LEGAL PLURALISM AND THE TEACHING OF INDIGENOUS LEGAL TRADITIONS: *A COMPARATIVE ANALYSIS OF INDIGENOUS LEGAL EDUCATION AT FACULTIES OF LAW IN CANADA AND COLOMBIA*[1]

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Introduction

Both Canada and Colombia have legal systems grounded on Euro-Christian hegemonic legal traditions. In Canada, there is a coexistence of the Common Law and the Civil Law legal traditions, whereas, in Colombia, the Civil Law tradition is predominant, even though important features of the Common Law traditions have been adopted, mainly in the field of criminal law. However, in both countries, Indigenous communities who have survived settler colonialism have maintained some portions of their ancestral legal traditions and practices to a certain extent. Despite Canada's lack of formal recognition of Indigenous legal traditions, Canadian faculties of law[3] have strived to incorporate the exploration and teaching of Indigenous legal traditions into their curricula. For its part, the Colombian Constitution recognizes that Indigenous authorities can exercise legal jurisdiction and apply their laws and traditions within their ancestral territories. Ironically, this has not meant that Colombian faculties of law commit themselves to learning and teaching Indigenous legal traditions. This is not to imply that there is or there must be a direct link between the existence of legal pluralism and the teaching of non-hegemonic legal traditions. But, given that it seems that in places, such as Canada, "the exploration of Indigenous ethics has become a particularly fruitful terrain for combining the why and who in the study of law,"[4] I believe that Colombian faculties of law need to embark on the exploration of Indigenous legal traditions to contribute to expanding their students' understanding of the challenges, complexities, and opportunities in the coexistence of different legal systems or traditions within one jurisdiction.

[3] For the purpose of this paper, I will use the phrases faculties of law, law faculties, and/or law schools interchangeably to refer to officially recognized educational institutions where law is taught.
[4] Shauna Van Praagh, *Building Justice: Frank Iacobucci and the Life Cycles of Law* (Aevo UTP, 2022) at 311.

In this paper, I seek to explore this paradox. I will argue that the formal recognition of legal pluralism does not necessarily lead to a legal pluralistic teaching of law, as the Colombian case shows, and, conversely, that the lack of such recognition is not an obstacle for faculties of law to implement a pluralist approach to the teaching of Law, as illustrated by the specific case of the University of Victoria's Joint Degree Program in Canadian Common Law and Indigenous Legal Orders (JD/JID). I will also argue that the Canadian legal system should continue exploring strategies to achieve a formal recognition of legal pluralism that acknowledges Indigenous legal traditions. For its part, Colombian faculties of law could learn some important lessons from the University of Victoria's experience, where the teaching of Indigenous legal traditions has become a salient feature of their legal education.

In this paper, I will discuss the following aspects: first, the notion of legal pluralism as a conceptual or guiding framework for this essay; second, the notion of multiculturalism, bijuralism, and Indigenous legal traditions in Canada; third, the coming into existence of the Truth and Reconciliation Commission of Canada and its Call to action No.28 for the teaching of Indigenous legal tradition; fourth, the experience of the teaching of Indigenous legal traditions in the University of Victoria's Faculty of Law; fifth, the notion of legal pluralism and the absence of teaching of Indigenous legal traditions in Colombia. Finally, I will conclude by discussing some lessons that could help strengthen legal pluralism in both countries and their respective legal education systems.

1. A brief understanding of Legal Pluralism

For this paper, I rely on the legal pluralism framework to analyze the reality of Indigenous legal traditions as an example of legal pluralism in Canada and Colombia and the teaching of Indigenous legal orders at faculties of law of both countries.

Brian Z. Tamanaha indicates that legal pluralism is everywhere in the form, for example, of complementing legal regimes or customs and competing legal regimes, customs, or religious traditions, and it is essential to acknowledge that reality to understand different societies and their complexities.[5] However, he states that legal pluralism "is a conceptual mess" because there is a challenge in defining with precision what "law" and "pluralism" are.[6] Tamanaha articulates that a way to define legal pluralism is by "opposition to the widely held image of monistic state law."[7] He encourages jurists "to set aside the vision of the monist law state and be open to new ways of conceiving of law that recognizes the pervasiveness of legal pluralism and the variety of ways law exists within, across, and outside of state systems."[8] This would provide for a more comprehensive understanding of legal regimes and their intertwining in a given societal context.

Further, Tamanaha "articulates and applies social-historical folk legal pluralism,"[9] which is a version of legal pluralism that "focuses on forms of law collectively recognized by people in society, which vary and change over time."[10] For instance, "Sharia and Halakhah *are law*

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[5] Brian Z. Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (New York: Oxford University Press, 2021) at 1–2.
[6] *Ibid* at 3–4.
[7] *Ibid* at 4.
[8] *Ibid* at 9.
[9] *Ibid* at 11.
[10] *Ibid*.

because Muslims and Jews, respectively, recognize that as law."[11] This version of legal pluralism is different from what Professor Tamanaha terms "abstract legal pluralism," which "is the product of social scientists and legal theorists whose aim is to provide a scientific or philosophical theory of law."[12] Tamanaha highlights that folk legal pluralism can be found present in three categories of law: 1) *community law*, which regulates interactions within communities and deals with legal issues such as marriage and property rights; 2) *regime law*, which seeks to implement state law through taxation laws, border control, and military services, among others; and 3) *cross-polity law*, which is mainly concerned with national laws, international law, and transnational law.[13] Therefore, when analyzed from a bottom-up perspective, as proposed in the notion of folk legal pluralism, legal pluralism opens immense possibilities to analyze comprehensively and transversally different legal systems.

Similarly, Martha-Marie Kleinhans and Roderick A. Macdonald recognize that contemporary legal pluralism rejects the notion of a monist/central State exclusivity in creating law.[14] Instead, they argue that "social-scientific legal pluralists have hypothesized a variety of interacting, competing normative orders-each mutually influencing the emergence and operation of each other's rules, processes and institutions."[15] These authors underscore that critics of legal pluralism will state that "legal pluralism undermines respect for the Rule of Law," because societies need a comprehensive and structured legal system and understanding of law to avoid "normative confusions," and State authority should not be subjected to scrutiny by non-state

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[11] *Ibid* at 12.
[12] *Ibid* at 11.
[13] *Ibid* at 13.
[14] Martha-Marie Kleinhans & Roderick A Macdonald, "What is a Critical Legal Pluralism?*" (1997) 12:02 Canadian Journal of Law and Society / La Revue Canadienne Droit et Société 25–46, at 30.
[15] *Ibid* at 31.

authorities with specific normative power within a given jurisdiction.[16] Another criticism of legal pluralism is of methodological nature, insomuch as "legal pluralism lacks a criterion for distinguishing non-State law from anything else that has a normative dimension (e.g. social practice, economic forces, religion, etc.)."[17] But, Kleinhans and Macdonald question the seriousness of this last critique because one could reverse the logic and say that law is everywhere, "and that the relationships between its different forms, processes, sites and orders can best be explored through 'ideal-type' formal and functional taxonomies."[18] They answer those criticisms by highlighting that the purpose of legal pluralism is to challenge the image of State centrality in the creation of law and recognize the existence of other sources of law that have been suppressed.[19] In fact, they argue that, by acknowledging those realities, the rule of law can be strengthened.[20] The authors propose a notion of critical legal pluralism, by which, contrary to traditional legal pluralism, legal positivism and law as a social fact are rejected,[21] and instead the capacity of individuals to participate in the creation and recognition of their own "legal subjectivity"[22] is recognized, meaning that they are "law inventing."[23] This notion goes beyond an understanding of individuals as subjects without content that are the object of the external creation of law,[24] treating them as simply "law abiding."[25] In short, the authors argue that critical legal pluralism conceives the idea of law as autobiographical.[26]

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[16] *Ibid* at 32.
[17] *Ibid*.
[18] *Ibid* at 33.
[19] *Ibid* at 34.
[20] *Ibid*.
[21] *Ibid* at 39.
[22] *Ibid* at 38.
[23] *Ibid* at 39.
[24] *Ibid* at 37.
[25] *Ibid* at 39.
[26] *Ibid* at 46.

Furthering the debate on legal pluralism, Boaventura de Sousa Santos introduces the idea that law, similar to maps and poets, distorts social realities to prove its exclusivity. In other words, law regimes tend to disregard different legal or customary regimes that exist within a particular society at a specific given time to monopolize regulatory powers over social subjects and their activities.[27] This allows for the constant struggle between regulators and emancipators.[28]

René Provost conceives legal pluralism as a framework that allows for exploring "the limits of our conception of law to encompass forms of normativity beyond those connected to the state in any way."[29] Provost underscores that more than recognizing the existence of different legal regimes operating simultaneously, legal pluralism is more concerned with understanding how "the different legal regimes intersect and interact."[30] This is relevant for legal education because the teaching and learning of Indigenous legal traditions also involves understanding their positionality within the legal and political context in which they exist, and the interaction and intersect with those legal systems that coexist with the Indigenous legal systems.

Finally, Maxime St-Hilaire points out that legal anthropology and sociology of law have developed an important literature "based on the idea that to a plurality of social groups there can correspond a plurality of legal orders."[31] However, like Tamanaha, he questions that the definition of a legal system from a legal pluralist perspective is complex and providing the

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[27] Boaventura de Sousa Santos, ed, "Law: A Map of Misreading" in *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* Law in Context, 3d ed (Cambridge: Cambridge University Press, 2020) at 499.
[28] *Ibid* at 496.
[29] René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (New York: Oxford University Press, 2021) at 12.
[30] *Ibid*.
[31] Maxime St-Hilaire, "The Study of Legal Plurality outside 'Legal Pluralism': The Future of the Discipline?" in *Stateless Law: Evolving Boundaries of a Discipline*, ed by *Helge Dedek & Shauna Van Praagh* (London: Routledge, 2016) at 116.

necessary clarity is still a pending task.[32] Accordingly, St-Hilaire claims that one criticism is the confusion around "what is law or legal order," which can lead to poor formulations of the existence of legal pluralism in a given context.[33]

The above authors provide important insights into the understanding of legal pluralism as a notion that questions the presumed State centrality or monopoly on the creation of legal regimes. This is relevant for legal education because it is indicative that law schools need to reconsider their exclusive or primary focus on State law production to build their curricula programs, and instead have a wider understanding of law and legal regimes to consider the teaching of non-State creation legal regimes or traditions. In countries such as Canada and Colombia, Indigenous legal systems or traditions have historically operated outside the hegemonic Western legal systems, which has led to their legal traditions not being widely known or understood and considered as valid of being taught or learnt at faculties of law.

The debate around how legal pluralism can define law or legal system is compelling, but it is beyond the scope of this paper. For the purpose of this paper, one would be on safe terrain to argue that in the Canadian and Colombian contexts, as will be discussed later, it is well-established that some Indigenous communities have discernable and distinguishable legal systems. For instance, the *Anishinaabe* in Canada and the *Wayúu* people in Colombia have forms of law that people in society collectively recognize. Thus, even if it does not require an embrace of legal pluralism *per se*, these communities have demonstrated their capacity to insert

[32] *Ibid*.
[33] *Ibid* at 115.

themselves into and interact with the State legal system. Now, as it will be examined throughout this piece, the question is how each country treats the reality of legal pluralism from a normative standpoint and a legal education perspective.

2. Multiculturalism and Bijuralism, and Indigenous Legal Traditions in Canada

Understanding how law is conceived in a specific country or context is a prerequisite for understanding how law is taught. This reality is illustrated by "the insistence that the content and method of effective legal education not be constrained by any particular state or indeed any particular system."[34] In this section, I seek to briefly explore some of the elements I consider relevant to understanding the conception of law in Canada and how they impact its teaching.

2.1 Multiculturalism and Bijuralism

Canada defines itself as a multicultural State,[35] a definition that has led Gary Bell to wonder "[w]hy should multiculturalism extend to languages and exotic dances but in principle not to law?."[36] Bell argues that multiculturalism in Canada should lead to legal pluralism, in the sense that indigenous legal traditions should be acknowledged as legitimate sources of law. Canada has nonetheless resisted adhering to that notion of legal pluralism. This resistance has its historical origin in the French and British colonial powers' opposition to recognizing Indigenous

[34] Shauna Van Praagh, "Teaching Law: 'Historian and Prophet All in One'" in *Stateless Law* (London: Routledge, 2016) at 25.
[35] Legislative Services Branch, "Consolidated federal laws of Canada, The Constitution Acts, 1867 to 1982", (7 August 2020), online: <https://laws-lois.justice.gc.ca/eng/const/page-12.html> at Article 27 Last Modified: 2020-08-07. "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Legislative Services Branch, "Consolidated federal laws of Canada, Canadian Multiculturalism Act", (1 April 2014), online: <https://laws-lois.justice.gc.ca/eng/acts/c-18.7/page-1.html#h-73130> , s 3 (1) Last Modified: 2014-04-01.
[36] Gary F Bell, "Multiculturalism in Law is Legal Pluralism—Lessons from Indonesia, Singapore and Canada" (2006) Singapore Journal of Legal Studies 315–330, online: <https://www.jstor.org/stable/24869083> at 315.

legal orders as legitimate sources of law.[37] What Canada has embraced is its bijuralism, which has allowed for the coexistence of legal institutions of Common Law and Civil Law traditions. According to the Department of Justice of Canada, Canadian bijuralism "refers to the co-existence of English common law and French civil law traditions, within a federal state."[38] This notion was enshrined in the Canadian legal system by the enactment of the 1774 Quebec Act, and the subsequent distribution of powers under subsection 92(13) of the 1867 Canadian Constitution.[39]

For contextual purposes, Patrick Glenn has asserted that the Civil Law tradition can be understood "as a history of two periods, that of roman law and that of modern continental law, beginning with the 're-discovery' of roman law in the eleventh century AD."[40] The Common Law has its origin, between the 9th and 11th century, in the context of the conquest of England by the French Normans, who promoted a distinctive legal order in England based on the appointment of judges who could guide the resolution of individual disputes, whose final decision were on the hands of a jury.[41] The Civil Law tradition has been historically characterized for the codification of norms and rules, while the Common Law tradition relies mainly on case law or legal precedents.[42] But, these differences are not as striking or visible nowadays because many countries use a mixture of Civil Law and Common Law systems.[43]

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[37] *Ibid* at 316.
[38] Louise Maguire Wellington, "Bijuralism in Canada: Harmonization Methodology and Terminology" (2000) Department of Justice Canada 25 at 1.
[39] *Ibid* at 2.
[40] H Patrick Glenn, *Legal Traditions of the World: Sustainable diversity in law*, 5th edition ed (Oxford, United Kingdom ; New York, NY: Oxford University Press, 2014) at 132.
[41] *Ibid* at 236–241.
[42] Department of Justice Government of Canada, "Where our legal system comes from - About Canada's System of Justice", (7 September 2016), online: <https://www.justice.gc.ca/eng/csj-sjc/just/03.html> Last Modified: 2021-09-01.
[43] *Ibid*; "What is the Difference Between Common Law and Civil Law?", (28 January 2014), online: *WU-LAW* <https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/>.

Therefore, the Canadian Legal system reflects and is officially based on the two major European legal traditions. That is, traditions that were imported to Canada in the process of settler colonialism have become the predominant or formally recognized legal traditions to the detriment of Indigenous legal traditions.

2.2 Indigenous Legal Traditions in Canada

Indigenous or aboriginal traditions, which would be a part of what Glenn characterizes as "Chthonic Legal Traditions," or the legal traditions of those who live ecological lives "in close harmony with earth," have existed in the Americas, including Canada, before the arrival of the Europeans.[44] Regarding this assertion that Indigenous legal traditions are characterized by norms that maintain the balance between humans and their surroundings, Rupert Ross presents us with the notion that "being Indian is a state of mind." He shares several examples of how Indigenous people interact with their surroundings and how their knowledge of different natural phenomena results from acute observation. Ross highlights the hunter-gatherer experience of Indigenous people, the pattern-thought process they use, the subconscious feelings, and the fact that knowledge does not seem to be taught but learned by watching and practicing constantly. Ross mentions that Indigenous people are perceivers, meaning they learn from their surroundings, while non-indigenous people are reasoners.[45] Being an Indigenous person could also be considered a state of being based, for example, on the experience of or the way of life of Indigenous communities in voluntary isolation and initial contact in South America.[46]

[44] Glenn, *supra* note 37 at 60–63.
[45] Rupert Ross, "Being Indian is a state of mind" in *Dancing with a ghost: Exploring Indian reality* (1992).
[46] *Indigenous peoples in voluntary isolation and initial contact in the Americas*, Inter-Am Comm HR, OEA/SerL/V/II (Washington, DC: IACHR, 2013).

For his part, Borrows indicates that Indigenous legal traditions share similarities with the Common Law system, such as precedents and stories. Still, First Nations use oral traditions to record their stories. He also advocates for Indigenous law to be used in an appropriate cultural way to resolve cases by Canadian courts. Borrows recognizes that prejudice plays an important role in preventing Canadian State authorities from using Indigenous legal traditions. He provides examples of sentencing circles used in the Canadian State legal system context. However, he still wonders how Canadian law should incorporate Indigenous legal traditions into the State legal system.[47] One possible way to answer that challenge can be by considering the notion of *lifeworlds* as explained by Aaron Mills to promote integration or interaction between Indigenous legal traditions and Western legal traditions. Mills indicates that the notion of lifeworld underlines Indigenous traditions. Yet, this is a notion created within specific contexts and he cautions that that can make the implementation of Indigenous legal traditions in other contexts something complex. He illustrates his point by providing an example of how he designed a course on indigenous legal traditions and how he taught it. In this respect, he shares an example of a syllabus he developed to teach a course on the constitutionalism of the *Anishinaabe* legal tradition. He also shares how he approached the teaching of that class, whose primary focus was to invite students to engage in class discussions.[48]

This brief discussion shows that in Canada, there are authors devoted to working on exploring Indigenous legal systems and their historical way of life, with the goal of demonstrating how these legal traditions and legal systems regulate the coexistence within these

[47] John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:3 McGill Law Journal 629, at 630–665.
[48] Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" McGill Law Journal, at 847–884.

communities. One could argue that these traditions are so rooted in these communities that they have survived until today to coexist with the Euro-Christian legal traditions of Common and Civil Law.

3. Truth and Reconciliation Commission of Canada and its Call to Action No. 28

Indigenous Peoples are currently 1.67 million or 4.6% of the Canadian population, and they are the fastest-growing population in the country.[49] But, they have been historically subjected to systemic discrimination by the Canadian State.[50] Between 1879 and the 1960s, Christian denominations were tasked with running Indian Residential Schools,[51] that were attended by around 30% of Indigenous children.[52] These Indian Residential Schools are considered to be a part of Canada's broader project to deal with the "Indian problem," which can be understood as "government attempts to incorporate and enfranchise them [Indigenous people] within a European way of life."[53] In the 1990s, allegations of physical and sexual abuse against indigenous children at these schools started to be made public.[54] The threats of thousands of class actions or legal claims against the government by the survival of these schools led to the signing between the Government and Indigenous

[49] *Annual Report to Parliament 2020*, report, by Indigenous Services Canada, www.sac-isc.gc.ca, (2020) Last Modified: 2020-11-03.
[50] Canada Royal Commission on Aboriginal Peoples, *Bridging the cultural divide: a report on Aboriginal people and criminal justice in Canada*, Law Reform Commission of Canada 34 Report (Ottawa, Ont.: The Commission, 1996) at 33–39.
[51] Andrew Woolford, "The healing state?: residential schools and reparations in Canada" in *Reparation for Victims of Crimes against Humanity* (Routledge, 2014) at 127; *Honouring the Truth, Reconciling for the Future*, by The Truth and Reconciliation & Commission of Canada (2015) at 4: There were schools that operate until much later than the 60s. For instance, the Mission School in British Columbia opened in the early 1860s and remained in operation until 1984.
[52] Woolford, *supra* note 48 at 128; St-Hilaire, *supra* note 27 at 25–26.
[53] Woolford, *supra* note 48 at 127.
[54] *Ibid* at 128–129.

authorities of the 2006 Indian Residential School Settlement Agreement (IRSSA).[55] The IRSSA is composed of two main elements: "compensation and a truth and reconciliation commission, accompanied by a formal apology."[56] For the purpose of this paper, the emphasis will be on the Truth Commission's work and recommendations.

The Truth Commission was established in 2008 and issued its final report in 2015.[57] The Truth Commission had as a mandate to:

> • reveal to Canadians the complex truth about the history and the ongoing legacy of the church-run residential schools, in a manner that fully documents the individual and collective harms perpetrated against Aboriginal peoples, and honours the resilience and courage of former students, their families, and communities; and
>
> • guide and inspire a process of truth and healing, leading toward reconciliation within Aboriginal families, and between Aboriginal peoples and non-Aboriginal communities, churches, governments, and Canadians generally. The process was to work to renew relationships on a basis of inclusion, mutual understanding, and respect.[58]

Based on that mandate, the Truth Commission issued some calls to action to different segments and institutions of the Canadian society intended "to redress the legacy of residential schools and advance the process of Canadian reconciliation."[59] As a part of a "call to Justice," the Truth Commission called on the Canadian faculties of law to take steps in the following terms:

> 28) We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights,

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[55] *Ibid* at 126, 130–131.
[56] *Ibid* at 126.
[57] The Truth and Reconciliation & Commission of Canada, *supra* note 48 at 23.
[58] *Ibid*.
[59] *Ibid* at 319.

> Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.[60]

Many universities across Canada have answered this call to action by incorporating the teaching of courses on Indigenous legal traditions into their curricula, such as Lakehead University's Bora Laskin Faculty of Law; the University of British Columbia's Allard School of Law; the University of Windsor; the University of Victoria's Faculty of Law, that since 2018 established a joint degree program in Canadian Common Law (JD) and Indigenous Legal Orders (JID);[61] the University of Manitoba's Faculty of Law;[62] and McGill University's Faculty of Law,[63] among others. Nevertheless, it is essential to acknowledge that the adoption of Indigenous legal tradition into Canadian Faculties of Law's curricula is an ongoing dialogue, and not all faculties of law have fully embraced this call to action, and those who choose to do it will do so in a range of ways.[64]

The call to action 28 can be conceived as a call for Canadian faculties of law to recognize the *de facto* existence of legal pluralism in this country by making the teaching and learning of Indigenous legal traditions a salient feature of their curricula. Even though the Canadian legal system does not formally recognize the existence of legal pluralism, the call to action 28 by the Truth and Reconciliation Commission is encouraging the institutions in charge of training future

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[60] *Ibid* at 323.

[61] Tansi Nîtôtemtik, "TRC Calls to Action #27 & 28 - Embracing A Time For Change", (11 November 2020), online: *Blog* <https://ualbertalaw.typepad.com/faculty/2020/11/trc-call-to-action-27-28-embracing-a-time-for-change.html>.

[62] University of Manitoba - //wwwumanitobaca, "Faculty of Law takes major steps to answer Call to Action 28", online: <https://news.umanitoba.ca/faculty-of-law-takes-major-steps-to-answer-call-to-action-28>.

[63] University of McGill's Faculty of Law, "Indigenous Students and Studies", online: *Faculty of Law* <https://www.mcgill.ca/law/indigenous>.

[64] Adrien Habermacher, "Understanding the Ongoing Dialogues on Indigenous Issues in Canadian Legal Education Through the Lens of Institutional Cultures (Case Studies at UQAM, UAlberta, and UMoncton)" (2021) 57:1 Osgoode Hall Law Journal, online: <https://digitalcommons.osgoode.yorku.ca/ohlj/vol57/iss1/2>.

lawyers to grapple with the reality that there are legitimate and functioning Indigenous legal systems that have been ignored or neglected because of the Euro-centric approach to law. The call to action 28 has spearheaded, in essence, a reflection within faculties of laws to challenge or rethink the exclusivity of Canadian bijuralism inspired by two major European legal traditions, Civil Law and Common Law.[65] This call to action can be a significant step that can lead to a future formal recognition by the Canadian Legal system of the legitimacy and validity of Indigenous legal traditions so that these traditions can operate and coexist with the Civil and Common law traditions already recognized in the country, as the Colombian experience shows.

In conclusion, a non-binding recommendation by the Truth Commission has sparked a provocative debate within Canadian faculties of law about whether and how they should answer the call to action 28 to promote the teaching and learning of Indigenous legal traditions. Some faculties of law have adopted different approaches to the teaching Indigenous legal traditions, and others are yet to define whether that is a path they would like to follow. Despite the challenges that incorporating indigenous legal tradition into law schools' curricula might entail, many law faculties in Canada have proven that this is not an unsurmountable task. Rather, this is an ongoing process that require a deep reflection and commitment by the academic communities within the Canadian faculties of law. I believe that Colombian faculties of law should embark on a similar reflection process to device ways in which the teaching of Colombian Indigenous legal traditions can be incorporated into their academic programs.

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[65] Adrien Habermacher, *Institutional cultures and legal education at select Canadian law faculties* McGill University, 2019) [unpublished] at 345–368 publisher: McGill University.

In the next section, I will examine the experience of the University of Victoria's Faculty of Law with its joint degree program in Canadian Common Law (JD) and Indigenous Legal Orders (JID) as a particularly ambitious and unique example of the incorporation of Indigenous traditions into the curriculum of a faculty of law.

4. The University of Victoria's Faculty of Law and the teaching and learning of Indigenous Legal Traditions

Shauna Van Praagh proposes teaching indigenous issues - such as the legacy of residential schools - to law students with a stateless law sensibility.[66] The author indicates that teaching through such a framework or lens invites telling stories not centered on the role of the State but instead considering the State as another actor in the story, which should also include the stories of Indigenous people.[67] In other words, Van Praagh argues that teaching and learning through a stateless law lens "invites us to hear and tell renewed narratives, and to take on and exercise renewed responsibilities. The teachers and students who accept the invitation engage in the conservation, generation and transformation of knowledge and actions, across a range of law-creating sources and law-practising participation."[68] The University of Victoria's Faculty of Law joint degree program in Canadian Common Law (JD) and Indigenous Legal Orders (JID) seems to follow this model.

Apart from being a unique program of its own worldwide, this program has other essential features: 1) it allows students to graduate with two professional degrees: "a Juris Doctor (JD) and

[66] St-Hilaire, *supra* note 28 at 25–26.
[67] *Ibid* at 24–27.
[68] *Ibid* at 27.

a Juris Indigenarum Doctor (JID);"[69] 2) the first-year courses are taught in a transsystemic way, which allows for the comparison of Canadian Common Law tradition and First Nation legal traditions (First Nations, Inuit, and Métis);[70] 3) during their third and fourth years of law studies, students are required to carry out field schools or studies in collaboration with the communities "to study in Indigenous contexts" and "learn from community-based experts on a particular Indigenous people's legal order, observe the ways in which Indigenous legal processes are being employed today, and work with the community on law-related projects."[71]

The features of this academic program show a genuine commitment by the University of Victoria's Faculty of Law to educating its students in a legal pluralistic way. Not only do the students learn about Common Law and Indigenous legal traditions comparatively in the classroom, but they go to do field studies on the territories of the communities, which allow students to understand and learn stateless law, to borrow Van Praagh's notion of learning about stories with legal relevance without having the State as the center of gravity. Additionally, the University's commitment to granting two diplomas reflective of the students' dual or transsystemic training is an interesting approach. It adds to the legitimacy and validity of Indigenous legal traditions as bodies of law that can be practiced. In short, the University of Victoria's joint degree program in Canadian Common Law (JD) and Indigenous Legal Orders (JID) is an outstanding example of good practice in the teaching and learning of Indigenous legal

[69] University of Victoria's Faculty of Law, "Joint Degree Program in Canadian Common Law and Indigenous Legal Orders JD/JID - University of Victoria", online: *UVic.ca* <https://www.uvic.ca/law/admissions/jidadmissions/index.php>.
[70] University of Victoria's Faculty of Law, "JD/JID Program Overview - University of Victoria", online: *UVic.ca* <https://www.uvic.ca/law/admissions/jidadmissions/jid-courses.php>.
[71] *Ibid*.

traditions. However, it is important to remain mindful that establishing a program like that is a challenge and requires enormous effort.

I will now turn to discuss the notion of legal pluralism in Colombia and the teaching and learning of Indigenous legal traditions in Colombia.

5. Legal Pluralism and the teaching of Indigenous Legal Traditions in Colombia

In Colombia, the Indigenous population is 1,905,617, who belong to 115 different native Indigenous Peoples, and 58% of that population live in 717 collective-owned land reservations.[72] They represent 4.4% of the Colombian population.[73] Like Indigenous Peoples in Canada, many Indigenous communities in Colombia, who have survived colonialism, have their own legal traditions. But, unlike Canada, the 1991 Colombian Constitution expressly recognizes the existence of legal pluralism in the country in the following terms:

> Article 246. The authorities of the indigenous [Indian] peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures as long as these are not contrary to the Constitution and the laws of the Republic. The law will establish the forms of coordination of this special jurisdiction with the national judicial system.[74]

In addition to the National Constitution, Colombia's international commitment under the International Labor Organization (ILO)'s Convention 169 also confirms the pluralistic nature of

[72] International Work Group for Indigenous Affairs, "Colombia - IWGIA - International Work Group for Indigenous Affairs", online: <https://www.iwgia.org/en/colombia.html>.
[73] International Work Group for Indigenous Affairs, "Indigenous World 2020: Colombia - IWGIA - International Work Group for Indigenous Affairs", online: <https://www.iwgia.org/en/colombia/3618-iw-2020-colombia.html>.
[74] *Political Constitution of Colombia*, 1991 at Article 246.

the Colombian legal system. Article 8 of such Convention establishes that "[t]hese peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. […]."[75] Colombia incorporated this treaty into its domestic legislation through Law 21 of 1991.

To further elaborate on the official recognition of legal pluralism in Colombia, it is worth underscoring that the Colombian Constitutional and human rights recognition of legal pluralism is the formal acknowledgement of the reality on the ground. This has been highlighted, for example, by the recent adoption of protocols for State legal authorities to interact with Indigenous[76] and Black communities' traditional authorities[77] in the context of the current transitional justice process as a result of the 2016-Peace Agreement between the Colombian Government and the former guerilla of the Colombian Revolutionary Armed Force-The People's Army or (Fuerzas Armadas Revolucionarias de Colombia-Ejercito del Pueblo or "FARC-EP" in Spanish).[78] These protocols seek to guarantee that the Special Jurisdiction for Peace, the

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[75] Convention C169 - Indigenous and Tribal Peoples Convention, 7 June 1989 (No. 169), International Labour Organisation, online: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> at Article 8; Republic of Colombia, "Ley 21 de 1991 - Gestor Normativo - Función Pública", online: <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=37032>; Xiomara Balanta-Moreno et al *"El enfoque étnico-racial en la Jurisdicción Especial para la Paz: una mirada desde el estudio de casos de la Sala de Amnistía o Indulto,"* in "La JEP vista por sus jueces (2018-2019)," ed by *Danilo Rojas Betancourth* (Bogota: JEP, 2020) at 526, online: *Scribd* <https://es.scribd.com/document/455787698/Libro-La-JEP-vista-por-sus-jueces-2018-2019-WEB-pdf> at 526.

[76] Special jurisdiction for Peace, *Diversidad Étnica y Cultural, Pluralismo Jurídico y Consulta Previa: Protocolo 001 de 2019 adoptado por la Comisión Étnica de la Jurisdicción Especial para la Paz para la coordinación, articulación interjurisdiccional y diálogo intercultural entre la Jurisdicción Especial Indígena y la Jurisdicción Especial para la Paz*, 2019.

[77] Special jurisdiction for Peace, *Protocolo de Relacionamiento entre la JEP y los pueblos Negros, Afrodecendientes, Raizal, y Palenquero.*, 2021.

[78] Xiomara Cecilia Balanta-Moreno & Yuri Alexander Romaña-Rivas, "The rights of Afro-Colombian communities in the Final Agreement and its mechanisms of implementation" in *The Colombian Peace Agreement* (Routledge, 2021) at 221.

Colombian transitional justice tribunal established as a result of the 2016 Peace Agreement, works hand in hand with Indigenous and Black communities' authorities to, among others, advance in the investigation of crimes committed against these communities taking into consideration their worldviews.

Thus, legal pluralism's recognition and its legal basis are not in doubt in the Colombian context. In fact, Colombian Indigenous legal traditions have influenced the jurisprudence of the Colombian Constitutional Court and the Inter-American Court on Human Rights.[79] In Colombia, there are concrete examples of Indigenous communities that rely on their legal traditions to administer justice within their territories, such as the *Embera-Chamí* community of Riosucio,[80] the *Nasa* People,[81] and the *Wayúu* People.[82] One would expect that logically, considering their acknowledgement and recognition of these legal regimes within the state's legal structure, Colombian law faculties would have a pluralistic approach to the teaching of Law. Yet, that is not the case. I reviewed the curricula of the five best-ranked law schools in Colombia,[83] and none of them has any course offering on indigenous legal traditions. This list includes the Andes

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[79] Felipe Gómez Isa, "Cultural Diversity, Legal Pluralism, and Human Rights from an Indigenous Perspective: The Approach by the Colombian Constitutional Court and the Inter-American Court of Human Rights" (2014) 36:4 Human Rights Quarterly 722–755, online: <https://www.jstor.org/stable/24518296> at 722–755.

[80] Ana María Zuleta Zuleta et al, "Coordinación entre la JEP y la JEI: rol de las autoridades indígenas en la justicia aplicada durante el posacuerdo" (2020) 19:39 Opinión Jurídica 167–185, online: <http://www.scielo.org.co/scielo.php?script=sci_abstract&pid=S1692-25302020000200167&lng=en&nrm=iso&tlng=es>.

[81] "Autoridades Indígenas Pueblo Nasa Archives", online: *Çxhab Wala Kiwe* <https://nasaacin.org/tag/autoridades-indigenas-pueblo-nasa/>.

[82] Nicolás Polo Figueroa, *El sistema normativo wayuú: módulo intercultural: (línea de investigación indigenista)*, Serie Investigación (Bogotá, Colombia: Universidad Sergio Arboleda, 2018).

[83] EduRank, "12 Best Law schools in Colombia [2021 Rankings]", (11 August 2021), online: *EduRank.org - Discover university rankings by location* <https://edurank.org/liberal-arts/law/co/>.

University,[84] Rosario University,[85] Javeriana University,[86] the National University,[87] and the Sabana University.[88] Since the 80s, especially propelled by the Mexican academic context, there has been a growing interest in Latin America in the teaching and learning of legal anthropology, which has allowed for a better understanding of Indigenous legal traditions.[89] However, none of the five best-ranked Colombian universities offers such a course. From experience, as a Colombian trained lawyer, I know that in the context of Constitutional Law courses, it is possible to discuss some legal rulings by the Colombian Constitutional Court involving Indigenous communities, but this does not compensate for the lack of a serious effort to engage in the teaching and learning of Indigenous legal traditions at Colombian Faculties of Law.

Hence, Colombia's formal acknowledgement of legal pluralism has not translated into a pluralist teaching of law, at least, that is true regarding the five top-ranked Faculties of Law of the country. This is a major weakness because if law students are not taught about Indigenous legal traditions, they will know in theory that those traditions exist, but they will not know how to understand them and their relevance, nor how to apply them when in conflict with another norm, which can result in strengthening the vision that the hegemonic European-centered

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[84] Universidad de los Andes, "Pregrado en Derecho | Uniandes", online: <https://derecho.uniandes.edu.co/es/pregrado-derecho>.
[85] Universidad del Rosario, "Jurisprudencia - Carrera de derecho - Universidad del Rosario", online: <https://www.urosario.edu.co/Facultad-de-Jurisprudencia/Programa-de-Pregrado/Presentacion/>.
[86] Universidad Javeriana, "Derecho | U Javeriana", online: <https://www.javeriana.edu.co/carrera-derecho>.
[87] Universidad Nacional de Colombia, "Información del programa: Facultad de Derecho, Ciencias Políticas y Sociales: Sede Bogotá: Universidad Nacional de Colombia", online: <http://derecho.bogota.unal.edu.co/formacion/pregrado/ciencia-politica/informacion-del-programa/>.
[88] Universidad de la Sabana, "Estudia Derecho en La Sabana - Uno de los mejores programas del país", online: <https://www.unisabana.edu.co/derecho/>.
[89] Guadalupe Irene Juárez Ortiz & Welliton Caixeta Maciel, "The Latin American Forum on Anthropology of Law: Dialogues, connections and challenges between Mexico, Brazil and Argentina" (2021) 18 Vibrant: Virtual Brazilian Anthropology, online: <http://old.scielo.br/scielo.php?script=sci_abstract&pid=S1809-43412021000100812&lng=en&nrm=iso&tlng=es> at 6–12.

traditions are the ones that contain true notions of law and deserve to be worth studying and observing. This lack of interest in teaching Indigenous legal traditions in Colombia amounts to a form of epistemic injustice[90] that needs to be addressed. Another aspect to consider in the teaching of Indigenous legal traditions in to understand how those traditions are taught within the Indigenous communities, and to achieve that, it is important for Law Schools to make efforts to engage with Indigenous communities who are interested in supporting the teaching, the revival, and educational promotion of their traditions.

While discussing the context and the challenges of teaching Indigenous legal traditions in Canada, Van Praagh underscores that "we can undertake productive comparison by noting the common central importance of teaching across legal systems and traditions."[91] In this sense, even though it is still far from perfect, the experience of Canadian faculties of law offers a good template for Colombia's faculties of law to begin seriously considering incorporating the teaching of Indigenous legal traditions into their curricula. Some lessons I find relevant for the Colombian context are the following. First, as the University of Victoria's Faculty of Law example shows, Colombia's faculties of law should partner with Indigenous communities to reflect on ways to incorporate the teaching of Indigenous legal traditions into their curricula. Second, Colombia's faculties of law should make at least a course on Indigenous legal traditions mandatory. A more comprehensive alternative, as is the case at the University of Victoria, would be that Colombian faculties of law adopt a transsystemic approach to the teaching of their core courses, where, for instance, they can teach Colombian Constitutional law by contrasting it with

[90] Michael Chandler, "Indigenous Education and Epistemic Violence" (2010) 50:5 Education Canada; Marjorie Johnstone & Eunjung Lee, "Epistemic Injustice and Indigenous Women: Toward Centering Indigeneity in Social Work" (2021) 36:3 Affilia 376–390, online: <https://doi.org/10.1177/0886109920985265>.
[91] Praagh, *supra* note 1 at 311–312.

the "law of origin" ("Ley de Origen" in Spanish) proclaimed by some indigenous communities in Colombia to explain their way of life and understanding of the world,[92] which is similar to the notion of *lifeworlds* articulated by Mills.[93] Third, as the case of the University of Victoria shows, it would be important that the Colombian faculties of law ensure that law students can go to the communities, with the authorization or consent of these, to learn first-hand how Indigenous communities live and practice their legal traditions. Finally, following the example of the Canadian Truth and Reconciliation Commission, if it is of their interest, Indigenous authorities in Colombia, for example, through their umbrella organization of the Colombian National Organization of Indigenous Peoples ("Organización Nacional Indígena de Colombia" or "ONIC" for its Spanish acronym)[94] could call upon Colombia's faculties of law to take action towards adopting a legally pluralist approach to the teaching of law.

Therefore, I find that the Canadian and Colombian experiences with the teaching of Indigenous legal traditions in some law schools and the formal recognition of legal pluralism, respectively, show that there are possibilities for Indigenous communities and State authorities in both countries to mutually enrich their own processes by further understanding each other's respective signs of progress and challenges on these very relevant matters: the teaching of

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[92] Duvan Ricardo Murillo Escobar, *Ley de origen y legislación en Colombia: contraposición, intereses y contradicciones entre los pueblos indígenas y el estado, en materia de explotación de recursos naturales en la Sierra Nevada de Santa Marta* Universidad Nacional de Colombia, 2013) [unpublished] at 30-32: The Law of Origin is a symbolic concept by which Indigenous communities guide their interaction with their surroundings. This helps them maintain their link to their territories. Additionally, the Law of Origin is the basis for their collective organization and survival in many spheres, such as socially, economically, culturally, politically, spiritually, educationally, and healthcare. The law of origin is also a conception by which indigenous communities explain the origin of the universe and the material world.

[93] Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" McGill Law Journal, online: <https://lawjournal.mcgill.ca/article/the-lifeworlds-of-law-on-revitalizing-indigenous-legal-orders-today/> at 847–884.

[94] Organización Nacional Indígena de Colombia, "ONIC - Inicio", online: *ONIC* <https://www.onic.org.co/>.

Indigenous legal traditions and the acknowledgement of legal pluralism. With this paper, I seek to make a small contribution to encourage that comparative exercise, which I believe could result in mutual benefits across both jurisdictions.

6) Conclusion and final reflections:

Building bridges between the paradox of legal pluralism without pluralist legal education and pluralist legal education attempts without legal pluralism recognition

The Canadian State has formally recognized itself as a bijuralist legal system rooted in the Common and Civil Law traditions. Still, it has not officially acknowledged Indigenous legal traditions as a formal element of its legal order. Nonetheless, in light of the Truth and Reconciliation Commission's call to action 28, many Canadian faculties of law have undertaken efforts to *de facto* adopt a legal pluralist approach to the teaching of law, in which the teaching and learning of Indigenous legal traditions play an important role in the training of future lawyers. The University of Victoria's Faculty of Law joint degree program in Canadian Common Law (JD) and Indigenous Legal Orders (JID) stands out as an ambitious commitment to teaching Indigenous legal traditions together with European-centered legal traditions, such as Common Law. This will equip future Canadian lawyers with a better understanding and respect for Indigenous legal traditions and will provide them with the necessary skills to practice law within indigenous legal orders.

For its part, in Colombia, the notion of legal pluralism is well-established within the Country's constitutional order to recognize the reality that Indigenous communities have their

own traditional laws, practices, and legal orders. Nevertheless, this has not translated into a pluralist teaching of law in the major faculties of law of the country.

We thus discover that formal recognition of legal pluralism does not translate into the adoption of a pluralist teaching of the law, as the Colombian case shows, and that the lack of a formal State acknowledgement of legal pluralism does not preclude the adoption of a pluralist approach to the teaching of law. Still, even if not essential for a legal pluralism approach to education, Canada should adopt a legal pluralistic approach by formally recognizing Indigenous legal traditions as a part of its legal order, because these communities have a right to self-determination pursuant to their own laws and worldviews, which they have never abdicated.[95] In addition, these would allow for better coordination between the legal systems existing in Canada. In other words, I believe that Canada would benefit from breaking with its colonial legacy of Euro-Christian hegemonic understanding of legal systems, and formally embracing Indigenous legal traditions as a part of its legal order because that would add another important incentive for law schools to engage with the teaching of Indigenous legal traditions. This can, in turn, make it possible for these legal systems to speak to each other more directly and potentially increase harmonization for society’s benefit. However, this does not mean that Canada must formally recognize legal pluralism to achieve the goal of having a pluralist teaching of law. Still, among the possible benefits of such recognition, given the current efforts by an important number of law schools to incorporate the teaching of Indigenous legal traditions into their curricula without a

[95] Michael Murphy, “Indigenous Peoples and the Struggle for Self-Determination: A Relational Strategy” (2019) 8:1 Canadian Journal of Human Rights 67, online: <https://www.canlii.org/en/commentary/doc/2019CanLIIDocs2836#!fragment/zoupio-_Toc3Page4/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgGYAFMAc0IAsASgA0ybKUIQAiokK4AntADkykREJhcCWfKWr1m7SADKeUgCElAJQCiAGVsA1AIIA5AMK2RpMACNoUnYhISA> at 69-70.

formal acknowledgement of the existence of legal pluralism, I can reasonably envision that formal recognition of legal pluralism can lead to an increased interest by law faculties in the teaching of Indigenous legal traditions.

Colombia's faculties of law should take note of the efforts undertaken by their counterparts in Canada to adopt a pluralistic legal approach to the teaching of law because this would be in line with the Colombia legal order that recognizes Indigenous legal traditions as a legitimate source and form of law, and that would widen students' horizons of their understanding of law by immersing them into the study of legal traditions beyond the Euro-centric ones. In sum, a legal pluralist teaching of the law should be grounded on the reality of the existence of different legal regimes. A pluralist teaching of law is also relevant to the training of future lawyers because it would provide them with a better understanding of other legal worldviews inspired by different legal traditions, which, as indicated earlier, could help us move to a future where the curricula and pedagogy of legal education are freer from particular States or legal systems.[96]

Since Colombia recognized Indigenous legal traditions as a part of the country's legal system in 1991, more than 30 years ago, it is long overdue for the faculties of law in the country to live up to this reality of legal pluralism by adopting a legal pluralist approach to the teaching and learning of Law. The Canadian and Colombian experiences with law school's legal pluralism approach to the teaching of Indigenous legal traditions and the formal recognition of legal pluralism, respectively, clearly present a paradox. But this is a paradox that can encourage mutual learning and enrichment of both countries' legal education institutions and legal systems.

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[96] St-Hilaire, *supra* note 28 at 25.

I hope Canada advances toward formal recognition of legal pluralism within the foreseeable future. Chiefly, I particularly hope this paper can contribute to igniting that debate in Colombia, and hopefully, within the near future, the teaching of Indigenous legal traditions will become a salient feature of the Colombian legal education system

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