Justice as Healing

A Newsletter on Aboriginal Concepts of Justice

• 2007 • Vol.12, No.1 • Native Law Centre

• • • • •

• • • • •

The *Justice as Healing* Newsletter (ISSN 1203-8393) is published quarterly. The 2007 subscription fee is $25.00 (Cdn) plus shipping and handling. Please add 7% GST (where applicable) to the total of price after shipping and handling. Prepayment is required. Please ensure that cheques are made payable to the University of Saskatchewan and mailed to the Native Law Centre (address page 2). To order by Visa or MasterCard call (306) 966-6189.
S&H: Canadian orders $3.60
U.S. orders $4.80; Int'l orders $5.80

Our GST # is R119279313.

Comparative Analysis of Canadian Law, Aboriginal Law and Civil Law: Traditions in Selected Civil Law Jurisdictions

Yvonne Boyer, LL.B, LL.M., Ph.D. (Can.) – Yvonne is a Métis lawyer practising in Ottawa. She is currently working on a Ph.D. in law at the University of Ottawa and specializes in Aboriginal health law.

Introduction

Professor John Henry Merryman describes a legal tradition as:

> … a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.[1]

Law tells stories about the culture that shaped it. These stories are entrenched in a legal system and influence how legal norms are created and applied in the system and how facts are translated into language and concepts of law. Laws affect ones' daily life through these stories as much as the specific rules, and standards that comprise it.[2]

Comparative law is used as a technique to help explore and question a legal system; it is an instrument to help a legal system improve. Comparative law understands that to focus clearly on the issues; one must step back and view them from a distance:

> When one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are simply due to historical accident or temporary social situation. …[3]

Comparative law is the migration of ideas between systems and is a "fertile source of legal development."[4] Comparative law borrows other countries legal ideas, systems and subsystems from inside and outside the law.[5] When comparative law is used to assist in solving a particular troublesome problem, it isn't the idea that a specific solution will be found, but a deeper understanding of the problem will result or perhaps a source of inspiration to solving the problem will result. "Comparison often picks up issues or makes connections that remain invisible to other research strategies," and is used to expand the legal theatre of observation.[6] It follows then that a critical evaluation must be completed to analyze these important discoveries. Legal pluralism is "the simultaneous existence within a single legal order of different rules applying to identical situations."[7] This term is used to refer to all situations where a body of law interacts with another system of norms, whether or not that system is designated as

law.[8] Canada is, at least at the theoretical level, legally pluralistic. Civil law and common law organize laws in different ways even though there are at first glance, seemingly similarities amongst them. Canada as a juridical pluralistic state provides the courts with opportunities to draw on varied sources of law to sustain order.

At times, the results of the applications will be the same. For English common law, its development is historically grounded within the influences of continental Europe.[9] In fact, every legal system in the world has some characteristics affiliating it with civil law or the common law.[10] The features that define common law are of European origin making these bodies of law Eurocentric in nature (particularly when one examines its application to Aboriginal issues in Canada). When Canada was colonized, the British common law was applied to the inhabitants of Canada. The purpose behind colonialism was to rid the country of Indian people. Duncan Campbell Scott spoke to Parliament in 1920 and stated that "Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question."[11]

Aboriginal people[12] in Canada have historically and continue to endure numerous and horrific harms resulting directly from the imposition of the common law that rigorously and relentlessly deliver policies of colonization and assimilation. Aboriginal life has been dramatically altered economically, politically and socially. In present day society, the harms inflicted are reflected within the disproportionate levels of incarcerations, poor health, unemployment, poverty, addictions and violence statistics that are the realities of Aboriginal life in Canada.

In spite of the disproportional status, Aboriginal people hold special constitutionally entrenched rights. Aboriginal and treaty rights are recognized and affirmed in the *Constitution Act, 1982*. The Supreme Court recognizes the constitutional supremacy of these rights and has provided principles for the legislature, governments and lower courts to follow. Aboriginal and treaty rights are remarkable sets of rights that recognize Aboriginal people as distinct rights bearing holders of unique customs, practices and traditions. Moreover, these rights are constitutionally entrenched as the Supreme law of Canada. However, twenty five years have elapsed since the Constitution of Canada was amended. In light of these incredible rights, Aboriginal people still suffer disproportionately.

It is suggested that although civil law provides much needed principles that can benefit common law analysis, when applied within the Indigenous legal traditions, civil law does not carry the same constitutional status and it is, therefore, impossible to reconcile with the *sui generis* nature of Aboriginal and treaty rights jurisprudence in Canada. I propose to look at historical matters and principles that govern Aboriginal legal traditions through an examination of the development of Aboriginal laws, in general, and the development of some specific Aboriginal laws. Broad general principles of the European Civil Codes and selected specific general principles will be discussed to assess if the applicability of some of its principles would assist in the analysis.

Part 1
Principles of Indigenous Legal Traditions

1.1 Development of Aboriginal Laws

Aboriginal law was given by the Creator through sacred ceremonies and is binding and unalterable. The promises and agreements encompass sacred principles, values and laws that are to govern every relationship and interaction. The law not only informs relationships among humans but with all ecological orders.[13] Accordingly, Aboriginal law has been described as:

> Powerful laws were established to protect and to nurture the foundations of strong, vibrant nations. Foremost amongst these laws are those related to human bonds and relationships known as the laws relating to *miyo-wîcêhtowin*. The laws of *miyowîcêhtowin* include those laws encircling the bonds of human relationships in the ways in which they are created, nourished, reaffirmed, and recreated as a means of strengthening the unity among First Nations people and of the nation itself. For First Nations, these are integral and indispensable components of their way of life. These teachings constitute the essential elements underlying the First Nations notions of peace, harmony, and good relations, which must be maintained as required by the Creator. The teachings and ceremonies are the means given to First Nations to restore peace and harmony in times of personal and community conflict. These teachings also serve as the foundation upon which new relationships are to be created.[14]

The many laws of Aboriginal people in Canada vary and are as diverse and varied as other nations throughout the world. In Canada, Aboriginal people speak over 50 different languages and have traditions, customs and laws which are historically different. The history of each First Nation, Inuit community or Métis community can be traced to their various regions or territories they originated from. Large differences existed then (and now) between Aboriginal people and resultantly all have developed different customs and conventions to guide their relationships. These customs and relationships then became the foundations for the various

Justice as Healing is published by the Native Law Centre, University of Saskatchewan. We welcome and invite your submissions, comments and ideas. Newsletter submissions can be made via email or on CD (formatted in Microsoft Word) and accompanied by a double-spaced typed copy. Correspondence and submissions should be sent to:

Wanda McCaslin, Editor
Justice as Healing Newsletter
Native Law Centre
University of Saskatchewan
101 Diefenbaker Place
Saskatoon, Saskatchewan S7N 5B8
http://www.usask.ca/nativelaw/index.html
Telephone: (306) 966-6189 Fax: (306) 966-6207
email: wanda.mccaslin@usask.ca

complex systems of Aboriginal law.[15] Professor John Borrows comments:

> To make laws, Indigenous peoples draw upon the best legal practices and procedures of their own culture, and of others. They compare, contrast, accept and reject legal standards from many sources, including their own. Indigenous law is a living system of social order and control. Some might call this revisionist, and thereby seek to undermine Indigenous governance and law. This criticism would be unfortunate and inaccurate. Law and governance is strongly revisionist, as it must be continually re-interpreted and re-applied in order to remain relevant in changing conditions. Law can become unjust and irrelevant if it is not continually reviewed and revised. Indigenous law is no different, and should not be held to higher standards.[16]

Although there is significant written material on Aboriginal laws it has been largely left out of the development of Canadian law.[17] The primary purposes of colonization was assimilation. There are other reasons that Aboriginal laws have been omitted from Canadian law including the fact that common law has been recorded in writing while Aboriginal law passed from generation to generation through story telling and oral tradition. Further, the common law evolved in a foreign European culture while Aboriginal people developed culturally along separate paths without a shared past. A racial superiority (colonizer/colonized) may have surpassed any wonder felt by the first entrants to North America as the laws of the land, values or culture were generally thought of as uncivilized, devalued and forcibly swept away through assimilation policies of the Canadian government. The Supreme Court of Canada has underscored:

> [W]hen Europeans arrived in North America, aboriginal peoples *were already*, here living in communities on the land, and in participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now, constitutional status.[18]

At the time of colonization there were Indian nations, organized at different levels into hundreds of bands. Professor Sidney Harring comments:

> Aboriginal people had their own laws and legal institutions, but these traditions were bound up with all other aspects of their societies. Law, leadership, religion, family, band and national structures, and economic activity were not differentiated the way they were in British and European societies.
>
> …
>
> Indigenous laws and legal traditions varied widely from nation to nation but were often characterized by an integrative and meditative quality designed to resolve disputes efficiently and restore traditional relationships.[19]

Author Rupert Ross explains that the Salish people of British Columbia had common threads of dispute prevention and resolution, respect and a minimalizing of open dispute. As to the Dogrib people of the north "The traditional legal system ensured that people understood what the rules were and that they were expected to follow the rules, that is, socialization ensured that the rules were the base for the normative way of behaving."[20] James Dumont in his *Round Table Report on Justice* for the Royal Commission on Aboriginal People (RCAP) comments on the Anishabek people and the law:

> The Anishinabe justice system is one that leans toward wise counsel, compensation, restitution, rehabilitation, reconciliation and balance, rather than obligatory correction, retribution, punishment, penance and confinement. As a people whose spirit and psyche revolves around a core of vision and wholeness that is governed by respect, it is natural that a system of justice be evolved that, in desiring to promote and effect right behaviour, not only attends to balance and reconciliation of the whole, but does so by honoring and respecting the inherent dignity of the individual.[21]

In relation to the Cree people in Central Saskatchewan:

> Long ago if someone in your community did something wrong, an Elder would go and talk to him or her. After this if they continued to do their harmful actions then two Elders would go and see him or her. If this didn't work then the Warrior Society was sent to see them. This time if this didn't work then the whole community would go to the person's teepee and destroy everything they had. After this if he/she felt sorry for them - the things they done then the community would help replace everything that they destroyed. If this didn't work then there would be banishment or outright death.
>
> The person who has done wrong had many chances to make things right- their wrongs, if they didn't take responsibility for their own actions they would face dire consequences. We also see that the whole community was involved in helping this individual learn from their mistakes and stand by them and help them rebuild their lives.[22]

In the following section the laws of three specific groups of Aboriginal people are examined: Haudenosaunee, Métis and Inuit. They are representative of only three Aboriginal groups noted in the *Constitution Act, 1982* (Indian, Métis and Inuit). These nations are representative and illustrative of the complexity of Aboriginal laws in Canada although they do not represent the sum total of all Aboriginal laws.

1.2 Specific Written Aboriginal Laws

i) The Iroquois Confederacy and the Great Law of Peace, Kaianerekowa

The Haudenosaunee people (also known as the Iroquois Confederacy) historically lived in Ontario, Quebec, New York and Wisconsin. The Iroquois Confederacy consists of the original five nations: the Mohawk, Oneida, Onondaga, Cayuga, and Seneca plus the Tuscaroras who joined in 1722.[23]

The basic societal values of the Haudenosaunee people includes respect, reasoning, fairness, caring, citizenship, integrity and co-existence. In 1807, Chief Joseph Brant wrote the following on Haudenosaunee laws:

> Among us we have no prisons, we have no pompous parade of courts; we have no written laws, and yet judges are revered among us as they are among you, and their decisions are as highly regarded.
>
> Property to say the least, is well guarded, and crimes are as impartially punished. We have among us no splendid villains above the control of our laws. Daring wickedness is never suffered to triumph over helpless innocence. The estates of widows and orphans are never devoured by enterprising sharpers. In a word, we have no robbery under the color of law.[24]

These values were transferred into a complex and sophisticated set of written laws called the Great Law of Peace or *Kaianerekowa*. This set of laws brought all six nations of the confederacy together and had a large impact on the democracy of the United States and on Indigenous peoples in Canada and the United States.[25] Today, The Great Law of Peace,[26] is known as

one of the world's greatest legal codes, as a "testament to the power of human creativity and accomplishment".[27]

ii) Métis Legal Traditions

As the Métis people of Canada were born from two distinct cultures, European and the First Nations people of Canada, the traditional laws were mixed between the two lifestyles and evolved with everyday practicalities. Although many Métis followed the traditional ways and laws of the Indian people, others were influenced by their European brothers and sisters as the Métis culture, language, political identities and legal traditions evolved. The Métis were crucial to the opening of the west and the fur trade and were integral to the Red River Buffalo Hunts in the early 1800s.[28] The purpose of the Buffalo Hunt Law was to bring order to their economic and social activities.[29]

Hundreds of families would be involved in the hunt as well as their Red River carts, horses and equipment for processing and preserving the meat and hides. It is also important to note that there were many oral and customary laws that regulated the hunt and other aspects of Métis life including laws on family, trade, political organization, trade and land use.[30] The Métis people were crucial to the development of Canada and to the creation of the *Manitoba Act* of 1870.[31] Métis law was important to the development of Canada and established a democratically elected government in St. Laurent, near Batoche.[32] Métis legal traditions are a strong and important part of Canada's legal inheritance. Their laws have survived in customary form, and still have political and practical relevance today.[33]

iii) Inuit Legal Traditions

The Inuit people live in the Arctic in regions of Canada, Alaska, Siberia and Greenland. Currently the Inuit people are implementing their legal traditions in a contemporary laws resulting from their land claims agreement and powers of public governance in Nunavut. Zebedee Nunguk in RCAP comments on the traditional laws of the Inuit people:

> The bulk of disputes handled by the traditional ways pre-contact mostly involved provision of practical advice and persuasive exhortation for a correct and proper behavior, which were generally accepted and abided by. In more serious cases, offenders were ostracized or banished from the clan or group. In these cases, the ostracized or banished individuals were given no choice except to leave the security and company of the group which imposed this sentence. The social stigma of having such a sentence imposed was often enough to reform or alter the behavior which was the original cause of this measure, and people who suffered this indignity once often became useful members of society, albeit with another clan in another camp.[34]

Among the most important legal terms in Inuit law are *maligait, piqujait* and *tirigusuusiit. Maligait* refers to things that have to be followed. It is a relational term focusing on the result of a request (the obligation to obey). *Piqujait* deals with things that have to be done. *Tirigusuusiit* refers to things that have to be avoided. If a person transgresses *tirigusuusiit,* they will face consequences from their actions.[35] Today, the Nunavut Territorial Government is one of the most important institutions implementing Inuit legal traditions in Canada. The government has taken great guidance from *Inuit Qaujimajatuqangit*[36] to structure its legislative and administrative agenda and actions by referring and incorporating Inuit legal traditions and principles in the legislature and throughout its regulations and legal proceedings.

It is evident that a fully functioning social order with traditional laws existed prior to the imposition of the British common law in Canada. These laws are still being applied in various contemporary contexts today. Although many have been written, either in whole or part, in English, these can only be fully known by oral tradition through the Elders in their respective languages and Nations. Pieces of this history have been studied and written about in shards and are continually evolving with changing conditions.

The negotiations of the legal status of Six Nations lands by Chief Joseph Brant attempted to reach a compromise that would protect (sic) traditional laws and culture and allow both societies to live alongside each other. Further, the Treaty negotiations were two sets of laws that met and attempted a compromise that would protect traditional laws and lands. As Canadian officials increasingly wielded their powers, the Indian people learned how to respond to the same. However, an imbalance was noted early:

> This is a miserable legal history of oppression, violence and domination. Indigenous people were victims of every kind of legal violence, fraud and theft. They lacked the education and means to use the civil courts to protect their interests. This legal chicanery was the subject of a number of official reports in the nineteenth century Upper Canada (Ontario) and the Maritimes.[37]

As typified by the Haudenosaunee, the Métis and the Inuit nations, strong legal systems were in place within the Aboriginal communities in Canada prior to contact/control by the British. While diverse and varied as Nations with various customs, practices and traditions, there remain common threads that govern their relationships. Principles of respect, community involvement and restoration of harmony are but a few common principles. Indigenous peoples' laws hold modern relevance for them and for others. While the laws have ancient roots, they speak to the present and future needs of not just Indigenous people but all Canadians in the Aboriginal law, common law and civil law traditions. Indigenous legal orders contain guidance about how to live peacefully in the world, how to create stronger order, and how to overcome conflict.

1.3 Colonization – Application of the English Common Law

The British common law developed through the legal traditions of the Romans, the Normans, church canon law and Anglo-Saxon law. When Canada was colonized, the British common law was applied to the original inhabitants of Canada. Colonialism became the main force being applied and to accomplised this goal, Aboriginal people and non-Aboriginal people were subject to different laws.[38] The *British North America Act, 1867* (*BNA Act, 1867*)[39] was the original legislation that provided for the formation of the Dominion known as Canada. The distribution of legislative powers between the federal and provincial governments was listed in s.91 and 92 of the *BNA Act, 1867*. "Indians, and Lands reserved for the Indians" fell within the legislative authority of the Parliament of Canada pursuant to s.91(24) of the Act.

The Parliament of Canada continues to have legislative authority over "Indians, and Lands reserved for the Indians". The operative federal legislation is through the *Indian Act*.[40]

Colonization is a process that was imposed with the industrializing of North America and continues to exist today in the marginalization of Aboriginal people in Canada. A "white settler society" is one that is established by Europeans on non-European soil. In its origins lay the dispossession and near extermination of Indigenous populations by Europeans. As it evolves, a white settler society continues to be structured by a racial hierarchy. In the national mythologies of such societies, it is believed that European people came first and that it is they who principally developed the land; Aboriginal peoples are presumed to be mostly dead, dying or assimilated. European settlers thus became the inhabitants most entitled to the fruits of new lands, unimagined wealth, power, human (slavery) and natural resources.[41] In addition, an imperial vocabulary developed in the nineteenth century with words and concepts such as "inferior" or "subject races," "subordinate peoples," "dependency," "expansion," and "authority."[42] A feature of white settler is the disavowal of genocide, slavery,[43] and the exploitation of the labour of peoples of colour. In North America, it is still the case that European conquest and colonization are often denied; largely through the fantasy that North America was peacefully settled and not colonized." In North America, the settlers were the people who invaded the land and had their identity, beliefs, standards and culture maintained and solidified in the institutions of the lands that they invaded. From a global perspective, Taiaiake Alfred and Jeff Corntassel comment:

> There are approximately 350 million Indigenous peoples situated in some 70 countries around the world. All of these people confront the daily realities of having their lands, cultures, and governmental authorities simultaneously attacked, denied, and reconstructed by colonial societies and states. This has been the case for generations.
>
> …
>
> [In Canada] the results are measured in losses of cultural identity, marginalization and health status that fall well below that of mainstream Canadians.[44]

In Canada, the intent behind colonization was to subjugate, by force if necessary, take possession of the land, assimilate the people through forced religious indoctrination, and promote adherence to Western society's norms, rules, organization, and ways of living and thinking. Assimilation was the goal in attempting to colonize Aboriginal peoples, and the *Indian Act* proved to be a useful and powerful tool. Education played a large role in this assimilation project. Residential schools were a product of the *Indian Act* of 1876, which allowed the Minister of Indian Affairs to control education for Indians. The residential school experience entailed a separation of the children from almost all family members. Parents were not allowed to visit their children in residential schools. If children were allowed to return home at all, they were only sent home for two months out of the year.[45] One of the diseases that were largely spread in residential schools was tuberculosis, which ultimately reached epidemic levels.[46] Besides the starvation and disease experienced in residential school systems, physical, mental and sexual abuse was rampant.

Sákéj Youngblood Henderson describes the source of colonialism as eurocentrism being a "dominant intellectual and educational movement that postulates the superiority of Europeans over non-Europeans."[47] The effects of the imposition of the British common law and the resulting colonization are measured in losses of cultural identity, marginalization and social ills and a health status that fall well below that of mainstream Canadians.

1.4 Legal Problems – Reconciling Diverse Legal Systems

Aboriginal laws are separate from the common law, and exist in Aboriginal society through daily actions, and through (oral and written) teachings of the Elders and law keepers. They interact with the common law and the civil law and produce sets of obligations for Aboriginal people. The sources of all laws are derived from the divine, natural, positivistic, deliberate and customary. The source of law determines how a certain set of laws is to be applied. Laws are not frozen time and Aboriginal laws are not simply a matter of historical significance – they are applied with each subsequent generation in accordance with the social standards of the changing times: the same methods are applied to the common law and civil law.[48]

As per the *Constitution Act, 1982*,[49] Aboriginal and treaty rights have been recognized and affirmed by section 35(1) of the *Constitution Act, 1982*:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.[50]

This recognition and affirmation of Aboriginal and treaty rights means that these rights are protected by Canada's Constitution[51] thereby changing the structure and scope of legislative power. By entrenching Aboriginal and treaty rights in the Constitution of Canada, these rights are given the highest protection by law in the country. As a result, neither the federal Parliament nor the provincial or territorial legislatures can alter the rights of Aboriginal peoples in Canada:[52]

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[53]

Aboriginal people in Canada have constitutionally entrenched rights that are not possessed by any other individual or group of Canadians. The entrenchment of Aboriginal and treaty rights in the Constitution means that every Aboriginal man, woman, and child carries a remarkable set of constitutional rights.[54]

Aboriginal rights are inherent to all Aboriginal people in Canada and are passed down from generation to generation. They are derived from Aboriginal knowledge, heritage, and law.[55] Aboriginal rights and fundamental freedoms stem directly from recognition of the inherent and inalienable dignity of Aboriginal Peoples. In addition to Aboriginal rights, some First Nations communities possess treaty rights. The Supreme Court of Canada has recognized that Indian treaties constitute a unique type of agreement that attract special principles of interpretation. It has defined a treaty as representing an exchange of solemn

promises between two sovereign nations – the Crown and Indian nations – whose nature is sacred.[56] According to the Supreme Court, treaties entrench a legal relationship between the Crown and an Indian nation with the intent to create obligations.

The Supreme Court of Canada has laid out certain principles of interpretation when there may be an infringement of Aboriginal or treaty rights. A fiduciary duty is incorporated in section 35(1) of the *Constitution Act, 1982*.[57] *Sparrow*,[58] *Delgamuukw* and subsequent decisions have held that the Crown has a fiduciary duty to Aboriginal Peoples when a government decision or action may have the effect of interfering with an Aboriginal or treaty right, which obligation requires the Crown to consult with the affected Aboriginal Peoples. The Crown's fiduciary relationship with Aboriginal Peoples has been described as *sui generis* in nature or of its "own kind or class".[59] Legal scholar Leonard Rotman explains that the Crown/Aboriginal relationship is "rooted in the historical, political, social and legal interaction of the groups from time of contact."[60] Fiduciary law, as part of the common law, is also part of the *sui generis* relationship and thus applies when determining if the Crown has breached its obligations to Aboriginal Peoples.[61]

The Constitution recognizes Aboriginal and treaty rights and the Supreme Court of Canada has recognized their *sui generis* nature which have been constitutionalized. Since 1982, when, however, Aboriginal and treaty rights were entrenched in the Constitution, there have not been substantial changes in the living conditions for Aboriginal people in Canada.

Part 2
Principles of Civil Law

2.1 Civil Law Legal Traditions

Civil law tradition has its origin in Roman law and was codified through the Corpus Juris Civilis of Emperor Justinian. It is characterized, not only by Roman law but is influenced by German law and customs, Cannon law and Law of the Merchants.[62] It developed in continental Europe in a highly structured fashion through civil codes. Codification developed particularly in the 17th and 18th century as a response to political ideals. Codification expresses concepts of the rule of law which required certainty, structure and uniformity. The codification of European private laws was completed in 1804 for the Code Napoleonic, in 1896 and 1900 for the German Civil Code. These two codes have served as models for most other civil codes. Many Asian nations fashioned their codes after the German code, for instance Japan and South Korea, the German Code was also introduced into China.[63]

Many areas of the codes are in contrast to the common law but civil law specifically distinguishes public and private law; commercial and private law. Civil law also places a very high value on legal academics, whose importance flow from the authority of the Commentators of the Roman law period.[64] While all of Canada, excluding Quebec follows the common law, Quebec follows civil law. The origins of the Quebec Civil Code stem from the period when New France became a Royal Province in 1663. Canada's civil law originally derived from a decree by King Louis XIV which was amended in 1667, 1678 and 1685.[65] In 1763, an attempt was made to abolish civil law in New France and the British common law was imposed. This however, proved to be a problem with the French settlers in New France. As a result, the British reinstated the civil law system (for property and civil rights) in the *Québec Act, 1774.* Civil law has survived in Quebec since that time.[66] Obviously influenced by the 1804 Code Napoléon in France, the *Civil Code of Lower Canada* was enacted in 1866.

Civil law in Lower Canada (Quebec) continued after Confederation in private law matters which was delegated through section 92(13) of the *British North America Act, 1867,* which gave the provinces exclusive power over 'property and civil rights'. This continued Quebec's legal tradition although the federal government retained jurisdiction over criminal law. In 1955 and 1994 the *Civil Code of Lower Canada* was amended. The new *Civil Code of Québec* contains ten books and includes some concepts from common law. From a historical perspective, the early 1900's saw the courts, Parliament, and legislatures outside Quebec paying very little attention to civil law within Quebec. It was said that the influence of the common law was appearing in the judicial interpretation of civil law of Quebec.[67]

In some Supreme Court of Canada decisions it appeared that civil law was in danger of being absorbed into the common law of the rest of Canada[68] There was a lack of reciprocity between the two systems that caused many to worry about the continued vitality of civil law tradition. However since 1949, the influence of civil law became more prominent.[69] Both the Supreme Court of Canada and the Parliament of Canada have taken steps to re-balance the relationship between the two systems. This dialogue has created a richer body of laws as resources for solving legal problems.[70] To gain recognition, civil law jurists did not have to concede the autonomy of the system's single source and intellectual approach to the civil law system. Using Quebec as an example it can be said that the use of comparative law to provide solutions to social problems is crucial. This notion is valid even if the country seeking the solutions is not a civil law country.[71]

2.2 Applicable General Principles

In many civil law systems "general principles of law" may be considered a primary source of law which can give rise to binding legal norms.[72] Some applicable principles include: *abuse of rights* and *unjust enrichment*.[73] The application of these principles is subject to interpretation depending on the country and the applicable civil code.[74] The judge aims to discover the express of implied will of the legislature;[75] this is particularly true when a code carries a "general clause". These general clauses may be akin to common law principles of equity (i.e.: estoppel or laches). Although not expressly provided for in civil codes, *equity can be found in judicial discretion*. General clauses can be used to modify the effect of a rigid code provision or to "set the course of a new development."[76] In France and Germany general clauses may reign over the subject matter of the entire code using general principles of law. For instance Article 6 of the French code requires that individuals must follow *public order* and *good morals* (*contra bonos mores*) in their dealings. Article 138 of the German Civil Code provides

that a transaction that offends good morals is void. In the performance of obligations both the German and French code provide for the *good faith* in the performance of obligations.[77] The principle of good faith runs through all of the civil codes, it is a cornerstone of the civil law.

Both the civil law and the common law have a common principle in that the *Rule of Law* is a fundamental premise. There are institutional arrangements to foster this rule. For instance, it stresses the independence of the judiciary and in Eastern Europe, the establishment of constitutional courts. It is a disposition to take law seriously, it is concerned with process and following form as it is with substantive results.[78] For instance, the transferring of a set of customs from one part of the world to another for its application is a feature of principle based laws. In the instance of New France and the Civil Code of Quebec who is directed from the top, with Royal ordinances, and edicts and decisions from the Conseil Souverain (Sovereign Council) proclaiming the laws by which people would live.[79] Fortunately, there was some early recognition that law is not effective if it does not *reflect local values*.[80] The same principle holds true to this day.

The issue of custom, (although this list is not exclusive) as a source of law is important as it is a well recognized as a written source of law in many codes. It has been argued by some that Aboriginal law is merely a set of customs and that societies have laws only if the laws are declared by some recognized power that is capable of enforcing such a proclamation. This, however, is not true. Aboriginal law is customary, positivistic, deliberative, and/or based on theories of divine or natural law. The Supreme Court of Canada has disagreed with an approach that discounts Aboriginal customs.[81] While courts and legislatures are important sources of law in Canada, it has long been accepted that a society does not need these institutions in order to possess law. For instance, the Supreme Court of Canada wrote that "European settlement did not terminate the interests of Aboriginal peoples arising from their historical occupation and use of the land. To the contrary, Aboriginal interests and customary laws were presumed to survive the assertion of sovereignty. …"[82]

Part 3

3.1 Can the common law, civil law and Indigenous law be compared?

I have noted earlier that Aboriginal and treaty rights are constitutionalized in the common law through Section 35 of the *Constitution Act, 1982*. The Supreme Court of Canada states that these rights are *sui generis* in nature. This is not like the common law or the civil law traditions in anyway. The common law jurisprudence is not *sui generis*, it is the common law. Civil law traditions of written code, customary law and general principles of law are not *sui generis* in nature. Common law is classified as common law, civil law is classified as civil law. They both fall within their specific categories of named law. The civil law operates in codes under the division of Parliamentary or governmental authority.

The use of comparative law on this level is impossible to reconcile as Aboriginal law, civil law and common law are not on the same level. They do not all possess *sui generis* rights. They cannot be compared from a hierarchal perspective because Aboriginal law is completely unlike civil or common law because of the *sui generis* nature of its jurisprudence in the common law. It is then logical to follow the examples of the development of the civil law in Canada and the co-operative spirit seen of blending the common law with the civil law to enhance each others laws thereby creating a multi-juridical system in Canada that recognizes three sets of laws.

Professor Borrows supports this approach:

> The more explicit recognition of Indigenous legal traditions could lead to useful experimentation and innovation in solving many of Canada's pressing problems. … A greater recognition of Indigenous legal traditions could provide some counterweight to the bi-culturalism and bi-elitism that sometimes infects Canada's polity.[83]

Conclusion

A comparative legal approach provides an understanding of law as telling stories about the culture that shaped it. These stories are entrenched in a legal system and influence how legal norms are created and applied in the system and how facts are translated into language and concepts of law. Laws affect ones' daily life through these stories as much as the specific rules, and standards that comprise it. This paper has offered a general view of Aboriginal laws and some specific laws to illustrate the complexity of the societies historically and in their current modern day context. Colonization (and its devastating impact on Aboriginal people) and the application of the English common law – specifically the application of constitutional supremacy have been noted. The Supreme Court of Canada has provided certain general principles of interpretation when dealing with Aboriginal and treaty rights. The Supreme Court recognizes the constitutional supremacy of these rights. There is however, a large gap between what the legislature and the government has been directed to do and what is actually being done. There also remains a very large gap between the health and judicial status between Aboriginal and non-Aboriginal people in Canada. Through a brief examination of civil law in the context of Aboriginal and treaty rights, the *sui generis* nature of the jurisprudence prevents any type of comparative analysis (and rightly so!). Certain broad principles of civil law or some specific possible remedies found in certain civil law countries may, however, be of some assistance. Overall though, it seems clear that a multijuridical system that consists of common law, civil law and Aboriginal law may be the logical approach to consider. It has already been established that two bodies of law exist in common and civil law Canada and share values and traditions with a co-operative spirit of blending the common law with the civil law. Aboriginal laws will only serve to enhance Canadian law and will assist in solving some of the flaws created by the other legal regimes, in particular as it relates to Aboriginal peoples. Anything less would merely be an importation of more "foreign (i.e. colonial) laws" which is the last thing Aboriginal people need or want.

[1] J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2 Ed. (Stanford, California: Stanford University Press, 1985) at 1.

[2] Gordon Glendon, & Carozza, *Comparative Legal Traditions in a Nutshell*, West Group, 2nd ed., 1999 at 13 [Glendon].

[3] Schlesinger, Baade, Herzog & Wise, *Comparative Law – Cases-Text-Materials*, Foundation Press, 6th ed.,1998, Chapter 2 at 14 footnote 41 [Schlesinger].

[4] Schlesinger, *ibid* at 10, footnote 27.

[5] Schlesinger, *ibid* footnote 26.

[6] Glendon, *supra* note 2 at 7.

[7] Andre-Jean Arnaud, "Legal Pluralism and the Building of Europe", Online: <http//www.reds.msh-paris.fr/communications/texts/arnaud2.htm> (accessed January 26, 2007).

[8] Schlesinger, *supra* note 3 at 289, footnote 23.

[9] Schlesinger, *ibid* at 289, footnote 30.

[10] Schlesinger, *ibid* at 285.

[11] J. Leslie and R. Maguire, ed., *The Historical Development of the Indian Act*, second edition (Ottawa: Treaties and Historical Research Centre, Indian Affairs and Northern Development, 1978) at 115.

[12] The term "Aboriginal peoples" is intended to encompass all original inhabitants of Canada as recognized by the *Constitution Act, 1982*.

[13] H. Cardinal & W. Hildebrandt, *Treaty Elders of Saskatchewan* (Calgary: University of Calgary Press, 2001) at 7 [Cardinal].

[14] Cardinal, *ibid*. at 15.

[15] J. Borrows, *Indigenous Legal Traditions in Canada*, Ottawa: Law Commission of Canada (January 2006) [Borrows]. See also, M. Battiste & J.Y. Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000) [*Indigenous Knowledge*].

[16] Borrows, *ibid* at footnote 36.

[17] S. Harring, *White Man's Law* (Toronto: University of Toronto Press, 1998) at 9 [Harring].

[18] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 146 at para 30 [Lamer CJC's emphasis] [*Van der Peet*].

[19] Harring, *supra* note 17.

[20] Harring, *ibid*.

[21] Harring, *ibid* at 256.

[22] When employed as Director of Justice for Saskatoon Tribal Council in Saskatoon Saskatchewan, I organized and facilitated bi-yearly gatherings of the Elders.

[23] Haundenosaunee, "Great Law of Peace" online: Haundenosaunee <http://sixnations.buffnet.net/Great_Law_of_Peace/> (accessed January 18, 2007).

[24] In C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 108.

[25] Donald A. Grinde, Jr., and Bruce E. Johansen, Exemplar of Liberty: Native America and the Evolution of Democracy (Los Angeles: American Indian Studies Centre 1991).

[26] Great Law of Peace, *supra* note 23.

[27] William Fenton, *The Great Law and the Longhouse* (Norman: University of Oklahoma Press, 1998).

[28] A. Ray, *Indians in the Fur Trade,* (Toronto: University of Toronto Press, 1974) at 205.

[29] Métis Resource Centre, "Laws of the Hunt" Métis Resource Centre April 25, 2002. Online: Métis Resource Centre http://www.metisresourcecentre.mb.ca/History/LawsHunt.htm > (accessed January 26, 2007).

[30] See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength,* Vol. 3 (Ottawa: Supply and Services, 1996) [RCAP].

[31] *Manitoba Act*, 1870 (U.K.) 32 & 33 Vict. c.3.

[32] The Laws of St. Laurent.

[33] See Métis Settlement Appeal Tribunal.

[34] Z. Nunguk, *Fundamental Values, Norms, and Concepts of Justice-Inuit of Nunavik* in Canada, RCAP *supra* note 30 at record 14447.

[35] Mariano Aupilaarjuk, Marie Tulimaaq, Emile Imaruittuq, Lucassie Nutaraaluk, Akisu Joamie, *Interviewing Inuit Elders, Volume 2: Perspectives on Traditional Law*, Jarich Oosten, Frédéric Laugrand and Wim Rasing eds., (Iqaluit: Nunavut Arctic College, 1999).

[36] Jaypetee Arnakak, "Commentary: What is Inuit Qaujimajatuqangit?" *Nunatsiaq News*, August 25, 2000.

[37] Harring, *supra* note 17 at 10.

[38] Schlesinger, *supra* note 3 at 316.

[39] The *British North America Act, 1867* (U.K.), 30 & 31 Vict., c.3 (*B.N.A. Act, 1867*). was renamed *Constitution Act, 1867* (U.K.), 30 &

[40] See the term "Indian" as defined in *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*, S.C. 1850, c.42, s.5.

[41] See Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990).

[42] E.W. Said, *Culture And Imperialism* (New York: Vintage Books, 1994) at 9.

[43] See Peter C. Newman, *Caesars of the Wilderness* (Markham: Viking, 1987) at 21.

[44] Taiaiake Alfred & Jeff Corntassel. "Being Indigenous: Resurgences Against Contemporary Colonialism." Government and Opposition, 2005. online: <http://www.wasase.org/pdfs/goop_166.pdf> (accessed March 5, 2006).

[45] Canadian Broadcasting Corporation, "Abuse Affects the Next Generation" (April 2, 1993), online: CBC Archives <http://archives.cbc.ca/IDC-1-70-692-4008/disasters_tragedies/residential_schools/ clip6> (accessed March 5, 2006).

[46] R.G. Ferguson, *Studies in Tuberculosis* (Toronto: University of Toronto Press, 1955) at 6.

[47] J. Sákéj Henderson, "Postcolonial Ghost Dancing: Diagnosing European Colonialism" in Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: University of British Columbia Press, 2000) 57 at 58.

[48] Borrows, *supra* note 15.

[49] *Constitution Act, 1982*, s.35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[50] *Constitution Act, 1982*, *ibid*.

[51] The Constitution, however, is not the source of Aboriginal and treaty rights. Yvonne Boyer, "Aboriginal Health: A Constitutional Rights Analysis" in *Discussion Paper Series No. 1, Aboriginal Health: Legal Issues* (Saskatoon: National Aboriginal Health Organization and the Native Law Centre of Canada, 2003) at 10.

[52] P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 2002) at 5–22.

[53] *Constitution Act, 1982*, *supra* note 49 at s.52.

[54] *Constitution Act, 1982*, *ibid* at s.35.

[55] *Indigenous Knowledge, supra* note 15 at 212–213.

[56] See James Sákéj Youngblood Henderson, "Interpreting Sui Generis Treaties" (1997) 36 Alta. L. Rev. (No. 1) 46.

[57] *Haida Nation v. B.C. and Weyerhaeuser* (2002), 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121 at paras. 33–36 (C.A.) [*Haida Nation*].

[58] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160.

[59] *Sui generis* is a Latin term meaning "of its own kind", "unique or peculiar". *Blacks Law Dictionary*, 7th ed., (St. Paul Mn.: West Group, 1999). Rights that are *sui generis* do not fit into categories of French or English law.

[60] L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 3.

[61] Rotman, *ibid* at 14.

[62] Glendon, *supra* note 2 at 16.

[63] *Ibid* at 32.

[64] Schlesinger, *supra* note 3.

[65] Borrows, *supra* note 15 at 81.

[66] John Brierly and Roderick Macdonald, eds., *Québec Civil Law: An Introduction to Québec Private Law* (Toronto: Emond Montgomery, 1993).

[67] See, generally, France Allard, "The Supreme Court of Canada and its Impact on the Expression of Bijuralism", in Justice Canada, *The Harmonization of Federal Legislation with the Civil Law of the Province of Québec and Canadian Bijuralism* (Ottawa: Department of Justice, 2001).

[68] D. Howes, "From Polyjurality to Monojurality: The Transformation of Québec Law, 1875-1929" (1987) 32 *McGill Law Journal* 523.

[69] Béliveau St-Jacques v. Fédération des employées et employés de services publics Inc., [1996] 2 S.C.R. 345.

[70] Canada, Department of Justice Canada, "Canadian Legislative Bijuralism" Online: http://www.justice.gc.ca/en/bijurilex/index.html (accessed January 26, 2007).

[71] Glendon, *supra* note 2.

[72] Glendon, *ibid* at 125.

[73] *Ibid* at 129, 130.

[74] *Ibid* at 139.

[75] *Ibid* at 140.

[76] *Ibid* at 141.

[77] *Ibid*.

[78] *Ibid* at 312, 313.

[79] Melanie Brunet, *Out of the Shadows: The Civil Law Tradition at the Department of Justice* (Canada: Supply and Services, 2000) at 5.

[80] Glendon , *supra* note 2 at 21.

[81] *Calder v. A.G.B.C.* [1973] S.C.R. 313 at 346-347.

[82] *R. v. Mitchell* [2001] 1 S.C.R. 911 at para. 8.

[83] Borrows, *supra* note 15 at 194.