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# Individual Choice of Law for Indigenous People in Canada: Reconciling Legal Pluralism with Human Rights?

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## INTRODUCTION

When two or more legal systems occupy the same social space, individuals often find themselves at the intersection of a plurality of normative regimes among which they may be able to choose to regulate a given relationship or situation. If the interaction between the legal systems is formally organized in a way that recognizes a substantial degree of legal pluralism, the right of individuals to decide to which law they wish to submit—the law of sub-state groups or state law—may be recognized and, as a consequence, enforceable by competent state institutions.

Individual choice, however, may occur even when it is not validated by the official law. For example, indigenous customary adoptions are still officially ignored in eight of the ten Canadian provinces.<sup>1</sup> Yet it has been found that a substantial

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1. See Cindy L. Baldassi, *The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts, and Convergences*, 39 U.B.C.L. REV. 63 (2006). For a collection of essays on customary adoption, see *L'ADOPTION COUTUMIÈRE ET LES DÉFIS DU PLURALISME JURIDIQUE* (Ghislain Otis ed., 2013).

proportion of the Inuit of Nunavik<sup>2</sup> apply customary law today when they adopt a child or decide to have their child adopted.<sup>3</sup> It seems fair to suggest that, given the intense exposure of the Inuit to state institutions and mainstream education in recent decades,<sup>4</sup> at least some Inuit are aware of the fact that state law regulates adoptions but nonetheless decide to uphold their traditional laws.<sup>5</sup>

Conversely, the fact that state law formally allows individual choice does not mean that it is always a realistic prospect in actual practice. By removing the possibility of coercion, the law creates a space of freedom, which is a necessary, but not sufficient, condition for the exercise of personal autonomy. For some individuals, the right to choose might be merely theoretical, due to a lack of adequate information, deeply entrenched power imbalances within a normative community,<sup>6</sup> or the perceived high cost—cultural, social, emotional, or economic—of setting aside the norms of their group.<sup>7</sup> It has been argued that in the case of particularly vulnerable members of sub-state groups, such as women and children, choice might even be unthinkable.<sup>8</sup> However, the effective capacity of individuals to avail themselves of a formal freedom to choose can neither be confirmed nor ruled out in the abstract, as it is contingent upon a range of social, economic, cultural, and personal variables that cannot be generalized.

It may also depend on the legal impact the choice has on an individual's connection to the group. Abandoning altogether one's legally-recognized status as a member of an ethno-cultural or religious community is not the same as merely opting out of some specific community norms under certain circumstances. In other words, choice of personal legal *status* should not be confused with choice of

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2. Nunavik is the name given to the Arctic region of Quebec that is the traditional homeland of the Nunavik Inuit.

3. See Mylène Larivière, *Le Régime Coutumier de L'Adoption des Enfants Autochtones: L'Exemple du Droit des Inuits du Nunavik*, in *L'ADOPTION COUTUMIÈRE ET LES DÉFIS DU PLURALISME JURIDIQUE*, *supra* note 1, at 7, 10.

4. In 1975, the Inuit of Nunavik, Canada and Quebec signed the *James Bay and Northern Quebec Agreement*, known in Canada as the first modern treaty. The Agreement ushered in a new era of interaction between the Inuit and non-Inuit institutions. A group of Nunavik Inuit organizations recently carried out extensive consultations, which revealed significant societal transformations among the Inuit that have resulted from the intensification of interactions with southern culture and institutions. See MAKIVIK CORP. ET AL., *PARNASIMAUTIK CONSULTATION REPORT* (2014).

5. The Parnasimautik report confirms that customary adoption remains a central and vibrant institution within Nunavik Inuit society. *Id.* at 50–51. The Quebec Civil Code now recognizes indigenous customary adoption. See *An Act to Amend the Civil Code and Other Legislative Provisions as Regards Adoption and the Disclosure of Information*, S.Q. 2017, c 12, arts 1–13 (Can.).

6. For example, because of enduring power imbalances and patriarchal forces, various choice models in some African countries have not, on the whole, effectively enabled women freely to move away from customary norms regarding marriage and access to land. See Tracy E. Higgins & Jeanmarie Fenrich, *Customary Law, Gender Equality, and the Family: The Promise and Limits of a Choice Paradigm*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 423 (Jeanmarie Fenrich et al. eds., 2011).

7. For an excellent discussion of the obstacles to choice, see BRIAN BARRY, *CULTURE AND EQUALITY* 150–51 (2001).

8. Susan Moller Okin, "Mistresses of Their Own Destiny": *Group Rights, Gender, and Realistic Rights to Exit*, 112 *ETHICS* 205, 222 (2002).

personal *law*. Choosing one personal legal status over another is determinative of legal identity. It also amounts to waiving all the rights, privileges, and advantages that the law attaches to the identity that is relinquished. For example, in Canada, if a person renounces his or her status as a member of an indigenous people under a treaty, he or she will no longer be able to claim any of the rights or benefits flowing from such status pursuant to the treaty.<sup>9</sup> Choice of law has less disruptive effects, as it applies only to a discrete situation or relationship and thus does not otherwise modify an individual's legal tie to the group.<sup>10</sup> For these reasons, there may be fewer obstacles to choice of personal law than to choice of personal status.

This paper examines choice of law by indigenous people in Canada where indigenous law and state law have long coexisted and interacted without any formal system of coordination due to the state's general indifference and even hostility toward indigenous law.<sup>11</sup> As a result, choice of law by indigenous individuals had until recently been mainly unofficial,<sup>12</sup> and its consequences had attracted little interest. Developments have taken place, however, particularly since 1982, when the aboriginal and treaty rights of the indigenous peoples of Canada were constitutionally recognized and affirmed in Article 35 of the *Constitution Act, 1982*.<sup>13</sup> Because these rights are group rights, the role played by indigenous legal systems in the communal regulation of their exercise is now acknowledged.<sup>14</sup> In addition, several modern self-government agreements and treaties have been signed and many more are being negotiated by indigenous nations and governments.<sup>15</sup> New indigenous law-making institutions have been put in place pursuant to these treaties,<sup>16</sup> thus adding a fresh layer of complexity to Canadian state legal pluralism. In this context, examining the issue of individual choice of law has become an

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9. For example, modern treaties grant specific rights only to individuals who are enrolled as indigenous persons connected to an indigenous people party to the treaty. The conditions for individual enrolment are specified in the treaties which explicitly allow for an individual's voluntary withdrawal from the enrolment register. *See, e.g.*, Nisga'a Final Agreement, B.C.-Can.-Nisga'a, chapter 20, section 17, May 27, 1998, S.C. 200, ch. 7 (entered into force May 11, 2000).

10. *See* Sebastien Grammond, *The Reception of Indigenous Legal Systems in Canada*, in MULTIJURALISM: MANIFESTATIONS, CAUSES, AND CONSEQUENCES 45, 50–51 (Albert Breton et al. eds., 2009).

11. For an account of the limited formal recognition of indigenous customary law in Canada since the nineteenth century, see Grammond, *supra* note 10.

12. *See id.*

13. Paragraph 35(1) of the Constitution Act, 1982, provides that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." For a general commentary of the law of aboriginal and treaty rights, see SEBASTIEN GRAMMOND, TERMS OF COEXISTENCE: INDIGENOUS PEOPLES AND CANADIAN LAW 203–50 (2013).

14. Ghislain Otis, *The Constitutional Recognition of Aboriginal and Treaty Rights: A New Framework for Managing Legal Pluralism in Canada?*, 46 J. LEGAL PLURALISM & UNOFFICIAL L. 320, 327–28 (2014).

15. For figures and statistics on modern treaties signed and currently being negotiated, see *Comprehensive Claims*, INDIGENOUS AND NORTHERN AFFAIRS CANADA, <http://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578> [<https://perma.cc/U6DP-X9NU>] (last updated July 13, 2015).

16. *See id.*

important task in understanding state legal pluralism with respect to indigenous peoples in Canada.

As Section 1 of this paper explains, when colonial powers could not simply ignore indigenous law, they favoured individual choice, which they viewed as a means of achieving the hegemony of Western law through the gradual erosion of non-Western law.

While the colonial logic of Western legal hegemony has lost much of its legitimacy today, Section 2 shows that individual choice of personal status and personal law still has enthusiastic supporters among liberal political theorists and legal scholars. These supporters link the individual freedom to choose and the effective protection of individual autonomy and human rights because it permits individuals to opt for state law wherever non-state law perpetuates rules and practices regarded as oppressive or discriminatory.

Section 3 of the paper ascertains the extent to which individual choice is recognized in the area of indigenous governance in Canada, and critically examines the strength of the human rights argument in favour of choice in the context of modern self-government treaties. Finally, this Section argues that there is no strong case in favor of individual choice as a means of self-protection from human rights violations in the context of modern treaties.

#### I. CHOICE OF LAW AS A DIFFUSIONIST COLONIAL TOOL

The need to reflect on the role of individual autonomy in the context of a plurality of personal laws seems to be as old as legal pluralism itself.

It is said that the Romans<sup>17</sup> and later the Ottoman Empire<sup>18</sup> recognized choice of personal law. The approach allowed Barbarians or certain religious minorities in the Empire to continue applying their laws or customs while also giving them access to the dominant law as they wished.<sup>19</sup> Starting in the eighteenth century, choice of law was used broadly by European colonial powers in their colonized territories where Western legal traditions and non-Western legal universes met. It was part of British practice in Asia, Africa, and the Middle East,<sup>20</sup> Dutch colonial law as applied

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17. NORBERT ROULAND, STEPHANE PIERRE-CAPS & JACQUES POUMAREDE, *DROIT DES MINORITÉS ET DES PEUPLES AUTOCHTONES* 54–55 (1996).

18. Non-Muslims could choose between their religious community's personal law and Muslim law, but choice of law was denied to Muslims. See PIERRE GANNAGE, *LE PLURALISME DES STATUTS PERSONNELS DANS LES ÉTATS MULTICOMMUNAUTAIRES* 350–52 (2001).

19. See ROULAND ET AL., *supra* note 17, at 55.

20. For Asia, see DAVID PEARL, *INTERPERSONAL CONFLICT OF LAW IN INDIA, PAKISTAN AND BANGLADESH* 28–34 (1981). For sub-Saharan Africa, see Anthony A. Allott, *What Is to Be Done with African Customary Law?: The Experience of Problems and Reforms in Anglophone Africa from 1950*, 28 J. AFR. L. 56, 61–63 (1984). For the Middle East, see Norman Bentwich, *The Application of Jewish Law in Palestine*, 9 J. COMP. LEGIS. & INT'L L. 59 (1927).

in the Indonesian archipelago,<sup>21</sup> and French colonial law in Africa.<sup>22</sup> It was designed to authorize the colonized to temporarily preserve their indigenous legal systems in certain areas of private law—in particular the law of persons and family law—while encouraging them to submit to the law of the colonizer.<sup>23</sup>

Choice of law can still be observed to this day, to varying degrees and in various forms, in at least one overseas French territory<sup>24</sup> and the multi-community states of the Middle East that practice the personality of laws on the basis of religion.<sup>25</sup> It also exists in several postcolonial African states where, in matters involving personal law, African populations may still choose between their customary or religious laws and the Western-inspired law of the state.<sup>26</sup> In some situations where several non-state legal orders exist in a territory with a multi-community population, individuals subject to these diverse personal laws may choose between them to govern their relationships with members of the other communities.<sup>27</sup> This is sometimes the case in Africa.<sup>28</sup> In such cases, choice of law can be characterized as “horizontal” in its relationship with non-state laws, as opposed to situations where the general law of the state and non-state laws govern their own respective areas (the “vertical” option).

Choice of law has generally been conceived as a tool to propagate the law of the colonial or imperial power and eventually secure its hegemony. Colonial doctrine in fact saw this option as a gentler, more realistic means of legally acculturating non-Western peoples than the brutal and largely ineffective transplantation of modern law.<sup>29</sup> Solus, a specialist in colonial French private law, associated choice of law with what he called the “sociological law of imitation.”<sup>30</sup>

... the Indigenous person will slowly become familiar with metropolitan institutions; he will understand the economy; he will appreciate the commodities and advantages. ... It will therefore not be surprising to observe him resort to the same proceedings and the same institutions when

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21. See Amry Vandenbosch, *Customary Law in the Dutch East Indies*, 14 J. COMP. LEGIS. & INT'L L. 30, 42–43 (1932).

22. On French colonial law, see HENRY SOLUS, *TRAITÉ DE LA CONDITION DES INDIGÈNES EN DROIT PRIVÉ* 286–93 (1927); LOUIS-AUGUSTIN BARRIÈRE, *LE STATUT PERSONNEL DES MUSULMANS D'ALGERIE DE 1834 A 1962* 139–55 (1993).

23. See Vandenbosch, *supra* note 21, at 42–43; SOLUS, *supra* note 22, at 431; GANNAGÉ, *supra* note 18, at 105.

24. This has been the case in Mayotte since 2003. See LAURENT SERMET, *UNE ANTHROPOLOGIE JURIDIQUE DES DROITS DE L'HOMME* 76–77 (2009).

25. GANNAGÉ, *supra* note 18, at 347–54. It must be remembered that choice is not allowed for Muslims.

26. S. AFR. LAW COMM'N, *THE HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW: REPORT ON THE CONFLICTS OF LAW* 14–20 (1999). See also Higgins & Fenrich, *supra* note 6; Chuma Himonga, *State and Individual Perspectives of a Mixed Legal System in Southern African Contexts with Special Reference to Personal Law*, 25 TUL. EUR. & CIV. L.F. 24, 30–33 (2010).

27. See S. AFR. LAW COMM'N, *supra* note 26, at 19.

28. *Id.* at 85–89.

29. GANNAGÉ, *supra* note 18, at 349.

30. SOLUS, *supra* note 22, at 424.

he later comes in contact with another Indigenous person and a European intervenes in the operation. Would he not in fact be encouraged to do so by the right to choose the law which is recognized by the colonial legislator, a right to choose which allows Indigenous persons to contract under French law?<sup>31</sup>

Thus, choice of law was an institution that legal variation theorists would characterize as “diffusionist.”<sup>32</sup> Drawing inspiration from the work of linguists, observers of the circulation of legal models have established a typology of the processes leading to the movement from one legal system to another. This typology comprises two fundamental categories: variation by evolution and variation by diffusion.<sup>33</sup> The means of diffusion of legal models are most often imitation, expansion, and transmission or teaching.<sup>34</sup> In a colonial or imperial context, choice of law combines the logic of expansion with that of imitation, encouraging individuals to behave in a manner likely to reproduce the dominant legal model by transposing this model into their legal lives.

It is thus part of a plan to cause non-state law and the institutions from which it originates to atrophy, due to unequal competition that favours state law because the dominant political and legal institutions are concerned with minimizing their share of risk in the competition between legal systems. They achieve that by channelling individual choices to their benefit. Thus, choice of law is invariably *asymmetrical*; in other words, individuals living under their specific personal non-Western laws can move toward the general law, while individuals governed by the general law cannot opt for non-state law reserved for members of recognized ethno-cultural or religious groups.<sup>35</sup> In the absence of a reciprocal freedom to choose, only the sub-state legal order risks losing the choice game, while the official law, being actively promoted, is the only legal system likely to recruit new “adherents.”

Asymmetrical choice does not appear to be fair when the relationship between legal systems is considered as purely “competitive” and in terms of the “marketplace of laws” within which systems are committed to maximizing their capital of adherents to the detriment of their competitors.<sup>36</sup> On the other hand, certain non-Western legal traditions, in particular those of indigenous or tribal peoples, are relatively free of the claim to universality that drives the expansionism of more hegemonic traditions.<sup>37</sup> In other words, for such non-Western legal traditions,

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31. *Id.* at 431.

32. RODOLFO SACCO, ANTHROPOLOGIE JURIDIQUE, APPORT À UNE MACRO-HISTOIRE DU DROIT 39–40 (2008).

33. *Id.* at 37–40.

34. *Id.* at 39–40.

35. See GANNAGÉ, *supra* note 18, at 104–05.

36. See H. PATRICK GLENN, LEGAL TRADITIONS IN THE WORLD: SUSTAINABLE DIVERSITY IN LAW 92 (5th ed. 2014).

37. Glenn has pointed out that “chthonic” legal traditions do not tend to be expansionist. See *id.* at 94.

competition with state law means quelling the disaffection of “natural” adherents more than converting individuals who are strangers to the group.

Despite the scarcity of empirical studies on the actual contribution of choice of law to the erosion of non-Western legal institutions, some jurists give credence to the diffusionist hypothesis. Allott, for example, notes the effect of individual choice on customary African law, and finds that:

Of all the solvents of customary law, the power to make contracts is surely the most powerful. Law follows events as much as it controls them.... The accumulated result of a million individual decisions to avail oneself of the possibilities of the law of contract, by entering novel transactions and relationship of a non-customary kind is to shift the law in that area from customary to non-customary.<sup>38</sup>

Certain precedents, however, suggest that when non-state law is a highly structured, revealed religious law such as Muslim law, the expansionist effect of the right to choose Western law is less evident.<sup>39</sup> In the case of Algeria, for example, one author has said that choice of law ran up against “the stubborn resistance of a population to assimilation of any sort, a veritable implementation of the immutability of Muslim law and its intransigence in the face of secularization of any kind.”<sup>40</sup>

The colonial approach to diffusionism as a rationale for individual choice of law, which is motivated by the notion that Western law should naturally become universal, has lost much of its ascendancy now that cultural and legal diversity are increasingly acknowledged as social goods worthy of protection even in so-called liberal states.<sup>41</sup> Where specific groups or nations such as indigenous peoples are concerned, strongly institutionalized promotion of the state’s Western legal system also appears to be at odds with the international affirmation of their right to self-determination and self-government, which favours the preservation and development of distinctive indigenous legal systems.<sup>42</sup>

38. Allott, *supra* note 20, at 62.

39. Research on French Algeria has shown the failure of the choice technique as a means of expanding the application of the Civil Code among the Muslim population. See BARRIÈRE, *supra* note 22, at 221.

40. François-Paul Blanc, *Preface* to BARRIÈRE, *supra* note 22, at ii.

41. Liberal theorists generally agree that sub-state ethno-cultural and religious groups should enjoy some measure of recognition but vigorously debate the extent of such recognition. For a useful discussion of some prominent schools of thought among liberal pluralists, see George Crowder, *Two Concepts of Liberal Pluralism*, 35 POL. THEORY 121, 121–26 (2007).

42. Article 34 of the United Nations Declaration on the Rights of Indigenous Peoples provides: “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.” G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, at art. 34 (Sept. 13, 2007). Likewise, article XXII of the American Declaration on the Rights of Indigenous Peoples states:

1. Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards. 2. The indigenous law and legal systems shall be recognized and



## II. THE PROTECTION OF HUMAN RIGHTS AS A NEW JUSTIFICATION FOR INDIVIDUAL CHOICE

In the postcolonial period, individual choice has found new advocates: the promoters of human rights in legally plural or multicultural societies. Indeed, of all of the issues related to choice of personal legal status and law, the protection of human rights and freedoms is perhaps the most significant in current political, philosophical, and legal debates.

The individual right to “leave” one’s group of belonging is often advocated as a *sine qua non* of freedom and equality for members subject to the normative powers of sub-state ethno-cultural or religious groups. French essayist Pascal Bruckner provides a classic formulation of this liberal defense of the so-called right to exit:

The protection of minority rights is also the right of all individuals belonging to these minorities to withdraw from these groups without damage as a result of indifference to or detachment from clan or family solidarities and to forge their own destinies, without inhabiting the roles inherited from their parents. Thus, it is the right to exist as private persons, to become different persons whose lives have the meaning they choose, not one they have inherited from their roots.<sup>43</sup>

In legal terms, the right to exit includes the freedom to abandon one’s personal legal status as a member of a formally recognized sub-state group, thereby opting for the legal status enjoyed by all citizens. Choice of legal status is also seen as necessary to safeguard the human rights of the most vulnerable individuals—women and children, for example—who are considered to be the most likely victims of “illiberal” community practices.<sup>44</sup> Exit, however, may not be a viable option or it may not be desired even by oppressed members of the group.<sup>45</sup> As one author puts it, “Rights of exit provide no help to women or members of other oppressed groups who are deeply attached to their culture but not to their oppressive aspects.”<sup>46</sup>

In such cases, choice of law is advocated as one of the alternatives to the “either/or” logic of exit.<sup>47</sup> It can be seen as a compromise between leaving the community and the total captivity of individuals within the legal order of their

respected by the national, regional and international-legal systems. Organization of American States, *American Declaration on the Rights of Indigenous Peoples*, at art. XXII, OEA/Ser.P, AG/doc.5537/16 (June 8, 2016).

43. PASCAL BRUCKNER, *THE TYRANNY OF GUILT: AN ESSAY ON WESTERN MASOCHISM* 148–49 (Grasset & Fasquelle eds., Steven Rendall trans., 2012).

44. There is a vast amount of literature on choice and the protection of the rights of women or minorities within religious groups. See AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* (2001); Leslie Green, *Rights of Exit*, 4 *LEGAL THEORY* 165 (1998); Dwight G. Newman, *Exit, Voice and ‘Exile’: Rights to Exit and Rights to Eject*, 57 *U. TORONTO L.J.* 43 (2007); Okin, *supra* note 8; Oonagh Reitman, *On Exit*, in *MINORITIES WITHIN MINORITIES: EQUALITY RIGHTS AND DIVERSITY* 189 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005).

45. Okin, *supra* note 8.

46. *Id.* at 226–27.

47. See SHACHAR, *supra* note 44, at 143.

group. Individuals are not compelled to make the often impracticable decision of totally cutting legal ties with the community, but may instead protect themselves in given situations by avoiding the application of a personal law that infringes their fundamental rights and freedoms. This is the position defended by Ayelet Schachar, for example, who proposes a system of options, while also subscribing to a limited liberal version of the diffusionist model whereby the competition of laws for the adherence of individuals encourages the sub-state group to spontaneously align its normative practices and treatment of its members with the state model of individual rights and freedoms.<sup>48</sup>

Legal scholars and institutions that have studied the issue of individual choice in countries that apply the personality of laws have often done so from the perspective of the protection of human rights. For example, the South African Law Commission has recommended that the regime of personal African custom co-exist with the right to choose on the grounds that “individuals are free to participate in a culture of choice.”<sup>49</sup> Likewise, the United Nations Committee on the Elimination of Racial Discrimination has urged Namibia to establish a choice of law regime to allow Namibian women to marry and divorce under the general state law if they so wish, to counter the application of customs held to be oppressive and discriminatory on the basis of gender.<sup>50</sup> In Lebanon, liberal jurists have long invoked individual rights and freedom of conscience to demand the right for Lebanese people to choose freely between religious law and the general state law, particularly in matters of marriage and divorce.<sup>51</sup>

In Canada, a heated debate flared up about choice of law and human rights when a government-appointed commissioner proposed confirming and regulating the right of couples in the province of Ontario to submit their family disputes to religious arbitration tribunals applying personal religious laws insofar as they were compatible with Ontario law.<sup>52</sup> It was specifically recommended that couples

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48. See *id.* For a discussion of choice of law as a possible means of reconciling a dual commitment to legal pluralism and gender equality, see Higgins & Fenrich, *supra* note 6.

49. S. AFR. LAW COMM’N, *supra* note 26, at 29.

50. The Committee “invites the State party to consider introducing a system which allows individuals a choice between customary law systems and the national law.” Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/NAM/CO/12, at ¶ 11 (2008).

51. Léna Gannagé, *Religion et Droits Fondamentaux dans le Droit Libanais de la Famille*, in DROIT ET RELIGION 517, 525–27 (Centre d’Études des Droits du Monde Arabe ed., 2003); Jean Salem, *Un Ordonnement Constitutionnel sous Hypothèque: Religion et Constitutionnalisme au Liban*, in DROIT ET RELIGION 469, 479–80 (Centre d’Études des Droits du Monde Arabe ed., 2003).

52. Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, MINISTRY ATT’Y GEN. (Dec. 2004), <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html> [<https://perma.cc/W43S-3PJ6>] (last visited May 25, 2018). For critical discussions of this controversy, see Faisal Bhabha, *Between Exclusion and Assimilation: Experimentalizing Multiculturalism*, 54 MCGILL L.J. 45, 72–83 (2009), and Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective*, 2006 OTTAWA L. REV. (40th Anniversary Ed.) 67.

should, subject to legal safeguards, have the right to choose between state law and religious law for the purpose of the arbitration of family disputes.<sup>53</sup> The government of Ontario rejected the idea of religious arbitration boards, and the Ontario legislature enacted a statute explicitly prohibiting the religious arbitration of family disputes in the province.<sup>54</sup>

So far, however, very little attention has been paid to choice of law by indigenous people, let alone its human rights implications and justification. Focusing primarily on modern self-government treaties, the next Section examines the extent to which indigenous choice of law is part of state legal pluralism in Canada, and assesses the validity of the human rights justification for individual choice in the context of modern treaties.

### III. INDIGENOUS GOVERNANCE, CHOICE OF LAW, AND HUMAN RIGHTS IN CANADA

In Canada, the competition between indigenous legal orders and Western law has existed since contact. Thus, the prospect of choice, whether officially sanctioned or not, has long been part of the lives of indigenous individuals. Until recently, formal regimes of choice of law have been rare in Canada, a country that is distinguished by the fact that, aside from a few circumscribed validations of customary law, its colonial law has not recognized or institutionalized an extensive system of indigenous personal law.<sup>55</sup> Unlike what has happened in Africa, Asia, and the Pacific, British and Canadian authorities did not see the need to establish an official dual legal regime, which would have required a consideration of the appropriateness of establishing a formal and detailed choice of law regime. This can most probably be explained by the fact that the indigenous peoples quickly found themselves in the minority due to massive and relentless colonization by non-indigenous settlers.<sup>56</sup> The result was that, despite the fact that the constitution eventually made it possible to apply personal laws for “Indians,”<sup>57</sup> the State has not made any decisive commitment toward indigenous personal law.

Nevertheless, very well-known examples of tacit choice of law mechanisms exist. For example, the case law and legislation declaring a customary adoption or marriage to be valid in no way oblige individuals to resort to such an adoption or such a marriage.<sup>58</sup> Statutes and courts accommodate the right of individuals to

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53. Boyd, *supra* note 52.

54. *See* Family Statute Law Amendment Act, S.O. 2006, c. 1 (Can.).

55. *See* GRAMMOND, *supra* note 13.

56. In 2011, 1.8 million individuals reported that they had at least one indigenous ancestor. That is about four percent of the total population of Canada. *See Population and Geographic Distribution*, STAT. CAN., <http://www.statcan.gc.ca/pub/89-645-x/2015001/pop-concept-eng.htm> [<https://perma.cc/945H-Y2ZD>] (last updated Dec. 24, 2015).

57. Constitution Act, 1867, 30 & 31 Vict., c 3, art. VI, § 91(24) (U.K.), *reprinted in* R.S.C. 1985, app II, no 5 (Can.).

58. For a study of the founding cases regarding recognition of customary adoptions and marriages in northern territories, see Norman K. Zlotkin, *Judicial Recognition of Aboriginal Customary*

choose the customary regime but do not deny them access to the state regime if that is what they prefer.

The potential for choice of law in indigenous governance has been reinforced by the implementation of aboriginal and treaty rights recognized in Section 35 of the *Constitution Act, 1982*. Aboriginal and treaty rights are group rights that relate to land and resources but can also extend to personal law matters, such as adoption or marriage.<sup>59</sup> Because they belong to the indigenous group and not to the individuals within it, it is up to the group to set the terms and conditions under which its members may exercise them.<sup>60</sup> Section 35 rights are, in other words, communally self-regulated. Where personal law matters are concerned, the individual exercise of aboriginal rights is governed by the rules of the group according to the principle of the personality of laws, since only individuals who can establish a personal connection to the group can avail themselves of the group right.<sup>61</sup> The same will be true of the general aboriginal right to self-government if such a right is one day acknowledged by the Supreme Court of Canada.<sup>62</sup> Self-governing authority would apply to a range of matters relating to the internal life of the community,<sup>63</sup> but with respect to personal law, would extend only to individuals who are members of the group or otherwise significantly connected to it.

Individuals, however, are not *a priori* legally compelled to avail themselves of an aboriginal right held by their community. State law remains at their disposal, even in situations dealt with under such a right. The mere fact that a community has an aboriginal right in relation to marriage, for example, does not require an indigenous couple to marry under the community regime arising from the aboriginal right instead of under the general law of the state. The application of the general law to a couple that has chosen to submit to it does not in itself constitute a violation of the aboriginal right, since the couple is establishing its legal relationship outside that right. The couple is not acting as indigenous beneficiaries of an aboriginal right, but as Canadian citizens claiming a general right.

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*Law in Canada: Selected Marriage and Adoption Cases*, 4 C.N.L.R. 1 (1984). Statutes currently recognizing customary adoptions in Canada are the following: Aboriginal Custom Adoption Recognition Act, S.N.W.T. 1994, c 26 (Can.); Child and Family Services Act, S.Y. 2008, c. 1 s. 138 (Can.); Adoption Act, R.S.B.C. 1996 c. 5, s. 46; Indian Act, R.S.C. 1985, c. I-5, s. 2 (Can.); An Act to Amend the Civil Code and Other Legislative Provisions as Regards Adoption and the Disclosure of Information, S.Q. 2017, c 12, arts 1–13 (Can.).

59. See *Casimel v. Insurance Corporation of British Columbia*, [1994] 2 C.N.L.R. 22 (B.C.C.A.) at para. 18 (Can.).

60. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 115 (Can.); *R v. Sappier; R v. Gray*, [2006] 2 S.C.R. 686, para. 26 (Can.).

61. See Ghislain Otis, *L'Autonomie Personnelle au Cœur des Droits Ancestraux: Sub Qua Lege Vivis?*, 52 MCGILL L.J. 657 (2007).

62. Aboriginal parties have claimed an aboriginal right to self-government in several court cases, but the Supreme Court has so far declined to rule on the matter. See *Pamajewon v. The Queen*, [1996] 2 S.C.R. 821, para. 24; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 170–171.

63. See Kent McNeil, *Judicial Approaches to Self-Government Since Calder: Searching for Doctrinal Coherence*, in LET RIGHT BE DONE 129, 143–50 (Hamar Foster et al. eds., 2007).

Like aboriginal rights, rights that arise from historical treaties belong to the collective,<sup>64</sup> and their individual exercise, according to the Supreme Court of Canada, is “by authority of the local community.”<sup>65</sup> Members of treaty signatory peoples may therefore exercise only treaty rights that are derived from the group<sup>66</sup> and in compliance with written or unwritten standards implemented by the group. These individuals are not required to act under the treaty, however, and may opt for state law, even though there are community standards that have been recognized by the treaty. For example, an individual may wish to hunt under the state’s statutory sports hunting regime instead of the indigenous regime under the treaty. The application of the general law to indigenous individuals who do not wish to invoke the treaty but instead seek a privilege granted under state law is not in itself a violation of the treaty.

Choice of law is also an important characteristic of the new governance structures established by recent agreements characterized as “modern treaties,”<sup>67</sup> which several indigenous nations have successfully negotiated to settle both their land and self-government claims.<sup>68</sup> Under these agreements, which are constitutionally protected pursuant to Section 35 of the *Constitution Act, 1982*, newly created indigenous governments hold a range of legislative powers, some of which

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64. See in particular *R. v. Sundown*, [1999] 1 S.C.R. 393, para. 36 (Can.).

65. *R. v. Marshall*, [1999] 3 S.C.R. 533, para. 17 (Can.).

66. However, discrete individual interests derived from such a collective right may ground individual legal claims. See *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227, para. 32–35 (Can.).

67. The term “modern” is used to distinguish treaties signed since the 1970s, after the government of Canada resumed treaty-making, from “historic” treaties negotiated between contact and the early 1900s.

68. See *Nisga’a Final Agreement*, B.C.-Can.-Nisga’a, May 27, 1998, S.C. 200, ch. 7, <http://www.nkn.ca/files/u28/nis-eng.pdf> [<https://perma.cc/862G-RGCF>] (entered into force May 11, 2000) [hereinafter *Nisga’a Agreement*]; *Land Claims and Self-Government Agreement among the Tlicho and the Government of the Northwest Territories and the Government of Canada*, Can.-Tlicho, Aug. 22, 1921, S.C. 2005, ch. 1, <http://www.aadnc-aandc.gc.ca/eng/1292948193972/1292948598544> [<https://perma.cc/5BMF-WUWJ>] (entered into force Aug. 4, 2005) [hereinafter *Tlicho Agreement*]; *Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, Can.-Inuit, S.C. 2005, ch. 27, <http://www.aadnc-aandc.gc.ca/eng/1293647179208/1293647660333> [<https://perma.cc/Z5B7-CGU9>] (entered into force Dec. 1, 2005) [hereinafter *Labrador Inuit Agreement*]; *Yale First Nation Final Agreement*, B.C.-Can.-Yale First Nation, S.C. 2013, ch. 25, <http://www.aadnc-aandc.gc.ca/eng/1336657835560/1336658472497> [<https://perma.cc/UDL3-32SC>] (last updated May 10, 2012) [hereinafter *Yale Agreement*]; *Maa-nulth First Nations Final Agreement*, B.C.-Can.-Maa-nulth, Apr. 9, 2009, S.C. 2009, ch. 18, <https://www.aadnc-aandc.gc.ca/eng/1100100022581/1100100022591> [<https://perma.cc/7GGR-R7AG>] (entered into force Apr. 1, 2011) [hereinafter *Maa-nulth Agreement*]; *Tsawwassen First Nation Final Agreement*, B.C.-Can.-Tsawwassen, Dec. 6, 2007, S.C. 2008, ch. 32, <https://www.aadnc-aandc.gc.ca/eng/1100100022706/1100100022717> [<https://perma.cc/K2LN-9MV3>] (entered into force Apr. 3, 2009) [hereinafter *Tsawwassen Agreement*]; *Lheidli T’enneh Final Agreement: Lheidli T’enneh Lands*, B.C.-Can.-Lheidli T’enneh, Oct. 29, 2006, <http://www.aadnc-aandc.gc.ca/eng/1100100022555/1100100022557> [<https://perma.cc/P3HL-PES4>] (last updated Sept. 15, 2010) [hereinafter *Lheidli T’enneh Agreement*]; *Tla’amin Final Agreement*, B.C.-Can.-Tla’amin, Apr. 11, 2014, <https://www.aadnc-aandc.gc.ca/eng/1397152724601/1397152939293> [<https://perma.cc/AK7A-JHXA>] (last updated July 13, 2017) [hereinafter *Tla’amin Agreement*].

are territorial while others are personal.<sup>69</sup> Personal law matters that are within indigenous jurisdiction include marriage,<sup>70</sup> family assets,<sup>71</sup> guardianship and tutorship,<sup>72</sup> adoption,<sup>73</sup> child protection,<sup>74</sup> legal capacity,<sup>75</sup> and successions.<sup>76</sup>

At this point, it should be noted that indigenous laws enacted on the basis of a treaty do not automatically extinguish indigenous law that might be observed outside the treaty or other institutional arrangements within state law. For example, the Nisga'a treaty takes notice of Nisga'a traditional laws and specifies that they are not included in the definition of "law" for the purpose of the treaty.<sup>77</sup> This acknowledgment that traditional laws continue to exist alongside the treaty leaves their reconciliation with official law to informal processes. Even if a treaty purported to abrogate non-state indigenous law, such a proclamation would not in itself suffice to eradicate the "living law" of the group, that is, the norms and processes governing the community, at least partially, in actual practice. Accordingly, it is conceivable that situations will arise where unrecognized customary or traditional law will occupy the same field as both official indigenous treaty law and state law. Individual choice between unrecognized living law and official indigenous or state law may therefore take place even if the choice of unrecognized law is not enforceable either by treaty-created indigenous institutions or by the state.

The issue that treaties can effectively regulate and enforce, however, is whether individuals may choose between indigenous law enacted or recognized pursuant to a treaty<sup>78</sup> and state law. A close reading of the treaties reveals that, indeed, both

69. Non-territorial indigenous authority under modern treaties is not restricted to personal law. It extends to cultural and social affairs and even, in some cases, to resource management and harvesting. For an overview of indigenous, non-territorial powers, see Geneviève Motard, *Le Principe de Personnalité des Lois Comme Voie d'Émancipation des Peuples Autochtones?* 205–17 (2013) (unpublished doctoral thesis, Laval University) (on file with Laval University).

70. Labrador Inuit Agreement, *supra* note 68, § 17.17.1; Lheidli T'enneh Agreement, *supra* note 68, at ch. 17, § 93; Yale Agreement, *supra* note 68, §§ 3.21.1–3.21.2; Tla'amin Agreement, *supra* note 68, at ch. 15, §§ 121–122. In the *Nisga'a Agreement*, the indigenous legislative power with respect to marriage is territorial. *See* Nisga'a Agreement, *supra* note 68, at ch. 11, §§ 75–76.

71. Labrador Inuit Agreement, *supra* note 68, § 17.18.2.

72. *Id.* § 17.18.6.

73. Labrador Inuit Agreement, *supra* note 68, § 17.18.9; Tsawwassen Agreement, *supra* note 68, at ch. 16, § 56; Tlilcho Agreement, *supra* note 68, § 7.4.4(i); Nisga'a Agreement, *supra* note 68, at ch. 11, § 96; Maa-nulth Agreement, *supra* note 68, § 13.15.3; Lheidli T'enneh Agreement, *supra* note 68, at ch. 17, § 53; Yale Agreement, *supra* note 68, § 3.14.2; Tla'amin Agreement, *supra* note 68, at ch. 15, § 62.

74. Labrador Inuit Agreement, *supra* note 68, § 17.15.5; Tsawwassen Agreement, *supra* note 68, at ch. 16, § 69; Maa-nulth Agreement, *supra* note 68, § 13.16.2; Lheidli T'enneh Agreement, *supra* note 68, at ch. 17, § 63; Yale Agreement, *supra* note 68, § 3.16.1; Tlilcho Agreement, *supra* note 68, § 7.4.4(g).

75. Tlilcho Agreement, *supra* note 68, § 7.4.4(h).

76. *Id.* § 7.4.4(i); Tsawwassen Agreement, *supra* note 68, at ch. 14, § 2; Nisga'a Agreement, *supra* note 68, at ch. 11, § 116; Yale Agreement, *supra* note 68, § 3.23.1.

77. *See* Nisga'a Agreement, *supra* note 68, at ch. 1 ("Definitions").

78. Customary law may be recognized by a treaty. *See, e.g.*, Labrador Inuit Agreement, *supra* note 68, § 17.3.4(e) (stating that the Inuit Constitution may provide for "the recognition of Inuit customary

choice of personal *status* and choice of personal *law* are recognized by modern treaties

An individual's eligibility to be enrolled as a "participant" or member of the indigenous nation party to a treaty is subject to detailed rules and conditions.<sup>79</sup> Once enrolled under the treaty, an individual can apply to have his or her name removed from the enrollment register, and the enrollment authority must remove the name of the applicant from the nation's register.<sup>80</sup> Apart from the application formality, no restriction or condition is imposed regarding the individual's choice to relinquish his or her status as a treaty participant, and the indigenous authority has no discretion to deny disenrollment. An individual's right to exit may not be overridden by indigenous law and thus is firmly entrenched in the treaties. Nothing in the treaties prevents an eligible individual from applying later for re-enrollment.

Of course, the legal consequences of waiving indigenous status altogether are far-reaching because doing so amounts to foregoing all the advantages and rights flowing from the treaty. Leaving will therefore be considered only in the most pressing situations. Ultimately, however, individuals are empowered to weigh the merits and drawbacks of their indigenous status and, if they so desire, opt for the status of mere Canadian citizen governed by the general law.

As for choice of law, the possibility for individuals within the reach of indigenous personal law to choose to be governed by state law instead is not so clearly affirmed in the treaties, but it does flow from a general provision found in every treaty stating that indigenous individuals holding treaty rights still retain the rights and benefits available to all Canadian citizens. For example, Section 2.2.4 of the *Tlicho Agreement* provides that "[n]othing in the Agreement shall affect the rights of Tâichô Citizens as Canadian citizens and they shall continue to be entitled to all the rights and benefits of all other Canadian citizens applicable to them from time to time." Section 2.8.1 of the *Labrador Inuit Agreement* more briefly declares that "[n]othing in the Agreement affects the rights of Inuit as Canadian citizens."<sup>81</sup>

The purpose of such clauses is quite clearly to ensure that indigenous persons will not be denied access to rights, programs, and benefits made available to all citizens by non-indigenous governments simply because they are treaty

law and the application of Inuit customary law to Inuit with respect to any matter within the jurisdiction and authority of the Nunatsiavut Government . . .").

79. Nisga'a Agreement, *supra* note 68, at ch. 20; Labrador Inuit Agreement, *supra* note 68, at ch. 3; Tlicho Agreement, *supra* note 68, at ch. 3; Tsawwassen Agreement, *supra* note 68, at ch. 21; Yale Agreement, *supra* note 68, at ch. 25; Maa-nulth Agreement, *supra* note 68, at ch. 26; Lheidli T'enneh Agreement, *supra* note 68, at ch. 3; Tla'amin Agreement, *supra* note 68, at ch. 22.

80. Nisga'a Agreement, *supra* note 68, at ch. 20, § 17; Labrador Inuit Agreement, *supra* note 68, § 3.8.1; Tlicho Agreement, *supra* note 68, § 3.4.2; Tsawwassen Agreement, *supra* note 68, at ch. 21, § 6; Yale Agreement, *supra* note 68, at ch. 25, § 5.9; Maa-nulth Agreement, *supra* note 68, § 26.5.1; Lheidli T'enneh Agreement, *supra* note 68, at ch. 3, § 18; Tla'amin Agreement, *supra* note 68, at ch. 22, § 20.

81. All the self-government agreements contain such a clause. *See* Maa-nulth Agreement, *supra* note 68, § 1.1; Nisga'a Agreement, *supra* note 68, at ch. 2, § 15; Tlicho Agreement, *supra* note 68, § 2.2.4; Tsawwassen Agreement, *supra* note 68, at ch. 2, § 35; Lheidli T'enneh Agreement, *supra* note 68, at ch. 3, § 29; Yale Agreement, *supra* note 68, § 2.9.1; Tla'amin Agreement, *supra* note 68, at ch. 2, § 33.

beneficiaries. A broad range of general laws offers rights and benefits to citizens, including legislation pertaining to personal law. Therefore, an indigenous citizen whose community has legislative authority in the area of personal law under a treaty should in principle still be able to benefit from the state's general law in the same area like other Canadian citizens. This is confirmed by a standard clause in treaties providing that federal and provincial laws apply to indigenous persons subject to the treaty,<sup>82</sup> and by the fact that, under the treaties, state and indigenous laws dealing with the same subject-matter both apply as long as they do not conflict.<sup>83</sup>

In this way, the treaties implement a regime of jurisdictional overlap that allows both indigenous treaty authorities and the state to exercise jurisdiction over the same act and the same actor. Individuals are enabled to navigate these normative orders by opting, for example, to marry in accordance with the general law and not pursuant to an indigenous marriage law enacted under the treaty. Because both indigenous and non-indigenous law are valid under the treaty, once they have opted and complied with the law of their choice, couples are legally married and therefore do not need to marry again under the other law.

Unlike the right to exit, however, this general rule of choice is not absolute, since the treaties do explicitly allow indigenous laws to displace the general state law in specific situations. This typically happens when indigenous law is given paramountcy in the event of a conflict with state law, thus rendering state law inoperative to the extent of the conflict. According to the treaties, indigenous personal law generally prevails when a conflict of laws arises.<sup>84</sup> The treaties specify that laws conflict when there is an “actual conflict in operation,”<sup>85</sup> which is one of

82. Labrador Inuit Agreement, *supra* note 68, § 2.15.1; Maa-nulth Agreement, *supra* note 68, § 1.5.1; Nisga'a Agreement, *supra* note 68, at ch. 2, § 13; Tl'icho Agreement, *supra* note 68, §§ 2.8.2, 7.7.1; Tsawwassen Agreement, *supra* note 68, at ch. 2, § 19; Lheidli T'enneh Agreement, *supra* note 68, at ch. 2, § 19; Yale Agreement, *supra* note 68, § 2.5.1; Tla'amin Agreement, *supra* note 68, at ch. 2, § 13.

83. Nisga'a Agreement, *supra* note 68, at ch. 2, § 52(b); Labrador Inuit Agreement, *supra* note 68, § 2.23.1. The other treaties apply the same rule as a result of their conflict rules, which allow both state and indigenous laws to apply in the absence of an operational conflict.

84. Indigenous laws are paramount in relation to adoption. *See* Labrador Inuit Agreement, *supra* note 68, § 17.18.14; Maa-nulth Agreement, *supra* note 68, § 13.15.3; Nisga'a Agreement, *supra* note 68, at ch. 11, § 99; Tsawwassen Agreement, *supra* note 68, at ch. 16, § 63; Lheidli T'enneh Agreement, *supra* note 68, at ch. 17, § 58; Yale Agreement, *supra* note 68, § 3.14.8; Tla'amin Agreement, *supra* note 68, at ch. 15, § 68. Indigenous laws are also paramount in relation to the celebration of marriage. *See* Yale Agreement, *supra* note 68, § 3.21.9. They are paramount in relation to successions. *See* Nisga'a Agreement, *supra* note 68, at ch. 11, § 116; Tsawwassen Agreement, *supra* note 68, at ch. 14, § 3; Yale Agreement, *supra* note 68, § 3.23.2. Finally, indigenous laws are paramount in relation to the effects of marriage or family relationships. *See* Labrador Inuit Agreement, *supra* note 68, § 17.18.14. Indigenous laws regarding child protection generally prevail over provincial laws. *Accord* Maa-nulth Agreement, *supra* note 68, § 13.16.7; Tsawwassen Agreement, *supra* note 68, at ch. 16, § 74; Lheidli T'enneh Agreement, *supra* note 68, at ch. 17, § 68; Yale Agreement, *supra* note 68, § 3.16.5. However, there is an exception. *See* Labrador Inuit Agreement, *supra* note 68, § 17.15.7.

85. This is the definition of “conflict” found in chapter 1 of the *Labrador Inuit Agreement*, *Tla'amin Agreement*, and *Lheidli T'enneh Agreement*. As for the *Maa-nulth Agreement*, *Yale Agreement*, and the *Tsavwassen Agreement*, they define a “conflict” as an “actual conflict in operation or operational incompatibility.”



the tests applied by the Supreme Court to decide whether a conflict exists between a federal and a provincial law. According to this test, an operational conflict occurs when compliance with one law would violate the other law.<sup>86</sup> It is submitted that these rules allow indigenous governments to enact legislation explicitly making indigenous law the sole law applicable to indigenous individuals in the area of personal law. If such legislation came into force, state authorities would necessarily breach it if they applied the general law to indigenous individuals governed by the treaty. An indigenous statute barring individual choice of law would thus generate an operational conflict making state law inoperative.<sup>87</sup>

This power of indigenous communities to determine the issue of choice of law requires that they reflect on the impact that a systematic competition with non-indigenous law can have on the vitality of the indigenous legal order. Individual freedom to choose the applicable law, if exercised by a substantial number of community members, could have collective and institutional consequences. The individual, whose decision could either reinforce or weaken the indigenous legal system in the face of the state's historically dominant position, becomes the ultimate judge of how authority and legitimacy are distributed among competing governments.<sup>88</sup> Ruling out individual strategic and possibly opportunistic choices would make it possible to assert indigenous autonomy, strengthen the foundations of new institutions, and promote the emergence of a new indigenous legal order.

There may be other good reasons to override choice of law. The exclusive application of indigenous law would avert the well-known pitfalls of choice such as the difficulty of ensuring that it is free and informed, the unforeseeability of personal law situations when individuals are permitted to "behave like perfect consumers of the law,"<sup>89</sup> and opportunistic temptations that have the potential to

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86. The Supreme Court of Canada has written that an operational conflict exists "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other.'" *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 S.C.R. 536, para. 64, (citing *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at 191). Likewise, article 2.52(a) of the *Nisga'a Agreement* states that "there is a conflict between laws if compliance with one law would be a breach of the other law." *Nisga'a Agreement*, *supra* note 68, at ch. 2, § 52(a).

87. As Aldridge puts it with respect to the *Nisga'a Agreement*, "if the federal law says it applies and the Nisga'a law says it does not apply, then that is inconsistency and the Nisga'a win." See Jim Aldridge, *The Nisga'a Treaty: Reflections after the First Ten Years*, in *FÉDÉRALISME ET GOUVERNANCE AUTOCHTONE (FEDERALISM AND ABORIGINAL GOVERNANCE)* 159, 164 (Ghislain Otis & Martin Papillon eds., 2013).

88. Glenn has shown that the vitality, and even the survival, over time of a legal tradition primarily depends on its capacity to retain its adherents in the face of the expansionism of competing traditions. This capacity is maintained not through coercive means but through persuasive arguments. See GLENN, *supra* note 36, at 40–42.

89. Régis Lafargue, *Les Contraintes Posées par l'Article 75 de la Constitution: Entre Héritage Colonial et Volonté de Modernisation de la Société Mahoraise*, in *MAYOTTE DANS LA RÉPUBLIQUE* 305, 330 (Laurent Sermet & Jean Coudray eds., 2004).

degenerate into abuse when individual choices are made to the detriment of the legitimate interests of others.<sup>90</sup>

But should choice nonetheless be maintained for the sake of enabling individuals to find refuge in the state law to avert human rights abuse at the hands of indigenous power?

The defense of individual choice of law as a preventive human rights remedy is compelling when the self-regulating group, for reasons pertaining to its religion or culture among other things, is not expected and does not wish to comply with the standards of protection of individual rights and freedoms imposed on state powers in Western democracies. This argument loses much of its persuasive force with respect to modern treaties in Canada, which affirm a strong indigenous commitment to human rights.

The treaties explicitly make indigenous governments and law-making authorities subject to the provisions of the *Canadian Charter of Rights and Freedoms*,<sup>91</sup> which guarantees fundamental freedoms as well as the rights of all to life, security, and equality.<sup>92</sup> As a result, legal remedies are available to any person whose rights or freedoms have been infringed by indigenous authorities in the exercise of their power under the treaty.<sup>93</sup> Certain indigenous constitutions also contain charters of rights setting out the need to consider the indigenous context, but also reiterating the imperative to protect individuals against the power of the group.<sup>94</sup> In addition, Subsection 35(4) of the *Constitution Act, 1982* states that notwithstanding any other

90. The need to check abusive choice of law—that is, choice intended to disadvantage or harm bona fide third parties—is acknowledged in countries that apply personal status pluralism. See GANNAGÉ, *supra* note 18, at 202.

91. Inuit Agreement, *supra* note 68, § 2.18.1; Maa-nulth Agreement, *supra* note 68, § 1.3.2; Nisga'a Agreement, *supra* note 68, at ch. 2, § 9; Tlicho Agreement, *supra* note 68, § 2.15.1; Tsawwassen Agreement, *supra* note 68, at ch. 2, § 9; Lheidli T'enneh Agreement, *supra* note 68, at ch. 2, § 9; Yale Agreement, *supra* note 68, § 2.3.2; Tla'amin Agreement, *supra* note 68, at ch. 2, § 8.

92. See Canadian Charter of Rights and Freedoms, Part I, § 7 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

93. Subsection 24(1) of the *Charter* provides that “[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

94. THE NUNATSIYAVUT CONSTITUTION ACT [CONSTITUTION] Dec. 1, 2005, § 2.1.3, <http://www.nunatsiavut.com/wp-content/uploads/2014/03/IL%202005-02%20-%20E.pdf> [<https://perma.cc/NJ75-RPDN>]; Yale First Nation Final Agreement Act, B.C.-Can.-Yale First Nation, SBC 2011, § 2.1, [http://www.bclaws.ca/civix/document/id/complete/statreg/11011\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/11011_01) [<https://perma.cc/2WT4-9G3K>] (assented to June 2, 2011). The following constitutions do not contain charters, but still provide for the protection of certain individual rights: TSAWWSSEN FIRST NATION CONSTITUTION ACT [CONSTITUTION], Feb. 3, 2009, § 4.1, [http://www.tsawwassenfirstnation.com/pdfs/TFN-Laws-Regulations-Policies/Constitution/Constitution\\_Act\\_06.15.pdf](http://www.tsawwassenfirstnation.com/pdfs/TFN-Laws-Regulations-Policies/Constitution/Constitution_Act_06.15.pdf) [<https://perma.cc/52NP-LVTW>]; HUU-AY-AHT FIRST NATIONS CONSTITUTION, Apr. 28, 2007, § 1.4, [http://www.maanulth.ca/downloads/Constitution\\_Huu-ay-aht.pdf](http://www.maanulth.ca/downloads/Constitution_Huu-ay-aht.pdf) [<https://perma.cc/BNV2-RJ4D>]; Ka:'yu:'k'e'h/Che:k'des7et'h' First Nations Final Agreement, July 24, 2008, § 1.4, [http://www.maanulth.ca/downloads/treaty/2010\\_maa-nulth\\_final\\_agreement\\_english.pdf](http://www.maanulth.ca/downloads/treaty/2010_maa-nulth_final_agreement_english.pdf) [<https://perma.cc/DE4E-E3EX>]; TOQUAHT NATION CONSTITUTION, May 14, 2007, § 1.3, [http://www.maanulth.ca/downloads/Constitution\\_Toquaht\\_Nation.pdf](http://www.maanulth.ca/downloads/Constitution_Toquaht_Nation.pdf) [<https://perma.cc/HV3K-W4XU>].

provision of the *Act*, “the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons,”<sup>95</sup> thus ensuring that women and men benefit equally from indigenous law enacted or applied pursuant to a treaty. Indigenous peoples no doubt expect *Canadian Charter* rights and freedoms to be interpreted and applied in a culturally sensitive manner, as is arguably mandated by the *Canadian Charter* itself,<sup>96</sup> so as to accommodate indigenous difference.<sup>97</sup> But individuals are nonetheless legally entitled to challenge the abuse of indigenous collective power in a meaningful way, and existing data shows that they are prepared to seek redress from their governments to vindicate their individual rights or freedoms.<sup>98</sup>

The exercise of indigenous powers relating to personal law is further circumscribed by the treaties through directive principles and legal standards designed to safeguard the interests of vulnerable individuals. For example, indigenous legislation on adoption, guardianship, and tutorship must affirm and respect the primacy of the best interests of the child.<sup>99</sup> In addition, indigenous law must in several areas be aligned with requirements protecting vulnerable individuals laid down in provincial or federal statutes,<sup>100</sup> thereby resulting in the harmonization of indigenous and non-indigenous laws.

95. See Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

96. Section 25 of the *Charter* provides that “[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada . . .” Some commentators take the view that section 25 mandates that *Charter* rights and freedoms should be construed in a culturally sensitive way so as not to unjustifiably undermine indigenous distinctive philosophies and traditions. For a useful review of section 25, see GRAMMOND, *supra* note 13, at 428–38.

97. For an exhaustive study of the culturally sensitive application of the *Charter* to indigenous systems of justice, see DAVID L. MILWARD, *ABORIGINAL JUSTICE AND THE CHARTER: REALIZING A CULTURALLY SENSITIVE INTERPRETATION OF LEGAL RIGHTS* (W. Wesley Pue ed., 2012).

98. See Ghislain Otis, *Aboriginal Governance with or Without the Canadian Charter?, in* *ABORIGINALITY AND GOVERNANCE: A MULTIDISCIPLINARY PERSPECTIVE FROM QUEBEC* 265 (Gordon Christie ed., 2006).

99. Most treaties also require that an indigenous law on child protection expressly provide that it “will be interpreted and administered such that the Safety and Well-Being of Children are the paramount considerations.” See Maa-nulth Agreement, *supra* note 68, § 13.16.3; Tsawwassen Agreement, *supra* note 68, at ch. 16, § 70; Lheidli T’enneh Agreement, *supra* note 68, at ch. 7, § 64; Yale Agreement, *supra* note 68, § 3.16.2(a); Tlicho Agreement, *supra* note 68, § 7.4.4(g); Tla’amin Agreement, *supra* note 68, at ch. 15, § 74(a).

100. See, e.g., Yale Agreement, *supra* note 68, § 3.14.3(b) (providing that indigenous adoption laws shall “require the consent of individuals whose consent to a Child’s adoption is required under Provincial Law, subject to the power of the court to dispense with such consent under Provincial Law.”). See also Tla’amin Agreement, *supra* note 68, at ch. 15, § 63(b). The *Lheidli T’enneh Agreement* requires that indigenous laws regarding adoption and child protection establish standards comparable to standards set out under Provincial Law. See Lheidli T’enneh Agreement, *supra* note 68, at ch. 17, §§ 54(b), 64(b); Tla’amin Agreement, *supra* note 68, at ch. 15, § 74(b). According to section 17.18.3 of the *Labrador Inuit Agreement*, Inuit laws on support, marital property, or family or domestic affairs “must accord rights to and provide for the protection of spouses, cohabiting partners, children, parents, vulnerable family members and individuals defined as dependents under Inuit Laws that are comparable to the rights and protections enjoyed by similarly situated individuals under Laws of General Application.” Some treaties subject marriages under indigenous law to provincial rules or requirements

Given the unqualified right to exit protected by the treaties and considering the foregoing human rights guarantees enshrined in the treaties, the argument that choice of law should be a feature of treaty governance to protect individuals from group oppression appears to be fatally undermined. The option to turn to state law would not afford an indigenous individual a decisive human rights advantage and, in fact, experience shows that state law may itself be in breach of *Canadian Charter* rights and freedoms. On the other hand, maintaining choice of law would create systemic competition between indigenous and state law to the potential detriment of indigenous law given the imbedded power dynamics.

#### CONCLUSION

Like the constitutional recognition of aboriginal rights, modern treaties have added a new layer of complexity to legal pluralism in Canada. They lay down a principle of individual choice of law, but this principle can in most cases be reversed by explicit indigenous legislation with respect to personal law matters such as marriage, adoption, or successions. No modern treaty indigenous government has yet legislated on choice of law or even made any substantial use of its legislative authority with respect to personal law. When such legislation is enacted, making indigenous law exclusive will strengthen the legal systems of fledgling authorities put in place to further self-government and correct now-discredited colonial policies. Other considerations may nevertheless favour a choice model.

Individual choice of law is one possible way of reconciling legal pluralism with individual freedom and human rights, although making it work in practice is admittedly a challenge, given the sociological forces that often impede individual autonomy. Formally placing the state and indigenous legal orders into competition with each other could be an alternative to aligning indigenous law with the state's human rights instruments. But indigenous governmental action based on modern treaties is subject to the *Canadian Charter* and also, in some cases, to indigenous charters of rights.<sup>101</sup> Therefore, the argument in favor of choice

based on human rights loses its force because indigenous individuals governed by these treaties are in no way delivered defenseless to community powers.

Yet it may be that many indigenous individuals value the notion that, in addition to their status and rights as members of treaty indigenous nations, they can still enjoy all the rights and privileges of Canadian citizens. Accordingly, regardless of human rights considerations, indigenous communities might be reluctant to deny

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so that marriage licenses may be issued by indigenous authorities only if such authorities have been appointed as an issuer of marriage licenses under provincial law and the issuance of the marriage license complies with the provincial marriage act. *See* Yale Agreement, *supra* note 68, § 3.21.4; Tla'amin Agreement, *supra* note 68, at ch. 15, § 124.

101. For example, chapter 2 of the *Labrador Inuit Constitution* contains the *Labrador Inuit Charter of Rights and Responsibilities*, which applies to Labrador Inuit governmental institutions. *See* THE NUNATSIAVUT CONSTITUTION ACT [CONSTITUTION] Dec. 1, 2005, sched. 1-A, <http://www.nunatsiavut.com/wp-content/uploads/2014/03/IL%202005-02%20-%20E.pdf> [<https://perma.cc/NJ75-RPDN>].

their members access to state law in the area of personal law. In that case, they should consider regulating choice, at least in terms of procedure and form, to ensure that it is free and informed and to guarantee a fair competition between indigenous and non-indigenous law within the framework of Canadian state legal pluralism.