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Business Ethics and Sovereignty in Settler Colonial States

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Abstract

The objective of this conceptual article is to make the case that Indigenous Cemānáhuacan nations' sovereignty is valid throughout all of Cemānáhuac (the Americas), thus rendering settler colonial laws illegitimate and illegal. This in turn means that firms need to abide by Indigenous Cemānáhuacan nations' laws. Theories relating to business, business ethics, compliance, and sustainability reflecting the assumptions of settler colonial sovereignty need to be reworked to take into account the ethical and legal reality of Indigenous Cemānáhuacan nations' sovereignty. Without coercion-free recognition from Indigenous Cemānáhuacan nations, firms cannot accept any claim of government authority, ownership, or sovereignty made by settler colonial states. This article closes a gap in the literature between Indigenous sovereignty and business ethics in a settler colonial context.

Keywords

ethical strategy; Indigenous sovereignty; North America; Central America; South America; Indigenous nations; legal pluralism; theory of law; business ethics

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Business Ethics and Sovereignty in Settler Colonial States

The objective of this conceptual article is to make the case that Indigenous nations' sovereignty is valid throughout all of Cemānáhuac,¹ otherwise known as the Americas. This sovereignty renders settler colonial laws illegitimate and illegal and requires business firms to abide by Indigenous Cemānáhuacan nations' laws. Acknowledging that Occidental terms like "law" and "sovereignty" are foreign to traditional Indigenous Cemānáhuacan conceptualizations, this article uses Occidental terminology because extant academic publications in business and business ethics overwhelmingly use it. The term West is rejected in favour of Occident because the former is ahistorical and ambiguous: West (المغرب) traditionally refers to the Maghreb region in Arabic and West(西域) traditionally refers to Central Asia in Chinese, among others. In this article, Occident refers to the cultural sphere rooted in the Greco-Roman heritage and Occidental Christianity—Protestantism and Roman Catholicism. Based on an analysis of Australia, Nicoll argued that Indigenous sovereignty can be understood as the opposite of *terra nullius* [nobody's land]: It is an ethical frontier, "a point beyond which non-Aboriginal Australians should never have invaded" (cited in Pratt, 2004, p. 45). Therefore, the acknowledgment and recognition of Indigenous sovereignty is a point against which contemporary policies and practices affecting Indigenous Peoples should be evaluated.

The ethical frontier that should never have been crossed in the settler colonial context raises the issue of how firms should navigate business ethics and compliance. There is a nexus between ethics and law (Beade, 2016), whereby the study of both are parallel (Plunkett & Shapiro, 2017). The premise that ethics and law are conjoined reaches into antiquity: Roman Law was held to always aim at *aequum* [right] and *bonum* [good, ethical] (Zwalve, 2014). Law needs an ethical foundation (Stilz, 2015)—incidentally, the same foundation needed in law is needed in business ethics. In the context of Indigenous Cemānáhuacan nations and settler colonial states, it cannot be assumed that the metaethics are shared. As such, it cannot be assumed that normative ethics and applied ethics are compatible.² Given that coercive power is generally absent from Indigenous Cemānáhuacan nations, Occidental firms are required to abide by Indigenous Cemānáhuacan nations' laws as the proxy of the level of business ethics.

Firms' current business ethics become virulent if there are doubts about the legality and legitimacy of settler colonial laws in relation to Indigenous Cemānáhuacan nations' laws. For a lawmaker's moral claim (Soper, 2002), illegality and illegitimacy would be fatal. Yet, settler colonial lawmakers' lack of sovereignty means there are good reasons to doubt both their legality and their legitimacy. A fatal blow to the legality and legitimacy of settler colonial lawmakers' laws is Alonso de la Vera Cruz's (1553/2007) finding in *De dominio infidelium et iusto bello* [On the Dominion of Unbelievers and Just War]³—

¹ The Aztec name Cemānáhuac describes the land between two oceans, the Atlantic and the Pacific. Such a description allows an expansive interpretation of Cemānáhuac to encompass the land stretching from Tierra del Fuego to Inuit Qeqertaat and from the Atlantic Ocean to the Pacific Ocean. An alternative name would have been Turtle Island, but Turtle Island is used to connote only the northern part of Cemānáhuac—also known as North America.

² Head and Mann's (2005) *Law in Perspective* contains critical analyses and syntheses of dynamic interactions between the economy, history, law, legal principles, philosophy, policy, and society.

³ Alonso de la Vera Cruz was one of the first professors of the Universidad de México. He was a defender of the human rights of Indigenous Peoples of Cemānáhuac, and the (effectively sovereign) rights of Indigenous Cemānáhuacan nations in the

founded on natural law⁴ developed by Saint Thomas Aquinas and *ius gentium* [law of nations]—that the conquest of Cemānáhuac was merely a *fait accompli* [an action that has been accomplished and, therefore, is difficult to undo] and not legal (see Westra, 2010). The treatment of Indigenous Cemānáhuacan nations and their legal systems as unequal to Occidental states and their legal systems began with the Occidental subjugation of Cemānáhuac (Bernal, 1989). Settler colonial states refuse to recognize Indigenous Cemānáhuacan nations' sovereignty (Richland, 2016); yet, the illegality and illegitimacy of the Occidental subjugation of the Indigenous Cemānáhuacan nations means that settler colonial states never achieved sovereignty and thus the right to pass laws in Cemānáhuac—with or without democracy. Commerce and war are interrelated (Buckley, 2004). As such, firms cannot easily extract themselves from the ethical challenges associated with wars of subjugation.

This illegality and illegitimacy is exacerbated by these states' ethnocidal and genocidal policies. Indigenous Cemānáhuacans have experienced genocide (Toko Ngalani, 2010). Occidental colonial expansion has been associated with the intent of spreading Occidental culture (Bardet, 2007), whereby cultural domination in the form of epistemological dominance has led to “epistecide” or the destruction of Indigenous knowledge systems (Dell'Omodarme, 2016). The Occident has ignored non-Occidental philosophies (Tshibilondi Ngoyi, 2016). Michel Foucault saw modern Occidental society as the result of the hegemony of one episteme of which law is an expression (Teubner & Boucquey, 1992). Settler colonial states' laws and lawmaking processes are thus an expression of Occidental hegemony.

Despite the United Nations (2007) Declaration on the Rights of Indigenous Peoples and other intrastate legal frameworks formally protecting Indigenous Cemānáhuacan nations' rights, firms and settler colonial states continue to violate Indigenous Cemānáhuacan nations' fundamental rights. This is clear from reports filed by the UN Special Rapporteur on the Rights of Indigenous Peoples on the situations in, for example, Brazil (United Nations General Assembly, 2016), Canada (United Nations General Assembly, 2014), Guatemala (United Nations General Assembly, 2011), Paraguay (United Nations General Assembly, 2015) and the United States (United Nations General Assembly, 2017). These reports focus primarily on firms with activities relating to landownership and natural resource extraction; cited activities include the Dakota Access Pipeline in the United States, the Marlin Mine in Guatemala, and the São Luiz do Tapajós Dam in Brazil. However, the reports do not pay adequate attention to the detrimental effects of firms' activities in the chemical, transportation, and telecommunications industries. Although symptoms of these effects can be observed in individual operations and projects, the reports reveal a systemic problem in the behaviour of firms and settler colonial states; this behaviour requires an effective and efficient remedy.

Settler colonists have used force to demand and establish special rights for themselves instead of accepting the laws of the land—the Indigenous Cemānáhuacan nations' laws. Building on Hayes, Introna, and Kelly (2018), settler colonial states' refusal to recognize the sovereignty of Indigenous Cemānáhuacan nations can be considered an institutionalization of inequality. One way of establishing

mid-16th century. Considered one of the founders of international public law, his *De dominio infidelium et iusto bello*, published in 1553, is a key work in this context and postdates Francisco de Vitoria's *Relectio de Indis*, published in 1539.

⁴*Ius naturalis* [natural law] has a long history in the Occident. Representatives of natural law include Aristotle, Plato, Cicero, Saint Augustine of Hippo, Saint Thomas Aquinas, Bartolomé de las Casas, and Hugo Grotius, among others. Not surprisingly, there is no consensus about the source of natural law. Consequently, the substance of natural law has varied considerably over time and space.

special rights is the reinforcement of settler colonial power structures via the use of legal positivism⁵ instead of natural law, and the use of settler colonial domestic law instead of international law. This strategy is clear in Canada. In *Delgamuukw v. British Columbia* (1997), the Supreme Court of Canada ruled that Indigenous title “is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown” (The Content of Aboriginal Title section, para. 2), “right of possession is based on the continued occupation and use of traditional tribal lands since the assertion of Crown sovereignty” (Content of Aboriginal Title section, para. 18), and “constitutionally recognized aboriginal rights are not absolute and may be infringed by the federal and provincial governments” (Infringements on Aboriginal Title section, para. 1). These criteria, among others, fail to consider the problematic legality and legitimacy of the settler colonial occupation of Cemānáhuac. In *Tsilhqot’in Nation v. British Columbia* (2014), the Supreme Court of Canada held that “(t)he claimant group, here the Tsilhqot’in, bears the onus of establishing Aboriginal title” (On Appeal from the Court of Appeal for British Columbia section, para. 6). This illustrates a reversal of a fundamental legal principle, insofar as it is typically the acquirer—in this case the settler colonial state—who carries the onus of proving the legal acquisition of land. In *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* (2017), the Supreme Court of Canada refused to recognize an Indigenous veto. These cases reveal a systemic problem that could be remedied through the recognition of the sovereignty of Indigenous Cemānáhuacan nations for all of Cemānáhuac.

When power dynamics that favour the contributions and roles of different stakeholders are translated to interactions between multinational enterprises and Indigenous nations (Karam & Jamali, 2017), it is often to the detriment of Indigenous Cemānáhuacan nations. Indeed, the distribution and dynamics of power in settler colonial states effectively determines the nature of these interactions before they materialize. Banerjee (2010) has emphasized the power aspect in which legitimacy criteria are determined by discursive, institutional, and material forms of power. Furthermore, Miéville (2005) has concluded that decisions by settler colonial courts benefitting Indigenous Cemānáhuacans are tenuous and unstable because international law is characterized by imperialism-related violence—this does not constitute a stable jurisprudential foundation from the standpoint of Cemānáhuacans. Moreover, settler colonists are neither authorized nor able to assess Indigenous laws (Nursoo, 2018). This means that even if they were inclined to do so, settler colonial courts would not necessarily be able to enforce and interpret Indigenous Cemānáhuacan laws.

The widespread poverty among Indigenous Cemānáhuacans has been seen a result of poor education and racism (Hall & Patrinos, 2012), but the negation of Indigenous Cemānáhuacan nations’ sovereignty and the related ownership of the lands and resources in addition to taxation power has not been addressed. Writing from a Canadian perspective, Schouls (2003) has averred that a key issue is the recognition of equivalence between Indigenous Cemānáhuacan nations and the settler colonial states—a somewhat modest stance. International law includes *ius cogens* [peremptory norm], which offers an ethical underpinning for international law through established norms that cannot be derogated (O’Connell, 2012). The recognition of Indigenous Cemānáhuacan nations’ sovereignty throughout all of Cemānáhuac, in combination with *ius cogens*, create an institutional foundation to solve the predicaments Indigenous Cemānáhuacan nations are facing as a result of settler colonialism.

⁵ In the civil law family, legal positivism recognizes only statutory (legal) norms as the foundation of jurisprudence and therefore rejects considerations relating to ethics and morals.

In the resurgence of non-Occidental cultures, identity is a point of conflict (Yah Kabran, 2016). Identity is a complex phenomenon that has been influenced by colonialism. For example, some members of the upper class in the Aztec Empire, such as the early dukes of *Moctezuma de Tultengo*, adopted Spanish family names in the 16th century (Roulet, 2012). Cultural and religious differences between societies pertaining to identity-related issues result in misunderstandings, tensions, and conflicts (Anoman Don, 2016; Grunberg, 2012). While some have claimed that culture is inherently unstable (Niezen, 2009), it is nonetheless the right of Indigenous Cemānáhuacan nations to defend their cultures and cultural practices. Sovereignty accords the power for this defense, and business ethics dictates that firms should not stand in the way of it. Firms abide by settler colonial states' laws, of course, because of these states' coercive powers. Yet, this does not change the fact that business ethics require that firms abide by Indigenous Cemānáhuacan nations' laws because of Indigenous Cemānáhuacan nations' sovereignty throughout all of Cemānáhuac.

This article closes a gap in the literature between Indigenous Cemānáhuacan nations' sovereignty and business ethics in a settler colonial context. Thus, this article contributes to the business ethics-, compliance-, Indigenous business-, and sustainability-related scholarship. It consists of six sections. First, it establishes that firms have no legal and legitimate foundation for their operations without assent from Indigenous Cemānáhuacan nations. Second, it determines that there is no foundation in the Occidental legal tradition for firms to reject Indigenous Cemānáhuacan nations' sovereignty. Third, it infers that the recognition of Indigenous Cemānáhuacan sovereignty gives firms legal certainty. Fourth, it notes that firms must abide by settler colonial states' laws because of the coercive power at their disposal irrespective of their invalidity in the face of Indigenous Cemānáhuacan nations' sovereignty. Fifth, it presents possible solutions to arrange the relationship between Indigenous Cemānáhuacan nations' laws and settler colonial laws. Sixth, it outlines intrafirm challenges following the recognition of Indigenous Cemānáhuacan nations' sovereignty and firms' liability for past actions.

Sovereignty

The Occidental discourse on sovereignty has been employed to legitimize Occidental colonialism (Anghie, 2012), and this makes the assessment of sovereignty in Cemānáhuac a challenging undertaking. Doubts regarding the legality and legitimacy of the sovereignty of settler colonial states of Occidental provenance in Cemānáhuac weigh heavily. It is necessary to start at the beginning—history.

Indigenous Cemānáhuacan nations' sovereignty has been usurped by settler colonial states (Turner, 2006). A key element of the Westphalian sovereignty concept—devised at the end of the Thirty Years' War—is the exclusion of external actors from internal institutions and policies (Krasner, 1999). The Westphalian sovereignty concept was preceded by a sovereignty concept in which the sovereign had the duty to safeguard the wellbeing of subjects, who in turn were required to support the sovereign (Johnson, 2014). McNeil (2012) has maintained that the sovereignty concept developed by Jean Bodin in the 16th century was specific to the situation in Europe at the time. It was developed to legitimize political aspirations in Europe in the 15th century (Gilli, 2009), instead of binding societal power to law. Using Bodin's work to determine the sovereignty of Indigenous Cemānáhuacan nations is thus problematic.

The refusal of settler colonial states to recognize unrestricted and effective sovereignty of Indigenous Cemānáhuacan nations, and the reduction of Indigenous Cemānáhuacan rights to unequal treaties (Clavero, 2005; Kontos, 2005), is ethically troubling. Granting autonomy to Indigenous Cemānáhuacan nations (Anaya Muñoz, 2005; Nahmad Sitton, 1999; Osorio Calvo, 2017), acknowledging Indigenous Cemānáhuacan treaty rights constitutionally (Otis, 2014), or recognizing the existence of Indigenous Cemānáhuacan jurisdictions (Jaramillo Pérez, 2012; Jiménez Bartlett, 2008; Lajoie, 2008) is ethically and legally dubious because the findings of Alonso de la Vera Cruz (1553/2007) support the Indigenous Cemānáhuacan nations' continued sovereignty throughout all of Cemānáhuac even after 1492.

The term sovereignty has a double meaning—one of law and another of facticity (Kurtulus, 2005). Does the factual settler colonial states' sovereignty in Cemānáhuac extinguish the Indigenous Cemānáhuacan nations' sovereignty on currently non-Indigenous territories? The current situation can be compared to illegal and illegitimate occupation from an Indigenous Cemānáhuacan perspective. As the sovereignty of Belgium, France, and Poland did not cease as the result of Nazi German occupation during the Second World War, the occupation of Indigenous Cemānáhuacan nations' territories by settler colonial states has not impacted the Indigenous Cemānáhuacan nations' sovereignty. In view of the decisive role territoriality plays in international law (Castellino, 2005), Indigenous Cemānáhuacan nations' continued sovereignty throughout all of Cemānáhuac means they are the sole owners of the area's land and natural resources. Particularly for firms engaged in natural resource extraction, this point is important because of the legal concept of *nemo plus iuris ad alium transferre potest quam ipse habet* [no one can transfer more rights to another than he himself has].

Despite their dubiousness, it is necessary to address the validity of treaties signed by Indigenous Cemānáhuacan nations with settler colonial states. As Indigenous Cemānáhuacan nations were coerced into signing treaties surrendering some of Indigenous Cemānáhuacan nations' rights and resources, settler colonial states cannot found any claims and rights on them. Some treaties are less problematic than others: For example, *La Grande Paix de Montréal* [The Great Peace of Montreal] of 1701 exemplifies one of the less problematic ones, but the number of less problematic treaties is small.

In order to determine the limits of realizable institutional arrangements between Indigenous Cemānáhuacan nations and settler colonial states, it is also necessary to consider the limitations in Indigenous Cemānáhuacan cultures and laws. In some Indigenous Cemānáhuacan cultures, a separation of an individual from a place is impossible (Povinelli, 2012). Generally, Indigenous Peoples of Cemānáhuacan did not separate between the sacred and the secular (Wenger, 2015). These observations raise the issue of the validity of any cessation of sovereignty by at least some Indigenous Cemānáhuacan nations. Thus, Indigenous Cemānáhuacan nations' sovereignty needs to be maintained throughout all of Cemānáhuac.

Beyond these limitations, settler colonial states' sovereignty claims are unethically founded on various manifestations of racism. The negation of statehood on racist grounds is obvious in Bluntschli (1875/2000):

No doubt before the colonization of America by Europeans there were larger States there, with a considerable and respectable civilisation (*sic*). But the theocratic monarchies of Peru and Mexico were probably not the work of indigenous races, but were founded by immigrants from Eastern and Southern Asia. The name of "White Children of the Sun" given to the Incas in Peru,

and the honour paid to white men as “sons of the Gods,” point unmistakably to an Aryan origin. Where the Indians were left to themselves, they again relapsed into the state of wild hunters, and fell into small groups. (p. 75)

The ethical case for the settler colonial states’ claimed sovereignty is further weakened by the spurious excuses used to legitimize the settler colonial states’ aggression against Indigenous Cemānáhuacan nations. For example, after settler colonists invaded Indigenous Cemānáhuacan nations’ territory that had been recognized as such *by* settler colonial states, these states used the defense of the lands by Indigenous Cemānáhuacan nations as an excuse to attack the defenders (Carlson, 2004).

Settler colonial states have striven to undermine Indigenous Cemānáhuacan nations’ sovereignty. An example involves the concept of Indigenous title. Settler colonial states have devised the concept of Indigenous title (Curthoys, Genovese, & Reilly, 2008; Yarrow, 2011), but this concept is tantamount to entrapment on two counts. First, the concept entails that Indigenous Cemānáhuacan nations recognize—on the foundation of Alonso de la Vera Cruz’ (1553/2007) findings—the illegal and illegitimate settler colonial states’ sovereignty. Second, the settler colonial states would, in exchange, graciously give the Indigenous Cemānáhuacan nations a small fraction of Cemānáhuac when the Indigenous Cemānáhuacan nations have inalienable sovereignty throughout and own all of Cemānáhuac. The settler colonial states’ *chutzpah* is breathtaking and undermines any trust in settler colonial states’ ethical integrity. In discussing Michel Foucault’s concept of bio-power, Moreton-Robinson (2015) has noted that settler colonial right and power should not be confused with legitimacy in the context of landownership. Similarly, the coercive power of settler colonial states does not create a legitimate ground for sovereignty in Cemānáhuac.

Historiography changes over time (Lowenthal, 2015), making ethical and legal reassessments necessary. The historical substantiation of Indigenous Cemānáhuacan nations’ continued sovereignty even after 1492 means that Indigenous Cemānáhuacan nations’ sovereignty supersedes settler colonial states’ claims of sovereignty—this flows from Alonso de la Vera Cruz’ findings. The work of Carlos and Lewis (2004) hints at the need to rethink the legal implications that would follow the recognition of Indigenous Cemānáhuacan nations’ sovereignty. A clarification thereof would also reduce the legal uncertainty encountered by firms.

Shortcomings in Occidental thinking erect barriers to nuanced legal assessments. Two issues are of concern here. First, the original concept of self-determination—and sovereignty as an extension⁶—assumes that there is only one people in a state (Anaya, 2000). This is clearly not true in settler colonial states, where there are numerous Indigenous nations, often operating in confederacies or affiliated groupings. Second, equating Indigenous Cemānáhuacan nations with ethnic, religious, or linguistic minorities is not accurate (Schabas, 2005).

⁶ The term self-determination is ambiguous because it might be interpreted as sovereignty or some form of autonomy. In the Latin American *neoconstitucionalismo* [neoconstitutionalism], the settler colonial states have opted to interpret the term as limited autonomy. Considering the problems associated with the settler colonial states’ sovereignty claims in view of the scholarship of Francisco de Vitoria and Alonso de la Vera Cruz, the term should rather be interpreted as sovereignty.

Meaningful consultations between Indigenous Cemānáhuacan nations and firms are rare in the settler colonial states (Whiteman, 2009)—a deficiency that can be attributed to the power asymmetry between Indigenous Cemānáhuacan nations and settler colonial states. Firms' behavior in the context of consultations underlines the need to recognize the Indigenous Cemānáhuacan nations' sovereignty, particularly if they wish to act ethically and legally.

The lack of autonomy or simultaneous sovereignty of settler colonial states granted by Indigenous Cemānáhuacan nations means that firms have no valid legal and legitimate foundation for their operations in Cemānáhuac if they do not have assent from Indigenous Cemānáhuacan nations. This is particularly troubling in the case of resource extraction, as resource extraction without permits from Indigenous Cemānáhuacan nations is tantamount to theft. Firms are thus confronted with serious problems vis-à-vis business ethics and compliance.

Legitimacy of Pluralism of Sovereignty

Is there anything in the Occidental legal tradition that would categorically rule out the recognition of Indigenous Cemānáhuacan nations' sovereignty throughout all of Cemānáhuac? The answer is decidedly no. The reported opposition to plurisovereignty⁷ (Fernández de Rota Irimia, 2016) is based on the fact that it is incompatible with the Occidental legal tradition. The legitimacy of legal pluralism⁸ is deeply ingrained in the DNA of Occidental law, as evidenced by its existence in the Classical Roman Empire (Humfress, 2013) and Charlemagne's Empire (Hoppenbrouwers, 2013). In legal theory, the Occident has accepted legal pluralism in Bodin (1577)⁹, and Vitoria and Pereña (1539/1967)¹⁰, but Occidental universalism¹¹ has taken over (Rech, 2013).

The Spanish Empire was characterized by imperial courts applying a mixture of Indigenous Cemānáhuacan and Occidental laws when adjudicating cases between Indigenous Cemānáhuacans, but

⁷ Plurisovereignty is understood to refer to a situation characterized by a territory with more than one legally recognized sovereign.

⁸ Effectively and efficiently working legal pluralism in Cemānáhuac is predicated on legal anthropology. Settler colonialism has had detrimental effects on the Indigenous Cemānáhuacan cultures and epistemes, including Indigenous Cemānáhuacan sources of law. It is therefore necessary to rebuild and revitalize the Indigenous Cemānáhuacan laws. This needs to be undertaken on the Indigenous Cemānáhuacan nations' terms. Valuable work in this respect has been carried out by, for example, the *Colectivo de Estudios Poscoloniales / Decoloniales en América Latina* (*Universidad Nacional de Colombia*), the Indigenous Law Research Unit (University of Victoria), and the *Instituto de Investigaciones Jurídicas* (*Universidad Nacional Autónoma de México*).

⁹ The book *Les Six Livres de la République* [The Six Books of the Commonwealth] (1577) was written in the context of the French Wars of Religion. The argument for strengthening the Crown was seen as a way to counteract the societal centrifugal forces that were on display during the French Wars of Religion. The concept of sovereignty represented a key component in strengthening the Crown. Based on *Les Six Livres de la République*, Jean Bodin may be considered the father of the concept of sovereignty in the Occident.

¹⁰ Francisco de Vitoria presented *Relectio de Indis* in 1539. In this work, the Crown's right to wage war against Indigenous Cemānáhuacan nations and deprive them of their possessions is rejected based on his application of theological and philosophical principles.

¹¹ In this article, Occidental universality is understood to mean that non-Occidental knowledge is rejected by the Occident irrespective of its merits. In the case of Cemānáhuacan, Occidental universality may have been facilitated by religious fanaticism associated with the Iberian *Reconquista* [The Reconquest] (Valdeón, Pérez, & Santos, 2011)—coincidentally completed in 1492—and connections between the Crusades and the Occidental Age of Exploration (Loução, 1998).

settler colonists were under Occidental law in the 16th century (Benton, 2012). In this context, the change in the Occidental and settler colonial states' views on Indigenous Cemānáhuacan nations' sovereignty is noteworthy: Indigenous Cemānáhuacan nations' sovereignty was overwhelmingly recognized in the 16th, 17th, and 18th centuries, but this changed in the 19th century (Morin, 1997). Interestingly, pluralism was sometimes accepted outside of Cemānáhuac (for example, in colonial Nigeria; Silverstein, 2012).

Legal pluralism means that there is more than one legal order in one social field (Griffiths, 1986). In a multicultural context, pluralism can be seen as a side-by-side of non-hierarchical and incommensurable cultures and legal outputs (Olson & Toddington, 2008). Discussing John Rawls' views on religion in politics, Baxter (2011) has noted that there needs to be restraint and reasonable pluralism. This contains two problems. First, it overlooks that the Occident is a product of Occidental Christianity and, thus, Occidental cultural and legal concepts often contain opaque Occidental Christian undercurrents. Second, reasonableness is in the eyes of the beholder, which raises the issue of whether Occidental laws can be considered reasonable from an Indigenous Cemānáhuacan perspective.

Hitherto, Indigenous nations have adapted, ignored, and resisted the intrusion of settler colonial states instead of accepting their supposedly superior Occidental laws (Bunn-Livingstone, 2002). The behaviour of the settler colonial states makes it necessary to recognize the Indigenous Cemānáhuacan nations' sovereignty throughout all of Cemānáhuac, but a caveat is warranted at this point. The K'iche constitutionalism, which entails the replacement of oral tradition with written statutes (Ekern, 2018), is problematic because written statutes may effectively mean a further settler colonial encroachment on Maya sovereignty by introducing Occidental concepts. It is doubtful that written statutes are sufficient to overcome coloniality.

What does this mean for firms with operations in Cemānáhuac? There is no settler colonial ethical or legal reason that firms can use to justify not abiding by Indigenous Cemānáhuacan nations' laws. Indigenous Cemānáhuacan nations' lack of coercive power means that abiding by the Indigenous Cemānáhuacan laws is a business ethical choice that firms need to make.

Precedence in Pluralism of Sovereignty

Postulating that Indigenous Cemānáhuacan nations and settler colonial states hold sovereignty over the same territory, their equality or precedence needs to be resolved. Establishing equality or precedence would assist firms in safeguarding compliance. Because pluriversality involves intercultural dialogue (Dunford, 2017), it is susceptible to being discriminatory in the context of the asymmetrical societal power structures of settler colonial states.

In settler colonial states, it is assumed that Indigenous Cemānáhuacan nations are not sovereign. This runs counter to the finding that not only are Indigenous Cemānáhuacan nations sovereign throughout all of Cemānáhuac, but that their sovereignty may take precedence over the claimed settler colonial states' sovereignty. Moreover, the lack of clarity vis-à-vis equality versus precedence calls into question the legality of, for example, landownership, operating permits, and taxation authority. The pitfalls of the lack of clarity are epitomized by contemporary negotiations between Indigenous Cemānáhuacan nations and settler colonial states to resolve Indigenous land claims (Anker, 2014). Such negotiations

are fundamentally flawed for two reasons. First, they occur against the backdrop of inequality and even coercion and corruption (Gilbert, 2006)—this calls into question the ethicality and legality of any resulting agreement. Second, the validity of negotiated solutions within the conceptual confines of apocryphal settler colonial sovereignty are questionable.

An issue not addressed in Dorobantu and Odziemkowska (2017) is the role settler colonial states play in compelling Indigenous Cemānáhuacan nations to sign community benefits agreements with Occidental firms by pauperizing Indigenous Cemānáhuacan nations—something made possible by settler colonial states' refusal to recognize Indigenous Cemānáhuacan nations' sovereignty. This demonstrates the point that the status quo of settler colonial states' unfettered sovereignty is unsound from a business ethics perspective.

An uncertain number of sovereigns on a particular territory also raises the issue ambiguousness of legal status (Kurtulus, 2005). Indigenous Cemānáhuacan nations may require some time to establish the geographical boundaries of the territories where they exercise sovereignty. Firms need to exhibit flexibility during this transitional period. The result of clarifying equality or precedence may be that firms lose some of the privileges and rights awarded them by settler colonial states. The benefit of the clarification for firms is that the recognition of Indigenous Cemānáhuacan nations' sovereignty settles uncertainties regarding privileges and rights.

Validity of Legal Norms

Power uses law, but law needs to be perceived as legitimate by society (Rocher, 2016). Submission to societal history and traditions establishes legitimacy and validity. Roman law is the foundation of the civil law branch of Occidental law (Bix, 2012; Mousourakis, 2015). Roman law has also influenced the common law branch of Occidental law, particularly via ecclesiastical law (Bix, 2012; Samuel, 2003). As a result, submission to Roman law confers legitimacy and validity to settler colonial states' laws. Because of differing histories and traditions, Roman law does not confer any legitimacy and validity in Indigenous Cemānáhuacan nations.

The Roman law-based stance is not always shared in the Occidental literature on legal theory. From the standpoint of the validity of Indigenous Cemānáhuacan nations' laws, legal positivism, the realist theory, and the historical school of law are particularly interesting. Georg Henrik von Wright has argued that a legal norm is valid if a higher-level norm authorizes its creation, but the higher norm needs to only exist instead of being valid in itself (cited in Falcón y Tella, 2010). This would effectively validate laws even if settler colonial higher-level norms are illegal and illegitimate—as in the case of Cemānáhuac. Whereas an illegal and illegitimate norm cannot establish legality and legitimacy, such a claim of validity is clearly untenable.

Based on a *de jure* [lawful, legitimate] instead of a *de facto* [in fact]¹² assessment, legal positivist Georg Jellinek (1905) has tied the validity of norms to the continuity of sources in a state as defined as the

¹² The difference of *de jure* and *de facto* can be observed in the occupation of Cemānáhuac. Although the military and other forms of violence perpetrated against the Cemānáhuacans factually (*de facto*) established colonial and settler colonial societal
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people, the sovereign power, and the territory (see also Falcón y Tella, 2010). Unquestionably, settler colonial states exercise sovereign power over Cemānáhuacan territories, and this would propound that settler colonial states' laws are valid. Implicitly, this stance would suggest that Indigenous Cemānáhuacan nations' sovereignty has extinguished in the aftermath of 1492. Yet, this is an untenable suggestion as the continued sovereignty of Belgium, France, and Poland during the Nazi German occupation demonstrates.

Hans Kelsen¹³ has offered a legal positivist view of mutually independent concepts of validity and membership. Hans Kelsen's (1934/2008) *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* [Pure Theory of Law] is a classic in legal theory: Analogously, the work of Émile Durkheim and Max Weber are classics in sociology. Any assessment of legal positivism needs to consider Kelsen's work. For legal positivism, legal norms enacted according to the relevant constitutional norms constitute a coherent and complete legal system. External sources epitomized by Occidental natural law are invalid. If the legality of the settler colonial states is questionable since 1492, then the legality of the positive legal systems of settler colonial states is equally questionable. Attempts to legalize the status quo on the basis of legal positivism therefore undermines such attempts. Whereas axioms are assumed to be valid, and serve as the foundation of assessments, an invalid axiom results in an invalid outcome. In natural science, an invalid axiom may be identified when the outcome contradicts with observable natural phenomena. In law, such a validation of axioms is only partially available. It is available within the positive legal system, but it is not available when the legality—validity—of the entire positive legal system needs to be validated. This is a result of Kelsen's coherence and completeness axiom.

Kelsen's work is a foundation for Falcón y Tella. Falcón y Tella (2010) has written: "(a) A norm is valid when it derives from another valid norm; (b) A norm belongs to a legal system when it derives from another norm derived from the same system" (p. 238). This creates a problem in the settler colonial context in Cemānáhuac. Hans Kelsen's criterion of systematic coherence (cited in Falcón y Tella, 2010) aggravates the problem. Hans Kelsen's criterion of the completeness of the system (Falcón y Tella, 2010) further aggravates the problem. Kelsen's conceptualizations would prevent attempts to incorporate and even recognize settler colonial states' laws in Indigenous Cemānáhuacan nations' laws. Considering the sovereignty-related challenges facing settler colonial states' laws in Cemānáhuac, Kelsen's arguments render the validity of settler colonial states' laws at the very least questionable.

Martin Diego Farrell's realist theory of axioms as the foundation of a legal system (cited in Falcón y Tella, 2010) is of also interest for the assessment of the respective validity of Indigenous Cemānáhuacan and settler colonial legal systems and the respective validity of their laws. Farrell's axioms are unverifiable within the legal system itself (Falcón y Tella, 2010). Hence, the validity of the axioms underpinning settler colonial states' laws vis-à-vis Indigenous Cemānáhuacan nations' legal systems cannot be verified within settler colonial legal systems. Therefore, the validity of settler colonial states' laws can only be

power structures in Cemānáhuac, the doubts raised by Francisco de Vitoria and Alonso de la Vera Cruz about the legality (*de jure*) of this occupation remain.

¹³ Hans Kelsen can be considered the founder of German legal positivism. German law belongs to the civil law family. Hans Kelsen rejected any ethical or moral consideration in jurisprudence. A key work outlining his thinking is *Hauptprobleme der Staatsrechtslehre*, originally published in 1911.

determined on the basis of Indigenous Cemānáhuacan nations' laws because of the questionable sovereignty of the settler colonial states in Cemānáhuac.

In the footsteps of Friedrich Karl von Savigny (1840), the historical school of law sees the validity of norms as resulting from their existence as a result of historical societal processes (see also Falcón y Tella, 2010). This creates precedence for Indigenous Cemānáhuacan nations' laws because the introduction of settler colonial nations' laws created a discontinuity that would have needed to be legitimized on the foundation of Indigenous Cemānáhuacan nations' laws. As this did not occur, settler colonial states' laws are not valid in Indigenous Cemānáhuacan nations per the historical school of law.

The concurrent existence of several legal systems in Cemānáhuac makes cosmopolitism¹⁴ a way to assess the situation. Jackson (2016) has described cosmopolitan jurisprudence thusly: "Law is the principled justification (scheme of rights and responsibilities) for authoritative conduct: policymaking, decision making, and action (or forbearance) on behalf of global economic participants qua members of domestic, international, and global communities" (p. 282). By emphasizing principled justifications, this description rules out political convenience as a foundation of justifications. Indeed, arguing in favour of the validity of settler colonial states' laws would be a convenient argument for settler colonial states' courts and lawmakers in view of extant societal power structures.

Additionally, cosmopolitism emphasizes the individual over groups and states, as shown in Rabkin (2012): "The ultimate units of moral concern are individual human beings, not states or other particular forms of human association. Humankind belongs to a single moral realm in which each person is regarded as equally worthy of consideration and respect" (p. 166). This is ethically troubling because individualism may be used as a smokescreen for legitimizing colonialism perpetrated by the Occident. An Occident-focussed cosmopolitism could thus be used to undermine Indigenous Cemānáhuacan nations' sovereignty over all of Cemānáhuac.

Yet, some warning words are warranted. The politics of philosophy is hidden in language, and this politics can be identified by linguistic deconstruction (Ward, 2004). The same holds true for law. Language can be used to effectively undermine the meaning of Indigenous Cemānáhuacan nations' laws in the context of codifications and translations into Occidental languages. The validity of codifications and translations must thus be considered critically.

Where does this leave firms with operations in Cemānáhuac? The validity of Indigenous Cemānáhuacan nations' laws is certain, but the validity of settler colonial states' laws is questionable. Firms are well advised to abide by settler colonial states' laws because of the coercive power at the disposal of settler colonial states. However, firms should not confuse the possession of coercive power with validity.

¹⁴ The Kantian universal cosmopolitism entails the simultaneous respect of human rights and sovereignty (Jiménez Solares, 2018). Whereas sovereignty has been denied to Indigenous Cemānáhuacans, and human rights are understood against their Occidental connotation, cosmopolitism contains coloniality.

International Law

International law refers to law regulating relations between political entities not recognizing a higher authority (Lesaffer, 2007). Institutions—like international law and the concept of sovereignty—are the result of historical evolution (Mutch, 2018). There is a clear nexus between colonialism and international law (Anghie, 2012). Therefore, current procedural and substantive international law needs to be applied decolonially in the settler colonial context.

The case of settler colonial states' exclusive sovereignty is not feasible in light of Alonso de la Vera Cruz's finding that the subjugation of *Cemānáhuac* was illegal from the start. If rule of law is considered an ideal in international law (Sampford, 2004), then the issue of which substantive law is applied arises in *Cemānáhuac*. This brings three solutions into play that are relevant for firms in the settler colonial context:

- a. Indigenous *Cemānáhuac* Nations' Exclusive Sovereignty: Firms need to solely abide by Indigenous *Cemānáhuac* nations' laws; all settler colonial states' laws are null and void *ipso facto* [by the fact itself].
- b. Indigenous *Cemānáhuac* Nations' Superseding Sovereignty: Firms need to always abide by Indigenous *Cemānáhuac* nations' laws and are allowed to abide by settler colonial laws only when they do not contradict the former.
- c. Indigenous *Cemānáhuac* Nations' and Settler Colonial States Simultaneous Sovereignty: Firms need to abide by all stipulations in Indigenous *Cemānáhuac* nations' laws and settler colonial states' laws.

Procedural justice has been proposed as a way to deal with identity-related misunderstandings, tensions, and conflicts (Anoman Don, 2016). This proposition relating to procedural law is equally problematic as the one relating to substantive law. It cannot be assumed that procedures defined by settler colonial states are legal and legitimate from the perspective of Indigenous *Cemānáhuac* nations. In light of this, the three solutions presented for substantive law can be applied to identify the proper procedures, if desired.

The lack of an enforcement mechanism in international law is a challenge, however (Hathaway, 2012). The situation is similar in *Cemānáhuac*. Whereas Indigenous *Cemānáhuac* nations lack enforcement mechanisms in settler colonial states, compliance is predicated on firms' commitment to business ethics. This lack of enforcement mechanisms is clearly unsatisfactory and needs to be addressed, because it can entice firms to act illegally and unethically.

Plurality of Sovereignty and Business Ethics

The recognition of Indigenous *Cemānáhuac* nations' sovereignty across all of *Cemānáhuac* does not only call into question the implicit assumption of unfettered settler colonial states' sovereignty in *Cemānáhuac* that underpins much of the scholarship on business ethics, compliance, Indigenous business, and sustainability. It also fundamentally changes business management in *Cemānáhuac*. Indigenous *Cemānáhuac* nations have existed before and since 1492, but this has usually been in

obscurity—even in business ethical scholarship. This is epitomized by Jones, Harrison, and Felps's (2018) discussion of firms' relational ethical strategy concepts—in this discussion, the authors address the direct relationship with settler colonial states, but they disregard the often indirect relationship with Indigenous Cemānáhuacan nations via the settler colonial states.

Building on Antonetti and Maklan (2016), firms can attempt to pretend that the interest of Indigenous Cemānáhuacan nations are the same as those of settler colonial states to minimize opposition to their operations and projects. The use of Occidental (business) ethics by firms does not translate into satisfactory results from the perspective of Indigenous nations (Kepore, Higgins & Goddard, 2013)—this should not come as a surprise. Since Indigenous Cemānáhuacan nations are sovereign throughout all of Cemānáhuac, calibrating the expectations of Indigenous Cemānáhuacan nations vis-à-vis settler colonial states and firms (as suggested in Ali, 2016) is not ideal—indeed, the calibration should be the other way around.

Firms accustomed to believing in the chimera of settler colonial states' sovereignty may find their mental rigidity to be detrimental to their activities. Risk discourages capital investments (Toko Ngalani, 2010), but the perception of increased risk as the result a recognition of Indigenous Cemānáhuacan nations' sovereignty throughout Cemānáhuac may be clouded by a racist and thus unethical ideology presuming Occidental superiority. To be blunt, recognizing Indigenous Cemānáhuacan nations' sovereignty may be beneficial for firms desiring to safeguard the supply of raw materials because, as Fisher, Kotha, and Lahiri (2016) have argued, accepting pluralism is helpful in the acquisition of resources. Indigenous Cemānáhuacan nations' sovereignty means that this safeguarding must happen on the Indigenous Cemānáhuacan nations' terms.

The United Nations General Assembly (2018) has reported about the disregard for the land rights and territorial rights, in addition to racism directed against the Indigenous Garifuna, Maya, and Xinka nations in Guatemala. Minera San Rafael—owned by a Canadian firm—is highlighted in the report. The UN Rapporteur has noted that there may have been attempts to deny the Xinka identity, that there was a failure to consult the Xinka, and that the Xinka nation's defense of their rights had been criminalized by settler colonists. What would business ethics recognizing plurality of sovereignty have changed? The firm owning Minera San Rafael would have filed an application for the proposed mine with the Xinka nation prior to starting any measures at the site. The firm would not have supported in any way paramilitary or other groups attempting to influence the decision-making process of the Xinka nation. The firm would have accepted whatever decision the Xinka nation would have arrived at. The firm would have respected all conditions—including royalty and tax payments—imposed by the Xinka nation. All of this would have been in addition to the regulatory approvals and conditions determined by the settler colonial state.

Yet, gaining intrafirm acceptance for and compliance with Indigenous Cemānáhuacan nations' sovereignty may prove challenging. Newark's (2018) view that the impact of leadership is minimal raises the issue of whether the required changes in mentality can be implemented from the top down. Settler colonial attitudes may persist in spite of a firm's management efforts to the contrary, but shame may be a catalyst of change (Creed, Hudson, Okhuysen, & Smith-Crowe, 2014)—including shame for the treatment of Indigenous Cemānáhuacans.

Indigenous Cemānáhuacan nations and settler colonial states cannot rely on firms' codes of conduct in the recognition of Indigenous Cemānáhuacan nations' sovereignty throughout Cemānáhuac. The problem is the lack of effective enforcement mechanisms for codes of conduct (Arthurs, 1999). Increased regulation might therefore be needed, at least for a transitional period.

The increase in regulatory complexity as the result of the recognition of Indigenous Cemānáhuacan nations' sovereignty requires more ambidexterity from firms. Deharo (2018) has proposed a nexus between agility and law. The need for legal ambidexterity may facilitate a broader change in mentality within firms. To the degree that ambidexterity is a competitive advantage, the recognition of Indigenous Cemānáhuacan nations' sovereignty may have favourable effects for firms. These favourable effects may include more innovation as a result of a broadening of the cultural and epistemic foundations of innovation, and an emergence of new market segments opening new business opportunities.

The argument that firms may be held responsible for their past actions (Schrempf-Stirling, Palazzo, & Phillips, 2016) raises the issue of whether firms can be held responsible for past actions of the societies they hail from. States can attempt to respond to historical injustices (Gordon, 2009), and firms can try to do the same and abstain from supporting a continuation of historical injustices. In reality, however, firms have shown their ability to receive damages when states have set limits to firms' destructive behaviour (Byrne, 2014; Kobrin, 2009). This ability suggests that Indigenous Cemānáhuacan nations will encounter challenges if they seek damages via settler colonial courts. The avenue via Indigenous Cemānáhuacan jurisprudence may offer remedies after the recognition of Indigenous Cemānáhuacan nations' sovereignty. In closing, legal pluralism and a plurality of sovereignty have significant implications for ethical and legal compliance in Cemānáhuac, which impact and encompass all aspects of firms' activities.

Conclusion

This conceptual article makes the case that Indigenous Cemānáhuacan nations' sovereignty is valid throughout all of Cemānáhuac, thus rendering settler colonial laws illegitimate and illegal. Consequently, firms need to abide by Indigenous Cemānáhuacan nations' laws when conducting business with Indigenous nations.

This article contains three key contributions. First, it argues that settler colonial states are not sovereign in any part of Cemānáhuac. Aggression and occupation have not extinguished or limited Indigenous Cemānáhuacan nations' sovereignty. Alonso de la Vera Cruz' finding that the conquest of Cemānáhuac was illegal according to Occidental law provides the basis for this interpretation. Per Cruz's findings, later Occidental assessments need to be discounted because of their susceptibility to political expediency.

Second, settler colonial states need to find a way of living with the sole holders of sovereignty in Cemānáhuac. This may take the shape of simultaneous sovereignty by Indigenous Cemānáhuacan nations and settler colonial states, settler colonial states' autonomy under Indigenous Cemānáhuacan nations' sovereignty, or comprehensive and sole sovereignty by Indigenous Cemānáhuacan nations. Any coercion or corruption undertaken against Indigenous Cemānáhuacan nations in finding this new way of living would be entirely illegal and illegitimate.

Third, without a coercion- and corruption-free assent by Indigenous Cemānáhuacan nations, any privilege or right granted by a settler colonial state is ethically and legally invalid. This includes natural resource extraction permits, operating permits, and ownership of immovables. To safeguard compliance, firms need to obtain coercion- and corruption-free assent for any privilege or right from Indigenous Cemānáhuacan nations. In some cases, this might be impossible because of fundamental tenets found in Indigenous Cemānáhuacan nations' laws.

Further research is needed on four key questions. First, this article operates mainly within the confines of Occidental conceptualizations, instead of Indigenous Cemānáhuacan concepts of law and sovereignty. Legal anthropology needs to explore such concepts. Second, three institutional alternatives to organize sovereignty in Cemānáhuac have been presented in this article, but the mechanisms in the case of ethical conflict and legal conflict still pose complex challenges. Third, the territories of Indigenous Cemānáhuacan nations may overlap, thus making it necessary to establish norms dealing with joint sovereignty by several Indigenous Cemānáhuacan nations. Fourth, legal anthropology is needed to recreate Indigenous Cemānáhuacan nations' ethics and law vitiated by coloniality.

This article has three key takeaways for firms with operations in Cemānáhuac. First, firms need to admit that Indigenous Cemānáhuacan nations' rights are ethically and legally normative, and these rights can therefore not be considered voluntary niceties that can be dealt with, for example, in corporate social responsibility statements. Second, firms need to assist and cooperate with Indigenous Cemānáhuacan nations in obviating the illegal and illegitimate activities of settler colonial groups and ideologies aiming to deny or limit Indigenous Cemānáhuacan nations' sovereignty. Third, until settler colonial states recognize the sovereignty of Indigenous Cemānáhuacan nations for all of Cemānáhuac, firms need to seek Indigenous Cemānáhuacan nations' approval for their operations and projects in addition to and separately from settler colonial states' regulatory processes.

Recognizing Indigenous Cemānáhuacan nations' sovereignty throughout all of Cemānáhuac rectifies an ethical and legal wrong. Firms will experience challenges when they need to bring their business ethics and compliance up to the standards required by Indigenous Cemānáhuacan nations. Throughout this process, a quotation might provide motivation: "But let justice run down as waters, and righteousness as a mighty stream" (Amos 5:24, The New King James version).

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