



*Val Napoleon*  
**Thinking About Indigenous Legal Orders**

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**Research Paper for the  
National Centre for  
First Nations Governance**

*June, 2007*

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**THINKING ABOUT INDIGENOUS LEGAL ORDERS**

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For:

**National Centre for First Nations Governance**

By:

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June 18, 2007

## INTRODUCTION

One of my law students said to me, “Just because something has ‘always been done that way’ does not make it law.” This student, who is Cree, was questioning whether Cree law could be considered real law or whether it was just custom or habit. In fact, his perception is not uncommon, and he was simply drawing from his recent reading of western legal theories about law. While the student’s statement is too general to provide a useful basis for analysis, it nonetheless demonstrates widely held assumptions about Indigenous legal orders and law that too often remain unchallenged. Since this was such an overwhelming statement of apparent disregard, it requires some careful unpacking to properly consider its implications for Indigenous peoples. The genesis for this paper is about unpacking and challenging this statement and other gross simplifications about Indigenous legal orders and law.

There are many ways to think about law. Basically, how we think about law is shaped by our experiences and history. As Indigenous peoples, we have gained much of our current understanding of law from our experiences with the western legal system in Canada. We know the western legal system through its courts, legislation, and enforcement, and by its treatment of our peoples, lands, and resources. Given this, many Indigenous peoples have come to associate “law” with power, punishment, hierarchy, and bureaucracy. In the case of my student, “real” law is clearly associated with formal, central, and deliberate processes of determining what law is and how to apply it.

There is a more useful way to think about law—beyond what we have come to know as western law. In this paper, I will describe how we might think about law so that it is more helpful to Indigenous peoples’ work generally. Such a discussion includes

asking questions about where law comes from and what its functions are. Thinking about law also raises questions about its legitimacy and authority, and how law changes over time. Such rigorous critical thinking about law can support the building of non-colonial relationships among Indigenous peoples and between Indigenous peoples and Canada.

I use the term “legal system” to describe state-centred legal systems in which law is managed by legal professionals in legal institutions that are separate from other social and political institutions. For example, Canada and other nation states have such central legal systems. In contrast, I use the term “legal order” to describe law that is embedded in social, political, economic, and spiritual institutions.<sup>1</sup> For example, Gitksan, Cree, and Dunneza people had legal orders. Indigenous law is a part of and derives from an Indigenous legal order. In distinguishing between legal systems and legal orders, I hope to avoid imposing western legal ideas onto Indigenous societies.

I also use the term “Indigenous legal traditions” when referring to Indigenous legal protocols and laws. Of course, it is preferable to use Indigenous peoples’ own language when referring to law and legal concepts. For example, the Gitksan people’s word for law is *ayook*, which means law, custom, or precedent.

## **LOCATING MYSELF**

By way of establishing my own experience with these issues, my family is from Sauteau First Nation located in northeast British Columbia’s *Treaty 8* area. I am of Cree and Dunneza heritage.<sup>2</sup> For over twenty-five years I worked mainly with Gitksan and Wet’suwet’en peoples in northwest B.C. which included community activism and support for the *Delgamuukw*<sup>3</sup> legal action. I am an adopted member of the Gitanyow (Gitksan)

House of Luuxhon. When I became a grandmother, I went to law school and I was called to the British Columbia bar in 2002. I am completing a Ph.D. with the Faculty of Law at the University of Victoria. Currently, I live in Edmonton and am an assistant professor with the faculties of native studies and law at the University of Alberta. Through my research, I work with Aboriginal peoples locally and regionally. Both inside and outside my work at the university, I advocate for academic and political diversity among Aboriginal peoples, and for ongoing gender analysis of all aspects of the larger Indigenous political project.

### **SEEING INDIGENOUS LAW**

This paper is not a prescription for all Indigenous peoples' legal orders and law. Rather, it draws on my experience with decentralized societies such as the Gitksan, Wet'suwet'en, Tsimshian, Cree, Dunneza, and Carrier peoples. It offers a way to think about law in a theoretical framework or mental scaffolding that can be shaped according to different cultures, experiences, and histories. And, it is intended to relate more specifically to decentralized peoples in western Canada. It definitely is not intended to represent or describe all Indigenous legal orders and law in Canada.

Law is one of the ways we govern ourselves. It is law that enables large groups of people to manage themselves. Law is something that people actually do. Indigenous peoples applied law to harvesting fish and game, the access and distribution of berries, the management of rivers, and the management of all other aspects of political, economic, and social life. Since our legal orders and law are entirely created within our cultures, it is difficult to see and understand law in other cultures. In other words, law is culturally

bound—it is only law within the culture that created it. Gitksan law is not law to Cree peoples, and vice versa.

I am referring to culture in the broadest sense—that which forms our horizon in the world. We can learn how to see law across cultures and we can agree to recognize other people's law through our various international arrangements. To do this we must pay attention to our own cultural biases so that we recognize them in our expectations, responses, and judgments of other peoples.<sup>4</sup> We have to take the time to understand how law makes sense in that other culture.<sup>5</sup>

Law is basically a collaborative process—something that groups of people do together. Law is never static, but rather, lives in each new context. In fact, one of the most important things to understand about any law is how it changes. And it has to change in order to be an effective part of governance—it has to be appropriate to new contexts and circumstances or it simply will not work. It also it has to be appropriate to the experiences of the people or it will have no meaning or legitimacy.

And most importantly, law is about thinking. In the summer of 2005, I asked a Gitksan person about the ayook. As an example of Gitksan law, he told me that there was a law regarding disgrace. When a person was disgraced, the Gitksan word for this meant that the person was “covered in a [metaphoric] layer of shit”.<sup>6</sup> I asked him, “When do people decide to apply the shit?” “What kind of disgrace justified a layer of shit?” “How thick should the layer of shit be?” and “For how long should the person be covered in shit?” It is this sort of questioning that forms the thinking and reasoning processes that make law. Rules are only a part of law. In other words, law is the intellectual process of deliberating and reasoning to apply rules according to the context.

## SOURCES OF LAW

It is helpful to think of different kinds of law along a spectrum. Where we place law on the spectrum is determined by where we think law comes from—the sources of law. It would look like this:<sup>7</sup>

<b>Law From Central Processes of Enactment</b>	<b>Law From Social Interaction</b>	<b>Law From the Divine or From Within Human Beings</b>
Known as Posited Law (Legal Positivism)	Known as Customary Law	Known as Natural Law
Law comes from a central authority through a formal process.  (E.g., Canadian Constitutions, <i>Indian Act</i> , etc.)	Law comes from the interaction between human beings that enables people to generally predict behaviours in a group.  (E.g., Resource management law of decentralized peoples)	Law comes from a divine authority or from basic human nature characteristics. <sup>8</sup>  (E.g., Ecclesiastical law, etc.)

Since law is a cultural institution, societies that are organized centrally will have centralized processes for enacting law. This is the case for Canada, which is centrally organized as a nation state with hierarchical levels of law-making authority and adjudication. However, decentralized societies do not have formal, centralized processes for enacting law. For example, the Gitksan are a decentralized society made up of matrilineal kinship groups known as “Houses”.<sup>9</sup> The House is the basic political unit of Gitksan society, and each one is closely interrelated with other Houses through kinship, marriage, and other relationships. All the Houses are part of the four larger clans.<sup>10</sup> While each Gitksan person is born into his or her mother’s House, there are many reciprocal obligations to his or her father’s House, spouse’s House, and so on. Territories are held in

trust by the House chiefs on behalf of the House members. This is a decentralized system because there is no big boss of all the Houses.

If there is no centralized Gitksan society, there can be no centralized Gitksan enactment of law. However, the Gitksan do have law, the ayook, which derives from the long-term social, economic, and political interactions of the members, House groups, and clans. This decentralized law is created by the conduct of Gitksan peoples in their relationships with one another over time—as individuals, House groups, and clans—and with non-Gitksan peoples. Gitksan peoples had ways of formalizing law that derived from social interactions over time, and these teachings are part of how Gitksan peoples managed themselves historically, and arguably they are still reflected in contemporary governance functions. The main point is that how we structure law reflects how we structure our societies. Indigenous societies that were more centrally organized will likely have more centralized legal orders, and so on.

Turning to natural law and sacred law, some Indigenous peoples equate their own laws with the laws of the natural world and so describe their law as “natural law.”<sup>11</sup> Other Indigenous peoples believe that their laws come from the Creator, and therefore consider them to be sacred.<sup>12</sup> However, since laws have to be interpreted by human beings, and law is not just rules, considering law to be sacred or natural (as in laws of nature) needs further thought and discussion. What are the consequences of law being sacred or natural? Who gets to say whether the law has been broken? How can people disagree with sacred law or natural? Can sacred laws change? Can natural laws change?

There is an important difference between, on the one hand, believing that the laws themselves are spiritual and sacred, and outside human control, and on the other hand,

understanding that all law, including western law, is founded on a world view (i.e., how we see human beings, non-human life forms, and the spirits and the universe). It is hard to perceive this in western law because it is always described as “normal” and “rational.” But all law, including western law, is based on an understanding of humans (i.e., individual, rational, competitive, etc.) and of the larger world (i.e., how humans relate to non-human life forms).

So if we understand law as being founded on our world views, including our norms and morals, and our relationship with the spirit world, then human beings are responsible for the interpretation, reasoning, and application of law. However, if we believe laws are sacred, our understanding about the responsibility of human beings can become reduced to following rules. It should be noted that just as there is great diversity among Indigenous peoples, there is also diversity within Indigenous communities. In any given community, there is a range of beliefs and resultant behaviours. Furthermore, these norms, or understandings of right and wrong, are contested at every level of human social interaction.

This critical question relates to the trend of turning elders into priest-like beings who are also sacred. What are the consequences of treating elders as if they were priests? Does this allow elders to admit when they do not know something? How does this reconcile with the high incidence of elder abuse in our communities? Can we disagree with elders? Is it a form of fundamentalism? Is this good governance? These are serious questions that require fearless on-the-ground exploration and much, much more discussion.

## **KINDS OF LAW**

Law may be described as “a language of interaction” that is necessary for people’s social behaviour to be meaningful and predicable.<sup>13</sup> It is this language of interaction that makes possible social settings where people’s behaviours generally fall within expected or known patterns.<sup>14</sup> Citizens can manage their lives within this interactive framework. They know what to expect from one another—at least generally.

Law still functions as law whether it is centralized or decentralized. So what is it that law does? The basic characteristic of law is that it lays down general rules or baselines that people figure out how to interpret and apply.<sup>15</sup> Decentralized Indigenous legal orders fulfill the basic functions of law and enable people to manage themselves.

Much Indigenous law is implicit, or unsaid.<sup>16</sup> In other words, many Indigenous peoples are not aware of the law they know—they just take it for granted and act on their legal obligations without talking about it. This is in contrast to explicit law, in which everything is explained and talked about and written down. Sometimes Indigenous peoples think that their laws have to look like western laws and so they try to describe them in western terms. Other times, like my law student, they fail to see Indigenous law as real law.

## **LEGAL REASONING**

So what is the reasoning process that makes rules into law? Why does this reasoning process matter? In the common law, which we follow in Canada (except in Quebec), legal reasoning is sometimes called “artificial reasoning.” This is because its form and structure are designed for a public forum where the reasoning is open to challenge. The

actual reasoning is the result of practical experience that people collectively reflect on through an agreed structure and process. This is different from the individual reasoning that we do everyday.<sup>17</sup>

In examining the management of crest disputes among the Gitksan for example, all of the elements of legal reasoning and law are manifest in the process.<sup>18</sup> The Gitksan chiefs considered Gitksan law, past cases, circumstances, and histories. The reasoning and interpreting process of the Chiefs was known to the participants because it was conducted through both formal and informal public gatherings. Numbers of people were involved—those with direct interests, those with related interests, and those who could be considered neutral. These Gitksan reasoning processes occur within the context of Gitksan culture, institutions, history, and experiences. In other words, appreciating the wisdom of Gitksan law “lies in recognition of the internal point of view of participants in the legal system.”<sup>19</sup>

Other Indigenous peoples also have processes by which legal reasoning and deliberation takes place. The challenge is to learn to recognize these processes because they are often implicit, informal, and decentralized. And it is critical to consider these laws from within their cultural and historical perspective so that they make sense as part of governance. We can figure out and explore these processes by looking at both historic and contemporary conflicts, agreements, and ongoing arrangements between people. It is also important to consider interactions and conflicts over time so that overall patterns and roles can be discerned.<sup>20</sup> For instance, there is a current dispute regarding the southern boundary of the *Treaty 8* territory in British Columbia.<sup>21</sup> The community of Lheidli T’enneh negotiated a modern treaty under the British Columbia Treaty Commission and

its proposed boundary overlaps that of *Treaty 8*. One way to resolve this dispute is to explore the historic relationships between the Lheidli T'enneh and *Treaty 8* peoples. How did people manage the overlap area in the past? What were the trade and intermarriage arrangements? How might these former conflicts and arrangements inform today's dispute?

Indigenous law is not stuck in the past. Rather, I think that Indigenous peoples continue to act on historic legal obligations where they can in modern forms, despite the damage to our legal orders. For example, it is arguable that the work that many people do at the community level with various Aboriginal justice initiatives is rooted in their historic legal obligations in their own legal orders.<sup>22</sup>

## **LEGITIMACY**

All peoples have to believe that law is legitimate before they will adhere to it. If people do not uphold the legal order and law, the resulting decisions will have no meaning. This does not mean that all parties involved in a decision will get what they want, but that even when they do not get their way, they will still abide by the decision.

This becomes another piece of the work involved with Indigenous legal orders and law. What makes the legal order and law legitimate? This question is complicated because in recent times, Indigenous laws have been broken with no consequences (e.g., alienation of land and resources, violence, failed kinship obligations, etc.). When laws are broken with no recourse, the legal order begins to break down and this has been the experience of Indigenous peoples. This is one of the reasons that western courts and lawmakers are so concerned with actions that might bring western law into "disrepute." If

the law looks ridiculous, it fails as a governance function. It no longer enables groups of people to manage themselves.

This does not make working with Indigenous legal orders and law impossible. It is simply another factor in the work. It is a reality that our legal institutions have been damaged, so we can consider the extent of the damage and start from there. And given that there is no pure, static law anyway, this is not a problem. We can learn from the present while drawing what is useful from the past.

For the Gitksan, the legitimization of the Gitksan legal order and law takes place horizontally among the members on a decentralized basis, and not vertically as when the government is centralized. Gitksan law was effectively approved and integrated into a body of law, and into people's daily lives. Also, approval of Gitksan law is evidenced in the ongoing management and resolution of disputes.<sup>23</sup> The nature of this consent, and therefore the authority of Gitksan law, is that Gitksan people agreed to live with how the disputes are handled and with the outcomes. The major agreements continue to be affirmed in the Feast hall through time and are witnessed in formal public processes.<sup>24</sup> That is, we know it exists because we can see it at work.

This becomes much more complicated with the various contemporary governing structures that represent band and tribal structures rather than kinship systems. The challenge is to effectively reconcile the modern and historic forms of governance and law-making authorities at the local level.

Historical ethics regarding authority and legitimacy still underlie many behaviours that create conflict today. For example, the Innu in Labrador practiced conflict avoidance. This worked well with small highly mobile groups of people that

were able to travel across a large territory. However, since the establishment of settled communities, the cultural practice of conflict avoidance no longer works. In fact, when people are living close together, the practice of conflict avoidance actually makes the conflict worse.<sup>25</sup>

Similarly, the Gitksan people were highly decentralized. This historical cultural ethic of decentralization still operates in the form of individual and collective resistance to hierarchy and centralization.<sup>26</sup> While these cultural ethics are powerful forces, for the most part they remain unexamined. This means that part of the work necessary for understanding Indigenous legal orders and laws is to identify underlying cultural ethics so they can be discussed. People will have to explore the original purpose of the behaviour and decide how to change or reconcile cultural ethics with present day circumstances. It may be that some of the behaviours are no longer appropriate, but people first have to “see” them and talk about them. Otherwise, the cultural ethics may be causing people to unknowingly react by sabotaging political efforts and organizations.

All peoples have conflict. Conflict in and of itself is not a problem. The challenge is not preventing conflict, but managing it effectively so that it does not paralyze people. This is one of the functions of law—including Indigenous law. Damage to Indigenous peoples’ conflict management systems and law has resulted in increased conflict that is destructive. The result is that many people no longer know how to constructively deal with conflict.<sup>27</sup>

## **WHERE IS INDIGENOUS LAW RECORDED?**

How, then, do people in oral societies record their laws? For the Tlicho Nation, law is recorded in the place names.<sup>28</sup> The names were a record of the historic events that took place and are tied to the oral narratives. From listening to the name of a site, a Tlicho person is able to learn what happened at that place, who was involved, how it was resolved or dealt with, what was important in the event, and how this information applies to his or her own behaviour.<sup>29</sup> The place names also provided important information about the land itself, such as the type of vegetation, water and resources, and other conditions necessary to living and surviving on the land.

Indigenous peoples' law is also recorded in our traditions and practices.<sup>30</sup> Sometimes it takes more thinking to see the usefulness and practical application of these traditions—or, for that matter, their uselessness. And sometimes looking at traditions can be a little confusing. For example, I was told the following story, which goes something like this: A dispute arose in a school regarding the keeping of sweet grass. Some of the community members were angry at what they saw as disrespectful treatment of sweet grass because it was left out on a desk. They argued that the sweet grass was supposed to be kept in a jar and put away in an enclosed place. An old person with a long memory was consulted. This person explained that it was because of the Church and the Indian agent that it became “wrong” to have sweet grass out in the open. In response to this, people put the sweet grass in jars so that the priests and Indian agent could not smell it, and they hid it away so the priests and Indian agent could not see it. Now it is a different time and it is no longer necessary to hide the sweet grass. So in this case, it was important to recall the original purpose of hiding the sweet grass. Traditions have to have a useful

purpose, and to figure whether this is still the case, the practices have to be discussed. If the practice no longer has a useful purpose, then people need to think about changing it.<sup>31</sup>

Then what is the goal of a tradition? What is its effect? For example, what is the effect of celebrating the first saskatoon berry or the first spring salmon? What is the effect of making an offering of food to the spirits before eating at a feast? In part, this is about being grateful for the food, sharing the food, acknowledging the enormity of the universe and our place in it, and understanding our own place within the world. There is more, but this is a start to figuring out some of the principles contained in the traditions that support Indigenous laws. We have to be critical and rigorous about this. There is no room for romantic notions or idealism. Romanticism will not enable us to govern ourselves and relate to others on the power of our own ability to govern ourselves. We have to apply the same critical thought to our Indigenous legal orders and laws as we do to western law.

Many Indigenous peoples recorded their laws in their oral histories and oral traditions. In the case of the Gitksan, it is the *adaawk* (owned, formal, collective oral history) that preserves the identity and history of a House with its owned territories, crests, songs, names, major events, and relationships with other Houses. As Richard Overstall writes, this is a legal order of embedded law:

The Gitksan legal order has evolved as the result of people observing the consequences of their behaviour over time. When the behaviour is disrespectful of spirits, animals, and others, then consequences are dire and are often recorded in the *adaawk*, especially if the behaviour alters a lineage's relationship with its territory. The *adaawk* thus have a role as legal precedents that inform later conduct.<sup>32</sup>

The Cheyenne,<sup>33</sup> Tlicho, Navajo, and many, many other Indigenous peoples recorded their law in their oral histories. Again, the work involves developing a careful perspective from inside the culture to identify and examine the legal precedents, principles, and content of the laws.

Finally, Indigenous law was often recorded inside peoples' relationships with one another. Turning again to the Gitksan, it is in the roles and relationships that peoples' legal obligations are found. Wherever one is within the Gitksan kinship network, there are definite roles and reciprocal obligations to others through that network. An individual's responsibility extends to the members in their mother's House and closely aligned Houses, father's House, grandparents' Houses on both sides, and spouse's House. Practically, this meant that one was responsible for addressing injuries caused by others, education, providing access to land and resources, and so on. And since these are reciprocal obligations, there are obligations through these networks back to the individual.

The Cree also have reciprocal legal responsibilities and obligations that are contained within the kinship networks. Described as a Cree law, the doctrine of *wâhkôhtwowin* guides the conduct and behaviour that must be maintained in all types of relationships.<sup>34</sup> These relationships include mother and child, cousins and other relatives, and unrelated persons. All one has to know is where one fits, and the surrounding relationships determine what one has to do in order to fulfill their responsibilities in that society.<sup>35</sup> Similarly, the larger group, whether organized into matrilineal or patrilineal kinship networks, will know their obligations to the individual. In considering social

relationships and practices as a source of law, we must ask what people recognize and treat as law.<sup>36</sup>

### **TERRITORY—HOW FAR DOES THE LEGAL ORDER GO?**

External boundaries have always been sites of ongoing negotiations in accordance with each Indigenous group's laws and political structures. At the most basic level, each group's legal order extends over their territory, and at its farthest reaches, another group's territory begins.<sup>37</sup> Historically, each indigenous group's territory was the area they could defend both physically and legally according to their indigenous legal orders.

International Indigenous laws and protocols enabled each group of people to maintain and protect their relationships with other peoples through time.

The discussion about resources and land raises three critical questions: Who is included in the Indigenous legal order? What territory does the legal order extend to? How does the law relate to other peoples' law at the farthest reaches of the territory? For the most part, these questions require Indigenous peoples to go beyond band structures in order to consider scale, the concepts of the public good and personal interests, accountability, and the full extent of the relationships and responsibilities within the society. The reserve boundaries created by the *Indian Act*,<sup>38</sup> which divided and grouped Indigenous peoples into bands, actually cut across the Indigenous legal orders. This division of Indigenous peoples and lands has undermined the management of the larger legal orders and has undermined the application of Indigenous laws. At the band level, the larger legal order becomes unworkable because it is disconnected, and some co-

operative arrangements must be established to enable bands to draw upon broader-based relationships at a national level to more effectively implement their laws.

As an example, Tsimshian people are divided into seven bands with a number of small reserves. Many Tsimshian people live off reserve. The Tsimshian legal order operates along kinship lines. In Tsimshian society, the legal obligations for dealing with a Tsimshian person's injuries are with his or her father's House. Members of the father's House can live anywhere, on or off reserve. If only the band membership is considered in the case of an injury to a Tsimshian person, then all the other members that have obligations in the kinship system are excluded from fulfilling their responsibilities. The Tsimshian legal order extends throughout Tsimshian territory and cannot work if its orientation is only at the band level. So people should ask, who does the legal order apply to and how far does it extend? What happens at the edge of the territory with other peoples' laws?

## **GENDER AND POWER**

There are a couple of common arguments made against Indigenous law: First, Indigenous law is incapable of dealing with complex present-day issues. Second, Indigenous law will allow Indigenous peoples to violate human rights.

It is true that, historically, Indigenous peoples did not have to deal with the pervasiveness of violence, crime, and addictions found in many Indigenous communities today. However, sorting out Indigenous legal traditions does not mean trying to return to the past. Rather, it is about drawing on the strengths and principles of Indigenous legal orders to deal with contemporary issues—including social dysfunctions. Such efforts

should be developed in light of current problems and the western legal system. Again, if we understand law to be collaborative and to be a function of governance, then that could be the basis for our responses to difficult social dysfunction.

Internal oppression and power imbalances are another reality that all Indigenous people—like anyone else—have to consciously guard against. Sexism is a reality. Homophobia is a reality. Ageism (despite the rhetoric) is a reality. Many of our communities are not safe places for our children and other vulnerable individuals.<sup>39</sup> Law is one way to deal with questions of oppression and the abuse of power. If we understand law as an intellectual process that all citizens engage in, then we can use that process to enable people to tackle the uncomfortable issues in our communities. In order to remain alive, Indigenous legal orders and law must be able withstand internal challenges and change. It is this ongoing challenge to norms that keeps a culture alive and vital—and ensures continued relevance for younger people.<sup>40</sup> Otherwise, Indigenous law will fail to be useful in today's world, and if it is not useful, there is no point in teaching or practicing it. Our young people will continue to turn away in spite of our rhetoric.

On the subject of gender, one of the key issues is the inclusion of Indigenous women. If one examines the Aboriginal rights-and-title case law and discussion, it appears that Indigenous women have been erased off both the land and the legal landscape.<sup>41</sup> It is as if women did not have an important and active presence on the land. The literature and images of Indigenous peoples focus almost entirely on males and their activities—hunting, fishing, and trapping. In this colonial mythology, women's role is restricted to dealing with what the men bring home from the hunt.<sup>42</sup>

These issues are real and current, and it is our responsibility to deal with the tough stuff and ensure that our legal orders and law are up to the task. Since power dynamics are always a part of social relationships, we need to ask whose power is preserved through oppressive cultural, legal, or social norms. We have to be fearless in looking at our own cultural institutions too—not just those modelled on western governance. When an oppressive cultural practice is identified, figure out what the goal of the practice is, then figure out how to meet that goal without oppression.

## **SUMMING UP**

I have proposed here that Indigenous legal orders and law should be understood as a necessary part of governance. It is not about trying to go back in time, but about drawing on the strengths and principles of the past to deal with modern-day problems and situations. A deeper and more critical understanding of Indigenous legal orders can strengthen today's governance structures and functions.

Rethinking Indigenous legal orders and law is fundamentally about rebuilding citizenship. The theory underlying this paper is that it is possible to develop a flexible, overall legal framework that Indigenous peoples might use to express and describe their legal orders and laws so that they can be applied to present-day problems. This framework must be able to first, reflect the legal orders and laws of decentralized (i.e., non-state) Indigenous peoples, and second, allow for the diverse way that each society's culture is reflected in their legal orders and laws. In turn, this framework will allow each society to draw on a deeper understanding of how their own legal traditions might be used to resolve contemporary conflicts.

The Canadian state is not going away and the past cannot be undone. This means that Indigenous peoples must figure out how to reconcile former decentralized legal orders and law with a centralized state and legal system. Any process of reconciliation must include political deliberation on the part of an informed and involved Indigenous citizenry. We have to answer the question, “Who are we beyond colonialism?”

## ENDNOTES

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<sup>1</sup> Harold J. Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983) at 49–50.

<sup>2</sup> Sauteau First Nation located in northeast British Columbia. This region is covered by one of the numbered treaties, *Treaty 8* which also covers northern Alberta and part of the Northwest Territories. Northeast B.C. is the homeland of the Dunneza people. By 1911, a group of Sauteaux people had moved into Dunneza territories. In 1914, the Sauteaux were “admitted” into *Treaty 8* without the usual negotiated admission process. In 1918, the Sauteaux took up residence at the eastern end of Moberly Lake where a reserve was set out for them. Sauteau is the preferred spelling for this community.

<sup>3</sup> *Delgamuukw v. The Queen* (March 8, 1991) Smithers 0843 (B.C.S.C.); *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4<sup>th</sup>) 470 (B.C.C.A.); and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

<sup>4</sup> William Alford, “On the Limits of ‘Grand Theory’ in Comparative Law” (1986) 61 Wash. L. Rev. 945.

<sup>5</sup> See generally, William Ewald, “Comparative Jurisprudence (I): What was it Like to Try a Rat?” (1994-95) 143 U. Pa. L. Rev. at 1889–1905, 1912–1916, 1924–1925, 1936–1943.

<sup>6</sup> Interview by Val Napoleon, July 11, 2005 in New Hazelton, B.C.

<sup>7</sup> This is an extremely brief outline. There are volumes written about each area of law.

<sup>8</sup> But see the extensive work of John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

<sup>9</sup> The basic conceptual political unit in Gitksan society is the *wilp* or House. It is the House that is the territory- and fishing site-owning entity. Each Gitksan person is born into his or her mother’s House, a matrilineal kinship group of about 150 persons who share a common ancestry. The term House originates from the historic longhouses, although members of the same House did not actually live under the one roof. Rather, House members were and are widely scattered by marriage and occupation. House members have rights and responsibilities in other Houses by virtue of their roles as spouses and clan members. See Richard Daly and Val Napoleon, “A

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Dialogue on the Effects of Aboriginal Rights Litigation and Activism on Aboriginal Communities in Northwestern British Columbia” (2003) 47:3 Social Analysis, The International Journal of Cultural and Social Practice 108.

<sup>10</sup> Each Gitksan House belongs to one of the four larger clans (*pteex*) which share a broader history – the *Ganeda* (Frog), *Gisgahast* (Fireweed), *Lax Gibuu* (Wolf), and *Lax Skiik* (Eagle).

<sup>11</sup> There are a number of theories about natural law, each with different perspectives on morality, authority of legal norms, and beliefs about human beings. For example, in one school of thought, the term “natural law” is about the laws of nature such as the law of gravity. Another school of thought holds that the organization of centralized states is a natural extension of natural individual rights. See generally, Wikipedia, The Free Encyclopedia online: Wikipedia [http://en.wikipedia.org/wiki/Natural\\_law](http://en.wikipedia.org/wiki/Natural_law) and online: Internet Encyclopedia of Philosophy <http://www.iep.utm.edu/n/natlaw.htm>.

<sup>12</sup> See generally, Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).

<sup>13</sup> Lon L. Fuller, “Human Interaction and the Law” (1969) 14 Am. J. Juris. 1 at 1 [Fuller, Human Interaction].

<sup>14</sup> *Ibid.* at 2.

<sup>15</sup> *Ibid.* at 23.

<sup>16</sup> See Gerald Postema, “Implicit Law” in Willem Witteveen & Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 255.

<sup>17</sup> Gerald J. Postema, “Classical Common Law Jurisprudence (Part II)” (2003) 3:1 Oxford U. Commonwealth L.J. 1 at 10. Postema contends that the reason common law is artificial is that “it is the disciplined practice of argument and disputation in a public forum – an art that had been called *ratio artificialis* long before Coke gave it currency in common law jurisprudence (at 10).

<sup>18</sup> Val Napoleon, “Living Together: Gitksan Legal Reasoning as a Foundation for Consent” (Paper presented at Consent as the Foundation for Political Community, Consortium on Democracy and Constitutionalism, University of Victoria 2004). The conference papers will be published in an inaugural consortium journal, forthcoming in 2006.

<sup>19</sup> Gerald J. Postema, “Classical Common Law Jurisprudence (Part I)” (2002) 2:2 Oxford U. Commonwealth L.J. 155 at 155.

<sup>20</sup> See generally, Roderick Macdonald, *Lessons for Everyday Law* (Montreal: McGill University Press, 2002).

<sup>21</sup> Val Napoleon, Indigenous Legal Lodge Proposal for *Treaty 8* [unpublished, archived with author].

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<sup>22</sup> Val Napoleon, Angela Cameron, Colette Arcand, & Dahti Scott, “Where is the Law in Restorative Justice” in Yale Belanger, ed., *Aboriginal Self-Government* (Purich Publishing, forthcoming 2007).

<sup>23</sup> *Ibid.* at 24.

<sup>24</sup> On this point, I agree with Jeremy Webber’s scepticism as to the adequacy of the language of consent and whether consent can actually be deliberately and explicitly provided to form the political basis of societies. See Jeremy Webber, “Challenges of Consent”, (Paper prepared for the Inaugural 2004 Conference of the Consortium on Democratic Constitutionalism: “Consent as the Foundation for Political Community”), online: University of Victoria [http://www.law.uvic.ca/demcon/2004\\_program.htm](http://www.law.uvic.ca/demcon/2004_program.htm) at 2. According to Webber, dialogic theories of consent conceptualize “a community’s legitimacy as a function of the quality of its interactions, rather than of an historic (and indeed generally mythical) act of adherence” (at 22).

<sup>25</sup> For example, Hedda Schuurman suggests that the current conception of “community” does not derive from Innu language or culture, and the experience of living within a fixed settlement is entirely foreign. Historically, Innu lived in small, mobile social units with a dynamic pattern of social organization and coherent identities, but with shifting social and geographic boundaries. One of the consequences of 1960s settlements has been a social stratification of subgroups that were created by contact – external privileging according to the degree of acculturation or isolation of the subgroups. This hierarchy now determines status, social positions, and political leadership. For the Innu, settlement has meant individual households, a cash economy and dependence, changes to Innu economic and social practices, breakdown of social relationships, centralized schools, and increased conflict. According to Schuurman, settlement has resulted in an anti-community consciousness that raises particular difficulties for leadership and the implementation of self-government. See Hedda Schuurman, “The Concept of Community and the Challenge for Self-Government” in Colin Scott, ed., *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001) 379 [Schuurman].

<sup>26</sup> Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at 202.

<sup>27</sup> For example, Adrian Tanner explains that since settlement, the Innu have experienced an epidemic of social breakdown and dysfunction generally. The former practice of dealing with disputes was primarily that of avoidance; when a dispute occurred, hunting groups split up. However, once people settled in villages, this conflict avoidance was not longer possible. According to Tanner, while self-government offers the Innu a way to address their problems, a new conception of community must be developed that is based on Innu values and that is acceptable to the larger Canadian society. See Adrian Tanner, “The Double Bind of Aboriginal Self-Government” in Colin Scott, ed., *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001) 397 [Tanner].

<sup>28</sup> John B. Zoe, Chief Executive Officer of the Tlicho Nation spoke at a public gathering in Edmonton at the University of Alberta on March 20, 2006.

<sup>29</sup> See “The Habitat of Dogrib Traditional Territory: Place Names as Indicators of Bio-geographical Knowledge” online: West Kitikmeot Slave Study [http://www.wkss.nt.ca/HTML/08\\_ProjectsReports/08\\_habitat/08\\_habDogribTT.htm](http://www.wkss.nt.ca/HTML/08_ProjectsReports/08_habitat/08_habDogribTT.htm).

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<sup>30</sup> See generally, H. Patrick Glenn, *Legal Traditions of the World, Sustainable Diversity in Law*, 2<sup>nd</sup> Ed. (Oxford: Oxford University Press, 2004).

<sup>31</sup> This incident was shared by Matthew Wildcat during a class discussion at the University of Alberta (spring term, 2006). It was related to Matthew by his father, Brian Wildcat. According to Matthew, the reason that this elderly person was so forthright was that he was not forced into a position of defending a cultural practice against imposed change. Rather, the issue was dealt with as a community education matter in which community members' experiences and ideas were valued.

<sup>32</sup> Richard Overstall, "Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order" in John McLaren, ed., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) at 40. Also see M. Jane Smith, *Placing Gitksan Stories in Text: Returning the Feathers. Guuxs Mak'am Mik'Aax* (Ph.D. Dissertation, UBC Faculty of Education, 2004) [unpublished] archived with the author.

<sup>33</sup> See generally, Karl Llewellyn & E. Adamson Hoebel, *The Cheyenne Way* (Norman: University of Oklahoma Press, 1921).

<sup>34</sup> Cardinal & Hildebrandt, *supra* note 23 at 34.

<sup>35</sup> Conversation with Wes Fineday, March 2005, Saskatoon, Saskatchewan.

<sup>36</sup> See Brian Z. Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27:2 J.L. & Soc'y 296 at 319. According to Tamanaha, "[L]egal pluralists currently tend to see law in far more places than general social practices would support" (at 320).

<sup>37</sup> This is not to suggest that there could only be one system of law in a physical or geographic space. The reality is always much more complicated. Trade and other ways of establishing and maintaining international relationships meant that people were constantly negotiating different legal orders in the same space.

<sup>38</sup> *Indian Act*, R.S.C. 1985, c. I-5.

<sup>39</sup> For the latest in the grim statistics on Aboriginal victims and offenders, see online: Statistics Canada <http://www.statcan.ca/Daily/English/060606/d060606b.htm>.

<sup>40</sup> For a very interesting critique of how harmony is used to stifle internal conflict and challenges to the status quo, see Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford, Cal.: Stanford University Press, 1990).

<sup>41</sup> Gerdine Van Woudenberg, "Placing Gender in the Mediation of Aboriginal Resource Claims and Conflicts" (2004) 34:3 *Recherches Amérindiennes au Québec*.

<sup>42</sup> Christine Miller & Patricia Chuchryk, eds., *Women of the First Nations* (Winnipeg: University of Manitoba, 1996).