"Justifying Blood Quantum as *Sui Generis* Tribal/State Law?"

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Review of Kirsty Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* **(New York: Oxford University Press, 2011), [***Tribal Constitutionalism***] 276 Pages.**

Former colonial governments, like Canada, New Zealand, Australia, and the United States have a common history of acquiring Indigenous lands and resources through means which were and remain destructive to each country's Indigenous peoples. Their colonial laws and policies divided, controlled, and attempted to assimilate the Indigenous Nations that occupied those territories so as to speed up settlement. In Canada, scalping laws, Indian residential schools, laws that banned cultural practices, and those that made it criminal for lawyers to assist Indigenous Nations are all part of that colonial legacy. The most powerful and arguably most destructive were those laws relating to who the government deemed to be Indigenous. Early definitions were based on racial concepts of what constituted a biological Indian that originated from pseudo-sciences like eugenics and phrenology—i.e., skin colour, curl of hair, cranial size, etc. The legislative objective was to assimilate Indians over time and the best way to do that was through a notional blood quantum formula which, coupled with out-marriage, would result in their legislative extinction. State legislative definitions and program criteria were imposed over traditional notions of what it meant to be Mi'kmaq, Maori, or Cherokee. Such definitions

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included common territory, history, ancestry, language, culture, laws, and values. These two concepts, the legislative and traditional, have clashed in recent years as Indigenous Nations all over the world are rebuilding their capacity and re-asserting their sovereignty and identities. Kirsty Gover, in her book *Tribal Constitutionalism: States, Tribes and the Governance of Membership*, confronts this definitional conflict head on, but in a surprising twist, advocates that post-colonial governments should have more of a role in determining Indigenous identity.[1] Further, she seems to suggest that blood quantum as criteria is suitable so long as it is tribal blood rather than generic Indian blood.

Kirsty Gover is a lawyer and professor at Melbourne Law School in Australia where she teaches courses on property and international law. Previously, she served as Senior Advisor and consultant to the New Zealand government on international and domestic policy related to Indigenous peoples and represented New Zealand at international drafting sessions related to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[2] Interestingly, the four countries covered in this book—Canada, the United States, Australia, and New Zealand—are the same four that voted against UNDRIP when it was passed by the United Nations in 2007.[3] UNDRIP contains many provisions relating to the right of Indigenous peoples and communities to determine their own identity and membership rules. Gover's four scholarly publications all relate to her doctoral research, which examined the membership codes for Indigenous communities in Canada, the United States, Australia, and New Zealand.[4] This book represents a compila-

1 K Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (New York: Oxford University Press, 2011) [*Tribal Constitutionalism*].

2 Melbourne Law School, "Academic Profile: Dr Kirsty Gover", online: Melbourne Law School <http://www.law.unimelb.edu.au/index>.

3 United Nations Permanent Forum on Indigenous Issues, "UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES—Adopted by the General Assembly 13 September 2007", online: UNPFII <http://www.un.org/esa/socdev/unpfii/en/declaration.html> [*UNDRIP*].

4 K Gover & N Baird, "Identifying the Maori Treaty Partner" (2002) 52 UTLJ 39 ["Identifying the Maori"]. K Gover, "Comparative Tribal Constitutionalism: Membership Governance in Australia, Canada, New Zealand, and the United States" (2010) 35 Law & Soc Inquiry 689 ["Comparative Tribal Constitutionalism"]; K Gover, "Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States" (2008/09) 33:1 Am Indian L Rev 243 ["Genealogy as Continuity"]; K Gover, "Tribal Constitutionalism and membership governance in Australia and New Zealand: Emerging Normative Frictions" (2009) 7:2 New Zealand Journal of Public and International Law 191 ["Tribal Constitutionalism and Membership Governance"].

tion of her previous work and provides an in-depth consideration of "tribal" membership codes in each of the four countries except Canada.[5]

The legalistic language used throughout and the multiple references to constitutional documents and legal cases means this book is geared primarily at lawyers who have a good base knowledge of Indigenous legal issues. This legalistic style of writing also means that the book would not be easily accessible to students, community members, or the public at large without a strong legal background. This places it in contrast to most books in this area, which are aimed at a broader audience that often includes Indigenous communities, governments, Aboriginal organizations, advocacy groups, and the public at large. That being said, the book is well suited to its legal audience and adds a detailed legal history both of how membership regimes were developed in each country, and of the laws and policies that affect them today. This is an important contribution to the current legal literature relating to Indigenous peoples as many textbooks skim over the highly controversial issues of Indigenous identity, membership and citizenship issues. In reality, Aboriginal and treaty rights, Aboriginal title, land claims and other rights are all dependent on the identification of Indigenous Nations and their citizens, and that depends, ultimately, on who has control over that determination. This book helps lawyers understand the complexities at work in state-Indigenous relations, negotiations, and the development of law and policy better.

The title of the book suggests that it will be a consideration of various constitutions written by Indigenous communities in the four named countries, with a specific focus on their membership provisions. However, a closer inspection of the table of contents reveals a slightly disjointed consideration of a variety of issues that are more reflective of the individual arguments presented in her previous publications, than of elements around a common theme for the book. Although the book is not presented as a compilation piece, some of the chapters are reproduced nearly word for word from her previous work. Specifically, Chapter 1, which includes a discussion of culture, indigeneity, and inter-tribal recognition, is reflective of her discussions in *Identifying the Maori,* published in 2002.[6] Chapter 2, which treats membership governance in the four named countries is a reproduction of her article "Comparative Tribal Constitutions," published in 2010.[7] The discussion of

5 In this book, Gover uses the term "tribal" to refer to Indigenous Nations and communities. The internationally accepted term is "Indigenous" and thus I will only use the term "tribal" where necessary when citing from her book.

6 "Identifying the Maori", *supra* n 4.

7 "Comparative Tribal Constitutions", *supra* n 4.

issues of descent and genealogy in membership codes in the United States that are considered in Chapter 3 follows her article "Genealogy as Continuity" (published in 2008) very closely, including the various charts and graphs.[8] Her article "Tribal Constitutionalism and Membership Governance," which deals with the impact of claims settlements on membership in Australia and New Zealand, is reproduced virtually word for word in Chapter 4, including the listing of membership codes.[9] While compilations of previous works are not uncommon in academic literature, this book is not presented as such and may, as a result, disappoint readers who were expecting a new contribution to the subject matter.

Assuming for a moment that most who read this book have never read Gover's previous publications, this book makes some significant contributions. Never before has such comprehensive data about codes from all four countries been presented to the general public. Generally, data related to internal Indigenous community governance is not available to the public. In fact, here in Canada, it is very difficult to access information related to First Nations, even through Access to Information and Privacy (ATIP) legislation.[10] Her persistence in acquiring these membership codes despite the difficulties speaks to her tenacity as a researcher in such a difficult and controversial research area as membership.[11] This book shares with readers how many Indigenous communities have codes, what kinds of codes they have, how these codes came about, and offers an international comparative analysis. Her appendices provide a comprehensive listing of every membership code for each country and she includes detailed graphs that highlight some of the trends she discovered. This type of data will be useful for other researchers and scholars working in the same area, as well as for Indigenous communities working on new or amended membership codes. However, her strict reliance on state-mandated documents results in a relatively unbalanced view of actual Indigenous "preferences" regarding membership.

The book's core normative question is "What principles should structure the relationship between settler and tribal governments in membership governance"?[12] In other words, "to what degree should a settler government dictate the human boundaries of a tribe as a condition of official

8 "Genealogy as Continuity", *supra* n 4.

9 "Tribal Constitutionalism and Membership Governance", *supra* n 4.

10 *Access to Information Act*, RSC 1985, c A-1 [*ATIP*]; *Privacy Act*, RSC 1985, c P-21.

11 *Tribal Constitutionalism*, *supra* n 1 at 74. Gover recounts the difficulty of accessing the band membership codes and the political and legal controversies which surround such requests.

12 *Ibid* at 2.

recognition"?[13] While Gover addresses the first question and argues for a more inclusive set of criteria, she fails to address adequately the second and arguably more important question of a state's right to determine Indigenous identity and membership. Many of Gover's conclusions are based on her review of individual membership codes found in Canada, New Zealand, Australia, and the United States, which she believes show a very obvious preference in Indigenous communities towards descent-based criteria; what she calls "genealogic tribalism."[14] She argues against racial criteria for determining membership in tribes, but then supports tribal use of blood quantum and descent criteria. She explains that "tribes are moving away from the "race-based" federal Indian blood quantum criteria, and are instead refashioning it into tribal Indian blood quantum.[15] Her thesis that state governments should use tribal criteria as one of the public law criteria to determine tribal membership leaves the decision-making over membership in the states' hands, but transfers the liability (or blame) for using racist blood quantum criteria back to the tribes. Gover argues that this tribal refashioning of federal blood quantum criteria takes blood quantum out of the classification of race and puts it in a *sui generis* category immune from claims of discrimination.[16]

This is a highly problematic line of reasoning and does little to solve the original problem she identified in Chapter 1 of too many Indigenous peoples being excluded from state recognition. It also fails to recognize the profound historical and contemporary influence of state laws and policies on Indigenous concepts of membership. Gover's reliance on membership codes to extract tribal "preferences" is a perfect example as these documents originate with and are circumscribed by state governments, even if they can be amended by tribes (and she notes that some are not). But tribal preferences are beside the point if what is really happening is the state justification of racial blood quantum and descent criteria under the guise of state law accommodating tribal law. Seen in this way, Gover's plea for a more inclusive definition of tribal membership is really a reinvigoration of colonial ideologies based on race, which she describes as culture, and continued state control over Indigenous membership, which she describes as facilitation.

The strict reliance on tribal membership codes, state documents, and interviews also presents a significant research problem. Her resulting analysis

13 *Ibid.*

14 *Ibid* at 113.

15 *Ibid* at 130. Despite her claim that use of tribal blood quantum is a tribal innovation, she acknowledges, almost as an afterthought, that states exercise "powerfully persuasive ideological leverage".

16 *Ibid* at 17, 62–63.

is biased in favour of state interpretations, positions, and ideologies. There is a notable lack of Indigenous perspective in her analysis. While she does engage with the critical literature in her first chapter, it is in relation to how best to theorize state recognition of Indigeneity (relational recognition) as opposed to Indigenous conceptions of Indigeneity or issues related to state control and recognition. Reliance on membership codes created to satisfy state requirements also leads to some factual errors that bring her conclusions into question. For example, she notes that after 1985, 30 First Nations adopted blood quantum codes in Canada. She then reviews the *Indian Act* and determines that Indian blood quantum has "never" been used by Canadian governments.[17] This leads her to assume that blood quantum was a "tribal innovation" in Canada.[18] Her source for this incorrect assertion fact is another state document: Indian and Northern Affairs Canada (INAC)'s Indian registration manual.[19] Yet, Indian blood quantum and descent-based quantum measurements have been a part of colonial legislation since pre-Confederation. Section 4 of the *Gradual Enfranchisement Act, 1869* provided that no Indian of less than "one-fourth Indian blood" would be entitled to Indian monies or interests in the band.[20] This blood quantum ideology informed subsequent *Indian Act* definitions of Indians whereby Indians of one-quarter blood or less were excluded from recognition.[21] Cabinet documents clearly showed that the second generation cut-off rule (two generations of parenting with a non-Indian) that was included during the 1985 amendments to the *Indian Act* was really a "one quarter blood" quantum rule specifically designed to limit the number of Indians, and therefore costs to the government.[22] Today, Canada does not use the term blood quantum publically, but uses terms like "genealogical proximity" to justify a notional one-quarter blood quantum rule.[23] Canada's own expert demographer on indigenous issues, Stewart Clatworthy, has explained that only "full Indians" and "half Indians" are included in federal definitions

17 *Ibid* at 83. "References to Indian blood *quantum* have never been used by the Canadian Federal Government, although references to Indian *blood* appeared in the first attempt to define Indians in the 1850 predecessor to the Indian Act and were not removed from the Act until 1951".

18 *Ibid* ("The Canadian First Nation use of blood quantum, then, is a tribal innovation").

19 *Ibid* at 83. Yet, at 87, Gover acknowledges that "Even though blood quantum is not explicitly used in Canadian public law, the Indian Act measures Indianness by reference to parentage".

20 *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c 6 (32–33 Vict) [*Gradual Enfranchisement Act, 1869*] s 4.

21 P Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing, 2011) [*Beyond Blood*].

22 *Ibid* at 28–32, 41.

23 *Ibid.*

of Indian and quarter Indians are excluded.[24] Gover makes the same claim of tribal blood quantum being an innovation of tribes in the U.S. and her source is an interview with a federal official.[25] These assumptions overlook the profoundly devastating and well-documented effects state control has had and continues to have on Indigenous practices.[26] Her concessions about the reality of state influence, both direct (through law) and indirect (through refusal to provide recognition or benefits), appear as afterthoughts as opposed to central to her analysis.[27] Additionally, so much of her overall analysis is based on the tribal experience in the U.S. that it is hard to draw general conclusions about Canada, New Zealand, or Australia with any degree of accuracy.

Gover's book presents a confusing engagement of an already complex concept of Indigeneity from the settler state perspective. Although she characterizes her book as one which, unlike those before her, considers the issue of tribal membership from the perspective of the tribes themselves, her complete reliance on state-controlled legal identification processes suggests otherwise. It cannot be said that a consideration of band membership codes created in Canada pursuant to federal legislative requirements under the *Indian Act* and that require government approval are a true reflection of a First Nation's concept of Indigeneity. Similarly, tribal recognition processes in the United States, which have stringent ancestry and blood quantum requirements, cannot be said to truly reflect tribal citizenship preferences. The same can be said of the claims settlement processes in Australia and New Zealand if, as Gover concedes, state requirements are imposed on indigenous groups as a pre-condition to recognition.[28] While she does acknowledge that "tribal identities are shaped at every stage of settler State recognition processes," she fails to truly consider

24 S Clatworthy & A Smith, *Population Implications of the 1985 Amendments to the Indian Act: Final Report* (Winnipeg: Four Directions Consulting Group, 1992) at 54.

25 *Tribal Constitutionalism*, *supra* n 1 at 115. "Tribal blood quantum is a tribal innovation, not a federal one." This was based on an interview with Scott Keep, Assistant Solicitor with the US Department of the Interior.

26 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples,* 1–5 (Ottawa: Minister of Supply and Services Canada, 1996) [*RCAP*]; E Garroutte, *Real Indians: Identity and the Survival of Native America* (Los Angeles: University of California Press, 2003) [*Real Indians*]; B Lawrence, *"Real" Indians and Others: Mixed Blood Urban Native Peoples and Indigenous Nationhood* (Lincoln: University of Nebraska Press, 2004) [*Real Indians and Others*]; S Russell, *Problems in Post-Colonial Tribal Governance* (Carolina: Carolina Academic Press, 2010) [*Tribal Governance*]; T Alfred, *Wasàse: Indigenous Pathways to Action and Freedom* (Toronto: University of Toronto Press, 2005) [*Wasàse*]; *Beyond Blood, supra* n 21.

27 *Tribal Constitutionalism, supra* n 1 at 121, 130.

28 *Ibid* at 167, 181–82, 184, 187, 191, 193, 199, 201. At 193, contrary to her arguments about Indigenous preference for descent/blood based membership rules, Gover explains that the reason why groups are more likely to opt for descent rules is because these criteria "are more likely to pass the Registrar's standard of objectivity." So this is less about actual Indigenous laws, rules or cultural

this factor in her analysis when she concludes that tribes have a preference for descent-based membership codes.[29] This failure has the effect of calling into question her entire analysis of the membership codes.

Even her conceptual treatment of Indigenous Nations and their individual citizens is circumscribed. She uses the term "tribes" to collectively describe all the Indigenous Nations in four countries, when even international protocols designed by Indigenous peoples, use the term "Indigenous Nations" or "Indigenous Peoples."[30] The term "tribe" was commonly used amongst anthropologists and sociologists to denote small groupings of pre-literate, ancient peoples without formalized or permanent leadership structures. Not only does this term not reflect the current status of Indigenous Nations, it also reflects the early ethnocentric ideologies about Indigenous peoples as primitive. Even if one were to take into account the differences in historical terminology usage between states, countries like Canada do not use the term "tribe," but instead refer to Indigenous communities as First Nations. It may only be one word, but through individual words, entire conceptions of a people are formed. In the vast amount of literature dealing with Indigenous issues, one usually only sees the term "tribe" used in Canada by scholars who still view Indigenous peoples as primitive or backward societies that need to be assimilated.[31] Her choice of terminology is also problematic in her treatment of band membership codes.

Gover's description of First Nation (band) membership codes in Canada as tribal "constitutions" is also highly problematic on several fronts. Constitutions are the whole set of fundamental rules, principles and values with which a state, or in this case, an Indigenous Nation, is governed. They are more organic in nature and cover laws (both written and unwritten), traditions, and practices that govern relationships between people; and for Indigenous Nations, between people and the lands, waters, and animals.[32] Constitutions are not

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preferences, and more about the legal requirement of communities to meet state definitions of who is and is not entitled to enjoy certain benefits.

29 *Ibid* at 17.

30 *Ibid* at 7. "I refer to them all as tribes, even though the terminology used to describe them varies from jurisdiction to jurisdiction." Yet, she refers to individual Indigenous peoples as "Indigenous".

31 T Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000); F Widdowson & A Howard, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* (Montreal: McGill-Queen's University Press, 2008); J Reilly, *Bad Medicine: A Judge's Struggle for Justice in a First Nations Community* (Calgary: Rocky Mountain Books, 2010). The exception being references to Indigenous Nations in the United States as "tribes" due to historical and contemporary usage.

32 H Bruce & A Walkem, "Bringing our Living Constitutions Home" in A Walkem & H Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Vancouver: Theytus Books, 2003) 343 at

codes created to satisfy a legislative requirement of Canada, or a recognition policy of the United States. Band membership codes are not constitutions as traditionally understood. Some of them are only one page long and only deal with band membership.[33] These codes do not reflect the views of Indigenous Nations, but instead represent, at best, the views of small communities divided from their larger Nations on small sectoral issues.[34] This a far cry from a comprehensive constitutional document laying out the foundations of a society and the rights and obligations therein. Furthermore, barely one third of all bands in Canada even have a membership code. Of those that do have codes, the majority enacted codes very quickly in reaction to short legislative time-frames imposed by Canada. As a result, many of them simply contain provisions identical or similar to the *Indian Act* provisions so as not to affect federally-imposed funding mechanisms.[35] The refusal by most bands in Canada to submit to federal jurisdiction over membership seems to argue against most of Gover's generalizations about what she sees as tribal views and preferences in Canada. Although this book is a good resource for identifying what legal instruments are currently in place in relation to membership in each country, what is missing is community-based information about whether these codes are used and if so, how are they viewed by the community; i.e., whether they are truly reflective of their "preferences."

The underlying conflict in the book is its failure to address the issue of who should be determining Indigeneity, which naturally precedes a consideration of who is Indigenous. Concessions about the impacts of state control and influence on membership are made, but not included in any meaningful way, in the overall analysis and interpretation of what is or is not considered "tribal" preference. How do her concessions impact the legitimacy of continued state control over membership? How much of what is reflected in Indigenous membership codes are coerced directly by state law or indirectly by withholding of recognition? Where is the engagement with state policy objectives—what are they are, and are they reasonable or compatible with modern domestic and international laws? Given that Gover has advised New Zealand on UNDRIP, I would have expected an analysis of the internationally recognized right of Indigenous peoples to determine their own identity and its specific criticism

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33 *Beyond Blood, supra* n 21 at c 4. See codes at Indigenous Nationhood, "Band Membership Codes", online: Indigenous Nationhood <http://www.indigenousnationhood.com/identity/membership/codes.html>.

34 *RCAP, supra* n 26.

35 *Beyond Blood, supra* n 21 at c 4.

of race-based criteria.[36] While I agree with her completely that Indigenous membership should not be restricted to those who are currently enrolled in recognized Indigenous communities, we differ greatly on the reasons why.[37] She argues that tribal membership rules, while not as ascriptive as commonly theorized in the literature, are too focused on territory, history, and culture to be legitimate. Many others have argued that reliance on First Nation membership codes is problematic because they are designed within the confines of discriminatory state-controlled legislation and processes.[38] This means she comes out supporting blood quantum as long as it is tribally-based, and the majority of the literature rejects blood quantum on any basis, characterizing such rules as racist criteria that only serve state attempts to assimilate Indigenous peoples through blood dilution (out-marriage).

Gover asserts that Indigenous conceptions of membership ought to be one consideration in public law definitions of Indigeneity as a means of "securing the consent of Indigenous communities," which she argues is a defining feature of state political theory.[39] In the end, this book reads as an indirect justification of the continued use of blood quantum in public law determinations of Indigeneity so long as it can be presented as tribal "preference" or "innovation." Her argument that states should accommodate tribal law by considering tribal membership criteria as one of the many ways to determine public Indigeneity is a guise under which to continue the use of blood quantum and will ultimately result in the eventual assimilation of Indigenous peoples via out-marriage. The questions that were never answered are: What is the practical difference between tribal reliance on blood quantum versus state-based blood criteria? How does this transfer of liability from state to tribe "shape the political theory of settler states"?[40] In what way does the continued use of blood quantum mean that states have reformulated their constitutions to

36 *UNDRIP, supra* n 3 at articles 8, 9, 11, 13, 15, 18, 20, and especially article 33. Also missing is a substantive analysis of Aboriginal and treaty rights and their impacts on the right of states or Indigenous communities to determine membership.

37 *Tribal Constitutionalism, supra* n 1 at 19. "A theory of recognition that aims to give official meaning and protection to indigenous culture cannot reasonably begin and end with tribes".

38 *Beyond Blood, supra* n 21; *Real Indians, supra* n 26; *Real Indians and Others, supra* n 26; P Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); S Grammond, *Identity Captured By Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal: McGill Queen's University Press, 2009); *RCAP, supra* n 26 at 168. Regarding citizenship criteria for Aboriginal Nations: "it cannot specify a minimum 'blood quantum' as a general prerequisite for citizenship. Modern Aboriginal nations, like other nations in the world today, represent a mixture of genetic heritages. Their identity lies in their collective life, their history, ancestry, culture, values, traditions, and ties to the land, rather than in their race".

39 *Tribal Constitutionalism*, *supra* n 1 at 9.

40 *Ibid.*

accommodate Indigenous laws? This book left me with more questions than answers. In my view, this book offers little to lawyers or Indigenous communities seeking to undo the destructive force of state laws and policies on Indigenous membership rules.