

BOOK REVIEW

Tribal Constitutionalism: States, Tribes and the Governance of Membership KIRSTY GOVER Oxford University Press, 2010*

Beyond Blood: Rethinking Indigenous Identity PAMELA D PALMATER Purich Publishing, 2011*

When my father was growing up in the north end of Winnipeg in the 1940s and 1950s, his Ojibway and Métis heritage were things to be hidden: he and his sisters told people that they were ‘French.’ My mother, on the other hand, grew up on her reserve in the Pas, Manitoba, and it was from there that she was sent to residential school at the age of five. To my mother, her Cree heritage was unshakeable, though the residential-school experience must surely have put these self-understandings to an awful test. My mother and father met and fell in love and had two children, of which I am the younger. Their union was in no way atypical, but it was not without consequence.

My father’s family history is partly Métis, partly from the Dog Creek reserve in Manitoba. He was not a status Indian because his great grandfather was said to have accepted land in exchange for his legal recognition as a treaty Indian. So when my parents married, he was a non-status Indian who told people he was French, and she was a Cree woman of the Opaskwayak nation with a status card issued by the government of Canada – the card was legal recognition of her place in a line of Cree persons who had signed onto Treaty #5, and it was a guarantee of her place in the generations of Cree people entitled to treaty rights. Soon after they married, my mother received a letter from the Department of Indian Affairs notifying her that she was no longer, legally, an Indian. Because she married my father, a non-status Indian and because, in those days, Indian status travelled only through patrilineal lines, the act of marrying my father was sufficient to strip my mother of her legal status as an Indian.

Twenty years later, in 1985, the Government of Canada amended the Indian Act with Bill C-31, the effect of which was to reinstate my mother, legally, as an Indian, and at the age of fourteen, I suddenly became a legal Indian. But my sister and I were not the same kind of Indian as my mother; we were 6(2) Indians, named after that section of the Indian Act that made us status Indians, and while we enjoyed all the rights and

* All subsequent page references are to these texts.

benefits of status Indians like my mother, my sister and I cannot pass on our status as Indians to our children unless we have children with other status Indians (known informally as the two-generation rule, this section of the Act imports a blood quantum test). Love being what it is, I have two children, neither of whom is a status Indian because their mother is not a status Indian. With Bill C-3, the Parliament of Canada has again amended the Indian Act such that my children are now 6(2) Indians, so that they are in exactly the same place as I was in 1985.

My family history, our coming in and out of legal recognition as Indians, is sadly a relatively normal part of being Indigenous in Canada. Two books out in the last year consider the issues of Indian status, Indigeneity, tribal identity, and the social, political, legal framework around the construction of these terms. Kirsty Gover's *Tribal Constitutionalism: States Tribes and the Governance of Membership* is the more academic of the two and it makes an important contribution to the literature, not least because Gover bases her account on a large, empirical study of tribal membership codes from Australia, New Zealand, Canada, and the United States. Pamela D Palmater's *Beyond Blood: Rethinking Indigenous Identity* is personal, vivid, and policy-oriented.

Gover begins, appropriately, with a deconstruction of the term 'Indigeneity.' What is it to be an Indigenous person? Is it ancestry that determines Indigeneity, or more scientifically, does blood quantum do the work of creating racial identity? Does culture play a role, and if so, how much? Is the idea of being an Indigenous person something that only an Indigenous community can bestow, or is Indigeneity the domain of state recognition? The answer, Gover tells us, is that each of these factors has mattered in the past and in all likelihood will continue to matter into the future. Blood quantum matters because blood ties are evidence of ancestry, and ancestral ties are part of what makes today's Indigenous communities the rightful inheritors of treaty promises, rights, and accommodations. State recognition matters because, through the recognition of Indigenous tribes and their members, states determine the allocation of benefits and resources to a distinct and knowable class of persons. Culture matters because it is the unique culture of Indigenous communities that make those communities what they are: Indigenous.

The central issue that Gover sets out to examine is the 'consequences of the distinctions' between Indigeneity and tribal membership (1). She makes this examination in the context of membership codes, arguing that 'membership rules give shape to an indigenous concept of indigeneity and an indigenous-non-indigenous boundary' (11). The membership codes that Gover has gathered for her study have been developed by Indigenous communities because settler governments require membership lists in order to know who is able to exercise the unique rights

enjoyed by Indigenous people. Tribal communities see their membership lists as exercises of their sovereignty or as articulations of their contemporary identity, and Gover notes that, in this sense, tribal and state governments approach the subject of membership codes from very different perspectives.

Where Indigeneity and tribal membership are fused together, the class of Indigenous persons perfectly coincides with tribal membership: to be Indigenous is to be a recognized tribal member. But of course, things are never so straightforward, and it is easy to imagine the enormous consequences of being left on the outside, to understand oneself as an Indigenous person but to lack any official recognition as an Indigenous person. Recognition matters because recognition is the key distinction between understanding oneself as Indigenous and being a person who is capable of exercising rights as an Indigenous person. The rights at issue can be enormously personal; the right, for example to engage in political activities like community elections, or the right to reside in a particular community, or the right to be buried alongside one's ancestors. Other rights have significant economic benefits like rights to harvest traditional resources or the right to access particular health care and education resources. Summarizing this view, Gover writes that 'the regulation of membership and disputes about how it should be done and who should do it, have functioned as proxies for discussions about resourcing, service provision, dispute resolution and land use' (210).

Gover's work is important, not so much for her conclusions, which essentially amount to a statement that '[t]ribal membership governance and its public consequences . . . should be dealt with by agreement and dialogue, not imposition' (209), but because Gover develops an analytic framework and a taxonomy for talking about the legal recognition of Indigenous status based on a reading of actual current and historical membership codes that lays bare the issues, something not reproduced elsewhere. That said, Gover's work is probably at its thinnest in discussing Canadian Indigenous membership codes, since she has been able to access so few of these documents (243 out of more than 600 Canadian Indian Act communities) and so the value of her work to Canadians lies not in its cataloguing but in its analytical framework. This is in sharp contrast to Palmater's work which is based exclusively on the Canadian experience, to which I now turn.

In Canada, membership codes are not necessarily coincident with state recognition. Section 10 of the Indian Act allows Canadian First Nations to develop their own membership codes, and this, in turn, adds new layers of complexity because it becomes possible to be recognized by the state as a legal Indian without having a home community in which to exercise one's rights; and conversely, it is possible to be a member of a

recognized First Nation community without being recognized by Canada as a rights-bearing Indian person. One would think that the capacity to create membership codes independent of the Canadian state would be a huge boost to the self-governance ambitions of First Nation communities but, as Palmater points out, most communities that have taken advantage of section 10 have simply adopted some version of the membership codes contained within the Indian Act. This means that many First Nations choose membership rules that greatly restrict the number of persons recognized as community members and some communities have chosen even more restrictive rules than would have been imposed under the Indian Act.

Membership in a Canadian First Nation community is often thus reduced to the question, 'Has the government of Canada recognized you as a legal Indian?' This abdication of jurisdiction – for that is what this amounts to – by First Nations in Canada leaves many Indigenous people without the right to vote in band elections, without the ability to reside in their home communities, without the ability to exercise treaty rights, and without affirmation of their identities as Indigenous people. Distinctions like this can destroy families and tear communities apart. So why have First Nations chosen membership rules as or more restrictive than those imposed on them by the Indian Act? The answer is resources. Palmater goes on at great length to develop what she feels is a more fair set of guidelines for choosing community members, and without doubt, adopting Palmater's approach would lead to considerably more inclusive membership rules in most First Nation communities. But what Palmater fails to observe except in passing is that membership rules delineate access to community resources, and Canadian First Nation communities receive benefits based in part on the number of community members recognized as legal Indians by Ottawa, not the number of community members on a band list. Thus, as communities increase membership by including more and more Indigenous people who are not recognized by Canada as rights-bearing Indigenous people, those communities have their already thin resources further stretched. There is, then, literally no incentive to create membership codes more inclusive than those imposed by the Indian Act, since every additional community member means more persons to house and maintain in poor and already grossly under-served communities.

The real problem, then, is not membership codes *per se*; the problem is that there is no alignment between membership rules and community benefits. A First Nations community is not like a municipality, where increased population means an increased tax base: First Nations under the Indian Act have very limited powers of taxation, so every additional member means a decrease in the funding available to every existing

member. No municipality could survive like this, and it is astonishing that we think First Nation communities could prosper under these conditions. What is required is a mechanism that allows members of First Nation communities to choose to direct all or a portion of their income tax to their home communities. This would sever the tie between funding and Indian Act recognition because even persons who were not recognized by Ottawa would be free to rejoin their home communities, and those communities would enjoy the benefits of increased membership through an increased tax base with which to distribute services to its members. Relatedly, for the first time in more than a hundred years, Chiefs and Council would be accountable to its tax paying members, not simply to the civil servants in Ottawa who now control the purse strings.

Gover's analysis concludes with the sentiment that the development and implementation of tribal membership should focus not only on the question of who is an Indian and who is not legally an Indian but rather on what type of Indian a person might be: Crow, Cree, Haida, or Blood. It must also focus, crucially, on how these identities combine, if at all, with other Indigenous identities as persons marry from one tribal group or another and as clan affiliations are potentially reaffirmed as having familial significance across tribal groups. This, Grover states, would 'invite observers to see settler governments in relation to an inter-Indigenous order, rather than as parties to a series of bilateral arrangement with tribes and individuals respectively' (212). This would be an expansion of our conceptual understanding of Indigenous people as existing in a web of relations that work independently of settler governments and thus represents new opportunities for Indigenous people to challenge the existing order of their communities, identities, and relationships with settler governments. This is a logical next step because Indigeneity is a constantly developing concept: it is not fixed in time, and as Palmater says, Indigenous people are not 'historic communities which are deemed to have existed only at a period of time in the pre-contact era, and who are now slowly disappearing through inter-marriage and assimilation' (176). Today's Indigenous communities are modern places, and these communities require modern and contemporary institutions of governance like the ability to tax members and to set and pursue ends independently of Ottawa's purse strings and the right to develop a membership code that meets the needs of these contemporary communities.

Douglas Sanderson
University of Toronto Faculty of Law