R. v. MARSHALL; R v. BERNARD: THE RETURN OF THE NATIVE

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"For when you domesticate a member of our own species, you reduce his output, and however little you may give him, a farmyard man finishes by costing more than he brings in. For this reason the settlers are obliged to stop the breaking half-way; the result, neither man nor animal, is the native."

- Jean-Paul Sartre, 1961, Preface to Frantz Fanon's *Wretched of the Earth*[1]

This brief commentary suggests that the Court has created a new, onerous test for proof of Aboriginal title, and in doing so, has reflected the policy orientation evident in legislation and earlier judicial decisions that seek to minimize conflict with non-Aboriginal economic interests by marginalizing Aboriginal economies. The Court's latest analytical approach also appears to take Canada on a path away from emerging international standards.

1. Judicial Adoption of the Historic Peasant Standard of Aboriginal Policy

The high standards of proof requiring intensive and regular use of lands will necessarily mean that Aboriginal people will have even greater difficulty in acquiring rights of ownership and control over lands and natural resources. This means less access to wealth producing assets. The reasoning, discussion and conclusions in the majority judgment in *Marshall and Bernard* reflect the traditional Canadian policy for Aboriginal people: that they should provide a labour force to feed the engines of civilization and economic production. On this traditional view, Aboriginal people occupy a particular economic niche as a pool of labourers in agricultural and other fields, and not as owners of revenue producing assets. This is Sartre's 'farmyard man'. The traditional view of Aboriginal policy, the farmyard man, finds expression in what is here called the 'peasant standard', established first

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[1] See online: <www.marxists.org/reference/archive/sartre/1961/preface.htm> (accessed 13 Feb 2006). The reference to this source does not mean that the author is a Marxist.

by policy and statute, and subsequently adopted by the Court in recent cases concerning both Aboriginal and statutory rights. A brief overview follows.

Section 32 of the *Indian Act* outlaws free trade from Indian reserves on the Prairies and was designed to maintain a peasant agricultural economy that would not be allowed to compete with non-Indians farmers.[2] In *Mitchell*, the Court had interpreted the taxation provisions of the *Indian Act* as not intended to provide a commercial advantage to Indian reserve merchants. In the words of La Forest, J.:

> The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect to personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens.[3]

The peasant standard was evident in the 'moderate livelihood' test created in the earlier *Marshall* case, interpreting a treaty right to harvest resources for trade.[4] It has been evident, too, in the judicial 'internal limitations' test developed in other recent cases.[5]

The adoption of the peasant standard illustrates the limited capacity of the Court to render justice for Aboriginal peoples where claims engage a redistribution of property and access not only to wealth but to political power. Not being in charge of the army or the treasury, the justices have limited capacity to redistribute wealth and access to wealth, and they are aware that if they go too far in recognizing rights that redistribute privileges of access to wealth, they will lose the support of the government and of the public that is most directly affected by the decision. Thus we witnessed the Court's political retreat in issuing its defence of its decision in the

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[2] S. 32(1) now provides: "A transaction of any kind whereby a band or a member thereof purports to sell, barter, exchange, give or otherwise dispose of cattle or other animals, grain or hay, whether wild or cultivated, or root crops or plants or their products from a reserve in Manitoba, Saskatchewan or Alberta, to a person other than a member of that band, is void unless the superintendent approves the transaction in writing." *Indian Act R.S.C. 1985, c. I-5, as am.* S. 33 makes a void transaction under s. 32 a statutory offence. See also the terms of the predecessor of s. 32, s. 30 of R.S.C. 1886, c.43. See the excellent discussions of the peasant standard in agricultural policy, and its history on the Prairies, in publications by Sarah Carter, including "Agriculture and Agitation on the Oak River Dakota Reserve, 1875-1895" (1983) 6 *Manitoba History* 2, and *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990).

[3] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; [1990] SCJ NO 63, (QL), para 88, per La Forest J. for himself, Sopinka, and Gonthier, JJ.

[4] *R. v. Marshall*, [1999] 3 S.C.R. 456; [1999] 3 S.C.R. 533 (intervenor's application).

[5] *R. v. Gladstone*, [1996] 2 S.C.R. 723; [1996] SCJ No 79 paras. 61-66 per Lamer C.J.C. (QL); *R. v.Van der Peet*, [1996] 2 S.C.R. 507, per McLachlin J., at para 224-322, and especially at paras. 268-69.

course of denying an intervenor's application for a rehearing of the earlier *Marshall* case.[6]

The approach of the court is to incubate the development of the 'peasant standard' test within the principle of protection that the Crown owes to Aboriginal peoples in respect to their property interests. The approach limits the sphere of Crown protection to a limited set of interests that minimize conflict with non-Indian interests. In this context, Crown protection means the Crown will undertake to protect Aboriginal peoples' interests to allow them to survive, but not to prosper.[7]

2. Modern Judicial Rejection of the Menagerie Theory of Aboriginal Land-holding

In a classic critique, Felix Cohen described, in terms similar to the farmyard man approach, what he called the 'menagerie theory':

> the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined. The sources of this 'menagerie' theory are many and varied and sometimes elegantly pedigreed.[8]

An 'elegantly pedigreed' expression of the menagerie theory in the early 20th century was that of Lord Sumner in *Re Southern Rhodesia*:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle

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[6] *R. v. Marshall, supra* note 4.

[7] This approach is difficult to reconcile with the theory of aboriginal rights, which are collective in nature. The duty of protection is owed to the group, and not to the individual members of the group who are citizens and entitled to all rights of citizenship. It is sometimes overlooked that Indians and other Aboriginal people who are members of treaty or aboriginal rights-bearing groups are also Canadian citizens. In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at 36, Dickson C.J.C. stated that, "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all the responsibilities including payment of taxes, of other Canadian citizens." The more complete statement of the law is that all Aboriginal people enjoy all the same rights and responsibilities of citizens except as may have been changed or removed by valid legislation, subject to the effects of the 1982 Constitutional amendments, which will require that the validity of such legislation be tested against the recognition and affirmation of the rights in s. 35. Early decisions relating to the rights of Indians *qua* citizens include *Regina ex rel Gibb v White* (1870), 5 P.R. 315; 2 C.N.L.C. 315; *Sanderson v Heap* (1909), 11 W.L.R. 238; 19 Man. R. 122; 3 C.N.L.C. 238.

[8] Felix S. Cohen, "Original Indian Title", 32 Minn. L. Rev. 28 at 58.

> to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.[9]

Similar ideas were expressed by less-pedigreed judges, too. In *R. v Syliboy*, a hunting rights case decided in Nova Scotia in 1928, an acting County Court judge rejected the idea that the Mi'kmaq people of Nova Scotia had any property rights. Patterson J. said: "The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it."[10] In 1970, Chief Justice Davey of the British Columbia Court of Appeal, in rejecting the Nisga'a claim to ownership of their traditional lands, described them as being, at the time of settlement, "a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property."[11]

Since 1973, the 'menagerie theory' or 'title of the native' view has been expressly repudiated in several Court decisions. In *Calder*, Hall J. repudiated the comments of Chief Justice Davey, quoted above, on the basis that in making those comments, the Chief Justice had ignored current historical knowledge and the evidence at trial, and "was assessing the Indian culture of 1858 by the same standards that the Europeans applied to the Indians of North America two or more centuries before."[12] In the *Simon* case, another Mi'kmaq hunting case, the Court expressly disavowed Patterson J.'s views in *Syliboy*: "... the language used by Patterson J. ... reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada."[13] In *Calder*, Hall J. commented on the importance of the relationship between the property concepts and interests of an Aboriginal people and those of the Canadian legal system, stating that:

> the trial judge's consideration of the real issue was inhibited by a preoccupation with the traditional indicia of ownership. In so doing he failed to appreciate what Lord Haldane said in *Amodu Tijani*...: "Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to

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[9] [1919] A.C. 211 (P.C.) at 233.

[10] [1929] 1 D.L.R. 307 (Co. Ct.) at 313.

[11] *Calder v. British Columbia* (1970), 13 D.L.R. (3d) 64 (C.A.) at 66.

[12] *Calder v. British Columbia*, [1975] S.C.R. 313 at 347.

[13] *R. v. Simon*, [1985] 2 SCR 387, at 399, per Dickson C.J.C. for the Court.

> systems which have grown up under English law. But this tendency has to be held in check closely."[14]

In spite of persistent judicial support for the farmyard man or menagerie theory, common law recognition of the property interests of Aboriginal peoples was established by the highest judicial authorities at least since the early 20th century.[15] The law was summarized by McLachlin J., as she then was, in her judgment in *Van der Peet* (dissenting on other grounds):

> It may now be affirmed with confidence that the common law accepts all types of aboriginal interests "even though those interests are of a kind unknown to English law" ... What the laws, customs and resultant rights are "must be ascertained as a matter of fact" in each case ... It follows that the Crown in Canada must be taken as having accepted existing native laws and customs and the interests in the land and waters they gave rise to, even though they found no counterpart in the law of England. In so far as an aboriginal people under internal law or custom had used the land and its waters in the past, so it must be regarded as having the continuing right to use them, absent extinguishment or treaty (citations omitted).[16]

3. A New Mirror Test for Aboriginal Title: the Return of the 'Native'?

In *Marshall and Bernard,* the majority designed an entirely new test for Aboriginal title, which I call the mirror test, without apparently relying on or distinguishing relevant judicial authority. The new test differs substantially from both the established judicial views on Aboriginal title and also from the more recent pronouncements in the Court itself, although these have been *obiter dicta* since the Court has not yet found an Aboriginal title in fact. The new test raises concern about the "return of the native" – the concept of the farmyard man.

The majority of the Court in *Marshall and Bernard* did not refer to Lord Haldane's caveat in *Amodu Tijani* when it enunciated its new mirror test, under which a court must:

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[14] *Calder v British Columbia*, [1975] SCR 313 at 372

[15] *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (J.C.P.C.).

[16] *R. v. Van der Peet* at 645, citing Lord Denning in *Oyekan v. Adele* [1957] 2 All E.R. 785 at 788, and Brennan J. in *Mabo v. Queensland* [No. 2] (1992) 175 C.L.R. 1 at 58. Lord Denning said that compensation for property acquired by the Crown shall be paid to everyone who "by native law has an interest in it ... even though those interests are of a kind unknown to English law." (emphasis added) For a complete discussion of Aboriginal laws that are recognized as the *lex loci* by the common law, see R. L. Barsh, "Indigenous Rights and the Lex Loci in British Imperial Law" in Kerry Wilkins, ed. *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing Ltd., 2004) at 91.

> ... examine the pre-sovereignty aboriginal practice and translate that practice into a modern right. The process begins by examining the nature and extent of the pre-sovereignty aboriginal practice in question. It goes on to seek a corresponding common law right. In this way the process determines the nature and extent of the modern right and reconciles the aboriginal and European perspectives.[17]

The Court rejected the notion that the nature of the interests of the Aboriginal people were to be determined in accordance with their own laws and customs. Instead, the Court implied that Aboriginal laws and values mattered only to the extent these reflected a common law right: "Taking the aboriginal perspective into account does not mean that a particular right, like title to land, is established. The question is what modern right best corresponds to the pre-sovereignty practice, examined from the aboriginal perspective."[18]

Under this new test, it is implicit that Aboriginal law or practice is only recognized as legally valid under Canadian law where it mirrors or fits common law incidents of property. According to the majority view of the Court, the honour of the Crown[19] requires that Aboriginal law or custom only be recognized and respected when it mirrors the laws or customs of the Crown's non-aboriginal subjects. The latter laws and customs relating to the use and occupation of lands are of course derived from the history and cultures of the English countryside, which included overcrowding and intense competition for land. Requiring Aboriginal title claimants to North American forests to show occupation of the kind associated with the English country garden is tied to the concept of honour of the Crown. This new judicial craftsmanship is difficult to reconcile with more ordinary understandings of the meaning of honour, or the majority's insistence and protestation that the Aboriginal 'perspective' matters in this analysis. The majority decision is clear that it matters only when it mirrors English values and way of life.

Holding that Aboriginal laws and customs relating to the use of lands and territories matter only to the extent that they mirror those of the English recalls the most extreme form of legal rejection of Aboriginal people, which is the doctrine of *terra nullius*. In the legal fiction of *terra nullius* the land is empty of people who matter in law; in the more accommodating modern legal fiction of the mirror test, the laws and ways of the people only matter when they mirror those of the English. LeBel J.'s minority opinion in *Marshall and Bernard* warned of the dangers of focusing too narrowly on common law concepts relating to property interests. He

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[17] *R. v. Marshall; R v. Bernard*, 2005 SCC 43 at paras. 48-70. Quotation is from para. 51. [*Marshall and Bernard*].

[18] *Ibid.* at para. 52.

[19] *Ibid.* at para. 46.

reminded the majority that a *sui generis* category of rights cannot insist on conformity with common law features:

> It is very difficult to introduce aboriginal conceptions of property and ownership into the modern property law concepts of the civil law and common law systems, according to which land is to be considered a stock in trade of the economy. Aboriginal title has been recognized by the common law and is in part defined by the common law, but it is grounded in aboriginal customary laws relating to land. The interest is proprietary in nature and is derived from inter-traditional notions of ownership.[20]

There is an obvious reference in this and similar judicial statements to two distinct political societies, each with a distinct set of societal institutions that determine what are acceptable social relations relating to property and other interests. These relations give rise to legally recognized interests or rights. The one society is the Aboriginal society claiming the rights in question. The other is Canadian society. The concept of Aboriginal rights, however, is complete only with the addition of a third set of inter-societal institutions. In his classic article, J.C. Smith has described the three sets of property institutions involved in a question of Aboriginal title: the dominant society's system (Canada's), the servient system (the Aboriginal system) and the inter-societal institution of property as between the dominant and the servient society.[21] In *Van der Peet* Lamer C.J.C., speaking for a seven-member majority, cited with approval Brian Slattery's view that the doctrine of Aboriginal rights recognizes three distinct sets of societal institutions: "the law of Aboriginal rights is 'neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities.'"[22]

It seems that on this model, the Mi'kmaq ought to be entitled to use their lands and territories as they see fit. Limitations on the use of the lands should arise only in a factual context where there are legitimate competing interests to be reconciled, and none were identified in *Marshall and Bernard.* Regrettably, the Supreme Court's latest analysis does not provide conceptual clarity by addressing this theoretical model in a direct way. Instead, the Court has articulated a conception that it has called the "aboriginal perspective".

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[20] *Ibid.* at para. 128. See also Cohen, "Original Indian Title", *supra* note 8.

[21] J.C. Smith, "The Concept of Native Title" (1974), 24 U.T.L.J. 1 at 14.

[22] *Van der Peet* at 547, citing Brian Slattery, "The Legal Basis of Aboriginal Title" in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C. & Montreal: Oolichan Books and The Institute for Research on Public Policy, 1992) at 113-32

4. The 'Aboriginal Perspective' and Aboriginal Rights

Binnie J., in delivering the judgment of the Court in *Mikisew Cree First Nation v. Canada (Minister of Heritage),* began by linking the modern recognition of Aboriginal and treaty rights to the oft-invoked goal of reconciliation: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions." (emphasis added)[23] This statement describes the law's role of reconciling competing interests. It also elucidates the meaning of 'Aboriginal perspective' in the context of Aboriginal rights jurisprudence. If the role of Aboriginal rights law is to reconcile the collective interests of the Aboriginal peoples with the competing collective interests of the Canadian public, then the relevant 'Aboriginal perspective' must constitute the collective Aboriginal interests as identified and promoted by the Aboriginal society whose collective rights or 'public interest' is at stake. A judicial inquiry into that 'perspective', it seems, would then require an examination of the Aboriginal society's social and political institutions that identify the interests at stake.

Thus, Aboriginal rights are identified by examining the laws and customs of an Aboriginal people. An 'Aboriginal perspective' is never a personal view; it is the collective manifestation of an Aboriginal people's political liberty to define its collective interest. In other words, the Aboriginal perspective represents the essential *opinio juris* of the community which gives the character of law to social practices, including those in the form of property institutions.

The approach of the majority in *Marshall and Bernard* to the concept of 'Aboriginal perspective' does not reflect this understanding.[24] The majority faithfully avoided any reference to Aboriginal laws, comparing the 'aboriginal perspective' to European common law perspectives. The mirror test was developed by identifying, from the perspective of non-aboriginal justices, an Aboriginal perspective in the form of ancient 'practices' that were then compared to legal concepts of the English. In the words of the majority: "The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right... [T]he nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it."[25] Thus, the Court rejects the *opinio juris* of the Aboriginal society itself, which is manifested in the intra-Aboriginal societal institutions that ought to inform the inter-societal concept of Aboriginal rights.

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[23] [2005] SCC 69 at para. 1

[24] The relevant discussion is at paras. 45-51.

[25] *Marshall and Bernard, supra* note 17 at para. 48.

In *Van der Peet*, Lamer C.J.C. cited with approval the analysis of Mark Walters, who described the doctrine of Aboriginal rights as a meeting of two dissimilar legal cultures. The Chief Justice, however, shortened the reference to "the bridging of aboriginal and non-aboriginal cultures", possibly to reflect the focus in that case which articulated a test based on "culture" for determining which pre-contact activities would support a claim to an Aboriginal right.[26] This creates some confusion. Following from the above discussion, the 'Aboriginal perspective' must be a proxy used by the Court to refer to the Aboriginal intra-societal property institutions. According to the view expressed by Justice McLachlin in *Van der Peet*, quoted earlier, these are laws, customs and rights that must be ascertained as a matter of fact. The Court avoids this established doctrine and thus puts itself in a position of deciding, not as a matter of fact, but as a matter of law, the contents of the substantive intra-Aboriginal societal institutions of property. This is a new approach, and it is accomplished with the tool of the 'aboriginal perspective'.

The Court's conclusion that the Mi'kmaq concept of property cannot support a successful claim to Aboriginal title raises the additional concern that the Court cannot recognize and protect the unique spiritual and philosophical features and values of the Aboriginal societies in Canada.[27]

5. Emerging Aboriginal Rights Doctrine in Breach of Canada's International Human Rights Treaty Obligations

A complete review and analysis, which are well beyond the scope of this note, would suggest that the decision to reject the claim to logging rights in the ancient Mi'kmaq forests is inconsistent with Canada's obligations flowing from human rights treaties, and possibly also contrary to international law standards.[28] Indigenous peoples have

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[26] *Van der Peet*, *supra* note 5 at 547, citing Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350 at 412-13.

[27] According to J.C. Smith, *supra* note 21 at 7, the property institutions of indigenous peoples, not only in North America but very generally, are likely to include the following understandings:

> 1. property relations to the lands and territories are communal rather than individual, but may include authority granted by the group to an individual to allocate use rights among members of the group;
>
> 2. the community of owners includes past and future, as well as the present generation of members;
>
> 3. the property relation reflects the patriarchal or matriarchal social ordering of the society.

Smith notes that such indigenous concepts are similar to the concept of seisin that, in early English law, preceded the concept of ownership.

[28] An excellent introduction to this complex emerging area of law is Erica-Irene A. Daes, "Striving for Self-Determination for Indigenous Peoples", in Y.N. Kly and D. Kly, *In Pursuit of the Right to Self-Determination: Collected Papers & Proceedings of the First International Conference on the Right to Self-Determination & the United Nations* (Atlanta, Ga: Clarity Press, Inc., 2001) at 50; see also Erica-

created a world-wide movement in the last generation that has sparked a number of international developments. Indigenous peoples seek recognition, respect and protection of their fundamental interests and rights from the states within which they and their homelands are now found. Indigenous action has sparked state practice that is giving rise to emerging international standards binding upon all member states of the United Nations. Furthermore, Canada owes specific obligations to indigenous peoples under several human rights treaties. These obligations relate, *inter alia,* to the recognition and protection of Aboriginal lands, territories and natural resources. The United Nations bodies responsible for oversight of these international treaty obligations have in recent years repeatedly criticized Canada for failing to uphold its obligations in respect to Aboriginal land and resource rights.

In 2002, the UN Committee on the Elimination of Racial Discrimination offered this assessment of Canada's performance in meeting its obligations under the Convention on the Elimination of Racial Discrimination:

> The Committee expresses concern about the difficulties which may be encountered by Aboriginal peoples before the courts in establishing Aboriginal title over land. The Committee notes in this connection that to date no Aboriginal group has proven Aboriginal title, and recommends that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts.[29]

In 1999, the Human Rights Committee included the following statements under its "Principal concerns and recommendations" relating to Canada's fulfillment of its obligations under the Convention on Civil and Political Rights:[30]

> The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains "the most pressing human rights issue facing Canadians". In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on

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Irene A. Daes, *Indigenous Peoples' permanent sovereignty over natural resources* (United Nations, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2004/30 13 July, 2004); Erica-Irene A. Daes, *Indigenous peoples and their relationship to land: Final Working Paper prepared by the Special Rapporteur, Mrs, Erica-Irene A. Daes, (Id.,* E/CN.4/Sub.2/2002/21, 11 June, 2001).

[29] United Nations, *Convention on the Elimination of Racial Discrimination* (Committee on the Elimination of Racial Discrimination, Sixty-first session (5-23 Aug. 2002), A/57/18) at para. 330. Justice LeBel raised questions about procedures in *Marshall and Bernard,* and there are others. For example, is it just that an individual defendant raising an aboriginal rights defence to a statutory offence be required to prove not his personal rights, but the collective rights of his people, without the required participation of his people's representatives in court?

[30] United Nations, *Convention on Civil and Political Rights* (Human Rights Committee, Sixty fifth session CCPR/C/79/Add.105, 7 April 1999) at para. 8.

> Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right of self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art.1, para.2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.

Viewed against the perspective of international standards, the Court's approach appears as judicial extinguishment of the rights of indigenous peoples, even though these rights are recognized by international customary law derived from state practice, and even though Canada has accepted treaty obligations to respect them.

6. Conclusion

The 1982 Constitutional amendments have worked significant changes, including some shifting of the traditional roles of the three branches of government.[31] In the case of Aboriginal title, the judicial view exemplified by *Marshall and Bernard* seems to be that recognition of title or ownership is a function of the executive and legislative branches, and the courts will not readily undertake this task. From the perspective of legal theory, the decision in *Marshall and Bernard* raises the spectre of the return of the native, the 'farmyard man' who only matters when he looks like his master.

[31] One of the most important issues in relation to the development of aboriginal rights is determining what questions the courts ought not to decide. The question of defining the membership of the political societies that constitute the 'aboriginal peoples' of Canada, for example, is a matter within the authority of each people to decide, and is not justiciable. This conclusion is compelled, *inter alia,* by the fundamental norms behind the concept of self-determination. Cf. *R. v.Powley*, [2003] 2 S.C.R. 207.