Rooted Constitution:

A look into the Living Tree Doctrine and Indigenous Rights

Author: Ananya Vohra
Discipline: Political Science

ABSTRACT: The living tree doctrine is a landmark amendment that transformed how the constitution was understood. However, it is often not used to its fullest extent in Indigenous rights cases. This paper explores how the underutilization of the living tree doctrine in Indigenous cases has been impacted by Canada's settler state mentality. This essay argues that the dismissal of the living tree doctrine in Indigenous rights cases has restricted Indigenous self-governance and that this is purposely done by the Canadian state to maintain oppressive colonial power relations. The paper will first explain the reasoning behind not employing the living tree doctrine in Indigenous rights cases and how it is rooted in maintaining colonial power relationships. It will also explore why and how the doctrine can help promote Indigenous rights.

KEYWORDS: Indigenous Politics, Indigenous Sovereignty, Indigenous Self-governance, Canadian Settler State, Colonial Power & Politics, Supreme Court of Canada, Living Tree Doctrine

The living tree doctrine was originally created by Lord Sankey regarding the Persons Case and was a landmark amendment that promoted the right of judges to participate in judicial activism (McLachlin, 2001: 65). The Persons Case laid the precedent that judges could interpret the constitution to fit the social climate. Originally only men were legally understood as Persons; however, by interpreting the law to include women, the judges not only altered the patriarchal underpinnings of the constitution but became a catalyst for using courts to promote social change (McLachlin, 2001: 65). The living tree doctrine uses the metaphor of a "living tree" to symbolize the Canadian constitution's ability to be flexible and to evolve with time (Cloutier, 2019: 467). The doctrine has been used to promote women's rights and the rights of LGBTQ individuals; however, it has been ignored in cases involving Indigenous peoples and their rights (Borrows, 2017). This essay will explore these ideas while asking the question: how has the underutilization of the living tree doctrine in Indigenous cases been impacted by Canada's settler state mentality? This essay argues that the dismissal of the living tree doctrine in Indigenous rights cases has restricted Indigenous self-governance and the Canadian state purposefully does this to maintain oppressive colonial power relations. This paper will first explain the reasoning behind not employing the living tree doctrine in Indigenous rights cases and how it is rooted in maintaining colonial power structures. I will then explore why and how the doctrine can help promote Indigenous rights.

Canada's Supreme Court often chooses to utilize originalism instead of the living tree doctrine in cases regarding Indigenous rights. Originalism is a philosophy in which judges must follow the original meaning behind a law based on its historical understanding, thus limiting constitutional interpretation (Borrows, 2016). John Borrows (2016) explains that this philosophy is used in Indigenous rights cases because:

> The Supreme Court… judges Indigenous peoples by reference to a mythically questionable past. Their cases measure the constitutionality of Indigenous peoples' rights by attributing public meaning to events that are regarded as being foundational to constitutional relations between Aboriginal peoples and the Crown at some dubious historical point. (130)

Therefore, Indigenous rights are limited in that the Supreme Court does not allow them to evolve beyond the point at which the colonial state first made legal relationships with Indigenous peoples. This suggests the Canadian state is trying to maintain an unjust relationship where Indigenous peoples are legally oppressed. When the living tree doctrine originally came into play, Lord Sankey stated that the constitution of Canada is "...a living tree capable of growth and expansion within its natural limits" (McLachlin, 2001: 65). As Canada is a settler state built on the suppression of Indigenous sovereignty, constitutional cases regarding Indigenous rights to self-determination can thus be seen as a natural limit. Borrows (2017) explains that originalism is used to limit Indigenous self-governance in that it limits Indigenous peoples' "decision-making authority" (121) about "rights like hunting, fishing, trading, education, economic development, caring for their children, providing for their health, and general welfare" (130). Limiting Indigenous sovereignty is purposely done because fostering Indigenous sovereignty "fundamentally interrupts and casts into question the story that settler states tell about themselves" (Simpson, 2014: 177). This is a story rooted in the assumption that the settler state is new and free of the guilt of colonization, dispossession, and violence against Indigenous groups (25). Simpson (2014) states that Canada "define[s] itself as a revolutionary (postcolonial) and simultaneously immigrant state" (25), and this identity would not be viable if Indigenous sovereignty was recognized. Hence, originalism is used in Indigenous rights cases because it not only maintains the settler-colonial relationship where Indigenous people are legally oppressed but also limits Indigenous sovereignty to maintain Canada's national and international image.

However, the living tree doctrine can and should branch out to include Indigenous rights. As Borrows (2017) argues, the living tree doctrine is the dominant practice in Canada regarding constitutional interpretation, and thus, it should also be used in cases regarding Indigenous rights (124). This is because this approach allows modern constitutional interpretations to take place, all while engaging with the history of the constitution. The metaphor of the living tree is constructed on the idea of evolution, but evolution that is limited by its inception as "trees, after all, are rooted" (Jackson, as cited

in Cloutier, 2019: 469). Therefore, though Indigenous treaty rights do not fit with modern liberal enlightenment ideals (an argument originalists often use), they still should be assessed under the dominant constitutional framework that permits growth. Practicing originalism does not allow that (Borrows, 2016: 144).
Borrows (2017) explains that "while history is relevant in deploying 'living tree' reasoning, historical understandings are thought to be a 'floor' for interpretation rather than a 'ceiling' for understanding rights" (125). Originalists should understand that the living tree doctrine does not disregard the histories behind certain rights and laws but instead keeps them in mind while also allowing for growth. It is important to understand Indigenous rights beyond a solely historical framework based on colonial relationships. Borrows (2017) argues that it would be significantly more valuable to see Indigenous rights within the framework of human rights. Just like how the Charter of Rights and Freedoms advanced human rights like the rights to religion, life, and equality, Indigenous rights should also be given the opportunity to evolve as human rights without being fully historically dependent (115). By pushing for Indigenous rights to stay historically entrenched, the Supreme Court asserts that Indigenous peoples are not allowed to evolve their practices and traditions as other groups do. Extending the living tree approach can, therefore, make Canada more inclusive towards Indigenous groups and represent the modern social climate around Indigenous rights while also keeping in mind the constitutional history that precedes them. It would be a step forward in eliminating the legal subjugation that Indigenous peoples experience.

In conclusion, the living tree doctrine has the ability to become an important tool in promoting Indigenous sovereignty and rights. However, currently, it is unutilized as the Canadian Supreme Court chooses instead to employ originalism in constitutional cases regarding Indigenous rights. The Supreme Court does this to limit Indigenous self-governance by holding Indigenous rights to the standards set to when Europeans first met the Indigenous peoples in Canada. The living tree doctrine allows judges to take into account the social climate of the time and evolve the constitution to match it while still considering the history of these laws. Though the living tree doctrine can be an immensely useful tool in Indigenous rights cases, it is important to acknowledge that it is still a part of a settler constitution and may have detrimental effects on Indigenous communities as well. The limitations of the living tree doctrine in regard to Indigenous cases can thus be researched further.

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Artist: Hannah Mehling