Shadows and Texts:
The Indigenous Legal Tradition and Courts

PRESENTED BY

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Christine Zuni-Cruz discusses the ways in which Indigenous legal traditions are considered by the courts. After comparing section 718.2(e) of Canada's *Criminal Code* and the *Indian Child Welfare Act* in the US, she concludes that courts in the United States and Canada have neither recognized nor implemented Indigenous legal traditions. She suggests focusing on the ways to bring the common law, civil law and Indigenous law traditions together in the court system.

Over-representation in Canadian prisons

In Canada, section 718.2(e) of the *Criminal Code* requires that all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders. This provision was introduced in 1996 to reduce the over-representation of Indigenous people in Canada's prison population. Since *Gladue*, in 1999, the courts have used reports drawn up under section 718.2 (e) of the *Criminal Code* to gain information on the unique, systemic or contextual factors that bring Indigenous offenders before the courts, leading to more appropriate sentencing procedures and sentences. Despite this, the principles of reparatory justice inspired by Indigenous legal traditions (rehabilitation, alternatives to imprisonment) incorporated into statutes and into the common law are still interpreted through the prism of common law. This does nothing to promote or ensure recognition for those traditions: the Indigenous view of the world is absent from penal procedures.

The *Indian Child Welfare Act* in the United States

In the United States, Congress passed the *Indian Child Welfare Act* (ICWA) in 1978, establishing standards to combat abusive practices in the area of child protection, under which Indian children were separated from their families through judicial adoption or placements with mainly non-Indigenous foster families. Many children were placed in White households, even when other appropriate parents were available. Forty years later, Indian children are still 2.7 times more likely than the national average to be found in the family placement system. Christine Zuni-Cruz questions the reasons for this failure: are the individual states really complying with the requirements of the ICWA and, if so, why are the results so dire for Indian children?

Based on the decision *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), Christine Zuni-Cruz suggests that the Indigenous legal tradition is neither named nor recognized, to the detriment of the collective identity and a child's family and tribal links. The partiality of the courtroom, where legal traditions mingle, results in a biased form of legal pluralism in line with the dominant vision.

The need for mechanisms to build bridges between legal traditions

Christine Zuni-Cruz considers the possibilities for ensuring recognition as spheres in a three-dimensional image, symbolizing the meeting of legal traditions in the courtroom, along with potential ways to move forward. She proposes, as a starting point, recognition for legal pluralism and, from there, recognition for Indigenous legal traditions. It is time to think about a meeting or overlapping of the spheres, respecting the space each occupies, but building bridges of understanding between them. By gaining a clearer idea of each sphere and, even more importantly, by recognizing that they can meet and establishing protocols, mechanisms and processes to bring them together, the objectives of legal pluralism will be attained more effectively.

The ICWA achieves this by allowing Indigenous nations to intervene in state procedures and by transferring child protection cases to the nations themselves. In closing, Zuni-Cruz points out that the recognition of Indigenous legal traditions is supported by the *Declaration on the Rights of Indigenous Peoples.*

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