

The Political Economy of “Aboriginal Customary Law”

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Discussions about aboriginal-non-aboriginal relations in Canada have stressed the need to recognize “aboriginal customary law” in self-government arrangements. It is maintained that many aspects of “native law” differ radically from the legal systems that emerged in European countries, and so imposing Canadian conceptions of law on aboriginal communities is an obstacle to native self-determination; there will be a continuation of aboriginal dependency and social dysfunction because governance will be inconsistent with the values and world views particular to indigenous cultures. These arguments, however, have not considered the major difference between the forms of social control in kinship-based groupings and those that are required for self-determination in modern nation-states. Using a political economy perspective, this difference will be examined. A historical and materialist analysis will show that “aboriginal customary law” actually pertains to custom, not law, and this has tremendous implications for the capacity of “indigenous legal systems” to function effectively in the modern context. In addition to analyzing this fundamental difference between aboriginal and modern political systems, the paper will also raise questions as to why this circumstance has been ignored or downplayed in the literature.

Studies of aboriginal-non-aboriginal relations in Canada have stressed the need for the Canadian state to recognize “aboriginal customary law”. It is maintained that aboriginal legal systems differ radically from those that emerged in European countries, and imposing Canadian conceptions of law is a continuation of colonialism, preventing the self-determination of aboriginal peoples. Recognition of “aboriginal customary law” is also advocated on the grounds that it will improve aboriginal-non-aboriginal relations and honour historical legal obligations towards the native population.

But these arguments do not attempt to understand the major distinguishing feature between “indigenous law” and “western” law. The former pertains to social control in kinship-based groupings, while the latter is essential to the definition of geographically determined modern nation-states. There is an important distinction between law and customs, and “aboriginal customary law” actually pertains to custom, not law. A political economy approach will show that this has tremendous implications for the capacity of “indigenous legal systems” to function effectively in the modern context. The acceptance of “aboriginal customary law”, in fact, will actually result in an absence of law, where remedies are determined on the basis of kinship, not the principles of universal citizenship and equality under the law that are enforced by the Canadian state.

The Case for Recognizing “Aboriginal Customary Law”

The Law Commission of Canada’s discussion paper, *Justice Within: Indigenous Legal Traditions*, maintains that “long before Europeans arrived in North America, Indigenous peoples...diverse customs developed into comprehensive systems of law”. These “systems of law”, it is argued, were not codified,¹ but passed down through the generations in stories, songs and ceremonies. These “customary laws” supposedly guided dispute resolution and social interaction within and between indigenous communities, clans and/or nations until they were undermined by colonization and the imposition of European legal systems on the native population.²

This imposition, it is claimed, has contributed to the current dependency and dysfunction plaguing aboriginal communities. Two reasons are provided to explain this circumstance. First, non-indigenous legal systems are culturally inappropriate for the native population, causing forms of governance that deny aboriginal peoples the capacity to live an authentic existence; second, the imposition of foreign legal concepts from outside deprived aboriginal peoples from having control over their lives, resulting in a sense of powerless and low self-esteem. Revitalizing “indigenous legal traditions”, therefore, is proposed as the solution for current aboriginal marginalization because it will facilitate native empowerment and cultural renewal.³

In addition to these moral considerations, political and legal arguments about the need to revitalize “indigenous legal traditions” are put forward. Politically, it is maintained that recognizing “aboriginal customary law” will improve aboriginal-non-aboriginal relations because it will mean that social control mechanisms are more likely to be accepted as legitimate by the native population.⁴ Criminal activity in aboriginal communities, especially the high rates of violence being endured by women and children, will be reduced because aboriginal people will begin to take ownership of their problems and propose culturally sensitive solutions. This promotion of “legal pluralism” is also justified legally, as it is considered an essential aspect of aboriginal sovereignty and self-determination.⁵

Consideration of these moral, political and legal arguments, however, raises the question of how “indigenous legal traditions” differ from those that are non-indigenous, and the political implications of instituting this “legal system” in the Canadian federation. In the

¹It has been maintained elsewhere, in fact, that “the very nature of oral customary law is antithetical to codification and threatens its accuracy and its legitimacy as well as its inherent value as a living, dynamic system of knowledge and thought”. Wendy Cornet and Allison Lendor, *Discussion Paper: Matrimonial Real Property on Reserve*, Paper prepared for the Department of Indian Affairs and Northern Development, November 28, 2002, http://www.ainc-inac.ca/pr/pub/matr/discp_e.pdf [accessed September 25, 2007], p. 64.

² Law Commission of Canada, *Justice Within: Indigenous Legal Traditions* (Ottawa: Law Commission of Canada, 2006), pp. i-3. See also John Borrows, *Indigenous Legal Traditions*, Report prepared for the Law Commission of Canada, January 2006, p. i.

³ Law Commission of Canada, *Justice Within*, pp. 6-7.

⁴ Borrows, *Indigenous Legal Traditions*, pp. iv, 3, 6 and 91.

⁵ Borrows, *Indigenous Legal Traditions*, pp. 1-3. Citing Andre-Jean Arnaud, Borrows maintains that this is “the simultaneous existence within a legal order of different rules applying to identical situations”.

literature on aboriginal self-government, typologies are often presented to emphasize the differences between aboriginal and European/western forms of dispute resolution. Usually taking the form of two columns, where the alleged traits of each are presented as polar opposites,⁶ it is pointed out that aboriginal practices tend to be informal and immediate, involve unwritten rules, value group cohesion, and rely on consensual forms of decision making. There are also references to the different values that inform each system; it is assumed, for example, that “peace, kindness, sharing and trust” or “respect, responsibility, obligation, compassion, balance, wisdom, caring, sharing and love” are fundamental aboriginal “legal inheritances”.⁷

Although it is not explicitly stated in these typologies, the language used harbours the assumption that aboriginal legal traditions are superior to those used by European systems. European justice is defined by "punishment", while aboriginal societies prefer "healing" and “restoration”. The Canadian system relies on "impersonal rules" instead of being concerned with "relationships" and "harmony". Offences are dealt with by the courts in a "strictly legal" and “prescriptive” fashion, not in the "holistic context" valued by native communities. The impression given is that European legal systems are mechanistic, inhumane and vengeful, while the forms of social control employed by aboriginal cultures are forgiving, people-centred, and concerned with rehabilitation. By recognizing “indigenous legal traditions”, it is implied that the conflict-ridden "adversarialism" found in Canadian courts can be replaced with peaceful and consensual "reconciliation".⁸

But these characterizations of “indigenous legal traditions” are largely drawn from aboriginal testimonies, and questions must be asked about how accurate these accounts are. Although historians extract information about the past from both oral accounts and written sources (as well as from archaeological, geological, palaeontological and linguistic evidence), it is important to note that there are added difficulties in using oral testimonies because they cannot be "pinned down" and can change dramatically over the years. This is especially relevant when one considers that oral traditions have been passed down through a number of generations; the longer the passage of time between an event and a recollection, the more likely the memory will be distorted by other events.⁹ As the anthropologist Alexander von Gernet states,

⁶See Emma LaRocque, “Re-examining Culturally Appropriate Models in Criminal Justice Applications”, in Michael Asch (ed) *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) for a discussion of these distinctions.

⁷ James [Sakéj] Youngblood Henderson, “First Nations’ Legal Inheritances in Canada: The Mikmaq Model” (1996), 23 *Manitoba Law Journal*, quoted in Cornet and Lendor, *Discussion Paper: Matrimonial Real Property on Reserve* p. 64 and Burrows, *Indigenous Legal Traditions*, p. 60. See also, Law Commission of Canada, *Justice Within*, p. 3.

⁸ See, for example, Law Commission of Canada, *Justice Within*, p. 3 and Pauline Comeau and Aldo Santin, *The First Canadians*, (Toronto: Lorimer, 1995), p. 132.

⁹The archaeologist Mark Whittow has noted that locals visiting a 12th Century archaeological site in Jordan had “vivid and contradictory accounts of their father or grandfather living in the house the team was excavating” even though the site had not been occupied for hundreds of years. He goes on to point out that “anthropologists have demonstrated how fluid and adaptable oral history can be” and that “the oral history of a tribe was primarily concerned to explain the present” and “would adapt and shape its view of the past, creating stories with supporting details to explain and justify present circumstances”. According to

the fact that oral narratives must be 'frozen' to be analyzed as evidence suggests that, in at least one important respect, they are different from written sources. Scholars have noted that a written document, while often biased in its original formulation, at least becomes permanent as it is archived and 'subtracted from time'. The original biases may be compounded by the interpretations of the historian who makes use of the document, but at least the content remains unaltered and may be interpreted by other parties. An oral tradition has additional problems. A primary or 'original' version (if such existed to begin with) is lost to modern scrutiny since it is replaced by later versions. What is left may be multiple layers of interpretations which have accumulated over time and a content that may only vaguely resemble an 'original' oration.¹⁰

Oral accounts also present the additional possibility that they could have been completely changed from the original version after the fact (either consciously or unconsciously) to put forward a particular view of history. This makes their incorporation different from the historian's use of written documents since, as Keith Windschuttle points out, very little of the written record that is available for historical interpretation "has been deliberately preserved for posterity". According to Windschuttle, "the biggest single source of evidence comprises the working records of the institutions of the past, records that were created, not for the benefit of future historians, but for contemporary consumption and are thus not tainted by any prescient selectivity. Most of these documents retain an objectivity of their own".¹¹ This capacity of written documents to constrain interpretations is very different from oral testimonies, which are obtained specifically for the purpose of constructing history.

These problems with the accuracy and flexibility of a group's collective memory are why the anthropologist Morton Fried stresses the need for researchers to separate their own observations from the recollections of the people they are studying.¹² Fried explains that statements made by aboriginal groups about the past are often inaccurate because these recollections can be infused with mythology. This is especially pronounced when groups have been dislocated in the process of colonization, which results in "a demand for a new mythology that bridges the gap between the acculturating native society and its new master".¹³ As Eleanor Leacock also has pointed out, "ethnohistorical studies of native North and South American societies... demonstrated that cultures reconstructed from interviews with tribal elders did not represent aboriginal times. To assume they did was

Whittow, even during continuous settlement of an area accurate memory lasts no more two generations and "in times of ...social upheaval change is quicker and more profound". Mark Whittow, *The Making of Orthodox Byzantium, 600-1025* (Los Angeles: University of California Press, 1996), p. 83.

¹⁰ Alexander von Gernet, *Oral Narratives and Aboriginal Pasts: An Interdisciplinary Review of the Literature on Oral Traditions and Oral Histories*, Department of Indian and Northern Affairs, April 1996, p. 11.

¹¹ Keith Windschuttle, *The Killing of History* (Free Press, 1996), p. 221.

¹² Morton Fried, *The Evolution of Political Society* (New York: Random House, 1967), pp. 84-5.

¹³ Fried, *The Evolution of Political Society*, p. 94. Bruce Trigger also makes this same point when he recognizes that there is a "tendency for lore to be refashioned as circumstances change". Bruce Trigger, "The Historians' Indian: Native Americans in Canadian Historical Writing from Charlevoix to the Present", *Canadian Historical Review* LXVII(3), 1986, p. 336.

to ignore the profound ways in which native peoples had been responding for centuries to Western trade and missionizing, and resisting invasion and conquest".¹⁴

The "demand for a new mythology that bridges the gap between the acculturating native society and its new master", in fact, has created the potential for many native "oral histories" to be distorted by the views of romantic philosophies. In response to the increasing alienation, misery, urban filth and poverty brought about by the industrial revolution and capitalist exploitation, a number of romantic reactionaries have looked upon the past as a simpler, happier and more "natural" existence. Instead of conceptualizing technological advancements and increasing productivity as being a defining characteristic of our species' evolution, they are viewed as a kind of hubris, separating humans from their innate innocence and causing a "fall from grace". These romantic ideas are ubiquitous in current accounts of aboriginal culture, where tribal societies are interpreted as having instinctively socialistic philosophies, egalitarian political structures and a widespread ecological consciousness. Robert McGhee, a Curator with the Canadian Museum of Civilization, notes that such romantic primitivism is referred to in French as *nostalgie de la boue* (literally "wistfulness [homesickness] for mud").¹⁵

While these romantic ideas originated within European populations, many have been absorbed in the "oral histories" of aboriginal peoples. This has been referred to by Alexander von Gernet as the "feedback effect". Von Gernet, for example, found this "feedback effect" in a case where the Hereditary Mi'kmaq Chief Stephen Augustine read a wampum belt pertaining to "Mi'kmaq law"; it was later determined that the belt had been made by a Quebec aboriginal group and had nothing to do with the Mi'kmaq. Ideas generated after the fact had enabled Augustine to become the "self-proclaimed interpreter of wampum belts", thereby inventing a "document" that supported the existence of "Mi'kmaq law".¹⁶

In order to show that values and practices really constitute an aspect of aboriginal cultures, and have influenced the development of "aboriginal customary law", it would be necessary to examine a much wider array of historical evidence. A review of the anthropological literature, in fact, shows that one of the major aspects of "aboriginal legal systems" is that social control is rooted in kinship relations, not in authority that is binding upon all the members of a political community and enforced by state institutions.

¹⁴ Eleanor Leacock, "Marxism and Anthropology", in Bertell Ollman and Edward Vernoff (eds), *The Left Academy: Marxist Scholarship and American Campuses* (New York: McGraw Hill, 1982), p. 256. Leacock maintains that the following anthropologists found that interviews with tribal elders were inaccurate accounts - Esther S. Goldfrank, *Changing Configurations in the Social Organization of a Blackfoot Tribe during the Reserve Period*, 1945; Joseph Jablow, *The Cheyenne in Plains Indian Trade Relations 1795-1840*, 1950; Oscar Lewis, *The Effects of White Contact upon Blackfoot Culture*, 1942; Elman R. Service, *Spanish-Guarani Relations in Early Colonial Paraguay*, 1954.

¹⁵ Robert McGhee, "Between Racism and Romanticism, Scientism and Spiritualism", Kooyman and Kelley (eds), *Archaeology on the Edge* (Calgary: University of Calgary Press, 2004). See also Roger Sandall, *The Culture Cult* (Boulder: Westview Press, 2001), for a similar discussion of "romantic primitivism".

¹⁶ (2002), 202 N.S.R. (2d) 42; [2002] 3 C.N.L.R. 176 at para 115, cited in Borrows, *Indigenous Legal Traditions*, pp. 26-27.

This has led a number of anthropologists to question as to whether or not these “indigenous legal traditions” can properly be referred to as “law”.

The Problem of Law

Whether or not “law” existed in aboriginal societies traditionally is a matter of intense debate in legal anthropology because this concept is defined loosely, and determining its existence (or absence) depends upon the criteria employed. Morton Fried has pointed out that the definitional problem has been compounded by the fact that a number of social scientists oppose any evaluation of different cultures and consequently “raise objections at the point at which some primitive cultures are said to lack one or more...institutional sectors”.¹⁷

Attempts to define the nature of law and understand its emergence began with the jurist Sir Henry Maine’s theory that social control evolved “from status to contract”¹⁸ – a conception that stressed the personal, spontaneous and informal character of earlier forms of social control in contrast with later developments. This analysis was extended by the legal scholar John Austin, who followed the English rationalist philosophers in arguing that law could not be separated from sovereignty,¹⁹ since it required “a paramount and determinate social locus of command with the power to enforce its directives”.²⁰ For Austin, “the important thing is that the sovereign enforces some rule”,²¹ because without an ultimate source of authority, there would be no mechanism to ensure that the commands of the lawgiver would be obeyed. This requirement in turn involves “the existence of an independent political society with primary access to power concentrated in the hands of an individual or group” that “constitutes the locus of sovereignty”.²² These institutions embody the formality and regularity necessary to ensure “the party who will enforce [the same sanction] against any future offender is...determinable and assignable”.²³ As Robertson (following Austin) pointed out, “we have all the elements of a true law present when we point to a community habitually obedient to the authority of a person or a determinate body of persons, no matter what the relations of that superior

¹⁷ Fried, *The Evolution of Political Society*, p. 15.

¹⁸ Rebecca Redwood French, “Law and anthropology”, in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Cambridge: Blackwell Publishers, 1996), p. 397.

¹⁹ Sovereignty has been defined as “the authority to override all other authorities” or the “bundle of powers associated with the highest authority of government”, including “the power to enforce rules” and “the power to make law”. It also pertains to “control of all the normal executive functions of government such as raising revenue, maintaining armed forces, minting currency, and providing other services to society...sovereignty always means the power to deal with the sovereigns of other communities as well as the right to exercise domestic rule free from interference of other sovereigns”. Mark O. Dickerson and Thomas Flanagan, *An Introduction to Government and Politics: A Conceptual Approach*, Sixth Edition (Toronto: Nelson-Thomson, 2002), pp. 44-45.

²⁰ Fried, *The Evolution of Political Society*, p. 18. Austin’s view was similar to Weber’s, which maintained that “a system of authority will be considered as law if it is externally guaranteed by the probability that unusual behavior will be met by physical or psychic sanctions aimed at compelling conformity or at punishing disobedience and administered by a group of men especially charged with the authority for that purpose”. Weber, quoted in Fried, *The Evolution of Political Society*, p. 23

²¹ Fried, *The Evolution of Political Society*, p. 20.

²² Fried, *The Evolution of Political Society*, pp. 18-19.

²³ Austin, quoted in Fried, *The Evolution of Political Society*, p. 152.

may be to any external or superior power. Provided that in fact the commands of the lawgiver are those beyond which the community never looks".²⁴

In the twentieth century, Austin's linkage of law with sovereignty, determinability and assignability was continued by E. Adamson Hoebel, who maintained that two requirements must be met before law could be said to exist - some kind of court, no matter how remote from Western conceptions, and "the legitimate use of physical coercion" to which the court must be subordinated.²⁵ Hoebel then used this "associat[ion of] legality with the application of threat of sanctions by a determinate social body" to claim that all cultures have law.²⁶ This assertion, therefore, differed from earlier developments in legal anthropology, which maintained that primitive societies²⁷ lacked state institutions that asserted a monopoly over the legitimate use of force within a defined territory.

Hoebel's attempt to develop the universal characteristics of law was debated by a number of legal anthropologists, the most notable being Leopold Pospisil.²⁸ Pospisil maintained that law was a "form of decision" with four attributes – legitimacy,²⁹ universal intention,³⁰ true *obligatio*,³¹ and sanction.³² Identifying these attributes in legal systems,

²⁴ Robertson, quoted in Fried, *The Evolution of Political Society*, p. 19.

²⁵ E.A. Hoebel, *The Law of Primitive Man* (Cambridge: Harvard University Press, 1958), p. 470.

²⁶ Fried, *The Evolution of Political Society*, p. 17.

²⁷ Although the term "primitive" is often opposed today for political reasons, it is commonly used in evolutionary theory to refer to a class of organisms that exhibit characteristics that are closest to those of our earliest ancestors. The British biologist Richard Dawkins, for example, states that "stoneflies are rather primitive flying insects". Dawkins explains that he makes this categorization because "primitive means that, although [stoneflies] are modern living insects, they are thought to resemble ancestors more than other modern insects resemble ancestors". Richard Dawkins, *Climbing Mount Improbable*, p.136. When such a characterization is used to refer to human groupings, it merely means that some societies resemble human ancestral forms more than others. For example, hunting and gathering economies resemble ancestral economies more than industrial economies.

²⁸ French, "Law and anthropology", p. 400. The most significant work of Pospisil in this regard was *The Anthropology of Law: A Comparative Theory* (New York: Harper and Row Publishers, 1971)

²⁹ With respect to "legitimacy", Pospisil argued that "a decision, to be legally relevant, or in other words, to effect social control, must either be accepted as a solution by the parties to a dispute or, if they resist, be forced upon them. Such a decision, of necessity, is passed by an individual, or group of individuals, who can either persuade the litigants to comply or who possess power over enforcement agents or the group membership in general to compel them to execute the verdict, judgment of informal decision even over protests and resistance of either or both parties to the dispute. Individuals who possess the power to induce or force the majority of the members of their social group to conform to their decisions I shall call the legal authority. Whereas this authority is formalized and specialized on the state level in our own and in other civilizations, in tribal societies and in some of the state's subgroups it often coincides with the leadership of various groups that exercises several functions besides the legal one". Pospisil, *The Anthropology of Law*, p. 44.

³⁰ The "universal intention" stipulation concerns "demands that the authority, in making a decision, *intend* it to be applied to all similar or 'identical' situations in the future", and pertains to "genuine cases showing the repetitive application of uniform settlements and penalties". According to Pospisil, "repetitive behavior, based upon the decisions and choices of followers, which is not the subject of the authority's decision is simply custom". Fried, *The Evolution of Political Society*, p.152. Pospisil, *The Anthropology of Law*, p. 79.

³¹ Pospisil maintains that "true *obligatio*" concerns "that part of a decision which states the rights of one party to a dispute and the duties of the other. It defines the social-legal relations between the two litigants

according to Pospisil, would enable anthropologists to distinguish law from politics and religion, thus aiding the task of cross-cultural definition.³³ In characterizing law in this way, Pospisil maintained that not all societies historically had developed law, although they usually had “law-like” processes for repairing social breaches where “one or more of the criteria of law are present and active, yet at the same time one or more of the criteria of law are absent”.³⁴

Differentiating law from law-like processes is useful, according to Fried, because it enables scholars to “analytically distinguish legal institutions from those that fall short, thereby assisting in discovering what developments go with others in the evolution of general sociocultural systems”.³⁵ In this evolutionary process, one of the most important distinctions to be made is between mechanisms of social control rooted in kinship and those that rely on the authority of the state. As Leslie A. White has pointed out,

in primitive society an injury or a death was avenged by the injured party or by his kinsmen. And in case the actual culprit could not be found for punishment, revenge could be inflicted upon members of his family. In short, in tribal society, vengeance was an affair among kin groups, a private right rather than a public, tribal prerogative. On higher cultural levels, where property is more abundant and is coming to be more significant in social relations, the rule of a life for a life, an eye for an eye, becomes commuted into money, and the wergild is established in a series of gradations corresponding to the seriousness of the offense...with the advent of civil society private vengeance becomes outlawed, and the state assumes an exclusive right to kill. This applies both to personal vengeance and private ‘wars’, such as used to be fought by Scottish clans...The outlawing of private vengeance and wars is one of the best indications that could be cited of the achievement of full status of civil society.³⁶

as they supposedly existed at the time of the defendant’s violation of the law. It also describes...how the relations became unbalanced by the act of the defendant”. According to Pospisil, true *obligatio*, is the “legal tie between two parties, a tie that manifests itself in the form of a duty on the part of one and a right on the part of the other to a contract or litigation”. Therefore, in Pospisil’s view, “a pronouncement of an authority which gives no one party a right while not stating the duty of the other one is not law even though the attributes of authority and of the intention of universal application are present. Such a statement becomes law only when a duty on the part of someone is implied or included in the decision”. Pospisil, *The Anthropology of Law*, pp. 81-82.

³²Fried (following Pospisil) argues that “sanction” includes the following: “a threatened penalty for disobeying a law or rule”, “measures taken by a state to coerce another to conform to an international agreement or norms of conduct”, or “official permission or approval”. He maintains that “sanctions are distinctly social and usually cultural as well and must be consciously applied, which is to say that, during the course of their formulation or application, the party that applies them does so with awareness of the line of conduct that is to be approved or censured. Not that the sanction will necessarily accomplish its intended end or that it will have no other effects; but there must be a concept of breach or there cannot be a sanction”. Fried, *The Evolution of Political Society*, p. 10.

³³ French, “Law and anthropology”, p. 400. French notes that Max Gluckman also “stressed the importance of generalized concepts for cross-cultural comparison”.

³⁴ Max Gluckman also attempted to make a similar distinction between formal, legal decisions and informal mechanisms for social control by differentiating between “multiplex relationships” and “single-interest relationships”. “Multiplex relationships” were identified by their “diffuse, multidimensional, and normative” character, and are “common in small face-to-face societies”. “Single-interest relationships”, on the other hand, are “specialized, functionally specific, instrumentalist, and goal-oriented” and “are common in large urban areas”. French, “Law and anthropology”, pp. 400-401, 403.

³⁵ Fried, *The Evolution of Political Society*, p. 145.

³⁶ Leslie A. White, *The Evolution of Culture*, pp. 316-17.

It is by making such a distinction between kinship-based vengeance and state sanctioned violence, in fact, which leads Fried to criticize Hoebel's contention that all cultures have law. In examining "cases such as describe the reaction of a community to recidivist homicide, which [Hoebel] asserts is the community imposition of a privileged sentence of death", for example, Fried comes to the conclusion that such a decision does not constitute law since "there is no legitimacy here, for those that carry out the killing of an offender cannot know that they themselves will not suffer the same fate for their act unless they liquidate all of the offender's relatives who might try to avenge him".³⁷ No distinction is made between violence meted out on the basis of "an unspecified, anonymous, undifferentiated aggregation of fellow tribesmen or citizens...or a special social or political mechanism, acting in the name of and by the authority of the society as a whole...".³⁸ As a result, Fried maintains that it "does not seem useful...to identify such action as law though it does clearly pertain to social control".³⁹

In order for there to be true law, in Fried's view, there must be a form of authority that is "recognized by the malefactor or those who would avenge him". Recognizing that a malefactor *might* be avenged, Fried argues, is an indication that those who impose a sanction do not have faith in its legitimacy, thus negating one of Pospisil's criteria for the existence of law. Fried points out that law must be distinguished from actions that are not "binding upon any of the parties except as they are members of a society carrying out the patterns of their culture", as well as actions where individual cases appear to exist by themselves so that "the only precedents that may be formed are those advanced by outside observers". It is also not sufficient to point to violence being carried out against an offender because "while law without sanction is chimerical, sanction itself cannot define law".⁴⁰ As Pospisil points out, "sanction alone cannot define a social phenomenon as law for the simple reason that many political decisions which are made *ad hoc*, without the leader's intention to apply them to future 'same' or similar situations, certainly are not laws, because they lack one of the most essential legal attributes, which I have identified broadly as the 'intention of universal application'".⁴¹

Fried argues that such a distinction between law and "law-like" processes has been impeded because "many distinguished writers have applied the term 'law' to customary actions or idealized versions of situations described by informants". He points out that "Hopi law", for example, also has been translated as "the way" of the Hopi, which is not really law at all but "the idealized-ideological self-image of the culture in question" where "violations of such standards are more likely to be regarded as normal than would be adherence".⁴² Fried maintains that claims about the universality of law in all cultures,

³⁷ Fried, *The Evolution of Political Society*, p. 90.

³⁸ White, *The Evolution of Culture*, p. 232.

³⁹ Fried, *The Evolution of Political Society*, p. 90.

⁴⁰ Fried, *The Evolution of Political Society*, p. 91.

⁴¹ Pospisil, *The Anthropology of Law*, p. 87. Marshall Sahlins makes a similar point with respect to groups in Fiji, where he notes that "given pervasive rivalry in the village, the private right to secure redress and the chief's only limited command of force, the traditional chief's peace was an uncertain business, depending largely on the willingness of contending parties to adhere to it". Sahlins, quoted in Fried, *The Evolution of Political Society*, p. 147.

⁴² Fried, *The Evolution of Political Society*, pp. 91-92.

in fact, are based upon a relativized criteria that either equates law with social control or even goes further to “identify law with general cultural norms”.⁴³ This is part of a larger trend in anthropology, where “the profession of ideas went from the identification of custom as an important source and basis for law through the holding of legislation subordinate to custom, finally arriving at the point at which law was figuratively swallowed by custom”.⁴⁴

This trend of “law [being] figuratively swallowed by custom” is a problem, in Fried’s view, because the definition of law becomes so broad as to be an unworkable tool for the ethnographer. For Fried, using a more restrictive definition “is not a matter of determining the ‘true’ meaning of a word but of stating clearly what that word is to mean in our usage and why it is advantageous to use it that way”.⁴⁵ Using Pospisil’s criteria is important, argues Fried, because it underlines “the terrible paraphernalia of law which ultimately intends the destruction of those who do not conform and possesses the physical means to carry it out and to prevent further vengeance”.⁴⁶ It is this coercive character of law and its capacity to bind all members of the community regardless of their kinship relations that is lost in conceptions that equate law and custom.

“Law” in Aboriginal Societies

This failure to recognize the socially binding and coercive character of law pervades current discussions of “indigenous legal traditions”. The Royal Commission on Aboriginal Peoples, for example, uses the term “law” in association with the social structures of a number of aboriginal groups,⁴⁷ when what is being referred to would be characterized by Austin, Pospisil and Fried as “custom” or “law-like” forms of social

⁴³ Fried, *The Evolution of Political Society*, pp. 149, 153.

⁴⁴ Fried, *The Evolution of Political Society*, p. 16.

⁴⁵ Fried, *The Evolution of Political Society*, p. 227.

⁴⁶ Fried, *The Evolution of Political Society*, p. 150. There are, in fact, many examples in anthropological accounts of aboriginal groups in what is now Canada, where vengeance was the mechanism of social control between different kinship groups. In the case of the Northwest Coast, for example, Philip Drucker notes that “there were two courses of action open to an offended group. One was to exact revenge by slaying one of the adversaries, and it was deemed proper to take vengeance not on the person of the killer but rather on a member of his group whose status was as nearly as possible equivalent to that of the victim...The second recourse, usually subsequent to blood vengeance, was to make a settlement through payment of valuables and wealth”. Within the kinship group, however, “in the rare instances in which blood was shed, usually nothing was done about it. The group would not take vengeance on itself, nor demand *wergild* of itself, and there was no higher authority”. Drucker, *Cultures of the North Pacific Coast* (San Francisco: Chandler Publishers, 1965), pp. 71-74. In a case where a “bully” was terrorizing a community, for example, Drucker notes that “there was no formal machinery to punish wrongdoers. People did not know quite what to do about the situation. They talked against [the offender] and refused to cooperate with him, but his rank gave him a certain immunity from physical harm. To the advice and pleas of his elders he turned a deaf ear. Finally the resentment became so obvious and unpleasant that thick skinned as he was he had to leave. Informants do not know what would have happened to a man of lesser rank who behaved [thus]; none ever did”. Drucker, quoted in Fried, *The Evolution of Political Society*, p. 148.

⁴⁷ See, for example, *Final Report*, 1, pp.600, 609, 639-40, 654, 668, 656 for the Royal Commission's application of the word law to aboriginal societies.

control.⁴⁸ The Royal Commission, in fact, defends its use of the term law to refer to custom in a section on "the rule of law" in the chapter on governance. Drawing heavily on the testimonials of aboriginal peoples (i.e. Fried's "idealized versions of situations described by informants"), it is maintained that

the traditional laws of most Aboriginal peoples are customary and usually unwritten. They are embodied in maxims, oral traditions and daily observances and are transmitted from generation to generation through precept and example. This practice is often misunderstood. Some outside observers, accustomed to thinking of the law as rules laid down by legislatures and embodied in written statutes, have denied that custom truly can constitute law. They forget that, even in mainstream society, few individuals are familiar with more than a small portion of the written law; in practice, ordinary people conduct their lives in accordance with what amounts to a living customary system. Moreover, English common law, which is the basis of the legal system in Canada outside Quebec, originated as a body of customary law under the supervision of the courts. To this day, it is largely uncodified.⁴⁹

But this conflation of custom with law relies on two incidences of faulty reasoning. The first uses the fact that many individuals in mainstream society are unfamiliar with laws and "conduct their lives in accordance with what amounts to a living customary system" to imply that there can be no distinction between custom and law. The second is the argument that since customs can become laws, customs somehow must *be* laws. But these assertions simply show that laws and customs can co-exist within a society, and that the latter can become the former. This does not mean the two are the same. The fact that we can state that customs can become part of a "legal system" that is "under the supervision of the courts", shows that they *are* distinct - one concerns sanctions that are

⁴⁸ The misapplication of the term law can be seen in the Royal Commission's references to the Mi'kmaq and the Dene. With the Mi'kmaq, for example, the Royal Commission refers to "the symbolic wampum laws of the Mi'kmaq alliances" (*Final Report*, 1, p.50). The following is provided as an explanation: "wampum was made traditionally of quahog (clam) shells, drilled and threaded into strings or woven into belts. Wampum of various colours carried different symbolic meanings. Wampum strings and belts were used as aids to memory and to validate the authority of persons carrying messages between communities and nations" (*Final Report*, 1, p. 91, note 8). But "aids to memory" and indications of status are not the same thing as "law". No one is obligated to recognize the "symbolic meanings" of wampum or the "authority" of persons carrying it. In its analysis of "The Yamoria Law of the Dene", the Royal Commission relies on a research study prepared by George Blondin (*Final Report*, 1, p.652) According to Blondin, the Dene have eight "laws", but as can be seen from a shaded box appearing in the *Final Report*, these eight statements have nothing to do with "law". Some, like "Law Number Two" - "Do not run around when Elders are eating, sit still until they are finished" - would be more accurately characterized as "good manners" or "ethics". This would be a "habitual or usual course of action", or custom, practiced by many families today. Others, such as "Law Number Eight" - "Be happy at all times because mother earth will take care of you" - is similar to many of the meaningless platitudes that adorn household kitsch.

⁴⁹ *Final Report*, 2(1), p. 120. This confusion of custom and law is also present in a chapter on "Aboriginal Concepts of Law and Justice - The Historical Realities", in its research report *Bridging the Cultural Divide*, pp. 12-25. In this chapter a relativist position is presented where it is claimed that the "culture-specific nature of western systems of law has blinded it to the existence of law in other societies. In the case of aboriginal peoples, not only in Canada but in other places in the world, this has led to a dismissal of complex Aboriginal cultural systems as not being 'legal' and to a denigration of societies bound only by 'primitive custom'". To "refute" this view, however, the Royal Commission uses a quotation from Francis Jennings that incorrectly conflates law with order, and then uses the fact that aboriginal societies were ordered by kinship relations where "every man bore arms" and "any man could be appointed to act guard or do executioner's duty" to show that "laws" existed. *Bridging the Cultural Divide*, pp. 12-13. Such a statement makes no distinction between kinship-based decisions and those sanctioned by the state.

"administered by a determinate locus of power", while the other does not since it is just a "habitual or usual course of action" or "established practice".

The Law Commission of Canada, on the basis of a paper prepared by John Borrows, also points out that "Indigenous laws have been described by some as custom rather than law", and notes, referencing a work by John Austin, that "those supporting such a characterization cite the lack of proclamation by a recognized power capable of enforcing the law as evidence that a norm or custom followed in an Aboriginal community is 'merely a rule of positive morality: a rule generally observed by the citizens or subjects but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it'".⁵⁰ The Law Commission then maintains that this view has been "rejected by legal scholars as a 'gross mischaracterization,'" arguing that "such a view ignores the fact that not all Indigenous law was customary and not all norms and traditions had only moral force. Many Aboriginal communities possessed sophisticated sets of laws which not only dictated acceptable behaviour, but also addressed the consequences of wrongdoing".⁵¹ Burrows and the Law Commission also point out that "Canada's Supreme Court...has rejected the idea that Indigenous peoples did not possess law prior to the arrival of Europeans in North America",⁵² and that "there has been no wide-spread extinguishment of Indigenous legal traditions through military conquest, occupation, or legislative enactment".⁵³

In discussions of aboriginal "customary law", however, no evidence is provided of sanctions "administered by a determinate locus of power".⁵⁴ Burrows does not explain

⁵⁰ Law Commission of Canada, *Justice Within*, p. 4, note 3. This follows from Burrows, *Indigenous Legal Traditions*, p. 4, note 14.. The work cited is John Austin, *The Province of Jurisprudence Determined*, 2nd ed. By W. Rumble, vol.1, (Cambridge: Cambridge University Press, 1995), p. 176. One page earlier Burrows also notes that "there is a debate about what constitutes 'law' and whether Indigenous peoples in Canada practiced law prior to European arrival. Some have said that Indigenous peoples in North America were pre-legal". This assertion references "Editorial: One Tier Justice, *National Post*, November 23, 2004, p. A19".

⁵¹ Law Commission of Canada, *Justice Within*, pp. 4-5, note 4. This follows from Burrows, *Indigenous Legal Traditions*, p. 4. To support this assertion, Burrows references Lon Fuller, who is quoted as stating that "if, in an effort to understand what customary law is and what lends moral force to it, we consult treatises on jurisprudence, we are apt to encounter some such explanation as the following...: Customary law expresses the force of habit that prevails so strongly in the early history of the race. One man treads across an area previously unexplored, following a pattern set by accident or some momentary purpose of his own, others then follow the path until a path is worn. [This] presents, I believe, a grotesque caricature of what customary law really means in the lives of those who govern themselves by it". Lon Fuller "The Law's Precarious Hold on Life" (1968-1969), 3 *GA. Law Review* 530. It is not explained, however, how this constitutes a "grotesque caricature" of the true nature of "customary law".

⁵² Law Commission of Canada, *Justice Within*, pp. 4-5, note 5. The court case referred to is *Calder v. A.G.B.C.* [1973] S.C.R. 313 at 346-347.

⁵³ Burrows, *Indigenous Legal Traditions*, pp. 4-5.

⁵⁴ To illustrate the existence of pre-contact aboriginal "laws", the Royal Commission relies on research reports obtained by Paul Williams and Curtis Nelson. This report relies heavily on the opinions of "oral historians", resulting in contradictory and romanticized accounts of pre-contact Iroquois life. For example, at the beginning of this research report, Williams and Nelson state that "The Great Law is not based on precise words but on principles", but then they go on to argue that "in Haudenosaunee society there was a well defined set of constitutional and internal laws that the people as a whole would obey and enforce...".

the nature of the “sophisticated set of laws” that he claims “addressed the consequences of wrongdoing”. His discussion of “indigenous legal traditions”, in fact, largely focuses on aboriginal spiritual beliefs. It is noted, for example, that “the Anishinabek people have a number of legal principles that guide their relationship with other living beings in a conservationist mode”, such as the belief that “rocks have an agency of their own which must be respected when Anishinabek people use them”. There is also a discussion of the many principles of “Cree law”, such as *Wahkohtowin* – “the over-arching law governing all relations” that is “said to flow from the Creator who placed all life on earth”. It is stated that “negative consequences will follow” the failure to abide by this “law”, but such consequences merely concern the spiritual belief that animals will not allow themselves to be hunted if they are not killed with sanctified methods. Similarly, it is pointed out that, in the case of “Carrier legal traditions”, there is an “obligation to treat [animals] with respect”, otherwise “they will leave Carrier territories and could even exact retribution”. The “rules of respect, love and obligation towards others” of “Carrier legal traditions” also concern the belief that “if people are not well treated, they can transform into animals and leave their partners”. The only mention of actual law concerns “Métis legal traditions”, which developed only after considerable European contact. These laws pertained to the sanctions specified (and supposedly carried out) during coordinated economic activities such as the buffalo hunt.⁵⁵

The Royal Commission also seems to contradict its assertions about the existence of “aboriginal law” by noting that aboriginal leaders act as “guides” or “counsel”, since “they typically do not exercise the authority to make unilateral decisions or to impose their will”.⁵⁶ This means that there is no “sovereign” to ensure that decisions are binding and commands are obeyed. Instead, “consensus” must be found to obligate members of the group to follow a designated course of action. Similarly, Cornet and Lendor, in their discussion of “Mi’kmaq customary law”, note that “its standards were neither universal, objective nor enforced by man-made institutions. Initiating the customary process was a family responsibility, remedy was a clan function”.⁵⁷ Other references to aboriginal “legal systems” confirm an absence of coercive mechanisms. Authority was not vested in legal offices, but in social and moral influence, resulting in much more flexible, situational, adaptable and non-coercive responses to disputes.⁵⁸ Even more importantly, in aboriginal societies “personal offences were viewed as transgressions against the

Paul Williams and Curtis Nelson, “Kaswentha”, *For Seven Generations* (Ottawa: Libraxis, 1997 [CD-ROM]).

⁵⁵ Burrows, *Indigenous Legal Traditions*, pp. 38, 49, 51, 53, and 60-61.

⁵⁶ *Final Report*, 1, p.87.

⁵⁷ Cornet and Lendor, *Discussion Paper: Matrimonial Real Property on Reserve*, p. 64. Cornet and Lendor cite Henderson, “First Nations’ Legal Inheritances”, as the source.

⁵⁸ Menno Boldt, *Surviving as Indians* (Toronto: University of Toronto Press, 1993), pp. 118-120; Henderson et al., quoted in Kiera L. Ladner, “Up the Creek: Fishing for a New Constitutional Order”, *Canadian Journal of Political Science* December, 38(4), 2005, pp. 939; J.R. Miller, *Lethal Legacy* (Toronto: McClelland and Stewart, 2004), pp. 59-60; Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations’ Independence* (Halifax: Fernwood, 1999), p. 159; Sally Falk Moore, “Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999”, in Sally Falk Moore (ed), *Law and Anthropology: A Reader* (Malden: Blackwell Publishing 2005), p. 357; and Marianne O. Nielsen, “Criminal Justice and Native Self-Government”, in R.A. Silverman and M.O. Nielsen (eds), *Aboriginal Peoples and Canadian Criminal Justice* (Markham: Butterworths, 1992), p. 245.

individual rather than the community" and so sanctions were meted out by the individual and/or his or her family, not the collective.⁵⁹ The offence of murder, for example, was seen as an offence against the family (i.e. kin). Consequently, the response would either be the pursuit of blood vengeance or the acceptance of gifts, depending on the status of the victim and the relative strength of their family.⁶⁰ Essentially there were three options available for a family when one of their members was murdered: killing the offender, accepting payment from the offender's family, or chasing the offender away from the camp. But these options depended on the resources of the families involved. If the victim's family was relatively weak, there would be nothing they could do except move away from the camp, since there were no overarching legal mechanisms to hold the offender accountable and the group lacked the military capacity to exact blood vengeance or tribute.⁶¹

It is generally recognized in the political science literature, in fact, that kinship was the basis of aboriginal societies inhabiting what is now Canada before contact,⁶² unlike modern justice systems where laws are enforced by the authority of the state, on behalf of all members of the political community regardless of their family status. The use of the word "modern" is important, because these forms of social control in "indigenous legal systems" do not just pertain to aboriginal societies in Canada. As White's reference to the term *wergild* above indicates, other pre-state societies have also used this primitive mechanism of reparation. *Wergild* was used by the Vikings and the Anglo-Saxons in the Neolithic period of development. Its existence also has been documented in the histories of many other European countries, including Ireland, Wales, Russia and Poland (although this practice was called *ericfine*, *galanas*, *vira {bupa}*, and *glówczyzna* respectively). Such a circumstance indicates the connection between legal processes and economic and political developments, an interaction that can be investigated in political economy.

Towards a Political Economy of "Aboriginal Customary Law"

Although a political economy of law in Canada remains inchoate, it has been noted that "one central question" that must be developed in this area is "how economic and social forces influence or 'determine' the development and trajectory of law-making, the

⁵⁹Curt Griffiths and Allan Patenaude, "Aboriginal Peoples and the Criminal Law", in Silverman and Nielsen (eds), *Aboriginal Peoples and Canadian Criminal Justice* (Markham: Butterworths, 1992), p. 72.

⁶⁰Boas, *The Central Eskimo*, 1964, p. 174; Dickson-Gilmore, "Resurrecting the Peace", 1992, pp. 267-9; Drucker, *Cultures of the North Pacific Coast*, (San Francisco: Chandler Publishing Company, 1965), p. 73.

⁶¹See Fried, *The Evolution of Political Society*, pp. 90-4 for a criticism of assertions of law in egalitarian societies; the arbitrary character of retaliation for homicides among food-gatherers is discussed in A. S. Diamond, *The Evolution of Law and Order*, pp.20-22 and Nielsen, "Criminal Justice and Native Self-Government", pp. 244-245.

⁶²Rupert Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused", in R.A. Silverman and M.O. Nielsen (eds), *Aboriginal Peoples and Canadian Criminal Justice* (Markham: Butterworths, 1992), p. 151; Menno Boldt, *Surviving as Indians* (Toronto: University of Toronto Press, 1993), p. 118; Bonita Beatty, "Integrating 'First' Principles into Aboriginal Administration", *Policy Options*, March 1997, pp. 31-32; *Final Report*, 1996, Vol 2., Part 2: Ch. 4, Sect. 3.2; Henderson et al., 2000, pp. 412-416, quoted in Ladner, "Up the Creek", p. 938; and Monture-Angus, *Journeying Forward*, p. 159.

content of law, and specific legal forms, institutions and procedures”.⁶³ As law is particular to human societies, a historical analysis is required to understand the unique characteristics that led to its emergence. In political economy, this is achieved by linking legal systems to the increasing productivity, size and complexity of societies over time. Customary and informal mechanisms of social control are sufficient in small groups that rely on kinship reciprocity, but it breaks down as surpluses increase and larger groups form, requiring more impersonal and standardized procedures, supported by legitimate coercion, to enforce property relations and distribute social resources. Also, because of the greater social complexity brought about by an increased number of occupational groups and social strata, there is more of a need for impersonal and all encompassing rules to regulate behaviour.⁶⁴

Although there is a general recognition in political economy that economic and political developments are connected to the emergence of legal systems, these historical circumstances can be interpreted very differently. In fact, there are two distinct approaches for understanding the evolution of law and the state – conflict and integrationist theories.⁶⁵ “Conflict theories” are most fully developed in the Marxist tradition. They are based on the insights of the evolutionary anthropologist and lawyer Lewis Henry Morgan, who maintained that legal developments were associated with the transition from kinship-based societies to those organized according to property relations and territory. The political economists Karl Marx and Frederick Engels used the work of Morgan⁶⁶ as the basis for their argument that laws came into existence through the development of productive forces and the increasing inequality that resulted from the production of economic surpluses.⁶⁷ In this view, increased control over nature to satisfy human needs through the social development of labour is paramount. Although this process is characterized by increases in rationality, scientific knowledge and self-awareness, as well as forms of political and ideological domination, these are the necessary result, not the cause, of producing and reproducing human existence.

Although Marxist political economy asserts that the “*ultimately* determining element in history is the production and reproduction of material life”, it is recognized that constitutions, juridical forms, religious ideas, and other political developments “also exercise their influence upon the course of the historical struggles and in many cases preponderate in determining their *form* [emphasis in original]”.⁶⁸ At a certain stage of the

⁶³ Amy Bartholomew and Susan Boyd, “Toward a Political Economy of Law”, in Wallace Clement and Glen Williams (eds), *The New Canadian Political Economy* (Montreal: McGill-Queen’s University Press, 1989), pp. 212-213.

⁶⁴ White, *The Evolution of Culture*, p.230.

⁶⁵ This distinction was first made by the evolutionary anthropologist Elman R. Service. See Ronald Cohen and Elman R. Service (eds), *Origins of the State* (Philadelphia: Institute for the Study of Human Issues, 1978).

⁶⁶ For a discussion of the relationship between the ideas of Morgan, Marx and Engels, see Lawrence Krader, “The Ethnological Notebooks of Karl Marx: A Commentary”, in Stanley Diamond (ed), *Toward a Marxist Anthropology* (The Hague: Mouton Publishers, 1979), pp. 153-171.

⁶⁷ Callincos, *Theories and Narratives*, p.107; Cohen, *Karl Marx’s Theory of History*, pp. 28-62; and Eric Hobsbawm, *On History*, p. 163.

⁶⁸ Frederick Engels, “Engels to J. Bloch in Königsberg”, in *K. Marks and F. Engels: Selected Works*, Vol. 3, p. 487.

development of a society's productive forces, in fact, it is hypothesized that inequalities become so pronounced that laws are needed to protect private property ownership, and this acts back upon and transforms production and reproduction. Coercion, and its associated legal structures, becomes necessary to contain the conflicts that are generated from blocking social access to basic resources. This form of social control is unnecessary when resources are distributed reciprocally through kinship networks,⁶⁹ because there are no differential rights for accessing the materials needed for the sustenance of life. Law, as conceptualized in the Marxist theoretical tradition, therefore, is a coercive "form of decision" that upholds the interests of the exploiting class.

While recognizing the class-based character of laws, Marxist political economists warn against "instrumentalism", stressing the "relative autonomy" of law.⁷⁰ This is to explain "the material basis for the persistent belief...that some laws confer benefits and some real measure of protection" to oppressed groups. Laws came into existence to protect the interests of the rich to the detriment of the poor, but this is due to the fact that the law is merely upholding the inequalities intrinsic to class-based economic systems. Redistribution varies depending upon ownership regimes, but the state is delegated to treat all members equally within the law, thus providing universal, rather than kinship-based, protection. The reality that the economically privileged can use their financial resources to access *better* services (i.e. more skilled legal help), does not negate the principle of legal equality; the wealthy are subject to the same procedures as everyone else if they are in violation of the law. Equal, objective and impersonal application of the law makes sexual assault of anyone and everyone illegal, regardless of their social position. This is why the law achieves widespread legitimacy in modern nation-states.

"Integrationist theories" in political economy, in contrast to Marxism's focus on class conflict, do not accept that laws emerged to maintain unequal social relations. Associated with the theories of the German sociologist Max Weber, this interpretation of legal evolution hypothesizes that laws emerged out of a process of increasing social power.⁷¹ Known as Weber's "rationalization thesis", it is maintained that laws and the state are part of an ongoing rational process of enlarging the social unit in order to generate greater security and prosperity. Weberian approaches are opposed to Marxist political economy in that they maintain that "forms of political and ideological domination [are] factors of explanatory importance coequal with that of class exploitation...".⁷²

With respect to the development of legal systems, the most important aspect of Weberian theories is their understanding of the evolution from traditional to legal-rational forms of authority. Weberian theories argue that political systems that are based on "legal-rational" principles are different from those that are governed by "traditional" forms of

⁶⁹ Karl Polanyi was the first to designate these economies as "reciprocal", but Marshall Sahlins refined this idea. According to Sahlins, there were three types of reciprocity: "generalized reciprocity", "balanced reciprocity" and "negative reciprocity". For a discussion of this see Fried, *The Evolution of Political Society*, pp. 35-36.

⁷⁰ Bartholomew and Boyd, "Toward a Political Economy of Law", pp. 218-219.

⁷¹ Callincos, *Theories and Narratives*, p. 107.

⁷² Callincos, *Theories and Narratives*, p. 7.

authority because the former are circumscribed by law, while the latter rely on custom, heredity and the personal attributes of leaders.⁷³ As Peter M. Blau and Marshall W. Meyer explain, in systems based on legal-rational principles, “authority is attached to offices rather than to the individuals occupying them” and there is “a formal and abstract conception of legal order existing and having significance apart from the interests of individual persons”.⁷⁴ With systems based on traditional authority, on the other hand, “what rules exist are those that have operated in the past” and obedience is usually given to “a traditionally designated individual”. As a result, “there is no requirement that rules be consistent, and appeals made to those exercising traditional authority are made personally, not as matters of principle...”.⁷⁵

Although forms of traditional authority exist in modern societies (for example, the “Crown” is a remnant of hereditary leadership), Weberian theorists point out that there has been a general trend for them to be replaced by legal-rational principles because of the increasing productivity, size and complexity of societies.⁷⁶ In small societies, where everyone knows everyone else and there is constant interaction in the context of relatively little social change, personal forms of authority can be used to ensure cooperation. But as a society grows and is transformed in the process, impersonal and abstract rules must be developed to regulate the interaction of strangers in new situations, since forms of dispute resolution for past social relationships no longer apply. As Blau and Meyer point out, “change undermines traditional authority because such authority is basically rigid and does not readily adjust to new situations. This is the case whether change is caused by foreign enemies, major technological innovations, basic economic developments, or some other alteration in social structure”.⁷⁷ Legal-rational forms of authority are adaptable, on the other hand, because they are rooted in abstract principles that can be reworked with standardized procedures if they are not effective in meeting new social requirements.

In addition to the difficulties of adapting past practices to new situations, Weberian theorists have argued that traditional forms of authority tend to break down because they

⁷³ Janine Brodie, “Power and Politics”, in Brodie and Rein (eds), *Critical Concepts: An Introduction to Politics* (Toronto: Prentice Hall, 2005), pp. 8-9; Robert Jackson and Doreen Jackson, *An Introduction to Political Science: Comparative and World Politics, Fourth Edition* (Toronto: Prentice Hall, 2003), pp. 12-14; and Eric Mintz et al. *Politics, Power and the Common Good* (Toronto: Pearson Prentice Hall, 2006), p. 16.

⁷⁴ Peter M. Blau and Marshall W. Meyer. *Bureaucracy in Modern Society, Third Edition* (New York: Random House, 1987), pp. 64-65. Graham White identifies seven principles associated with legal-rational authority: 1) “Hierarchical with Power Concentrated at the Top”; 2) “Extensive, Written, Impersonal Rules and Procedures”; 3) “Authority based on Office-Holding”; 4) “Compartmentalization and Division of Labour”; 5) “Merit”; 6) “Adversarial Challenging of Assertions and ‘Rational’ Evaluation of Evidence”; and 7) “Maximum Public Release of Information”. Graham White, “Culture Clash: Traditional Knowledge and EuroCanadian Governance Processes in Northern Claims Boards”, paper presented at the “First Nations, First Thoughts” Conference, Centre of Canadian Studies, University of Edinburgh, 2005, pp. 13-20.

⁷⁵ Blau and Meyer, *Bureaucracy in Modern Society*, p. 65.

⁷⁶ Blau and Meyer, *Bureaucracy in Modern Society*, p. 83; Dickerson and Flanagan, *An Introduction to Government and Politics*, pp. 20, 38; Jackson and Jackson, *An Introduction to Political Science*, pp. 286-289).

⁷⁷ Blau and Meyer, *Bureaucracy in Modern Society*, p. 70.

are difficult to justify in periods of change. The notion that people should obey a dictate just because "it has always been so" gains little acceptance when society itself is being radically transformed. Legal-rational forms of authority, on the other hand, are derived from rational principles with universal applicability; they can be justified without reference to the past. Because modern governance can be judged rationally in terms of its ability to achieve specified results, dictates and policies can be justified even when they have no historical precedent.⁷⁸ Current legal systems, for example, are legitimate because they are consistent with the democratic principle known as the "rule of law", whereby citizens are "subject to known, predictable, and impartial rules of conduct rather than to the arbitrary orders of particular individuals", ensuring that both "rulers and the ruled are subject to the law".⁷⁹ This abstract principle has benefits for all because it "prevents rulers from using their coercive power arbitrarily against those who are the object of their dislike" and punishing people just because of their personal attributes.⁸⁰ It also enables public duties to be separated from private interests, so that public officials cannot use their legal authority to accrue a personal, and therefore socially unjustifiable, benefit.

Although "conflict" or "integrationist" interpretations of political development differ in important respects, both see law as a necessary progression in social relations as kinship (i.e. traditional) forms of organization begin to erode. For both theories, progress in law consists of removing the arbitrariness of personal judgement. This insight has implications for the revitalization of "indigenous legal traditions" today because kinship was the basis of aboriginal societies before contact. A political economy of law raises questions about whether or not forms of social control based on kinship are compatible with those that require legal-rational types of authority. Political economy approaches recognize that the state came into existence as a result of the increases in scale, productivity and complexity of societies – including the development of stratification – that could no longer be reproduced on the basis of kinship alone. If this is the case, how can aboriginal societies, which are now much larger and embedded within the complex network of economic processes and political relations with the wider Canadian society, "govern" themselves with kinship-based values and procedures?

⁷⁸ Blau and Meyer, *Bureaucracy in Modern Society*, p. 65. A good example of the justifiable character of legal-rational authority concerns the principle of merit. Before legal-rational principles were instituted in countries like Canada, bureaucracies were run on the basis of patronage, where positions were awarded according to "kinship, friendship, or personal favour" (Dickerson and Flanagan, *An Introduction to Politics and Government*, p. 482). The increasing size and productivity of societies, however, meant that governance became more complex, requiring more expertise in public administration. Merit, not one's personal connections, became the more prominent principle by which appointments to the bureaucracy were made. At the same time, such appointments also could be justified to all people in society. Unlike patronage, which does not benefit those who are not receiving the favour, hiring civil servants on the basis of merit is acceptable even to those who are excluded from employment. This is because, all things being equal, merit enables the bureaucracy to operate more efficiently and effectively, which is a benefit to all members of society.

⁷⁹ Mintz et al, *Politics, Power and the Common Good*, p. 103.

⁸⁰ Dickerson and Flanagan, *An Introduction to Government and Politics*, p. 95.

“Legal Systems” in Conflict

Although it was mentioned earlier that aboriginal testimonies stress how the principles of “community harmony”, “forgiveness”, etc. form the basis of “indigenous legal traditions”, these accounts are problematic for a number of reasons. First, they rely on idealized memories of the past, and are unlikely to constitute an accurate representation of historical reality. Secondly, even if these principles could be shown to be an inherent aspect of aboriginal cultures, they would be tied to kinship reciprocity, not bestowed upon the entire population. Oriented towards those related by blood or marriage, these principles would not be applied to the same extent, or even at all, to the wider society. Finally, the use of words like “community harmony” and “forgiveness” mask the fact that the revitalization of “indigenous legal traditions” is often promoted so as to oppose the punishment of offenders. This raises questions about how the victims of violent offences, most often women and children, will be served by the application of “aboriginal customary law”.

Aboriginal peoples today live in modern conditions, yet the view persists that the mechanisms of social control once used in kinship-based economies can still be applied. This means that instead of the enforcement and protection of rights being carried out by the state, on behalf of all members of society, aboriginal peoples’ access to justice will still depend on their position within the community. Aboriginal justice, in fact, is often emphasized as being “intensely personal” by anthropologists. Although lauded for considering “the holistic context of an offence”,⁸¹ personalization is a step backwards in time where the social power of the offender determines the community’s response to social breaches. “Intensely personal” is merely a euphemism for subjectivity, where powerful members of society can receive preferential treatment.⁸²

This can be seen in the distribution of publicly funded goods and services in many aboriginal communities. As is the case for all forms of social control based on traditional forms of authority, “indigenous legal traditions” make no distinction between personal interests and one’s official or public position. Because kinship is the organizing principle in aboriginal culture, one’s personal relationship to those in power tends to determine access to jobs, contracts and housing, and there is little appreciation of the need for the universal application of abstract rules.⁸³

⁸¹ Mandamin et al, *Justice on Trial Task Force*, p. 9.

⁸² Elizabeth Dickson-Gilmore, for example, notes that “traditional justice” in the case of the Mohawks, includes the following: 1) complaint-driven processes resolved by the families involved; 2) the different weighting of crimes depending upon the victim; and 3) offenders having to approve of their punishment. Dickson-Gilmore, “Resurrecting the Peace: Traditionalist approaches to separate justice in the Kahnawake Mohawk Nation”, in Robert A. Silverman and Marianne O. Nielsen (eds), *Aboriginal Peoples and Canadian Criminal Justice* pp. 259-277.

⁸³ Edward W. Van Dyke, *Families in Other Cultures* (Calgary: Bear-Spike Holdings Ltd., 1998; Boldt, *Surviving as Indians*, pp. 124-127; Nielsen, “Criminal Justice and Native Self-Government”, p. 254; Beatty, “Integrating ‘First’ Principles into Aboriginal Administration”, p. 32.

This problem, in fact, is referred to by the Royal Commission on Aboriginal Peoples as the “inappropriate mix of politics and business” in aboriginal communities. According to the Royal Commission,

whether in Inuit, Métis or First Nation communities, it is not difficult to find examples of political leaders interfering with economic development organizations and projects for political reasons - for example, demanding that certain individuals be hired, standing in the way of lay-offs that may be necessary on financial or business-related grounds, or trying to influence the distribution of grants or loans. The result of these interventions is the demoralization of staff, the failure of individual business ventures, and sometimes the undermining of an entire economic development organization. Over the long term, the result is an unpredictable, arbitrary business environment that discourages investment and commitment. There are important, indeed crucial, roles for political leadership - to create and sustain an appropriate environment, establish guidelines, and make important strategic decisions about the direction of development - but they do not lie in day-to-day decisions about economic development.⁸⁴

Even more disturbing than the kinship-based distribution of public resources in aboriginal communities is the response of “aboriginal customary law” to violence against native women. Although “community justice” proposals point to the “reconciliation” and “community harmony” that can be restored, these initiatives, because of their “intensely personal” (i.e. arbitrary) character means that “forgiveness” can be coerced from women so that offenders can avoid punishment.⁸⁵ Since offenders are often members of powerful families, victims who attempt to press charges can be subject to extreme social pressure.⁸⁶ Such problems were recognized over a decade ago when Marianne Nielsen warned that “great care will have to be taken in developing practices that will leave justice in the hands of the community but will not make it a political tool [of particular factions attempting to manipulate the process]”.⁸⁷ Besides the direct threat of reprisals, aboriginal women are often discouraged from speaking out about the unbalanced character of community justice because they fear being seen as a traitor to the cause of supporting “indigenous traditions”.⁸⁸

⁸⁴ *Final Report*, 1996, Vol. 2, Part 2, p. 843. The problem is compounded by the fact that most of the “economic development” in aboriginal communities consists of the distribution of federal transfers. Native “corporations”, for example, are not privately owned, but belong to an aboriginal collective, usually beneficiaries of a land claims settlement. Their mandate is to invest and distribute the money obtained from the federal government in the interests of all aboriginal beneficiaries (i.e. in the “public interest”). Immediately after the settlement is reached, however, pressure is placed on the heads of these “corporations” to distribute funds and award contracts to cronies. For a discussion of this, see Frances Widdowson, *The Political Economy of Aboriginal Dependency*, Unpublished Ph.D. Dissertation, York University, Toronto, pp. 444-585 and “Aboriginal Self-Government in Canada: An Inherent Right of Unethical Governance?”, Paper presented at the Annual Meeting of the Canadian Political Science Association, York University, Toronto, June 2006.

⁸⁵ See Gloria Galloway, “Native-White justice drawing mixed reviews”, *Canadian Press Newswire*, February 1, 1995; and “Sentencing circles need credibility”, *Yellowknifer*, July 26, 1996.

⁸⁶ See, for example, the case of Maxine Clinton and Billy Taylor. “Sask. Appeals”, *Edmonton Journal*, June 24, 1995, p. A3.

⁸⁷ Nielsen, “Criminal Justice and Native Self-Government”, p. 254. See also, Ross, “Leaving our white eyes behind”, pp. 157-158.

⁸⁸ Green, “Constitutionalising the Patriarchy”, p. 118 and Emma LaRocque, “Re-examining Culturally Appropriate Models in Criminal Justice Applications”, p.90.

These circumstances played out in the case of the Justice Education Project on southern Vancouver Island. Aimed at reducing the number of aboriginal people in B.C. jails, the project consisted of having elders offer advice on diverting offenders from the provincial justice system to "the bighouse" for cultural and spiritual initiations. The project came under fire in 1993 when it was reported that women were either bribed or threatened if they attempted to file assault charges with the police instead of using the alternative system, and some were actually chased off the reserve when they persisted with their complaints. It was also discovered that a number of elders sitting on the council were offenders themselves, yet nothing was done about it because powerful community members supported the project.⁸⁹

And such problems have not just occurred with respect to violence against women; a number of troubling incidents have arisen with respect to kinship-based politics and the sexual abuse of children. A review of child welfare services in Manitoba, for example, noted that "within the relatively close network of relationships in a small community there can be a tendency to undervalue the seriousness of these incidents and protect those responsible for such abuse. This may result in a failure to respond appropriately both to the abusers and to the victims of this abuse".⁹⁰

One of the most disturbing incidents of kinship relations subverting child protection goals concerned the case of Lester Desjarlais. Although Lester had made allegations to several people that his step-uncle, Joe Desjarlais, had tied him to a tree and raped him, the child welfare agency had done nothing about it, and Lester eventually committed suicide as a result of the abuse. An inquest that was held to investigate Lester's suicide found that the problems of political interference were widespread in the community. Because chiefs and band councillors often controlled the school board and child welfare agency, they were able to exert great pressure on social workers, teachers and other members of the community who tried to report abuse. Children who were being abused by powerful members of the community would not be apprehended, and "overzealous" childcare workers would find themselves isolated from the power structure and soon out of a job. According to Brian Giesbrecht, the judge presiding over the inquest, these circumstances were not uncommon. At the time, he claimed that many reserves were being "overseen by an Indian leadership that in too many cases is more concerned with allegiance to family and friends and the pursuit of political goals than with the welfare of the community".⁹¹

After Lester's suicide, in fact, the family allegiances that were protecting abusers like Joe Desjarlais continued. Although Joe was eventually convicted and sentenced to eight years in prison in the "western" legal system for other instances of abuse, the victims were not supported by the community. The chief, Angus Starr, declared that he was "especially annoyed" at the charges being laid since "he was afraid that if more things were said about the reserve, it would crush whatever spirit there was left".⁹² At the trial, a number

⁸⁹ Holly Nathan, "Native justice system abused, critics charge", *Eye Opener*, 1993, pp. 79-80.

⁹⁰ Cited in Ruth Teichroeb, *Flowers on My Grave*, p. 39.

⁹¹ Teichroeb, *Flowers on My Grave*, p.155.

⁹² Teichroeb, *Flowers on My Grave*, p. 173.

of community members showed up, but not to support the victims, but their abuser. For years, the victims were ostracized by their family and the community, since they were perceived as breaking the "unwritten rule" in tribal politics that "protecting family and community took precedence over airing problems in the outside world".⁹³

While the above constitutes just three problematic examples of applying "aboriginal customary law", it is important to understand how they are indicative of the fact that kinship-based politics conflicts with the principles of modern legal systems. Modern legal systems, because of the need to contain conflicts and integrate people unrelated by blood and marriage, have developed objective, impersonal and universally applied mechanisms to minimize arbitrariness. "Indigenous legal traditions", on the other hand, were developed in the context of smaller, less productive and simpler political economies, making it virtually impossible for them to effectively and fairly resolve disputes in Canada today.

But if this is the case why is there so little discussion of the kinship basis of "indigenous legal traditions" in the literature on self-government and "aboriginal customary law"? Why do political economists continue to accept the idealized accounts that aboriginal cultures are inherently socialistic, and therefore do not need the universally applied and enforced "forms of decision" found in all modern nation-states?

The Politics of "Aboriginal Customary Law"

The lack of discussion about the problems with revitalizing "indigenous legal traditions" in the modern context is related to the more general problem of the constraints imposed upon open and honest debate in matters pertaining to aboriginal politics.⁹⁴ These constraints are related to the fact that many academics see the romanticism of aboriginal cultures as a way of righting past wrongs. Uncritical references to aboriginal peoples' "laws" being handed down by "The Creator", for example, would not be accepted in studies of any other group, but this is seen as a harmless way of making aboriginal peoples "feel good" about themselves and their culture.

Taboos and deferential conduct are particularly pronounced when scholars attempt to examine the differences in development that exist between aboriginal and modern cultures. This is related to the confusion that has occurred between culture and race, and the subsequent idea that identifying the lower level of economic and political development of societies with hunting and gathering/horticultural traditions is somehow "mean spirited", "insensitive" or, more disturbingly, "racist". Any attempt to consider the economic and political implications of the fact that hunting and gathering/horticultural

⁹³ Teichroeb, *Flowers on My Grave*, p.168.

⁹⁴ The American anthropologist James Clifton, in fact, notes that "one of the most stringently observed canons governing the behavior of those who work among Indians" is referred to behind closed doors as the "Eleventh Commandment" in native studies. This "Commandment", according to Clifton, is the dictate that "Thou Shall Not Say No to an Indian"; anyone who does not abide by its associated "norms and taboos of deferential conduct" is immediately labeled as an enemy of aboriginal peoples. Clifton, "Introduction: Memoirs, Exegesis", *The Invented Indian*, pp. 13-14.

societies were smaller, less productive and less complex than industrialized nation-states leads to the accusation that one is "convert[ing] *differences* into *inferiorities*".⁹⁵

The semantic confusions that lie behind the promotion of hunting and gathering/horticultural practices, values and forms of social organization in the modern context are also related to another obstacle facing political economists attempting to develop a historical and materialist understanding of "aboriginal customary law". This is the extent to which political advocacy has intermingled with the scholarship pertaining to the relationship between aboriginal peoples and the Canadian state.⁹⁶ Since the 1960s, there has been an increasing amount of government funding provided to a number of aboriginal organizations, consultants and lawyers to pursue land claims and self-government initiatives.⁹⁷ Part of the justification for these initiatives is that aboriginal peoples have unique "legal traditions" that are beneficial to all Canadians.⁹⁸ Theorizing "aboriginal customary laws" as inadequate for resolving the disputes that result from productive economies and integrated political systems threatens the political goals of these parallel aboriginal organizations and the academic and legal advocates that are associated with them.⁹⁹

This political tendency to orient scholarship towards the support for land claims and self-government has been extended by the analysis of a number of academics whose work can loosely be described as "postmodern". These academics maintain that a universal understanding of historical development cannot be developed because research findings are shaped by the "ethnocentric" perceptions of the theorist. Therefore, no agreement about the relationship between aboriginal peoples and "Westerners" can be found since they have "different" yet "equally valid" understandings of their circumstances. This postmodern influence has intruded into studies of "aboriginal customary law" because it is maintained that there can be no objective way to distinguish between legal and pre-legal forms of social control. Such developments, in fact, have meant that anthropological attempts to develop a cross-cultural definition of law largely came to an end in the 1970s.¹⁰⁰

⁹⁵ *Final Report*, 1, p.45, emphasis in original.

⁹⁶ For a detailed discussion of this see Frances Widdowson and Albert Howard, *Disrobing the Aboriginal Industry: The Deception of Indigenous Cultural Preservation* (Montreal: McGill-Queen's University Press, Forthcoming). This has also been discussed by a number of other academics elsewhere. See, for example, James A. Clifton (ed). *The Invented Indian: Cultural Fictions and Government Policies* (New Brunswick: Transaction Publishers, 1996); Noel Dyck, "Telling it like it is' Some Dilemmas of Fourth World Ethnography and Advocacy", in Dyck and Waldram (eds), *Anthropology, Public Policy and Native Peoples in Canada*, pp. 192-212; and Robert Paine (ed). *Advocacy and Anthropology: First Encounters* (Newfoundland: Institute of Social and Economic Research, 1985). With respect to the discipline of history, this problem has also been identified by J.E. Rea, "The Historian as 'Hired Gun'", *The Beaver* 73(2), June 1992; and J.R. Miller, "From Riel to the Métis", *Canadian Historical Review* 1(1), 1988.

⁹⁷ Cairns, *Citizens Plus*; Doug Daniels, "The Coming Crisis in the Aboriginal Rights Movement: From Colonialism to Neocolonialism to Renaissance", *Native Studies Review*, 1986, 2(2), pp. 97-115.

⁹⁸ *Final Report*, 1, p. xxiii, 2(2), pp. 778-9; Burrows, *Indigenous Legal Traditions*, pp. 3, 6-7, 194-6; Law Commission of Canada, *Justice Within*, pp. 1-2, 29.

⁹⁹ Parallelism is a term coined by Alan Cairns. It concerns the view that aboriginal cultures and the wider Canadian society can exist separately from one another, and continuously reproduce distinctive economies, political systems and "world views". For a discussion of this see Cairns, *Citizens Plus*, pp. 70-3, 117, 132.

¹⁰⁰ French, "Law and anthropology", p. 400-402.

Although some would celebrate such a state of affairs, for political economists it poses great difficulties. This is because political economists are attempting to understand the relationship between economic and political developments. Political economy, with its focus on political and economic structures as historically evolving phenomena, strives for objectivity in attempting to understand the economic foundations of different societies and how they have changed over time.¹⁰¹ Subjective and spiritually-based aboriginal conceptions of “aboriginal customary law”, on the other hand, deny the evolutionary character of humanity’s development, asserting that archaic economic and political forms are viable in the modern context. The concern is with promoting a reactionary political agenda aimed at maintaining aboriginal “difference” through parallel institutions, rather than elucidating the historical and material forces influencing human development. This will not serve either aboriginal or non-aboriginal peoples, because, as Keith Windschuttle has noted, it is only by “facing the truth of both our separate and common histories that we can best learn to live with one another”.¹⁰²

¹⁰¹ Eric R. Wolf, *Europe and the People Without History* (Berkeley: University of California Press, 1997), p.ix.

¹⁰² Windschuttle, *The Killing of History*, p. 281.