
Indigenous Legal Traditions

Legal Dimensions Series

This series stems from an annual legal and sociolegal research initiative sponsored by the Canadian Association of Law Teachers, the Canadian Law and Society Association, the Council of Canadian Law Deans, and the Law Commission of Canada. Volumes in this series examine various issues of law reform from a multidisciplinary perspective. The series seeks to advance our knowledge about law and society through the analysis of fundamental aspects of law. The essays in this volume were selected by representatives from each partner association: Debra Parkes (Canadian Law and Society Association), Philip Girard (Canadian Association of Law Teachers), Harvey Secter (Council of Canadian Law Deans), and Dennis Cooley and Nathalie Des Rosiers (Law Commission of Canada).

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Edited by the Law Commission of Canada

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UBCPress · Vancouver · Toronto

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15 14 13 12 11 10 09 08 07 5 4 3 2 1

Printed in Canada on acid-free paper

Library and Archives Canada Cataloguing in Publication

Indigenous legal traditions / edited by the Law Commission of Canada.

Includes bibliographical references and index.

ISBN 978-0-7748-1370-9

1. Native peoples – Legal status, laws, etc. – Canada. 2. Native peoples – Canada – Social life and customs. 3. Native peoples – Canada – Government relations. 4. Customary law – Canada. I. Law Commission of Canada.

KE7735.I54 2007

342.7108'72

C2007-903206-0

KF8220.I54 2007

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada through the Book Publishing Industry Development Program (BPIDP), and of the Canada Council for the Arts, and the British Columbia Arts Council.

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

604-822-5959 / Fax: 604-822-6083

www.ubcpres.ca

This volume is dedicated to Perry Shawana,

*who died shortly after completing his draft of the essay
that appears in this book. Perry was greatly admired by all
who knew him and will be sadly missed.*

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Preface

Indigenous legal traditions have a long and rich history in North America, stretching back hundreds, if not thousands of years. Living together in societies long before the arrival of the first Europeans, Aboriginal peoples developed complex systems of law based on social, spiritual, and political values expressed through the teachings of knowledgeable and respected individuals and elders. Enunciated in rich stories, ceremonies, and traditions within Native communities, Indigenous legal systems represent the accumulated wisdom and experience of Aboriginal peoples.

Because these were ignored, banned, or overruled by non-Indigenous laws under colonialism, their influence has been greatly eroded. Despite this legacy, many Indigenous communities across Canada, maintaining and developing their own traditions, continue to be guided by them in the governance of their communities, the environment, and their relationships with people. Others are exploring ways to reclaim their customs and legal traditions and to restore their place in the governance of their communities. Canadian society also has begun to recognize the importance of Indigenous legal traditions and Aboriginal law making. With formal recognition of the inherent Aboriginal right to self-government and the observation by the Supreme Court of Canada that the customary laws of Aboriginal peoples survived the assertion of sovereignty by the Crown, Canada has begun to embrace its unique legally pluralistic identity.

The relationship between Indigenous and Canadian legal orders and the ways in which Indigenous legal traditions might be recognized and given space in the Canadian legal landscape are the common threads linking the chapters in this collection. As Andrée Lajoie notes in the Introduction, in each of the essays the authors explore “how to come out of colonialism ... from differing angles.” In examining different aspects of and models for the recognition and accommodation of Indigenous legal orders, the authors also present us with several different visions of legal pluralism.

This collection is born of the legal and sociolegal research initiative jointly sponsored by the Canadian Association of Law Teachers, the Council of Canadian Law Deans, the Canadian Law and Society Association, and the Law Commission of Canada. The Legal Dimensions Initiative, which focuses on a different theme each year, seeks to stimulate critical and innovative thinking on emerging law and society issues.

The Law Commission extends its thanks to its partners, to the authors of the essays, and to Andrée Lajoie, the author of the Introduction, who also acted as discussant when the original papers were presented in Harrison Hot Springs in June 2005.

Indigenous Legal Traditions

Introduction: Which Way Out of Colonialism?

Andrée Lajoie

The expression “Aboriginal legal traditions” refers to a large corpus of rules, mostly *implicit* and *inferential* as Rod Macdonald would qualify them, that apply not only to Aboriginal dispute resolution systems but more generally to their governance process.¹ Deeply rooted in Aboriginal culture, yet constructed, as Karim Benyekhlef and others have shown,² and therefore evolutive, they are transmitted either orally or through precedent or pictograms, from generation to generation. The importance of these legal traditions for the preservation of the political autonomy of Aboriginal nations cannot be overstated. Aboriginal nations have not been conquered and have not surrendered (except some that have signed treaties, the validity of which in some cases is questionable). Hence the interest of the exercise in which the Law Commission of Canada has invited Aboriginal and non-Aboriginal scholars to participate, in which the complex phenomenon of disentangling colonial ties has been analyzed.

It is no secret that, during colonization, these legal traditions were deemed invalid by Canadian laws and are even nowadays deprived of effectiveness through the same means. However, as Ted Palys, Wenona Victor, and Paulette Regan show in Chapters 1 and 2, some Aboriginal nations, including the Stó:lō and the Gitksan, covertly kept them alive or are reviving them now, even if the Canadian judiciary is far from ready to recognize them entirely, as Minnawaanagogiizhigook (Dawnis Kennedy) demonstrates in her Chapter 3 analysis of the Supreme Court case law on the subject.

Yet, this is not the only way in which Aboriginal nations are trying to get out from under colonialism. In Chapter 4, Perry Shawana studies the place of traditional knowledge in the maze of colonial/traditional/hybrid legal systems in Canada. And in Chapter 5, Ghislain Otis outlines an innovative solution as he reflects on the possibility of another kind of federalism, one based not only on territorial but also on personal links.

Although I want to thank the Law Commission for the opportunity to comment on the interesting case studies analyzed here and the occasion it

provided for me to learn about West Coast Aboriginal customs and contemporary law, I am even more grateful for the interesting insights into legal theory thus offered. The essays display a convergent preoccupation with how to come out of colonialism, approaching the subject from differing angles. The “unified variety” of these angles sheds a great deal of light and opens several vistas on this difficult subject.

Below, I will summarize the five chapters gathered in this book, show their common threads and differences, and outline their contribution to legal theory, more particularly to that regarding pluralism, personal federalism, and the qualification of various stages of the evolution of normative forms as they are transited through colonization/decolonization.

The Essays

The chapters will be summarized here in the order they are mentioned above, as this reflects a progression from partial and judicial to political and more global ways out of colonialism, which can serve as a basis for further analysis.

In Chapter 1, Ted Palys and Wenona Victor provide us with an analytic description of the Qwi:qwelstóm justice project. This project is grounded in the ancestral traditions and values of the Stó:lō Nation, and is an exercise in self-determination as well as a response to an unjust and externally imposed justice system. The authors describe how, after several fruitless attempts by the Canadian government over the last four decades to “indigenize” Aboriginal justice, the Stó:lō government decided to take responsibility for justice issues in relation to its people.

Grounded in the realization that, if Aboriginal justice is not given its meaning by Aboriginal peoples, it cannot claim to be truly Aboriginal, the Qwi:qwelstóm program of justice is based on Stó:lō culture, customs, and traditions, supported by the Stó:lō communities, and driven by the Stó:lō people. In order to achieve this, the Stó:lō persuaded the Canadian government to give a “mandate” to a traditional institution of their nation, the House of Justice, to act through a devolution from the Department of Indian Affairs, “empowering” it to develop and implement alternative justice programs to help the nation re-establish healthy communities. This in itself is a great innovation on which I will comment below. But the authors stress that the Stó:lō government went even further, giving the House of Justice powers not envisaged by the delegation from the Canadian state. These included accepting referrals not only from government agencies but also from community members, as well as self-referrals, imposing preconditions deriving from Stó:lō culture for acceptance of cases, and introducing the participation of healing circles working orally in the Stó:lō language, with the collaboration of specially trained helpers in the community and a special role for elders and families.

In Chapter 2, Paulette Regan also deals with Aboriginal alternative dispute-resolution mechanisms, but more specifically in relation to Indian residential schools and reconciliation. Describing a Hazelton feast that focused on reconciliation, she draws the lessons learned from this encounter, which makes space for Indigenous law, conflict resolution, and peacemaking traditions by also addressing the colonial legacy of Indian residential schools in Canada. Rooted in the concept of reconciliation as a process inscribed in an ongoing relationship, such an encounter suggests that the space for acknowledgment of the past and envisioning of the future is necessary in order to reframe the present. Regan shows that in the second phase in this process, the Hazelton Apology Feast, the participants moved from meeting Western criteria for reconciliation to an Indigenous encounter of reconciliation, thus creating a fulcrum point for decolonizing and rebalancing the relationship between the Gitxsan and non-Aboriginal Canadians. Such political recognition of Indigenous law and especially one of its institutions, as well as respect for Indigenous legal expertise, thus shifts the balance of power and control from Western hands to Indigenous hands; the colonial taking of space is reversed in the making of space that is key to decolonization.

Yet, however important these first steps in decolonizing Aboriginal judicial processes may be, they have not fully reached the Canadian courts, which continue to interpret Indigenous traditions for the benefit of the dominant Canadian legal order. This we learn in detail in Minnawaanagogiizhigook's Chapter 3 analysis of the Canadian judicial process. She shows how Canadian Aboriginal rights doctrine installs a form of neo-colonialism. Her chapter converges with the previous ones to complete the picture of the difficult transitional stage in which we find ourselves as we emerge from judicial colonialism.

She reveals how the Supreme Court, and especially its then Chief Justice Antonio Lamer, skirts the question of Indigenous traditions whenever possible or treats them as discoverable facts that are, moreover, frozen in time, rather than as (as I have written elsewhere more than once) evolutive systems of law produced by legal orders dating from pre-colonial times but still in force. Especially interesting is her demonstration that the Supreme Court's interpretation is not at all consistent with section 35 of the *Constitution Act, 1982*; the section *recognizes* and *affirms* existing Aboriginal rights, which by definition pre-exist and have originated outside the Canadian Constitution and which are rooted in pre-contact Aboriginal legal orders, not in pre-contact frozen practices.

Yet, the hybridization of colonial and Aboriginal structures and law does not occur only in the justice system, as Perry Shawana's chapter shows through its analysis of the place of traditional knowledge in the maze of colonial/traditional/hybrid legal systems in Canada, which he correctly

characterizes as a weak form of legal pluralism.³ His discussion introduces another element of tradition – “medicine knowledge.” In approaching this, the author crosses over the border from judicial to legal tradition, broaching the rules that govern the use of such knowledge both inside and outside the communities where it is produced. Drawing on the context of the Carrier people, Shawana argues that Indigenous legal systems not only exist but are best suited to govern knowledge generated from within Indigenous communities, stressing how the application of dominant Western legal norms has negatively impacted and influenced Indigenous peoples’ innovations, creations, and discoveries. As we shall see, his theorization of this problem can serve not only for the justice programs analyzed by the previous contributions but also for any other sector of norms in transition from pre-contact traditional, to colonial, to postcolonial popular law, if and when it reaches that stage.

In Chapter 5, Ghislain Otis explores a further step in the decolonization process of legal traditions, aiming not only at specific sectors (dispute resolution, reconciliation, medicine knowledge) or systems (judicial or normative) but also at the whole jurisdiction of legal orders. He examines the option of the “personality of laws” or “personal federalism,” a type of legal organization in which the laws or norms applied to individuals, and consequently to their participation in a legal tradition’s culture, are predicated not exclusively upon their link to a territory but also upon their link to a group, community, or nation. He thus puts in perspective the fact that Indigenous governance can and should connect with territoriality outside territorialized legal orders. Yet, although in some instances it does not exclude purely personal jurisdiction, such a model is not intended to be exclusively personal, hence the term “personal *federalism*,” in reference not to formal federalism involving a division of powers between territorial legal orders, such as Canadian federalism, but simply to the fact that some matters are governed on a territorial basis and others on a personal one.

Common Threads and Differences

Obviously, all these contributions share a common preoccupation with colonialism and the quest for various ways out – or rather “almost out” – of it. Yet, major differences arise, concerning not only the scope of the normative sectors the authors are trying to recover in Indigenous legal traditions, but also how far – and fast – they want to run away from colonial domination.

Whether they proceed from case studies, as do Ted Palys and Wenona Victor (alternative dispute resolution in the Stó:lō Nation), Paulette Regan (reconciliation practices in the Gitx̱san tradition), and Perry Shawana (medicine knowledge in Carrier norms), or from the analysis of whole systems, such as the judicial system viewed from the Supreme Court (Minna-waanagogiizhigook) or the whole normative system, viewed from the angle

of personal federalism (Ghislain Otis), all the contributors to this book are looking at ways by which Indigenous legal traditions can escape the trap of colonialism. Some do so by stressing the deleterious effects on Indigenous legal traditions of their control by Canadian courts (Minnawaanagogiizhigook), their domination by Canadian norms (Perry Shawana), or the inadequacy of their link with territory (Ghislain Otis), implicitly calling for the elimination of such external constraints on Indigenous traditional rules. Others prefer institutional solutions whereby an Indigenous institution, already endowed by Canadian authorities with certain powers, is attributed additional powers, this time by Indigenous authorities (Ted Palys and Wenona Victor), or whereby Canadian authorities are driven to adopt and participate in Indigenous institutions (Paulette Regan). But all are trying to find how to evolve out of colonialism towards a more autonomous status, be it through the recognition by Canadian authorities of Indigenous norms (Ted Palys and Wenona Victor, Paulette Regan, Minnawaanagogiizhigook), emancipation in a new kind of federalism (Ghislain Otis), or co-existence of Indigenous and Canadian territorial legal orders of equal status (Perry Shawana).

You will have noticed that all but Shawana (Chapter 4) and Regan (Chapter 2) favour solutions that do not take the Indigenous legal orders completely out of the Canadian state. This is a first and important difference, but one can find others in the gradation of solutions proposed by the authors. Thus, even though the first three chapters deal with case studies of sectorial scope and analyze institutional solutions, the reconciliation practices Regan describes in the Gitxsan Nation, which impose an Indigenous institution on the colonizer, and Shawana's option for independent legal orders seem bolder and further away from colonialism than even the addition of powers to the House of Justice of the Stó:lō Nation analyzed by Palys and Victor (Chapter 1). By comparison, the solution implicit in Minnawaanagogiizhigook's (Chapter 3) denunciation of the Supreme Court's case law and Otis' (Chapter 5) proposition of personal federalism are both wider in scope but less invasive of the colonial state than the others.

Contributions to Legal Theory

However important they may be, the inroads these essays make into colonialism are not their only contribution, as the development they induce in legal theory is quite worthwhile as well. But before I can assess these contributions, it is important to document some legal theories that I have already mentioned as particularly relevant to this field and that will both apply to and be enriched by the chapters in this book. These are pluralism, personal federalism, and the categorization of normative forms in the colonial context. So it is with each of these legal theories as a backdrop that I will specify the advances that the chapters represent for these theoretical approaches.

Pluralism

Of course, it is pluralism that first comes to mind when Indigenous traditions are analyzed within the context of colonialism, even in its “post”-colonial form. I will not go into all the complexities this theory has developed, some of which find no application here,⁴ but it is important first to define pluralism and to distinguish between at least two of its better-known forms.

Legal pluralism – as distinct from social and political pluralism⁵ – is a theory that recognizes a multiplicity of legal orders functioning on the same territory at a given time, and takes into account the fact that “the state, as it exists in Canada and Quebec, does not sociologically enjoy the monopoly of legal regulation.”⁶ It should not be confused with the plurality of status that characterizes most legal systems in which, for instance, women and minors are treated differently from men and adults.⁷ It applies only when parallel legal orders, issuing, interpreting, and applying norms, exist either within or outside the state.

The first of these forms, conceived by Max Weber within the scope of legal positivism, and qualified as “weak pluralism” by John Griffith, acknowledges the existence of only those normative powers that are distinct from those of the state and sometimes in command of better enforcement mechanisms: this form is referred to as intra-state pluralism.⁸ On the contrary, the second form, extra-state pluralism, or “strong pluralism” in Griffith’s language, contests the state’s positivist definition of law in the name of a pluralist and decentralized formulation of democracy itself.

Against this background, one can see which form of this theory is applied by the authors of this book, and how they contribute to its evolution. After a thorough review of both the literature and the case law on the subject of pluralism, in which he detects the colonial traps embedded in weak pluralism, Shawana (Chapter 4) chooses as a solution the kind of strong pluralism characterized by the co-existence, independence, and complementarity of Indigenous and Canadian legal orders. He thus demonstrates the relevance of this theory through its application to Carrier medicine knowledge normativity.

Although they do not cross the boundary into strict extra-state pluralism, in which Indigenous legal orders are completely equal and not at all subordinate, Palsy and Victor’s and Regan’s case studies (Chapters 1 and 2) interact very interestingly with pluralism, as they show examples of the emergence of a new hybrid pattern of governance.

In the first instance, a pre-existing traditional Indigenous institution, the Stó:lō House of Justice, was empowered by the Canadian state through delegation to develop and implement alternative justice programs to help the nation re-establish healthy communities. It was then given other powers that were not envisaged in the initial delegation, but this time by the Stó:lō

authorities. The hybrid institution that resulted from this double infusion of powers certainly does not constitute pure extra-state pluralism, since it retains the powers given by Canadian authorities. But, no less certainly, it escaped the realm of pure intra-state pluralism, as it derived first its existence and later some of its powers from Indigenous authorities.

Regan's chapter has perhaps an even more important implication for theories of legal pluralism. She shows that, though the Gitksan legal order is not removed from the Canadian state, one of its institutions, the Hazelton Apology Feast, not only exists independently of Canadian law but binds the Canadian authorities, who have agreed to submit to its rituals.

In a different way, Minnawaanagogiizhigook's Chapter 3 analysis of Supreme Court case law contributes to debunking the myth that Aboriginals are well treated by our judicial system, which refuses to recognize both the existence and the application of their legal traditions.

Personal Federalism

As Otis himself writes in so many words (Chapter 5), personal federalism could qualify, in a way, as a yet different kind of pluralism, as it posits the co-existence of different legal orders on the same territory. Yet it differs from other kinds of pluralism due to the fact that such different legal orders, based not only on territory but on ethnicity, share jurisdiction over the same normative objects.

Personal federalism is a very complex system based on the postulate that multicultural governance implies the disjunction of territory and political authority and puts in perspective the fact that Indigenous governance can take into account territorial concerns otherwise than by making them the sole basis of institutionalization of power within the state context. There is "personal federalism," in which several communal political entities are, as between themselves and the state, in a relationship akin to federalism. Otis' contribution to this theory, which was itself conceived in the context of the analysis of European colonialism and multinational states,⁹ resides perhaps in his introduction of this approach to anglophone readers in Canada, but certainly in its first application to the Indigenous context here. He identifies various scenarios in which going beyond the territorial reference becomes a condition of effectivity of Aboriginal governance and bridges the gap between internal Aboriginal governance and Indigenous/non-Indigenous relationships.

Categorization of Normative Forms in Colonial Context

A third theoretical approach, that of Etienne LeRoy and Mamadou Wane, is useful here, although it does not define various institutionalizations of legal orders, dealing instead with the categorization of norms in the successive stages of colonization and decolonization.¹⁰ This theory constructs four

distinct status categories for the evolving norms in colonial territories. The first is the *traditional law* of pre-colonial times, when Aboriginal populations, not being herds of deer, produced rules to govern themselves according to their own values and traditions. The second is *customary law*, an initial form of colonial law in which colonial authorities reinterpret these Indigenous traditions through colonial courts. Third comes *local law*, a second form of colonial law that is characterized by a narrow delegation of powers to Indigenous populations. Fourth is *popular law*, in which the Indigenous population reinstates its traditional law, at least in part, reinterpreting it yet again in a context now completely transformed.

Although none of our five authors mention this theory, I think at least some of their findings can be interpreted through it with great advantage and can even bring it further than it has ventured so far. Indeed, as one considers the evolving categories of norms just described, it becomes obvious that – except for the first, since pre-colonial times have passed and colonization has occurred – all of them apply to the various kinds of norms reviewed in this book. For instance, and to start therefore with the second category, customary law, in which colonial authorities interpret traditional pre-colonial law to their own advantage, clearly encompasses the Supreme Court's description of Indigenous traditions as discoverable facts frozen in time, as is implied by Minnawaanagogiizhigook's analysis. But it is mostly in the last two categories, local and popular law, or a mixture of both, that the case studies examined by Palys and Victor and Regan, as well as Shawana's and Otis' propositions for new kinds of governance, can be seen to fall.

Thus, the Palys and Victor case study in Chapter 1, involving a narrow delegation of powers by Canadian authorities to a Stó:lō institution, the House of Justice, seems at first glance to be a straightforward instance of local law, precisely characterized by such a delegation. But the fact that the Stó:lō authorities subsequently delegated other powers to this same institution, thus transforming it into a hybrid normative vehicle, brings its legal production across the border into popular law as well, or places it on the frontier between both. The incursion into that last category is even more evident for the traditions followed in the Hazelton Apology Feast described in Chapter 2 by Regan, in which it is a Gitksan institution that is imposed on colonial authorities, a clear example if there ever was one of the reinterpretation by an Indigenous nation of its tradition in a completely contemporary context, characteristic of popular law.

This last pattern of governance is also suggested by Perry Shawana and Ghislain Otis in Chapters 4 and 5, who consequently favour the production of popular law. Shawana, who shows how Canadian intellectual property law is inadequate for the regulation of traditional knowledge, suggests instead a reappropriation of this field by Indigenous traditions adapted to contemporary situations, the very definition of popular law. For his part,

Otis envisages yet a bolder form of the same mechanism applied to numerous other fields of the whole legal system, both normative and judicial. But Shawana's solution concerns only one field (intellectual property) and Otis' only those that would be confirmed to the Indigenous authorities in whatever distribution of powers would result from a given form of personal federalism.

Consequently, in none of the contributions to this book is the reappropriation total, or complete self-government involved: Indigenous legal traditions are evolving out of colonialism, but the journey is not over and the situations analyzed or suggested in this book do not qualify as extra-state pluralism. This observation brings us back to theories of legal pluralism, showing both the links between the theoretical approaches applicable to all contributions in this book and the light this last categorization of normative forms sheds on the evolving path towards decolonization.

Notes

- 1 Roderick A. Macdonald, "Pour la reconnaissance d'une normativité juridique implicite et inférentielle," *Sociologie et sociétés* 18, 1 (1986): 47-58.
- 2 Karim Benyekhlef, *Une courte histoire de la norme, les enjeux des normativités à l'heure de la mondialisation*, forthcoming. Eric Hobsbawm, "Introduction: Inventing Traditions," in E. Hobsbawm and T. Ranger, eds., *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983), 1. See also Anthony Giddens, *Runaway World: How Globalization Is Reshaping Our Lives* (London: Routledge, 2000), 57, which explores the link between traditions and myths.
- 3 Perry Shawana wrote a draft version of this but died before he could present it at the June 2005 Law Commission meeting in Harrison Hot Springs, BC. In this book, his text is reproduced along with comments in foreword and afterword by Minnawaanagogiizhigook (Dawnis Kennedy), Mary Teegee, and Warner Adam.
- 4 These include radical and stipulative pluralisms. For details, see A. Lajoie, J.M. Brisson, S. Normand, and A. Bissonnette, *Le statut juridique des peuples autochtones au Québec et le pluralisme* (Cowansville: Editions Yvon Blais, 1996), 7-12.
- 5 *Ibid.*
- 6 A. Bissonnette, "Les droits et libertés des peuples autochtones au Canada: Débats constitutionnels et identités culturelles," *Recherches Amérindiennes au Québec* 19 (1989): 9 [translated by author].
- 7 As J. Vanderlinden first did when he published "Le pluralisme juridique, essai de synthèse," in J. Glissen, ed., *Le pluralisme juridique*, Institut de sociologie (Brussels: Éditions de l'Université de Bruxelles, 1972), 15-56, only to retract his conclusions later in "Vers une nouvelle conception du pluralisme juridique," *Revue de la recherche juridique Droit Prospectif* 18 (1993): 573-83.
- 8 M. Reinstein, ed., *Max Weber on Law in Economy and Society* (Cambridge: Harvard University Press, 1955); J. Griffith, "What Is Legal Pluralism?" *Journal of Legal Pluralism* 24 (1986): 1.
- 9 S. Pierré-Caps, *La multination: L'avenir des minorités en Europe centrale et orientale* (Paris: Éditions Odile Jacob, 1995); N. Rouland, S. Pierré-Caps, and J. Poumarède, *Droits des minorités et des peuples autochtones* (Paris: PUF, 1996).
- 10 Etienne LeRoy and Mamadou Wane, "La formation des droits non-étatiques," in *Encyclopédie juridique de l'Afrique* (Abidjan: Nouvelles Éditions Africaines, 1982), 1:353.