

# The stranger within

## Zygmunt Bauman's theory of modernity and 'the distinct culture test' in the legal praxis of the Supreme Court of Canada

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In its decision on *R. v. Pamajewon* in 1996, the Supreme Court of Canada elaborated on the content of the rights granted to Canadian Aboriginals under section 35(1) of the Constitution and considered the relationship of the norm to the claim for self-government; the impact of this decision is still considerable today. This paper uses a critical, 'deconstructive' approach to discuss the relation of that decision to the general legal conceptions about indigenous peoples' own culture, indigenous difference and the right of indigenous peoples to govern themselves, by reflecting the decision the Supreme Court gave against the ideas Zygmunt Bauman has developed around modernity and the concept of 'stranger'. The main assertion of this paper is that the court's considerations in the case can – at least partially – be read as modernity's reaction to the ambivalence that Bauman's 'stranger' represents, and that those human rights mechanisms that deal with issues relating to indigenous peoples' own culture may contain such kind of elements of modernity. Thus, it becomes meaningful to analyze them using a methodological perspective similar to that applied here in regard to *Pamajewon*. The argumentation in the paper will be developed by reviewing the facts of the case and the legal reasonings it generated; by examining Zygmunt Bauman's thoughts on modernity and the 'stranger'; and, finally, by connecting these different discourses and discussing the results of these connections.

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\* This text has been written as part of the research project Legal Constructions of Reality, funded by the Academy of Finland.

### **The facts: R. v. Pamajewon**

In 1982 Canada carried out a prominent law reform by introducing The Constitution Act, in which the state incorporated aboriginal rights into its Constitution for the first time. The new section 35(1) formed a part of the provision that granted constitutional law status to rights which were earlier founded on common law (see Kontos 2005, 195), and it stated the following: ‘The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.’

As the use of political mechanisms in the detailed arrangement of aboriginal peoples’ legal position proved to be challenging,<sup>1</sup> the constitutional reform was followed by a series of cases brought before the Supreme Court of Canada. In these cases the content of section 35(1) was further clarified and defined by the court by adopting rules for interpretation with which the scope of the concepts ‘existing’, ‘aboriginal’ and ‘treaty rights’ was to be determined. Among the cases was one that formed a culmination of the developments regarding this interpretation; the case was called *R. v. Pamajewon*<sup>2</sup>, and dealt with the relation between the asserted right of two First Nations to self-government and the aboriginal rights that were granted under section 35(1) of the Constitution.

The two First Nations, the Shawanaga First Nation and the Eagle Lake First Nation, had established their own legislative acts under which they had arranged public gaming houses on the reservations; these provided bingo and high stakes gambling activities to a clientele consisting of the inhabitants of the reservations as well as visitors and tourists. The activities provided work and income to the members of the First Nations who lived on the reservations, together with markedly abundant annual profits, permitting some considerable improvements to the communal services within the reservation.<sup>3</sup> In this sense the operations of the gaming house served as a remedy for the severe problems the First Nations communities (those under discussion and in general) faced in

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<sup>1</sup> See Borrows 2002, 5. On this simultaneous political process see e.g. Macklem 2001, 178-180.

<sup>2</sup> *R. v. Pamajewon*; [1996] 2 S.C.R. 821.

<sup>3</sup> The Eagle Lake First Nation gained profits that surpassed a million dollars and, as a result of this, was able to build (among other things) a conference centre, local school and gymnasium on the reservation using the profits gained from gaming. See Macklem 2001, 173.

their struggle for economic self-sufficiency,<sup>4</sup> representing one possible way for First Nations in Canada to establish the kind of material conditions that were necessary if the Nations were to exist in difficult social circumstances as distinct self-governing entities.<sup>5</sup>

Since the gambling activities that were initiated according to the Nations' own statutory mechanisms (Shawanaga First Nation lottery law and Eagle Lake First Nation Band Council's lottery law) and under the assumption that the First Nations had jurisdiction to act in this way (see Macklem 2001, 173), the First Nations had not sought the provincial licence required by federal law to authorize the activities.<sup>6</sup> This oversight was regarded as constituting a violation of the Provincial gambling laws and as contrary to the federal Criminal Code.<sup>7</sup> Negotiations were unsuccessful and the First Nations rejected the proposals for attaining the license. They were concerned that the terms of licensing which, among other things, limited the size of the prizes, would have rendered the activities unattractive among other than the people living within the reservation. They also saw the acceptance of the licence as narrowing the scope of the inherent right of the First Nations to self-government. (See Morse 1997, 1023-1024.)

As a result, police actions had been committed and the appellants, members of the two First Nations, had been charged and convicted of the offences under the Criminal code, their criminal responsibility resulting from their executive position either in the governing body of the Nation or from establishing and maintaining the activities.<sup>8</sup> The appellants submitted an appeal, basing it, for the first time in Canadian legal praxis (Morse 1997, 1012), principally on the claim to aboriginal self-government,<sup>9</sup> and seeing the scope of that right to be broad enough to permit and empower the management of the use of the reserve

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<sup>4</sup> On the difficult social situation of many First Nations in Canada, see Morse 1997, 1018-1019.

<sup>5</sup> It seems reasonable to assert this, even though the gambling activities are also seen as a possible source of different kinds of social problems, and despite the fact that the reactions of aboriginal people towards gaming have been both positive and negative. On these issues see Morse 1997, 1021.

<sup>6</sup> *R.v. Pamajewon*, para. 6.

<sup>7</sup> *Ibid.*, para. 3. See also Morse 1997, 1020.

<sup>8</sup> *R.v. Pamajewon*, paras. 7 and 12.

<sup>9</sup> The appellants belonging to Shawanaga First Nation used the term 'self-government' whereas the other appellants invoked the Nation's right to 'self-regulate in its economic activities'; *ibid.* paras. 6 and 11. On the other premises employed in the case, see Morse 1997, 1025.

lands, thus rendering the Criminal Code ‘inoperative in reference to them and to their First Nations’.<sup>10</sup>

The court gave its decision while occupied by several different aboriginal rights issues; the decision has systematic connections mainly to three other cases: *R. v. Sparrow*<sup>11</sup>, *Delgamuukw v. British Columbia*<sup>12</sup> and *R. v. Van der Peet*.<sup>13</sup> The first decision, that of *Sparrow*, had laid down guidelines on how to interpret section 35(1) in regard to the meaning of the term ‘existing aboriginal rights’ in specific factual circumstances. It provided, for instance, a legally sound foundation for a liberal interpretation of the term that would allow these rights to build up in time, but, at the same time, it acknowledged the possible connection between section 35(1) and the integrality of a particular action to a distinctive culture of aboriginal peoples.<sup>14</sup> In the second case, *Delgamuukw*, the court had i.a. defined the relationship between aboriginal territorial interests and section 35(1)<sup>15</sup> by attaching aboriginal title solely to the continuing, pre-European occupation without requiring that the different ways to use the land based on the occupation necessarily had to be ‘integral to distinctive cultures of Aboriginal societies’ (Macklem 2001, 101). This did not exclude the possibility of developing a generous interpretation in respect to the general aboriginal right to self-government in the future.<sup>16</sup> In the third case (*Van der Peet*) the rules of interpretation laid down

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<sup>10</sup> Ibid., paras. 6 and 11; see also paras. 14, 16 and 18; Macklem 2001, 173. Again this wording was used by the appellants belonging to Shawanaga First Nation, whereas the other appellants used a slightly different argumentation; see Morse 1997, 1025-1026.

<sup>11</sup> *R. v. Sparrow*; [1990] 1 S.C.R. 1075.

<sup>12</sup> *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97.

<sup>13</sup> *R. v. Van der Peet*; [1996] 2 S.C.R. 507. *Van der Peet* forms a trilogy with two other cases, *R. v. N.T.C. Smokehouse* ([1996] 2 S.C.R. 672) and *R. v. Gladstone*, [1996] 2 S.C.R. 723. In addition to these decisions there are several other cases that concern the scope of section 35(1); for acquiring general reference information on the ‘entity’ of these decisions see e.g. Scheinin 2000, 196, and Kontos 2005, 195.

<sup>14</sup> See *R. v. Sparrow*, para. 1093; Scheinin 2000, 196. In the case the defendants, having been convicted for using fishing nets that exceeded the terms of the Nation’s fishing licence, claimed that the federal / provincial fishing regulation violated the Nation’s existing aboriginal right to fish.

<sup>15</sup> In the case the plaintiffs claimed title to land that had been traditionally occupied by them.

<sup>16</sup> See Macklem 2001, 100-101. Yet, the way the court committed this ‘non-exclusion’ was very cautious, leaving thus room for speculation about the court’s position on the question. Martin Scheinin notes here, e.g., that as the case dealt with aboriginal

in *Sparrow* had been applied by establishing an interpretation procedure called ‘distinctive culture test’ for the assessment of different activities in respect to their compatibility with the constitutional norm.<sup>17</sup>

In its decisive reasoning in *Pamajewon*, the court relied mainly on *Van der Peet*, choosing a different route of argumentation than what it used in *Delgamuukw* for considering the nature of the right to self-government. The court began its reasoning by turning down the appellants’ claim that the right should have a broad content, and that it would pertain to the general overall use of land. Instead, the court saw the question of self-government as concerning (in that particular case) only the gaming regulation. The court stated that the asserted right to self-government was not a general right belonging to the First Nations *per se*, but rather a specific claim whose validity was to be evaluated by linking it to the particular activity it was claimed to cover (which in this case was gambling). The court then continued by considering the activity ‘in light of the purposes underlying’ section 35(1),<sup>18</sup> i.e. by applying as a rule of interpretation ‘the distinctive culture test’ to the case at hand, seeing it as an appropriate method to apply also in the forthcoming cases, in ‘determining the practices, customs and traditions’ that were to be included under section 35(1). The test was regarded as providing ‘the legal standard against which the appellants’ claim must be measured’.<sup>19</sup> The content of it is as follows: ‘In order to be an Aboriginal right an activity must be

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title, which is only one particular issue under section 35(1), it is not possible to draw any conclusions from it in regard to other aboriginal rights; see Scheinin 2000, 200.

<sup>17</sup> In this case, at issue was whether the bartering and trading of fish, actions that (again) were not included in the Nation’s fishing licence, could be regarded as belonging to the Nation’s existing aboriginal right to fish; on the facts of each of these cases in a summarised form, see e.g. Scheinin 2000, 196-204.

<sup>18</sup> See *R. v. Pamajewon*, paras. 24 and 27, where the court used the following words: ‘Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is nonetheless that laid out in *Van der Peet*, supra. In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.’ Leena Heinämäki notes, though, that the court did not exclude the opportunity to recognize the right in future, providing that it ‘could be seen as an Aboriginal right linked to a distinctive practice of that particular society predating European contact’. Heinämäki 2006, 168; see also Heinämäki 2006, 175. On the differences and similarities between the policies of the court and the federal government in relation to the status of the right to self-government as an aboriginal right, see e.g. Heinämäki 2006, 157-158, 170 and 175; Matthews Glenn & Drost 1999, 184-185.

<sup>19</sup> *R. v. Pamajewon*, para. 23.

an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.<sup>20</sup>

The court applied the test reinforcing simultaneously the further preconditions that had been attached to it in *Van der Peet*, by considering that the requirement of integrality was fulfilled only if the activity under inspection could be regarded as ‘a defining feature of the culture in question prior to contact with Europeans’.<sup>21</sup> As the court found that the appellants had failed to substantiate their assertion in this respect, it ascertained that gambling activities could not be regarded as constituting an integral part of the culture of the two First Nations. As a result, the court concluded that the appellants’ claim to self-government in relation to those activities could not be considered as falling under the category ‘existing aboriginal rights’, which are granted legal protection under section 35(1). Therefore, the court rejected the appellants’ claims and dismissed the case.<sup>22</sup>

The decision was severely criticised by using several different arguments, partly as an independent case, partly as sharing the same problematic features as *Van der Peet*. The most common critique was that the court had maintained and reinforced the ‘frozen rights approach’<sup>23</sup> (towards aboriginal cultural and social distinctiveness as indigenous peoples) that it had adopted in *Van der Peet* by accepting as ‘existing aboriginal rights’ only those rights that were attached to activities that had their origin in the time before the arrival of another culture and that could be seen to ‘have survived’ the time period from this arrival to the present day; this approach was considered both paternalistic and discriminatory in regard to new, non-traditional activities of aboriginal peoples, as it allowed no room for the once existing rights to change, or for new rights to emerge, in a way that would have enabled ‘the advancement and protection of contemporary Aboriginal ends and interests’.<sup>24</sup> In addition, by applying the distinctive culture

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<sup>20</sup> *Ibid.*, para. 25 (where the court quotes *R. v. Van der Peet*, para. 46).

<sup>21</sup> *Ibid.*; *R. v. Van Der Peet*, para. 59.

<sup>22</sup> See *R. v. Pamajewon*, para 30. The decision was not unanimous; the critique that was presented in the differing opinion (*R. v. Pamajewon*, paras. 33-44) partly overlapped with that of the academics analysing the decision. See specifically paras. 37-40 in the decision; also, Morse 1997, 1030.

<sup>23</sup> Bradford W. Morse uses here an even harsher, slightly sarcastic term, ‘permafrost rights’, to describe the impact of the decision on the evolvement of the rights. See Morse 1997, 1012.

<sup>24</sup> Murphy 2001a, 119 and 126-127. See also Borrows 2002, 60, and Macklem 2001, 168. On the critique against the attitude the court had in this matter, see Murphy 2001a, 126-127 and, indirectly and a bit provocatively, Barsh / Henderson 1997,

test in assessing whether the right to self-government exists, and thereby accepting its underlying idea that all the ‘existing aboriginal rights’ refer to activities that somehow reflect the material difference between aboriginal *culture(s)* and that of non-aboriginal peoples, the court was said to misunderstand the nature of indigenous difference by recognizing culture and cultural definition as an exclusive, decisive element of that difference, and to give an unjustly narrow political-philosophical meaning to aboriginal peoples’ right to rule over themselves.<sup>25</sup>

All these lines of consideration have relevance in both international and national discourses on the formation of indigenous peoples’ legal position; to me they represent important ‘what’ questions when seeking to point out the problematic elements of the decision and discussing the impact of its argumentation on the political and social status of First Nations in general. Yet, I would like to advance the argument by using a slightly different approach; for what both fascinates and troubles me in a more philosophical sense in the case, is the way the court attaches the existence and justification of the rights to the criteria of distinct culture in a context in which distinctiveness appears to mean being distinct *in relation to the other*; that is, in relation to the evaluating subject, to ‘us’. It leads us to ask *why* the court acts in this manner, and to seek answers from the intriguing ideas Zygmunt Bauman has developed around the concept of ‘stranger’. In my opinion, these ideas may function as a method to connect the case to an even wider international, legal theoretical context than what the sheer decision and the critique it inspired ipso facto permit.

### **A theory: Zygmunt Bauman’s ‘stranger’**

Zygmunt Bauman can be said to be one of the most important thinkers within the discourses of sociology and other social sciences in forming a general theory of postmodern ‘having become serious’.<sup>26</sup> In order to understand post-modernity (see Ahponen & Cantell 1996, 13), Bauman has become profoundly acquainted

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1000-1003 and 1005. On the other lines of critique, e.g. on the undue difficulties to prove the integrality of the activity to aboriginal peoples’ culture, and on the arbitrariness of the date from which the activity was required to exist, see e.g. Morse 1997, 1034-1037, where Morse discusses *R. v. Van der Peet*, but in a manner that makes the critique relevant also for *R. v. Pamajevon*.

<sup>25</sup> On this issue, see Macklem 2001, 61-62, Murphy 2001b, 373-375.

<sup>26</sup> See e.g. Ahponen & Cantell 1996, 7, 12 and 17, where Bauman’s theory is seen as an alternative to ideas about post-modernity being a ‘nihilistic end of a modern

with modernity, observing and describing its basic structure and (its) underlying assumptions together with reasons that have caused its assumed, ongoing transformation (or even collapse) and the gradual emergence of the postmodern.<sup>27</sup> For Bauman, one of the most fundamental elements that enables one to conceive modernity and the modern society is an understanding about what order is and about its place in, or significance to the society and to the world; another issue is the kind of relationship order has with its counterpart, chaos. Order is, or seems to be, in some dualistic way, something the modern both consists of and pursues; it is modern's everlasting, never truly fulfilled dream, a need that is inherently, structurally attached to it (see Bauman 1991, 4, and Bauman 1992, xi). Order can be seen as a tool for modernity to understand itself, to define itself and make itself transparent by excluding everything it considers ambiguous and thereby frightening and undesirable (see Bauman 1991, 9). Bauman makes clear the significance of the order and ordering with the following words: 'We can think of modernity as of a time when order – of the world, of the human habitat, of the human self, and of the connection between all three – is *reflected upon*.'<sup>28</sup>

According to Bauman, order is to be achieved by finding a place in the system for all that exists. This is done by using defining classifications that function as building blocks, by finding a place in the system for all that exists.<sup>29</sup> Order, with and within its systematisations, thus provides everything with an identity, a place, or a status *in relation to* (and defined by) something, i.e. in relation to the other, to one's opposite.<sup>30</sup> A basic way to classify existing objects is to divide them, in this case the persons and groups of persons, into 'us' and 'them' (or to friends and enemies); the fundamental significance of this act is that it provides one with

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project' or a 'joyful and gay liberation from all the former commitments'; Ahponen & Cantell 1996, 17; author's translation.

<sup>27</sup> On Bauman's own understanding on the concept of 'modernity', see Bauman 1992, 12. In his later works Bauman has developed his ideas of modernity and of its relationship to post-modernity as well as his conceptions about the stranger; on these developments, see Bauman 2000. This paper utilizes, however, primarily Bauman's earlier works.

<sup>28</sup> Bauman 1991, 5 (emphasis in the original text).

<sup>29</sup> *Ibid.*, 1, where Bauman acknowledges the significance of the structure and functions of language and linguistics for his society-related theory.

<sup>30</sup> The concept 'identity', in being a systematic, structural definition, or a defining tool, seems to attach itself here both to the conceptual emergence of the societal order and to the individuals within the society.

information about how to define ‘me’, and about what is not ‘me’.<sup>31</sup> The problem is, however, that order in action really does not reduce the number of things that require it: the need for continually re-established order is based, in Bauman’s opinion, on the (disturbing) discovery about naturally existing order being always and necessarily ambiguous, fragile and contingent (see Bauman 1992, xi-xii). Ordering the world and everything in it provides the foundations modernity needs in conceiving and managing what exists, and in this way, weakens, perhaps, the fear modernity feels in relation to the ambiguity discovered. And yet, the same act of organization creates the opposite of itself and its goal. It creates chaos, something that consists of nothing but ‘pure negativity’ and anything *but* order. It creates that which has been excluded from the process of ordering, being thus the ‘other of order’. (See Bauman 1991, 7).

And, simultaneously, chaos is what is inherently needed so that order can be attained; it is what order needs to exist.<sup>32</sup> In Bauman’s words:

‘The dream of order and the practice of ordering constitute the world – their object – as chaos. And, of course, as a challenge – as a compulsive reason to act.’<sup>33</sup>

There exists, however, something that profoundly threatens the order by challenging the dichotomies established and maintained by modernity, something in which the ambivalence that modernity so anxiously tries to remove has grown denser; here Bauman presents us with the concept of stranger.<sup>34</sup> The stranger who is, in Georg Simmel’s words, ‘the man who comes today and stays tomorrow’.

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<sup>31</sup> On the fundamental nature of the ‘us / them’ division, see Bauman 1991, 53-54.

<sup>32</sup> *Ibid.*, 4, 7 and 38; see also Robinson 2002, 36, where Robinson describes chaos as simultaneously ‘existing as the product of order’s self-constitution, and representing ambivalence’.

<sup>33</sup> Bauman 1991, xi. The portrayal that Bauman sketches of modernity with order as its main feature has also raised criticism; on this critique, see e.g. Crozier 2002, 23-24, where Crozier sees the gardening metaphor that Bauman uses in describing the ordering function of society as too one-sided to describe modernity in an adequate manner; on a more general critique of the metaphor, see e.g. Hetherington 2002, 361-362, where Hetherington also introduces a different, interesting shift of vantage point in regard to the relationship between order and ambivalence.

<sup>34</sup> The concept of the stranger is not inherently bound to modernity as also the post-modern society recognises the existence of the stranger, though perhaps in a different mode and with a different essence; see e.g. Marotta 2002, 383-385.

row.’<sup>35</sup> The stranger questions the hard-earned borders between ‘us’ and ‘them’, and reminds one about the true nature of these categories as pure social constructions that constitute each other.<sup>36</sup> He does this by acting as ‘we’ act, making claims for being inside the same category as the subject who makes the determining classification, and yet maintains, or seems to maintain, the aspect that is considered to be alien in him. In doing this, he reveals the frailness, the shallowness of those identities that modernity created and claimed to ‘fully exist and make a difference’.<sup>37</sup>

Thus, being and remaining ‘immanently ambivalent’ (Diken 2002, 103), creating a need for the existing systematisation to be modified<sup>38</sup> in perpetuity,<sup>39</sup> the stranger represents the ultimate threat for modernity.<sup>40</sup> Therefore, in order to stabilize and maintain order with its dichotomies and classifications it becomes necessary to eliminate the threat, to erase the strangerhood in stranger, by including him in some manner in the existing system of definitions, or excluding him altogether from the relevant life-world of ‘us’.<sup>41</sup> Thus, when ‘he is’, when he factually or conceptually exists within the society, he is to be considered and

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<sup>35</sup> Simmel 1971, 143; Bauman 1991, 59. Bauman has adopted the term ‘stranger’ from Georg Simmel, and developed it ‘to look like his true self’, partly by referring directly to Simmel’s thoughts, partly by using the term in a different, perhaps more general and abstract context than Simmel does. To compare the ideas of these two theorists, see Simmel 1971, 143–149.

<sup>36</sup> Bauman 2000, 177 (quoting Frederik Barth without further information on the reference); Diken 2002, 106.

<sup>37</sup> On this, see Bauman 1991, 68.

<sup>38</sup> Diken 2002, 106, where Diken sees the ambivalence of the stranger as being ‘both the source and the consequence of “naming”.’

<sup>39</sup> On the growing anxiety emerging from the cycle of ordering and the reappearing of disorder, see Bauman 2000, 106.

<sup>40</sup> For Bauman, to fear a stranger is more profound than to fear an enemy; whereas the enemy belongs to modernity’s categorisations and is something we already understand because of the definitions and classifications, representing thus only a threat to the individual or individuals in and after the process of organization, the stranger means, according to Bauman, the ‘threat to sociation’ itself. Bauman 1991, 55. See also Robinson 2002, 40.

<sup>41</sup> Here, though, excluding may actually mean ‘including by excluding’ in ‘Agamben’s way’; see Oxford 2006, 183. The author wishes to thank the official referee of this paper for this remark.

classified at least as ‘something’; either as a friend or an enemy, but not as anything that could be regarded as both.<sup>42</sup>

## The coalescence

Is there then a way to connect these different considerations together in a valid, relevant manner? And, on the other hand, is there any general, internationally significant reason to do that? I will begin with the first question. Bauman uses his ideas in a slightly different social reality than what has been discussed here, emphasizing quite strongly the idea that the stranger is someone who has *de facto arrived* in the life-world of the subject who makes the classifying us / them evaluation (see e.g. Bauman 1991, 79 and 85-90). However, it still seems relevant to me to compare his thoughts with the actual case in question. For me the way to do this is to consider whether the court and the appellants can be seen to somehow represent the situation in which the stranger meets an actor who belongs to modernity. The fact that ‘us’ and ‘them’, as well as the stranger himself (see Bauman 1991, 75), truly are (in Bauman’s thoughts) social constructions speaks on behalf of considering the court’s actions as reactions modernity produces in the event of the appearance of the stranger. By approaching the decision from this angle it may be possible to treat as separately as possible those aspects that may result in general legal theoretical presumptions which Bauman’s thoughts potentially articulate, and those elements that can and perhaps should be analysed in light of the special social and political circumstances prevailing in Canadian society.

The relationship between Bauman’s thinking and the court’s considerations is significant bearing in mind that the court’s decision was based on norms regulating something located both inside and outside the cultural and normative sphere of the decision-making subject. The law is dealing with a situation in which the contact between groups of people enables them to impact on each other’s everyday social and cultural choices in a way that makes the ‘borders’ between the two cultural groups more and more ambivalent, while causing increasing heterogeneity within the two groups.<sup>43</sup> In this factual social context the essence of ‘strangerhood’, the ambiguity resulting from the both/and aspect the

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<sup>42</sup> See Bauman 1991, 62, 65-66 and 69-70; also Bauman 2000, 101 and 175-176.

<sup>43</sup> See e.g. Macklem 2001, 47. Here, though, one needs to take a cautious attitude towards the idea that there would exist some fixed, rigid borders between different cultures, as this assumption has been successfully contested within the disciplines studying culture; see e.g. Merry 2001, 40-41. Yet, the term is used here as it expresses

stranger carries with him, appears in the situation, where law justifies itself on the basis of the dualism that the stranger questions. Here 'we', the law making and enforcing authorities, acknowledge the distinctiveness of 'them', the First Nations, in regard to 'us', and maintain and reproduce this difference in rights legitimizing discourse, whereas the group that is seen as different from 'our' point of view simultaneously makes claims relating to activities that typically have been seen to belong to 'our' activities. This forces (at least in some degree) the two discourses to emerge, the one dealing with rights based on difference as their justification, and the other concerning the right to self-determination<sup>44</sup> based on equality between the similar kinds.

The factual considerations of the court also resemble the ways to deal with the stranger that Bauman discusses. The distinctive culture test that the court used to allow itself to define the scope of the rights granted to the two First Nations under section 35(1), and also the legal reasoning that spells out the need to establish the test, are founded on the assumption that it is possible, right and necessary to find an unambiguous classification that defines the object under examination; that is, to regard the group as being either 'clearly not us', i.e. belonging to the category 'them', with rights to specific protection in regard to the activities that in themselves are seen as distinct enough, or 'not enough them', i.e. being, then, a part of 'us' without any such rights. The nature of this assessment and its relation to modernity's way to cope with the world are problematic elements, in my opinion, because the kind of argumentative tools used may turn against the very group of people whose interests this assessment is supposed to guard. The result is an injustice that emerges from the structural denial of (the inability to recognise and to give weight to) the diversity of those features that form the relevant social context of significance for the group concerned: the ambivalent totality of the aims, needs and actions of a particular First Nation. Here Zygmunt Bauman's thoughts may help one to deconstruct the legal-social event that is manifested (with all its consequences) and to make visible and transparent the possible structural, societal reasons for its being what it is.

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the fundamental legal assumption underlying the regulation concerning the protection of the culture of aboriginal peoples.

<sup>44</sup> The term is used throughout this paper in a loose, strictly moral meaning, referring to one's right to decide over matters concerning him- or herself, without a legal connection to international law; this is done acknowledging and sharing the political philosophical concern James Tully feels regarding too strict categorisations of one's basic need for self rule; on this issue, see Tully 1995, 4-6.

Naturally, not everything the court said or did can (or should) be explained by applying Bauman's considerations. The case is apparently composed of the perplexity and plurality of the issues and problems that are attached to the political formation of First Nations' legal status in Canada, containing also their explanatory foundation. In its decision the court had to take into consideration, at least implicitly, some very theoretical, general questions that impact on the overall legal regulation relating to aboriginal peoples: How to understand and interpret the term indigenous difference, the concept that should function as a moral and political justification for the establishment of the rights of aboriginal peoples;<sup>45</sup> How to balance the interests of both the sovereign crown and the other individuals whose rights were protected under the Constitution (see Kontos 2005, 195) with those of the First Nations, whose autonomous authority and general position in Canadian society, that of being both a nation (or nations) inhabiting the territory before the arrival of the current ascendant institution and a culturally distinct minority in relation to the majority of other Canadians, still remained unsolved, lacking a definitive, detailed and comprehensive affirmation in Canadian jurisprudence (see Kontos 2005, 195-196). In answering these questions the court was neither an isolated official that gave a hapless decision outside the political society it belonged to nor a 'general representant of modernity', a functionary stripped of particularity and ambiguity in regard to its own position in modernity. Rather, the decision reflects the legal reasoning bound by the existing and concurring policies for dealing with aboriginal peoples, policies whose current balance is partly included in the law that the court is to apply and to interpret (see Franks 2000, 200), policies whose relationship to modernity may still remain partly undefined. In my opinion, however, even this kind of indefinite relationship between the court's actions and the (modern) society the court is part of, justifies the application of Bauman's thoughts when trying to understand the decision and the reasons behind it.

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<sup>45</sup> The concept 'indigenous difference' distances itself here from the term aboriginal cultural difference; on this question, see Macklem 2001, 47-48.

### **R. v. Pamajewon, the stranger, and human rights: are there any connections?**

All in all, having discussed the possible way to unite the two threads of discussions and having considered the reasons that may justify this act, one is left with one final question, one simple and elegantly nonchalant ‘So...?’; Why is it so important to process the issue? Why could one not just dismiss the matter by seeing it as an exceptional case that appeared in one particular context and therefore lacks any general relevance? The answer to these questions is rather straightforward: Similar arguments as those of the Supreme Court are also applied in the discourses of international law in relation to the cultural protection of indigenous peoples; although the actions of the Court have been criticised within international law because of their undue strictness, which cannot be legitimized, for example, via international human rights practices,<sup>46</sup> neither the idea of evaluating indigenous peoples’ cultural circumstances by using testing, nor the legal philosophical reasoning behind it are usually regarded as problematic in the mainstream international human rights discourse that evaluates the fulfilment of the rights of indigenous peoples.<sup>47</sup>

Actually, one of the main moral and legal arguments for justifying the rights of indigenous peoples is the appeal to the distinct culture of these groups, and to the need to maintain this divergence and to protect it against assimilation *in a manner* that seems to imply a way to objectively evaluate the difference that is to be protected. In these circumstances testing represents an inherent, presupposed, and uncontested need for this ‘*objective*’ evaluation of indigenous peoples’ distinctive ways of life, and of the necessary, material difference in those peoples’ culture(s) or in their cultural circumstances (in relation to the lifeworld that the evaluator regards as her own), by a manner conceivable to persons not necessarily sharing that particular cultural context. This evaluation is then applied, at least in international human rights law.<sup>48</sup>

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<sup>46</sup> See e.g. Xanthaki 2007, 258; Eisenberg 2005, 27. On the reactions to the issue within international human rights discourse, see also Scheinin 2000, 198-199.

<sup>47</sup> Avigail Eisenberg, for instance, regards the distinctive culture test as a way for institutions to ‘engage in, rather than avoid, discussions about culture and cultural identity in public forums and institutions, and in a manner that exposes ethnocentricity and problems of legitimacy’; He sees the future of the test resting in the analogous procedures emerging in the work of national and international institutions. See Eisenberg 2005, 27.

<sup>48</sup> The monitoring body of the UN International Covenant on Civil and Political Rights, (The ICCPR), the UN Human Rights Committee has for instance, in assess-

While the relevant monitoring mechanisms definitely work with more flexible tools than the Supreme Court operated with in pursuing to define the limits of those issues that fall under the rights of the First Nations, the basic discursive structure these different actors rely on in this function seems, in my opinion, to bear a resemblance to the original testing mechanism. In fact, this kind of evaluation may well be seen as the only thinkable way to assess whether the protection of minority and indigenous cultures is rightly established and maintained. It may even be possible to assert that there is nothing intrinsically problematic in it, particularly if one focuses solely on the content of one specific right and its interpretation. This would, however, exclude questions that relate to the factual context of the evaluating process and to the impact that a particular execution of the interpretation has on the group of persons directly involved, not to mention the issue of simultaneous applicability of several relevant norms in the case, such as the right to self-determination, or the right to subsistence. If these considerations are to be given appropriate weight, the situation may change drastically.

*R. v Pamejewan* in my opinion represents an extreme situation in which the need to find a difference evaluable by the criteria of the evaluating subject produces unreasonable results from the point of view of the person or group under evaluation. It requires the group, which is explicitly assumed and required to be

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ing whether certain activity can be regarded to form such an essential part of one's culture that it is entitled to protection under the covenant, argued in its views in a way that reminds one of the rationales of *Pamajewon* and *Van der Peet*; see Xanthaki 2007, 258, where Xanthaki refers to the decision given in the case *J.G.A. Diergaardt et al. v. Namibia*, Communication No 932/2000. The relevant question in the case was, from the point of view of this paper, whether cattle raising on the communal land of a minority group was such an essential element to the culture of the community that it could gain protection under article 27 of The ICCPR. The Committee answered 'no' to the question, stating i.a. the following: 'However, in the present case the Committee is unable to find that the authors can rely on article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, *it is not the result of a relationship that would have given rise to a distinctive culture*. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of self-government, *the authors have failed to demonstrate how these factors would be based on their way of raising cattle*.' (para 10.6, author's emphasis.) Yet, in contrast to what has been discussed here on the decision and its learnings, see e.g. Kontos 2005, 217, and Scheinin 2005, 13-14, where the legal significance of the decision has been considered in a different manner. On the other cases, in which the evaluation is applied, see e.g. *Kitok v. Sweden*, Communication No. 167/1984, UN Doc. CCPR/C/38/D/167/1984.

in some manner different, to ‘put aside this difference for a moment’ and step into legal discourse that is established by others than the group itself, and that prevalingly expects all its participants to position themselves in the category of ‘us’ in that particular moment of discussion. The decision does this in a way that makes it easy to regard the case as a singular act with no references to more general legal processes. Putting Zygmunt Bauman’s ideas about the stranger within and above the categorisations of order into this context takes the edge of possible assertions that a critique of the case would have to be limited to that particular national context in which that particular, ‘classified-as-exceptional’ decision was given. Bauman’s theory highlights the problematic element of the decision, which is the law’s dualistic way of dividing things into rigid categories, itself not in any manner exceptional within law; in this situation, however, this act of dividing becomes problematic.

### An ‘Epilogue’

In speaking about national self-determination Michael Murphy says:

It is a nation’s right to determine its own future as free as possible from external interference or domination by another nation or collection of nations. [...] While it is important to recognize differences among the range of groups and claims asserted under the rubric of national self-determination, which often necessitate very different institutional responses, it is also important to recognize that what remains undifferentiated across these empirical nuances and differences is the common normative basis of their political claims. Cultural minorities claim political rights primarily on the normative basis that these are essential to protect their distinctive cultures. Nations, in contrast, claim political rights and self-government on the basis that it is their democratic right, which has no necessary connection at all to their cultural distinctiveness. (Murphy 2001b, 374 and 375.)

Although Murphy speaks about *national* self-determination, *minorities* and *nations*, using concepts that have their precise legal meaning elsewhere than in the discourse attached directly to indigenous peoples,<sup>49</sup> I feel that these thoughts also apply in a moral, political and philosophical sense to the situation of the First Nations in the context of this paper and of several indigenous peoples in general,

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<sup>49</sup> Here the manifold, per se important questions relating to the definition and to the content of these concepts are intentionally left aside as taking them into consideration would have caused too great a shift in the view adopted in the paper.

at least in a sense that indigenous peoples should be able to improve their overall legal and social situation by applying or appealing to that legal, moral or philosophical justification which in the most appropriate manner coincides with the needs and aspirations the people have in the question at hand. This requires, in Bülent Diken's words, 'an affirmation of ambivalence and hybridity, that is, being open toward and having an eye for the open-endedness and both/and of situations' (Diken 2002, 135). To be able to do this, one should not take for granted such legal justification mechanisms that have their foundations in a phase overly fond of separating 'us' from 'them'. We need to 'create equality without creating sameness'; we need to 'promote difference without forcing people to be different in a way sometimes predestined in legislation' (Toivanen 2004, 185); and, most of all, we need to understand those mechanisms that may work against these objectives. I believe that Zygmunt Bauman may on his part help us to do that.

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