Book Review

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Dimitrios Panagos, *Uncertain Accommodation: Aboriginal Identity and Group Rights in the Supreme Court of Canada* (Vancouver: UBC Press, 2016).

Discussion on the implications of the Aboriginal and treaty rights clause in section 35 of the *Constitution Act, 1982* is far from over. In his book, *Uncertain Accommodation: Aboriginal Identity and Group Rights in the Supreme Court of Canada,* political science professor Dimitrios Panagos approaches the scope of section 35 from a distinctive perspective combining considerations from politics, philosophy, and the law. The book examines the different conceptualizations of *Aboriginality*. He argues that the Supreme Court of Canada's (SCC) approach to the meaning of *Aboriginality* has led to what he would identify as the misrecognition of Aboriginal peoples in Canada.

Panagos's overview of the historical and legal framework of section 35 lays the foundation for the book. He gives an account of how judicial perspectives on Aboriginal rights shifted from skepticism to a still-vague constitutional recognition in 1982. However, he suggests that the vagueness of section 35 was intentional, as it was the only way that the proponents of the section could have succeeded in including it in the Constitution.[1] Consequently, Canadians remained in the dark about the nature and scope of Aboriginal rights until the 1990s, when the Supreme Court of Canada began to interpret section 35.[2]

In his examination of the Court's cases on section 35, Panagos finds that Aboriginal rights as embedded in the *Constitution Act, 1982* interpret a central concept of *Aboriginality*, concerned with the protection of the collective identity of Aboriginal peoples.[3] Panagos recognizes two competing scholarly

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1 Dimitrios Panagos, *Uncertain Accommodation: Aboriginal Identity and Group Rights in the Supreme Court of Canada* (Vancouver: UBC Press, 2016) at 6.

2 *Ibid* at 19-20.

3 *Ibid* at 36. See also *R v Sparrow*, [1990] 1 SCR 1075, 111 NR 241; *R v Van der Peet*, [1996] 2 SCR 507, 200 NR 1; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 220 NR 161; *Haida Nation*

approaches to the conceptualization of *Aboriginality*: *Trait-Based* and *Relational*. The former deals with the collective characteristics that the members of a group share, while the latter conceptualizes identity around what Panagos refers to as *a set of relations*.[4] He defines *a set of relations* as either bonds of attachment that groups feel for themselves or the differences between groups in terms of resources, power, and opportunity.[5] After an examination of the pros and cons of both approaches, the author follows scholars like Schouls,[6] Dick,[7] and Barcham[8] in adopting the *Relational* approach as the superior conceptualization of Aboriginality.

Panagos goes on to construct three theoretical versions of *Aboriginality* using the *Relational* approach. These versions are *Nation-to-Nation*, *Colonial*, and *Citizen-State*. The *Nation-to-Nation* approach reflects the political interaction between Aboriginals and Europeans in the pre-colonial era, which is driven by cooperation and the pursuit of group-specific interests.[9] Within this account, Aboriginal nations created a mutual relationship with Europeans to gain advantages like military alliances and access to European goods.[10] The Europeans also had their motives for establishing and maintaining cooperative interactions with Aboriginal nations.[11] Panagos contends that a *Nation-to-Nation* era facilitated Aboriginal self-government and self-definition.[12]

In contrast, the *Colonial* theoretical approach shows disrespect towards the culture and values of Aboriginal peoples by the European colonizers.[13] Here, there is no cooperative interaction between the colonial powers and the Aboriginal nations; the initial interaction between these groups is marked by a lack of consent.[14] Thus, *Aboriginality* within the *Colonial* approach denotes

v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511; and *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

4 *Ibid* at 35, 41.

5 *Ibid* at 41.

6 Tim Schouls, *Shifting Boundries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003).

7 Caroline Dick, "Politics of Intragroup Difference: First Nations' Women and the *Sawridge* Dispute" (2006) 39 Canadian Journal of Political Science 97.

8 Manuhuia Barchvarova, "(De) Constructing the Politics of Indigeneity" in Duncan Ivison, Paul Patton and Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000).

9 Panagos, *supra* note 1 at 60.

10 *Ibid* at 60. See also Robert A Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press) at 21.

11 Panagos, *ibid* at 62.

12 *Ibid* at 62.

13 *Ibid* at 63.

14 *Ibid* at 63.

a collective identity made by foreigners who subjected Aboriginal nations to their laws.[15]

Lastly, under the *Citizen-State* approach, Aboriginals are theorized to enjoy the same rights as non-Aboriginals, as well as another special bundle of rights granted just for them.[16] In this approach, the special rights held by Aboriginals proceed from the sovereignty of the Canadian Crown and the same sovereignty protects those rights.[17]

After consideration of these approaches to Aboriginality, Panagos argues that Section 35 can best be interpreted through the *Citizen-State* approach. Besides his consideration of these three approaches, Panagos also examines submissions on *Aboriginality* in the Supreme Court of Canada by claimant Aboriginal communities and federal and provincial governments. He also considers the Court's decisions in this area. While the submission of Aboriginals links self-government to Aboriginal culture and identity (*Nation-to-Nation* approach), the submissions of governments tend to continue to tilt towards the *Colonial* approach.[18] The Court itself has tended to try to strike a balance between the attachments of Aboriginals and the sovereignty of the Crown. This permits justifiable infringements of Aboriginal rights for a "greater good" (as understood through the *Citizen-State* approach).[19]

In his last chapter, Panagos argues that the approach of the Supreme Court of Canada to Aboriginality is unfairly prejudicial to Aboriginal peoples in Canada. In his view, a jurisprudential gap exists because the SCC has failed to give reasons for adopting the *Citizen-State* approach of *Aboriginality* over the *Nation-to-Nation* approach. He contends that there can only be a justification for this gap if an alternative like the *Nation-to-Nation* approach is unworkable.[20] Thus, he concludes that the linking of section 35 to the *Citizen-State* approach has led to the harms of misrecognition and unfair treatment of Aboriginal peoples in Canada. He aligns himself with Professor Charles Margrave Taylor, whose recognition theory can be used to argue that the misrecognition of Aboriginal peoples is a form of injustice because it results in

15 *Ibid* at 65. See also Robert Blauner, "Internal Colonialism and Ghetto Revolt" (1969) 16:4 Social Problems 393 at 396, Online: <https://www.jstor.org/stable/799949>.

16 Panagos, i*bid* at 66.

17 *Ibid* at 67. See also Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 157.

18 Panagos, *ibid* at 76.

19 *Ibid* at 86.

20 *Ibid* at 112.

inequality and exploitation.[21] Therefore, the Court's approach results in the unfair treatment of Aboriginal peoples in Canada.[22]

As mentioned above, Panagos's arguments centre on the meaning of *Aboriginality*. However, he opts for the more uncertain *Relational* approach towards defining that concept. The *Relational* approach, as he points out, is a conceptualization of collective identity built around *a set of relations*.[23] This set of relations seem largely idealistic and unclear. Panagos downplays the relevance of the *Traits-Based* approach, which is arguably indispensable in defining *Aboriginality*. Beyond the concept of *Aboriginality*, one can sensibly argue that the *Trait-Based* approach is the best approach for defining identity. There have been arguments along such lines in the context of African identities, for example, framed around the very foundational idea that every being is distinct from others based on that being's traits.[24] This principle arguably also extends to the identities of communities and nations. The traits to be considered are by no means limited to physical traits but also include culture, descent, language, values, shared practices, attachment to the land, and so on.[25] This alternative remains more plausible than Panagos's assumption. This is because the first step for the identification of a group of people should ordinarily be to consider their traits; such theories deserve ongoing attention.

I do not suggest in any way that the *Trait-Based* approach to community identity is flawless, but Panagos's full reliance on the *Relational* approach seems to jettison the *Trait-Based* approach, and this decision may prove to be problematic. Arguably, the *Relational* approach makes the concept of *Aboriginality* vaguer than it already appears to be. The *set of relations* which the *Rational* approach deals with are less obvious and arguably less reliable than the traits of a group. On Panagos's account, the set of relations includes bonds of attachment a group of people feel for themselves and the differences between groups in terms of resources, power, and opportunity.[26] First, it may be difficult to ascertain the kind of bonds of attachment a group may feel for themselves. Assuming that these bonds can be ascertained, Panagos does not show how or why those bonds would override the identification of Aboriginal peoples

21 *Ibid* at 113. See also Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994) at 64.

22 Panagos, *ibid* at 114.

23 *Ibid* at 41.

24 Frank Okenna Ndubuisi, "The Philosophical Paradigm of African Identity and Development" (2013) 3:1 Open Journal of Philosophy 222 at 223.

25 Panagos, *supra* note 1 at 36.

26 *Ibid* at 41.

by their traits, including their attachment to land, culture, descent, language, values, shared practices, and so on.[27]

Finally, Panagos recognizes the legal challenges in his contention that, if section 35 should be connected to *Aboriginality*, Aboriginal rights should be made to uphold the *Nation-to-Nation* approach.[28] The challenge is that the nature and scope of the sovereignty of the Crown and title still exist.[29] No matter the approach adopted for section 35, the rights provided therein flow from the honour of the Crown.[30] Hence, it is arguable that the *Nation-to-Nation* approach as Panagos illustrates may not be legally attainable in Canada today.

This book adds to the existing literature on the need for the Supreme Court of Canada to be more proactive about and clear on the implication of section 35. In order to illustrate the harm that arises from the connection of Aboriginal rights to *Aboriginality* within the decisions of the Supreme Court of Canada, Panagos's analysis brings together scholarship on law, philosophy, and Aboriginal politics.[31] The book is particularly important because of the need to keep examining the Supreme Court of Canada case law on the protection of the rights of Aboriginal peoples. Even if one has ongoing questions on the theoretical approach adopted, the book effectively analyses a number of the Court's decisions to show its misconception and misrecognition of *Aboriginality*, which has consequently led to the unfair treatment of Aboriginal peoples in Canada. The themes at issue will warrant ongoing attention, but this book makes important contributions to discourses surrounding Reconciliation in Canada today.

27 *Ibid* at 36.
28 *Ibid* at 125.
29 *Ibid* at 125.
30 Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29:1 SCLR 543 at 544.
31 Panagos, *supra* note 1 at 124.