

...the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the Indian Act representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples.¹⁰⁴²

Canadian law has established trust-like relationships between the governments and Indigenous peoples. The decision in the case of *Ogawa v Hori (Ogawa)*¹⁰⁴³ in Japan was brought to the courts due to the legal establishment of a trust-like relationship between the government and the Ainu with regard to some of their assets. Nevertheless, as exemplified in the case of *Ogawa*, the responsibility towards the Ainu is unilaterally decided. The main problem that I find regarding this approach is

¹⁰⁴² *Guerin v The Queen*, [1984] 2 SCR 335; 13 DLR (4th) 321 (SCC), at pp. 108-109.

¹⁰⁴³ See *Ogawa v Hori, Heisei 11* (Gyo U) No. 13 (Sapporo D. Ct. Mar. 7, 2002). [Originally in Japanese, see bibliography for citation in original language.] In this case, 26 Ainu plaintiffs sought restitution of their property, which had been held under the management by the Hokkaido Government since the end of the 19th century. In 1997, the Ainu Cultural Promotion Act established that the remaining communal property of Ainu people that was managed by the secretary of the Hokkaido Government Agency and later the governor of Hokkaido under the Hokkaido Former Natives Protection Act of 1899 should be returned to their 'original' owners. 23 plaintiffs (the ones that received some kind of restitution) were found to do not have standing to come to court because the court found that they had been restituted US\$13,600 of communal property, and they had not suffer no loss or prejudice. It also found the arguments of the 3 remaining plaintiffs (the ones that did not receive any restitution for lack of proof of entitlement) unreasonable and dismissed their cases. Georgina Stevens, in "Ogawa v Hokkaido (Governor), the Ainu Communal Property (Trust Assets) Litigation" (Fall 2005) 4 *Indigenous Law Journal* 219, wrote that:

The Court found the defendant did not know the management details and whereabouts of some of the designated communal property that had been under its control since 1899. Nonetheless, the Court interpreted the restitution provisions of the Cultural Promotion Act narrowly to find the government had met its duty, which was only to return the US\$13,600 of communal property "actually managed" by the governor when the Cultural Promotion Act came into force in 1997.

that it places the power to decide on one side, without giving ‘a say’ to Indigenous peoples. It means a dependent relationship between the state and the Indigenous communities.

In my opinion, the requests of Indigenous peoples to decide by themselves what their relationship with the government should be, and to know and decide what is done in the lands that they consider their responsibility, are without success mainly due to the rigid position that the courts have taken on the notion of sovereignty and jurisdiction. This strict position seems to be a problem that stems from the fact that law as a language, uses words that drag meanings from different times, but also from the lack of political will to fix the situation.

8.3 Conclusions

Historical accounts and studies of the Indigenous struggles for land and jurisdiction show an unjust, and often illegal dispossession and occupation of Indigenous peoples’ lands and powers. In colonial struggles for power, a system was implanted that killed, discriminated against, and took lands and goods from various groups, particularly Indigenous peoples through the use of force. This historical context, the introduction of law to each territory, the assertion of sovereignty, and the relevance of the normative systems of Indigenous peoples is something that receives limited attention in the decisions in these three cases.

Colonial laws and the mentalities behind them assumed for many centuries that the devastation of Indigenous life and culture was “an irresistible course of nature given that the superior get the better of the inferior.”¹⁰⁴⁴ Colonial laws and legal systems together with the immense impact of the introduction of firearms and epidemics, decimated Indigenous populations, created systems capable of the worst atrocities, weakened Indigenous legal systems and norms, and established a global society

¹⁰⁴⁴ “Reasons for the Introduction of the Former Natives Protection Act,” [Ainu Association of Hokkaido, Compilation of Materials from International Conferences, 1987-2000] at 16, in Georgina Stevens, “Ogawa v Hokkaido (Governor), the Ainu Communal Property (Trust Assets) Litigation” (Fall 2005) 4 *Indigenous Law Journal*, at 219.

where some were considered more civilized, intelligent and able than others.¹⁰⁴⁵ Such mentalities and ideas remain real in the law because the language of the law remains, even today, a conservative language that uses words and concepts from earlier times.¹⁰⁴⁶

I argued in chapter 6 that the first issue that affects the litigation of claims by Indigenous communities in the world today is the unavailability of suitable forms of action that the communities can use effectively to challenge the interventions of the state and third parties in their ancestral territories and communities. I also argued that there are no effective channels for negotiation that could prevent such interventions, regarding such interventions, and regarding the consequences of such interventions. In my opinion this is an effect of how the assertion of sovereignty and the establishment of jurisdiction over Indigenous people's territories happened and continues to happen.

For example, the title of the Zirahuén Community was recognized during the colonial period, but not after the Independence of Mexico. The legal regimes of communal land, the recognition of communal titles and the legal resources to protect Indigenous communal land have been arbitrarily imposed to homogenize procedures and concentrate power in certain institutions in Mexico repeatedly (due to the numerous invasions by foreign powers, wars and civil unrests) in the 19th and 20th century. The Community and many other Indigenous peoples in Mexico did not participate in such processes, even though changes in law and changes in legal actions have tremendous consequences for the legal understandings of their rights. This repetitive pattern has led the courts and administrative authorities to disregard the Zirahuén Community's request for the restitution of their land for almost a hundred years. This pattern has

¹⁰⁴⁵ Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous peoples*, (New York: Zed Books, 1999), at 66. According to Louis A. Knafla, *Aboriginal title and Indigenous peoples: Canada, Australia and New Zealand* (Vancouver: UBC Press, Law and Society Series, 2010), at 23:

In the colonial arena, however, the Roman and common law of property have been used to extinguish Indigenous title in a discriminatory manner.

¹⁰⁴⁶ Dennis R. Klinck, *The Word of the Law, Approaches to Legal Discourse* (Ottawa: Carleton University Press Inc., 1992). Andrew Fitzmaurice "The genealogy of Terra Nullius" (2007) 38 *Australian Historical Studies*, 129, at 2.

left their request buried in the Agrarian archive. The arbitrary imposition of certain laws, causes of action and legal procedures has, little by little, left the Community without the recognition of their lands and in this case, without remedies.

If law is a cultural phenomenon,¹⁰⁴⁷ then it follows that a culture needs to be the main agent in the process of protecting itself if it is to thrive. In other words, a culture needs to live through its *nomos* to stay alive. Any process that does not allow a culture to protect itself is a colonization process; it is a process that imposes one cultural view on the other. To secure cultural continuity, each nation ought to have the capacity to decide for itself its own way of relating internally and to others. No culture can guarantee the continuity of another one by becoming its warden.

The plaintiffs that brought these cases to the courts all sought recognition of their 'Indigeneity' and rights to their territories. While the courts were able to marginally recognize them, they could not recognize their Indigenous rights to their territories because they found it impossible to accommodate such rights within the framework of their sovereign states. They all found inconsistencies between the communities' claimed rights and the states' right of sovereignty. They all acted conservatively, not only because the issues presented were politically charged and not clearly defined by public policy, statutes and laws, but also because the language of the law promotes the maintenance of certain meanings of legal terms. By failing to give certainty and

¹⁰⁴⁷ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights: A Liberal Theory of Minority Rights Oxford Political Theory Series* (Oxford: Oxford University Press, 1995):

While a state may have no established religion, it will always have an established culture, including an established language (at least in education and government), and political boundaries and distributions of power that are culturally fraught.

See also John Borrows *supra* note 1022, at 140, and John A. Powell, "Disrupting Individualism and Distributive Remedies with Intersubjectivity and Empowerment: An Approach to Justice and Discourse," 1 *U Md LJ Race, Relig. Gender & Class* 1, available at: <<http://digitalcommons.law.umaryland.edu/rrgc/vol1/iss1/2>>: *Law is a public language that monopolizes*. According to him the hegemony of law as language assimilates and divides. J. C. Smith and D. N. Weisstub, *The Western Idea of Law* (Toronto: Butterworths, 1983), explain at vii:

Law is a significant description of the way in which a society analyzes itself and projects its image to the world. It is a major articulation of a culture's self-concept, representing the theory of society within that culture. It is the deepest and most generalized philosophical statement that a non-revolutionary or non-anarchistic culture can make about itself. The legal experience, in its most comprehensive form, is a multidimensional phenomenon, wherein mythic, dramatic, rhetorical, and philosophical elements play significant roles.

meaning to the rights of Indigenous peoples and the laws regulating the relationship between Indigenous peoples and states, they have failed to recognize that the rule of law prevails over any act of the sovereign.

In these cases, the courts failed to recognize that consent is required in the establishment of sovereignty and that the governments of Canada, Japan, Mexico, and many other places, have not obtained the consent required to use the lands of Aboriginal peoples in the ways they are being used.

Many courts have failed to realize that the notions of ‘sovereignty,’ ‘jurisdiction,’ ‘Aboriginal title,’ among other concepts, have been used in the past within a very different narrative; and that they need to break away from older meanings. The concept of ‘sovereignty’ does not mean the same thing to today’s people, bureaucrats and lawyers, that it meant several hundred years ago when the colonies of British Columbia, Hokkaido and Nueva España were established. The mentality of that old narrative was discriminatory and sought assimilation, and the decisions of today cannot continue this trend.

In Canada, Japan, and Mexico, Indigenous rights such as Aboriginal title, self-government, self-determination, and the right to be consulted are meant to empower Indigenous peoples. Nevertheless, as David Yarrow has plainly stated, much of the issue is that “Aboriginal rights have been recognized in land but have not been accommodated with jurisdiction.”¹⁰⁴⁸

Jurisdiction is the power to govern people. It is usually considered that jurisdiction is an attribute of sovereignty determined by the intentions of a constitutional order (which can be of a political, social, economical, or international nature). Jurisdiction is never a product of the will of an individual or group of individuals but only of the will of the people expressed in the law. Jurisdiction can be renounced only

¹⁰⁴⁸ Louis A. Knafla and Haijo Jan Westra, *supra* note 1018, at 17.

exceptionally. It is an essential part of the governmental landscape of a state.¹⁰⁴⁹ In my opinion, each Indigenous community and each government related to it needs to find the kind of ‘power’ that would make sense of its realities and thus, I use a broad and flexible understanding of the term ‘jurisdiction.’¹⁰⁵⁰ To define jurisdiction would be to foreclose the intended scope of this chapter.¹⁰⁵¹

It seems that courts could be more coherent and certain if they could use a renovated and more current notion of sovereignty. If Indigenous peoples’ rights to their lands are something more than simple ownership and something less than full sovereignty, it means that it must be some kind of jurisdiction.¹⁰⁵² The question is, what kind of jurisdiction? Courts ought to interpret the rights that have been established for the protection and cultural security and continuity of Indigenous peoples and their land, giving them a voice in the process. Interpreting their rights granting them a powerful voice could be the only way to prevent governments from infringing their rights.

¹⁰⁴⁹ See SCJN, [J]; 9a. Época; Pleno; SJF y su Gaceta; Tomo X, Septiembre de 1999; and Bryan A. Garner (Ed.) *Black’s Law Dictionary* (St. Paul, MN: Thompson Reuters, 2009), at 927.

¹⁰⁵⁰ I use the terms of ‘some control over’ and ‘power’ interchangeably with the term ‘jurisdiction.’ I have decided to use this term flexibly, with the aim of evading the issue of using prescriptive language.

¹⁰⁵¹ Other scholars have discussed this issue under the umbrella of self-government and self-determination rights, among other rights. Gordon Christie, “Aboriginal Nationhood and the Inherent Right to Self-Government,” (2007) Research Paper for the National Centre for First Nations Governance, wrote that:

There can be, however, no better way to dissolve this relationship than to recognize the self-government rights of Aboriginal nations. The relationship arises because the Canadian state historically took up control over the lives and lands of Aboriginal peoples. As the Crown releases this control, the relationship begins to equalize: Aboriginal peoples become less like wards of the state, they regain control over their lives and lands, and a new form of Federal state emerges.

¹⁰⁵² Federico Lenzerini, *supra* note 674, at 186. Professor Lenzerini has also said something similar in describing courts decisions on Indigenous rights:

It appears from the words used in defining the nature of the right of Indigenous peoples over their traditional lands that such right encompasses a certain degree of sovereign powers, since it cannot be disposed by the government as ordinary property.

Chapter 9: Conclusions

During the last 30 years, an increasing number of laws have been enacted with the aim of protecting Indigenous peoples in these three countries and elsewhere.¹⁰⁵³ They give them rights to the land, to govern themselves, to protect their culture, and to improve their living conditions. This dissertation looked at how courts in Canada, Japan, and Mexico interpret the rights of Indigenous peoples to their land through an interpretive case study.

The cases and decisions used in this study were first selected because they were considered positive and influential decisions in matters of Indigenous rights in three jurisdictions with very different legal rules regarding Indigenous peoples. The decisions contained interpretations of the rights of Indigenous peoples that were progressive, but they all denied the Indigenous plaintiffs what they sought. The Indigenous plaintiffs asked for the legally impossible, but the legally impossible had been committed against them. This thesis looked at how this happened from a legal point of view.

The first and second chapters introduced the study and the methodology used to analyze the cases. The third, fourth, and fifth chapters summarized the contexts and the decisions in the three cases. These three chapters emphasized how the law framed many of the struggles of the plaintiffs and gave the necessary background to understand the claims in each case. In these chapters, I explained how the plaintiffs pleaded and why they decided to plead as they did.

One common thread observed in the three cases is the continuous disregard by governments for the requests of the Indigenous communities studied in this

¹⁰⁵³ See the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, adopted by the United Nations General Assembly on 14 December 1960 (Resolution 1514(XV)), the *Constitution Act, 1982* in Canada, the establishment of the UN Working Group on Indigenous Peoples in 1982, the ILO *Indigenous and Tribal Convention, 1989 (No. 169)*, the constitutional reforms in Mexico of 1992 and 2001, the establishment of the *Ainu Culture Promotion Act, 1997* in Japan, the establishment of the UN-ECOSOC Permanent Forum on Indigenous Issues in 2000, the appointment of a Special Rapporteur on Indigenous Peoples in 2001, the 61/295 *United Nations Declaration on the Rights of Indigenous Peoples, 2007*, among other laws.

dissertation to negotiate or settle the question of their title or ownership to their land and the regulation of their people.

The Gitksan and Wet'suwet'en had been asking the provincial and federal governments to negotiate their rights over their land and the jurisdiction over their people for more than a hundred years. The governments continuously disregarded their requests for negotiation and excused themselves through policies that notoriously put the two communities at a disadvantage. In Japan, land was taken from the Ainu without giving them a say in what land should be put to what use, and no causes of action, negotiations, or discussions were held in this regard. The state unilaterally transformed the Ainu to 'former aborigines' by law and then later, simply did not recognize their character as Indigenous peoples or any particular rights over their ancestral territory. The community of Zirahuén in Mexico has requested the recognition of their ancestral territory since the beginnings of the 20th century without success, even though it holds a title from the 18th century. Their territory, water, and forests continue to be taken without them having a say in how it happens, or why it is necessary. Their current request for extension of their territories is still pending.

Another common thread found among the cases is that the claims go beyond what courts usually expect in a claim. The Gitksan and Wet'suwet'en originally claimed the recognition of their 'ownership' and 'jurisdiction' over 58,000 square kilometers. Mr. Kayano and Mr. Kaizawa came to the courts just as the construction of a dam had started, knowing that most probably they would obtain a resolution after their lands had long been covered with water.¹⁰⁵⁴ The community of Zirahuén came to the courts challenging the process of a constitutional reform, arguing an international treaty as the source of their right to be consulted in the draft of such reform.¹⁰⁵⁵ None of them, in the end, claimed monetary compensation or damages.

¹⁰⁵⁴ Judicial procedures in Japan can extend for very long time. This has changed recently but still, in contested cases at the district court level, it takes on average 27.5 months for a decision to be rendered. See Hiroshi Oda, *Japanese Law* (Oxford: Oxford University Press, 2011), at 66.

¹⁰⁵⁵ The lawyers in Nibutani and *Zirahuén* knew well that their chances to win were slim. They intended the trial as part of a larger Indigenous social, political and legal movement in both jurisdictions. Michael Jackson told me

They brought these atypical claims to the courts because there was no other channel through which to raise such issues with the governments of British Columbia and Canada, Japan, and Michoacán and Mexico. Their claims were a starting point of a conversation that ought to have started long time ago but that due to legal and social discrimination against them and a lack of awareness of the harm they were enduring, never happened.

Since the cases of *Delgamuukw* and *Nibutani Dam*, the Gitksan, Wet'suwet'en and Ainu started different kinds of dialogues with the state. The Gitksan and Wet'suwet'en have not reached any agreement regarding their rights over their territory. In BC, the BC Treaty Commission has only achieved two treaties in twenty years (Tsawwassen and Maa-nulth). Criminal prosecutions are still frequent, and one of the lawyers interviewed for this study state, that in their opinion, the communities are in a worse legal situation than before *Delgamuukw*.¹⁰⁵⁶ In *Nibutani Dam*, a couple of museums have been established, but the plans for another nearby dam are to be carried out in the near future. The Zirahuén Community is still waiting for a resolution to a request for an extension of their territories. In Mexico, the COCOPA proposal has been resubmitted to Congress, where constitutional reform is expected to be discussed again soon.¹⁰⁵⁷ The communities are struggling to maintain their unity. All communities struggle to be consulted in what regards decisions about their territory and people. The right to be consulted exists in Canada and Mexico, but its reach, scope, and content is contested.

The sixth chapter explained the procedural issues that the courts considered crucial for the dismissal or rejection of the plaintiffs' claims. In that chapter, I analyzed how the courts dismissed or rejected the claims. In these three cases, there was a lack of suitable causes of action, a lack of adequate remedies, a problematic set of rules of

that in *Delgamuukw* they really thought they would win (Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011).

¹⁰⁵⁶ Stuart Rush, QC, Counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 14 December 2011.

¹⁰⁵⁷ Parliamentary Gazette, year XVI, number 3688-IV, Wednesday January 16, 2013: Parliamentary Group of the PRD: That reforms, adds and derogates several articles of the Constitution of the United States of Mexico. [Originally in Spanish, see bibliography for title in original language.]

evidence that prompted the dismissal or rejection of the cases and a pervading uncertainty and contestation about the nature and reach of Indigenous peoples rights. The primary conclusion of that chapter is that there are rules of procedure that make it very difficult for the courts to examine the claims of Indigenous plaintiffs, their context, and their evidence.

The most relevant of the commonalities among the three cases is that in all of them, the courts could not reconcile the claims with any remedy and thus, the plaintiffs were left without relief. For example, in *Nibutani Dam*, the plaintiffs did not have recourse to any injunction to stop the construction of the dam and thus, there was in the end no remedy for them. In *Zirahuén*, the Community could not be granted what they asked for because the law of Mexico did not provide an action and remedy for such a wrong, even when there was an existing right in an International treaty.

The findings of this study explained in chapter 6 indicate that the lack of certainty in the area of Indigenous rights law and the high level of contestation of the meaning and reach of Indigenous peoples' rights were large contributors to the failure of the claims in these three cases. The meanings of Indigenous peoples' rights and the words used in laws regulating Indigenous peoples are contested in all senses: in the case of *Delgamuukw*, the plaintiffs thought that the label of 'Aboriginal title' was closer to the meaning of 'fee simple ownership,' the courts did not agree. Similar problems arose in the cases of *Zirahuén* and *Nibutani Dam*. This difference in meanings might be very difficult to breach. The only way to achieve legal certainty and diminish the degree of contestation of Indigenous peoples' rights is through the establishment of dialogue and negotiation. And the establishment of a fair and effective dialogue and negotiation process will only happen if the courts provide sufficient legal certainty and force the government to recognize the equal footing of Indigenous legal and cultural perspectives.

In these three cases the courts did not provide sufficient certainty nor set the example in recognizing the equal footing of Indigenous legal perspectives. In the decisions in

these three cases, courts did not examine properly the context of Indigenous peoples and their claims. The Supreme Court of Canada (SCC) in *Delgamuukw* could not recognize the customary system used by the communities when coming forward as individual houses claiming lands for their communities. In examining their claim, the court could not properly give a place for the plaintiffs' normative system into Canadian law. Similarly, the Second Chamber of Supreme Court of Justice (SSSCJN) in Mexico was unable to take into consideration the *San Andrés Accords*, the Commission for Concord and Pacification's (COCOPA) reform proposal, and the larger context of lack of consultation when assessing the harm done to the community. In these three cases, the reader can see how the courts impose on the plaintiffs a culturally biased set of rules that undermine the normative systems and perspectives of the Indigenous plaintiffs.

In order to explore more deeply how such imposition happened in the three cases, chapter 7 looked at the rationality of the courts in their decisions in the cases. This chapter was based on the premise that the procedural rules used in the decisions have their source in a particular rationality of the law, an aim for legal autonomy, certainty, coherence, fairness, and accountability.

I argue that in these three cases the courts do not achieve autonomy due to the lack of recognition of how the dominant culture (including legal culture) continues to shape the evaluation and authentication of Indigenous normative systems and lives. The legal systems of Canada, Japan and Mexico, as any other legal system, are permeated with culture and values that contrast in different degrees with those of Indigenous peoples. The rulings in these three cases did not recognize this elemental issue. Thus, they could not study the Indigenous plaintiffs' claims as they would have studied any other non-minority's claim. Through the filter of the law, these claims were deprived of their distinctiveness and the particularity of the position of Indigenous peoples within the three states. The judges, limited by their own cultural background and that of the law, seemed not to comprehend how the trial process and its rules prevented them from writing a decision that enhances legal diversity. The rulings seem to

persist in the notion that Indian cultures are primitive vis-à-vis those of Westerners, and that Indigenous communities ought to transform (adapt) not only to develop but also to be heard by the courts.

The courts were also unable to create legal certainty because the reach and scope of Indigenous peoples rights, duties, and responsibilities, are contested and remained unresolved. The courts' conservative use of language in relation to Indigenous peoples' rights, context, title, and its relationship with the broader policies and societies in each state also fomented the problem of legal uncertainty in these cases. Moreover the governments' violations of the rights of Indigenous peoples, and disregard of past agreements or requests for negotiation adds a level of complexity that prompts communities to come to the courts with atypical claims. Cases with atypical claims, such as *Delgamuukw*, *Nibutani Dam*, and *Zirahuén*, will probably continue to be seen in the courts. Uncertainty is creating a problem for the rule of law in Canada, Japan, and Mexico.

I also conclude that the courts in these cases did not achieve coherence because the lack of remedies is not coherent with the language and wording of reconciliation and responsibility used by the courts in the decisions and established through laws and policies.

Even though granting extensive powers of self-government may be beyond the traditional authority of the judicial branch in these three countries, courts in these cases could have interpreted the rights of Indigenous peoples in ways that provide certainty, coherence, autonomy, fairness, and accountability. Moreover, I consider that courts could have interpreted Indigenous peoples rights placing Indigenous legal perspectives in an equal position to that of the state. In my view, only with such interpretations in place will the courts be able to participate in the establishment of a legal environment that allows an effective reconciliation between Indigenous peoples

and the state. Without such interpretations, Indigenous peoples will continue to be assimilated into the dominant and imposed legal system.¹⁰⁵⁸

Truly pluralistic legal systems should be able to develop and maintain a dialogue between different kinds of laws, Indigenous and non-Indigenous. Courts cannot continue to impose one cultural legal understanding on the normative understandings of Indigenous peoples. In order to be pluralistic, courts ought to study Indigenous peoples representation systems, and sense of harm within a more contextualized and less culturally biased adjudication process. Pluralistic legal systems cannot impose one form of representation on another one or one view of harm on another one. Pluralistic legal systems would enhance negotiation, agreement, and consensual relationships. This is why the establishment of channels and venues for dialogue among Indigenous communities and between communities and the government is so important. Indigenous peoples would not need to establish blockades (as Gitksan and Wet'suwet'en often do), to start revolutions (as the Zapatista Indigenous movement has done in Mexico) or to stop completely speaking their mother tongue due to fears of discrimination (as the Ainu in Japan have done) if they could have an ongoing constructive dialogue with the state and the broader community. The dialogue has to be carried out following the forms, ceremonies, language, and ideas of all parties involved. If truly plural legal states are desired, Indigenous peoples do not need to assimilate to the legal forms and ceremonies of the states.

In the jurisdictions of British Columbia in Canada, Hokkaido in Japan and Michoacan in Mexico, there have been limited spaces for the resolution of conflicts between Indigenous peoples and the state using the normative systems of Indigenous peoples. An effective reconciliation should recognize and effectively 'use' such normative systems.¹⁰⁵⁹ Moreover, courts need to recognize such sources of law in order to

¹⁰⁵⁸ Mylene Jaccoud, "Aboriginal Criminal Justice: From Imposed Justice to Power Transfer," in Gordon Christie (ed.) *Aboriginality and Governance: A multidisciplinary Perspective from Quebec*, (British Columbia: Theytus Books, 2006), at 211.

¹⁰⁵⁹ Abundant sources of those normative systems are available; among them are the works by John Borrows, Val Napoleon, etc. See Catherine Edith Bell and Val Napoleon (eds), *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives*, (Vancouver: UBC Press, 2008); Val Napoleon, "Raven's Garden: A

interpret the rights of Indigenous peoples' appropriately. Many treaties, establishing the rules of the relationships between Indigenous peoples and others, have been achieved in traditional Indigenous ceremonies and through the exercise of 'Indigenous jurisdiction.' Sadly, such processes are disregarded and remain non-executable/nonjusticiable in most cases. An example are the *San Andrés Accords* in Mexico.

Non-colonial judicial decision-making on Indigenous peoples' rights and title requires that courts and lawyers look beyond discourses about liberalism, individualism, and legal autonomy. The key for cultural security and continuity of Indigenous peoples and the protection of Indigenous peoples' rights is in empowerment and in language.

These three cases strongly suggest that effective reconciliation will not be achieved in the courts, nevertheless also exemplify how courts' decisions play a crucial role in setting the parameters of negotiations and shaping the realm of the possible for Aboriginal peoples.¹⁰⁶⁰ Courts need to decide the cases so that governments understand that they have a duty to negotiate and accommodate with a broader mandate and with legal consequences. Most probably, reconciliation will be achieved through an agreement between governments and communities and among communities but such agreement will only be possible if the courts go beyond self-limiting decisions and force governments to interpret Indigenous rights and title more broadly. An example of such a decision can be seen in *Baker Lake*, the case in which a federal court recognized Aboriginal title to the Inuit in Nunavut, leaving the precise scope and nature of that right to be defined through negotiation.

The discussion in this chapter examined the application of the procedural rules in these jurisdictions in terms of the plaintiffs' struggles through the examination of

Discussion about Aboriginal Sexual Orientation and Transgender Issues," (2002) 17 *Can. J.L. & Soc.* 149; and John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, (Toronto: University of Toronto Press, 2002).

¹⁰⁶⁰ Bruce Ryder, "Aboriginal Rights and Delgamuukw vs. The Queen" (1994) 5 *Constitutional Forum Constitutionnel* 1-4, at 47.

these three cases, I found that in these three jurisdictions, if a community decides to come to the courts using their traditional ways of representation, leadership, and understandings of their reality, such community would confront considerable representation, evidence, and identity challenges in the courts. The courts will focus on issues of standing instead of issues of substance and most probably dismiss their claims. If Indigenous individuals make their claims in their own behalf, the decision would have no practical and real effect for the communities. Moreover, in Canada and Mexico (in Japan this is not possible), if a community decides to come to court under the terms of the rules for representation of the legal systems in the three nations, as a community with a centralized will, the community will necessarily be transformed, putting in danger its traditional leadership and normative systems. This could entail, in the long term, its disintegration.

Furthermore, the decisions in the three cases were shaped by how courts understood that sovereignty had been asserted in the three jurisdictions and over Indigenous peoples. The emphasis the courts put on this aspect is crucial in the three final decisions in these cases. The courts in *Delgamuukw* and *Zirahuén* concluded that because of the constitutional arrangements of power in each state, the rights of the plaintiffs remained without protection.

In chapter 8, I conclude that such interpretation blocks the granting of any practical right to truly protect Indigenous peoples. I argue that the concept of sovereignty that the courts use in the decisions is obsolete, uncritical, and formalistic. Courts must adapt their decisions to a more modern notion of sovereignty if Indigenous communities are to have the jurisdiction necessary to protect themselves. As Justice Binnie of the SCC wrote in his opinion in *Mitchell* in 2001:

Care must be taken not to carry forward doctrines of British colonial law into the interpretation of s. 35(1) without careful reflection.¹⁰⁶¹

¹⁰⁶¹ *Mitchell v Ministry of National Revenue* [2001] 1 SCR 911.

A process that does not allow a culture to protect itself is a colonization process; it is a process that imposes one cultural view upon another. A more updated notion of sovereignty, one that recognizes the constitutional will of the people to protect Indigenous minorities is needed. Such a notion of sovereignty would provide such minorities with some jurisdiction or power to decide what happens in their ancestral land and to their people.

The decisions studied in this dissertation show that in these cases “justice was not done, because if done, ‘heavens’ would have fallen.” This is not surprising. The issues discussed reflect a serious absence of the rule of law, deep political contradictions, and defects in the legal and historical foundations in these three states. Moreover, the political underpinnings of the claims of the plaintiffs in these three cases challenge profoundly the way in which law is practiced in the three countries and more importantly, the political agreements and policies decided by a non-Indigenous majority which dominates the governing institutions in each state. This struggle is also reflected at the treaty negotiation tables, where the governments operate with a very limited mandate.¹⁰⁶²

The political character of the claims and the decisions in the three cases cannot be denied, and might be the most important reason behind the ways in which the cases were resolved. Even though all lawyers in the three cases tried their best to make plausible legal cases seeking redress and justice, they all recognized the political dimension of the plaintiffs’ struggle and the political tone of the decisions.¹⁰⁶³ I conclude that the decisions of the courts in the three cases reflect how judicial interpretation, particularly constitutional judicial interpretation, is charged with

¹⁰⁶² Assembly of First Nations Report to the UN Special Rapporteur on the Rights of Indigenous Peoples, October 14, 2013, at p. 10-11. Online: <http://www.afn.ca/uploads/files/13-10-14_afn_report_to_un_special_rapporteur_final_en.pdf>.

¹⁰⁶³ Eva Castañeda Cortés, QC, Co-counsel for the Appellants: Zirahuen Community, interview with author, 13 July 2011. Kiyoshi Fusagawa, QC, Co-counsel for the Appellants: Shigeru Kayano and Koichi Kaizawa, interview with author, 23 August 2011. Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011. Stuart Rush, QC, Counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 14 December 2011. Teruki Tsunemoto, Director of the Center for Ainu and Indigenous Studies, interview with author, 22 August 2011.

political overtones and often continues to be another source of colonization of Indigenous peoples.

The rights to self-determination, land title, cultural promotion, and consultation and accommodation were meant to empower Indigenous peoples and to provide them with legal tools to secure their wellbeing and cultural continuity. In Canada, Section 35 of the *Constitution Act, 1982* is interpreted as giving to aboriginal peoples “a measure of control over government conduct and a strong check on legislative power.”¹⁰⁶⁴ The SSSCJN has also interpreted the latest Mexican constitutional reform on Indigenous issues as pursuing the “strengthening the participation and political representation of Indigenous peoples according to their own traditions and regulations.”¹⁰⁶⁵ Nevertheless, the courts in these three cases seem to have trouble in reflecting these aims through their interpretations of these rights. The SCC in *Delgamuukw* ruled that there is always a duty to consult but did not issue a decision that would grant an effective and fair negotiation and consultation process to the plaintiffs. The SSSCJN in *Zirahuén* did not issue a decision that strengthens the participation and political representation of the Community in the broader decision-making processes that affects them.

Canadian courts have recently imposed on governmental institutions, the duty to consult and accommodate aboriginal communities before making decisions about the management and disposition of land and resources over which they have asserted claims, even if those claims may not be finally resolved for years.¹⁰⁶⁶ Nevertheless, this duty is considerably limited by judicial interpretation. For example, in recent cases, the courts have adopted the standard of reasonableness in reviewing the adequacy of the consultative and accommodation processes adopted by such institutions. Instead of forcing the government to consult and accommodate placing

¹⁰⁶⁴ *R. v Sparrow*, [1990] 1 SCR 1075.

¹⁰⁶⁵ Supreme Court of Justice of Mexico (SCJN), [TA Constitutional]: 1a. CXII/2010; 9a. Época; 1a. Sala; SJF y su Gaceta; Tomo XXXII, Nov 2010; Pág. 1214.

¹⁰⁶⁶ Lorne Sossin, “The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights” (2010) 23 *Canadian Journal of Administrative Law & Practice* 93, at 98.

Indigenous legal perspectives on the same level to the governments', their standard allows the government to impose its own perspectives on the consultation and negotiation processes. As Lorne Sossin has affirmed:

By adopting a standard of reasonableness, the Court has signalled that its view of the Constitutional duty on the Crown includes significant deference to the Crown's judgment...¹⁰⁶⁷

Following this tendency, instead of solving the many issues regarding the rights of the Indigenous plaintiffs, the final decisions in these three cases further limit the plaintiffs' abilities to protect their own territories and peoples. The courts that ruled these decisions allowed governments to continue ignoring their duty to consult, negotiate, and work with Indigenous peoples in a meaningful and effective way through their silences in relation to the sovereignty of Indigenous peoples in British Columbia, the public character of Ainu communities in Hokkaido and the negotiations carried out with Indigenous peoples for the amendment of the Constitution in Mexico; their emphasis on moral duties; and their disregard of the practical consequences of strictly applying rules of procedure to the claims of the Indigenous plaintiffs.

The rights of Indigenous peoples will remain 'paper rights' if the attempts by the courts to facilitate the legal relationship between Indigenous peoples and governments continue to fail to produce effective remedies and results.

If the new emphasis on just procedures fails to result in just outcomes, the Supreme Court's bold attempt to build trust and facilitate compromise through the duty to consult and accommodate will seriously and perhaps irrevocably erode the potential for reconciliation between Canada and aboriginal peoples.¹⁰⁶⁸

It is evident that the phenomenon studied in this dissertation not only weakens Indigenous communities, but as is clear from these three cases, these complex and

¹⁰⁶⁷ *Ibid.*, at 113.

¹⁰⁶⁸ *Ibid.*

far-reaching claims put to the test the institutional limitations of the judiciary, and the law in general. These cases show the precariousness of the task of the courts in adjudicating claims of Indigenous peoples. Through the SSSCJN' decision in *Zirahuén*, the court moved away from a precedent that allowed it to review the process of reform of the Constitution. The other courts also saw themselves limiting their actions and powers through the decisions in the cases of *Delgamuukw* and *Nibutani Dam*.

Using the words of Hart, since the core of the law regarding Indigenous peoples remains uncertain, the solution to cases regarding Indigenous peoples cannot be a matter of logical deduction, which diminishes legitimacy in the law.¹⁰⁶⁹ In these leading cases the rights of Indigenous peoples remained only 'paper rights,' a situation that seems to weaken the law in its broadest sense.

Neil Sterritt has written that the unsuccessful development from 'rights' to 'outcomes' might not be surprising. He wonders if it is not time to recognize that the Indigenous policies are meant to contain and undermine native title and rights, and whether it is not time for First Nations to develop a strategic approach to rebuild their nations' governance and identify priorities and the approaches to be taken.¹⁰⁷⁰ Without doubt, in order to transform rights into outcomes, an enormous effort of the parties involved will be needed, but most importantly, such transformation will require a shift in the understandings on both sides of the relationship between Indigenous peoples and others. In these three cases, constitutional rights remained unprotected because the plaintiffs and their communities did not have constitutional jurisdiction. It seems clear that any meaningful transformation will require the recognition of some kind of jurisdiction through their rights to self-government, self-determination or Indigenous autonomy.

¹⁰⁶⁹ H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, (Oxford: Clarendon Press, 1983), at 64.

¹⁰⁷⁰ Neil Sterritt, "The Trials and legacies of Mabo and Delgamuukw: Converting Rights into outcomes for Australian and Canadian First Nations Peoples," (December 19, 2012) National Native Title Conference 2012: Echoes of Mabo, Honour and Determination. *Australian Institute of Aboriginal and Torres Strait Islander Studies*, at 29. Online: <<http://www.aiatsis.gov.au/ntru/documents/NeilSterritt.pdf>>.

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Appendices

Appendix A List of Individuals Interviewed

- **Eva Castañeda, QC, Co-counsel for the Appellants: Zirahuén Community, interview with author, 13 July 2011.**
- **Kiyoshi Fusagawa, QC, Co-counsel for the Appellants: Shigeru Kayano and Koichi Kaizawa, interview with author, 23 August 2011.**
- **Michael Jackson, QC, Co-counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 15 November 2011.**
- **Stuart Rush, QC, Counsel for the Appellants: The Gitksan Hereditary Chiefs, interview with author, 14 December 2011.**
- **Teruki Tsunemoto, Director of the Center for Ainu and Indigenous Studies, interview with author, 22 August 2011.**