POWER AND POLICY: NAVIGATING LEGAL PLURALISM IN CANADIAN MIGRATION LAW

Asad Kiyani

I. Introduction

Legal pluralism is, at its core, a description of the extent and sources of legal obligations beyond state law.[1] While that boundary may be difficult to identify in many areas,[2] it seems clearer in the context of migration law. Given the state's sovereign right to control entry and membership, there does not seem to be much space for alternative, non-state legal orders to play a role. State laws remain paramount,[3] with allowances made in federal law for national variation, such as provincial needs to preserve particular cultural and linguistic traditions,[4] or the acknowledgement that provinces are best positioned to decide which immigrants will best fill their labour market needs.[5] Canadian courts have repeatedly affirmed the federal government's

[1] See e.g. Leopold Pospisil, *The Anthropology of Law: A Comparative Theory of Law* (New York: Harper & Row, 1971) ("every functioning subgroup in a society has its own legal system which is necessarily different in some respects from those of the other subgroups" at 107); Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law & Soc'y Rev 869, 873 ("According to the new legal pluralism, plural normative orders are found in virtually all societies. This is an extraordinarily powerful move, in that it places at the center of investigation the relationship between the official legal system and other forms of ordering that connect with but are in some ways separate from and dependent on it").

[2] John Griffiths, "The division of labor in social control" in Donald Black (ed.), *Toward a General Theory of Social Control* (New York: Academic Press, 1984) at 45 ("It is as if people had quarreled for years about whether the difference between "hot" and "cold" lay at the freezing point of water, at body temperature, or at the boiling point and then realized that a single dimension of continuous variation underlies the contending positions").

[3] Provinces have concurrent jurisdiction over immigration, subject to the doctrine of federal paramountcy: *Constitutional Act, 1867* (UK) 20 & 31 Vict, c 3, s 95, reprinted in RSC 1985, app II, no 5.

[4] Starting in 1971, a series of agreements have been concluded between the federal government and Québec that grant the province greater authority over migration to the province. See Government of Canada, *Canada-Québec Accord Relating to Immigration and Temporary Admission of Aliens* (5 February 1991), preamble ("An objective of this Accord is, among other things, the preservation of Québec's demographic importance within Canada and the integration of immigrants to that province in a manner that respects the distinct identity of Québec"); *Loi sur l'immigration au Québec*, CQLR, c I-0.2.1.

[5] While the federal government has a range of economic streams of migration, including for both temporary and permanent migrants, provinces and territories are permitted under federal regulations to negotiate agreements with the federal government that allow them to establish their own immigration programs. Most have negotiated agreements to establish Provincial Nominee Programs (PNPs), which are independent of federal immigration programs and permit skilled, semi-skilled, and low-skilled workers to apply to fill provincial employment needs. Provinces with PNPs are also able to send "notifications of interest" to individuals who are applying through federal economic migrant categories. See *Immigration and Refugee Protection and Regulations*, SOR/2002-27, s 87 [*IRPR*]. See also Sasha Baglay, "Provincial Nominee Programs: A Note on Policy Implications and Future Research Directions" (2012) 13:1 J Intl Migration & Integration 121; Asha Kaushal, "Do the Means Change the Ends? Express Entry and

authority to control entry into Canada.[6] All of this suggests that while immigration and refugee law trade in varying degrees in notions of cultural pluralism, they do not—some would say cannot—accommodate legal pluralism simply because it is *solely* the role of state law, and not some other normative order, to delineate the terms of entrance into and membership in Canada.

Given this understanding, there is little room for non-state legal orders to exert influence in Canadian migration law. Yet it may be that there both is and ought to be a space for legal pluralism to operate in migration law. Migration law is about legal status, but it is also about the regulation of cultural pluralism. Liberal and open migration regimes can diversify the demographics of a state by inviting and including newcomers in greater numbers from a greater number of places around the world. Closed systems will tend to welcome fewer people from fewer places. One will lend itself to greater cultural pluralism—to greater diversity of *identity* as it is currently and popularly understood—and the other will not. With cultural pluralism, however, comes some need for legal pluralism. Different societies will have different understandings of relationships of belonging—to family, to fellow Canadians, to the state itself—that will themselves be conditioned by local normative orders that may well be distinct from Canadian legal norms. Understanding how Canadian migration law can account for these differential understandings (and if it does account for them at all) is thus a way of understanding the openness and flexibility of the migration system, and why the system is or is not particularly pluralist.

Taking this position of constraint as its starting point, this paper addresses legal pluralism in Canadian immigration and refugee law in three parts. The paper analyzes how different forms of migration law—refugee law, immigration law, and citizenship law—take up the challenge and possibilities of legal pluralism, to consider whether Canadian migration law can or will accommodate legal pluralism. Understanding *why* legal pluralism is visible or accommodated is valuable to understanding the nature of the migration law regime. This paper argues that a close examination of legal pluralism reveals an important relationship between legal and cultural diversity, and that migration law tends to accommodate one more than the other. Relatedly, a study of the dynamics of legal pluralism shows that the relative insularity of state law—its inoculation from legal diversity—protects and projects a

---

Economic Immigration in Canada" (2019) 42:1 Dal LJ 83, 119 (warning about the potential divergence between national interests, provincial and territorial interests, and private sector/employer interests).

[6] *Canada (MEI) v Chiarelli*, [1992] 1 SCR 711 at 733, 90 DLR (4th) 289 ("The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country…The distinction between citizens and non-citizens is recognized in the *Charter*. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2), only citizens are accorded the right "to enter, remain in and leave Canada" in s. 6(1). Thus, Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada."). See also *Prata v Minister of Manpower and Immigration*, [1976] 1 SCR 376, 52 DLR (3d) 383; *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779, 84 DLR (4th) 438; *Bensalah v Canada (Minister of Citizenship and Immigration)*, [1999] 173 FTR 73, 1999 CanLII 8562; *Gill v Canada (Minister of Citizenship and Immigration)*, [1999] 173 FTR 183, 1999 CanLII 8561 (FC); *Medovarski v Canada (MCI)*, 2005 SCC 51; *Haj Khalil v Canada*, 2007 FC 923.

specific Canadian identity that is not strictly legal. In this way, the contours of legal pluralism reflect the inclusion (and exclusion) of specific communities as legal agents because their legal orders or rules are (or are not) accommodated within the state's legal system. Mapping legal pluralism in migration law thus illustrates surprising ways in which minority groups may be able to obtain substantive equality under the law, and, as is a point of emphasis in this article, how that equality is denied through the treatment of pluralism. Thus, while one might not expect to find much pluralism, studying the ways in which pluralism is restricted nonetheless shines important light on the design and goals of Canadian migration law.

Addressing this requires some basic understanding of legal pluralism as a field of study concerned with fundamental questions about the nature of law. Core to the very idea of legal pluralism is that the answer to the permanently vexing question of "what is law?" is "more than you think."[7] In so far as that answer is addressed to a positivist tradition that sees the state as the only authoritative source of law,[8] it remains as complete a response as necessary by avoiding the interminable difficulties of drawing the boundaries between law and non-law.[9] This acknowledges the pervasiveness of alternative, non-state normative orders that for some are at least as binding or obligation-producing as state law.[10] Legal pluralism thus describes situations where there is a multiplicity of normative orders in the same social field.[11] It is aimed primarily at understanding the structure of these overlapping orders and how those structures relate to one another, and secondarily about the content of those orders. Yet it is the very particular content of those orders—and their effect on those who adhere to the rules of those orders—that confirm the nature and structure of those orders.

Religions, Indigenous legal systems, and customary rules have been cited as examples of binding non-state legal orders, and their very nature as non-state law is what suggests the disconnect between legal pluralism and immigration and refugee

---

[7] John Griffiths, "What is Legal Pluralism?" (1986) 24 J Leg Pluralism & Unofficial L 1 at 38 ("The idea that the law of the state is law 'properly so called' is a feature of the ideology of legal centralism and has for empirical purposes nothing to be said for it….").

[8] Ronald Dworkin, "The Model of Rules" (1967) 35:1 U Chicago L Rev at 18 (critiquing positivist definitions of law on the basis that "different versions of legal positivism differ chiefly in their description of the fundamental test of pedigree a rule must meet to count as a rule of law" and thus positivist definitions of law invariably collapse into descriptions of moral or political standards).

[9] Brian Tamanaha, "The Folly of the Social Scientific Concept of Legal Pluralism" (1993) 20 JL & Soc'y 192.

[10] See Sally Falk Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999" (2001) 7 J Royal Anthropological Institute 95; John Griffiths, "The Idea of Sociology of Law and its Relation to Law and to Sociology" in *Law and Society*, Michael Freeman, ed (New York: Oxford University Press, 2006).

[11] Merry, *supra* note 1 at 870. See also André-Jean Arnaud, "Legal Pluralism and the Building of Europe" in *Legal Polycentricity: Consequences of Pluralism in Law*, Hanne Petersen & Henrik Zahle, eds (Aldershot: Dartmouth Publishing Co, 1995).

law. Yet pluralism is also identifiable in how life in refugee camps is regulated,[12] how borders are controlled by different states,[13] and how migrant rights can be protected through different regional and international human rights laws.[14] At the same time, immigration and refugee law is about the crossing of international borders, and entry and membership into a particular state, meaning that the state's rules about entry and membership will likely be paramount because of the perceived centrality of such laws to state sovereignty. State legal orders may differ from one another, but alternative legal orders largely do not have a role here because, by definition, they cannot operate in parallel to state law.[15] The Catholic Church may have competing understandings of what it means to be a member or what members are entitled to do, but it cannot negate the decisions of the Canadian state.

Legal pluralism thus identifies and generates a conflict of laws problem that the simple description of pluralism cannot readily resolve.[16] When that conflict arises in respect of a state's sovereign right to decide who to admit into its territory, and on what terms, there is likely to be less conflict because states will simply exclude any alternative consideration or interpretation. This is not to say that it is futile to approach migration law from the lens of legal pluralism. It rather suggests the importance of using this lens, as studying legal pluralism will invariably demand a study of power relationships.[17]

On this understanding, if pluralism matters to Canadian migration law, it is in the state's justification of those laws, and their impacts. Inbound migration has a tendency to increase the diversity of a given population, and the merits or extent of this diversity is the primary mode of studying pluralism in migration; it centers *cultural* pluralism as a focal point of public anxieties about *how many* immigrants from *which places* and of *what backgrounds* and *what will happen to national unity*.[18] As

[12] Kirsten McConnachie, *Governing Refugees: Justice, Order and Legal Pluralism* (Abingdon, UK: Routledge, 2014).

[13] Galina Cornelisse, "Legal Pluralism in the European Regulation of Border Control: Disassembling, Diffusing, and Legalizing the Power to Exclude" in *Research Handbook on Legal Pluralism and EU Law*, Gareth Davies & Matej Avbelj, eds (Cheltenham, UK: Edward Elgar Publishing, 2018) at 373–91.

[14] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford: Oxford University Press, 2015) at 41–62.

[15] Franz von Benda-Beckmann, "Who's Afraid of Legal Pluralism?" (2002) 47 J Leg Pluralism & Unofficial L 37 (that legal pluralism is concerned with "the frequent existence of parallel or duplicatory legal regulations").

[16] Ralf Michaels, "Global Legal Pluralism and Conflict of Laws" in *The Oxford Handbook of Global Legal Pluralism*, ed by Paul Schiff Berman (Oxford: Oxford University Press, 2020) at 629–30.

[17] Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009) at 118; Anne Griffiths, "Pursuing Legal Pluralism: The Power of Paradigms in a Global World" (2011) 43 J Leg Pluralism & Unofficial L 173 at 194.

[18] See e.g. Sarah V Wayland, "Immigration, Multiculturalism and National Identity in Canada" (1997) 5 Intl J on Group Rights 33; Antoine Bilodeau, Luc Turgeon & Ekrem Karakoç, "Small Worlds of Diversity: Views toward Immigration and Racial Minorities in Canadian Provinces" (2012) 45:3 Can J

part of the attempt to understand how changing patterns of migration may have affected public responsiveness to migration,[19] population diversity has been tracked to varying degrees for at least a century.[20] Yet while migration law is a facilitator of cultural pluralism, it is not necessarily a guarantor of *legal* pluralism because policies of admittance and membership are so closely associated with the sovereign authority of the state. Cultural pluralism's relationship to legal pluralism (and vice-versa) is thus mediated in part by migration law.

Having acknowledged this tripartite relationship, this paper focuses on the presence or absence of legal pluralism in three different spheres of migration law. Studying these areas involves analyzing the interaction of different legal systems and normative orders with Canadian law. The paper assesses domestic Canadian law's interaction with the domestic legal regimes of other jurisdictions (immigration law), international law's interaction with domestic Canadian law (refugee law), and, finally to Canadian state law's interaction with non-state legal orders in Canada (citizenship law). These boundaries are not neat and clean; as will be shown, migration law is routinely interacting with external and internal legal orders, even if indirectly.

The first substantive section of the paper explores the atomized spaces at which Canadian immigration law has approached pluralism. While Canadian migration law is itself unlikely to be deeply pluralist, it is continually faced with individual claims that require Canadian decision-makers to assess and at times recognize both non-Canadian state legal orders and non-Canadian non-*state* legal orders. The (non-)recognition of Islamic guardian relationships in the immigration context are areas where governments, courts and administrative decision-makers have had to confront law beyond Canada and resisted accommodation or negotiation with those legal systems. The second part shifts from immigration law to refugee law specifically and considers its liminal position as international law that is interpreted domestically. That position invites a degree of pluralism, which this part examines by addressing the role of the state in interpreting international law, and the focus on security as the overriding policy concern guiding the interpretation and application of international law. By showing how domestic laws formally intersect with the security

---

Political Science 579; Garth Stevenson, *Buildings Nations from Diversity: Canadian and American Experience Compared* (Montreal: McGill-Queen's University Press, 2014).

[19] Canada, Department of Justice Canada, Peter S Li, *Cultural Diversity in Canada: The Social Construction of Racial Differences*, (Research Paper), online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rp02_8-dr02_8/index.html> [perma.cc/B48P-GEXA].

[20] *Ibid (*an example of contemporary analysis of such patterns). For early examples, see J H Haslam, "The Canadianization of the Immigrant Settler" (1923) 107 Annals American Academy Political Soc Science 45; Anthony H Richmond, "Immigration and Pluralism in Canada" (1969) 4:1 The Intl Migration Rev 5 at 8–12. Statistics Canada now regularly tracks the evolving ethnic composition of Canada: see e.g. Canada, Statistics Canada, *2021 Census Fact Sheets: Updated content for the 2021 Census of Population: Immigration, ethnocultural diversity and languages in Canada*, (Fact Sheet), (Ottawa: Statistics Canada, July 17, 2020). The Minister for Immigration, Refugees and Citizenship Canada regularly reports on the same: see e.g. Canada, Minister of Immigration, Refugees and Citizenship, *2020 Annual Report to Parliament on Immigration* (Ottawa: Minister of Immigration, Refugees and Citizenship, 2020) at 33.

apparatuses of other foreign states through information-sharing and migrant-management agreements, this part explains how security concerns drive refugee law choices and importantly the discourse around legal pluralism. This suggests that the apparent pluralism of refugee law is sometimes materially undone by an anti-pluralism driven by state policy choices. Something quite distinct happens in other scenarios, where it is state policy to deny the legal pluralism that *does* exist to advance that security agenda. Thus, pluralism is subject to discursive strategizing. The third part considers citizenship law, and specifically the relationship between citizenship and coloniality in Canada. It considers how the special position of various Indigenous groups in relation to mobility and citizenship rights might be evidence of genuinely legally pluralist space. Yet it also resists this point by showing how this complexity is surface level at best. It argues that cultural pluralism is less a propellant of legal pluralism than a victim of its absence. This insight has particular resonance for the colonial-citizenship context, but arguably manifests throughout Canadian migration law.

While this paper concludes that Canadian migration law is not as legally pluralist as it *could* be, and points to a variety of concerns that follow from this deficiency, it does not argue that more legal pluralism is necessarily a good thing. As Boaventura de Sousa Santos has argued, "there is nothing inherently good, progressive or emancipatory about legal pluralism."[21] The degree of pluralism in a particular social field is merely indicative of the range of normative orders or social control labour happening in that space, rather than an evaluation of the content of those orders or of the outcomes produced by their interaction. To assess the range or depth of pluralism is not to pass a value judgment, but to attempt to understand the factors that shape the relevant legal system, and the impact of the presence or absence of pluralism.

Several conclusions are evident from this brief study of Canadian migration law. First, it suggests that while cultural pluralism is no guarantor of legal pluralism, an absence of legal pluralism can meaningfully limit cultural variety and diversity within a society. As an example, the inability to recognize particular familial relationships which may be uncommon in Canada (or at least uncommon in its lawmaking and governing classes) will discriminate against communities where those relationships are not unusual while also limiting the ability of their members to lay claim to the right to enter and remain in Canada. Second, it shows that even a state legal system that operates in a pluralist fashion by recognizing the validity of two different European legal systems—the common and civil law traditions—can struggle to account for non-European systems as legal. This incapacity or unwillingness carves out certain societies and individuals as genuine norm-producing agents and excludes others. Line-drawing of this sort has particular significance for Indigenous communities in Canada, whose presence pre-dates the arrival of European colonizers and their legal systems, and for whom the revitalization of Indigenous legal orders is

[21] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge: Cambridge University Press, 2002) at 89 ("there is nothing inherently good, progressive, or emancipatory about Legal Pluralism").

seen as essential to the reconciliation process. Finally, the reticence with which the Canadian legal system approaches non-state legal orders or even the legal orders of other states (such as some Muslim-majority states) suggests a wariness that is intensely protective of the state legal system but also conditioned to perceive alternative legal orders and arrangements as existential threats to the idea of Canadian identity. Mapping the manifestations of legal pluralism and parsing the rhetoric around it illustrates the significance of understanding the mechanisms of norm development in migration law, their relationship to larger debates in Canadian society, and the anxieties that continue to condition the development of the law.

II. Islamic Personal Law and Adoption from Muslim-Majority States

As a first step in attempting to understand how Canadian migration law grapples with legal pluralism, this section engages with the central question of familial relationships. Like migration law itself, questions of kinship are questions about membership and belonging more broadly.[22] This section examines the Canadian legal system's struggles to identify which declared members of a family ought to be considered family members for the purposes of immigration law by focusing on the issue of overseas adoptions. Vigilance around overseas adoptions is necessary because it presents risks of child exploitation and human trafficking.[23] But this vigilance can lead to the denial of genuine relationships that are suspicious not because they are exploitative but because they are novel to the Canadian legal system. Studying pluralism through an examination of parent–child relationships is a fruitful enquiry for two reasons. It first exposes the inability or unwillingness of migration law to incorporate alternative forms of parent–child relationships found in non-Canadian legal systems. As well, it points to the material discrepancies between what is legally recognized as a valid immigration-based parent–child relationship and what is legally recognized as a valid exclusively domestic parent–child relationship. Studying these dynamics of exclusion prompts further enquiry into why such distinctions are drawn in migration law, and the relationship between cultural and legal pluralism.

One way in which Canadian migration law fails to give effect to pluralist legal orders is through the prohibition of adoptions from children from states who

---

[22] See Michael Walzer, *Spheres of Justice* (Boston: Basic Books, 1983) at 35–42 (analogizing political membership to membership in neighbourhoods, clubs, and families).

[23] Judith L Gibbons, "Human Trafficking and Intercountry Adoption" (2017) 40:1-2 Women & Therapy 170 (arguing that there are eight parallels between patterns of intercountry adoption and human trafficking); Erin Siegal McIntyre, "Saviours, Scandal, and Representation: Dominant Media Narratives Around Human Trafficking in International Adoption" (2018) 4:1 J Human Trafficking 92 (describing bribery and corruption in intercountry adoptions in Central and South America); Anqi Shen, Georgios A Antonopoulos & Georgious Papanicolaou, "China's stolen children: Internal child trafficking in the People's Republic of China" (2013) 16 Trends in Organized Crime 3; Zhongliang Huang & Wenguo Weng, "Analysis on geographical migration networks of child trafficking crime for illegal adoption from 2008-2017 in China" (2019) 528 Physica A 121404; Andréa Cardarello, "The Movement of the Mothers of the Courthouse Square: "Legal Child Trafficking," Adoption and Poverty in Brazil" (2009) 14:1 J Latin American & Caribbean Anthropology 140 (all describing how domestic child trafficking can fuel both domestic and intercountry adoptions).

apply Islamic family or personal law. These restrictions flow from the Canadian state's interpretation of international law, *shari'a* law, and foreign state law. Canadian citizens are facing increasing obstacles in sponsoring children who are protected under what *shari'a* law describes as *kafala* because that protection is not perfectly coextensive with adoption, even though it is otherwise internationally recognized as an alternative form of care.[24] The abrupt elimination of such adoptions has only compounded the problem.

From the state's perspective, Canadian law cannot recognize adoptions that commence in the form of Islamic guardianship known as *kafala*.[25] Decade-long restrictions covertly imposed by federal and provincial governments indicate the suspicions and fears that animate the anti-pluralism of migration law. They show that Canadian migration law tends to resolve any potential conflict of laws or imperfect coordination of legal systems by either simply ignoring the alien norms or requiring that they be substituted with Canadian state norms. Inflexibility and the interpretative hegemony imposed by the Canadian state in this area stands in sharp contrast to that of other Western states dealing with adoptions from Muslim-majority states.

It is helpful to understand the broad strokes of the adoption process as integrated into the migration system, as well as the impact of the prohibition. For the purposes of migration to Canada, adoptions have to be processed at both the federal and sub-federal level. Key to this approach is the need for the adoption to be in conformity with the law in the home state and Canada, as well as the constitutional division of powers that assigns jurisdiction over Canadian migration broadly to the federal government, but jurisdiction over family matters to provincial governments.[26] The federal government designs general rules for international adoptions, including identifying states from which adoptions are prohibited or suspended.[27] Provincial and territorial governments are important because they regulate the adoption process in the

[24] See e.g. *Convention on the Rights of the Child* (1989), 1577 UNTS 3, art 20 (describing *kafala*, along with adoption and foster placement, as "alternative care" for children "deprived of [their] family environment"); *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (1996), 2204 UNTS 503, art 3(e); *Guidelines for the Alternative Care of Children*, GA Res 142, 64th Sess, UN Doc A/Res/64/142 (2010) at para 161 (describing *kafala* as a "stable and definitive" solution for children).

[25] *Kafala* relationships do not grant the same entitlements to children as adoptions, which has been interpreted as violating the legal requirement in cases of family migration and sponsorship that there be a parent-child relationship: *IRPR*, *supra* note 5, s 3(2). See e.g. British Columbia, Ministry of Children and Family Development, Intercountry Adoption Alerts: DRC, Russia, Pakistan, Nepal, Liberia (Alert), (May 2019), online: <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/births-and-adoptions/adoption/intercountry-adoption/ica_alerts_non-hague_countries.pdf> [perma.cc/983N-STAN].

[26] On the need for compliance with provincial, national, foreign, and international law, see *IRPR*, *supra* note 5, ss 117(3)(d)–(g).

[27] Immigration, Refugees and Citizenship Canada, "Countries with suspensions or restrictions on international adoptions (29 April 2022), online: <www.canada.ca/en/immigration-refugees-citizenship/services/canadians/adopt-child-abroad/restrictions.html> [perma.cc/56KM-YGW6].

jurisdiction where the parents and adopted child are to reside.[28] If either level of government prohibits or disapproves of the proposed adoption, it will fail. While this issue has come to light largely because it limits the ability of Canadian citizen parents to adopt overseas non-Canadian Muslim children who are affected by Islamic personal law, it also impacts those families with non-biological children that are applying to immigrate to Canada and who will struggle to have those relationships recognized. The potential scope of the ban is both extensive and anomalous.

Kafala is a form of child guardianship developed in Islamic law that places protective obligations on the parents who take in a child in need of protection, but does not usually sever the birth parents' relationship with the child.[29] Adoption as defined in Canadian immigration law, however, requires the creation of a legal parent–child relationship.[30] *Kafala* relationships thus do not qualify, which poses a problem for Western legal systems because in places where *kafala* exists, adoption usually does not. If a child in one of those states is to be adopted domestically or internationally, it usually must be through the guardianship of *kafala* rather than through formal adoption. That being said, conceptual disagreement on child entitlements need not be an obstacle to adoptions in Western states. In the United States, United Kingdom, and Australia, overseas adoptions of children through *kafala* relationships continue, as they did in Canada until 2013.

Canada first introduced a ban on adoptions that turn on *kafala* in 2013, in respect of adoptions from Pakistan.[31] This ban was later extended to all Muslim countries with *kafala* and no adoption system, although the same formal notice that accompanied the Pakistan ban was not made.[32] Instead, the federal government engaged in discussion with provincial and territorial governments to confirm that no *kafala*-based adoptions would be provincially recognized.[33] Confusion followed. The lack of notice left putative families bewildered and adrift, with no clear information

---

[28] As a result of provincial jurisdiction over adoption, Canadians who seek to adopt overseas must obtain a letter of non-objection from "the competent authority of the child's province of intended destination": *IRPR*, *supra* note 5, s 117(3)(e).

[29] Karen Smith Rotabi et al, "The Care of Orphaned and Vulnerable Children in Islam: Exploring Kafala with Unaccompanied Refugee Minors in the United States" (2017) 2 J Human Rights & Social Work 16 at 17.

[30] *IRPR*, *supra* note 5, s 3(2).

[31] Immigration, Refugees and Citizenship Canada, Archived notice - Adoptions from Pakistan (2 July 2013), online: <www.canada.ca/en/immigration> [perma.cc/X4QA-FRL4]; Nicolas Keung, "Canada's ban on Pakistani adoptions baffles parents, clerics", *Toronto Star* (5 August 2013), online: <https://www.thestar.com/news/canada/2013/08/05/canadas_ban_on_pakistani_adoptions_baffles_parents_clerics.html> [perma.cc/S2ZP-AYCD].

[32] Shanifa Nasser, "How Canada barred adoptions from Muslim countries - and used Shariah law to do it", *CBC News* (29 October 2018), online: <https://www.cbc.ca/news/canada/adoptions-kafalah-pakistan-canada-ban-muslim-1.4855852> [perma.cc/D9G5-GWT5] [Nasser, "Canada barred adoptions"].

[33] Shanifa Nasser, "Canadians adopting from Muslim counties caught in legal limbo", *CBC News* (1 June 2015), online: <https://www.cbc.ca/news/canada/canadians-adopting-from-muslim-countries-caught-in-legal-limbo-1.3089651> [perma.cc/U5KA-GAEY] [Nasser, "Adopting from Muslin countries"].

from any branch of government.[34] Some families moved to the countries where their adoptive children resided, rather than endure years more uncertainty and separation. Investigative reporters suggest that alongside the formal legal issue of discordance between *kafala* and adoption, the Canadian government wanted to counter an unspecified terrorist threat in an unspecified manner by banning the adoptions,[35] as well as respond to Pakistan's concerns about human smuggling.[36] At the same time, Pakistan has repeatedly insisted that adoptions are permitted under domestic Pakistani law, that *kafala* is recognized as a valid mode of child protection under international law, and that there is no objection *ab initio* to *kafala* relationships that become adoptions in Canadian law.[37]

Yet while *kafala* adoptions continue in other countries, Canada's review of the ban has led to no change. In fact, the prohibition has expanded beyond Pakistan and beyond the Canadian government's stated concerns about human trafficking. The federal government has suspended processing all *kafala*-based immigration applications, and provincial and territorial governments do not recognize them either.[38] In explaining their non-recognition, these governments all rely on two points. First, the fact that most Muslim majority states (Turkey being one significant exception) have not ratified the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*[39] ("Hague Convention on Intercountry Adoption"), which does not recognize *kafala*. Yet some of those states, including Egypt, Pakistan and Lebanon nonetheless do permit adoptions for non-Muslims,[40] suggesting that emphasis on Hague Convention ratification oversimplifies the issue. Moreover, as noted above, other international agreements do recognize the legitimacy of both *kafala* and adoption as ways of ensuring care for a child without a family.

The second reason for non-recognition is in fact an engagement with a different legal order. Contrary to the interpretation of Pakistani officials and jurists, *kafala* and adoption are not equivalent or compatible. In other words, those who practice *shari'a* law are misinterpreting it. At a high level of generality, this assumed

---

[34] See Keung, *supra* note 31; Nasser, "Adopting from Muslin countries", *supra* note 33; Nasser, "Canada barred adoptions", *supra* note 32; Brian Hill & Megan Robinson, "Canada's ban on adoptions unjustified, Pakistan says; leaves family desperate for change", *Global News* (9 August 2019), online: <https://globalnews.ca/news/5731362/canadas-ban-adoptions-pakistan-family/> [perma.cc/UB6L-HY3Z].

[35] Nasser, "Canada barred adoptions", *supra* note 32.

[36] Hill and Robinson, *supra* note 34.

[37] *Ibid.*

[38] See e.g. Secrétariat à la adoption internationale Québec, Countries that prohibit adoption, online: <adoption.gouv.qc.ca/en_kafala-et-adoption> [perma.cc/89BX-HKD3].

[39] *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 29 May 1993, 1870 UNTS 167, 32 ILM 1134 (entered into force 1 May 1995).

[40] Usang M Assim & Julia Sloth-Nielsen, "Islamic *kafalah* as an alternative care option for children deprived of a family environment" (2014) 14 African Human Rights LJ 322 at 337.

incompatibility between *kafala* and adoption thus cuts both ways.[41] *Kafala* may be unacceptable to systems that prefer adoption, but adoption is also anathema to the idea of *kafala* because it generally requires the severance of the birth parents' rights over the child, because of the severance of kinship ties through the changing of the child's name (and at some points the issuance of new birth certificates entirely), and because of the erasure of the child's right to inheritance from the birth family.[42] Yet the inherent plurality of *shari'a* law significantly disturbs this conclusion,[43] which is the same one that has otherwise animated the total Canadian ban on *kafala*-based adoptions. Muslim-majority states assess the compatibility of *kafala* with adoption in a variety of ways, including internally.[44] According to Eadie, only one of four national level approaches involves strict prohibition; of the remainder, all three are relatively compatible with the notion of an "open" adoption as currently predominates in Canada, in which an adoptee is able to discover her birth identity.[45] As well, there is a transnational Islamic jurisprudence that suggests the compatibility of adoption and *kafala* rooted in the best interests of the child.[46] Pakistani practices suggest compatibility, with jurisprudence that allows for permanent guardianship, the routine creation of contractual relationships with birth parents that confirm the waiver of parental rights, the use of care plans and home studies to evaluate the suitability of proposed guardians, and the judicial recognition of the permissibility of overseas relocation for children.[47] Assertions to the contrary, by Canadian officials or otherwise, reflect "the perceived gap between Islamic and international law" that ignores the similarities between adoption and *kafala*; the latter ought to be understood as "a pathway toward adoption as understood in the West."[48]

---

[41] Nermeen Mouftah, "The Muslim orphan paradox: Muslim Americans negotiating the Islamic law of adoption" (2020) 14 Contemporary Islam 207 at 218–19.

[42] Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law, Policy and* Practice, 2nd ed (Dordrecht: Springer, 2015) at 605.

[43] *Ibid* at 604; Shaheen Sardar Ali, "A Step Too Far? The Journey from "Biological" to "Societal" Filiation in the Child's Right to Name and Identity in Islamic and International Law" (2019) 34:3 JL & Religion 383 at 384, 398–402; Kieran Mclean Eadie, "The application of *kafala* in the West" in Nadirsyah Hosen, ed, *Research Handbook on Islamic Law and Society* (Northampton, MA: Edward Elgar, 2018) 48.

[44] Jamila Bargach, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco* (Lanham, MD: Rowman & Littlefield, 2002); Eadie, *supra* note 43 at 56 (adapting and altering Bargach's categories).

[45] Eadie, *supra* note 43 at 67. For evidence that closed adoption systems limit the ability of Muslim adoptions, see Amira Daher, Yaakov Rosenfeld & Lital Keinan-Boker, "Adoption Law, Dilemmas, Attitudes and Barriers to Adoption Among Infertility Patients in Israel" (2015) 34:1 Med & L 55.

[46] See Mouftah, *supra* note 41 at 219–20; Muslim Women's Shura Council, "Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child", *Report of the American Society for Muslim Advancement* (2011), online: <https://bettercarenetwork.org/library/the-continuum-of-care/adoption-and-kafala/adoption-and-the-care-of-orphan-children-islam-and-the-best-interests-of-the-child> [perma.cc/5SQH-533W]; Faisal Kutty, "Islamic Adoptions and the Best Interests of the Child", *Islamic Horizons* (2015), 38 online: <https://issuu.com/isnacreative/docs/ih_jan-feb_15> [perma.cc/D2ZZ-NDGS].

[47] Eadie, *supra* note 43 at 64–67.

[48] Ali, *supra* note 43 at 387–88.

Canada's dismissal of *kafala* sharply differs from that of other Western states that have developed methods to integrate the *kafala* system into the inter-country adoption regime. Different regimes exist for reconciling *kafala* with adoption, *inter alia*, in the United States,[49] United Kingdom,[50] and Australia.[51] In the European Union, various civil law states have developed mechanisms to recognize the essential parallels between *kafala* and adoption, even if the two are not perfect. This has been crystallized into European Court of Human Rights (ECtHR) decisions regarding *kafala* and the right to family life in France[52] and Belgium.[53] The Court of Justice of the European Union similarly confirmed that children in a *kafala* relationship with European Union (EU) citizens are granted the same mobility rights as other children of EU citizens even though they are not "direct descendants" for the purposes of the Citizens' Directive that confirms the right to free movement within the EU.[54] Canada thus occupies a unique space of intransigence as compared to both other Western states as well as those Muslim-majority states which have reconciled *kafala* and adoption.

While there is no perfect analogy between adoption and *kafala*, solutions can certainly be negotiated between and within states by identifying the common aspirations of both *kafala* and open adoptions.[55] What is telling in the Canadian context is that in spite of the provincial and federal governmental implications that it is Muslim-majority states that are being inherently inflexible by generally not

[49] In order to adopt from Pakistan, parents must obtain legal guardianship in Pakistan, then demonstrate that the child is an orphan in accordance with US law. See US Department of State Bureau of Consular Affairs, Pakistan - Intercountry Adoption, online: <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Pakistan.html> [perma.cc/9F2H-44KZ]. Similar provisions exist with respect to adoptions of children in other Muslim-majority states that have not ratified the *Hague Convention on Intercountry Adoption*.

[50] As in the United States, direct intercountry adoption is not available, but parents who obtain guardianship in Pakistan may return to the UK and have their adoption formalized in spite of the fact of non-ratification of the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, provided that certain other regulations are complied with upon return to the UK. See *Adoptions with a Foreign Element Regulations 2005* (UK), SI 2005 No. 392, Regs 23–27.

[51] Ann Black, "Can there be a compromise? Australia's confusion regarding shari'a family law" in Elisa Giunchi, ed, *Muslim Family Law in Western Courts*, 1st ed (London: Routledge, 2014) 149 at 165; Eadie, *supra* note 43 at 51.

[52] See *Harroudj v France*, App No 43631/09 (4 October 2012), where the European Court of Human Rights upheld a decision of domestic French courts to deny a woman the ability to adopt a child in her care under the Algerian *kafala* system on the basis that *kafala* and adoption in France offered substantively the same rights, and there was no denial of a right to family life under Art 8 of the European Convention on Human Rights. In a survey of national treatments of *kafala*, the Court noted that at least 9 European states presented no fundamental legal objection to the recognition of *kafala*.

[53] *Chbihi Loudoudi and others v Belgium*, (2010) 52265/10 ECtHR, [2014] ECHR 1393 (that Art 8 of the European Convention on the right to family life depended on "de facto family ties", and that relationships based on *kafala* are such ties even if Belgium does not equate adoption and *kafala*).

[54] *SM v Entry Clearance Officer, UK Visa Section*, (C-129/18, EU:C:2019:140).

[55] Eadie, *supra* note 43 at 67.

recognizing adoption or signing the *Hague Convention on Intercountry Adoption*,[56] the reality is that many Muslim states have developed nuanced approaches to guardianship and child protection that significantly bridge the gap to open adoptions. What is missing is a comparable willingness on the part of Canada to engage in the legal negotiation inherent to existing in a legally pluralist space.[57]

The resistance to working through the complexity of *shari'a* in the immigration context reflects its treatment in domestic Canadian family and citizenship law. Non-cooperation with *kafala* in respect of immigration, a nuanced yet integral part of the personal law of members of the world's second largest religion, mirrors domestic suspicion of *shari'a* law. In particular, the negation of *kafala* as a valid option for Canadian citizens reflects the larger negation or nullification of Islamic law in the personal lives of Canadians. Quebec's 2019 ban on religious symbols[58] for various government employees is another such attack on Muslim personal law. While the ban is framed in neutral terms, public support is largely animated by Islamophobia.[59] The 2019 ban is paired with 2017's Bill 62, which asserts the religious neutrality of the state and obligates members of the public to uncover their faces while receiving specific government services.[60] Again, while framed as non-discriminatory, Bill 62 makes particular allowance for "emblematic and toponymic elements of Quebec's cultural heritage that testify to its history",[61] clearly suggesting that symbols of Catholicism will be unaffected by the Act. Both the 2017 and 2019 laws clearly target the head and face coverings worn out of religious obligation by some Muslim women, many of whom serve as public school teachers in the province, with the 2017 law making education a special point of emphasis.[62] These acts were accompanied by new provincial citizenship guides that explained to immigrants and refugees that Quebec

---

[56] US Department of State Bureau of Consular Affairs, *supra* note 49.

[57] An option was proposed as early as 1994. See Syed Mumtaz Ali, "Establishing guardianship: The Islamic alternative to family adoption in the Canadian context" (1994) 14 Institute Muslim Minority Affairs 202.

[58] *An Act respecting the laicity of the State*, SQ 2019, c 12.

[59] Jason Magder, "A new poll shows support for Bill 21 is built on anti-Islam sentiment", *Montreal Gazette* (18 May 2019) online: <https://montrealgazette.com/news/local-news/a-new-poll-shows-support-for-bill-21-is-built-on-anti-islam-sentiment> [perma.cc/9HEP-8XBC].

[60] *An Act to foster adherence to state religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies*, SQ 2017, c 19, s1.

[61] *Ibid*.

[62] *Ibid*. See also the factum of the Canadian Civil Liberties Association in its challenge to the constitutionality of the laws. *Hak et al c. Québec (PG)*, No. 500-09-0294546-215 (QCCA) (2 décembre 2021) (Mémoire des appellants at para 85) *("*Encore plus troublante, la preuve présentée au procès confirme que la politique d'exclusion de la Loi 21 s'applique d'une façon disproportionnée aux minorités religieuses. Toute personne qui a perdu son emploi en raison de la Loi 21 auprès d'un centre de service, scolaire au Québec était une femme musulmane. Et les experts s'entendent sur le fait que l'interdiction du port de signes religieux affecte davantage les minorités religieuses." [citations omitted]). The Act also made consequential amendments to the *Educational Childcare Act*, RSQ 2005, c 47, S-4.1.1.

had its own distinct view of religious neutrality, unironically pointing to the pluralist justification for its anti-pluralist approach to Muslims.[63]

Quebec's legislative acts will be familiar to those who followed the evolution of family law in Ontario some fifteen years earlier. Prior to Quebec's religious neutrality acts, Ontario moved to eliminate access to non-state law in family law disputes. Until 2005, the province's arbitration act permitted citizens to agree to settle family disputes, including inheritance, through forms of law other than state law.[64] Decisions made under religious or non-state family law were nonetheless subject to oversight by Canadian courts, which had the jurisdiction to vary the decisions in order to ensure that they did not fundamentally deviate from the requirements of state family law.[65] Yet when it became apparent that Muslim families were relying on certain provisions of *shari'a* law under the Act, the provincial government moved swiftly to negate the ability to rely on religious family law.[66] As with the Quebec laws, public support here was galvanized by Islamophobia, and in particular the assertion by one retired Muslim lawyer that the *Arbitration Act* could give effect to *shari'a* more broadly. While the statement emphasized that such arbitrations would be subject to judicial oversight, the self-aggrandizing nature of the announcement and the overbroad assertions mobilized resistance based on misunderstandings and objections to Islamic law.[67] In spite of commissioning an extensive set of consultations and analysis of the provision that concluded there was no evidence of systemic discrimination against women,[68] and that the practice could continue with some enhanced oversight without risking either the grand fantasy of total *shari'a* or the more tangible possibility of

---

[63] Gouvernement du Québec, Settle and Integrate in Québec, online: <https://www.quebec.ca/en/immigration/settle-and-integrate-in-quebec> [perma.cc/M4AV-M2D2].

[64] *Arbitration Act,* SO 1991, c 17. While the Act did not specifically name religious laws, it permitted them to be relied upon by the parties by not specifically excluding them: Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto: Ministry of the Attorney General, 2004), at 12, online: <https://wayback.archive-it.org/16312/20210402062351/http:/www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html> [perma.cc/3M84-ACK7] [Boyd, "Protecting Choice"].

[65] While there was no clear provision describing the problem of deviation from family law norms, s 50(7) of the *Arbitration Act* permitted courts to refuse to enforce any order they would not have had jurisdiction to make or would not have granted, providing an indirect route to give effect to state family law. As Boyd describes, many courts used this jurisdictional provision to avoid enforcement: *Ibid* at 16.

[66] The *Family Statute Law Amendment Act*, SO 2006, c 1, *inter alia*, did the following: (i) eliminated the possibility of the parties choosing what rules to apply, (ii) required that family arbitration be conducted in accordance with the substantive law of Ontario or another Canadian jurisdiction; (iii) and, declared that any decisions made in violation of these requirements were not considered to be family arbitrations and would have no legal effect; and, (iv) declared the supremacy of the *Family Law Act* in the event of any conflicts between it and the *Arbitration Act*. See *Arbitration Act, supra* note 64 at ss 2.1–2.2, 32(3)–(4).

[67] Boyd, "Protecting Choice", *supra* note 64 at 4–5; Marion Boyd, "Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism" in Keith Banting, Thomas J Courchene & F Leslie Seidle eds, *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2007) 468 [Boyd, "Belonging?"].

[68] Boyd, "Protecting Choice", *supra* note 64 at 133.

gender inequity in family law decision making,[69] the government nonetheless eliminated the possibility entirely by granting no legal status to religious principles.[70] Again, the negotiated solution was deliberately avoided.

In each of these three spheres—federal immigration law, Quebec public law, and Ontario family law—the fear of Islam and *shari'a* as competing normative orders led to strict and unqualified legal responses that left virtually no room for the expression of Islamic legal concepts. In each case, there was clear evidence of a lack of engagement with the alternative legal norms. Instead, Islamic legal norms were only acceptable if they strictly complied with the state's legal norms; otherwise, the blunt tools of effective non-recognition were employed.

An unwillingness or inability to work in a legally pluralist fashion has secondary effects. Muslim Canadians who want to adopt children from the Muslim-majority states they have ancestral roots in or ties to, are prohibited from doing so. Discrimination thus manifests in two ways: children in those states are simply not able to be adopted in Canada, and Muslim Canadian citizens are unfairly treated within the adoption regime. Adoptions now generally are open, and part of deciding the suitability of an adoptive placement rests on the ability of the adoptive family to nurture the cultural background of the adoptee. By prohibiting adoptions of overseas Muslim children, Canadian Muslim parents are prejudiced in their ability to adopt because the state does not allow them to adopt the children who, due to their language, culture, and religion, would otherwise be the best matches for them. By denying immigrants the ability to develop the same kind of complex or non-traditional parent–child relationships that are permitted under domestic law, immigrant families are similarly prejudiced by migration law. In this respect, anti-pluralism operates in migration law to externally project the internalized biases of the domestic legal system. It also compounds the impact of such laws on marginalized communities, reducing their ability to adopt is another way of producing a diminished citizenship status. Anti-pluralism in a legal context can thus also manifest as anti-pluralism in a cultural context, reinforcing both the relationship between the two and the need to hold them apart from one another.

III. Refugee Law and the Policy-Based Denial of Pluralism

Migration law's relationship to legal pluralism is highly conditioned by its connection to state sovereignty, and the right to control who enters a state and on what terms. On its face, refugee law ought to be subject to a similar analysis, given that it also centers on a state's right to determine who is allowed to access the state and its asylum system. That right is inherent to all states but is also mediated by a variety of international law rules and documents that guide, without limiting, the process by which states make such determinations. This flexibility allows for states to develop different domestic legal approaches to refugees while still conforming to the general requirements of

[69] *Ibid* at 133–42.

[70] Boyd, "Belonging?", *supra* note 67 at 472 (describing the decision as "without warning").

international law. This section explores the relationship between this legal pluralism that refugee law both contemplates and permits,[71] and the tendency of the Canadian state to downplay legal pluralism in service of its goal of limiting refugee claims.

While there is a great deal of domestic law interpreting and applying refugee law, its core substance is rooted in two foundational international agreements, opening the door for the interaction between two different legal systems: one domestic, and one international. As well, other international treaties and jurisprudence continue to be meaningful tools for understanding refugee law domestically, leading to the further interaction between domestic law and other international laws. Finally, each sovereign state will also interpret and apply the international obligations in slightly or substantially different manners, suggesting a pluralism of state laws in relation to the overarching international law. At the same time, state policies have both created areas of convergence and homogeneity that are centered around common concerns among states and denied the significance of legal pluralism where it otherwise seems to exist.

Refugee law flows from obligations that states agree to when they ratify the 1951 *Convention relating to the status of refugees* ("Refugee Convention").[72] Chief among these is the obligation of *non-refoulement* in Article 33 of the Refugee Convention,[73] and which is reproduced in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[74] States should not return any individual to a place where there is a well-founded fear of persecution on account of that person's race, religion, nationality, political opinion or membership in a particular social group, and the state is unwilling or unable to protect that person.[75] Similarly, the *Convention Against Torture* limits the ability of states to return individuals to a risk of torture. States that have accepted these obligations are not required to accept any refugees but are essentially required to develop a system to identify people genuinely in need of protection to ensure that the *non-refoulement* commitments are not violated.

Aside from offering a definition of who qualifies as a refugee, and who is unable to claim refugee protection,[76] the Refugee Convention does not detail the procedures to be used or how the legal definitions are to be interpreted. States have relative autonomy to craft their own responses in accordance with their national

---

[71] And, arguably, requires. See Jenny Poon, "A Legal Pluralist Approach to Migration Control: Norm Compliance in a Globalized World" (2020) 34 Emory Intl L Rev Recent Developments 2037 at 2039.

[72] *Convention relating to the status of refugees*, 28 July 1951, 189 UNTS 137 (entered into force on 22 April 1954) [*Refugee Convention*].

[73] *Ibid*.

[74] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) [*Convention Against Torture*].

[75] This is the combined effect of Art 1 and Art 33 of the *Refugee Convention*, *supra* note 72.

[76] While people who are fleeing torture do not necessarily satisfy the definition of a refugee, they are offered equivalent protection in Canada and subject to effectively the same status determination processes.

interpretations of these international obligations. On its face then, this structure encourages legal pluralism. It establishes an overarching framework in the form of the Refugee Convention but allows crucial legal decisions about how to implement and interpret the treaty to be made by national legal systems. In this form of umbrella pluralism,[77] a state is granted a great deal of latitude to develop independent solutions that fit the specific needs and understandings of that state. Thus "a refugee in Canada may not be a refugee in the United States, and vice versa."[78] Yet it is important to understand that in respect of refugees, there is an understandable degree of substantive convergence but also an ongoing desire to *assert convergence* for the specific purpose of excluding asylum-seekers from the refugee protection system. In other words, refugee law is not necessarily *substantively* homogenous, but states nonetheless have an interest in denying the degree of pluralism that may exist.

As most states do not accept resettled refugees in any meaningful way,[79] their primary concern is dealing with asylum-seekers: those foreigners who arrive uninvited and, immediately or after some delay,[80] make a refugee claim. While Canada's laws in this regard are not perfectly duplicative of any other state, there is much conceptual overlap, reliance on comparable legal and policy instruments and, at times, integration between the refugee regimes of many Western states. All of these states recognize that as there is no obligation to accept any resettled refugees, they ought to pay particular attention to stopping asylum-seekers—those refugee claimants who show up at the border unannounced and eliminate international agencies such as the UN High Commission for Refugees as an interloper by making their pleas for protection directly to the state. States are developing convergent and at times coordinated legal responses to this common concern.

---

[77] In which an international law provides general conditions by which domestic law should operate, while not requiring perfect homogeneity between different domestic systems. See Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007) at 187–89 (discussion of "interpretive guidelines" in respect of pluralism in international criminal law).

[78] Anthony M North & Joyce Chia, "Towards convergence in the interpretation of the Refugee Convention: A proposal for the establishment of an International Judicial Commission for Refugees" in James C Simeon, ed, *The UNHCR and the Supervision of International Refugee Law* (Cambridge: Cambridge University Press, 2013), 214.

[79] See UNHCR, "Projected Global Resettlement Needs 2018" (9 June 2017), online (pdf): *The UN Human Rights Agency* <https://www.unhcr.org/protection/resettlement/593a88f27/unhcr-projected-global-resettlement-needs-2018.html> [perma.cc/P4BU-7FHG] (In 2016, the UN High Commission for Refugees stated that it had a "20-year high" in terms of successfully resettling refugees. That year, 125,800 refugees (of an estimated 1.19 million in need of resettlement) were resettled across 37 states); UNHCR, "Projected Global Resettlement Needs 2022" (23 June 2021), online (pdf): *The UN Human Rights Agency* <https://www.unhcr.org/protection/resettlement/60d320a64/projected-global-resettlement-needs-2022-pdf.html> [perma.cc/8E4Y-92M7] (In 2020–a pandemic affected year–22,770 refugees were resettled across 22 states. 1.44 million refugees had previously been identified in need of resettlement). See also Benedicta Solf & Katherine Rehberg, "The Resettlement Gap: A Record Number of Global Refugees, but Few Are Resettled", Migration Policy Institute – Washington, DC (22 October 2021), online: <https://www.migrationpolicy.org/article/refugee-resettlement-gap> [perma.cc/9WY7-EKQU**].**

[80] Not all asylum-seekers start off as such. They may be classified as a distinct kind of migrant—a tourist, or temporary worker or student—who is then compelled by changed circumstances in their home state to seek reclassification as a refugee.

Canadian refugee law finds its greatest points of convergence with the United States, with whom it shares its only land borders.[81] Both states have been criticized for increasingly harsh policies towards asylum-seekers, with far greater attention given to their respective regimes since the terrorist attacks of September 11, 2001. Yet as Obiora Okafor persuasively argues, the securitization of refugee law in both the United States and Canada is not a post-9/11 trend. Legal changes that followed 9/11 were already moving towards greater restrictions, with 9/11 only confirming rather than introducing the two states' parallel steps towards securitizing refugee law.[82] The securitization process truly began in the 1990s, where Democrat developed legislation expanded the detention and removal regime in US refugee law, while simultaneously limiting access to the refugee system.[83] Canada introduced its new immigration and refugee laws several years later through the *Immigration and Refugee Protection Act* (*IRPA*),[84] which now contains multiple provisions that also expand detention and removal systems in Canada.[85]

One particularly controversial provision contained in the *IRPA* is that of the "safe third country." A safe third country is a state that an asylum-seeker has transited through before arriving at another state's border. Asylum-seekers in this position will generally be barred from making their refugee claim at the new state's border; they will instead be directed back to the "third state" to make their claim. This is an admittedly confusing term, given that in the paradigmatic example, an asylum-seeker will leave their state of nationality or habitual residence (1st state), travel through a "safe" state (2nd state), and then arrive at the border of the state they wish to make the claim (3rd state). Nonetheless, from the point of view of the state receiving the asylum-seeker, this "safe" state is the third one in the relationship. Canada has only designated one such country, the United States, via the Regulations of the *IRPA*[86] and a bilateral

[81] Along the 49th parallel separating Canada's provinces from the continental United States, and along the 141st meridian west, which defines most of the border separating Alaska from British Columbia and the Yukon Territory.

[82] Obiora Chinedu Okafor, *Refugee Law after 9/11: Sanctuary and Security in Canada and the United States* (Vancouver: UBC Press, 2020) at 9.

[83] See the *Illegal Immigration Reform and Immigration Responsibility Act*, Pub L No 104-208, 110 Stat 3009-546 (1996), and the *Anti-Terrorism and Effective Death Penalty Act*, Pub L No 104-132, 110 Stat 1214 (1996).

[84] *Immigration and Refugee Protection Act*, SC 2001, c 20 [*IRPA*].

[85] Including the Designated Foreign National (DFN) standard, which allows the Minister of Immigration, Refugees and Citizenship to compel the detention of individuals arriving in a designated group, reduces their ability to challenge their detention, and restricts their ability to access other procedural protections or apply for permanent residence even if successful in their asylum claim (*ibid*, ss 20.1, 20.2, 55(3.1)(a)). For an extensive critique of Canada's immigration detention regime see Canada, Immigration and Refugee Board of Canada, *Report of 2017/2018 External Audit (Detention Review)*, (Report), (Ottawa: March 2018), online: <https://irb.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx> [perma.cc/6P5N-65V3].

[86] IRPR, *supra* note 5, ss 159.3–159.6.

treaty.[87] Although several exceptions to the general rule of returning asylum-seekers to the third state exist in the context of Canada's relationship with the United States,[88] the relationship otherwise follows the general form of safe third country designations by rendering transiting asylum-seekers ineligible to make a refugee claim in Canada.[89] In the specific Canada–US relationship, this ineligibility further only applies when the claimant arrives (i) at the land border between Canada and the United States, that (ii) has an official border crossing point.[90] This limitation stems from a concern that it would otherwise be impossible to determine whether a claimant had traveled from either the US or Canada, and thus impossible to confirm which of the two states was responsible for that asylum claim.[91]

The logic of designating a country as safe does not necessarily require some degree of legal alignment between Canada and the third state. In the case of the *Safe Third Country Agreement* ("*STCA*"), cabinet is required to assess the safe third country's human rights record, both generally as well as specifically in relation to refugee law. States are declared to be safe based on their ratification and implementation of the *Refugee Convention* and the *Convention Against Torture*, as well as their overall human rights record.[92] In other words, what is assessed is the degree of compliance with *international* human rights law rather than domestic Canadian law. While the *Refugee Convention* permits some measure of legal pluralism, the *STCA* requires some level of legal homogeneity. Litigation challenging the designation of the United States as safe on this basis has twice been filed, but substantive successes at trial (determinations that there is *not* sufficient concordance with international human rights law) have both been overturned on appeal on procedural grounds and admonishments about an alleged lack of evidentiary foundation.[93]

---

[87] *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, United States and Canada, 5 December 2002, Can TS 2004 No 2 (entered into force 29 December 2004) [STCA].

[88] Most turn on whether the asylum-seeker has a family member in Canada or permission to travel to Canada. See IRPR, *supra* note 5, ss 159.5(a)–(h).

[89] *IRPA*, *supra* note 84, s 101(1)(e).

[90] STCA, *supra* note 87, Art 4(1).

[91] US, *United States and Canada Safe Third Country Agreement: Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary (House of Representatives)*" 107th Cong (16 October 2002), online: <http://commdocs.house.gov/committees/judiciary/hju82363.000/hju82363_0f.htm> [perma.cc/BB5T-3SPW] at 13 [STCA Hearings].

[92] *IRPA*, *supra* note 84, s 102.

[93] See *Canadian Council for Refugees v R*, 2007 FC 1262 [*CCR 2007*]; *Canadian Council for Refugees v Canada*, 2008 FCA 229; *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770 [*CCR 2020*]; *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2021 FCA 72.

What is revealing about the designation of the United States as a safe third country is not merely that it is substantively contestable, but that it is now desirable to Canada. When the notion of a safe third country was first introduced in Canadian immigration law in the 1980s, Canada decided not to declare the United States a safe third country. This was because of the US practice of denying the right to make a claim to specific applicants from Central America,[94] a practice with disturbing parallels to contemporary US refugee policies that have only recently been revisited: the over policing of migrants in the southern US, mass trials of irregular border crossers, detention of children and separation of families, closing the border specifically to Latin-appearing migrants, and attempting to shift asylum claimant processing to Latin American states.[95] These apparently contradictory approaches can be reconciled by understanding that Canada's support of the *STCA* was rooted in the desire to limit the number of asylum-seekers arriving from the United States at its borders; Canadian cooperation on enhanced post-9/11 border security measures was granted in return for a reduction in the number of asylum seekers arriving in Canada from the United States via the STCA.[96] Once the Agreement was in force, Canada further built on this rationale of limitation by eliminating an exception which exempted from the *STCA* claims from anyone who was from a country to which Canada was temporarily suspending removals because of the generalized risks and dangers in that state.[97] Canada is therefore effectively compelled to assert the safety of the American refugee system and its compliance with international human rights law in order to insulate the *STCA*—the key limiting instrument—from litigious or judicial attack. In this way, Canada is pragmatically obligated to minimize the legal pluralism that has otherwise been identified by litigants and judges.[98]

This approach is mirrored in other steps Canada has taken in refugee law, such as the expansion of the safe third country concept to limit asylum claims even further by explicitly denying any meaningful pluralism as between the refugee laws of certain foreign states and Canada's own domestic refugee law system. Under this new system, Canada refuses to hear any refugee claim made by an asylum-seeker who has

---

[94] Lara Sarbit, "The Reality beneath the Rhetoric: Probing the Discourses Surrounding the Safe Third Country Agreement" (2003) 18 J L & Soc Pol'y 138 at 143.

[95] *See* Asad G Kiyani, "Criminalization, Safety and the Safe Third Country Agreement", in Michael Carpenter, Melissa Kelly & Oliver Schmidtke, eds, *Borders and Migration: The Canadian Experience in Comparative Perspective* (Ottawa: University of Ottawa Press, 2022) at 147–72.

[96] STCA Hearings, *supra* note 91 at 12, 16–17, 63. In defending the STCA to Congress, the State Department noted that while the STCA *appears* balanced in its language it responds to an unbalanced problem in which thousands of refugee claimants cross from the United States to Canada but only a few hundred cross the other direction. The STCA was described as a "trade-off" (*ibid* at 61 and 63) between the United States' security needs and Canada's logistical goals. One witness complained that refugees were "being made a bargaining chip" (*ibid* at 40). On the disparity between asylum seekers moving from one state to the other, see Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement" (2004-5) 36:2 Colum HRLR 365 at 394–95.

[97] Okafor, *supra* note 82 at 188.

[98] See e.g. *CCR 2007*, *supra* note 93; *CCR 2020*, *supra* note 93.

made a claim in any other designated country.[99] The only requirement is that Canada enter into an information sharing agreement with the designated state. Countries that have so far been designated are the other members of the so-called Five Country Conference ("FCC") of Canada, the United States, United Kingdom, Australia, and New Zealand.[100] The FCC is a consortium of states that share information between themselves to enable the enforcement of immigration and refugee law. There are important practical and conceptual differences here from the *STCA*. First, there are no exceptions to the rule, as there would be in the case of the *STCA* for claimants with certain family members in Canada. Second, there is no legislative requirement to assess the ongoing compliance of these designated countries with international human rights norms such as the *Refugee Convention* or the *Convention Against Torture*. Finally, even though it is the alleged correspondence between the domestic refugee law systems of the FCC that justifies the rule, there is no requirement for ongoing monitoring of this declared consonance.

According to Canada, what links the members of the FCC are "the commonalities among [their] immigration programs."[101] In other words, it is the absence of pluralism that matters, and which justifies both a tremendous amount of information sharing between the states, as well as the new provision prohibiting second asylum claims within the FCC. The prohibition is justified on two bases. First, as with the *STCA*, there is a minimization of legal pluralism. Canada has declared the provision justified because of the alleged substantive equivalence of the refugee law systems of these safe countries.[102] Second, the lack of *cultural* pluralism between states also justifies the prohibitions within the FCC. This minimization of cultural differences between the states rests on claims that the states have "many historical ties and a common language" and "share many common patterns of both regular and

---

[99] *IRPA*, *supra* note 84, s 101(1)(c.1). Operational instructions and guidelines describe the process by which the exclusionary ground is to be enforced by IRCC staff. See Canada, Immigration, Refugees and Citizenship Canada, *In-Canada refugee claims: Grounds for ineligibility*, (Operational Instructions and Guidelines) (Ottawa: updated 31 March 2022), online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugee-protection/canada/processing-canada-refugee-claims-grounds-ineligibility.html> [perma.cc/Z6XT-SRYJ]. See also, Canada, Immigration, Refugees and Citizenship Canada, *GCMA workarounds due to IRPA changes to the refugee claim process – June 21, 2019*, (Operational Instructions and Guidelines) (Ottawa: 21 June 2019), online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/bulletins-2019/663.html> [perma.cc/WXT8-JPDY].

[100] IRPR, *supra* note 5, ss 315.21, 315.36.

[101] Regulatory Impact Analysis Statement, *Regulations Amending the Immigration and Refugee Protection Regulations*, PC 2017-462 (17 May 2017), C Gaz II, vol 151, no 10, online: <https://canadagazette.gc.ca/rp-pr/p2/2017/2017-05-17/html/sor-dors79-eng.html> [perma.cc/MJC4-4C2S].

[102] *Ibid*. See also Kathleen Harris, "Liberals move to stem surge in asylum-seekers – but new measure will stop just fraction of claimants", *CBC News* (10 April 2019), online: <https://www.cbc.ca/news/politics/refugee-asylum-seekers-border-changes-1.5092192> [perma.cc/6ECU-HNZE] (quoting government ministers describing all five states as 'safe' for the purposes of refugee law).

irregular migration".[103] Here, the policy decisions both compel a denial of two forms of pluralism—legal and cultural—while encouraging horizontal integration that may well have the effect of turning rhetoric into reality by producing further legal and cultural convergence between the various systems and states.

Implicit in these declarations of legal and cultural commonalities is a shared ideological position that border securitization is a singularly pressing imperative, and that migrants pose a criminal if not existential threat to the border. It is no surprise that the *STCA* was signed in the aftermath of 9/11, and only once Canada promised to engage in greater information sharing and cooperation on border security arrangements.[104] Language of "crimmigration"[105] has been used to describe the convergence of domestic criminal and immigration laws. The subsequent convergence of the *national* legal regimes of like-minded states is only the natural consequence of that initial domestic conflation. As Okafor argues, this convergence of priorities is clear in the context of the United States–Canada relationship, which have both spent decades attempting to secure their borders against asylum-seekers and use quasi-criminal tools to deter them.[106] At the same time, there are significant differences in the substantive law and legal instruments used by the two states in pursuit of this common policy agenda.[107]

The safe third country concept is distinct from other related ideas such as “first country of origin” or “safe country of origin” because of the centrality of legal pluralism to its analysis. While the safe third country idea achieves a familiar result—precluding a claim by the asylum-seeker—it uses a different method.[108] It relies on descriptions of legal process rather than the variable and unpredictable country conditions of any particular state. In this understanding, what makes a third country safe is less the on–the–ground reality and lived experience of the migrant, and more the presumed fairness and rationality of the law that adjudicates the claim. Crucially, the reference point for assessing this third state’s legal system is its concordance with

---

[103] Tim Legrand, "Transgovernmental Policy Networks in the Anglosphere" (2015) 93:4 Public Administration 973 at 982–83.

[104] STCA Hearings, *supra* note 91 at 12–13 (noting that the STCA is one component to “be viewed in the context of the overall 30-point action plan” agreed between the US Attorney General, the US Director of Homeland Security, and Canadian Foreign Minister, and describing the integration of border enforcement, information sharing, and the potential for visa system harmonization).

[105] Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power" (2006) 56 Am U L Rev 367 at 378–81.

[106] Okafor, *supra* note 82.

[107] *Ibid*.

[108] The ‘first country of origin’ doctrine presumes that *any* country other than the state of origin is safe enough for a genuine refugee (and thus that an asylum-seeker should make their claim in the first state in which they arrive), while the ‘safe country of origin' presumes that the *general* conditions of the state of origin are proxies for whether any given individual faces persecution (and thus that individuals fleeing those states aren't truly refugees. See James C Hathaway, *The Rights of Refugees Under International Law*, 2nd ed (Cambridge: Cambridge University Press, 2021) at 330–35.

international law as well as the law of the state that has received the migrant. Declarations of, and concrete moves toward, a lack of meaningful variation between legal systems are integral to this task because they reduce the scope for identifying discrepancies that can be used to attack the premise of "safety by common process."

In this way, and in spite of both international refugee law's invitation to pluralist approaches and often the presence of meaningful legal pluralism, a policy of anti-pluralism is integral to the political task at hand. Denying the fact of legal pluralism is essential to justifying the exclusion of asylum-seekers on the procedural grounds of the safe third country concept. While the ideas of "safe countries of origin" and "first countries of origin" are both divorced from the experience of the asylum-seeker because they do not enquire into the relationship between the specific migrant and the specific country of origin, the safe third country concept goes further by denying the relevance of that experience at all and simply focusing on the formalities of the legal system instead. These approaches are justified on the basis of a lack of both legal and cultural pluralism.

IV. Citizenship and the Bivalence of Legal Pluralism

Having considered the demonstrations and denials of pluralism in the immigration and then refugee spheres, this paper now turns to pluralism in citizenship law and considers how different understandings of citizenship are treated by state law. For many migrants, obtaining citizenship is the guarantor of the greatest freedom and security, acting as an indicator of formal equality between all members of a political community. At a base level, citizenship is valuable to the migrant because of how it affects their mobility. It offers two important guarantees: a right to enter Canada, [109] and to remain in Canada.[110] Citizenship additionally permits equal participation in the electoral political sphere.[111] These assurances make citizenship an unlikely space for studying legal pluralism, but not if citizenship status is understood as a guarantor of a constitutional minimum set of entitlements, rather than as a set of uniform entitlements. This idea of asymmetric citizenship—that some citizens are legally owed additional privileges as compared to others—is present in Canada. This section examines this issue by addressing the position of Indigenous peoples in Canada, whether the citizenship rights owed to them is evidence of legal pluralism, and what can be gleaned from the Canadian state's response to this apparently pluralist understanding of citizenship. Studying pluralism in respect of citizenship and Indigenous peoples illustrates that Canadian migration law's uncertain relationship with legal pluralism is deeply connected to anxieties about the initial imposition of

[109] The right to enter does not, however, entail a right to leave to the extent that it does not entail a right to obtain a passport: *Canadian Passport Order*, SI/81-86, s 9.

[110] Citizenship can be renounced voluntarily, but it can also be revoked by the government in certain instances of fraud or misrepresentation: *Citizenship Act*, RSC 1985, c C-29, ss 9–10.

[111] *Canadian Charter of Rights and Freedoms*, s 3, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

colonial law and the need to minimize the degree of both legal and cultural pluralism when building the nation-state of Canada.

Much has been written on the citizenship status of Indigenous peoples in Canada, the manipulation of that status by the federal government, and the effect of non-unitary citizenship models on national identity.[112] In short, the idea of non-unitary citizenship is controversial because it implies that some citizens have greater entitlements than others, which conflicts with the liberal democratic notion of equal treatment of all under the law. This is differentiated citizenship, and in Canada largely reflects the notion that Indigenous peoples in Canada are not only Canadian citizens but may also have additional entitlements flowing from "promises made to [Indigenous peoples], from expectations they were encouraged to hold, and from the simple fact that they once occupied and used a country to which others came to gain enormous wealth in which the Indians have shared little."[113] Indigenous peoples and others have noted that Crown–Indigenous relations formally require the "citizens plus" approach defended by the Hawthorn Commission and advanced by the so-called "Red Paper."[114] This includes s 35(1) of the *Constitution Act, 1982*,[115] which recognizes Aboriginal rights and title claims in the abstract without actually defining their specific content. As Aboriginal rights and title are not accessible to non-Indigenous Canadians, theirs is a lesser form of citizenship. In this light it might be said that by developing distinct citizenship regimes based on Indigenous rights and legal orders, Canadian migration law *is* legally and not merely culturally pluralist. At the same time, this is arguably a theoretical possibility rather than one put into practice, and while there may be strong reasons for preferring a legally pluralist citizenship structure, it would be misleading to say that this potential is realized in Canada.

Three examples serve to illustrate the difficulties surrounding claims of pluralism in respect of citizenship. Broadly speaking, this is the argument that by

---

[112] See e.g. John Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court" (2001) 80 Can Bar Rev 15; Alan C Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000); Martin J Cannon, "First Nations Citizenship: An Act to Amend the Indian Act (1985) and the Accommodation of Sex Discriminatory Policy" (2006) 56 Can Rev Soc Policy 40; Wendy Cornet, "Indian Status, Band Membership, First Nation Citizenship, Kinship, Gender, and Race: Reconsidering the Role of Federal Law" (2007) Aboriginal Policy Research Consortium Intl 92; Kirsty Gover, "When Tribalism Meets Liberalism: Human Rights and Indigenous Boundary Problems in Canada" (2014) 64 UTLJ 206; Martin Papillon, "Segmented Citizenship: Indigenous Peoples and the Limits of Universality" in Daniel Béland, Gregory Marchildon & Michael J Prince eds, *Universality and Social Policy in Canada* (Toronto: University of Toronto Press, 2018) at 137–54.

[113] HAC Cairns, SM Jamieson & K Lysyk, in HB Hawthorn, ed, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies*, vol 1 (Ottawa: Indian Affairs Branch, 1967) 6.

[114] Indian Chiefs of Alberta, *Citizens Plus* (Edmonton: Indian Association of Alberta, June 1970), *reprinted* in (2011) 1:1 Aboriginal Policy Studies 188 at 194 (emphasizing the treaty relationship as a justification). See also James (Sákéj) Youngblood Henderson, "*Sui Generis* and Treaty Citizenship" (2002) 6:4 Citizenship Studies 415 at 416 (describing "formally equal" citizenship as "an invitation to compliance with colonialism and domination"); Cairns, *supra* note 112.

[115] Borrows, *supra* note 112.

creating exemptions from the ordinary immigration rules that apply on both sides of the border, and recognizing alternative forms of citizenship, the treatment of various Indigenous groups can be seen as carving out a pluralist space. The first example is the Nisga'a Final Agreement.[116] Negotiated after the *Calder*[117] decision, the Final Agreement included a large financial settlement, the grant of 2,000 square kilometers of land in northwestern British Columbia, and a variety of resource allocations (including wildlife, timber, minerals, and other rights) on treaty lands.[118] Alongside this came the ability of the Nisga'a to decide for themselves who was a Nisga'a citizen. This grant of citizenship power was controversial because of the specific use of "citizen", which implied a sovereign authority that competed with or supplanted that of the state.[119] Understood in this way, there was a pluralist space created in immigration law, with differential citizenship rights granted to the Nisga'a. Another example, this time concerned with mobility rights, is the Jay Treaty of 1794.[120] Negotiated with the British Crown by US Supreme Court Chief Justice John Jay, the treaty recognized the division of groups of Indigenous peoples who straddled what is now the US–Canada border. Article 3 of the Jay Treaty allows members of those groups to travel freely across the border, free of the restrictions that constrain other citizens of both countries. Finally, border restrictions introduced in response to the COVID–19 pandemic have not applied equally to all Canadians. In the Mohawk reserve of Akwesasne, whose traditional territorial boundaries straddle three Canadian and US jurisdictions—what are now known as Ontario, Quebec, and New York State—distinct border crossing rules apply to Indigenous residents. Indigenous residents with proof of their status and residency were unaffected by the pandemic-induced closure of the US-Canada border. Once the border reopened generally, these residents were still exempted from COVID–19 testing and vaccination requirements on return to Canada.[121] On their face, each of these differentiations suggest the possibility of a legally pluralist migration and citizenship law, one that accommodates the unique position of Indigenous peoples in Canada.

Yet immigration and refugee law has carefully circumscribed the boundaries of such deviations, with state law often acting as an umbrella under which differences are accommodated on a case–by–case basis. Federal and provincial legislative approval (along with that of a majority of Nisga'a voters) was required for the Nisga'a

---

[116] Canada, BC & Nisga'a Tribal Council, *Final Agreement* (1999), online: <www.nnkn.ca> [perma.cc/6CFG-UY8F].

[117] *Calder v BC (AG)*, [1973] SCR 313, [1973] 4 WWR 1.

[118] *Nisga'a Final Agreement Act*, SC 2000, c 7.

[119] Carole Blackburn, "Differentiating indigenous citizenship: Seeking multiplicity in rights, identity, and sovereignty in Canada" (2009) 36:1 American Ethnologist 66 at 72–74.

[120] *The Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America*, Great Britain and USA, 19 November 1794 (entered into force 29 February 1796).

[121] Mohawk Council of Akwesasne, Press Release, "Akwesasne residents exempt from Covid-19 testing at Canada's border crossings" (17 February 2021), online: <http://www.akwesasne.ca/akwesasne-residents-exempt-from-covid-19-testing-at-canadas-border-crossings/> [perma.cc/HD9F-85WE].

Final Agreement. The scope of Nisga'a authority only extends to membership in the Nisga'a community, not the ability to grant Canadian state citizenship. While it may be a step towards a form of legal pluralism within Canada,[122] these are two distinct forms of citizenship, only one of which is covered by the Agreement. Both membership in Canada, and the ability to cross Canada's borders to visit other foreign states, depends upon decisions and documentation issued by the Canadian state. This same reality applies to all other discussions of Indigenous citizenship: currently Indigenous citizenship models have not led to the Canadian state loosening its exclusive authority to decide who to permit into Canada, and on what terms.

The *Jay Treaty* is less an allowance under immigration law, and more a vestigial artifact in the form of a treaty that pre-dates Confederation and was incorporated as a holdover into Canadian immigration law. Importantly, the substantive effects of the treaty—allowing Indigenous people born in one country to claim rights and privileges in the other—largely manifest in the United States.[123] Canadian-born Indigenous people wishing to cross into the United States are able to rely on a statutory provision in American law,[124] but American-born Indigenous people seeking to cross into Canada must demonstrate that the *Jay Treaty* reflects an unextinguished Aboriginal right under s 35(1) of the Constitution Act.[125] The Treaty itself is not part of Canadian law because it has not been ratified by the legislature, and was agreed between the United States and Great Britain rather than with any Indigenous nation.[126] The rights under it are recognized but only as questions to be addressed through the generalized framework of constitutional Aboriginal rights litigation.

Finally, Mohawk movement rights in the Ontario–New York border region are limited in their exceptionality. While the ability to freely cross the border has survived the COVID–19 pandemic, border crossing in Akwesasne remains fraught with allegations of racism and discrimination against residents using the crossing[127] as well as Mohawk employees of the border agency.[128] As well, these mobility rights—as with the Nisga'a—do not affect the ongoing citizenship and membership debate

---

[122] Blackburn, *supra* note 119.

[123] Caitlin Smith, "The Jay Treaty Free Passage Right in Theory and Practice" (2012) 1:1 American Indian LJ 161.

[124] *Immigration and Nationality Act*, 8 USC § 1359 (2006).

[125] See Nell Jessup Newton et al, eds, *Cohen's Handbook of Federal Indian Law*, 2012 ed (New York: LexisNexis, 2012).

[126] *Francis v The Queen*, [1956] SCR 618, 3 DLR (2d) 641.

[127] APTN National News, "Mohawks of Akwesasne face discrimination at border crossing says class-action suit", *APTN* (18 July 2019) online: <https://www.aptnnews.ca/national-news/mohawks-of-akwesasne-face-discrimination-at-border-crossing-says-class-action-suit/> [perma.cc/VL8E-9WQ6].

[128] Catharine Tunney, "Episodes of racism, harassment, homophobia recorded at border crossing", *CBC News* (30 June 2021) online: <https://www.cbc.ca/news/politics/cbsa-cornwall-akwesasne-1.6085999> [perma.cc/S9G3-YM5Y].

between the Mohawks of Kahnawà:ke, which itself flows from the federal government's depredation of Indigenous sovereignty and autonomy *in spite of* the unique position of Akwesasne.[129]

Moreover, pointing to the treatment of select Indigenous groups as evidence of a legally pluralist order misses four important features of Indigenous existence in Canada. The first is that Aboriginal rights are hotly contested, often through litigation and protracted negotiation. The Nisga'a success in *Calder* came in 1973, but the *Final Agreement* was not concluded until 1998. The ongoing non-recognition of the *Jay Treaty* in Canada is another example of such contestation. While the law formally recognizes the *potential* of these rights, the fact that they must be litigated, that process often takes decades, and, if actually adjudicated, depends on questionable tests of the veracity of the claim, suggests that any legal pluralism that exists is minimal and highly circumscribed by the state legal order.

Second, despite the minor exceptions carved out by and for some Indigenous groups, it would be overly generous to transpose these distinctions to Canadian immigration and refugee law generally. Unlike the exceptional approaches noted above, that general body of law routinely applies to hundreds of thousands of individuals every year, with the bureaucratic relentlessness and indifference characteristic of immense administrative structures developed to process massive amounts of information and applications. It would thus be an optimistic interpretation of the actual accommodation of non-state legal orders to say that Canadian migration law is openly legally pluralist. In reality, migration law has, under great pressure and in very specific circumstances, made limited concessions to the fact of Indigenous presence that predates European arrivals in Canada. On this evidence, Canadian migration law is iteratively and unpredictably open to some degree of pluralism in highly regulated circumstances whilst otherwise preserving the hegemonic weight of state law on migration.

Third, Canadian governments have very deliberately tried to not only eradicate Indigenous traditions and legal orders, but also to sanitize the attendant cultural genocide[130] by reframing the civilizing mission of residential schools and the

---

[129] On the membership debate and its origins, see Audra Simpson, "Paths Toward a Mohawk Nation: Narratives of Citizenship and Nationhood in Kahnawake" in Duncan Ivison, Paul Patton & Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 113; EJ Dickson-Gilmore, "*Iati-Onkwehonwe:* blood quantum, membership and the politics of exclusion in kahnawake" (1999) 3:1 Citizenship Studies 27; Daniel Rück, *The laws and the land: the settler colonial invasion of Kahnawà:ke in nineteenth-century Canada* (Vancouver & Toronto: UBC Press for the Osgoode Society for Canadian Legal History, 2021).

[130] Truth and Reconciliation Commission of Canada, “Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada” (2015), online (pdf): *Government of Canada* <https://publications.gc.ca/site/eng/9.800288/publication.html> [perma.cc/4DS2-KD7B] at 1 (“For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and

governance of Indigenous peoples in the language of migration. During the 1950s and 1960s, federal governments conceptualized and treated Indigenous peoples as immigrants. Indian Affairs and Immigration were one federal department, and assimilation programs targeted at newcomers to Canada were also adapted and applied to Indigenous peoples.[131] While the idea that Indigenous peoples are merely "our oldest Canadians"[132] and the rhetoric that "We are all immigrants" has since subsided,[133] the practices of assimilation and suppression have not.

This connects to the fourth and final feature missing from an analysis that suggests there is a legally pluralist citizenship order because of the treatment of *some* Indigenous groups (such as the Nisga'a, the Mohawks of Kahnawà:ke) or the existence of the *Jay Treaty*. While these three pieces might suggest a "citizenship *plus*" model, whereby some Indigenous peoples have a Canadian citizenship that is *enhanced* with additional privileges, the history of Canada–Indigenous relations shows us something very different. As Papillon writes, and as with the earlier discussion of the impact on Muslim Canadians of excluding *kafala*-based intercountry adoptions, Canadian and Indigenous citizenship must be considered relationally:

> Throughout Canada's colonial history, Indigenous peoples were progressively subjugated by the Canadian state and forcibly included in the citizenship regime. In the process, their own forms of citizenship were destroyed and replaced with a ward-like status.[134]

While Muslim Canadians have not had their citizenship status "destroyed" in the same way as Indigenous peoples in Canada, the larger point remains: to speak of Indigenous citizenship—indeed citizenship in any form—is to speak of more than simply the formal legal category of citizen. To be a citizen is to have certain fundamental freedoms and rights, including rights of mobility and voting, but it also encompasses more. Citizenship also connotes a form of *belonging* and membership in a society and community, which can be conditioned by the granting of formal entitlements, but also by informal depredations.

---

racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide").

[131] Heidi Bohaker & Franca Iacovetta, "Making Aboriginal People 'Immigrants Too': A Comparison of Citizenship Programs for Newcomers and Indigenous Peoples in Postwar Canada, 1940s - 1960s" (2009) 90:3 Can Historical Rev 427.

[132] House of Commons, *House of Commons Debates*, 24-4, No 2 (16 February 1961) at 21:36 (Hon Ellen L Fairclough).

[133] Although the then-leader of the federal Liberal party, Michael Ignatieff, used it in 2009: Kenneth Whyte, "Maclean's Interview: Michael Ignatieff", *Maclean's* (12 February 2009), online: <https://www.macleans.ca/general/macleans-interview-michael-ignatieff/> [perma.cc/4BPD-R25B].

[134] Martin Papillon, "Structure, Agency, and the Reconfiguration of Indigenous Citizenship in Canada" in Mireille Paquet, Nora Nagles & Aude-Claire Fourot, eds, *Citizenship as a Regime: Canadian and International Perspectives* (Montréal and Kingston: McGill-Queen's University Press, 2018) at 76–77.

Canada's partial recognition of some elements of Indigenous citizenship thus cannot be disentangled from the experience of Canadian citizenship that Indigenous peoples have within the state system. Arguably the lived experience of Indigenous peoples is of an unequal, *diminished* citizenship[135] generated by informal means (say, prejudice against Indigenous peoples on the part of employers, educators, health care workers and so on) and formal means. The latter includes but is not limited to the underfunding of education and health care for Indigenous peoples; a lack of clean drinking water, over-policing (of Indigenous people as offenders in both the criminal and child welfare context) and under-policing (in support of Indigenous complainants and victims), and, of course, territorial dispossession. This "segmented citizenship" has been continued rather than eliminated by the transition from colonial rule to the admission of Indigenous peoples into the welfare state.[136] Thus while "citizens plus" may have been the aspirational goal, the reality may be closer to "citizens minus."[137] While competing modalities of citizenship may be evidence of a legally pluralist citizenship regime, the evaluation of that regime must be holistic. Any assessment of citizenship entitlements that purportedly accrue to Indigenous peoples above and beyond that which accrue to other Canadian citizens must consider the pervasive *disentitlements* that also condition their experience of Canadian citizenship.

Disentitlement is a particularly important feature of citizenship in the Canadian settler–colonial context and is a way of understanding the relationship between cultural pluralism and legal pluralism in Canada. As in all settler–colonial states, cultural pluralism in Canada is generated internally and externally. External sources of cultural pluralism are immigration laws and policies that permit foreigners to enter Canada temporarily or permanently and perhaps obtain the status of legal citizen. Cultural pluralism is generated internally by the continued existence of Indigenous peoples, and their continued assertions of distinct claims, rights, and entitlements that flow from Indigenous legal and cultural orders. Each of these generators of cultural diversity are simultaneously potential sources of legal diversity. As Muslim Canadians may wish to have family law disputes settled through reference to Islamic precept, Indigenous communities may wish to adhere to their own conceptions of environmental stewardship. What connects the two is not that "we are all immigrants", but that the Canadian state has resisted the demand for legal pluralism and pursued a multiculturalism policy that to its critics remains deeply racialized and

[135] See Borrows, *supra* note 112 (Borrows suggests this is one reason justifying a formal differentiated citizenship favouring Indigenous peoples).

[136] Papillon, *supra* note 112.

[137] David Mercer, "'Citizen Minus'?: indigenous Australians and the citizenship question" (2003) 7:4 Citizenship Studies 421.

hierarchical,[138] in part because of its anchoring in the bicultural framework of Anglo/Francophone settlement.[139]

That anchoring, which flows from the terms of reference of the Royal Commission on Bilingualism & Biculturalism[140] which effectively posited Canada's founding "races" as having equal status, need not continue to restrain legal pluralism in the present day. Yet the trope of considering all people in Canada as "immigrants", whether they are first or twelfth generation, disguises the absence of formally and substantively equal citizenship and decision-making authority that different immigrants were permitted, and erases the different social, cultural, and political demands and concessions placed on or granted to these various communities.[141]

One concession that has not been granted to Indigenous peoples—at least not willingly—is the differentiated citizenship implied by s 35(1) of the Constitution. Here again is an opportunity for the Canadian state to meaningfully engage with and give effect to legal pluralism that has not been taken up. The promise of Aboriginal rights and title, and the consequential effects on the *Canadian* citizenship of Indigenous peoples, thus reflects a latent, *potential* pluralism rather than an acceptance of pluralism as a feature of migration law or indeed any aspect of state law. On the part of the Canadian state, taking up this option for pluralism would be fundamentally different because of the unique relationship of Indigenous people to Canada. Indigenous peoples are not just newcomers who wish to have select elements of their legal cultures recognized or affirmed, but pre-contact inhabitants whose entire ways of life, including their legal traditions, were involuntarily subjugated by the Canadian state. The historical facts of involuntariness and indigeneity strengthen the demand for legal pluralism, as well as the potential scope of the claim. In other words, differentiated Indigenous citizenship implies something far more extensive than merely the granting of additional privileges to Muslim individuals on a case–by–case basis, because differentiated citizenship implies at least a partial repudiation of the Canadian state and sovereign authority in multiple areas of the law.

Not only is there a lack of pluralism in spite of the potential for a truly differentiated citizenship, but there are also different reasons for the state's turn away from it. The denial of pluralism in respect of citizenship is not only to achieve a specific policy goal such as limiting the intake of asylum-seekers or rooted in cultural prejudice against alternative forms of parent–child relationships, but to avoid the existential repudiation of the state and its mechanics of governance. Indigenous differentiated citizenship is not a direct grant from the state to an individual; it flows

[138] MA Lee, "Multiculturalism as nationalism: A discussion of nationalism in pluralistic nations" (2003) Can Rev Studies Nationalism 103 at 111.

[139] Eve Haque, *Multiculturalism Within a Bilingual Framework: Language, Race, and Belonging in Canada* (Toronto: University of Toronto Press, 2012).

[140] Will Kymlicka, "The Three Lives of Multiculturalism" in Shibao Guo & Lloyd Wong, eds, *Revisiting Multiculturalism in Canada* (Rotterdam: Sense Publishers, 2015) 17.

[141] This holds true even if Indigenous peoples are rightly carved out from the paradigm of "newcomers".

from group-based entitlements. It is not, as an example, a grant of monetary reparations to members of a group historically oppressed by the state. It is not the goal but instead a necessary yet incidental consequence of collective challenges to the legal–political order. In this way, the presence of differentiated citizenship is evidence of the risk of systemic changes to social, political, and economic structures, and fundamentally challenges the sovereign authority of the state. In this light, both the demand for and absence of differentiated citizenship should come as no surprise.

V. Conclusion

This brief survey of three dimensions of migration law points to the value of engaging with legal pluralism as a field of study. Legal pluralism is not merely descriptive in nature but analytic. It can explain the seemingly natural, non-pluralist features of an area of the law that may not seem a natural site for pluralist engagement. It can also help uncover why specific legal choices or arrangements are pursued and not others, including when there is homogeneity across legal systems. While it is true that Canadian migration law is becoming more culturally adept—willing to recognize that religious practices might manifest differently in other parts of the world, or that arranged marriages can be genuine spousal relationships—the goal of this paper has never been to confirm or deny that Canadian migration law is or is not legally pluralist. To do so would assume that the descriptive origins of legal pluralism have some normative weight—that being legally pluralist is inherently good or bad.[142]

What is gained from applying a legal pluralist lens is a richer understanding of the state legal system, its capacity for accommodation, and the reasons for actualizing that potential or not. The non-recognition of alternative legal orders says more about the pre-occupations of Canada's legal system than it does about *shari'a* law, international or foreign state law, or Indigenous precepts. That in some cases the state presumes the ability to know foreign law better than those who practice it, suggests an extraordinary sense of who is a law-making agent, and who is competent to interpret the law (foreign or otherwise), and who is not. In studying these dynamics, this analysis of migration law also describes the power relationships that condition the law and challenges the notion that the common law is inherently rational, inevitable, or natural.

Four conclusions can be drawn from this treatment of legal pluralism. First, the breadth or depth of legal pluralism is connected to the degree of cultural pluralism within Canada. Cultural diversity cannot be neatly severed from diversity in legal normativity. An inflexibility in respect of migration law limits the ability of Muslim children to be adopted, and for Muslim families within Canada to adopt. Enfeebled Indigenous legal orders, meaningfully constrained by the state's overarching exercise of control, restrict the ability of Indigenous peoples in Canada to fully flourish as

[142] Asad G Kiyani & James G Stewart, "The Ahistoricism of Legal Pluralism in International Criminal Law" (2017) 65:2 Am J Comp L 393 at 403–04 (showing the potential problems with a legally pluralist criminal order, and identifying the possibility "that a single universal norm may enjoy stronger credentials in (value) pluralism than the variety of standards in existing doctrine").

collectives, and to develop revitalized post-colonial Indigenous communities.[143] The rhetorical denial of the existence of legal pluralism—the flattening of differences between Western states' refugee status determination systems—in order to limit asylum claims only serves to hinder the ability of poor and often racialized migrants to reach safety in Canada. Circumscribing legal pluralism in the way Canada does has the concrete effect of inhibiting cultural pluralism.

Second, understanding where and when legal pluralism does not manifest helps illustrate who constitutes a legal agent. The non-recognition of *kafala* relationships and the diminished status of Indigenous legal orders and authority shows how shallow the pool of legitimate sources of law is in Canada. The literature on the politics of legal knowledge shows that non-Western legal systems have continually been marginalized at the expense of Western legal norms in international law,[144] with Indigenous legal orders having been particularly marginalized in Canadian law.[145] This has two effects. It is self-reinforcing, with the legal system defining what is legal knowledge, how it is to be understood, and who can act as a legal actor.[146] As a result, it limits the ability of minoritized groups to access the mechanisms of state power. It also restricts the ability of the state to engage in the creative experimentation that is one justification for a more deliberate engagement with legal pluralism that pushes

---

[143] On the importance of revitalizing Indigenous legal orders, see the Truth And Reconciliation Commission Report's Call to Action 50: Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: James Lorimer & Company, 2015) at 207–14.

[144] See e.g. Kiyani & Stewart, *supra* note 142; RP Anand, ed, *Asian States and the Development of Universal International Law*, (Delhi: Vikas Publications, 1972); Antony Anghie, "Francisco de Vitoria and the Colonial Origins of International Law" (1996) 5:3 Soc & Leg Stud 321; Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (London: Verso, 1996) at 175–76; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Asad G Kiyani, "International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion" (2015) 48 NYUJ Intl L & Pol 129; ONUMA Yasuaki, *International Law in a Transcivilizational World* (Cambridge: Cambridge University Press, 2017); Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017); Daniel Bonilla Maldonado, "The Political Economy of Legal Knowledge" in Daniel Bonilla & Colin Crawford, eds, *Constitutionalism in the Americas* (Northampton, MA: Edward Elgar, 2018) 29 at 30–31 (describing "the colonial model of the production of legal knowledge" that privileges the legal systems of the West, and in particular the "grammar of modern constitutionalism" as "primarily created and managed by a small group of European and North American political theorists").

[145] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 22 ("While civil and common law traditions are generally recognized across the country, this is not always the case with Indigenous legal traditions…Indigenous legal traditions are a reality in Canada and should be more effectively recognized."); Lisa Monchalin, "Euro-Canadian 'Justice' Systems and Traditional Indigenous Justice" in *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto: University of Toronto Press, 2016) 258; Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019) at 4 (describing Canadian state law as "implicated in efforts to remove these competing [Indigenous] authorities?"); Val Napoleon & Emily Snyder, "Housing on Reserve: Developing a Critical Indigenous Feminist Property Theory" in Angela Cameron, Sari Graben & Val Napoleon, eds, *Creating Indigenous Property: Power, Rights, and Relationships* (Toronto: University of Toronto Press, 2020) at 41–93.

[146] Maldonado, *supra* note 144 at 29–30.

past what Berman describes as the "pluralist justification for federalism" [147] to a more robust internal legal pluralism that continuously interacts with non-state law, particularly Indigenous legal orders, alongside state laws. It further forecasts a diminished form of reconciliation in which Indigenous peoples, despite their prior presence and unique legal and constitutional rights, are not seen as co-equal legal agents to European settlers.

Third, the substantive and rhetorical turn away from legal pluralism reflects an uncertainty and insecurity about the status of Canadian common law, and its integral association with Canadian identity. While no formal explanation has been offered for the anomalous treatment of *kafala*, one possible reason offered in this article is that there is a generalized anxiety about the consequences of recognizing *shari'a* law concepts in Canadian state law, whether at the national or provincial levels, or even admitting Muslim immigrants into Canada.[148] In other words, alien laws—like alien peoples—pose a threat. Similarly, the thin notions of Indigenous citizenship that are permitted in Canadian migration law reflect the legal system's persistent inability and unwillingness to recognize Aboriginal rights and title claims. Validating Indigenous legal orders in any sense—including through the recognition of Indigenous-specific movement or citizenship entitlements—risks implying the irrelevance of the state's legal system to the adjudication of rights and title claims.[149] In both contexts, patterns in domestic law and policy reproduce themselves in migration law.

The denial of substantive pluralism in respect of refugee law similarly employs rhetoric about common challenges, histories and legal systems as a way of counter-intuitively confirming the sovereign right of the state to design its own refugee determination system independent of international views. It allows Canada to decide for itself where it fits into the range of state practices on refugee law, and—through alliances with what it deems to be states offering equivalent protections—normalize its own approach. This has the effect of protecting Canada from external threats to sovereignty, both real and imagined, that might attempt to impose different standards. Coordination also allows Canada to claim that if standards are to be imposed, then it should be those of the like-minded Western states it already cooperates with. Canada's treatment of legal pluralism in migration law thus insulates the Canadian legal system in very specific ways, while also declaring—internally and externally—that it is the appropriate and arguably model legal system. While the Refugee Convention was intentionally designed to accommodate state sovereignty by requiring only the development of a refugee determination process[150]—in other words, by permitting

[147] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012).

[148] Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (Cambridge: Cambridge University Press, 2016) at 62–89.

[149] Christie, *supra* note 145.

[150] Hathaway, *supra* note 108 at 27–28 (describing the balance struck at the negotiation of the Refugee Convention between international coordination and independent control by states).

legal pluralism—the denial of pluralism is now central to attempts to limit state obligations under the Refugee Convention. Continual arrivals of asylum-seekers, the practice of religiously grounded kinship traditions of Muslims, and the persistence of demands for Indigenous sovereignty are all distinct sites for exploring pluralism but are linked through the shared threat they present—that the totalizing assimilationism of the state cannot be taken for granted. It must be managed, articulated, and directed.

This leads to the final concluding point: the absence of legal pluralism can be interpreted as an indicator of aggression rather than defence. As Gordon Christie writes, "pull[ing] Indigenous peoples fully and completely into worlds built according to non-Indigenous ways of thinking of such things as sovereignty, law, and authority" is a way of ensuring that "Indigenous self-determination fades from the landscape."[151] Constraining the scope and strength of Indigenous legal orders is a deliberate way to control the Indigenous claim to self-determination and the fundamental challenge to political sovereignty of the Crown. Moreover, this examination of the limits on *kafala* adoption, refugee status determination, and Indigenous citizenship suggests that the security agenda that seems most overt in respect of refugee claimants is not just about protecting tangible people and objects from physical threats—the well-trodden ground of "securing the border"—but about securing the intangible goods of the legal system and perhaps the nation itself. In this light, there is an *overarching* security agenda within migration law, one as concerned with protecting bodies as it is with protecting the associated incorporealities of the rule of law and statehood.

While this analysis has by no means claimed to be a comprehensive analysis of the entire system, it has illustrated the meaningful limits and constraints upon pluralism in the field. The denial of legal pluralism in migration law seems to pose a challenge to cultural diversity through the impacts on specific groups. Seemingly natural features of the law of sovereignty, such as the right to control entry into a state, have adverse impacts on minoritized groups both at home and abroad. There are clearly implied policy prescriptions, which are aimed not at engaging in pluralism simply for its own sake, but as a way of responding to the multifarious challenges and choices faced by those individuals caught up in the strict bounds of Canadian migration law. The details of such responses are beyond the scope of this overview. If there is a value to nonetheless in studying where and why legal pluralism does or does not manifest, it is in that it sketches out a more three-dimensional understanding of migration law: not just its norms, but its concerns about legitimacy and identity, and its responses. It illustrates the inhibited reflexivity of the law—a dynamism stifled by its anxieties. The resultant picture is not an attractive one: it suggests fear, institutionalized discrimination, and the ongoing coloniality of the state legal system. Yet if the "secret virtue of immigration [is that it] provides an introduction, and perhaps the best introduction of all, to the sociology of the state",[152] then at a minimum the value of studying pluralism in migration is to consider the contents of that introduction more carefully.

---

[151] Christie, *supra* note 145 at 5–6.

[152] Abdelmalek Sayad, *The Suffering of the Immigrant* (Cambridge, MA: Polity, 2004) at 279.