

COMENTARIO DE JURISPRUDENCIA

MCGIRT V. OKLAHOMA: ENFORCING INDIAN TREATIES AND COLLECTIVE TITLES TO INDIAN LANDS

CASO MCGIRT VS. OKLAHOMA: EL CUMPLIMIENTO DE LOS TRATADOS INDÍGENAS Y LOS TÍTULOS COLECTIVOS A LA TIERRA

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ABSTRACT

One of the most important modern United States' Supreme Court cases involving indigenous politics centers on the problem of defining criminal jurisdiction. The Supreme Court's decision in *McGirt v Oklahoma* advanced the principle that both U.S. state and federal governments must abide by longstanding treaty agreements with tribal nations, strengthening—tangentially—the collective titles to Indian lands. If an Indian reservation is to be suppressed, it must come via an explicit act of Congress, not the will of state or local governments. The immediate consequences of this decision

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are a renewed sense of legal duty toward treaty obligations for the United States and the reinvigoration of Muscogee (Creek) Nation jurisdiction over tribal lands, including over non-indigenous people. In the long run, this case stands to open doors for other tribal nations to challenge state absorption of tribal jurisdictions.

Keywords: Indian treaties, Collective title, Indian lands, Jurisdiction, Indian Nation, Supreme Court of the United States.

RESUMEN

El presente caso es uno de los más importantes del periodo moderno de la Corte Suprema de los Estados Unidos que, definiendo la competencia penal, establece políticas indígenas. La sentencia de la Corte Suprema en *McGirt vs. Oklahoma* establece el principio que los estados y el gobierno federal deben acatar los tratados de larga data con las naciones indígenas, reforzando al mismo tiempo —y tangencialmente—, los títulos colectivos indígenas a la tierra. Si la reserva de tierra indígena va a ser suprimida, debe hacerse explícitamente por una ley del Congreso, no por la voluntad del estado ni de los gobiernos locales. Las consecuencias inmediatas de la sentencia comprenden nuevas obligaciones estatales para Estados Unidos y la revitalización de las competencias de la Nación Creek (Muscogee) sobre la tierra indígena, incluyendo a población no indígena. A largo plazo, este caso puede abrir la puerta para que otras naciones indígenas desafíen la absorción de competencias indígenas por parte de los estados.

Palabras Clave: Tratados indígenas, Título colectivo, Tierras indígenas, Jurisdicción, Nación indígena, Corte Suprema de los Estados Unidos.

I. JUDGEMENT RULE

The state of Oklahoma in United States of America does not have authority to prosecute Mr. Jimcy McGirt, based on the fact that part of this state is actually under the sovereign jurisdiction of the Muscogee (Creek) Nation. Oklahoma does not have jurisdiction for prosecuting crimes committed by indigenous people such as McGirt on tribal land. The Supreme Court not

only affirmed that the Creek Nation has reserved for them an area of three million acres, including the city of Tulsa, the justices also acknowledged the existence of multiple other sovereign tribal nations within the state of Oklahoma. The indigenous land in Oklahoma includes the Eastern side of the state, 19 million acres that are the home to nearly two million peoples, although only about 10% of that population is Indian.

McGirt v. Oklahoma, Supreme Court of the United State of America, July 9th, 2020, 140 S. Ct 2452.

II. COMMENTARY

Indigenous land is a complex topic for any government with profound liberal roots. There is a legal aspect to indigenous peoples' approach to collective land ownership distinct from and yet rooted in identity, sociological, anthropological, and political factors. To understand the role of land for indigenous peoples or Indian nations, a term used in the United States, it is essential to comprehend the concept of connectivity, which means one whole without discontinuity.¹ In the case of Indian nations, they achieve continuity by viewing themselves as connected to their lands. They share a profound and vital connection with their land, territories, and natural resources. In losing this connection, they risk losing their lives, economic stability, social cohesion, and dignity.² This connectivity is a critical element of their identities and their self-government. Therefore, any act of the government recognizing and affirming these elements is essential to greater stability and efficacy. This theme was present in the case of *McGirt v. Oklahoma*, decided by the Supreme Court of United States on July 9th, 2020.

This case resolves a conflict of criminal jurisdiction over the proper court to prosecute Jimcy McGirt, a Muscogee Creek Nation member who raped, sexually abused, and sodomized the four-year-old granddaughter of his wife in 1996. An Oklahoma court convicted and sentenced him to 1000

¹ PERVIN William J., "Connectedness in Bitopological Spaces", *Indagationes Mathematicae (Proceedings)* 1967, 70, pp. 369-372, [https://doi.org/10.1016/S1385-7258\(67\)50052-5](https://doi.org/10.1016/S1385-7258(67)50052-5), date of consultation: August 21th, 2020.

² IWGIA, *Indigenous World 2019*, IWGIA, Copenhagen, 2019, https://www.iwgia.org/images/documents/indigenous-world/IndigenousWorld2019_UK.pdf, date of consultation: August 20th, 2020.

years of live imprisonment without probation. After several habeas corpus and legal actions at the state level,³ the defense pursued his case to the U.S. Supreme Court. The defense argued that since the place where the crime was committed was on Indian land, the applicable rule is the Major Crime Act (MCA) enshrined in 1885. According to this law, McGirt can be prosecuted and sentenced only by a federal court and not by a court of Oklahoma.⁴ In this case, legally, the conviction is void as the state of Oklahoma never had jurisdiction over the crime in the first place. This is what the U.S. Supreme Court decided in its majority vote.⁵ Arriving at this opinion, the judges developed an argument regarding the value of Indian treaties, indigenous land, and who has the authority to suppress inherent tribal sovereignty.

This paper addresses more than just the jurisdictional conflict over the crime, but also an idea tangentially mentioned in the case: the connectivity between Indian nations and lands in a legal way, enhancing the idea of territories, and the extension and quality of lands. These ideas hinge upon the validity of Indian treaties signed between the federal government and tribes, sometimes even centuries ago. The McGirt case recognizes that indigenous treaties created an indigenous collective title to the lands. The consequences of this declaration establish new obligations for the state and the non-Indian populations that live in those territories.

To begin the analysis, it is essential to point out the complex relationship between the United States and Indian peoples that inhabit that country. This relationship has had a diverse level of development and traumatic episodes. Among the most distressing is the one called the “Trail of Tears” in the nineteenth century. A considerable number of Indian tribes were violently moved from the East to the West of the U.S., leaving behind loss of life and the destruction of many cultural traditions of American Indians.⁶ This

³ These legal actions are pursued after the Court of Appeal of the Tenth Circuit resolved, in another case, the Muscogee reservation was not suppressed. Court of Appeal 10th. Circuit (United States), *Murphy v. Royal*, 866 F.3d 1164.

⁴ Furthermore, if native people committed a crime, the jurisdiction is federal and indigenous instead of the state. There will be federal jurisdiction if indigenous peoples commit the crime at the reservation. The state-level will have jurisdiction for crimes committed by no indigenous peoples over no indigenous peoples.

⁵ The dissent expresses the liberal posture of the topic: distrust over the Indian people’s way of justice and a moral judgment regarding the crime, without considering the Indian jurisdiction.

⁶ TeSelle, David K., “Review of *McGirt v. Oklahoma* – How the Supreme Court and Justice Gorsuch’s Revolutionary Textualism Brought America’s ‘Trail of Tears’ Promise to the Creek Nation Back From the Dead”, *The National Law Review* 2020, X, no. 248.

happened also to the Muscogee people. They were relocated from Georgia and Alabama to the East of the Mississippi River in Indian Territory. The treaty establishing their relocation was signed in 1832 between chiefs of the tribe and the U.S. government. This treaty determined the borders of the permanent residency of the Creek Nation, which continues today.

As a legal instrument of domination, treaties have been used since the “discovery” of the Americas by British, French, and Spaniard colonizers.⁷ In the United States, the treaties were signed under the authority given by the Constitution for negotiating with sovereign nations, such as Indian tribes. This practice was discontinued by 1871 because treaties were an impediment to assimilation.⁸ Additionally, since the nineteenth century, indigenous rights are recognized as part of the native title of common law. States cannot avoid the rights of Indian people because they are the first inhabitants of the territory. In this sense, *McGirt v. Oklahoma* is a continuation of that doctrine,⁹ but it is more robust as we will develop. This is not a case regarding the nature of treaties. The U.S. Supreme Court has resolved the legal nature of them in several previous cases, and currently is not an issue.¹⁰ The novelty of *McGirt*, in the American context, is the change in tendency. In previous cases, there was a limitation of applying indigenous authority to non-indigenous peoples, such as in *Montana v. the United States* in 1981¹¹. *McGirt v. Oklahoma* rather states that Creek sovereignty extends over the non-indigenous population in their territory, in certain matters.

The justices ruled in favor of the 1832 treaty,¹² specifically Justice Gorsuch,¹³ stating its validity despite Congress’ history of broken some

⁷ LANGTON Marcia; TEHAN, Maureen; PALMER, Lisa, *Honour Among Nations?: Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton, 2004, pp. 1–26.

⁸ LANGTON; TEHAN; PALMER, cit. (n.7), p.9.

⁹ These cases are *Johnson v. McIntosh*, 8 Wheat 543 (1823); *Cherokee Nation v. Georgia*, 5 Pet 1 (1831); *Worcester v. Georgia*, 6 Pet 5 (1832); *Mitchell v. United States*, 34US (9 pet) 711 (1835); *United States v. Cook*, 86 US 591 (1876); *United States v. Santa fe Pacific Railroad Co*, 314 US 339 at 345 (1941).

¹⁰ The United States has signed the Indian Treaties because it is recognized the status of Nations of the Indian Tribes since the seventeenth century. The treaties are classified as international treaties and Indian treaties on every official site and documents. The Indian treaties share the definition of being contracts signed by a sovereign nation. Still, the differences are they have a specific signatory: native nations, and a specific content (lands and territories). PEVAR, Stephen, *The Rights of Indians and Tribes*, Oxford University Press, New York, 2012.

¹¹ HARVARD LAW REVIEW, “*McGirt v. Oklahoma*,” *Harvard Law Review* 134, no. 1 (2020): 600–609.

¹² Justices Gorsuch, Ginsburg, Breyer, Sotomayor, y Kagan, delivered the opinion of the Court.

¹³ President Donald Trump appointed this justice, and it promised to be one of the most conservative

promises to the Creek Nation. Furthermore, according to the Court, when an Indian reservation¹⁴ or jurisdiction has been established, it can only be limited by a clear expression of Congress. This expression, Gorsuch opined, has not occurred. Neither a state-level nor local authority can end a reservation on a political whim. This interpretation follows a textual criterion.¹⁵ This criterion places the rule of law, and the republic, over all other considerations related to federal and state relationships with Indian nations.

Broken promises and Congress' decreasing of Creek Nation self-determination, through Allotment and other policies designed to fragment collectively owned Indigenous lands, do not affect ultimate Muscogee sovereignty over their lands, reserved for them by the 1832 treaty. The *McGirt* case holds the government to its word, protecting the rights of the Creek Nation regarding their lands. The treaty, reformed in 1866, remains legally binding for all the signers,¹⁶ and continues to bolster the territorial sovereignty of Creek people.

This idea is contrary to the vision in the dissent penned by Chief Justice Roberts,¹⁷ who argued that the consequence of the Court's opinion will be a profound destabilization of Oklahoma's government. It will allow many others, besides *McGirt*, to defy their convictions by state courts. This consequence diverges from "settled understanding" between the Creek Nation and the government of Oklahoma, who has used and administrated the lands. This concept of "settled understanding" must be studied carefully. The dissent's argument rests upon the idea that a settled understanding has existed between state and tribe over who can more efficiently and effectively govern the lands in questions—a notion underpinned by the state's long-held conviction that native nations cannot govern their lands as well as United States officials do.¹⁸ A "settled understanding," however, cannot be based on breaching the law, in this case, a treaty, and if it does, it does not comply with

members of the U.S. Supreme Court. TESELLE, cit. (n. 6).

¹⁴ The Indian reservation is an indigenous land with several federal immunities (SUTTON, Irme "Sovereign States and the Changing Definition of the Indian Reservation", *Geographical Review*, 1976, 66, no. 3, pp. 281–295), in which the use and benefit are only for one or more tribes (PEVAR, cit. (n. 10) p. 23).

¹⁵ TESELLE, cit. (n. 6).

¹⁶ KUSHNER, Aaron, "Holding the Government to Its Word: *McGirt v. Oklahoma* and Tribal Sovereignty," *Starting Point*, 2020, <https://startingpointjournal.com/holding-the-government-to-its-word-mcgirt-v-oklahoma-and-tribal-sovereignty-kushner/>, date of consultation: September 3rd, 2020.

¹⁷ It also joins justices Alito and Kavanaugh, and justice Thomas joins except as to footnote 9.

¹⁸ KUSHNER, cit. (n. 16).

the rule of law. With Gorsuch's opinion, the Court is leaving behind an implicit paternalism against the self-government of indigenous peoples. This level of Indigenous self-government may not be best for the state government,¹⁹ but it is the best and most reasonably justified for Indian nations.

The U.S. Supreme Court ruled that the state must comply with the 1832 treaty, and without saying it expressly, recognized in the treaty a collective title to the land for Creek people. This title has consequences for the state and increasing authority for the Creek nation, including in the non-Indian population.

In this sense, the indigenous title is a legal instrument that enshrined ancestral indigenous rights to the land, territories, and national resources.²⁰ This is the role of the treaty. This title confers a perpetual right to remain sovereign in the territories until Congress resolves something different.²¹ The indigenous title has the characteristic of being collective,²² which means that the nation, tribe, or community must use it in the group communally. The *McGirt* case reaffirmed the legal validity of the government's word in the treaty, which was updated by subsequent decisions that ordered individual instead of collective use of the land. One such posterior decision occurred during the "Allotment Era" when Congress passed the General Allotment Act in 1887. The government put pressure on the tribes to abandon their communal and collective ways of living, fractioning their territories into smaller lots of individual ownership. In the case of the Creek Nation, the agreement was signed in 1901. In *McGirt*, the main argument of the state of Oklahoma for defending their trial position was that in the General Allotment Act, the Creek reservation was eliminated by Congress. The U.S. Supreme Court contested this argument because neither the act nor agreement states that the Creek Nation lost any sovereign interest in the territory.²³

In the *McGirt* case, the Court stated that even with Congress' intrusion upon the sovereignty of the Creek Nation, Congress left space for self-government within their territories, on indigenous land. For example, Indigenous nations can collect taxes, open schools, and enshrine norms as

¹⁹ KUSHNER, cit. (n. 16).

²⁰ AGUILAR, 2005, Gonzalo, "El Título Indígena y Su Aplicabilidad En El Derecho Chileno," *Revista Ius et Praxis* 11, no. 1, p. 269.

²¹ PEVAR, cit. (n.19), p. 25.

²² AGUILAR, cit. (n. 20), p. 269.

²³ It did not occur with other nations, such as the Ponca or the Otoe, who lost the reservations by rules from Congress.

they see fit. In 1936, they were authorized to have a constitution and specific rules for their communities. Even then the U.S. acknowledged a measure of Indian jurisdiction over their territories.

One relevant point in the case is that the U.S. Supreme Court asserted the primacy of interest of the Creek Nation regarding their collective title to the land over any other individual and particular interest (Indian or non-Indian). This is the first consequence of the indigenous title. The indigenous titles create new protections and authority, changing the government's obligation. Therefore, the collective title is more important than individual titles. This idea creates a notable and transcendent impact in understanding property, shifting from the individual property ownership, which is the norm.

From the western perspective, the land represents a piece of property that an owner can have, sell, give and even destroy if it is his/her will. The owners of the land can do whatever they please because they have property rights. This classic-liberal notion comes from the philosopher John Locke, perpetuated by the American founders—government has an obligation not to interfere.²⁴ By recognizing indigenous land titles, the government's obligation shifts to making an inventory of the lands and establishing protections for their rights. The government also needs to sanction for violation of these rights according to the norms of International Law. For example, the government needs to recognize and protect productive systems based on the extensive use of indigenous land and, consulting any public policy that affects the indigenous territories, obtain their free, informed, and previous consent, in some cases. These new obligations, or previous obligations that were ignored, are interesting because the state of Oklahoma, and the United States in general, must change their practical relationships with native nations, creating a new level of protection that nowadays they do not have. They have to build in legal terms some new standards that belong to international treaties that The United States has not subscribe to them.

A second consequence is the effect on the non-Indigenous population living within the Creek Nation. These new protection standards will establish a new understanding between the state and the Creek nation. The nation will have a development, but most of the population is non-Indian. The challenges of this situation are myriad. Non-indigenous peoples are now under a collective title created by the treaty, with federal and indigenous

²⁴ UNDERKUFFLER, Laura S., "On Property: An Essay," *The Yale Law Journal*, 1990, 100, no. 1, pp.127–148, <https://doi.org/10.2307/796765>, date of consultation: August 20th, 2020.

jurisdiction. This occurs mainly in criminal issues but also extends to other areas, such as administrative rulings. Therefore, on Creek land, Indigenous sovereignty extends over all the population across 19 million acres of Oklahoma. The Court decision states that this new relationship is already under construction because it shows some preventive agreements to resolve problems. No doubt, this is a step forward compared to past cases related to indigenous land, in which the states did not obey the ruling of the Court.

This potential strengthening of self-determination for Indigenous nations over non-Indian citizens is particularly appalling for the dissent, affirming the liberal paradigm against indigenous philosophies. Chief Justice Roberts and his colleagues fear the decreased authority of the state of Oklahoma and that Indian tribes may use their sovereignty vengefully against the United States.²⁵ The implication of this, analyzing the sentence, is the fear of being treated wrongfully by Indian nations and the lack of trust in Indian justice, the central issue in the case. This idea is dangerous and creates a high level of uncertainty. This particular fear shrouds the demons of paternalism and colonialism, strong motivations behind the historic legal treatment of indigenous peoples. In this sense, it shows concern that Indian tribes will do to state citizens what the states have done to them if they have the opportunity to discriminate and abuse.²⁶

In general, the case *McGirt v. Oklahoma* is a powerful political and juridical symbol for Indian nations in the United States. The case brings a perspective regarding the functioning of the rule of law. It reaffirms the extent and quality of Creek jurisdiction over its lands. It prioritizes the collective title to the lands over any individual fragmentation incentivized by Congress. The case can open future opportunities for other Indian tribes, which try to defy the state governments.²⁷ The consequences of this case can be seen from two perspectives: distrust over the decreasing of state-level power or with trust in the competency of indigenous peoples to resolve problems that occur on their lands. Only time will show which perspective is the most applicable, having in mind the diverse relationship that the parties are developing now and in the future.

²⁵ KUSHNER, cit. (n. 16).

²⁶ KUSHNER, cit. (n. 16).

²⁷ This is already occurring in cases such as *Oneida Nation v. Village of Hobart*. The Court of Appeal states Oneida nation of Wisconsin does not need state permit to develop their Big Apple Fest. The Court argues the fest will develop in the Oneida reservation, established by a treaty not suppressed by Congress. This case is based expressly on *McGirt*.

REFERENCES

a) Doctrine

AGUILAR, Gonzalo, “El Título Indígena y su Aplicabilidad En El Derecho Chileno”, *Revista Ius et Praxis*, 2011, 11, no. 1, pp. 269–295.

HARVARD LAW REVIEW (Eds.), “McGirt v. Oklahoma”, *Harvard Law Review* 2020, 134, no. 1, pp. 600–609.

IWGIA, *Indigenous World 2019*, IWGIA, Copenhagen, 2019, https://www.iwgia.org/images/documents/indigenous-world/IndigenousWorld2019_UK.pdf, date of consultation: August 20th, 2020.

KUSHNER, Aaron, “Holding the Government to Its Word: McGirt v. Oklahoma and Tribal Sovereignty”, *Starting Point*, 2020, <https://startingpointsjournal.com/holding-the-government-to-its-word-mcgirt-v-oklahoma-and-tribal-sovereignty-kushner/>, date of consultation: September 3rd, 2020.

LANGTON, Marcia; TEHAN, Maureen; PALMER, Lisa, *Honour Among Nations?: Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton, 2004.

PERVIN, William J., “Connectedness in Bitopological Spaces”, *Indagationes Mathematicae (Proceedings)*, 1967, no. 70, pp. 369–72. [https://doi.org/10.1016/S1385-7258\(67\)50052-5](https://doi.org/10.1016/S1385-7258(67)50052-5), date of consultation: 21th, 2020.

PEVAR, Stephen, *The Rights of Indians and Tribes*, Oxford University Press, New York, 2012.

SUTTON, Irme, “Sovereign States and the Changing Definition of the Indian Reservation”, *Geographical Review* 1976, 66, no. 3, pp. 281–295.

TESELLE, David K. “Review of McGirt v. Oklahoma – How the Supreme Court and Justice Gorsuch’s Revolutionary Textualism Brought America’s ‘Trail of Tears’ Promise to the Creek Nation Back from the Dead”, *The National Law Review* 2020, X, no. 248, <https://www.natlawreview.com/article/review-mcgirt-v-oklahoma-how-supreme-court-and-justice-gorsuch-s-revolutionary>.

UNDERKUFFLER, Laura S., “On Property: An Essay,” *The Yale Law Journal*, 1990, 100, no. 1, pp.127–148, <https://doi.org/10.2307/796765>, date of consultation: August 20th, 2020.

b) Rules

Treaty with the Muscogee Nation, 1832, and its 1866 amendment (United States).

General Allotment Act, 1887 (United States).

Major Crime Act (MCA), 1885 (United States).

c) Case Law

Court of Appeal 10th. Circuit (United States), *Murphy v. Royal*, 866 F.3d

1164.

Court of Appeal 7th. Circuit (United States), *Oneida Nation v. Village of Hobart*, No. 19-1981.

Supreme Court (United States), *Cherokee Nation v. Georgia*, 5 Pet 1 (1831).

Supreme Court (United States), *Johnson v. McIntosh*, 8 Wheat 543 (1823).

Supreme Court (United States), *McGirt v. Oklahoma*, 140 S. Ct 2452

(2020).

Supreme Court (United States), *Mitchell v. United States*, 34US (9 pet)

711 (1835).

Supreme Court (United States), *Montana v. United States*, 450 U.S. 544

(1981).

Supreme Court (United States), *United States v. Cook*, 86 US 591 (1876).

Supreme Court (United States), *United States v. Santa Fe Pacific Railroad Co*, 314 US 339 at 345 (1941).

Supreme Court (United States), *Worcester v. Georgia*, 6 Pet 5 (1832).