# Kindreds and States:

## Using Anglo-Saxon and Gitxsan Law to Help Reconcile Aboriginal and Crown Sovereignty

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# Contents

## 1. Introduction

The ideas described in this paper have as their starting point the writer's experience and understanding of the kinship-based legal orders[1] of the peoples of the Pacific Northwest Coast of North America. These include the Tsimshianic-speaking peoples of the coast and the Athabascan-speaking peoples of the interior. Then some casual reading about the early Anglo-Saxon society in England quickly brought to the fore the remarkable similarity between the two peoples, separated as they are by such great time and distance. This observation prompted two questions: Why had two cultures with no apparent historical connections developed such similar ways of ordering their societies and settling their disputes? And given that similarity at one time, why has one evolved slowly over thousands of years while the other evolved very rapidly at the start of the second millennium AD into the English common law and statutory law systems that are the basis of Canadian law today?

Given the fragmentary historical records from both culture areas, any answers to these questions are not likely to be definitive. Nevertheless, the effort may be useful, not only in getting a better understanding of the nature of one form of aboriginal law and of the Anglo-Canadian common law, but also of how the two legal orders may interact in the modern Canadian state. Over the past 150 years that interaction has not been constructive. The common law has been used by European settlers to deny aboriginal people in the region the right to reach an equitable accommodation with the settlers' use of aboriginal lands. One of the more recent and extensive attempts by aboriginal people of the region to give effect to that right culminated in the 1997 *Delgamuukw* decision of the Supreme Court of Canada, a case in which the Gitxsan and Wet'suwet'en peoples made a claim, ultimately, for aboriginal title and the right to govern their territories.[2] The Gitxsan territories are in the upper Skeena and upper Nass watersheds in northwestern

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[1] The term 'legal order' is used in this paper to describe legal rules and procedures that are undifferentiated from social life and from political and religious institutions. Harold Berman distinguishes legal orders from 'legal systems' which he sees as a distinct, integrated bodies of law, consciously systematised by professionals with specialised institutions, legislation, literature and "science of law": H.J. Berman, *Law and Revolution* (Cambridge, Massachusetts: Harvard University Press, 1983) at 49 and 50.

[2] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010.

British Columbia. The Gitxsan are a people of the Tsimshian language and culture group that includes the Tsimshian proper in the lower Skeena and the Nisga'a in the lower Nass. The Wet'suwet'en territories lie to the south of the Gitxsan in the Bulkley and upper Fraser watersheds. Between the time the *Delgamuukw* action was initiated, in 1984, and the final decision, the British Columbia government decided to join the Canadian and some aboriginal governments in comprehensive tripartite treaty negotiations, one of which, with the Nisga'a people, was successfully concluded.[3]

In its *Delgamuukw* decision, the Court recognized that aboriginal title exists and is protected under the Canadian constitution. Chief Justice Lamer, for the full Court, said that aboriginal title is a people's communal right to the land, which he meant as a right to exclusively use and occupy land in ways that are reconcilable with the nature of the people's attachment to the land.[4] He described it as *sui generis* in that it could not be completely explained by either the common law of real property or by aboriginal land-holding laws. This is because it arose from the peoples' possession before the assertion of British sovereignty.[5] It is the reconciliation of aboriginal peoples' pre-existence with Crown sovereignty that the Court recommended should be negotiated between the aboriginal parties and the Crown, albeit reinforced by the Court's judgments.[6]

The Court in *Delgamuukw* took a historical approach to recognizing claims for aboriginal title. It applied aboriginal law by requiring that those asserting a claim show that they legally occupied the land according to their own tenure and land-use laws and, equally, it applied common law by requiring them to show they had physically occupied the lands to the exclusion of others at the time the Crown asserted sovereignty.[7] But the Court made no corresponding demands on the Crown. Despite being the subsequent claimant, the Crown does not have to show under common law or under aboriginal law how it acquired

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[3] Nisga'a Final Agreement, Canada, British Columbia, and the Nisga'a Nation (4 August 1998, reprinted December 1998). The treaty has been ratified by the Nisga'a Nation, enacted by the British Columbia legislature as the Nisga'a Final Agreement Act, S.B.C., 1999, c. 2, and enacted by the Canadian parliament as the Nisga'a Final Agreement Act, S.C., 2000, c. 7.
[4] *Supra* note 2 at 1082 to 1083, 1095.
[5] *Ibid*. at 1081 to 1082.
[6] *Ibid*. at 1123.
[7] *Ibid*. at 1097 to 1101.

sovereignty of aboriginal lands. The Court merely claims that the Court's conception of aboriginal title "crystallized" at the moment the British "gained" sovereignty in some as yet unexplained manner.[8] Brian Slattery argues that European nations' assertions of sovereignty in North America by discovery, symbolic acts, occupation or treaties among themselves cannot be justified under either international law or basic principles of justice. He says it was only because aboriginal peoples had exclusive title to their territories that they were able to actively participate, as they did, in the formation of Canada.[9] Given the Court's recognition that aboriginal peoples occupied and exercised their laws over their lands prior to the British arriving, and given that the Court has provided no legal theory of how sovereignty was gained, it would seem more logical to characterize sovereignty, rather than aboriginal title, as suddenly crystallizing.

Aboriginal people are able to characterize myths such as title crystallization or sovereignty crystallization through an intellectual tradition that teaches about incomplete ideas and principles.[10] The teachings come through a character known as the trickster — in the northwest coast region, he is Raven and for the Gitxsan, he is Wiigyet.[11] John Borrows uses the trickster's interaction with the Supreme Court of Canada in some of the aboriginal rights cases leading up to *Delgamuukw* to encourage an awakening of understanding by compelling listeners to interpret and reconcile the notion that their ideas may be partial. Borrows says that lessons are learned as the trickster engages in actions which in some particulars are representative of the listeners' behaviour, and on other points are uncharacteristic of their conduct. The trickster is able to kindle these understandings because his actions take place in a perplexing realm that "partially escapes the structures of society and the order of cultural things." [12]

This paper is intended to assist in understanding how what the Court calls aboriginal title and what it calls Crown sovereignty might be reconciled. It will do this by exploring the

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[8] *Ibid*. at 1100.
[9] B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29:4 Osgoode Hall L.J. 681.
[10] John Borrows, "Re-Living the Present: Title, Treaties, and the Trickster in British Columbia" (1998/99) 120 BC Studies 99.
[11] The Book Builders of 'Ksan, *We-gyet Wanders On* (Saanichton: Hancock House, 1977).
[12] *Supra* note 10.

perplexing realm of law and legal process in England and northwestern Europe in the times before the concepts of common law and sovereignty came into being and comparing it with the legal order of the Gitxsan and their neighbours in northwestern America. In Europe, the historical and geographical context will be those early medieval peoples who lived in the lands bordering the North Sea, in as much as explication of those legal systems helps in understanding the legal system in England over the five centuries between the Anglo-Saxon invasions and settlement and the assertion of Norman sovereignty. In British Columbia the context will be the Skeena River, Nass River and northwestern coastal region of British Columbia in historical and recent times. This comparison has two purposes. The first is to provide a historical framework and analysis that may assist aboriginal and Crown treaty negotiators to reconcile Gitxsan pre-existence with that of the English and, later, Canadian common law. The paper will do this by paying particular attention to what we now call constitutional law, land law and criminal law in the two systems and by describing their similarities and differences. The second purpose is to provide a historical framework and analysis that may explain how concepts of "Crown" and "sovereignty" came about and how the former conceived it could assert the latter over other peoples with legal impunity. The paper will look at how the Anglo-Saxon Crown was able to assert sovereignty over English lands and how the common law and the concept of property emerged from that assertion.

In 1470, an English serjeant-at-law considered the common law to have been in existence since the creation of the world.[13] Many judges and lawyers in Canada as well as other common law jurisdictions, unlike Borrows' trickster, still have not escaped from the "structures of society and the order of cultural things" from which that fifteenth-century lawyer looked out. From this vantage point, both pre-common law England and Gitxsan law and society have already been pre-judged. Consider J.H. Baker in the 1990 edition of his legal history textbook describing justice in England before the common law:

> Force belongs in the state of nature to individuals who have the power to use it, and the suppression of private force by investing in the community at large with a

[13] J.H. Baker, *An Introduction to English Legal History*, 3d ed. (London: Butterworths, 1990) at 1.

> greater force required a degree of social organisation which it must have taken countless dark and forgotten centuries to achieve.[14]

Now compare that with British Columbia's Chief Justice Allan McEachern when he says in his trial decision in *Delgamuukw*;

> I do not accept that the ancestors [of the Gitxsan and Wet'suwet'en] "on the ground" behaved as they did because of "institutions." Rather I find they more likely acted as they did because of survival instincts which varied from village to village.[15]

McEachern C.J. went on to say in *obiter* that he thought "aboriginal life in the territory was, at best, "nasty, brutish and short." [16] Baker and McEachern represent the high echelons of legal academia and the judiciary respectively; both used the imagery and ideas of seventeenth-century political philosopher Thomas Hobbes to describe peoples outside of the common law: peoples who, in Hobbes' words, "live without a common power to keep them all in awe." [17] In contrast, the comparison attempted in this paper follows legal scholar Catherine Bell and anthropologist Michael Asch who reviewed anthropological textbooks espousing contrasting poles within the discipline and looked for common elements across the spectrum of current anthropological thought. They found a common view that every group of human beings is organized into a society with respect to all aspects of social life and has an overall culture and that no society exists that does not have jurisdiction over its members and its territory, which, to the authors, means all societies have "the institution of law and the means to enforce sanctions against its members." [18] This paper will therefore assume that these social and cultural attributes were and are held by the peoples of early medieval northwestern Europe and of aboriginal northwestern North America.

The theoretical device used to explicate the social and legal orders of Anglo-Saxon and and Gitxsan societies so they can be compared might be called structural essentialism. It

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[14] *Ibid.* at 4.
[15] *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 at 441 (B.C.S.C.).
[16] *Ibid*. at 208.
[17] Thomas Hobbes, selections from "Leviathan" in Brian Tierney & Joan Scott, eds. *Western Societies: A Documentary History* (New York: Knopf, 1984) 2:8-10.
[18] Catherine Bell & Michael Asch, "Challenging Assumptions" in Michael Asch, ed. *Aboriginal and Treaty Rights in Canada*, (Vancouver: UBC Press, 1997) 38 at 64 to 71.

assumes that within the vast array of observable social phenomena lie deeper patterns. It is proposed that these patterns or basic social structures mould how societies evolve and constrain the behaviour individuals within them. It is suggested that the number of such fundamental structures is limited and that similar structures will produce similar practices in the people who live under them.

## 2. The Northwest Coast Legal System

The history of northwestern coast peoples is contained in their *adaawk*,[19] sets of oral accounts, each of which has been memorized by a long succession of chiefs of the particular lineage whose story they tell and whose prerogatives and responsibilities they affirm. The histories cover the period from when humans first walked the land until the present.[20] The peoples have always said they have lived on their land since time began, while most scientists have dated human occupation of the region from sometime after deglaciation from the last ice-age, about 10 000 years ago, when immigrants from Asia were said to have crossed the Bering land bridge to populate the Americas. But recent geological and archaeological work has established that habitable land existed during the ice-age in a now submerged area off the north coast of British Columbia.[21] These findings integrate well with the existing *adaawk* record to provide a richer geographical context and longer time-scale to human events in the region. Closer to the present, side by side readings of *adaawk* and the European settlers' documents have started to provide a more complete account of the 18th to 20th century history of the region.[22]

*Adaawk* histories can be grouped into a number of distinct periods.[23] In the early ones, the various peoples explored a treeless and still geologically shifting land. They established villages on stable ground and worked out a way of living on the land, often having to abandon their original choices as conditions changed. A common theme of the early period is the story of a lineage descended from a common ancestor acquiring specific land territories through encounters with the spirits of that land. The concept of a single lineage as the basic unit of society together with the concept of its spiritual

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[19] Most Tsimshianic language group concepts are expressed by similar words, similarly pronounced in all languages of the group (Tsimshian proper, Southern Tsimshian, Nisga'a and Gitxsan), although a large number of orthographies are in use. The orthography used in this paper follows that used in *Tribal Boundaries* (*infra* note 20) for the Gitxsan.

[20] N.J. Sterritt *et al*, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998) c. 2.

[21] See *e.g.* H.W. Josenhans *et al*, "Post Glacial Sea Levels on the Western Canadian Continental Shelf: Evidence for Rapid Change, Extensive Subaerial Exposure, and Early Human Habitation" (1995) 125 Marine Geology 73; D. Fedje, "Millennial Tides and Shifting Shores: A Gwaii Hanaas Story and Its Implications for Coastal Archaeology" (1998) Unpublished manuscript on file at Parks Canada, Victoria.

[22] See *e.g.* R. Galois, "The History of the Upper Skeena Region, 1850 to 1927." (1994-5) 9:2 Native Studies Review 113; S. Marsden & R. Galois, "The Tsimshian, the Hudson's Bay Company, and the Geopolitics of the Northwest Fur Trade, 1787-1840." (1995) 29:2 Canadian Geographer 169.

[23] *Supra* note 20 fn. 1 at 273.

connection with a defined area of land form the cosmological basis of the subsequent legal system. In later periods, there were famines and migrations; new groups came into the region and reached accommodations with those already there or else moved on. In the process, a mosaic of linguistic groups took hold of the region; to the south of the Tsimshian speakers of the Skeena and Nass rivers are Wakashan speakers, while to the east and north numerous Athabascan-speaking peoples have lands across the prairies to the Canadian Shield, and off shore the Haida have their own distinct language. As well, new concepts of how the world works, new social structures and new kinship lineages were added to those established earlier. In more recent periods, wars were fought and peace treaties settled with land given in compensation. In this interaction of peoples with each other and with the land and its animals, a system of law emerged which has also been recorded in the *adaawk*.[24] People worked within this land tenure system as they met the changing economic conditions occasioned by the migration of Europeans into the region and in the process trapped for fur, managed pack-trains for miners, farmed hay for the pack animals, supplied meat, fish and firewood to railway builders and riverboat operators, and logged cedar poles. This was "not discontinuous change, but evolution based on upon existing patterns." [25] These activities continued until the early 1960s when large-scale forest tenures and a massive intrusion of government social welfare agencies cut off people's access to their House resources, substituted government welfare payments for family resource income, and disrupted family life through massive child apprehensions.[26]

The most interior of the Tsimshian-speaking peoples are the Gitxsan, who for a long time have lived in the Skeena watershed above Kitselas canyon and the Nass watershed above the Kinsuch River confluence. The constitutional basis of Gitxsan society, as with other peoples in the region, is a kinship system designed so that in any given political, economic or legal issue, each individual involved will have balanced obligations to all those involved. Each person in the society is born or, more rarely, adopted into a *Wilp* or

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[24] Gisdaywa & Delgamuukw, *The Spirit in the Land* (Gabriola: Reflections, 1987) 25-28; *supra* note 18 at 15-58.
[25] *Ibid.* at 45.
[26] Neil J. Sterritt, personal communication.

House, an extended family of between 50 and 200 persons who can trace their lineages through their mothers to a common ancestor. Each House is an autonomous political unit whose internally negotiated decisions are voiced, but not directed, by its Chief. The House and its Chief share the same name; for example, Delgamuukw is the Chief of the Frog Clan House of Delgamuukw of Kispiox. Although Delgamuukw was the first of 39 Gitxsan plaintiffs named in the *Delgamuukw* case, neither he nor his House has any greater legal powers than any other Gitxsan House or Chief. There is no higher authority than the House Chief — no high chief of the Gitxsan or even of a Clan. When a Chief dies, another House member, usually a sub-Chief, or 'wing' Chief, who has been groomed for the role, will assume the name. If, however, that person proves to be unsuitable, another person who has the appropriate qualities will be selected from the House. There is then, an election process, but from a limited pool of trained candidates. The selectors will be other wing-chiefs and matriarchs of the House in consultation with other, closely related Houses.

Each House identifies itself as a member of a geographic grouping and as a member of a wider genealogical grouping. A House belongs to a village community where its members live, usually close to their adjacent House territories. Much of the political and economic interaction among Houses occurs at the village level through communal economic activities, feasting and intermarriage. The village level of organization is more formalized on the coast where the village site, its inhabitant's Houses and their territories form an integrated tribe. Houses are also members of one of the four Gitxsan Clans (*Pdek*). Clans are wider kinship groupings defined according to ancient common ancestors whose biological lines are now not known. The most important secondary law states that a person cannot marry within his or her own Clan. Thus every person is born into the same House and Clan as their mother and their father will always be from a different House and Clan. This ensures that the obligations of the kinship group on the 'mother's side' is separate and distinct from those of the 'father's side' for each individual, and that in any dispute an involved individual will have responsibilities on both sides of the issue. This is true of disputes and, indeed, all interactions ranging in scale from those within the nuclear family to those at the international level.

Cross-cutting the local divisions of villages and peoples is another order of relationships among Houses, the *wilnaat'aahl*. This is a grouping of Houses whose lineages are closely related in the sense that they have common ancestors whose activities are recorded in *adaawk* shared among them. It is a flexible grouping of relations that can include a wider or narrower connection depending on the legal or social context. An example of a broad *wilnaat'aah* was effectively employed by Chief Ligeex, the leading Eagle Clan chief of the Tsimshian Gispaxlo'ots tribe, as he inserted the newly arrived Hudson's Bay Company into his Skeena River trading empire in the late 18th and early 19th centuries. As a preface to their detailed cross-cultural history of Ligeex's endeavour, Marsden and Galois explain the *wilnaat'aahl*:

> Each House is part of a *wilnaat'aahl*, or network, of Houses sharing a common ancient heritage. The Houses in each network trace their origins through the matrilineal line to a common ancestor. They also share a common history which tells of the migrations of their ancestors and their dispersal across the Northwest Coast…Each of these *wilnaat'aahl* is part of a larger exogamous matrilineal group, the clan, within which everyone is considered kin.[27]

Equivalent Clans and *wilnaat'aahl* are thus found among all peoples in the region, facilitating trade and border issues between peoples. The Gitxsan, for example, can recognize distant relatives in an area west to the coast and Haida Gwaii, south to Bella Coola, north to the Stikine country, and inland to the Wet'suwet'en and other Athabascan peoples of the Fraser drainage. A complex web of relationships extends over a wide area with crests commemorating common origin and migration events being reproduced on poles, blankets and other regalia to let travelers recognize their clan relations.[28]

The power of the House, its *daxgyet*, comes not only from its kinship net and its history, but from the bond between the group and its territory. In the early historical period, the Chief would touch a cane to the land to signify the power of the House merging with that of the land. Later the crest pole, the *xwtsaan*, carried on the same symbolic role by reaching up to the spirit forces that give the people their power and by being planted in

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[27] Marsden and Galois, *supra* note 20 at fn. 5, 180.
[28] *Supra* note 20 at 272n5; *Supra* note 24 at 25.

the ground so that man spirit and land are linked.[29] Thus, land law based on each House being responsible for one or more discrete, well-defined territories is founded on more than economic utility. The land base of the Gitxsan and each of its neighbours is wholly made up of a mosaic of such House territories. When a territory was originally settled, the House Chief called a feast where its acquisition was announced and invited Chiefs of other Houses, to witness, and thus validate, the new tenure. An *adaawk* of the Gitanyow Frog House, describes its arrival at its present village area:

> The chiefs established themselves at Gitanyow and raised their poles. The poles gave them power or coat of arms and gave them the right of ownership over all the lands, mountains, lakes and streams they had passed over and camped or built villages in. The power of these poles goes unto the lands they had discovered and taken as their own.[30]

Once acquired, rights to territory are inalienable unless the House suffers depopulation or otherwise becomes so poor it cannot meet its obligations at the feast. In that case, another House considered close because of historical, Clan and home village ties (that is, within the same *wilnaat'aahl*) will take in the remaining members of the depleted House along with its *adaawk*, crests and chiefly names. If a House is so impoverished that a related House has to assume its funeral obligations, there may be a temporary transfer of territory control until the obligations can be repaid. Should the new lineages grow strong again and the melded House too large, it will divide into two again. Over time, there is thus a continuous merging and splitting as Houses' and even Clans' fortunes wax and wane. But all the time, the histories, songs and crests are preserved.[31]

Compensation involving significant House properties such as land, wealth, names or crests is known as *xsiisxw* and will be given for serious offences that affect a whole House. If the dispute is between Houses of the same people, territories are transferred to the wronged House on a temporary basis, usually the lifetime of the individual victim's immediate family. If the dispute is among Houses of different nations, a permanent transfer of territories is made. Such settlements were often made after wars where new

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[29] *Supra* note 24 at 26.
[30] Wilson Duff, ed. *Histories, Territories and Laws of the Kitwancool,* Anthropology in B.C. Memoir No. 4 (Victoria: BC Provincial Museum, 1959) at 24.
[31] *Supra* note 20 at 13.

peoples had come onto Gitxsan borders and were not familiar with the established law. Although called wars, the incidents were no more than international feuds between two House or Clan groups. The fighting did not involve a specialized military and, although massacres of entire villages are recorded, generally there were few deaths. For example, when recently-arrived Athabascan hunters began intruding into northern Gitxsan Wolf territories about 200 or 300 years ago, the resulting skirmishes over trespass escalated into a war. The war leader, Suwiiguus, a nephew of a Wolf House Chief, led a party of over a hundred Wolf Clan members from his own and an adjacent village and killed most of the men in the Athabascan villages, capturing the women as slaves.[32] Peace usually came when the original death or deaths were considered balanced by the deaths of persons of equivalent status on the other side. But the decision to accept compensation or to initiate a feud was often close. In 1861 for example, a brother of the great Tsimshian trader, Ligeex, was shot by a Kitselas man. This act diminished Ligeex's status and that of his lineage in the eyes of his fellow chiefs. To restore his honour, he was eager to fight, to kill someone of equal or higher status in the offender's lineage. He was reminded by his kinsmen, who would have born the brunt of the ensuing feud, that the Kitselas had an easily defended village in a canyon and now had guns:

> Finally Ligeex decided that there would not be war. He decided that he would dance the war dance and pay for the blood of the Kitselas chief who was unavenged. He knew also that there would be payment for the blood of the chief who had been killed at Kitwanga. He sent messengers to Kitselas to tell them there would be no war, and that he and his people would come to Kitselas for a feast.[33]

Thus payments by both parties were made and the matter was settled at a feast that would have been in the form of a *xsiisxw*.

The basic principle of international land tenure law extends to individuals. It states that a person cannot trespass on another House's territory without that House Chief's permission. Such permission was given to travelers passing through on the condition that no resources were taken, although traders, like Ligeex, would have been required to pay for their privileges. Rights of *amnigwootxw*, lifetime resource-use, are usually accorded

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[32] *Supra* note 20 at 38-39.
[33] A.W. Clah, Diaries and Papers, WMS Amer 140, (London: Wellcome Institute).

to spouses and children of House members if they want to use them. In this way, most families in a community can access resources and choose with which relatives they wish to work according to their particular needs and preferences. The famous fugitive, Geel or Simon Gunanoot, made good use of his father's territory in the Meziadin Lake area through *amnigwootxw* while on the run from pursuing Pinkertons agents from 1906 to 1919.[34] Trespassers are usually given warnings, three being the number quoted in the *adaawk* most often. In the past, persistent trespassers were killed, as unregulated resource-use would threaten the spiritual, economic and social fabric of the community. Usually, the more distantly related the trespasser was, the fewer warnings he received. Healthy, trespassing strangers were killed on sight.[35]

Land law and dispute law intersect in that there is no such thing as an accident, so that a House is responsible as much for an accident on its territory as it is for a homicide or any other deliberate act by one of its members. When, in 1872, some miners' failed to extinguish their campfire and the fire spread to burn the Gitxsan village of Kitseguecla, including 12 crest poles, the Gitxsan expected compensation according to their law. When it failed to materialize, the Chiefs ordered a blockade of the Skeena River to all trading and supply boats. A meeting on the gunboat sent by the province to the mouth of the Skeena was seen as an attempt at a feast by the Gitxsan who had traveled there and for them the payments given by the governement served as compensation and the matter was settled. Accounts in Victoria newspapers told only of ship's guns being fired to "impress the savages." [36] Other major incidents between the Gitxsan and the provincial government in the late 19th century period can also be traced to the settler community misunderstanding, or ignoring, the significance of compensation and of responsibility for accidents in the Northwest Coast legal system. In a 1884 murder case, Mr. Youmans, a Hazelton merchant, failed to report the accidental drowning of one of his Gitxsan crewmen on a Skeena River canoe trip and was subsequently stabbed by the man's father. The leading Chief in Gitanmaax, Gyetmgaldoo, attempted to explain the Gitxsan law in a letter to the British Columbia Provincial Secretary:

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[34] *Supra* note 20 at 219, 228-230 & fn. 6, 272.
[35] *Ibid*. fn. 7 at 272.
[36] *Supra* note 24 at 51 to 53.

> We wish to lay before you our law in regard to accidents and death that occur in company with others. It is expected that survivors shall immediately, or as soon as possible, make known to the friends of the injured or deceased, what has taken place…The general custom among the Indians is that if anyone calls another to hunt with him, to go canoeing, etc., and death occurs, the survivor always makes a present corresponding to his ability, to show his sympathy and good will to the friends of the deceased, and to show there was no ill-feeling in the matter.[37]

In 1888, Kamalmuk, a father whose son had died of witchcraft, shot the Kitseguecla shaman who was responsible — a legitimate reponse under Gitxsan law. Provincial police, however, intervened and in the course of an arrest, Kamalmuk was killed by a policeman. When authorities failed to hold the policeman accountable and failed to compensate the family, again this led to a general uprising and more military forces were dispatched to the Skeena River.[38]

In dispute law, deaths and injuries, insults and debts are the responsibilities of kinship groups, Houses and Clans, not individuals. The goal is to restore harmony in the community rather than punish an offender. As with land disputes, a settlement is negotiated by the relatives of the individual parties to the dispute or who are the offender and victim. The participants in the discussions are determined by the relationships between the Houses of those involved and are different in every case. If compensation is involved, the House as a whole must pay it and the injured party's House receives it. Compensation in the form of land rights has been described with respect to major international offences involving death. For less serious incidents and those within the nation or where culpability is not so great, transfer of wealth at a feast is considered an appropriate settlement. In compensation for the killing of his brother in the Kitselas incident referred to above, Ligeex received a female slave, six marten skins, one fisher skin, one beaver pelt, and one elk hide.[39] The amount of compensation is more gauged to settling the disquiet felt by the other party than replacing the lost value. But in the past, if the compensation process was not quickly started, homicides and other serious offences could escalate into feuds as retaliation killings were lawful after warnings had been

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[37] Letter of Gyetmgaldoo to the B.C. Provincial Secretary (September 7, 1884) cited in Galois, *supra* note 20 at 134.
[38] Galois, *supra* note 20 at 136.
[39] *Supra* note 33.

given. Those who were considered to be beyond restoring to the community and a threat to its integrity, were banished. In times when food and shelter came from complex cooperative efforts, banishment was usually a death penalty. If the dispute is within a House there is no compensation and often no formal record of the matter. If within a Clan, the settlement may involve the exile of the responsible person's House from the Clan's lands. A case from the early history of the Gitanyow Frog Clan illustrates this. When a member of Gamlaxyeltxw's House killed a clan relative, Skawil, in his territory and village at the headwaters of the Nass, the group of Houses related to Gamlaxyeltxw could not stay in the village or move to other villages in that headwaters area because Skawil's relatives lived in them. The exiled group migrated down the Nass River establishing various villages on their journey of many generations before reaching their present village of Gitanyow. They remember the great sadness over leaving their original territories in a *limx'oy* — a dirge song.[40]

The source of the legal system of the Gitxsan and other Northwest Coast aboriginal peoples may lie in their belief in reincarnation and transformation. The idea that an animal can transform into a human and back again and that a human can reincarnate into another human being or, more rarely, into an animal lends credence to the concept of the trickster always being present in some form or other to remind people that thinking only for the moment inevitably leads to disaster.[41] If past events are not just history, but can directly effect the present and the future, then actions or conflicts at one point in time can have implications in a future when the roles of those who initiated them could be quite changed. The emphasis on the *adaawk* and the crests, on recording history, on knowing where and who one comes from, on staying on one territory and on maintaining kinship connections are all consistent with this world view. The exogamous, matrilineal House and Clan seems to have ensured that for every dispute there is support for the two parties, both to negotiate the settlement and to pay for it. From the international to the family level, the law takes the kinship units as being the legal actors. There is no evidence of legal or enforcement specialists directing its operation or playing roles of lawyers or

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[40] *Supra* note 20 at 20.
[41] *Supra* note 11 at 7.

police. There is no evidence of hierarchy above the level of the House, and even the launching of military expeditions appears to have left no lasting tiered organization. Legal process thus emerges out of the negotiated interaction of equal and autonomous groups. In practice, it has sought to allocate compensation for dishonour caused, rather than punishment for offences or replacement of losses, an emphasis that would best achieve its stated purpose of restoring balance.

### 3. The Early English Legal System

In the first century AD, two broad tribal groups lived on the northwestern frontier of the Roman Empire — the Germans and the Celts. While the Celts had been familiar to classical historians since Aristotle, the Germans were relatively new to them, appearing in Roman records at the end of second-century BC with the migrations of the Cimbric people, one of the many Germanic tribes with whom the Romans would be warring over the coming centuries. The first reliable Roman description of Germanic society was completed by Tacitus in 98 AD.[42] His second-hand summary of military intelligence and trader's reports is considered a good reflection of the empire's experience of its sometime foes and sometime mercenary allies from across the Rhine,[43] although its inherent uncertainty requires careful evaluation.[44] In particular, Tacitus sometimes uses his account of the Germani as a mirror to reflect an idealised version of his urban audience's social and moral virtues before they succumbed to the vices of civilisation. This stereotype of hard primitivism is applied to both Celts and Germani, who were said to be strongly attached to freedom from institutional authority but impulsive and governed by strong emotions, instead of discipline and reason.[45] While some historians suggest that Tacitus is sketching an abstract 'barbarian' cultural type,[46] here I argue that Celtic and Germanic peoples showed similar social traits because they had similar social structures.

Tacitus describes the Germani as a number of peoples without permanent kings who governed themselves through scheduled assemblies, which were led by a chief chosen "more through his influence than his power in command." [47] Here, the people decided matters such as mutual settlement of feuds, marriages, selection of leaders, and declarations of war.[48] On minor matters the chiefs consulted among themselves. The assembly also chose specialist adjudicators who administered the law in each community; [49] in effect, judges. Most offenders, including killers, thieves and adulterers, were

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[42] Tacitus, *Germania*, trans. and commentary R.B. Rives (Oxford: Clarendon Press, 1999).
[43] A.C. Murray, *Germanic Kinship Structure* (Toronto: Pontifical Institute of Medieval Studies, 1983).
[44] *Supra* note 42 at 66.
[45] *Ibid.* at 61 to 63.
[46] *Ibid.* at 64.
[47] *Ibid.* at para. 11.
[48] *Ibid.* at para. 22.
[49] *Ibid.* at para. 12.

required to pay compensation for their actions. Part of the payment, the *fredus* in later Lombardic law, went to the king[50] and the remainder went to the victim and his or her kinship group:

> [B]y a fixed number of cattle and sheep they can make amends even for manslaughter, and the entire family receives satisfaction: to public advantage, since feuds waged freely are more fraught with danger.[51]

The danger referred to by Tacitus was of feuds between kinship groups, as a man had a duty to accept the enmities and the friendships of his father and kinsmen.[52] Only slaves were not protected by compensation or revenge. According to a close analysis of Tacitus' text by historian Alexander Murray, the German kinship groups were not ancestor-focused corporate clans as previously thought, but were ego-focused , that is, centred on the individual actor, and bilateral, with important bonds with the mother's as well as the father's family.[53] On marriage, the groom gave a gift to his bride's family, a bride-price that recognised the property she was bringing to the groom's lineage.[54] Men were as close to their sisters' sons as to their own children – the more kin a man had, the more honour he was accorded.[55]

The Roman accounts of Germanic land holding are problematic. According to them, land appears to have been held communally with neither individuals nor kinship groups appearing to occupy the same area from year to year. Writing in the first century BC, Julius Caesar in his account of the Gallic wars, said of the Germani:

> [N]or does anyone have a defined measure of land or set boundaries, but every year the magistrates and leading men distribute to the clans and kindreds and groups of people who have come together as much land and in such location as seems proper; and they force them to depart from it the following year.[56]

Tacitus' sources seem confirm this account, adding that

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[50] *Ibid*. at para. 12.
[51] *Ibid*. at para. 21.
[52] *Ibid*.
[53] *Supra* note 43.
[54] *Supra* note 42 at para. 18.
[55] *Ibid.* at para. 20.
[56] Julius Caesar, *Bell. Gall.* vi. 21.

> [l]ands in proportion to the number of tillers are occupied one after another by them all together, and then divided among them according to rank: a broad expanse of fields guarantees an ease of division.[57]

This appears contrary to archaeological evidence, which indicates small fields with fixed boundaries that were maintained for long periods.[58] It could be that the sources were attempting to maintain the stereotype of the Germani as a semi-nomadic people. This is also contradicted by Tacitus relating that the sole arable crop was wheat — a plant that requires reasonably well-cultivated land to grow. Cattle, however provided the main source of food in the form of milk, and it is likely the Germanic groups prqctised some form of transhumance. In any event, the land would appear to have been held by only the larger kinship or tribal group, but neither Tacitus nor Caesar describe any attachment of a tribe or kindred to a particular area of land.

The German tribes were renowned for their military skills and tactics. At Teutonberg Forest in 9 AD, a coalition of tribes under Arminius had annihilated three Roman legions in the worst military disaster of the reign of Caesar's successor, Augustus. Understandably, Tacitus gives more detail of Germanic military life than civil life. He describes a battle order where the main masses of the people fought on foot in kinship groups, with a mounted elite ordered somewhat separately from the rest of society.[59] Distinct from the kings who were chosen from royal lineages, the war leaders led "more by example than command," but their commands did not extend beyond the current campaign.[60] The elite military corps were organised by chiefs from a group of 'companions' – young men and boys chosen by the people. The power of a warlord was determined by the number and bravery of his companions,[61] who were each rewarded with a war horse, a spear and a share of cattle and crops. These supplies came, in turn, from voluntary gifts from the rest of the population.[62] In peacetime, the companions were

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[57] *Supra* note 42 at para. 26.
[58] *Ibid.* at 222.
[59] *Ibid.* at para. 6.
[60] *Ibid.* at para. 7.
[61] *Ibid*. at para. 13.
[62] *Ibid*. at para. 15.

considered an ‘ornament’, and with extended peace, the chief took his troops to fight in other lands to maintain their prestige and coherence.

To understand how the Germanic legal order later evolved, it is important to note in Tacitus’ account the presence of a military code of conduct that had its own offences and punishments. In substance and process, these rules were quite distinct from the rules of compensation/feud that governed civilian offences and disputes. Military law decreed that in battle it was a disgrace for a companion not to fight as fiercely as his chief, but more importantly, it was infamy to survive a fallen chief: “The chiefs fight for victory; the companions for their chief.” [63] There were two types of military offence, each with its own type of summary punishment. Traitors and deserters were hung from trees; cowards, the unwarlike and “those who disgrace their bodies” – likely meaning effeminate men assumed to be cowards – were submerged in marshes.[64] Tacitus says the difference reflects a policy that villains should be made public examples, while shameful deeds should be hidden.

The Germanic peoples most familiar to Tacitus were those across the Rhine River who, over the next four centuries, drove eastwards along the north shore of the Danube to the Black Sea. That area was natural grassland, the western end of the Asian steppe corridor extending back to northern China, which over the next millennium was to become an route for successive invasions of horse-mounted Turks and Mongols. In the fifth-century, the first wave, the Huns, was on its way. Under Attila, they and their east German allies swept across the German plains almost to the shores of the North Sea, part of a scattering of dominoes that included the radical transformation of the Western Roman Empire and the invasion of Celtic Britain in coastal row boats by German tribes from the country around the mouths of the Elbe and the Rhine.[65] These were principally Angles, Saxons,

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[63] *Ibid*. at para. 14.
[64] *Ibid*. at para. 12 and at174.
[65] Colin McEvedy, *The New Penguin Atlas of Medieval History* (Harmondsworth: Penguin Books, 1992) 10 to 18.

Jutes and Frisians, but included people from an area extending from Scandinavia to southern Germany.[66]

By the seventh-century, the Germanic invaders had settled all of eastern Britain, leaving the Cornish peninsular, Wales, Cumbria, Scotland and Ireland to the Celtic tribes. The legal order they brought with them was very similar to that described by Tacitus five centuries earlier except that our documentation of it comes from the people's own institutions rather than from an outside imperial observer. The surviving sources include the kings' law books, royal and other charters and writs, wills, legal memoranda, and church records. Throughout the Anglo-Saxon period and beyond it, these documents were written by clerics and most were records of the church's own land holdings and its role in moulding the emerging English social institutions. There is then a tendency for the records to relate to the legal actions of the king and his councillors, and of the corporate church and its leaders. Nevertheless, it is possible to trace the continuing interaction, noted by Tacitus, between, on the one hand, the self-sufficient, kinship-based peasant communities with their local popular assemblies and compensation-based law and, on the other hand, the hierarchical military elite with its unflinching service to the war-leader, its rigorous chivalrous and criminal regimens and its dependency on the peasant community for food and supplies.

According to the eminent English historian on the Anglo-Saxon period, Sir Frank Stenton, "unlike Gaul, Spain and Italy, Britain was invaded, not by tribes under tribal kings, but by bodies of adventurers, who according to their own traditions were drawn from three distinct Germanic peoples." [67] The result was a land divided among a remarkable number of separate dynasties, which allowed the tradition of local government and justice to continue and evolve, albeit under the increasing control of the increasingly centralised monarchy. Stenton, Pollock and Maitland[68] and other authors [69]

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[66] James Campbell, Eric John & Patrick Wormald, *The Anglo-Saxons* (Oxford: Phaidon Press, 1982) at 31 to 34.
[67] F.M. Stenton, *Anglo-Saxon England*, 3d ed. (Oxford: Clarendon Press, 1971) at 37.
[68] F. Pollock & F.W. Maitland, *History of English Law Before the Time of Edward I* (Cambridge: University Press, 1895).
[69] *e.g.* H.R. Loyn, *Anglo-Saxon England and the Norman Conquest* (London: Longmans, 1962) at 290.

consider the fundamental unit of early (seventh- to eighth-century) English society to have been the free peasant and sometime foot-soldier, subject to the war-leader or *Bretwalda* but not to any intermediate secular lord. Little was recorded about the workings of the English kindreds, most likely because they were universally known. The kinship system recorded in the English law codes was not as elaborate as those of twelfth-century Scandinavia or eighth- to thirteenth-century Celtic Wales and Ireland, but was consistent with that earlier recorded by Tacitus in the German homelands. The Celtic and Scandinavian kinship systems — whether bilateral, like the Germanic, or patrilineal and bilateral, like the Irish; whether headed by a monarch, like the Welsh and Norse, or by chieftains only, like the Irish and Icelanders — all had laws that allowed strangers, freed slaves and, perhaps most often, kinless soldiers of a successful invading army to achieve the status of free tribesmen after a designated number of generations in the same chief's territory and after acquiring certain amounts of property. It was, however, the kinship group, rather than the individual that climbed the status ladder. The early English kinship laws were simpler, or less completely recorded, but appear to provide the same ladder up which the kinless stranger could start to climb with the knowledge that his descendants would reach the status of *ceorl* or of *gesithcund*, a full freeman (Fig. 1).

**Figure 1. Early Medieval Kinship Ladders in Northwest Europe.**[70]

| | ***Brehon (Ireland) (8C - 11C)*** | ***Cymric (Wales) (10C - 13C)*** | ***Norse (12C)*** | ***Anglo-Saxon (7C - 8C)*** |
|---|---|---|---|---|
| Free Tribesman<br>↑<br>**Kinship Ladder**<br>Bonded "strangers" | ***Aire*** (free)<br>↑<br>5 generations<br>***Fuidir*** (unfree)<br>↑<br>3 or 4 generations<br>***Senclaith*** | ***Breyr*** or ***Uchelwr***<br>↑<br>5 generations<br>***Aillt*** or ***Taeog*** (unfree)<br>↑<br>4 generations<br>***Alltud*** | ***Arborinn***<br>↑<br>5 generations<br>***Leysing's Sons***<br>↑<br>4 generations<br>***Leysing*** (makes "freedom ale")<br>↑<br>***Thrall (Frials-giafi)*** | ***Gesithcund*** *(twelve-hynde man)*<br>↑<br>4 generations<br>***Ceorlisc*** (free) *(twy-hynde man)*<br>↑<br>***Theow or Laets*** |

In all these societies, the need for kinship groups to establish, maintain and enhance their free status was essential to conduct business, receive and pay its debts, receive and pay the compensation needed avoid feuds, and to exercise land rights. Different configurations of kin had different roles in these matters as shown in Figure 2.

[70] D.A. Binchy, "Historical Value of Irish Law Tracts" in *Celtic Law Papers* (Bruxelles: Les Editions de la Librairie Encyclopedique, 1973) 96 to 102; F. Kelly, *A Guide to Early Irish Law* (Dublin: Dublin Institute for Advanced Studies, 1988); H. Lewis, *The Ancient Laws of Wales* (London: Elliot Stock, 1889); H.R. Loyn, "Kinship in Anglo-Saxon England" (1974) 3 Anglo-Saxon England 197; N.T. Patterson, *Cattle-Lords and Clansmen: The Social Structure of Early Ireland* (Notre Dame: University of Notre Dame Press,1994); F. Seebohm, *Tribal Custom in Anglo-Saxon Law* (London: Longmans, 1911); s*upra* note 66 at 59; s*upra* note 67 at 316.

**Figure 2. Kinship Groups and their Obligations in Northwestern Europe.**

| | ***Brehon (Ireland) (8C - 11C)*** | ***Cymric (Wales) (10C - 13C)*** | ***Norse (12C)*** | ***Anglo-Saxon (7C - 8C)*** |
|---|---|---|---|---|
| **Honour-price** (for loss of social status, injury) | *eneclann, dire, log n-enech* (amount depended on victim's status, being about 1/3 of the person's cattle holding) | *wynebwerth, sarhaet* (amount depended on victim's status) | *rett* (amount depended on victim's status) | *bot* (amount depended on victim's status) |
| paying / receiving kindred | Bilateral, ego-centred kindred of 3 generations | Bilateral, ego-centred kindred of 7 generations | | |
| **Blood-price** (for physical loss and death) | *eraic, cro* (fixed amount of 21 cows for the death of a freeman) | *galanas* **(fixed** amount**)** | ***bauga*** | *wergild* (amount depended on victim's status and extent of loss) |
| paying/receiving kindred | ***Indfine*** Patrilineal, ego-centred kindred of 6 generations with contingent land rights. | ***Cenedl*** Bilateral, ego-centred kindred of 7 or 9 generations of tribesmen. | *Baugamen* Bilateral, ego-centerd kindred of *Odalmen* of 9 generations of kin and 4 or 5 generations on same land. | ***Maegth*** Bilateral, ego-centred kindred of 7 generations with contingent land rights. |
| **Land-holding kindred** | *Derbfhine* (4 generations) or, later, *Gelfhine* (3 generations) Patrilineal, ego-centred kindred with vested rights in *fintui* land. | ***Gwely*** Patrilineal, ancestor-centred land-holding kindred of 4 generations. | *Odal* | 'Inner kin' 2 or 3 generations with vested land rights. |

In the meantime, a kinless man was protected in the feud and from the price of causing a death, the *wergild*, only by the *Bretwalda* to whom he was bonded.

In the same way that a *Bretwalda* ruled a people, not a territory,[71] a kinship group was responsible for its members' actions but did not hold land *per se*. By regulating the rules of inheritance, however, a kinship group ensured that the individual possessor "had no right to alienate any part of it to the disadvantage of his expectant heirs." [72] It was an exercise of kindred jurisdiction, not kindred ownership. There is eighth-century evidence of original tribal territories called *maegths* (meaning kindred) or, in Latin, *regiones* or

[71] A.W.B. Simpson, *Legal Theory and Legal History* (London, Hambledon Press, 1987) at 2.
[72] *Supra* note 67 at 317.

*provincae*, each named after the tribe which settled it. A list called the Tribal Hidage indicates that these units were used by the *Bretwaldas* as part of an assessment system to support the military. This support had become mandatory and more formal since Tacitus's time and took the form of *feorm* or food rent and *fyrd* or military service by the peasants. It was assessed on each tribal group as a whole and thus required local courts or assemblies, *folcmoots*, to adjust individual contributions and to organise collection, especially in later times when the local population was no longer required merely to provision the *Bretwalda* and his party when they passed through, but to deliver supplies to a central depot — the royal manor. In early Anglo-Saxon England the holders of these ancient kin group lands owed these obligations directly to the *Bretwalda* with no lord intervening.[73]

The *folcmoots* not only collected the royal dues but also dealt with disputes, thefts and assaults. In this early period, the legal system very much reflected the practices of the German tribes. The system revolved around the concept of each kin group being entitled to its peace or *mund* which gave its owners the right to self-help through negotiation or feud. The law observed by Tacitus provided for set levels of compensation in livestock for specific harmful acts. In England, this scheme was recorded in a number of legal codes, the first surviving one being the Laws of Aethelbert (601 AD). This and subsequent royal codes appeared to elaborate on the scheme by mandating monetary payment on a graduated scale according to the rank of the victim and the seriousness of the injury.[74] The detailed royal scale of compensation and its strictures against feuds may have misled historians. William Miller shows in his detailed study of early medieval Icelandic law that the complexity of the written codes may have had more to do with the love of systematization by clerics and lawyers than actual practice. Unlike students of early England, Miller has the advantage of an extant corpus of saga literature covering the period and amounting to 700 pages of case law. Of the more than one hundred compensation cases recorded in the sagas, none followed the letter of the written laws —

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[73] *Ibid*. at 293 to 300.

[74] V.R. Sanchez, "Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today" (1996) 11: 1 Ohio State Journal on Dispute Resolution 1 at 14 to 16.

the *Baugatal*.[75] Similarly, "not a single decision reached in Anglo-Saxon England deferred explicitly to an extant decree, let alone quoted one."[76] As Binchy said of the body of Irish law, it was "accurate in fundamentals, but often untrustworthy in its details."[77] Similarly, the occurrence of feuds may have been overstated in both sagas and laws because, then as now, actions that threaten political stability always seem to get more official attention.

While the compensation amounts paid may have only vaguely conformed to the precise accounts laid out in the king's law books, the three main principles in those codes were probably followed. First, in Aethelbert's Laws there is only a slight reference to punishment in one out of ninety clauses; the main concern is *bot* or compensation. This was not civil restitution or a criminal fine, but rather an alternative to retaliation in cases where the harm was loss of face by an injury or insult. Second, the payment for death or complete loss, the *wergild*, is to the kin, with two-thirds to the father's side and one-third to the mother's side. Lastly, in this early code there is relatively little mention of additional payments to the king — his fine or *wite*.[78] All these provisions are similar to those in Tacitus' account. In other early English royal codes there are further principles from old Germanic laws, for example, that a person was responsible for the consequences of his voluntary acts, even if they are a pure accident[79] — an early form of absolute liability. In England, as in Celtic and Norse law, there was no compensation or revenge for a homicide within the kindred. The only surviving Anglo-Saxon epic poem, *Beowulf*, recounts how the hero's foster father, Hrethel, took to his bed and died because there could be no revenge when one of his sons killed another son by accident:[80]

> [W]hen Haethcyn bent his horn-tipped bow
> and loosed the arrow that destroyed his life.
> He shot wide and buried a shaft

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[75] W.I. Miller, *Bloodtaking and Peacemaking: Feud, Law and Society in Saga Iceland* (Chicago: Chicago University Press, 1990) at 144.
[76] Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century* (Oxford: Blackwell,1999) at 143.
[77] Binchy, *supra* note 70 at 94.
[78] *Supra* note 71 at 4 to 5.
[79] *Supra* note 68 at 54.
[80] Dorothy Whitelock, *The Beginnings of English Society*, 2nd ed. (Harmondsworth: Penguin Books, 1954) at 40.

> in the flesh and blood of his own brother.
> That offence was beyond redress, a wrongfooting
> Of the heart's affections; for who could avenge
> The prince's life or pay his death-price?.[81]

Most civil disputes were about land and, then as now, while most were probably settled by negotiation between the parties, some were litigated. Until recently, descriptions of legal process in early Anglo-Saxon *folcmoots* relied on the prescriptive royal law books, whose ecclesiastical focus has already been mentioned. Those sources allowed legal historians from Pollock and Maitland through the twentieth-century to Plucknett[82] and Baker[83] to see Anglo-Saxon legal process as a somewhat irrational state of nature. The view of this school is well presented by Pollock and Maitland:

> The staple matter of judicial proceedings was of a rude and simple kind. In as far as we can trust the written laws, the only topics of general importance were manslaying, wounding and cattle-stealing… As to procedure, the forms were sometimes complicated, always stiff and unbending. Mistakes in form were fatal at every stage. Trial of questions of fact, in anything like the modern sense, was unknown. Oath was the primary mode of proof, an oath going not to the truth of specific fact, but to the justice of the claim or defence as a whole.[84]

This orthodoxy has been reappraised by scholars such as Patrick Wormald[85] and Valerie Sanchez[86] who have reread the contemporary records and from them describe a system that makes more sense than the stiff, unbending process of the traditional view. Both authors emphasize three aspects of legal procedure common to the cases they briefed; the disputes were decided by rational criteria using 'realistic' evidence as opposed to oracular proofs, written as well as oral testimony was prominent, and oath-swearing was part of the remedy, not part of the decision. Wormald's cases are from the 9th and 10th centuries and will be dealt with later in this paper. Sanchez includes cases from the 7th century where the litigants apparently had a choice between public adjudication or private arbitration and both processes were controlled by third parties whose first task was to

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[81] *Beowulf*, trans. and commentary Seamus Heaney (New York: Farrar, Straus and Giroux, 2000) at 165.
[82] T.F.T. Plucknett, *Concise History of the Common Law,* 5th ed. (London: Butterworth,1956) at 88ff.
[83] *Supra* note 13 at 4 to 7.
[84] *Supra* note 68 at 38-39.
[85] P. Wormald, "Charters, Law and the Settlement of Disputes in Anglo-Saxon England" in W. Davies & P. Fouracre, eds. *The Settlement of Disputes in Early Medieval Europe* (Cambridge: Cambridge University Press, 1986).
[86] *Supra* note 74.

discern the facts of the case. Their methods included hearing witnesses, looking at documents and assessing the litigants' reputation. On the basis of this evidence, a judgment on the merits of the case was reached. Most cases ended there, although some were finalized through an oath swearing. The court, either the *folcmoot* or, on a rare appeal, the *Bretwalda*, awarded the oath to the party it decided was in the right. The successful litigant then swore the oath, not to the court, but to the other party as a form of "satisfaction". The swearer had to produce oath-helpers who were usually his kindred. But, depending on the facts of the case, he may have had to chose them from among nominees of the court or of the other party. Oathswearing was not taken lightly by either pagan or Christian litigants and the prospect of it at the end of the process appeared to have been designed to prevent false accusations and encourage confessions from those in the wrong. Adjudication was thus a two-stage process: judgment first by humans, then by the gods or God. In other cases, after their decision was announced, but before the oath was sworn, the adjudicators would give the parties an opportunity to negotiate a compromise settlement; "bargaining in the clear light of legal certainty." [87] In criminal cases, God's decision was often divined in the result of the ordeal by fire or water and had a similar function of encouraging confession but, again, was awarded as a "proof" only after a human investigation had led to a presumption of guilt. In her paper, Sanchez provides case histories of each type of decision from the surviving dispute-related charters. She emphasizes the process-centred approach to law in these courts as opposed to a rule-centred approach.[88]

In contrast to the steady world of the free peasant where legal status was built over generations, where disputes and conflicts were often negotiated among men, and where even God's judgment was subject to a chance of respite, the warrior's environment was one of high drama, unswerving loyalties and strict rules of conduct. The secular epic, *Beowulf*, gives an eighth-century view of the power dynamics within the military elites that established and defended the Germanic presence in England. From it, James

[87] *Ibid*. at 26.
[88] *Ibid.* at 18 to 28.

Campbell *et al* identify four features that dominated political life in the *Bretwalda's* court:

> the importance of the king's noble retinue, some of whose members may derive from kingdoms other than his own; an indissoluble connection between success and gifts of gold; the store set by good weapons, which are regarded as treasure; and the endless insecurity associated with feud. A king lives surrounded by noble warriors who feast with him, sleep in his hall by night, fight for him and are ready, or anyway sincerely hoped to be ready, to die for him. Their number and loyalty are crucial to royal power.[89]

Again, this heroic world appears to have remarkable continuities from that of the first-century, although, as Campbell *et al* go on to show, the fate of the individual leader was inherently unstable. In order to keep his companions, the *Bretwalda* has to keep giving treasure and arms, the main sources of which were the spoils of war. "To keep giving, he has to keep taking, and so adds feud to feud." [90] There is no long-term success in such a dynamic and none of the English *Bretwaldas* of this early period was able create an overarching kingship beyond his own lifetime. One of the features of this heroic caste was the concern men had for the reputation they would leave behind rather than for any divine rewards in this world or the next.[91] As Tacitus noted:

> Their funerals involve no ostentation… They soon have done with tears and laments, but grief and sadness linger long. It is thought becoming for a woman to mourn, for men to remember.[92]

In the first two centuries after the coming of the Germanic peoples to Britain, the core features of their constitutional, criminal and land dispute laws were unchanged from those of their homeland described six centuries earlier. Free kindreds under moderately weak, minor kings ran their own assemblies in which disputes and injuries were negotiated or adjudicated and settled by payment of compensation within a predictable range. While feuds were permitted if negotiations failed or were slow to start, the fact that each disputant's kindred was centred on that individual and included both his or her mother's and father's side ensured that in any dispute, the loyalties of many of those

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[89] *Supra* note 66 at 54.
[90] *Ibid.* at 55.
[91] *Supra* note 80 at 27.
[92] *Supra* note 42 at para 27.

involved would probably be equally divided between the principal disputants and would thus pressure a settlement. Feuds were recorded in literature and history much more frequently among the war-leader and warrior class. This would be expected, as the sole duty of the military retainer was pledged to his war-lord thus removing the customary constraints of the multitude of ties in the peasant kinship network. Further, the warrior's expectation of rewards from his leader for his loyalty pushed the military class to always be seeking feuds and war to maintain the flow of looted treasure and thus its cohesion.

**4. Homoeostasis and Change in Two Kinship Societies**

This section steps back for a moment from the narratives that have constituted the main part of this paper so far, to take stock of the two societies being described. It will compare the Gitxsan legal system as it looked at the beginning of the twentieth-century with the Anglo-Saxon legal system as it looked at the end of the eighth-century. The comparison will focus on the constitution of the societies, how they held land, how they settled internal disputes, and how they went to war. In the remainder of the paper, the treatment of the two societies becomes somewhat uneven. While the history of the Gitxsan and other Northwest Coast societies is full of the vissitudes that tragedy, humour, courage and ambition can bring to any people, its essential structure, the framework within which the drama is played, has remained unchanged. This is true from the evidence of the oral histories combined with, in the last 200 years, the settlers' documented history. That is not to say that European colonization has not had its intended and unintended impacts, but both the pleadings presented in the *Delgamuukw* case and the evidence elicited by the plaintiffs were consistent with the Gitxsan continuing to retain responsibility for each other and for their lands according to their own laws until the present.[93] In short, while acknowledging the need to accommodate the rest of Canada[94], the people decided to do so on the basis of that essential constitutional framework that had enabled them to accommodate other cultures and societies over the millennia.

In Anglo-Saxon England, however, fundamental change was everywhere. From the ninth-century to the eve of the Norman Conquest, the society of free immigrant peasants under transient war leaders had transformed into a kingdom with a central government and legal system firmly under the control of a king, and with considerably less freedom for the majority of his subjects. The paper will attempt to identify sources of that change from among the social structures already described and, in particular, by contrasting the structures with those of the Gitxsan. That will set the stage for the more prescriptive part of the paper: to suggest how the history of these two societies and cultures can inform

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[93] *Supra* note 24 at 11.
[94] *Ibid*.

their modern-day reconciliation based on the Supreme Court of Canada's *Delgamuukw* decision.

But first, a look at the comparison: in sketching an outline of the two societies, the first sections of this paper have focused on four areas of law: their constitutions, with particular attention to their underlying organizational strategies of dealing with potentially destructive competition among their members and with strangers, their more explicit dispute resolution processes, their military organization, and their relationship with land.

From the cultural viewpoint of the bureaucratized modern nation state, the problem of how to structure a legal system so that internal disputes are contained, and how to structure diplomatic and military strategy so external disputes are contained, always looms large as an explicit, ongoing matter of political debate about law-making and law enforcement, and about international treaty-making and military action. In both Gitxsan and early Anglo-Saxon societies, the solutions to these problems were more implicit; they emerged from the basic structure of the societies. Both were kinship-based, and embedded in the rules of those kinship structures were mechanisms to ensure that in a dispute, all interested individuals, including the parties themselves, would have blood-relationship loyalties that were about equally divided on both sides. In the Gitxsan case, this evolved so that each community is made up of at least two, and usually not more than three, exogamous Clans; that is, corporate groups with common ancestors and histories and with members of the same Clan not being allowed to marry each other. This results in each individual, each nuclear family and each community — defined narrowly or broadly — having at least two "sides" with the power of history and blood relationships behind them. The pressure of the two sides, and the sometime availability of third parties in the form of other Clans, tended to inherently move people towards what would be called settlement in a state society, and what kinship societies would call restoration of mutual respect. By paying careful attention to their ancient origin histories, the Northwest Coast societies were able to extend this bilateralism to cover their relationships with most other peoples in the region through the *wilnaat'aahl* and the

Clans. The Anglo-Saxons and other Germanic societies seemed to have evolved the same two-fold division of loyalties through kinship systems, but in a somewhat different manner. Rather than having the society divided into discrete exogamous clans, each kinship group called into play for a particular situation was centred around the individual party involved — that is, they were ego-centred — and thus were reshuffled from dispute to dispute. But as the kin groups were defined to include both the father's and the mother's kin, two distinct sets of relations were always brought to bear on the issue. Within this underlying stability in both the Gitxsan and Anglo-Saxon kinship systems, the more explicit dispute-resolving processes could function, as they appeared to have done, without the constant adjustment of complex legal codes.

The basic legal process mechanisms were remarkably similar for both Gitxsan and early Anglo-Saxon litigants. They are easier to understand if the remedies are explained first. In both societies, the principle remedy employed was compensation, not in the sense of replacement value, but in the sense of quieting the disturbance or loss felt by the injured party — Anglo-Saxon records refer to the *mund* or peace of the household, the Gitxsan today talk of the restoration of harmony. Perhaps because of this emphasis on the effect of the initial event on the injured party, both intentional harm and accidents were treated in the same way in both legal systems. The remedy of compensation was applied to what today would be called both criminal and civil actions although most attention was paid to the formalities around the consequences of homicide. Compensation was paid and received, not by the offending individual or the victimized individual, but by their kinship groups, with the relatives closest to the parties contributing and receiving the most, thus supporting the underlying kinship structure. In both societies, the alternative to the compensation for homicide was a feud — the measured killing of a person from the opposing party's kinship group who was of a status close to that of the initial victim. This process could alternate between the two kinship groups, usually with victims of incrementally escalating rank, until good sense prevailed and a settlement was reached. As such feuds were costly, they appear to have been relatively rare, although their impact on relations for generations make them prominent in the histories of both areas. In most conflicts, there was a strong motive for the party who initiated the dispute to own up and

arrange for a settlement. First, he would then carry no sense of ongoing shame and, second, he faced severe penalties for attempting to hide his role in a death or injury. Thus, while accidental and intentional homicides were compensatable in both England and the Skeena, failing to disclose such a death made it murder and that could be legally dealt with by summary execution by the victim's kinsmen. Where there was uncertainty by either party as to who should bear the consequences of an illegal act, rational fact-finding processes by third parties were available. These processes were less well recorded in both societies than were some of the resolution formalities such as the oath-swearing by Anglo-Saxons and the settlement feasts by the Gitxsan. The bilateral aspects of each person's and each group's social interactions that underlie these legal processes failed them in one instance — where the dispute was between relatives. In that case, the kinship group in both societies swallowed the hurt and no formal compensation or redress was available.

In other aspects of their legal systems, the Gitxsan and Anglo-Saxons were significantly different from each other. The attachment of a particular kinship group to a particular area of land so characteristic of Northwest Coast societies appears to be quite weak among Germanic societies and among the Anglo-Saxons in particular. Where there is some evidence of kinship groupings associated with certain areas in the English Tribal Hidage records and in some southern county place names, this aspect of the cultural geography appears lost by the time more consistent surviving records appear in the seventh century. By then, the right to have a say in the disposition of land is confined to an extended family comprising the offspring of four generations from a common grandfather. Gitxsan people, on the other hand, regard their House territories as being their fundamental link with the earth, with other living things and with the supernatural. Having its own territory is essential for any group to maintain its credibility in the feast system and thus survive as an independent House in a community. House territories have well defined boundaries, which are strictly defended by House members and carry flexible, but principled, access laws which depend on permission from the House Chief.

The military cultures of the two peoples also differ appreciably. The Gitxsan have always been amateurs, drawing on House and Clan members when the need arises but showing much skill and ingenuity in the design of armour and defensive forts as well as showing great courage in battle. The Anglo-Saxons were professionals. They maintained an elite cadre of very young fighting men around a charismatic leader to whom they owed strict allegiance. In the early days of the settlement of England, the warriors took their rewards in gold and arms and a place at the leader's hall. In nearly all respects, these groups of teenaged 'companions' resemble nothing as much as the gangs of today's inner cities. They had intense, irrational loyalty to each other and their leader and were prepared to kill and be killed for superficial rewards and no discernible, principled cause except to maintain their personal 'reputation'. The Anglo-Saxon military elites were maintained by food-rents collected from the peasantry, an imposition that was to play a crucial part in the subsequent evolution of the English state. The war leader or *Bretwalda* also played another important role in early Anglo-Saxon society. The status of full freeman could only be achieved when a person had sufficient kinsmen to support him with payments for compensation payments or fighting support in the feud. Climbing the kinship ladder took at least four generations and in the meantime the individuals belonging to the intervening generations were protected by being bonded to the war leader. This means they owed rents and service to the *Bretwalda* until their descendents had built up a sufficient kindred to support each other's free status. Such kinless men appeared to have been common in the period of unrest that characterized England in early medieval times. Kinless persons are dealt with quite differently in the Skeena region. Gitxsan society accommodates unattached persons by adopting them as adults into an appropriate House — a process that also serves to augment the populations of depleted Houses. This process underlines the final difference between the two societies, that of the Gitxsan having the House as its basic decision-making unit and strictly maintaining that there should be no authorities above the Houses. The Anglo-Saxons always had chieftains and war leaders with jurisdiction over the kindreds on some matters, albeit initially within quite a limited range.

In summary, while both the Gitxsan and the Anglo-Saxons had similar kinship systems that formed the basic constitutions of their societies and had strikingly similar laws and legal processes for dispute resolution, they differed in their emphasis on military preparedness and relationship to land. The Anglo-Saxons maintained a significant elite fighting force along with the social structures and culture necessary to support it. For the kinless man, the war leader's aid and resources were substituted for that of the kinship group. The Gitxsan were not specialised soldiers but do maintain a profound connection with their territories.

Mindful of these similarities and differences, the paper will now sketch the evolution of later Anglo-Saxon society in the ninth to eleventh centuries, focusing on changes in the constitutional balance between kinship and lordship, changes in the way land was held, and changes in the source of ultimate judicial authority. It is not controversial to say that the two principal agents through which change occurred were the church and the military. These were not dissimilar organizations. The Christian church began its association with the military in fourth-century Rome which was dominated by the army, whose generals supplied most of the subsequent emperors. At the same time, the empire was converted to Christianity and as the Church tightened its hold over emperors and empire it transformed its organization to match that of the militarized imperial bureaucracy.[95] Instead of Christianity infusing the Roman Empire, the precise opposite happened. At the same time, St. Patrick was converting the Irish and by the early seventh century, Irish and Roman missionaries under St. Augustine had converted Anglo-Saxon England, or at least its leading *Bretwaldas*.[96] Later in the century, under the great archbishop of Canterbury, Theodore, the English church began to centralise with a hierarchy of ecclesiastical authority that matched that of Rome but which the secular English kingdom was yet to achieve. During this reorganization, the church was issued the oldest of the English charters — written instruments that recorded grants of land, usually by the king and, at this time, usually to the church. The charters of pre-Conquest England were

[95] *Supra* note 65 at 10 & 22.
[96] *Ibid*. at 36.

derived from the form of the private charter of the later Roman empire.[97] The rights they granted were often not tangible but were the right to collect revenues, the food rents, and to exercise the jurisdiction normally reserved for the king. In other words, they were gifts of privilege. Of great importance was that the rights could be alienated, a necessary condition if the grant was to stay with the corporate church and not revert to the kin of the clergy who happened to head the particular institution at the time of the grant. This was the first great divide: lands subject to charter, *bocland* (bookland), were alienable and devisable, and could be adjudicated in the king's council; while the remaining lands were *folcland* (folkland) subject to kin inheritance, and adjudicated in the *folcmoot* or, later, other local courts.[98] A century after the first charters to ecclesiastics, there are records of grants to lay nobles, and although it is likely that kings had been granting lands to followers for some time previous to that, the earlier grants were probably for the recipient's lifetime only. Stenton explains how the practice of granting land rights evolved from the practice of rewarding the military elite with the spoils of war:

> The most admired virtue of an early king was generosity to his followers. It was probably accepted throughout the north that every member of the king's household might expect to receive an endowment in land from his lord…But the gifts which are actually on record have a different character. They were not in the strictest sense grants of land. Each of these gifts empowered the man who received it to exact within a definite area the dues and services which local peasantry had formerly rendered to the king himself.[99]

The emergence of charters to the nobles had two consequences. It placed lords between the peasants and the king and it gave the nobles an independent source of income that they could bequeath or alienate to others. Under the impetus of invasion from overseas by the Norse and Danes in the ninth century, and the threats and realities of internal insurrection, the need for a specialized army increased and with it the need for a systematic organization of the country to organize defences and to raise taxes to pay for them. The nobles, once exclusively made up of warriors, now drew on those warriors' bonds of allegiance to oversee new administrative units, the hundreds and shires, on behalf of the king. With this top-down diffusion of monarchal hierarchy, the lordship

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[97] *Supra* note 67 at 140 to 143.
[98] T.F.T. Plucknett, *Studies in English Legal History* (London: Hambledon Press, 19__) c. 1, at 66-72.
[99] *Supra* note 67 at 306.

principle began to overcome the kinship principle.[100] The kinship ladder was kicked away and a fixed hierarchy emerged, certainly by the time of King Alfred at the end of the ninth century.[101] The former interim arrangement of kinless men being temporarily bonded to the *Bretwalda* while they established kinship networks, become a permanent bondage of the *ceorls* or peasant under the *thegns* or military. Permanent bondage or *seisin* between lord and man, combined with the growing state's need for greater rents and a steady supply of men for the army, gradually changed the peasant's status from that of a free farmer to that of a subject tenant with significant ongoing obligations of rent and service to his lord. The basics of the feudal order were thus in place well before the more formal and rigorous version came to England with the Norman conquest in the eleventh-century.

As has been described, the granting of land tax collection rights and jurisdictional rights by the king, first to the church and later to the military, initiated a hierarchy of ecclesiastical and lay aristocracy between the peasants and the king, which led the way to the emergence of the territorial state. There is no evidence that these developments were intended or even wanted: they were the natural consequence of the organizational response by the king and his advisors to the pressures of the corporate church and the need for a more systematic defence of the country and of the monarchy itself. The introduction of land charters also had a profound effect on the legal system. As the grants came from the king, it was in his courts that disputes were adjudicated and the charters themselves became important evidence to bring before the courts to prove ownership of land rights. Thus a literate judiciary under the king's authority was required and it was largely the church with its territorially-based hierarchy that initially filled this need. Later, the king's local representatives, the shire-reeves or sheriffs, were appointed to preside over the lower royal courts. Under their influence, decisions tended to be less orientated towards finding a consensus to restore the peace and more towards a balancing of the scales of justice to determine who was wrong. At the same time, the consequences of being wrong were becoming more serious. Under the influence of the

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[100] *Supra* note 69 at 292-298.
[101] Seebohm, *supra* note 70 at 503.

church's penitential system, the concept of punishment was being introduced into the civil legal process. The earlier Germanic concept of summary execution for the military crimes of treachery, cowardice and desertion was extended to include many other offences. Wormald, after analyzing late Anglo-Saxon case histories and the law codes, describes how the oath of loyalty to the king was extended to all men over twelve who then not only had to swear to abstain from treason but from also being a thief or a thief's accomplice:

> The implications both of theft and perjury were widely extended in later Anglo-Saxon England. Flagrant theft had always been subject to instant vengeance; so now was proven theft, and at the hands not of the victim but of the state…Even those who lost their pleas in cases of property dispute were in danger of being regarded as thieves, and so traitors, and liable to condign punishment, temporal and eternal; and if they tried to defend their claim under oath but still lost, they aggravated their position…[P]erceptions of unamendable crime extended to whatever could be construed as treason through witchcraft to marital offences and tax evasion. The early English kingdom had an ambitious and aggressive idea of its public responsibilities.[102]

Not only was the range of offences extended to come within the purview of the state, but its interventionist role in the proceedings introduced not only new principles but also new exercise of power and patronage.[103]

Having seen how English kinship-constituted land holding and legal systems quickly evolved in the late Anglo-Saxon period into a monarchical state, it is relevant to look at how similar systems in another European society of the same period and in one of the Northwest Coast societies fared under different but comparable influences. Between 870 and 930, the north Atlantic island of Iceland was settled by Norwegians bringing essentially the same culture to the more or less uninhabited island that the Germanic bands of adventurers had brought to Britain 400 years earlier. And, interestingly, they were escaping the imposition of the same monarchical rule by King Harald of Norway that was emerging in England at this time. Like much of England, the basic communal productive unit was the farmstead, but the unit of governance was the kinship group which interacted at a series of annual meetings of free men, called *Things* under the

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[102] *Supra* note 85 at 165.
[103] *Ibid*. at 162-167.

authority of chieftains. The highest of these forums was the *Thing* for all of Iceland, the *Allthing*, which met for two weeks once a year. A well-documented set of laws and, more particularly, case histories in saga form, document the practice of feuding under an honour and vengeance ethic comparable to that of the English *Beowulf* saga. The Icelanders, however, never did evolve a central government in their four centuries of independence until coming under Norwegian royal rule in the 1260s. The reasons for this are necessarily speculative but the bare subsistence of the pastoral economy yielding little in the way of surplus to support a military elite or attract invasion, combined with no other nearby societies to influence or raid the country, have been suggested as explanations. The eventual collapse of the commonwealth and its succession to Norway was, in part, due to climate change making farming no longer viable, but also due to pressure from the church, both internally and externally.[104] Nevertheless, the story of medieval Iceland does indicate that an honour and feuding ethic, by itself, is insufficient to induce the formation of a state structure.

The Northwest Pacific Coast faced pressures similar in effect to those of early Anglo-Saxon England, but in the form of external commercial trade rather than invasion and war. A well-documented example is Marsden and Galois' account of the rise of Ligeex's trading empire in the late 18th to mid-19th century — a hegemony that covered an area of the northwest coast of British Columbia about the same size as Anglo-Saxon England. The impetus for Ligeex's initiatives, the European demand for fur, was certainly external yet the responses to the consequent disruption were determined by Tsimshian laws, social and economic structures, and above all by Tsimshian principles:

> Ligeex's initiatives, his marriage alliances for example, can be seen as a series of strategies to restore a measure of stability and to expand his sphere of influence to incorporate new actors. In the case of the [Hudson's Bay Company], by 1838, Ligeex's diplomatic manoeuvres had inserted the Company into his network of prerogatives.[105]

The objective of all the actors in this economic arena was simple: get control of the routes from the interior, where the fur were being trapped, to the coast, where the traders' ships

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[104] *Supra* note 75.
[105] Marsden & Galois, *supra* note 22 at 179.

could anchor. In assembling his trade network, Ligeex used all of the kinship and marriage connections potentially available to him. The House of Ligeex was the leading House of the leading tribe of the northern Tsimshian, the Gispaxlo'ots, which gave him control of the tribe's exclusive trading privileges with the Gitxsan on the Skeena River. The House was also a member of an Eagle Clan *wilnaat'ahl* that extended across four other coastal peoples, all with access to interior fur routes. Ligeex himself made four strategic marriages to women from the other two Clans in the coastal area, and he married off two son and two daughters to access trading routes held by other groups. One of those included the marriage of his daughter to the Hudson's Bay Company factor at Fort Nass and later Fort Simpson. But the authors caution against taking the Ligeex story as incipient nation-building thwarted by the subsequent coercive colonization:

> What may be interpreted here as a move by the Tsimshian to a more centralised system of governing was in reality a temporary situation that was followed, immediately after this period, by a return to a less centralised balance of power within both the northern and southern regions.[106]

[106] *Ibid*. fn. 4, at 180.

## 5. Conclusions

This paper began by assuming that every human being has always been a member of a society and has always had a culture that mediated all his or her thinking and actions. More pertinently, it assumed that every society has had jurisdiction over its members and territory through an institution of law and has had the means to ensure compliance with that law. The evidence reviewed in this paper found that this assumption was essential in order to compare two societies so profoundly separated in time and space as that of the Gitxsan and that of the Anglo-Saxons, which was a predecessor to the writer's own society and culture. Using this anthropological perspective and historical method, it was possible to demonstrate that each society's legal institutions were fundamentally linked within its social structure. The paper showed evidence of these links in how the societies exercised jurisdiction and management of their lands and how they resolved disputes.

The theoretical tool used to explore these linkages was that of 'structural essentialism' — the idea that there are a limited number of basic social structures into which societies tend to evolve and that these structures are determined by and, to a degree, mold the relationships among society members and the institutions that emerge to facilitate those relationships. This study found evidence of two such basic social structures or 'attractors' in the societies and time periods considered. The first is the kinship structure seen in Gitxsan society and Northwest Coast culture, and in early Anglo-Saxon society and early medieval culture of Northwest Europe. A fundamental feature of these societies is the extension of family relationships to incorporate broader social, political and spiritual institutions. The bonds between wives and husbands, parents and children are part of a continuum with the bonds within communities, between communities and among different peoples. It is through this horizontal network of relatives that a person views the world and places himself or herself within it. The second basic structure seen in this study is that of the bureaucratized hierarchy seen in the nation state of the late Anglo-Saxon society and the European culture of later medieval and subsequent periods. The fundamental feature of this society is the use of command and obedience relationships to organize social, economic, political and spiritual institutions. Family relationships are clearly separate from, and contained by, the broader institutions. It is

through a set of vertical hierarchies that the citizen of the nation state views the world and places himself or herself within it.

During the period studied, English society began to move from a kinship-based structure to that of a bureaucratized hierarchy. The Gitxsan and other Northwest Coast societies, although appearing to be moving in a similar direction at in some places, at some times, remained kinship-based. The change in Anglo-Saxon society appears to be the result of two mutually reinforcing historical processes. First was the rise to dominance of the military relationship and ethic, always present in the Germanic culture but never overwhelmingly so. This relationship, when extended over a whole country and applied to most of its institutions, required a bureaucracy to manage it and a legitimized dictatorial decision-maker in the form of the monarch. The second process was the Christianisation by a church already bureaucratized by its absorption of the military structure of the late Roman empire. The church gave the new head of state legitimacy in the minds of the people by anointing him as a Christian king and initiating a theocratic monarchy. Equally important, the church provided the emerging English state with a model of territorial organization and readily available literate bureaucrats to staff it. By transforming the monarch from a leader of a people to a ruler of a territory, the idea of sovereignty was sown in England.

The intrusion of both the military and the church into the kinship-regulated world of the Anglo-Saxon farmer came from their need to access rents and fines hitherto solely the king's prerogative. Disputes over the royal charters granting land rights could only be adjudicated by the king and, as the workload increased in volume and complexity, by royal courts. Once officials began to administer the law on behalf of the king, the abstract concept of the Crown as the nominal party representing the state began to emerge.[107] Although as institutions local courts were destined to give way to the king's courts, they had established a sufficiently strong tradition of independent adjudication that the judiciary always remained separate from the rest of the state administration and

[107] J. Garnett, "The Origins of the Crown" in M.S. Arnold *et al*, eds. *On the Laws and Customs of England* (North Carolina: University of North Carolina Press, 1981).

thus the later common law system retained qualities of a network rather than a hierarchy. Nevertheless, the monarchy, and later Parliament, retained its prerogative over law-making through the, at least nominal, supremacy of legislated law over judge-made law. Thus, the tension between the kinship-based networks and the military hierarchy of the early Anglo-Saxons finds a subdued resonance in the debate between the relative roles of judicial law and legislated law in Canada today.

It is the somewhat less bureaucratized and slightly more independent common law tradition that may offer a better solution to the difficult and protracted process of reconciling aboriginal title as recognized and described by the courts with Crown sovereignty, however it may have arrived on the American continent. On the face of it, Justice Lamer seems to have set an impossible task when he urged in his *Delgamuukw* decision that the aboriginal parties and the Crown negotiate their reconciliation. As has been shown in this paper, the Gitxsan and other Northwest Coast societies have a basic social structure fundamentally different from that of the sovereign state as represented by the Canadian and British Columbian governments. These differences are felt most acutely in discussions on land rights, self-government and the administration of justice; areas that this paper has focused on and where it has shown that the different underlying structures express themselves most explicitly.

One solution for aboriginal people to consider is that endorsed by the neighbours of the Gitxsan — the Nisga'a. In their modern day treaty with Canada and British Columbia,[108] the Nisga'a have agreed to structures for political decision-making, land jurisdiction and management, and justice administration that appear to be based on bureaucratic state institutions and not what Nisga'a and other Northwest Coast historical sources tell about the structure of Nisga'a institutions. This structuring of post-treaty aboriginal governments seems to be generally acceptable to the federal and provincial governments. If the thesis of this paper is valid, the Nisga'a people may see the underlying structure exerting itself and their post-treaty government more reflecting the practices and values of a western government bureaucracy than their own practices and values. It is suggested

[108] *Supra* note 3.

that this could occur even though the Nisga'a government would be directed and staffed by Nisga'a people and have Nisga'a values as its stated objectives.

A treaty such as the Nisga'a Final Agreement reads like legislation and, in most important respects, serves as legislation binding on all three governments. As such, it is part of that line of governmental structure rooted in the military command and obedience ethic seen in the Anglo-Saxon *Bretwalda's* retinue of nobles. The nature and structure of Northwest Coast aboriginal societies explored in this paper suggests that the other Anglo-Saxon tradition of independent decision-making based on precedent and circumstance may be more appropriate in reconciling aboriginal and state jurisdictions. This tradition is reflected in the modern Anglo-Canadian legal system by the common law and, especially, those aspects of it that originated in the law of equity, as well as less formal manifestations in the field of alternative dispute resolution. If this line of thinking was followed, the form of reconciliation would be more the process-centred approach seen in the early *folcmoots* than the rule-centred approach of royal legal codes and, later, colonial treaties. In the modern British Columbia treaty-making process there are already informal suggestions of using this approach, as in the proposal to emphasize interim measures agreements between aboriginal peoples and state governments while final treaties are pending. The suggestion is that a final treaty may never actually come if the interim agreements provide a suitable working basis for reconciling jurisdiction issues.[109]

As well, the courts could take a more proactive role in applying the principles of the law of equity in judicial review of decisions by bureaucrats in the areas of consultation and infringement of aboriginal title. Such findings by the courts on injunctions about government-licenced land use or orders quashing administrative decisions could form the basis of lasting accommodation between the parties rather than attempts to temporarily maintain the commercial status quo that they are being used for today. It must be acknowledged that the deep-seated common law ideology in favour of individualism mitigates against this suggestion. On the other hand, a failure of the legislatures to

[109] See for *e.g.* presentation by Barbara Fisher, former British Columbia Treaty Commission member, at University of Victoria Faculty of Law, October 5, 1998.

grapple with the Supreme Court of Canada's reconciliation agenda may prompt imaginations in inferior courts. There is also a deep public antipathy to greater judicial activism, which might be mitigated by the use of that old medieval device of the jury in civil proceedings. If used to carefully inquire into local facts and local solutions and not to implement title law, the jury could be a further mechanism to involve local non-aboriginal populations in the legal process of implementing aboriginal title.

Finally, the equity device of the trust could be used imaginatively by both courts and negotiators as a buffer between the centralized state system and kinship-based aboriginal systems. It might be especially useful in those agreements where a significant non-aboriginal population would be affected. As this paper has shown, local decision-making has not been a part of Anglo-Canadian constitutions for a millennium, and redirecting the focus of the reconciliation on local arrangements may be yet another path to imaginatively implement a *Delgamuukw*-based agreement.