What Is Indigenous Law? A Small Discussion

By Val Napoleon

> Law is not tidy. It is not contained by the boundaries of modern states nor generated solely by the work of public officials … . Nor is law lonely. It is frequently found overlapping or interacting with other instances of law. Yet somehow, despite this messiness and multiplicity, law still can, or at least claims to be able to, create obligations … . Despite its plurality, law still has or at least claims some kind of authority.[1]

The only alternative to lawful societies is unlawful societies. Indigenous societies were lawful. It is time for the conversations to move from the why of Indigenous law (whether Indigenous societies had law and why it matters) to the how of Indigenous law so that the work of law may done by and within Indigenous communities, between Indigenous communities, and between Indigenous societies and the state (and settler society).

Through the ages, the question of 'what is law?' has preoccupied people from all walks of life – legal scholars, activists, legal practitioners, community members, students, politicians, and government officials. Law libraries are full of law texts of every description and the judiciary generates seemingly endless volumes of legal decisions touching every facet of life and death. We all hold expectations for what law is and what it should do in our world and beyond. These ideas about law can be positive or negative, prescriptive or normative, and they reflect a range of political perspectives. For example, one school of thought, that of law and economics, takes the position that the role of law and its institutions should be minimized to allow the economic market to make the necessary determinations about social ordering. In contrast, some newer scholarship seeks to decentre the market as sole determinant and factor in unaccounted environmental costs and collateral ecological damage. In the end though, law is a human endeavor. It is an active collaborative and public process, and is never insulated from the larger social and political forces around it. Rather, law can be understood as being formed by and forming those constant social, economic, and political dynamics. And, since law is fundamentally collaborative, it operates through public legal institutions which for Canada emanates from a state centre (vertical and from the top down) operating through the judiciary, law enforcement, and government. These are some of the conditions that make Canadian law and its legalities[2] possible.

All of these law debates are live in the broader society and all of these complexities apply equally within Indigenous societies and their corresponding legal traditions.[3] For the most part,

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[1] Nicole N. Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (New York: Oxford University Press, 2013) at 1.

[2] See generally, Kirsten Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford, UK: Hart Publishing, 2012).

[3] Legal traditions are deeply rooted and comprise "historically conditioned attitudes about the nature of law, role of law in the society and the polity, about the proper organization and operation of the legal system, and about the ways law is or should be made, applied, studied, perfected, and taught". J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press, 1985) at 1.

Indigenous societies[4] were non-state without formal centralized authorities or a separate delegated class of legal professionals. Instead, law and legal authorities are decentralized, operating through horizontal (from the bottom-up) public legal institutions. In each Indigenous society, citizens organized in various ways were, and are, responsible for the maintenance of their legal order. For example, in Cree society, there are four decision-making groups, and their role and authority depends on the type of legal decision required: the family, medicine people, elders, and the whole community.[5] Another example is Gitksan society where law operates through the matrilineal kinship units of extended families and overarching clans.

Indigenous peoples were and are reasonable and reasoning peoples, and law is one of the ways we govern ourselves. It is law that enables large groups of people to collectively manage themselves "against a backdrop of deep-seated normative disagreement" and to fashion "collective positions out of the welter of disagreement".[6] Law is an intellectual process, not a thing, and it is something that people actually do. Indigenous peoples apply law to manage all aspects of political, economic, and social life including harvesting fish and game, accessing and distributing resources, managing lands and waters. Indigenous law is not perfect nor does it have to be, but it works well enough and has endured through time. No system of law ever lives up to all of its aspirations, but a people's collective aspirations provide direction, order, standards and ethics, and the power of hope. As with all law, Indigenous law contains thinking processes and intellectual resources, and it changes to live in each generation.

While law is societally determined and therefore unique, the problems law must deal with are universal. Every society deals with human violence and vulnerabilities, and with all the mundane and general messiness of collective life. At its most basic level, law is collaborative problem-solving and decision-making through public institutions with legal processes of reason and deliberation. Indigenous laws and legal orders are comprehensive in scope and depth, and require legitimacy and coherence just as Canadian law does. The legitimacy and efficacy of any stable legal system requires the collective capacity to decide the substance of law as well as its: (1) ascertainment (agreement of what law is); (2) change (how law is changed and why), and (3)

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[4] Indigenous societies share a history, land base, language, social and political orders, and law (see RCAP 1996 generally). Historically, each Indigenous society's territory was the area they could defend both physically and legally according to their Indigenous legal orders. Colonial reserve boundaries created by the *Indian Act*, which divided and grouped Indigenous peoples into bands, and cut across the Indigenous legal orders. This division of Indigenous peoples and lands has undermined the efficacy of the larger legal orders and the application of Indigenous laws. For example, Tsimshian society is divided into seven bands with a number of small reserves. Many Tsimshian people live off reserve. The Tsimshian legal order operates along kinship lines across the territory. In Tsimshian society, the legal obligations for dealing with a Tsimshian person's injuries are with his or her father's extended family or 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 band member, then all the other Tsimshian people, either living on other reserves or off reserve, 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.

[5] Hadley Friedland, *Cree Legal Traditions Report* (2014) Accessing Justice and Reconciliation Project, http://indigenousbar.ca/indigenouslaw/.

[6] Jeremy Webber, "Naturalism and Agency in the Living Law" in Marc Hertogh, ed., *Living Law: Reconsidering Eugen* Ehrlich, Oñati International Series in Law and Society (Portland, OR: Hart, 2009) 201 at 202. Webber defines a normative order as "a natural dimension of any human interaction, generated through the day-to-day business of human life, perhaps even definitional of the existence of society" (at 201).

application of law (when law is broken and appropriate legal response).[7] And to draw on the words of Indigenous tribal judge, Matthew Fletcher, Indigenous law must be accessed, understood and applied.

Law exists in memory, organized as public legal precedent (e.g., oral histories, stories, etc.), so that it can be applied in the everyday thereby creating new precedents for future legal problem solving. There are a number of sources of Indigenous law. For example, John Borrows argues that Indigenous societies have at least five sources of law: sacred, deliberative, custom, positive, and natural.[8] Another source of law is human interaction and general patterns of how we treat one another over time.[9] Borrows cautions against treating these sources as separate or artificially watertight because, in actuality, "Indigenous legal traditions usually involve the interaction of two or more . . . sources".[10] Lawful practice requires interpretive choices about precedent on a pragmatic case-by-case basis, drawing from legal memory and precedent. It is through this sustained engagement with law that people create the necessary intellectual space to critically examine norms, power, and assumptions – a healthy exercise of agency and citizenship so integral to healthy societies.

So what are the conditions that will make Indigenous law and its legalities possible and coherent today? What will enable Indigenous peoples to restore Indigenous lawfulness? Given Canadian colonial history,

> [T]he ground of Indigenous law is uneven—Indigenous law exists, it has not gone anywhere—and we saw this, but there are also serious gaps where some Indigenous law have been undermined, distorted, or lost. Given this, simply arguing for the recognition of Indigenous law is inadequate because we cannot just assume that there are complete and intact legal orders that can spring to life through recognition. This means that engagement with Indigenous law must move to thoughtful rebuilding, and this generates two questions: (1) What are the terms for this thoughtful rebuilding process with communities? and (2) What are the intellectual processes in each Indigenous society that historically enabled people to deal with and account for change?[11]

Indigenous law is concerned with the same human concerns as Canadian law including community safety, fairness, and accountability. These were common themes shared across multiple Indigenous legal orders as evidenced in the research completed by the Indigenous Law Research Unit (ILRU) directed by Val Napoleon.[12] The ILRU employs Hadley Friedland's Indigenous legal methodologies[13] for the substantive articulation and restatement of Indigenous law: (1) developing community-specific research questions; (2) analyzing oral

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[7] H.L.A. Hart, Concept of Law 2nd ed. (New York: Oxford University Press, 1994).
[8] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23.
[9] Val Napoleon, "Thinking About Indigenous Legal Orders" (revised) in Colleen Shepard & Kirsten Anker, eds., *Dialogues on Human Rights and Legal Pluralism*, 2012 Springer Press' Seriesm, lus Gentium: Comparative Perspectives on Law and Justice.
[10] *Ibid*. at 55.
[11] Hadley Friedland and Val Napoleon, "Gathering the Threads: Indigenous Legal Methodology" 2015 Inaugural Issue of Lakehead Law Journal 16.
[12] *Ibid.*
[13] In 2015, Hadley Friedland developed a second Indigenous legal methodology for ILRU lands and resources research.

history/story/case; (3) creating a synthesized body of law around the research topic; and (4) applying and critical evaluating the implementation results.[14] The research question determines what is learned from the analysis and how the law and legal processes are set out. Key within this methodology are the dual requirements for transparency of reasoning and interpretive processes, and the consistent citing of sources be they interviews, discussion groups, or oral and written stories. Everyone has to be able to go to the same sources to determine their own interpretations in order to foster respectful debate and inclusive engagement. These methodologies result in a synthesized law report that sets out the: (1) legal processes of determining the appropriate authoritative decision-makers and how to respond to the legal problem; (2) appropriate legal responses or resolution; (3) legal obligations; (4) substantive and procedural rights; and (5) legal principles. This articulation and restatement of Indigenous law facilitates an internal view of Indigenous law that enables its argumentation and practice in the real world. An Indigenous law resurgence will make a symmetrical relationship possible with Canadian law – leaving behind the colonial asymmetry which denied and disregarded Indigenous legal traditions.

Law is a distinct form or governance and is essential to social order in all societies.[15] In its best form, the enterprise of law centres on human beings as interpretive agents who are capable of purposive action, and who are deserving of dignity. According to Kirsten Rundle, the legal processes themselves are constituted and enlivened by the ways in which agents participate within them; basically, human agency is essential to law's efficacy and legitimacy.[16] For Indigenous law, we must integrate individual human agency with relational, collective agency operating through contemporary public forms and legal institutions that are informed by historic institutions and law.

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[14] Friedland and Napoleon, *Gathering the Threads.* Also see Val Napoleon and Hadley Friedland, Roots to Renaissance, "From Roots to Renaissance", in Markus Dubber, ed., *Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2015).
[15] Rundle, *supra* note 2 at 99.
[16] Friedland and Napoleon, *supra* note 11.