

# Postcolonial Indigenous Legal Consciousness

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*Indigenous lawyers face some difficult challenges in confronting the existing injustice created by colonization and racism for the Aboriginal peoples of Canada. In the Canadian justice system that is failing Aboriginal peoples, they have to challenge the existing colonial ideology of contrived superiority of European law and humanity and the psychology of cultural and racial inferiority of Aboriginal peoples. They must revitalize the justice system, decolonize the judicial precedents and renew respect for ecological and human diversity. These multifaceted tasks require not only the establishment of an innovative postcolonial Indigenous legal consciousness based on Aboriginal teaching and law, but also require them to dream and articulate impossible visions to create a postcolonial Canada.*

## I SOME TEACHINGS

“I know where to hide it, my Creator,” the Mole said. “I know where to hide the gift of the knowledge of Truth and Justice.”

“Where, then, my brother?” asked the Creator. “Where should I hide this gift in the humans?”

“Put it inside them,” said the Mole. “Put it inside them because then only the wisest and purest of heart will have the courage to look there.”

And that is where the Creator placed the gift of the knowledge of Truth and Justice.<sup>1</sup>

A human being who has a vision is not able to use the power of it until after they have done this vision on earth for people to see.<sup>2</sup>

Across countless generations, comforted in the safety of Indigenous languages, Elders, knowledge keepers and storytellers have continued Indigenous teachings and law. In different languages, at greater length and with more details than I can ever hope to grasp, these teachings have given form to a sacred creation. These teachings reveal the animate processes of creativity in implicate sacred terrestrial consciousness and its ecological forces. These teachings have illustrated a consensual order that is based on endless interrelated transformations that involve all life forms. These oral teachings and symbolic literacies communicate many choices, paths, or roads. They impart the stories of Indigenous life, of our experience, our

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1. Edited version of story told by Richard Wagamese (based on story by Phil Lane Jr.), *Four Worlds Development* (Lethbridge: University of Lethbridge) printed in Canada, *Final Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 105-106. [hereinafter *Final Report*].

2. This is an old Indigenous teaching among many Indigenous nations. Often, the teaching is attributed to Nicholas Black Elk, a Lakota *wicasa wakan* and Catholic catechist.

creativity, and our realizations. They manifest the noblest understanding of why we live with doubt and uncertainty. They are also the stories of our lodges, our villages, our homes, and our families. Most importantly they contain intergenerational solutions and remedies to many of our contemporary quandaries.

These teachings are especially important for those people who seek to protect and enhance the lives and aspirations of Indigenous people. These people have to find the answers and solutions to contemporary quandaries in their hearts, and then they have to reveal their visions to all peoples. This is the intimate road to the transactions of ‘truthing’ and understanding justice. This journey is to the unknown or inner meditation. Most Indigenous lawyers and law students follow this visceral path. They are the people of shared persuasion. They share their experiences and ideas of justice and use them to persuade others of the good and just road. These paths call on us to face others and ourselves on pivotal issues. We must face the unresolved and unknown with awareness, courage, kindness, and honesty. These attributes are the integral skills or ‘weapons’ of Indigenous lawyers as legal warriors;<sup>3</sup> they are the forces of Indigenous lawyers as diplomats.<sup>4</sup>

Most of the time, people are skeptical of this hard and difficult path. Indigenous knowledge and the structure of the languages rely on personal experiences and feelings rather than external authority and authoritative visions of the law lodge. Yet with the attempt to unfold the law of colonization and its adjudicative legacy in contemporary legal analysis, this is the road of the legal warriors. For Indigenous peoples, they have to search in European thought and Indigenous teaching for the sources of ‘truthing’, justice, healing, and emancipation. The purpose or spirit of this search is to create an equitable society that never has been and yet must be. The mapping and structuring of an innovative and creative postcolonial society is the purpose of Indigenous legal warriors, statesmen and scholars. I have been struggling with this purpose during my formal legal education and legal experience, an experience that has become to feel like an exhaustive vision quest. This is a shared quandary that each Indigenous legal warrior struggles to comprehend. The essence of these questions is how Indigenous peoples can change existing Eurocentric thought and analysis to create a better life for Indigenous peoples and a postcolonial society. I want to transform Eurocentric legal analysis so that law may fulfill its primary avocation of creating, sustaining, and protecting an enlightened and

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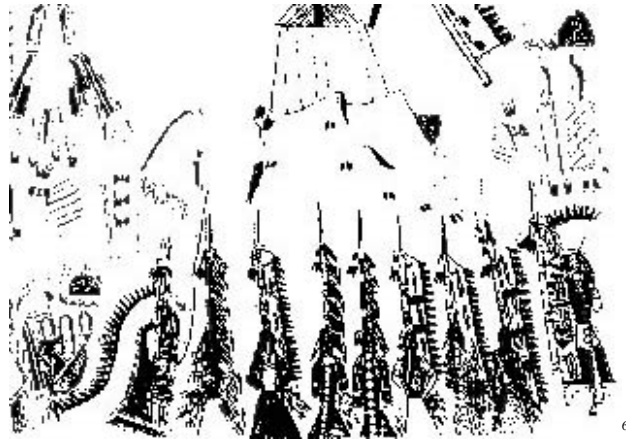
3. Gloria Valencia-Weber, “Law School Training of American Indians as Legal Warriors” 20 *Amer. I. L. Rev.* 5 and our elegant conversations on this topic.

4. When I speak of Indigenous lawyer diplomats, I do not distinguish them from legal warriors, but only from the practical Indian band politicians and administrators. Typically, the best diplomats are also legal warriors. Mature legal warriors must have the skills of the diplomats and they must know when to use them. However, this is another discussion.

democratic society that respects Indigenous peoples and their rights. The postcolonial society requires a deeper, inclusive, democratic governance that is capable of generating a high-energy political mobilization, which is cumulative, sustained, and motivated through institutional innovations, while respecting the inherent diversity of humans and ecologies.

In this process, I look to teachings from the ‘Indigenous Humanities’ of every continent for guidance. Comprehending ‘Indigenous Humanities’ generates an alternative intellectual context capable of enhancing core values such as parity, freedom, justice, and human rights. Its fundamental premise is that at one time the entire human realm was Indigenous. Thus, scholarship must explore the movement from Indigenous to colonizer, imperial, modern, postmodern and postcolonial movements. Contemporary scholarship should always indigenize, critically historicize and dialogue comparatively.<sup>5</sup> This methodology not only allows others to learn from the Indigenous experience, but also offers greater legitimacy for Indigenous peoples. The relevance of the ‘Indigenous Humanities’ to the postcolonial consciousness and law can provide teachings and lessons learned by Indigenous peoples around the world.

## II      **OBSIDIAN QUANDARIES**



The quandary and obstacles to creating postcolonial ‘Indigenous Humanities’ legal consciousness, and postcolonial society can be

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5. Professor L.M. Findlay in “Always Indigenize: The Radical Humanities in the Postcolonial Canadian University” (2000) *Ariel* 31 at 307-26 articulates this fundamental concept.
  6. J.M. Szabo, *Howling Wolf and the History of Ledger Art* (Albuquerque: University of New Mexico Press, 1994) at 107.

summarized as 'Eurocentrism'. Eurocentrism is the gentle label academics apply to the legacy of colonization and racism.<sup>7</sup> It is the imposing ideology of formal education, which has created the Enlightenment and secular nationalism. Also, it has generated the diverse social and economic theories of liberalism, socialism, communism, and capitalism as well as racism, sexism and related intolerances. The fundamental assumption of Eurocentrism is the superiority of Europeans over Indigenous peoples. Eurocentrism is not a matter of attitudes in the sense of values and prejudices. It is the structural keeper of the power and context of modern prejudice or implacable prejudgment. It has been the dominant artificial context for the last five centuries and is an integral part of most existing scholarship, opinion, and law. As an institutional and imaginative context, it includes a set of assumptions and beliefs about empirical reality. Educated and usually unprejudiced Europeans and their colonizers accept these assumptions and beliefs as true 'natural' propositions supported by 'the facts'. Historian Lise Noël has dramatically captured the consequences and contradictions of this cognitive context:

Alienation is to the oppressed what self-righteousness is to the oppressor. Each really believes that their unequal relationship is part of the natural order of things or desires by some higher power. The dominator does not feel that he is exercising unjust power, and the dominated do not feel the need to withdraw from his tutelage. The dominator will even believe, in all good faith, that he is looking out for the good of the dominated, while the latter will insist that they want an authority more enlightened than their own to determine their fate.<sup>8</sup>

Eurocentric contexts are supported and sustained by educational curricula, which in turn defines practicality and 'reality'. When most professors describe the 'world', they are describing the artificial Eurocentric contexts and traditions as universals, thereby dismissing and ignoring Indigenous worldviews, knowledge, humanities and thought. Often, Indigenous peoples have described these various curricula as the 'dead white men' studies. At best, universities define Indigenous heritages and worldviews as inferior and exotic as compared to the Eurocentric heritage and worldview. Typically, however, Eurocentric thought gives scant attention to Indigenous worldviews and humanities. This lack of attention systematically confirms Indigenous inadequacy, both explicitly and implicitly. Neglect of Indigenous humanities and law reinforces a negative image developed by Eurocentrism of the many and diverse Indigenous heritages and worldviews.

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7. J.M. Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (New York: Guilford Press, 1993). I have relied heavily on Blaut's analysis. See generally L. Noël, *Intolerance: A General Survey*, trans. A. Bennett (Montreal and Kingston: McGill-Queen's University Press, 1994).

8. Noël, *ibid.* at 79.

Slowly, however, a strong critique of Eurocentrism is under way in most academic disciplines and fields of thought, usually under the labels of post-modernism and postcolonialism.<sup>9</sup>

Eurocentric curricula are not benign, and have shown themselves to be extremely destructive to Indigenous languages, knowledges, and existence.<sup>10</sup> They have conceptualized and shaped a false ideology of Indigenous inferiority, which stripped our grandparents and parents of their knowledge, dignity, and wealth.<sup>11</sup> For most Indigenous students, the realization of their invisibility or transparency in Eurocentric curricula generates the systemic trauma of looking into a still lake and not seeing their images. Studying and learning the Eurocentric canon makes them become alien in their own worldview and eyes. They are unable to recognize themselves or their languages, humanities, and knowledges as integral to ‘the’ knowledge. They exist as another manifestation of the legal fiction of *terra nullius*. They exist as negative reflections and shadows in the Eurocentric worldview.

Yet, we survive this traumatic experience of being excluded and devalued. But the costs of survival have been very high. Most Indigenous students are well aware of these losses and biases under Eurocentrism and racism. Others carry the biases as their personal doubts. Tragically, some students succumb and inwardly endorse Eurocentric thought, helping to lay the foundations of the relationship of domination that will entrench their thoughts.<sup>12</sup> Sometimes they become aware of these biases when they are faced with arguments that critique or contradict them. None of these realizations, however, restore to Indigenous students their ancient heritage and talents. They do not allow them to understand their cognitive abilities or gifts. Instead, these realizations give them a haunting awareness of their

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9. E. Duran & B. Duran, *Native American Postcolonial Psychology* (Albany: SUNY, 1995); I. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); J.R. Ponting, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986); H.A. Bulhan, *Frantz Fanon and the Psychology of Oppression* (New York: Plenum Press, 1985); J. Axtell, *The Invasion Within: The Conquest of Cultures in Colonial North America* (New York: Oxford University Press, 1985); A. Nandy, *The Intimate Enemy: Loss and Recovery of Self Under Colonialism* (Delhi: Oxford University Press, 1983); A. Memmi, *Dominated Man: Notes Toward a Portrait* (Boston: Beacon Press, 1969) [hereinafter *Dominated Man*]; F. Fanon, *Black Skin White Mask*, trans. C.L. Markman (London: MacGibbon & Kee, 1968); F. Fanon, *The Wretched of the Earth*, preface by Jean-Paul Sartre, trans. Constance Farrington (London: MacGibbon & Kee, 1965); A. Memmi, *The Colonizer and the Colonized*, trans. Howard Greenfield (New York: The Orion Press, 1965) [hereinafter *The Colonizer*].
  10. M.A. Battiste, “Micmac Literacy and Cognitive Assimilation” in J. Barman, Y. Hébert, & D. McCaskill, *Indian Education in Canada: The Legacy* (Vancouver: University of British Columbia Press, 1986); Assembly of First Nations, *Towards Linguistic Justice* (Ottawa: AFN, 1990) and *Rebirth of First Nations Languages* (Ottawa: AFN, 1992).
  11. See generally *Final Report*, *supra* note 1; H. Cardinal, *The Unjust Society; the Tragedy of Canada’s Indians* (Edmonton: M.G. Hurtig, 1969) [hereinafter Cardinal].
  12. Noël, *supra* note 7 at 79–80.

cognitive annihilation and of the transformation required if education is to be a fair and just experience. Over time, these awarenesses will emerge powerfully.

### III POSTCOLONIAL LEGAL CONSCIOUSNESS AS LEDGER DRAWING

How does one begin to counteract the Eurocentric contamination of one's mind? Specifically, how does an Indigenous mind make sense of the obsidian quandaries caused by the clash between Indigenous teachings, law and values and the values taught in the course of Eurocentric legal training? Only particular responses exist to these issues. In my responses to these challenges and historical atrocities, my ancestors have silently guided my approach. They were also imprisoned and forcibly taught English, Eurocentrism and to assimilate to foreign values. In groping for legal responses to replace violence with dialogue and to replace discrimination with fairness, I think of my ancestors, especially *Minimic* (Eagle Head) and his son *Honanistoo* (Howling Wolf) and their generation. They were imprisoned for struggling to maintain the treaty order against transgressors and the soldiers who protected these violations. Behind the gray, stone walls of their prison in Florida, they were forced to learn the English language and Eurocentrism. They had to learn to be at home with the forces of the imposed legal system in contrast to their teachings and memory.

My relatives translated the experience of imprisonment and colonization in interesting ways. Dwelling in the heartless space of prison life and alien education, the space between incapacity and inability, they navigated the vicious tensions of memory, learning, and forgetting by interpreting their experiences through drawings sketched in nineteenth-century ledger books. The contents of these books have been labeled by some as ledger drawings or ledger art.<sup>13</sup> By invoking ledger drawing, I am seeking to honor the efforts of these interpreters of experience, but also affirming their visions and translations. I may not use their precise visual icons, but my symbols are based on their cognitive experiences. I draw on their experiences when I find myself faced with similar colonized artifices and texts.

The military personnel offered my Cheyenne (*Tsistsistas*) relatives<sup>14</sup> empty ruled accountants' ledger books as gifts so they could record their

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13. See generally Szabo, *supra* note 6; Janet C. Berlo, *Plains Indian Drawing 1865-1935: Pages From a Visual History* (The American Federation of Arts and Drawing Center, 1996); Valerie Robertson, *Reclaiming History: Ledger Drawings by the Assiniboine Artists Hoñgeeesa* (Calgary: Glenbow-Alberta Institute, 1993). See especially the innovative and brilliant use of the legal drawer art in the conceptualization of Canada in Professor L.M. Findlay, "Interdisciplining Canada: 'Cos Breaking Up is Hard to Do'" (1999) 65 *Essays in Canadian Writing 1* and forthcoming works that have inspired my thoughts.

14. See Szabo, *ibid.*; Peter J. Powell, "Artists and Fighting Men: A Brief Introduction to Northern Cheyenne Ledger Book Drawing" (1968) *American Indian Art Magazine* 1(1) 44.

educational teachings. The ruled ledger books represented symbolically the colonial aspirations: they were the medium and tool of a capitalistic, market vision of Eurocentrism. They symbolized the economic potential of the new continent to the colonizer, underscoring their desire for abundance and purposes of economic opportunity.

Little is known about how my relatives understood the ledger books; however, their efforts speak for them. They found their own use for the books within their heritage. They ignored the covert purpose and principles of the ledgers and used them instead to contain their memories of ceremonies and images of their experiences and visions. Slowly they filled the lines of financial regulation, which waited for English script and the enumeration of progress and prosperity, with drawings.<sup>15</sup> Their drawings reclaimed the ancient memory of pictographic symbols on rocks, buffalo robes, parfleches or saddlebags, shields, and teepees. Their designs were similar to those that had pervaded their lives and winter counts. They captured the tragedies arising from rows of smoking guns. They invented new symbols to represent complex ideas, such as dotted lines emerging from the mouth to represent speech or song. In abstract symbolism and narrative representation, the ledger books unfolded a worldview and destiny different from the one their donors had intended: they captured the integrity of Indigenous thought and humanities rather than Eurocentric thought.

Through the hybrid medium of Indigenous representations in European texts, these ledger drawings recorded a familiar heritage in an unfamiliar medium. The drawings witness a powerful Indigenous response to the colonial encounter. These ledger drawings are similar to the modern prison writing embodied in Antonio Gramsci's *Prison Notebooks*,<sup>16</sup> Aleksandr Solzhenitsyn's *Gulag Archipelago: 1918–56*<sup>17</sup> and Nelson Mandela's *The Struggle is My Life*.<sup>18</sup> All share a transformation of imprisonment and displacement into covert resistance against colonial violence, practices, and developmental economics.

Most contemporary Indigenous scholars, lawyers, and law students are involved in a project similar to ledger drawing. Our diverse efforts to achieve balance and to decolonize Eurocentric law and thought all share the indomitable spirit of ledger drawers. The major difference is that rather than using ledger books, our memory of our Indigenous heritage has been drawn or scrawled on legal notepads and pleadings. The similarities are entrenched in the art of refusing to forget or deny our heritage or languages. Also, our

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15. See Szabo, *ibid.*; Powell, *ibid.*; Berlo, *supra* note 13.

16. (New York, Harper & Row, 1973; New York: Columbia University Press 1992). Originally titled *Quaderni Del Carcere*. See also D. Boothman, ed. and trans., *Further Selections from the Prison Notebooks* (London: Lawrence & Wishart, 1995).

17. (New York: Harper & Row, 1974-1978).

18. (New York: Pathfinder Press, 1986).



attempts to transform the texts and symbols of constitutional and common law into different shapes are similar to the ledger drawers' use of the accountants' ledger books. It is part of the spirit of the Indigenous trickster in our teachings.

Our redrawing of the legal text of colonization and attempts to eliminate racism are similar processes to ledger drawing. Indigenous lawyers have had to resist the European categories and methods and redraw the map and consequences of the law of colonization. The law of colonization is derived from Protestant and Puritan reformations in Germany and Britain, which free law from theological doctrine and ecclesiastical influence and enable the spiritualization of the secular law. These legal transformations were the last great movements of institutional religion to fundamentally influence the development of Eurocentric law.

The spiritualization of the law was based on the belief in the individual Christian consciousness. By God's grace, this consciousness was required to reform the existing order and to create new social relations through the exercise of will.<sup>19</sup> These beliefs recast the old legal order of the Catholic church and monarchies into new forms and actions. Protestant conscience transformed will and intent into a theory of law. Nature transformed into property law; economic relations became contract, thereby allowing individual entrepreneurs to arrange their property and business relations. The property and contract rights so created were held to be sacred and inviolable so long as they did not contravene Protestant conscience, which gave them their sanctity.

In this legal reformation, this consciousness established elected local congregations as the seat of truth and political authority. The reforms limited also the spiritual or secular sovereign of the absolute monarchs and aristocrats of states who ruled Europe. Lutheran and Puritan positivism began to separate law from morals, deny the law-making role of the Church, and find the ultimate sanction of law in coercion and punishment. The development of positive, written law was originally conceived to rest ultimately upon the prince alone; except the law precariously presupposed that any exercise of the Sovereign's will would respect the individual christianized consciences of his subjects, especially their property and their contract rights. After the English Revolution of the seventeenth century, the common law redefined its meaning and authority as derived from the past history of the people whose law it is, their customs, the genius of their

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19. See generally B. Tierney, *Religion, Law and the Growth of Constitutional Thought, 1150-1650* (Cambridge: Cambridge University Press, 1982); G. Winstanley, "Law of Freedom in a Platform" in C. Hill, ed., *The Law of Freedom and Other Writings* (Harmondsworth: Penguin, 1973); M. Walzer, *Revolution of Saints: A Study in the Origins of Radical Politics* (Cambridge, Mass: Harvard University Press, 1965); John T. McNeil, *The History and Character of Calvinism* (New York: Oxford University Press, 1954).

institutions, and their historic values. Judicial precedents were built on custom and into the Anglocentric common law legal system. However, in constructing its distinction between law making institutions and law applying institutions, the British legal philosophy and political power has swung between absolutism and natural law theories of order freedoms.

In the seventeenth century, the Puritan Revolution was extended to develop the ideas of colonization of Indigenous territories. The active Puritan colonizers were bent on reforming the Indigenous world: they had already deified the highest powers of church and state in England on the grounds of individual conscience, divine biblical law, and natural law concepts embodied in the medieval legal tradition. Their open disobedience to English law laid the foundations for civil or human rights traditions, civil liberties, and representative government.<sup>20</sup> Also, the Calvinist congregationalism provided the religious and moral basis for the modern concepts of laws of nations, the treaty order, the emerging social contract and government by consent of the governed.<sup>21</sup> The treaties between the British sovereign and Indigenous nations reflected these conceptions. The treaty order is a consensual order, expressing the free will of both nations.<sup>22</sup> These treaties invoked the voluntary rules that govern the international

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20. David Little, *Religion, Order and Law: A Study in Pre-Revolutionary England* (Chicago: University of Chicago Press, 1984); A.D. Lindsay, *The Modern Democratic State* (New York: Oxford University Press, 1962).

21. Generally attributed to the writing of Thomas Hobbes and John Locke, *infra* note 48.

22. For constitutional manifestation of the significance of treaties and the treaty order in North America, see *An Act to Remove Doubts as to the Exercise of Power and Jurisdiction by Her Majesty within Divers Countries and Places out of Her Majesty's Dominions, and Render the same more Effectual*, 1843 (U.K.), 6 & 7 Vict., c. 94; Constitution Act, 1982, ss. 35, 52, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; U.S. Const. art. VI, cl. 2. See generally R.L. Barsh & J.Y. Henderson, "International Context of Crown-Aboriginal Treaties in Canada," CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996); R.A. Reiter, *The Law Of Canadian Indian Treaties* (Edmonton: Juris Analytica, 1995); A.T. Vaughan & W.S. Robinson, eds., *Early American Indian Documents: Treaties and Laws, 1607-1789*, 5 vols. (Frederick, Maryland: University Publications of America, 1983); C. Alexandrowicz, *The European-African Confrontation: A Study in Treaty-Making* (Leiden: A.W. Sijthoff, 1973); C. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon Press, 1967); R. Strickland, ed. *Cohen's Handbook of Federal Indian Law, 1982* (Charlottesville, Va: Michie Company, 1982) 62-126; M.F. Lindley, *The Acquisition of Backward Territory* (London: Longmans, Green & Co., 1926); H. F. Depuy, ed., *Bibliography Of The English Colonial Treaties With The American Indians* (New York: AMS Press, 1917); W. Lee-Warner, *The Protected Princes of India*, 2d ed. (London: Macmillan, 1910), reprinted as *Native States of India* (New York: AMS Press, 1971); Sir F. Piggot, *Exterritoriality: The Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (London: Butterworth & Co., 1907); C.J. Kappler, ed., *Indian Affairs: Laws and Treaties*, 2 vols. (Washington: Government Printing Press, 1902); A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880; Saskatoon: Fifth House Publishers, 1991).

transfer of rights between two distinct nations, with each nation operating as a constitutional federation.

In the past two centuries, the colonial Anglocentric jurists of the common law were engaged in a focused search for the built-in legal structure of the market version of colonial democratic society.<sup>23</sup> It was built on an unexamined foundation of colonization and its strategy of difference. The jurists and law profession attempted to find the latent principle in the theories of property, torts, and contract in private case law that represented the lawyers' medium and tool for a colonial, private, market-driven society, just as the ledger books represented the accountants' medium and tool for the same society. Property law sought to find the rules that governed the individual acquisition of rights in external things. Torts sought the rules governing protection of private individuals. Contracts sought the rules to govern the transfer of acquired and protected rights between individuals and groups. These common law rules were organized around a principle of individual autonomy and consent. These legal traditions extol the virtues of individualized justice in a two-party lawsuit on a case-by-case basis. These are the values that represented the Anglocentric legal culture.

In addition, in the colonies the common law courts attempted to find an equitable and fair structure of representative, responsible, democratic government and federalism in imperial and constitutional law. The colonial courts and legal profession became absorbed in their ideologies of self-rule and nationhood by confronted imperial law and searched for the intrinsic legal structure of a democratic or republic governments.<sup>24</sup> They neglected the Indigenous law and treaties and sought only to assimilate Indigenous peoples into their utopian, Eurocentric, dream worlds.

The judicial quest for an implicate order that combines private and public law has failed or is failing.<sup>25</sup> The courts failed the diasporic settler society and the Indigenous nations. The common law search was tempered by the strife that pervades everyday life. Courts continually blurred the line between private rights and public law, and created an elusive and complex continuum of relative rights. This created the legislative interventions and the fiction of Parliamentary omnipotence in Britain and its colonies that

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23. R. Pound, *The Spirit of the Common Law* (Boston: Marshall Jones Company, 1921); R.M. Unger, *What Should Legal Analysis Become?* (London and New York: Verso, 1996).

24. See *Re Reference by the Governor General in Council Concerning Certain Questions Relating to the Secession of Quebec*, [1998] 2 S.C.R. 217 [hereinafter *Quebec Secession Reference*] for the contemporary judicial construction of that process and the implicate principles of the movement.

25. R.M. Unger, "The Criticism of Legal Thought" in *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1983) at 5-14.

affirms positivism in academic and legal thought.<sup>26</sup> Judges and academic lawyers in the United Kingdom, New Zealand, and Australia have challenged the legacy of parliamentary sovereignty.<sup>27</sup> In *Constitutional Fundamentals*, William Wade wrote that British lawyers have been “brain-washed...in [their] professional infancy by the dogma of legislative sovereignty.”<sup>28</sup> In the United Kingdom, Sir John Law has argued that true sovereignty belongs not to Parliament, but to the unwritten constitution, which the judiciary can enforce by invalidating statutes.<sup>29</sup> In Canada, constitutional supremacy and latent, unwritten principles are displacing parliamentary supremacy.<sup>30</sup>

Despite the legal failures, the professional techniques of legal positivism, judicial decisions and legislative powers continue to imprison or contain Indigenous law, peoples, lawyers, and law students. They ignore the intimate relations between customary law and orders of Indigenous peoples and the seventeenth century common law. The searches, legal analyses, and compilations of black letter law, legal positivism, and habitual obedience to the law remain the uneasy foundation of contemporary legal education in law schools. This curriculum is based on the Protestant legal revolution as it transformed into colonial law benefiting the colonizers. Enfolded in these legal decisions are the normative visions that protect the colonizers’ prosperity, their system of rights, and their institutions of government and adjudication.<sup>31</sup> Legal texts oppress and discriminate against Indigenous customary law, as well as the ecological theory of law. The continuing thrust in modern legal thought and analysis to regulate market and constitutional law ignores Indigenous law and its implicate order based on

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26. See generally A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 9th ed. (London: Macmillan, 1939); J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999).
  27. Scholars have denounced Dicey’s doctrine of parliamentary omnipotence as a “huge, ugly, Victorian monument that has dominated the legal and constitutional landscape and exerted a hypnotic effect on the legal perception.” See G. de Q. Walker, *The Rule of Law—Foundation of Constitutional Democracy* (Melbourne: Melbourne University Press, 1988) at 161. See also M.D.J. Conaglen, “Judicial Supremacy: An Alternative Constitutional Theory” (1994) 7 *Auckland Univ. L. Rev.* 665 at 666. The dogma of parliamentary sovereignty has also been called a fairytale, the Aladdin’s cave of the common law and the declaratory theory of law. See Lord Reid, “The Judge as Law Maker” (1992) *The J. Soc. Public Teachers of Law* 22.
  28. William Wade, *Constitutional Fundamentals* (London: Stevens, 1980) at 68. Earlier Wade, in “The Basis of Legal Sovereignty” (1955) *Cambridge L.J.* 172 at 188, had stated: “The rule of judicial obedience [to parliamentary sovereignty] is in one sense a rule of common law, but in another sense—which applies to no other rule of common law—it is the ultimate political fact upon which the whole system of legislation hangs” [emphasis in original].
  29. John Law, “Law and Democracy” (1995) *Public Law* 72 at 87, 92; John Law, “The Constitution: Morals and Rights” (1996) *Public Law* 622 at 635.
  30. *Quebec Secession Reference*, *supra* note 24.
  31. A.W. Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (Toronto: University of Toronto Press, 1990).

the surrounding ecology.<sup>32</sup> It continues to ignore or marginalize Indigenous legal systems, their procedures, and laws. Law schools even ignored the innovative *sui generis* analysis generated by the Supreme Court when dealing with Aboriginal and treaty rights; the schools continued to rely on Eurocentric legal positivism, precedent and policy derived from colonial legal thought.<sup>33</sup> These intentional omissions create our sharp obsidian quandaries of our warrior's legal consciousness and our relations with Canadian legislation, jurisprudential theory, and precedents.

In an attempt to balance their Eurocentric legal consciousness with Indigenous legal consciousness, Indigenous lawyers are reintroducing ancient visions of human relationships to constitutional, legislative and procedural rules, as well as private law. We are restructuring these relationships in the spirit of the ledger drawers. This process is both idealistic and visual. I find myself sharing (even imposing) Indigenous worldviews and thought on Anglo-American legal texts and processes with other Indigenous lawyers. In the most important meetings, while deep in thought or listening, I find the Indigenous lawyers are all drawing ancient icons and visual images on agenda lists and memos. In both activities, we are retracing an ancient art form of ledger drawing.

Those who hold power have categorized our efforts to transform their texts into documents of inclusion and empowerment for Indigenous peoples as 'postcolonial legal thought'. I enjoy the inspirational idea of 'postcolonial,' but achieving this state is still problematic. The legal and academic positivists insist on forging a definition of the concept of postcolonialism to place in their word dictionary and debate its meanings.<sup>34</sup> Indigenous lawyers and scholars, however, conceptualize the idea as discursive remedies to our suffering, rather than quibbling word games and conceptual riddles as in Eurocentrism. The remedies are in our vision, consciousness, and feelings. They remain in the places and ceremonies that our Creator placed them; it is for us to continually rediscover and renew these teachings.

Postcolonial society has not been realized yet. Its achievement is our hope, vision, and purpose. Our Indigenous strategy is scrambling and quibbling towards a distant horizon surrounded by apathy, bad faith and deception. Creating and rethinking a postcolonial legal order is our shared

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32. From a scientific view of theoretical physics of the implicate order, see D. Bohm, *Wholeness and the Implicate Order* (London: Routledge & Kegan Paul, 1980). I have benefited tremendously from my discussion with Leroy Little Bear and the Elders on the topic of the implicate order in Aboriginal languages and thought.

33. For a balanced approach to these topics in constitutional law, see P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

34. Most forget that dictionaries were created as a colonial project at the time of high colonialism and their definitions have to be understood in this context.

vision; getting past existing colonial thought is our actuality. I see our efforts as stirring up a vortex of commitments to end our oppression and suffering by creating a new vision of an equitable society. As our teachings reveal, we are not able to use our vision of a postcolonial legal order or society until after we have mapped and articulated the vision for people to see and visualize. This consciousness is another manifestation of the spirit of ledger drawing in legal and political thought. Let us call our shared and unnamable vortex as ‘postcolonial ledger drawing’.

#### IV ELIMINATING OUR COGNITIVE IMPRISONMENT

Eurocentrism and colonial thought still imprisons colonized Indigenous peoples and Indigenous lawyers. Eurocentric thought has dreamed imaginary societies that generate our cognitive prisons. Eurocentric law and punishment sustained them. These noble visions, however, have remained flawed and the legal systems they have created have trapped Indigenous peoples. Eurocentric thought has not been able to live up to or implement its dreams. Europeans and their colonizers have been unable to defend their visions on intellectual merits; instead they have sustained them by legalized force. Neither the Europeans’ word-worlds nor their life-worlds have created human solidarity. They have created comfort for the colonizers and poverty for the Indigenous peoples. The economic gap is still growing. This weakness has created and now sustains the violent world in which we live.

Indigenous thinkers have long noted these facts. As early as 1777, a Cherokee commented about Eurocentric thought:

Much has been said of the want of what you term “Civilization” among the Indians. Many proposals have been made to us to adopt your law, your religion, your manners and your customs. We do not see the propriety of such a reformation. We should be better pleased with beholding the good effects of these doctrines in your own practices than with hearing you talk about them or of reading your newspapers on such subjects.<sup>35</sup>

Similarly, a century later, in 1880, a Lakota stated that, “[w]hite men have education and books, and ought to know exactly what to do, but hardly any two of them agree.”<sup>36</sup>

Unfortunately, the modern boundaries of our imprisonment are both cognitive and physical. For the first and fragile generation of legal warriors, diplomats and ledger drawers, it is the context of our struggles. We need to understand our ideological prison before we can talk about strategies and

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35. Old Tasse, in N.S. Hill Jr., ed., *Words of Power. Voices from Indian America* (Golden Colo.: Fulcrum Publishing, 1994) at 36.

36. Spotted Tail, in Hill, *ibid.* at 38.

tactics for escape, emancipation or remedies. This is especially important to Indigenous lawyers since we seek to practice law, law reform, and empower our communities and peoples within the toxic parameters of our cognitive prison of our legal consciousness. Additionally, beyond our cognitive prison, stands physical prisons, penitentiaries or correctional institutions that contain many of our people. This new representation of Indigenous peoples reveals the extent of systemic discrimination in Canada and other British colonies. These actualities form the menacing backdrop to, and serve as symbols for, all our legal efforts and thoughts. We are the road-people that negotiate the boundaries between freedom and imprisonment of our peoples.

Although occasionally Eurocentric thinkers and lawyers are aware that their governments are artificial constructs,<sup>37</sup> they violently resist remaking these constructs. In fact and theory, they usually deny that their governments can be reimagined or modified to be more democratic or inclusive. Faced with the realization that some Indigenous idea or action might compete with their constructs, they evoke the Hobbesian nightmare of the chaos that would follow if they were to change the existing order. It is not the chaos they fear, but having their contrived superiority challenged. As one Eurocentric scholar has confirmed:

When we discover that there are several cultures instead of just one and consequently at the time when we acknowledge the end of a sort of cultural monopoly, be it illusory or real, we are threatened with the destruction of our own discovery. Suddenly it becomes possible that there are just others, that we ourselves are an "other" among others.<sup>38</sup>

To shore up their failing imaginative contexts and structures, Eurocentric governments resort to coercive authority or violence or imprisonment to maintain their enormous privileges and enslaving visions. The Eurocentric order and thought is constructed on the idea that terror is a legitimate source of sovereign power and law. What it conceals, however, are the effects of such terror on those who suffer under the rule of this law.<sup>39</sup> This has created

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37. See generally K. Keohane, *Symptoms of Canada: An Essay on the Canadian Identity* (Toronto: University of Toronto Press, 1997) ("The unity of what is common to us, let's call it 'Canada', is an allusive/ illusive ideal" at 8); C. Castoriadis, *The Imaginary Institutions of Society*, trans. K. Blamey (Cambridge, Mass: MIT Press, 1987); R.M. Unger, *Social Theory: Its Situation and Its Task: A Critical Introduction to Politics, a Work in Constructive Social Theory* (Cambridge: Cambridge University Press, 1978).

38. P. Ricoeur, *History and Truth*, trans. C. Kelby (Evanston, Ill.: Northwestern University Press, 1965) c. 5 at 278, cited by Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" [1989-1990] Can. Hum. Rts. Y.B. 3.

39. W.E. Conklin, *The Phenomenology of Modern Legal Discourse: The Juridical Production and the Disclosure of Suffering* (Vermont, U.S.A.: Ashgate Publishing, 1998).

endless mass atrocities and wars of colonization in the twentieth century.<sup>40</sup> Typically, they hold and exercise that force by means of the legal system and its police. If these are inadequate, they rely on the army. These Eurocentric responses create the need for Indigenous legal warriors as well as the invention of new and legal form of responses to unspeakable destruction and degradation of human beings by Eurocentric governments.

The problems the Eurocentric legal system has with Indigenous peoples are also widespread in educational institutions. Universities and educated people struggle with similar negative attitudes toward our humanity and its relevance to curricula. These institutions maintain our cognitive prison house. They are the oldest forums of the learned audience of deaf men that cannot hear Indigenous languages and teachings. They attempt to force all knowledge into the Eurocentric categories and discrete disciplines. They attempt to deny our holistic knowledge and thought. Indigenous people are forced to exist as exotic interdisciplinary subjects. Our diverse legal orders and consciousnesses are dismissed as imaginary and not coercive enough to qualify as law. Our humanity and our very essence as human beings are ignored in favor of failed Eurocentric models.

Eurocentric education forces Indigenous peoples to live according to imposed Eurocentric scripts. We are not living our own worldviews or visions. We live most of our life in someone else's dream world. We exist in the contrived institutional and conscious realms of a failed colonialization; a state of existence that is often confused with the idea of civilization or modernity. We resist imitation of these colonial scripts, but we are partially complicit in maintaining them even as we seek to change them. Thus, we live in contradictions and irony. Although we resist these manifestations of who we should be, we are forced to live life with a mistaken and imposed identity that is better suited to the imagination of others. Our educational and professional experiences make us feel disconnected from our worldviews, our languages and our teachings. Our enormous creative and spiritual potential is not being used sensibly; the imposed identity unbalances our capabilities and needs.

Eurocentric universities must renounce the assumed higher authority of their curricula and methods.<sup>41</sup> This higher authority has never been earned or properly possessed. To imagine the impossible and talk about it effectively,

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40. M. Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998).

41. Costa Rica Declaration on "Workshop On Research And Higher Education Institutions And Indigenous Peoples" (Costa Rica: Office Of The United Nations High Commissioner For Human Rights, 2 July 1999) ("Attending experts and delegates affirm that the Indigenous communities are sources of higher education for the particular Indigenous heritage and knowledge. Attending experts and delegates reject the idea that Eurocentric educational institutions are 'higher' education and thus are required and necessary.").



we must confront Eurocentric thought and its fragmented disciplines. We must reveal to Eurocentric specialists their significant biases against Indigenous knowledge. We must abandon these biases for a new style of intellectual and cultural collaboration with Indigenous knowledge. We must create a new vision of postcolonial society.

In the past, our survival has depended on our acceptance of Eurocentric worldviews. Jean-Paul Sartre noted the existence of an “iron law which denied the oppressed all weapons which he did not personally steal from the oppressor.”<sup>42</sup> Initially, educated Indigenous peoples were unaware that the Eurocentric standards imposed upon them did not have an existence independent of their hierarchical relations of power. Only gradually have we come to understand that we cannot win at a game where the rules are rigged and likely to change as soon as we discover how they work. Forced to look inward for a secure cognitive foundation, educated Indigenous peoples have learned to know their own identity.<sup>43</sup> As Memmi recounts this process:

And [the colonized] who has the wonderful good luck to be accepted in a school will not be saved nationally. The memory which is assigned him is certainly not that of his people. The history which is taught him is not his own ... He and his land are nonentities ... or referenced to what he is not ... The colonized is saved from illiteracy only to fall into linguistic dualism ... In the colonial context, bilingualism is necessary ... But while the colonial bilinguist is saved from being walled in, he suffers a cultural catastrophe which is never completely overcome ... Suppose that he has learned to manage his language to the point of re-creating it in written works; for whom shall he write, for what public? If he persists in writing in his language, he forces himself to speak before an audience of deaf men ... It is a curious fact to write for a people other than one's own, and it is even stranger to write to the conquerors of one's people ... As soon as they dare speak, what will they tell just those people, other than of their malaise and revolt?<sup>44</sup>

Similarly, historian Lise Noël states the dilemma:

One of the not inconsiderable effects of oppression is that the dominator succeeds in imposing his logic even on the process adopted by the dominated to escape his control. This logic is double-edged, supplying both the victims the weapons and the oppressor with pride in having produced them. For example, some westerners have boasted of having taught Africans and Asians the principles of a revolutionary and liberal heritage after these were invoked to launch decolonization ... The dominated must free themselves from the snares and pitfalls pervading the discourse that they did not initially recognize as alien because it presented itself as all-encompassing and impartial ... The

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42. “Orphée Noir” in L. Senghor, *Anthologie De La Poésie Noire* cited in Noël, *supra* note 7 at 147.

43. Noël, *ibid.* at 190-91.

44. *The Colonizer*, *supra* note 9 at 104-09.

first thing that will have to be called into question will be the principle of an ideal model of humanity or a complete objectivity. In seeking emancipation, the oppressed ... would do best to renew the prevailing discourse by emphasizing the relative nature of differences in identity and recognizing the inevitability of competing subjectivities in the development of knowledge.<sup>45</sup>

To acquire freedom in any decolonized and de-alienated order, the colonized must end their silence and struggle to retake possession of their humanities, languages, and identities.<sup>46</sup> To speak initially, they have to share Eurocentric thought and discourse with their oppressors; however, to exist with dignity and integrity, they must balance Eurocentric knowledge with Indigenous knowledge and live with the ambiguity of thinking against the educated self. This keeps us as a member of the Indigenous split-brain society. The split-brain society was first generated in the horrific residential schools, but now exists in all Eurocentric educated Indigenous peoples who experience both sentiments of disintegration and resignation at the same time. We must learn to create models to help them take their bearings in unexplored territory, to heal and to end the gaps between systems of knowledge and peoples. Educated Indigenous thinkers have to understand and reconsider Eurocentric discourse in order to reinvent an Indigenous discourse based on heritage and language. Such understanding is essential if they are to develop new postcolonial syntheses or converge knowledge and law to protect them from dominators and oppressors, both old and new.<sup>47</sup> Still, they cannot legitimate this interpretative monopoly as universal; it is only a partial tool. Innovative,

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45. Noël, *supra* note 7 at 148-49.

46. See generally G. Castle, *Postcolonial Discourses: An Anthology* (Malden, Mass.: Blackwell, 2001); J. Thieme, *Postcolonial Con-texts: Writing back to the Canon* (London; New York: Continuum Books, 2001); C.R. King, ed., *Postcolonial America* (Urbana: University of Illinois Press, 2000); M. Wilson & A. Yeatman, *Justice & Identity: Antipodean Practices* (St. Leonards, NSW: Allen & Unwin, 1995); F. Barker, ed., *Colonial Discourse/Postcolonial Theory* (Manchester, U.K. & New York: Manchester University Press & St. Martin's Press, 1994); P. Williams & L. Chrisman, eds., *Colonial Discourse And Post-Colonial Theory: A Reader* (New York: Columbia University Press, 1994); J. White, ed., *Recasting The World: Writing After Colonialism* (Baltimore: John Hopkins University Press, 1993); E. Mudimbe-Boyi, ed., (1993) 33(2) *Post-Colonial Women's Writing* [Special issue L'Esprit Creature]; M. Wetherell & J. Potter, eds., *Mapping the Language of Racism: Discourse and the Legitimation of Expectation* (New York: Columbia University Press, 1992); I. Adam & H. Tiffin, eds., *Past the Last Post: Theorizing Post-Colonialism and Post-Modernism* (Calgary: University of Calgary Press, 1990); S. Harasym, ed., *The Post-Colonial Critic: Interviews. Strategies. Dialogues: Gayatri Chakravorty Spivak* (New York: Routledge, 1990); B. Ashcroft et al., *The Empire Writes Back: Theory And Practice In Post-Colonial Literatures* (London; New York: Routledge, 1989); P. Sharrad, ed., "Post-Colonial Issue" (1989) 17 *New Literatures Review* (Special Issue); S. Selmon & H. Tiffin, *After Europe* (Sydney, N.S.W: Dangaroo Press, 1989); R. Pinxten, ed., *New Perspectives [sic] in Belgian Anthropology or the Postcolonial Awakening* (Göttingen, F.R. Germany: Edition Herodot, 1984).

47. Noël, *supra* note 7 at 145.

interpretative convergences of Indigenous and Eurocentric thoughts are needed in all levels of education to create a postcolonial society.

Most of our relatives are still living in an artificial society contaminated by colonial Eurocentric thought. The colonial educational systems have taught them to not believe in anything, to ignore each other or to care only for themselves. We were forced, and have become accustomed, to being something different from what we are or thought we were. Eurocentric thinkers have come to view Indigenous traditions as primitive relics from ancient times, perhaps even a little absurd in the era of science and computers. Indigenous knowledge is viewed as attempts to turn backward into memory rather than move toward the future. Indigenous peoples have become used to the colonial system and its educational system as many of us have accepted it, and our marginal role in it, as an unalterable fact of life. By Eurocentric desires of glory, pride, power, wealth and universalism, we have been forced or have chosen to become contaminated by the forces of assimilation. Thus, we have been complicitous with some of these forces and we have helped perpetuate them. We are all responsible for the operation of colonialism. While each of us is its victim, we are also, at various levels, its participants. We have suffered much for our participation. We have lived by always expressing our gratitude to others for the smallest of favors. We have allowed ourselves to exist as appendages of other peoples' vision of us.

To understand the sad legacy of the last five hundred years as something totally alien, something bequeathed to us by European society by colonialization and racism, would be buying into a false worldview. We cannot blame European society for everything, although on some days this makes so much sense. If we accept the notion of non-responsibility of our situation as our shield, we will be forced to rely on Eurocentric solutions and remedies rather than our own. This notion hides our complicity with colonization. It shields us from our responsibility to create a better society of our peoples. Indigenous peoples must accept their complicity with the legacy of colonization as a shame some of us have committed against our heritage and peoples. If we accept it as such, we will understand that it is up to us, and ultimately to us alone, to do something about it. Each of us has a duty today to dream of a better society. This is part of our legacy, the purpose of our suffering and our responsibility for the future seven generations.

Whether or not we are fully aware of it, however, like the ledger drawers, we care about our shared culture and our challenges as Indigenous peoples. Typically, our concern is manifested in negative ways. We become afraid of our dreams, our visions, our unrealized possibilities, and our destinies. Often, we doubt our worldviews, languages, and teachings. Even more often we surrender in frustration to imitative legal ideas. These

negative reactions are part of our hybridized worldviews and visions of how things should be. Because of the singular focus of the colonial system, these doubts are not viewed as normal. They are interpreted as evidence of Indigenous inferiority and low self-esteem. Thus, the awareness of our deep diversity is often experienced in a negative way, mostly because doubt is just not a very comforting feeling. Our painful contradictions are symptoms of colonialism and its demise in our spirits. They are daily reminders of our cognitive imprisonment and the need to harmonize Eurocentrism with Indigenous knowledge, heritage and languages.

## V UNFOLDING CONTRIVED SUPERIORITY

European beliefs in their superiority and civilization over Indigenous inferiority and primitiveness are the foundations of Eurocentric thought and law. These foundations have their roots in the ‘state of nature’ theory propounded by the seventeenth-century English political philosopher Thomas Hobbes and expanded on by John Locke, John Austin and Adam Smith.<sup>48</sup> Hobbes’ vision of the ‘state of nature’ has been and remains the prime assumption of Eurocentric modernity; a cognitive vantage point from which European colonialists can carry out experiments in cognitive modeling and engineering in residential and public education and use to justify our cognitive prison based on our perceived difference.<sup>49</sup> It is the ideology of context upon which colonial law has grounded our continued domination, oppression, and inferiority. From the idea of the ‘state of nature’, Hobbes and the political and legal philosophers who followed him constructed the idea of the artificial man-state and legal positivism.<sup>50</sup>

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48. J.Y. Henderson, “The Context of the State of Nature” in M. Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: University of British Columbia Press, 2000) at 57-76. Robert A. Williams Jr., *The American Indian in Western Legal Thought* (Oxford: Oxford University Press, 1990). The classic works of the ‘state of nature’ are: T. Hobbes, *Leviathan, or The Matter, Forme, & Power of a Common-wealth Ecclesiastical and Civill*, ed. by C.B. Macpherson (Baltimore: Penguin Books, 1968); J. Locke, *Two Treatises of Government* [1698] 2 vols., ed. by P. Laslet (Cambridge: Cambridge University Press, 1970); A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [1776] (Oxford: Clarendon Press, 1976); J. Austin, *The Province of Jurisprudence Determined*, 2d ed., and *Lectures of Jurisprudence*, 3 vols. (London: John Murray, 1861-63).

49. For a critique of the earlier conceptualizations of Indigenous peoples, see M.T. Hodgen, *Early Anthropology in the Sixteenth and Seventeenth Centuries* (Philadelphia: University of Pennsylvania Press, 1964) at 354-55. See also H.S. Commager, *The Empire of Reason: How Europe Imagined and America Realized the Enlightenment* (Garden City, N.Y.: Anchor Press/Doubleday, 1977); W. Brandon, *New Worlds for Old: Reports from the New World and Their Effect on the Development of Social Thought in Europe 1500-1800* (Athens, Ohio: Ohio University Press, 1986).

50. E. Cassirer, *The Philosophy of the Enlightenment*, trans. by Fritz Koelin & James Pettegrove (Boston: Beacon Press, 1955) at 19.

Indigenous peoples need to understand both the nature and the function of this ideology: to understand why and how we were taught these ideas, why the image of Indigenous inferiority has remained unchanged over the centuries, and how it constrains both our present abilities and our children's future.

Because of the negative images of Indigenous peoples, we are still not flourishing. To a majority of nation-states and Indo-European peoples, our humanity remains problematic. They do not respect our human rights. We still exist as Hobbesian savages in the 'state of nature', an idea that is the cornerstone of the colonial legal order. This idea has allowed the colonizers to rationalize their disregard of our human rights and their attempts to improve our inferior past with Eurocentric education. When the missionary and educational efforts failed, the colonizers saw Indigenous peoples as degenerates stuck in an irreversibly primitive condition. This rationalization projected us into the past, created the vanishing-race theory and allowed the colonial legal systems to ignore our human and treaty rights. Today, some existing legal orders have admitted their historical legacies are wrong and they are now searching for ways to remedy past denials of our human dignity and worth.<sup>51</sup>

Without reflection or explanation, Europeans have evaluated their legal system as superior. Eurocentric legal thought suppresses and controls all Indigenous forms of law, even those provisions interpreted as "special" or *sui generis*.

## VI OUR QUESTIONED HUMANITY AND HUMAN RIGHTS

Nowhere is the failure of the search for an innate, universal order in Eurocentric thought and human rights clearer than in the stalled discussions of the nation-states' Working Group on the Draft Declaration of Indigenous Rights ("WGDD") in the United Nations ("UN"). In this forum, the operations of our cognitive imprisonment and imposed inferiority are crystallized into questioning our humanity, our capacity as peoples and the failure of universal human rights and self-determination. This is not a new legal invention; it is the continuation of Eurocentrism and its strategies in public international law.<sup>52</sup> The Working Group discussions have exposed the incoherencies of colonization and human rights. They became the modern

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51. See "Canada's Statement of Reconciliation with Aboriginal Peoples" (1998) 3 Justice as Healing 1-2.

52. A. Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40(1) Harv. Int'l L.J. 1; D. Kennedy, "A New Stream of International Law Scholarship" (1988) 7 Wis. Int'l L.J. 1, 3. Kennedy criticizes twentieth-century scholarly output in international law as bound in "European doctrinal formalism".

audience of deaf men. The nation-states question colonized Indigenous peoples' personhood, our undefined identity and our humanity. While many call for the universalization of human rights, the nation-states fail to understand the necessity of the equal application of existing human rights to Indigenous peoples.<sup>53</sup> In particular, they reject the right of Indigenous peoples to self-determination, since this might lead to unacceptable freedoms for them. The resistance of the nation-states is based on their interpretation of state legitimacy and territorial integrity. They ignore the requirement that they only grant such ideas to those states that conduct themselves in conformity with the principles of equality and self-determination of all peoples.<sup>54</sup>

Very few academics, either in law or the humanities, have supported or helped the Indigenous quest for equal human rights in these crucial discussions. Like their nation-states, Eurocentric scholars are struggling with our transformation from being a force of nature with no role in the forces of politics or production to our being a force with aspirations for our humanity as codified in the text of the *Draft Declaration* of the UN Working Group of Indigenous Populations.<sup>55</sup>

Our daily existence in the nation-states also reflects the debates and intellectual violence of the WGDD. In Eurocentric thought, the legal system is where the ideal of colonization has taken on a detailed institutional form. The typical form has been manifested by the ideal of civilization. Eurocentric legal doctrine makes it possible to represent and discuss civilization and its institutions, and thus, to sustain and develop the privileges of the colonists. We must grasp the negative role assigned to Indigenous peoples before we can effect positive change.

The governments of the day, our legal guardians and fiduciaries, do not want to discuss ways of transforming legal or political institutions to include Indigenous peoples in nation-states. They have ignored the Royal Commission on Aboriginal Peoples and failed to fully implement the decisions of the Supreme Court of Canada. They do not want to end their national fantasies and myths about their nation, or to expose the injustices

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53. The Working Group on the Draft Declaration on Indigenous Rights ("WGDD") was convened in UN Headquarters in Geneva in 1995. The Ambassador of Peru is the elected chairman/rapporteur. Report of the UN Commission on Human Rights, *Establishment of a Working Group on Human Rights to Elaborate a Draft Declaration in Accordance with Operative Paragraph 5 of General Assembly Resolution 49/214 4*, Session L1/CHR Res. E/CN.4/1995/L. 11/Add.2:1995/32 (23 December 1994).

54. *Principles on Friendly Relations Among States in Accordance with the Charter*, GA Res. 2025, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8082 (1970) at 121.

55. See generally S.J. Anaya, *Indigenous Peoples In International Law* (New York: Oxford University Press, 1996); R.L. Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law?" (1994) 7 Harv. Human Rights J. 33.

that have informed the construction of state institutions and practices.<sup>56</sup> They do not want to create a postcolonial state. They do not want to sustain these efforts at institutional reform. They reject the idea of a hybridized state that includes Indigenous peoples in the political and adjudicative realms. They want Indigenous peoples to vanish into separate replicative or imitative institutions or organizations without equalized funds or capacities or shared rule. All these efforts are attempts to conceal the constitutive contradiction or unwanted side effects of the artificial, imaginative settler or “sodbuster” state and law whose search for implicate order has failed.

## VII BLACK STEM PIPE SENSIBILITIES IN THE LAW LODGE



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Among the Plains Indians, the rite of the black stem pipe is used in times of distress. Indigenous lawyers have learned to live as legal warriors, as a black stem pipe society. The crisis in Eurocentric legal and political thought and its colonial structures has created postcolonial thought among Indigenous lawyers. Indigenous lawyers have experienced and lived within this crisis of injustice. We live in a time of the black stem sensibilities. In *Gladue v. The Queen*,<sup>58</sup> the Supreme Court of Canada affirmed this conclusion:

In *Bridging the Cultural Divide* ... at p.309, the Royal Commission on Aboriginal Peoples listed as its first “Major Findings and Conclusions” the following striking yet representative statement: The Canadian criminal justice system has failed the Aboriginal peoples of Canada—First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural—in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the

56. See generally Cardinal, *supra* note 11; *Final Report*, *supra* note 1, vol. 5.

57. Berlo, *supra* note 13 at 104 (Unknown artists, Cheyenne leader meeting with Three Crows).

58. *Gladue v. The Queen*, [1999] 1 S.C.C. 688 at para. 62.

fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

In *Bridging the Cultural Divide*, the Royal Commission reported that colonization has systematically undermined the traditional Indigenous worldview and justice system and created racism as the fundamental lens through which Canadians view Aboriginal peoples. 'Race' is assumed as a 'natural' category, rather than a socially constructed category. Racism is a social context that focuses on observable physical difference as the basis for categorizing people and making decisions. An example of this context is the view that the constitutional rights of Indigenous peoples are race-based rights, rather than basic human rights. More than two decades of commissions, inquiries, reports, special initiatives, conferences and books have established the totalizing effects of colonization on Aboriginal peoples in Canada.<sup>59</sup> The common conclusion is that decolonization is a necessary and urgent reform needed to create an impartial legal system.

Indigenous peoples know this crisis more as feeling than as theory. They have to build their lives around injustices and pollution that they cannot heal, undermining their lives and dignity. In the context of a failed justice system that we do not control, we are struggling to free our minds and our peoples from the worst manifestations of the Eurocentric colonial context.<sup>60</sup> Additionally, Indigenous peoples are forced to live in societies with contaminated lands, sick rivers and forests; however, we are beginning to resist the cognitive imperialism that constructed these societies. We are

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59. Canada, Indian and Northern Affairs, *Indians and the Law* (Ottawa: Canadian Corrections Association and the Department of Indian and Northern Affairs, 1967); Law Reform Commission of Canada, *Report No. 34, Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: The Law Reform Commission of Canada, 1991); Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: The Commission, 1989); Ontario, *Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee* (Ontario: The Committee, 1990); Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991); Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impacts on the Indian And Métis People of Alberta* (Edmonton: The Task Force, 1991); Saskatchewan, *Report of the Saskatchewan Indian Justice Review Committee* (Saskatoon: The Committee, 1992); British Columbia, *Report on the Cariboo-Chilcotin Aboriginal Justice Inquiry* (Victoria: The Inquiry, 1993); Québec, *Justice for and by the Aboriginals: Report and Recommendations of the Advisory Committee on the Administration of Justice in Aboriginal Communities, submitted to the Minister of Justice and the Minister of Public Security* (Québec: Advisory Committee on the Administration of Justice in Aboriginal Communities, 1995); Canada, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996).

60. See for example M. Jackson, "Justice and Political Power: Reasserting Maori Legal Processes" in K.M. Hazlehurst, ed., *Legal Pluralism and Colonial Legacy* (Aldershot; Brookfield, USA: Avebury, 1995); The Honorable R. Yazzie, "Life Comes From It: Navajo Justice Concepts" (1994) 24 N.M.L. Rev. 175.



also beginning to resist the ecological consequences we have hitherto been forced to live with and accept. While Indigenous lawyers still have to acknowledge the dialectic of colonization, we must also have the courage to cause legal transformations. We must empower the ecologically-based knowledge of Indigenous thought, our kinship governance system and our laws, teachings, and customs. This harmonization haunts this essay, and will continue to haunt my mind.

Eurocentric thinkers do not understand the elegance of Indigenous thought and do not question the negative myths of colonial thought. They easily conclude that Indigenous knowledge, consciousness, and languages are irrelevant to contemporary thought. They see them as life-worlds without systems. Yet, when one aspires to decolonize Indigenous peoples, these neglected concerns contain the authority to stabilize Indigenous worldviews, languages and communities. Indigenous peoples cannot know who they are through the structure of borrowed languages and their categories. We cannot read about ourselves in books or reports written in alien languages. Since we do not know who we are, we remain trapped in another context and discourse that others have constructed based on presumed negative values.

The likely contribution that Indigenous peoples can make to postcolonial writing and research will be to elaborate on the weaknesses of current Eurocentric theories of development and culture. Regardless of how much satisfaction that effort brings us, however, it is not enough. We have to refocus on our experiences as Indigenous peoples and what this means to us, in order to transform legal consciousness. Discovering and understanding the dynamics of legal transformation will, in turn, create fresh awareness. This new awareness must inform an interdisciplinary synergy in law and related disciplines. This synergy is vital to healing and restoring our intercultural or transcultural integrity and our human dignity. This synergy is necessary to put Eurocentric thought in its proper place.

Indigenous scholars, writers, activists, and legal warriors are struggling to articulate postcolonial thoughts.<sup>61</sup> Law is only one mode of communication that Indigenous scholars are using to end their silence and suffering. It is only a black stem pipe ceremony, which is only part of the

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61. Battiste, *Reclaiming Indigenous Voice and Vision*, *supra* note 48; M. Battiste & J.Y. Henderson, *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich Press, 2000); L. Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London; New York: Zed Books, 1999); P. Monture-Angus, *Journeying forward: Dreaming First Nations' Independence* (Halifax, N.S.: Fernwood, 1999); T. Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999); O. Mercredi & M.E. Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Penguin Books Canada, 1994); H. Cardinal, *The Rebirth of Canada's Indians* (Edmonton: Hurtig, 1977); G. Manuel & M. Postluns, *The Fourth World: An Indian Reality* (Don Mills, Ont.: Collier-Macmillan Canada, 1974).

healing process. Often surrounded by systemic injustices, the legal determination of a wound or remedy is difficult. We should not see legal discourse as superior to other forms of discourse. The purpose of the entire Indigenous effort is to enrich our teachings with our experiences with colonialism and racism. The integrated effort, when combined with our creativity and vision, will lead to our restoration.

As the Mole in the teaching that prefaces this paper predicted, various Indigenous beliefs about truth and justice exist. Considering the inability of Indigenous peoples to trust others to aid them in their troubled times, these strategies are a good foundation to help shape a better and enriched quality of life. Such a foundation can provide for the spiritual revival of society. It can enhance the truly human dimension of life. It can elevate life to a higher degree of dignity everywhere.

#### **A The Law Lodge**

At its core, law and its need to be just are not abstract. Behind its arcane theories, artificial reasoning and phrases, law is part of a world full of people who live and move and do things to other people. The law lodge has a rhythm of transformation toward justice, which is guided by an elusive human spirit. Law represents that quest. It is a consciousness that attempts to reason from assumptions and commitments to create imaginary purposes and practical results. It is more than a compendium of written text, called either a constitution or legislative statutes or posited rules.<sup>62</sup> It is more than the underlying conceptions or values or customs expressed in text. It is more than a set of interpretations and justification of the text; more than its manifestations or reflections. Justice is a normative vision of the human spirit unfolding, a product of shared thoughts and consciousness. It is a product of a community's beliefs and imagination. It is the shared consciousness that makes a person feel as if they belong to a community. It is the frontier line between power and imagination. Like all visions, it is subject to the evaluation of the community and to transformation.

In the various situations in which Indigenous peoples find themselves, law is not noble. The law lodge is broken and being altered in its functions. It has not been a shared experience. It was the colonizer command, justified by their interpretative monopoly of Eurocentrism. There have been widespread and arbitrary abuses of power by Eurocentric governments against Indigenous peoples, their Indigenous legal system and their treaties. The posit rule of law, its professional techniques and its legal analyses all

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62. See *Sunday Times v. U.K.* (1979) 2 EHRR 245 at para. 46, 47, 49-53. Also see *Ref. Re Amendment of the Constitution of Can.* (Nos. 1, 2 and 3), [1981] 1 S.C.R. 753 (unwritten postulates form the very foundation of the Constitution of Canada); *Quebec Secession Reference*, *supra* note 24.

serve to justify these abuses. Yet, in the face of such abuse, there exists a general and spontaneous acceptance of the idea of rule of law and the positive belief in Eurocentric legal education among Indigenous peoples. Why is that?

This question raises the issue of whether legal education and appeals to legality make any sense considering Indigenous peoples' experiences with the law. This question is relevant since the judicial system and law schools have operated as little more than a façade for white supremacy and Eurocentrism. The rule of law has operated as a mere word game, behind which lay total manipulation of Aboriginal and treaty promises, human rights and state obligations. It seems to make sense that the law cannot be the doctor if it is the disease.

Typically, Indigenous answers to the question about the value of the legal system display a deep continuity in Indigenous teachings. These teachings imply a profound trust in knowledge and justice; a trust that most law schools and legal professionals do not share. The Indigenous teaching about learning and justice as animate forces in human consciousness continues to justify our efforts to create a fair legal system and legal reform. The answers to the question of the value of law witness the same legal sensibility that was operative at the time the treaties were signed. We believe in the spiritual force of law and justice in Indigenous knowledge and languages, independent of Eurocentric legal concepts and how Europeans use them.

From an Algonquian language perspective, the answers to our belief in law and justice are found in our worldview, language and values. First, the teachings of the elders have taught us of the value of human dignity and integrity. They believe only personal attributes can create extended friendships and alliances. Second, the innermost structure of Algonquian thought is hostility toward the idea that the cult of violence manifest in Eurocentric thought can create a just society. We prefer shared ideas and persuasion to brute force.

Algonquian speakers believe in a law and in an enriched version of justice. This law should not be confused with either moral law or natural law or the common law in Eurocentric thought. To distinguish Indigenous law from these Eurocentric theories, the Indigenous law is based on the implicate order.<sup>63</sup> Life within an ecosystem and ancient promises made to the forces of the place are the sources of Algonquian governance, rites and laws. Even in the most ideal situations, Algonquian teachings assert that legal rights are only one of several imperfect ways of defending what is better in Indigenous values and life against what is worse. By itself, no legal system or law can ever create anything better. Law's purpose is to render a service

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63. Bohm, *supra* note 32 at 1-27.

and its meaning does not lie in the law itself. Establishing respect for legal rights cannot automatically ensure a better life for anyone; for that, after all, is the job of each generation and extended families. The key to a humane, dignified, enriched and happy life does not lie in the law. Laws merely establish what may or may not be done to individuals by others. Just and equitable laws can protect the Indigenous way of life from the ideology of strangers, but laws can never give life substance or meaning.

The failure of the criminal justice system and law to Indigenous peoples in all British colonies, territorial and governmental jurisdictions manifest the ongoing transformation from colonial law to postcolonial law.<sup>64</sup> The failure of one part of the Eurocentric concept of justice means the ultimate failure of the entire legal system. A legal system cannot sustain itself by being partly unjust and partly just. The principal explanation for this crushing failure of law and justice is the fundamentally different worldviews with respect to such elemental issues as the substantive content of justice, the process of achieving justice and colonization theory. This explanation manifests the spirit of Indigenous law resisting Eurocentric worldview and law.

The spirit of Indigenous law appears parallel to the spirit of Eurocentric law. Over its history, the spirit of Eurocentric law has been illustrated by its emancipatory transformations.<sup>65</sup> These legal transformations or revolutions are grounded in the reductionistic idea of distinctive “legal” institutions, values and concepts that are autonomous from other institutions, ideas that are foreign to holistic Indigenous law. The constructed Eurocentric legal traditions are based on distinctions rather than interrelations, which guide the Indigenous traditions. Eurocentric law was constructed as relatively autonomous from other knowledges and institutions, with its special professionals who are specially trained in the legal process in legal

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64. See e.g. P. Havemann, *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Auckland: Oxford University Press, 1999).

65. H. Berman, *Law and Revolution* (Cambridge, MA: Harvard University Press, 1983). This essay relies on Berman's analysis of the legal revolutions in Eurocentric or Western legal traditions. Eurocentric law is a particular historical culture or civilization, which can be characterized in many different ways, depending on the purposes of the characterization. Eurocentric is not a geographical concept: it is, rather, an artificial phenomena, but with a very strong diachronic dimension. It implies a historical worldview, an ideology and a structured history. 'Israel', 'Greece' and 'Rome' became spiritual ancestors of the Western European thought not primarily by a process of survival or succession but by a conscious process of adoption: Eurocentric thinkers and jurists adopted them as ancestors. Moreover, it adopted them selectively—different parts at different times. It used to be called “the Occident” and was taken to comprise all the cultures that adopted the heritage of ancient Greece and Rome, as contrasted with ‘the Orient’, which consisted chiefly of Islam, India, and the Far East. The term ‘Western’ is also used to distinguish European from Eastern people. With the discovery of Africa and America, it was the legal traditions of the European colonizer that was used as a contrast to the Indigenous peoples.

institutions by legal scholars.<sup>66</sup> Although it remains strongly influenced by Eurocentric religions, politics, moralities and customs, the legal tradition has attempted nevertheless to distinguish itself from them. The developing body of law, both at any given moment and in the long run, is conceived by some to be binding upon the aristocracies and the state itself. Law was interpreted as transcending sovereignty and politics, even though intimately linked to them. Even the processes of legal learning in which the aloof legal specialists are trained asserts a complex, dialectical relationship to the legal system and profession that it justifies, especially between the processes of jurisprudence, legislation and adjudication.<sup>67</sup>

The Eurocentric tradition of distinctive legal institutions, values and concepts has been consciously developed and transmitted from generation to generation and constitute a 'tradition' born of a 'revolution'.<sup>68</sup> During the course of the last millennium, existing Eurocentric legal orders and systems have been periodically interrupted and transformed. The contextual assumption of each of these legal transformations has been a belief in the capacity of peoples to regenerate society and the necessity for them to do so in order to fulfill an ultimate destiny. Without such beliefs, the great legal revolutions of Eurocentric history could not have occurred.<sup>69</sup> These beliefs provided a basis both for a conscious attack upon the existing order and for the conscious establishment of a new order. The context for overthrow of the preexisting legal order was justified as the reestablishment of a more fundamental law as justice or freedom. Each of the great transformations of the millennium made a sharp division between the law before it, what came with it and what became the law after the transformation. Each of them also placed the historical old and new within a framework of an original creation, or 'state of nature', and an end, an ultimate victory.

The fundamental justification of the legal transformations has been the belief that existing law was betraying its ultimate purpose and mission. When the existing legal order was weighed in the balances of the Christian end-time,<sup>70</sup> it was found wanting.<sup>71</sup> The spiritual and messianic ideal of

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66. These characteristics of the Eurocentric legal tradition were adopted from the tradition of Roman law as it developed in the Roman Republic and the Roman Empire from the second century B.C. to the eighth century A.D. and later. A relatively sharp distinction is made between legal institutions (including legal processes such as legislation and adjudication as well as the legal rules and concepts that are generated in those processes). See *ibid.* at 8.

67. *Ibid.* at 7-10.

68. *Ibid.* at 1.

69. Berman argues there are six total revolutions in Eurocentric law: Indigenous folk law of Europe to the Papal Revolution (1075-1122), the German Protestant Reformation of 1517, the English Revolution of 1640, the American and French Revolutions of 1776 and 1789, the Russian Revolution of 1917.

70. See Eugen Rosenstook-Huessy, *Out of Revolution: The Autobiography of Western Man*, 3d rev. (Norwich, VT: Argo Books, 1938).

71. See Norman Cohn, *The Pursuit of the Millennium* (London: Secker & Warburg, 1957).

justice in Eurocentric law has provided the justification for the realization of justice and personal freedom. The overthrow of the preexisting law as order was justified as the reestablishment of a more fundamental law as justice.<sup>72</sup> Originally the Papal legal revolution associated the ideal of justice with the Last Judgment and the Kingdom of God while the German or Protestant legal revolution associated it with the Christian conscience. The English revolution associated it with public spirit, fairness and the traditions of the past. The American and French Revolutions associated it with public opinion, reason and the rights of man. The Russian revolution associated it with collectivism, planned economy and social equality.<sup>73</sup>

The unresolved tension between the ideals and operations of a legal tradition and its contradictory purposes to preserve order and be just has led to the replacement of legal systems. These ‘violent’ revolutions were not accomplished by ‘legal’ force imposed by established governments through police or armies, but rather by ‘illegal’ force exerted by individuals and groups against established authority or order.<sup>74</sup> Each revolution represents the failure of the old legal system to respond to changes that were taking place among the peoples guided by a mystical human spirit.

These legal transformations in Eurocentric societies exhibit certain patterns or regularities.<sup>75</sup> Each legal revolution was marked by a fundamental, rapid and enduring change. These changes affect the entire society. Each transformation has sought its legitimacy in a fundamental law, a remote past, and an apocalyptic future. Each took more than one generation to establish roots. The resulting legal regime was renewed by the transformation of older legal regimes being replaced or radically changed.<sup>76</sup> The unification of legal systems produced a new system of law, which embodied some of the major purposes of the revolution and which changed the Eurocentric legal tradition, but which ultimately remained within that tradition.<sup>77</sup> Eventually, that ancient law, raised to authority because of such an overthrow, created new and enduring systems of government and law. The system of government and law of every nation of the Europe and America goes back to such a revolution. The great national revolutions of the past have always had to eventually make peace with and converge with the legal tradition that they or some of their leaders had set out to destroy.

These legal reformations of the existing order continued much of the old legal order. Ultimately, each of the great revolutions may be seen to have

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72. Berman, *supra* note 65 at 22.

73. *Ibid.* at 21-22.

74. *Ibid.* at 20.

75. *Ibid.* at 19. Berman notes some writers have treated these historic explosions as a kind of recurrent “cancer” in Eurocentric society, a “fever” that must run its course.

76. *Ibid.* at 20-21.

77. *Ibid.* at 18-33.

been not so much a breakdown as a transformation. Each had to compromise with the past and make peace with the pre-revolutionary law by restoring many of its elements that were consistent with the major goals, values and beliefs for which the revolution has been fought and by including them in a new legal order. Each succeeded in establishing a new kind of legal order that embodied many of the major purposes for which it had been fought. They transformed the legal tradition while remaining within it.

The constructed Eurocentric traditions involve what is sometimes called the legal process, or what in German is called *Rechtsverwirklichung*, the 'realizing' of law, or what Lon Fuller has defined as "the enterprise of subjecting human conduct to the governance of rules."<sup>78</sup> This definition rightly stresses the primacy of cognitive activity over legal rules not only in governance, but also in constructing and facilitating voluntary arrangements. Law in action consists of people legislating, adjudicating, administering, negotiating and carrying on other legal activities. It is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation. Such a broad concept of law is needed in order to compare, within a single framework, the many specific legal systems that have existed in Eurocentric thought during the millennium and in order to explore the interrelationships of these systems with other political, economic and social institutions, values and concepts.

At the beginning of this millennium, the Eurocentric legal tradition is in a revolutionary crisis of decolonization, which may be a greater transformation than any other in its history. This legal transformation exhibits the customary patterns or regularities. Some believe this transformation may end the Eurocentric tradition and begin a global legal tradition, however, the transformation is best seen as a new blending of all the legal traditions. European legal elites have always transformed ancient laws and united them with other legal systems to create the legal transformations.<sup>79</sup> This unfolding legal transformation is transforming the legal legacy of colonization as well as communism in some parts of the earth; each movement must make peace or converge with the best of the older legal tradition. In the unfolding contemporary Indigenous legal transformation are Indigenous spirituality and teachings, which are associated with self-determination of all peoples, human rights, Aboriginal and treaty rights and sustainable ecological development.

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78. Lon L. Fuller, *The Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969).

79. These regimes were antagonistic. The Hebrew legal regime would not tolerate Greek philosophy or Roman law; the Greek legal regime would not tolerate Roman law or Hebrew theology; the Roman legal regime would not tolerate Hebrew theology and it resisted large parts of Greek philosophy. Yet, beginning in the late eleventh and early twelfth centuries, the creators of the Eurocentric legal thought combined all three regimes, transforming each one throughout the millennium. See Berman, *supra* note 65 at 3.

As in the Eurocentric legal tradition, the Indigenous legal transformation, the legal “resonance” (or renaissance) is based on rediscoveries, reexaminations, and receptions of the ancient legal teachings, texts or codes. Similar to the quest to balance Indigenous law with Eurocentric law, the creation of a Eurocentric legal tradition was achieved by a remarkable blending of antagonistic and diverse elements into a pluralistic order. The intergenerational compilers of the Eurocentric traditions accomplished this pluralistic integration by conceiving the transformation as a coherent, integrated legal order and constructing legal integration over centuries so that the changes were conceived as a natural process of innovation or change. These two processes developed the belief in the organic character of law, with its capacity for growth over generations and centuries because it was guided by a built-in implicate mechanism or internal logic (or necessity). Legal changes do not occur at random but proceed by a rational or purposeful reinterpretation of the past law to meet present and future needs. These processes and beliefs generated the acceptance, coexistence and competition within the same community of diverse jurisdictions and diverse legal systems and made the supremacy of law both necessary and possible as a way of resolving the political and economic conflicts.

In Canada, the failed justice system and constitutional reforms in 1982 provided a basis both for a conscious attack upon the existing order and for the need of legal transformation and a new order. The constitutional reforms manifest the belief in the capacity of peoples to regenerate society to fulfill an ultimate destiny of a multinational, transcultural and federated nation. The affirmation of Aboriginal and treaty rights in the constitutional transformation in Canada law is part of the Indigenous transformation. It provides the ancient legal teachings to the colonial Eurocentric order. The Supreme Court of Canada has established *sui generis* interpretative principles and new contexts for the displacement of our restrictive colonial establishment and its institutions. By interpretation of s. 35(1) the Supreme Court of Canada has affirmed that constitutional orders of Aboriginal peoples pre-existed imperial power and treaties and the subsequent sovereign delegation of political power to the “fit” immigrants. The doctrine of Aboriginal rights protecting the Aboriginal orders were part of a body of fundamental constitutional law and presumptive legal structure that was logically prior to the introduction of English common law. This doctrine automatically governed the reception and application of the British law in



the colony.<sup>80</sup> The Court has affirmed when the British sovereign asserted any jurisdiction over Aboriginal territory, the assertion protected and vested the pre-existing Aboriginal order in British imperial constitutional law.<sup>81</sup> It stated:

[W]hat s. 35(1) does is provide the constitutional framework through which the fact that Aborigines lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose;<sup>82</sup>

The protection afforded *sui generis* Aboriginal orders by both British imperial constitutional law and British common law prohibited intrusions by the British Parliament, colonial governments, the common law courts or the colonialists. These protections were transferred to Canadian constitutional law by virtue of s. 35(1).<sup>83</sup>

These *sui generis* Aboriginal orders are the ancient law of the land and they are embedded in Aboriginal heritages, languages, and laws.<sup>84</sup> *Sui generis* orders of Aboriginal nations exist in the same way as the Eurocentric legal tradition. In his 1983 article, “*Nomos and Narrative*,” Professor Robert Cover described it this way:

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80. *R. v. Côté*, [1996] 3 S.C.R. 136 at para. 49 [hereinafter *Côté*]. Also, the Supreme Court has held that the law of Aboriginal title represents a distinct species of federal common law rather than a simple subset of the common, civil or property law operating within the province. See *Roberts v. Canada*, [1989] 1 S.C.R. 322 at 340. As to the reception of law and its complications, see K.G. McHugh, “The Common-Law Status of Colonies and Aboriginal ‘Rights’: How Lawyers and Historians Treat the Past” (1998) 61(2) *Sask. L. Rev.* 393-429.
81. *R. v. Côté*, *ibid.* at para. 49; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*] at paras. 114, 145. For the development of and a description of imperial constitutional law, see M.K. Walters, “British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*” (1992) 17 *Queen’s L.J.* 350; “*Mohegan Indians v. Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America” (1995) 33(4) *Osgoode Hall L.J.* 785 at 789-803; and “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and under the *Constitution Act, 1982*” (1999) 44 *McGill L.J.* 711. For the imperial constitutional law protecting the *sui generis* treaties with Aboriginal nations, see R. Dupuis & K. McNeil, *Canada’s Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Québec*, vol. 2 (Ottawa: Supply and Services Canada, 1995) (Domestic Dimensions) at 4-47.
82. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 31 [hereinafter *Van der Peet*].
83. *R. v. Secretary of State*, [1981] 4 C.N.L.R. 86 at 99 (Eng. C.A.) per Lord Denning M.R. [hereinafter *Secretary of State*]; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para. 23, online: QL (SCJ) [hereinafter *Sparrow*].
84. *Final Report*, *supra* note 1, vol. 4 at 454; Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, United Nations Economic and Social Council, *Preliminary Report of the Special Rapporteur, Protection of the Heritage of Indigenous Peoples*, UN ESC, (1994), UN Doc. E/CN.4/Sub.2/1994/31 at para. 8. For a more comprehensive analysis, see M. Battiste & J.Y. Henderson, *supra* note 61.

A legal tradition ... includes not only a *corpus juris*, but also a language and a mythos—narratives in which the *corpus juris* is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves—a lexicon of normative action—that may be combined into meaningful patterns culled from meaningful patterns of the past.<sup>85</sup>

*Sui generis* Aboriginal orders reveal legal traditions based on shared kinship and ecological integrity. They demonstrate how Aboriginal peoples deliberately and communally resolved recurring problems.<sup>86</sup> Aboriginal judgements, both implicit and explicit, reflect a vision of how to live well with the land and with other peoples.<sup>87</sup> They reveal who Aboriginal peoples are, what they believe, what their experiences have been, and how they act. In short, they reveal Aboriginal humanity's belief in freedom and order.

*Sui generis* Aboriginal orders exist as comprehensive orders with deeply interrelated responsibilities, rights and obligations that are specific and precise. They are consensual, interactive, dynamic and cumulative. They operate by their own force; they are not delegated orders derived from the British or French sovereign. The Supreme Court has held *sui generis* Aboriginal orders exist independently of British constitutional law, proclamation, or sovereign recognition and independently of British common law.<sup>88</sup> They do not depend for their existence on consistency with British law. The Court has acknowledged *sui generis* Aboriginal orders must be understood and interpreted as distinctive and integral to Aboriginal law and societies, rather than as part of European law and societies.<sup>89</sup> It has stated that neither the British nor the French legal tradition can adequately

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85. R.M. Cover, "Nomos and Narrative" (1983) 97 Harv. L. Rev. 4 at 9. See also A.T. Kronman, "Precedent and Tradition" (1990) 99(4) Yale L.J. 1029 at 1066 ("[W]e must respect the past because the world of culture that we inherit from it makes use of who we are. The past is not something that we, as already constituted human beings, choose for one reason or another to respect, it is such respect that establishes our humanity in the first place.").

86. See the elegant works of John Borrows: "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C.L. Rev. 1; "With or Without You; First Nations Law (in Canada)" (1996) 3 McGill L.J. 629; "Frozen Rights in Canada: Constitutional Interpretation of the Trickster" (1997) 22 American Indian L. Rev. 37.

87. The interpretative framework of the courts is different in construction, but similar in legal operation to the "images" W.E. Conklin describes in *Images of a Constitution* (Toronto: University of Toronto Press, 1989). McLachlin J., as she was then, when dissenting in *Van der Peet* describes the majority constitutional framework as "reasoning from first principles" rather than following imperial British common law and its historical and judicial methodology to the *sui generis* orders. See *Final Report*, *supra* note 1 at para. 262.

88. *Côté*, *supra* note 80 at paras. 49, 52; *Van der Peet*, *supra* note 82 at para. 247 per McLachlin J. dissent.

89. *Van der Peet*, *ibid.* at paras. 17, 20, 42.

describe or operate *sui generis* Aboriginal orders.<sup>90</sup> The Court has stressed *sui generis* Aboriginal orders are distinct from the liberal principles and abstract rights used in *Charter* interpretations of personal rights.<sup>91</sup> All these manifestations of Aboriginal rights are constitutionally valid, even if they have never been positively affirmed by British or Canadian legislation.<sup>92</sup>

Additionally, the Court has held that Aboriginal and treaty rights are sacred.<sup>93</sup> Each treaty party's laws, mutual contexts and the intent of the treaty parties control the interpretation of *sui generis* treaties with Aboriginal nations and the Sovereign.<sup>94</sup> These obligations regulate and supervise the actions of Canadian governments and subjects toward *sui generis* Aboriginal orders and are articulated as constitutional and statutory fiduciary duties on the Crown.<sup>95</sup> These duties ensure the integrity and honour of the Crown.<sup>96</sup> All parts of Canada have a duty to recognize and affirm *sui generis* Aboriginal constitutional rights; they cannot pretend Aboriginal

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90. *Delgamuukw*, *supra* note 81 at paras. 130, 189; *St. Mary's Indian Band v. Cranbrook (City of)*, [1997] 2 S.C.R. 657, at para. 14; *Mitchell v. Pegus Indian Band*, [1990] 2 S.C.R. 85 at para. 34, per Dickson, C.J.; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at 678; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 382.

91. *Van der Peet*, *supra* note 82 at para. 19 (Aboriginal rights cannot be defined on the basis of the philosophical precepts of the liberal enlightenment.).

92. *Côté*, *supra* note 80 at para. 48, per Lamer, C.J. ("Although the doctrine [of Aboriginal rights] was a species of unwritten British law, it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there.") and para. 52 ("Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive [A]boriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizer."); *Van der Peet*, *supra* note 82 at para. 247 ("Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the [A]boriginal peoples in question"), per McLachlin J. dissent.

93. See *R. v. Badger*, [1996] 1 S.C.R. 771 [hereinafter *Badger*] at para. 80. See also *Campbell v. Hall*, (1774) 1 Cowp. 204 (aff'd in *Secretary of State*, *supra* note 83 at 127 (Eng. C.A.)).

94. *Badger*, *ibid.* at paras. 41, 52-54, 78; *R. v. Marshall*, [1999] 3 S.C.R. 456 at paras. 7, 14, 40, 43-44, 48, 64 [hereinafter *Marshall*]; *Côté*, *supra* note 80 at para. 49; J.Y. Henderson, "Interpreting *Sui Generis* Treaties" (1997) 36 *Alta L. Rev.* 46.

95. *Sparrow*, *supra* note 83 at para. 59.

96. *Ibid.* at paras 58, 65; *Badger*, *supra* note 93 at para. 78; *R. v. Sundown*, [1999] 1 S.C.R. 393 [hereinafter *Sundown*] at para. 24; *Marshall*, *supra* note 94 at paras. 49-52.

society had no law or primitive law.<sup>97</sup> The Court has held plain, clear and positive imperial or constitutional law can limit Aboriginal law or rights.<sup>98</sup>

Under constitutional supremacy, the Supreme Court has acknowledged the constitutional necessity of constructing a fair, respectful, and impartial analysis of the constitutional rights of Aboriginal peoples that affirms their human dignity. As guarantors of the constitutional order,<sup>99</sup> the courts have a constitutional duty to protect the constitutional and *Charter* rights of Aboriginal peoples from infringement, to prevent the abrogation or derogation of these or other rights,<sup>100</sup> to interpret these rights in a manner consistent with the preservation and enhancement of Aboriginal heritage,<sup>101</sup> and to give Aboriginal peoples appropriate and just remedies if their rights are violated.<sup>102</sup>

To continue the Indigenous renaissance and achieve their constitutional destinies, Indigenous peoples should continue their discussion about constitutionally transforming colonial institutions in accordance with *sui generis* constitutional rights of Aboriginal peoples, and should strive to achieve human dignity by clarifying the terms and consequence of colonization and its ideology. Similar to other legal transformations, Indigenous lawyers have to assert our teachings and belief in the capacity of peoples to regenerate the law lodge and communities, and the necessity for them to do so in order to fulfill an ultimate destiny. Many strategies exist for realizing the convergence of Aboriginal and treaty rights in Canadian law. Three important strategies in the law lodge are discussed below: the decolonization of judicial precedents, renewing autochthonic ecological orders and recognizing the importance of human diversity.

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97. In the colonial era, courts routinely stated that Aboriginal peoples were ‘barbarous’, ‘savage’ or ‘uncivilized’, incapable of recognition at common law and that they had no law. This view was rejected by the Supreme Court by Hall J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 at 346-47 and Dickson, J. in *Simon v. R.*, [1985] 2 S.C.R. 387 [hereinafter *Simon*] at 399. In defiance of the classical common law in British legal history, the British legal positivist debated whether customs qualify as law, since they restricted the concept of law to positive law or a command theory. See J. Austin, *Lecture on Jurisprudence or the Philosophy of Positive Law*, 3d ed. by R. Campbell (London: John Murray, 1869) at 104, 204 and 237-38; H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 3-4 and 89-90. Compared to Professor Joseph Raz, the rule of law bears no relationship to the moral worthiness of the substantive content of its laws, whether primitive or evil, the courts are required to observe the legislation even if the substantive content is morally repugnant. See Joseph Raz, “The Rule of Law and its Virtue” (1977) 93 L.Q. Rev. 195 at 202-205. Regarding the development of unwritten principles in the Canadian Constitution, see *Quebec Secession Reference*, *supra* note 24.

98. *Sparrow*, *supra* note 83 at para. 37; *Delgamuukw*, *supra* note 81 at para.180.

99. *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at paras. 47-52.

100. *Canadian Charter of Rights and Freedoms*, *supra* note 100 at ss. 15, 25, 26.

101. *Ibid.* at s. 27.

102. *Ibid.* at s. 24(1).

## **B Decolonizing the Judicial Precedents**

In the United States, Canada, Australia and New Zealand, among others, the complicity of the existing legal systems with colonialism is all too often unappreciated and conveniently avoided. This is especially true in law schools, in judicial interpretations and in legal practice. For a discipline known for its commitment to unmasking injustice and oppression, such neglect, avoidance and continuation of jurisprudential traditions in supporting the colonialization of Indigenous peoples are remarkable. To paraphrase my Chickasaw cousin, Linda Hogan, who wrote *Mean Spirit*, the courts have been “a cold uncle with a mean soul and a cruel spirit.”<sup>103</sup> The prevalent outlook of those legal professionals who have stood apart or acted as neutral agents in the oppression of the Indigenous peoples needs to be corrected.<sup>104</sup> Yet correcting the prevailing amnesia in the legal profession about its complicity in colonization is only a partial solution to the problems faced by Indigenous peoples.

Indigenous lawyers and peoples should never forget that the judiciary created our imprisonment. By their interpretations of the constitutional order and of our treaty order, the courts created the colonial structure of federal Indian law.<sup>105</sup> In the era of deep colonialism and racism, the courts used colonial ideology to fabricate new relationships between governments and Indigenous nations and tribes. These categories still imprison Aboriginal peoples behind the virtually unlimited will of unrepresentative legislative bodies. These legal doctrines create exemptions from typical constitutional protection.

For example, when faced with constitutionally protected treaty obligations, the United States judiciary devised unique colonial theories of false necessities. Feigned cases between non-Indigenous peoples, without any representation of Indigenous peoples, led to the development of these theories and principles. The classic examples are *Johnson and Graham's Lessee v. M'Intosh*.<sup>106</sup> Common law courts around the earth followed the precedent, for example, *St. Catherine Milling and Lumber Co. v. The Queen*.<sup>107</sup> Consequently, common law courts carry the stigma of bad faith in

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103. Linda Hogan, *Mean Spirit: A Novel* (New York: Atheneum, 1990) at 219.

104. See J.Y. Henderson, M.L. Benson & I. Findlay, “Displacing Colonial Discourse” in *Aboriginal Tenure in the Constitution of Canada* (Toronto: Carswell, 2000) at 247-330.

105. For the original visions, see Robert A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (Oxford: Oxford University Press, 1997); J.Y. Henderson, “Empowering Treaty Federalism” (1994) 58 Sask. L. Rev. 243 at 270-282; R.L. Barsh & J.Y. Henderson, *The Road. Indian Tribes And Political Liberty* (Berkeley: University of California Press, 1980).

106. 21 U.S. (8 Wheat.) 543 (1823).

107. (1888) 14 App. Cas. 46.

their efforts and decisions.<sup>108</sup> That these cases have judicial authority is unconscionable. This state of affairs witnesses a failure of legal analysis in the common law system.

These cases should have no judicial authority in postcolonial law; they are unconscionable and represent the prejudice and bias of another legal era.<sup>109</sup> The British Columbia Court of Appeal in *Delgamuukw v. The Queen*<sup>110</sup> clearly expressed not only unease but also rejection of the notion that courts affecting the rights of parties without those parties being present in the proceedings make declarations. Yet this is exactly what happened with respect to the rights of Indigenous peoples.

These bad faith judicial decisions established the doctrine of discovery,<sup>111</sup> conquest,<sup>112</sup> civilization,<sup>113</sup> and the government-authorized guardianship and trusteeship of Indigenous peoples.<sup>114</sup> Under these categories around the earth, our *sui generis* (self-generating)<sup>115</sup> Indigenous tenure and property rights vanished in the courts.<sup>116</sup> To abrogate our treaty order and rights,<sup>117</sup> the courts have constructed and justified unlimited

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108. In my opinion the worst examples of judicial bad faith are commissions that have acted like courts, for example, the Indian Claims Commission in the United States. They created an entire chain of bad faith in the United States Court of Claims and the United States Supreme Court.

109. *Simon*, *supra* note 97.

110. (1993), 104 D.L.R. (4th) 470 (B.C. C.A.).

111. *Johnson and Graham's Lessee v. M'Intosh*, *supra* note 106; *St. Catherine Milling and Lumber Co. v. The Queen*, *supra* note 107; *Van der Pete*, *supra* note 82.

112. *Johnson and Graham's Lessee*, *ibid.*; *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) [hereinafter *Tee-Hit-Ton Indians*].

113. Also known as manifest destiny. This includes the doctrine of superiority of agriculture over hunting.

114. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) at 16; *United States v. Kagama*, 118 U.S. 375 (1886) at 383-85. The guardianship and trust doctrine are derived from European cultural superiority. See Note, "Rethinking the Trust Doctrine in Federal Indian Law", 98 Harv. L. Rev. 422 at 426-29.

115. *Aboriginal Tenure in the Constitution of Canada*, *supra* note 104 at 397-400; *Guerin v. The Queen*, [1984] 2. S.C.R. 335 at 382 (Aboriginal title cannot be describe in terms appropriate to English land law; it is based on premises and doctrines distinct from those of property law); *Delgamuukw*, *supra* note 81 at para. 1012. (Aboriginal title is affirmed as constitutionally *sui generis*; its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in Aboriginal legal systems.) See also M.L. Benson & M. Bowden, *Understanding Property: A Guide to Canada's Property Law* (Toronto: Carswell, Thomson Professional Publishing, 1997), especially Part V at 152-179.

116. *Tee-Hit-Ton Indians*, *supra* note 112. See Williams, *supra* note 48 and S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practices* (Oxford: Clarendon Press, 1996).

117. As expressed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) at 560-61 (Cherokee Nation did not surrender its independence and right of self-government by associating with the United States by treaty, and therefore remained a distinct community in which a state's law were inapplicable); and *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) at 172 n.7 (Federal power derives from regulating commerce with Indian tribes and for treaty making).

plenary Congressional legislative power<sup>118</sup> or Parliamentary sovereignty<sup>119</sup> over Indian nations and tribes. They have rejected judicial activism when faced with legislative power that sought to assimilate, civilize and terminate our constitutional status as Indian nations and tribes.<sup>120</sup> They have refused to protect Aboriginal governments from federal, state or provincial authority under their judicially created infringement<sup>121</sup> and inconsistency tests.<sup>122</sup>

These colonial precedents remain in force through common law traditions and constitutional conventions. Legislatures have not sought to change the authority of these legal precedents. Indeed, empowered by the judiciary, legislatures have used these judicial doctrines to attempt to eliminate our cultures and values. This legacy must be questioned critically and transformed, since the assumptions and rationales on which it is based are no longer acceptable. The assumptions and presuppositions about Indigenous peoples left over from the colonial era require reinterpretation. Legal methods, categories, and precedents that we have inherited from the past have limited validity and utility in any postcolonial legal order.

Three remedies exist for this precedential bias. First, Indigenous peoples and their lawyers cannot and should not accept a jurisprudential status quo forged in their absence and which consequently strongly favors governments and non-Indigenous parties. Second, given the conditions under which early precedents were established, it is not appropriate for Crown prosecutors to continue to invoke these authorities or actively to resist attempts to have the courts reexamine earlier authorities. Third, given the systemic exclusion of Indigenous law and perspective, the courts must understand that it is reasonable for Indigenous peoples and their lawyers to insist upon having the state of the law reexamined by the courts in the light of contemporary values, in the face of more detailed and fairer historical, anthropological and archeological postcolonial research and from the perspective of the Indigenous peoples.

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118. *Lone Wolf v. Hitchcock*, 187 U.S. 553; *United States v. Wheeler*, 435 U.S. 313 (1978) at 322-23. Lone Wolf “appeared to say that Indian tribes had acquired no rights by treaty which the Congress was bound to respect” in *Sioux Nation of Indians v. United States*, 601 F.2d 1157 (Ct. Cl. 1979) at 1173 (Nichols, J., concurring), *aff’d* 448 U.S. 371. See generally R.A. William, Jr., “The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence” (1986) *Wis. L. Rev.* 219.

119. *Re Eskimos*, [1939] S.C.R. 104; *R. v. Sikyey* (1964), 43 D.L.R. (2d) 150 (N.W.T.) at 155-162; *R. v. George*, [1966] S.C.R. 267; *Canada (A.G.) v. Lavell* [1974] S.C.R. 1349; P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 301-314.

120. *Menominee Tribe of Indians v. United States*, 607 F.2d 1335 (Ct. Cl. 1979) at 1338-39, cert. denied 445 U.S. 950 (1980).

121. *William v. Lee*, 358 U.S. 217 (1958); *Sparrow*, *supra* note 83.

122. Section 52(1) of Part V of the *Constitution Act*, *supra* note 22 states: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” This is also called paramourty of federal law in the United States.

For any legal system to continue to invoke earlier precedents in Indigenous contexts is similar to suggesting that earlier debates over human slavery as a property right and whether women were persons are still relevant in litigation respecting property rights, human rights and gender equality. This state of affairs in Indian law witnesses a failure of legal analysis in the common law system.

Several good examples of rejecting colonial judicial precedents exist. We need many more. I will emphasize a few. Justice Hall of the Supreme Court of Canada initiated the decolonization of Canada law. In condemning the practice of invoking the savage and civilization dualism in judicial opinions deriving from U.S. precedent, Justice Hall stated in *Calder v. Attorney General of B.C.*:<sup>123</sup>

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or cultures, in effect subhuman species. This concept of the original inhabitants of America led Chief Justice Marshall in his otherwise enlightened judgment in *Johnson v. McIntosh*, which is the outstanding judicial pronouncement on the subject of Indian rights to say, "But the tribes of Indians inhabiting this country were fierce savages whose occupation was war ..." We now know that that assessment was ill-founded. The Indians did in fact at times engage in some tribal wars but war was not their vocation and it can be said that their preoccupation with war pales into insignificance when compared to the religious and dynastic wars of 'civilized' Europe of the 16th and 17th centuries. Marshall was, of course, speaking with the knowledge available to him in 1823. Chief Justice Davey in the judgment under appeal, with all the historical research and material available since 1823 and notwithstanding the evidence in the record which Gould J. found was given "with total integrity" said of the Indians of the mainland of British Columbia ... They were undoubted at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property. In so saying this in 1970, he was assessing the Indian culture of 1858 by the same standards that the Europeans applied to the Indians of North America two or more centuries before.<sup>124</sup>

Justice Hall urged courts to reexamine their notions of Indigenous society and law, and their views of Indigenous peoples in the face of more detailed and sophisticated understandings.

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123. [1973] S.C.R. 313.

124. *Ibid.* at 346-47.



Since the constitutional reforms of 1982 enshrined Aboriginal and treaty rights in Canada,<sup>125</sup> the Supreme Court of Canada has rejected some colonial precedents. In *Simon* (1985), the Supreme Court reversed the interpretation of the 1752 treaty given in *R. v. Syliboy*.<sup>126</sup> Speaking for a unanimous court, Chief Justice Dickson overruled the colonial belief that held “[t]he savages’ right of sovereignty even of ownership were never recognized” by the Crown or international law.<sup>127</sup> He held the 1929 holding was substantively unconvincing and a bias and prejudice of another era in Canadian law. Additionally, he found the holding inconsistent with a growing sensitivity to Aboriginal rights.<sup>128</sup>

Similarly, in *Sparrow*, the Supreme Court affirmed that

the context of 1982 is surely enough to tell us that this is not just a codification of the case law on [A]boriginal rights that had accumulated by 1982. Section

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125. *Rights of the Aboriginal Peoples of Canada*, Part II of the *Constitution Act, 1982*, *supra* note 22 provides in section 35(1): “The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, ‘[A]boriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the [A]boriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.” Section 35(1) provides “The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the *Constitution Act, 1867*, to section 25 of this Act or to this Part, (a) constitutional conference that includes in its agenda an item relating to the proposed amendment of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and (b) the Prime Minister of Canada will invite representatives of the [A]boriginal peoples to participate in the discussion on that item.” Section 91(24) of the *Constitution Act, 1867* provides Parliamentary authority over “Indians and Lands reserved for Indians.” Section 25 of the *Canadian Charter Of Rights And Freedoms*, *supra* note 100 provides “[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any [A]boriginal, treaty or other rights or freedoms that pertain to the [A]boriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. These constitutional rights are enforced by Section 52(1) of the *Constitution Act*, *supra* note 22.

126. (1929), 1 D.L.R. 307 at 313; 65 C.C.C. (2d) 233 (N.S. Co. Ct.) [hereinafter *Syliboy*].

127. *Simon*, *supra* note 97. Acting Judge Patterson in *Syliboy* (*ibid.* at 313-314) stated that, “[t]he Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages’ rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it”.

128. *Simon*, *ibid.* at 399. More often, however, the Supreme Courts merely winks at colonial law. For example, compare with Cory J. in *R. v. Horseman*, [1990] 1 S.C.R. 901 who wrote “although it might well be politically and morally unacceptable in today’s climate to take such a step as that set out in the 1930 Agreement without consultation with and the concurrence of the Native people affected, nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned and has not been challenged in this case” at 934.

35 calls for just settlement for [A]boriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.<sup>129</sup>

Furthermore, leading Canadian constitutional law professors Peter Hogg and Mary Ellen Turpel-Lafond have suggested, “[i]t is an important task of constitutional lawyers and elected officials to review those [constitutional] doctrines that reflect the Eurocentric bias of Canadian constitutional law and government ... and embark on the reordering of institutions and doctrine that is required to give full expression to the longstanding Aboriginal presence in Canada.”<sup>130</sup>

In 1992 the High Court of Australia in *Mabo v. State of Queensland* acknowledged the role that the *terra nullius* doctrine had played in the dispossession and oppression of the Aborigines of Australia. The court rejected the continuing application of the settled colony and the *terra nullius* doctrine. Moreover, the court held that Aboriginal title did apply in Australia, and that the underlying title of the Crown and the Colony of New South Wales was reduced and qualified by Aboriginal title.<sup>131</sup> Mr. Justice Brennan stated:

If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today’s world that common law should neither be nor seen to be frozen in an age of racial discrimination.<sup>132</sup>

Mr. Justice Brennan also stated:

[I]n discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England ... Although our law is the prisoner of its history, it is not bound by decisions of courts in the hierarchy of an Empire, then concerned with the development of its colonies.<sup>133</sup>

129. *Sparrow*, *supra* note 83 at 1106. The Supreme Court of Canada concluded that: “For many years, the rights of the Indians to their [A]boriginal lands—certainly as *legal* rights—were virtually ignored ... For fifty years after the publication of Clement’s *The Law of the Canadian Constitution* (3d ed., 1916) there was a virtual absence of discussion of any kind of Indian rights.” *Ibid.*

130. P.W. Hogg & M.E. Turpel, “Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues” (1995) 74 Can. Bar Rev. 187 at 192.

131. (1992), 102 A.L.R. 1 at 101. The Australian legislature has not positively responded to the judicial challenge. But that topic is another tyranny. Currently, a federal election is being held on the battle between Native title and Crown pastoral rights. This process reminds me of the political battle after *Worcester* in the United States, and after *Sparrow* and *Marshall* in Canada.

132. *Ibid.* at 18.

133. *Ibid.* at 82.

Justices Deane and Gaudron identified the role that judicial doctrines played in the unjust dispossession of the Aborigines:

Inevitably, one is compelled to acknowledge the role played, in the dispossession and oppression of the Aborigines, by the two propositions that the territory of New South Wales was, in 1788 *terra nullius* in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of Aboriginal inhabitants. These propositions provided a legal basis for the justification of the dispossession. They constituted the legal context of the acts done to enforce it and, while accepted, rendered unlawful acts done by Aboriginal inhabitants to protect traditional occupation or use. The officials endorsement, by administrative practice and in judgments of the courts, of those two propositions provided the environment in which the Aboriginal peoples of the continent came to be treated as a different and lower form of life whose very existence could be ignored for the purposes of determining the legal right to occupy and use their traditional homelands.<sup>134</sup>

The two justices also called for the rejection of the fundamental principles of Australian case law:

If this were any ordinary course, the Court would be justified in re-opening the validity of fundamental proposition which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than 150 years ... Far from being ordinary, however, the circumstances of the present make it unique. As has been seen, the two propositions in question provided the legal basis for dispossession of the Aboriginal peoples of most of their traditional lands. The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from those past injustices ... For the reason which we have explained, that re-examination compels their rejection. The lands of this continent were not *terra nullius* and “practically unoccupied” in 1788.<sup>135</sup>

Such decisions are not “ghost dance shirts” that can protect us from other decisions; however, they are courageous judicial insights that we should honor. These decisions reflect a good faith judicial awareness. They clearly

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134. *Ibid.* at 82-83. Compare to *Vermont v. Elliott*, 616 A.2d 210 (Vt. Sup. Ct. 1992) (“at some point the weight of history overtakes, crushes and obliterates Aboriginal claims”) and *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 at 370 per Lambert, J. (“extinguishment or elimination of Aboriginal title and rights by passage of time or weight of history is not part of the law of British Columbia and should be resolutely rejected”).

135. *Ibid.*

identify the fictions of colonization and attempt to correct them. Such decisions create a postcolonial interpretative context.

### C Renewing Autochthonic Ecological Orders

Indigenous lawyers must transform the colonizing legal systems that deal with Indigenous peoples by changing the premises of the systems. We must seek to reveal and enrich the idea of law rather than to reinforce the boundaries that currently conceptualize constitutional supremacy, legislation and adjudication.<sup>136</sup> Eurocentric political theory and law represent an effort to sustain an artificial, male version of order over any autochthonic or Indigenous ecological order. The Eurocentric version of social order and land use planning, the shadow of the 'state of nature' premise, represents the view of about nine percent of the world's population. These modern, artificial orders are irrational realms full of inconsistencies and uncertainties, which are now being exposed. These inconsistencies have accumulated beyond reasonable toleration. They are creating a legal transformation, which Indigenous lawyers must be involved in creating a new framework for legal analysis.

Indigenous peoples cannot construct Indigenous order, law, remedies and solidarity on Eurocentric foundations.<sup>137</sup> As Audre Lord, the African-American poet, has tried to teach us, "the Master's tools have not been designed to dismantle the Master's house."<sup>138</sup> We have replicated Eurocentric artificial governments and administrative forms. They have not secured for us either prosperity or contentment. They only operate on a foreign affairs model, directed outward. When they are directed inward to our families, Indigenous peoples resist these models. We view them as processes of "making up the rules as they go" rather than as sustainable relationships. Often, these Eurocentric administrative systems become engines of cognitive imperialism and oppression.<sup>139</sup>

In my view, the failure of these imitative administrative systems resides in the fact that they are artificial entities that ignore the ecological contexts

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136. See D. Kennedy, *A Critique of Adjudication {fin de siècle}* (Cambridge, Mass.: Harvard University Press, 1997).

137. J. Borrows, "With or Without You: First Nation Law (in Canada)" *supra* note 86; R. Delgado, "Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence" (1995) 68 S. Cal L. Rev. 545.

138. Audre Lord, "The Master's Tools Will Never Dismantle the Master's House" in *Sister Outsider: Essays And Speeches* (Freedom, Cal.: Crossing, 1984) at 110.

139. "Micmac Literacy and Cognitive Assimilation", *supra* note 10; R. Phillipson & T. Skutnabb-Kangas, *Linguistic Human Rights* (New York: Mouton de Gruyter, 1995); R. Phillipson, *Linguistic Imperialism* (Oxford: Oxford University Press, 1992).

of Indigenous thought.<sup>140</sup> Throughout the Eurocentric idea of time and history, the ecology has determined the structure of Indigenous nations, tribes and societies. Our ecology and its forces have been our greatest teachers.

These autochthonic ecologies taught our peoples that everything is interrelated and all life forms and forces are in a process of flux or circular interaction. The belief that the ecological order is connected through relationships with the keepers of life is the premise of our worldviews. By knowing our relationships with the natural order, our shared relationships can sustain harmony and balance. Coming to know is not located outside one's self but is founded upon the interconnectedness and interdependent relationship one has with the sources of life. Understandings come through connecting with the sources of life through intuition and through experience. Through millennia of observation and relationships with a certain ecology order, our teaching emerged. It is through these understandings that tribes have been able to exist in harmony in environments plagued with uncertainty.

We did not see all life forces as natural resources, but as sacred ways of life-giving. Respect of these forms and forces is the key to living a good life. It is through coming to know and working with these relationships that our ancestors came to understand the relationship and laws of the earth. It is through ceremonies, stories and songs that our ancestors were given the gifts of survival. We do not see life forces as natural resources, but as sacred ways of life-giving. It was respect that forged our relations. We had no need for a rights theory of alliances or to conceptualize our relations as vague noun-objects.

Indigenous peoples must distinguish between the existing legal system that regulates us and the environment from the subtle and complex system of Indigenous ecological orders. Our ecological surroundings are important because we derive our shared worldviews, languages and teachings from them. Our cultures are not artificially created. We do not base our relationships on the Eurocentric categories of "rights", "race" or "blood". Our worldview is not an act of imagination, but a series of teachings about a particular place and about the proper way to relate to a whole and irrevocable ecosystem.

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140. L. Hogan, *Dwellings. A Spiritual History of the Living World* (New York: W.W. Norton, 1995); G. Cajete, *Look to the Mountain. An Ecology of Indigenous Education* (Durango: Kivaki Press, 1994); J. Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47 U.T.L.J. 417-468; A.L. Booth & M.L. Jacobs, "Ties That Bind: Native American Beliefs as a Foundation for Environmental Consciousness" (1990) 12 Env. Ethics 27; J. Ragsdale, "Law and Environment in Modern America and Among the Hopi Indians: A Comparison of Values" (1986) Harv. Envt'l. L. Rev. 417.

Our oral traditions teach us that all forms of expression are necessary to sustain the cross-disciplinary synergy required by Indigenous beliefs. A diversity of opinion exists. And we will make choices. Some Indigenous thinkers have argued that we can wish away colonization and that its effects can be left behind entirely when Indigenous peoples reach political independence. Around the earth, this vision has failed to realize its magic. A variation of this idea is the vision that colonized cultures must be liberated from domination and subservience in the realm of the imagination. They argue that human existence and reality find their fullest manifestations in the imagination, and that humans consist of words rather than existing in our surrounding ecology. Frequently, these imaginers use the idea of the trickster character in Indigenous cultures to challenge the assumptions of Eurocentric realities and to create alternative destinies.

Most Indigenous thinkers say that this wishing away is impossible. Indigenous peoples must confront the cognitive harm and wrongs of colonization before healing and restoration can begin. They argue that the beginning of self-realization lies in Indigenous knowledge, worldviews and teachings, in short, in Indigenous languages. Others argue that we must value a reformed colonized consciousness for its syncreticity and acknowledge that knowing many languages is important in creating an innovative transcultural consciousness.

At the core of these strategies is a rejection of Indigenous peoples as primitive and backward, which is the way they have been depicted through the distorted history of the colonizers. Instead, postcolonial writers are expressing their Indigenous voices, sensibilities and visions. They speak and write as human beings who have dreams and aspirations, value systems and an understanding of their humanity. This is a good thing, a beginning.

Indigenous peoples have pushed the Supreme Court of Canada to recognize the intimate relationship between conservation priority and Aboriginal treaty.<sup>141</sup> It has also inspired public international law to respectfully accept our established relationships with an ecosystem.<sup>142</sup> The UN's *Rio Declaration on Environment and Development* (1992) stressed the "vital role" that Indigenous peoples may play in achieving sustainable

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141. See *Sparrow*, *supra* note 83; *Badger*, *supra* note 93; "Sui Generis Aboriginal Tenure" in *Aboriginal Tenure in the Constitution of Canada*, *supra* note 104 at 397-426.

142. The United Nations Conference on Environment and Development also adopted Agenda 21, a comprehensive statement of policy and plan of action. Agenda 21 includes a separate chapter or program for Indigenous peoples, as well as references to Indigenous people in its chapters on biodiversity and biotechnology, deforestation, living marine resources and freshwater resources. Chapter 26 of this plan is devoted entirely to the "role of Indigenous people", and calls upon States, *inter alia*, to "adopt or strengthen appropriate policies and/or legal instruments that will protect Indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices." UN Doc. A/CONF.151/26/Rev.1, vol. I, para. 26.4 (b).

development “because of their knowledge and traditional practices.”<sup>143</sup> The conference also called on governments and intergovernmental organizations to enter into “full partnership with Indigenous peoples.” The conference urged governments to take legal measures to recognize traditional forms of knowledge and to enhance capacity-building for Indigenous communities based on the adaptation and exchange of traditional knowledge.<sup>144</sup> Additionally, the *UN Convention on Biological Diversity* (1992), in its preamble, recognized

the close and traditional dependence of many Indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.<sup>145</sup>

The convention identified two of the rights of Indigenous peoples: resource use and traditional knowledge. Paragraphs 10(c)<sup>146</sup> and 8(j)<sup>147</sup> of the convention addressed these rights. The convention mentions a right to environmental rehabilitation in paragraph 10(d), which relates logically to the issue of use.<sup>148</sup> Additionally, the Special Rapporteur of the UN Economic and Social Council in *the Guidelines and Principles for the Protection of the Heritage of Indigenous Peoples* (1994) and the *Draft Declaration of Rights of Indigenous Peoples* affirm these ecologically based theories of human rights.<sup>149</sup>

This emerging ecological theory of human rights and law resolves some pressing problems: the problems arising from attempting to live with the idea of government, society and law as human artifacts. This “make it up as you go” premise of society fails to acknowledge or respect ecosystems and

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143. UN Doc. A/CONF.151/26 (vol. I), (1992) annex I, principle 22.

144. *Ibid.* at (vol. III), para. 26.3.

145. UN Doc. UNEP/Bio. Div./N&-INC.5/2 (1992)

146. Article 10(c) of the Convention, which directs state parties to “[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.”

147. With respect to traditional knowledge, Article 8(j) requires that each state party, “[s]ubject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices[.]”

148. Article 10(d) of the Convention directs state parties to “support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced.”

149. *Guidelines and Principles for the Protection of the Heritage of Indigenous Peoples* (1990-1995) E/CN.4/Sub. 2/1995/31 paras. 12-13 at 6. *Draft Declaration on the Rights of Indigenous Peoples*, E/CN.4/Sub. 2/ 1994/Add. 1, articles 3 and 25.

the need to live in harmony with the environment. No doubt some problems—such as nuclear armaments, pollution, war, prejudice, substance abuse, poverty, and crime—need human solutions. To remain rational, however, human societies must be ecologically sustainable. Indigenous peoples must reclaim their natural context and structure of order. They must reclaim the worldviews, knowledge, and languages that nourish this order. Surely, ecological studies will be more important to Indigenous peoples in the next century than the existing political rhetoric and legal myth of dead white men creating artificial societies.

#### **D Recognizing Diversity**

Another challenge in the postcolonial interpretation being undertaken by Indigenous lawyers is the Eurocentric tradition of universality or generality. This is a noble but illusory vision. In law this vision is illustrated by the idea of an impartial judge who treats all situations according to general and neutral rules that treat all parties as equals. This is the universal ideology of Eurocentric law. It is a noble but artificial concept. We must challenge the fairness of its style of judicial inference and deduction, which is derived from the general, impartial and objective principles that underlie the belief in universality. Indigenous lawyers must expose the limitation of this artificial construct, its categories and its legal reasoning and transform it. Also, we must challenge Eurocentric rules of judicial procedure and evidence with Indigenous procedures and ceremonies.

Universality appears in many false masks, but the most intriguing is its manifestation in the idea of polarities. Examples of the tactical polarities of colonial thought are the distinctions between savage/civilized, special rights/general rights, public/private, state/society, legislative/judicial, power/law and law/policy. The collapse of these dualities is fatal to colonial legal thought, which is founded on the strategy of difference illustrated by these dualities.<sup>150</sup> The failing or vanishing polarities or the collapse of those differences in jurisprudential thought illustrates a transformation or contextual shift in contemporary legal thought. Universality is often considered a solution to these collapsing polarities. However, the diversity that exists in this world overwhelms the renewal of universality created by the collapse of these dualities. Creating false uniformity is a useless activity. We must learn to exist with diversity and its processes. We must understand that no one is above the incessant diversity; not one tradition or ideology can assert itself as universal.

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150. See *Dominated Man*, *supra* note 9. See also, D. Kennedy, “The Stages of the Decline of the Public/private Distinction” (1982) 130 U. Penn. L. Rev. 1349 and “A Semiotics of Legal Argument” (1991) 42 Syracuse L. Rev. 75-90.



The only sustainable category of universality is diversity. Biodiversity in its “human” manifestation is found in the vast multiplicity of human consciousnesses and forms, the particularity of shared traditions, and the specificity of contexts. Such diversity, especially Indigenous diversity, cannot sustain the Eurocentric idea of universality or impartial reasoning.<sup>151</sup> Thus, European thinkers have marginalized and excluded our teachings and thoughts from political and legal theory. We have become the definition of marginality as well as Aboriginality.

The task of Indigenous peoples is to encourage diversity as the prime assumption of legal systems, and to resist any false universality, despite the consequences for existing legal theory. The infinite diversity in a biodiverse earth disrupts the idea of Eurocentric categories, which are indispensable for Indo-European languages, political theory, and legal reasoning. We have little choice in this matter. Theory and reasoning are supposed to help us understand the diversity of the world, not be a substitute for it. We must create a legal order that is consistent with our ecological sensibilities and our awareness of biodiversity.

All existing Eurocentric legal orders need to create an integral jurisprudence that meets the needs of all people, and acknowledges both the solidarity and the diversities of these communities. Established legal orders must accept transcultural law, embrace cultural diversity, and eliminate colonial bias. Eurocentric legal thinkers must understand that transcultural, syncretic, legal thought and jurisprudence can create a legitimate venue where postcolonial worlds can recover an effective relationship between identity and place. This vantage point provides a framework for “difference on equal terms,” within which transcultural theories may be explored. These thinkers must recognize transculturality and interdisciplinarity in both theory and method, and recognize that this approach spells the potential end of the interpretative monopoly of universal Eurocentric thought.

The relationship between universal and diversity in modern thought hides the diversified unity of an interrelated correspondence:

All our different ways of thinking are to be considered as different ways of looking at the one reality, each with some domain in which it is clear and adequate. One may indeed compare a theory to a particular view of some object. Each view gives only an appearance of the object in some aspect. The whole object is not perceived in any one view, but, rather, it is grasped only implicitly as that single reality which is shown in all these views. When we deeply understand that our theories also work in this way, then we will not fall into the habit of seeing reality and acting toward it as if it were constituted of

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151. I.M. Young, “Impartiality and the Civil Public: Some Implications of Feminist Critique on Moral and Political Theory” in S. Benhabib & D. Cornell, eds., *Feminism as Critique: On the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987) at 57.

separately existing fragments corresponding to how it appears in our thought and in our imagination when we take our theories to be 'direct description of reality as it is'.<sup>152</sup>

The relationship is understood and described as the quandary of the universal and particular. Canadian thought and law asserts the particulars (facts, desires, values, and identities) exist only through the universal (theory, reason, rules, and government), yet must be separated from the universal. Its theories create the questionable binary distinctions between theory and fact; reason and desire; rules and values; means and ends; form and substance; public and private life; technique and theory.<sup>153</sup> However, if the universal or singularity exists only through the particulars, it cannot be separated from its diversities.

In the modern Canadian polity, governments and courts must function with a plurality of competing conceptions of the good derived from cultural or linguistic worldviews, rather than political ideologies. The diverging normative assumptions and objectives of worldviews hinder the creation of a fair and just balance between plurality and solidarity. The governments lack a broadly based shared understanding on how to promote social cohesiveness while at the same time preserving and enhancing its plurality and dealing justly with the issues that arise as a consequence of its diversity. These diversities are attempted to be balanced through a division of law, ethics, and politics and adherence to different criteria for lawmaking and adjudication. These diversities are sought to be preserved through allocation of individual, cultural and minority rights, and unity promoted through voting that establishes ruling majorities.

Achieving a proper balance among peoples and worldview hinges on "just" constitutional and judicial interpretation of their diverse concepts of the good that neither underprotects or overprotects constitutional and private rights and prevents one of the competing conceptions of the good to dominate over its rivals. However, Canadian law is an interpretative enterprise that seeks universal and general principles, which may not exist among its diverse peoples and their constitutional rights. Judges do not have a vision of how and where to draw the jagged line between diverse and competing concepts of good and their assumptions of striking a just and workable balance. Lacking a shared reservoir of universally shared concepts of the good, judges debate the 'how' or seek to discover the 'where'. They have not discovered any impartial or neutral interpretative method between the genuine differences among conflicting concepts of the good, thus the lines appear as reflections of political ideology. All legal interpretations

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152 Bohm, *supra* note 32 at 3-9.

153. See generally R.M. Unger, *Knowledge and Politics* (New York: Free Press, 1975) and *Politics, A Work in Constructive Social Theory* (Cambridge: Cambridge University Press, 1987).

seem inextricably bound to only some among the competing conceptions of good, thus denying any pretence to universalize or generalize principles. Accordingly, the justification of legal interpretation is partial and local; it appears incapable of transcending fragmented biases and indistinguishable from politics. The inevitability of partial interpretation, the constraints of imperfect justice and the impossibility of surmounting the conflicting concepts of the good creates need for transformation in democratic thought, governance and the rule of law.<sup>154</sup>

To understand the endless flow of diversity, especially Indigenous diversity, Canadian law and political thought must accept plurality, its perspectives and its new skills. Diversity reveals what law, politics, or society might become. To accept plurality and diversity is to realize the need to reimagine and remake institutions, political relationships and law itself. It is to realize the importance of enriched skills of cooperative innovation and of loosening the institutional restraints. It requires accepting the profound judicial idea that all governments are imperfect and no nation has already found the basic design of a free society, a fair and just market economy, or robust democracy.

The legal challenge of Indigenous diversity is the ability to sustain commitments and relationships with different peoples. Indigenous integrity and dignity, after all, is part of the human spirit that has always overrun imposed, artificial limits created by governments and legal orders. The political and legal encounter of a diverse multicultural society with Aboriginal and treaty rights must be a resilient encounter of competing commitments, an encounter with the vectors of each particularity and angularity. Innovative constitutional and legal encounters may be capable of harnessing the conflict among competing conceptions of the good, the gap between the self and others, individual and community. These encounters may be able to frame new institutions and just theory interpretations.

Such encounters should not be viewed as valueless relativism aimed at achieving agreement or compromise—an indiscriminating gray zone with all perspectives equally viable, and as a result, equally unconvincing. Instead, these encounters are among valued worldviews, ideologies and identities of Indigenous peoples and others seeking to achieve a sustainable, dynamic and respectful relationship with other powers and peoples. To move forward, the legal system must establish new ways of learning to think, converge and act together without reliance on force to create justice. It requires innovative *sui generis* analysis and discourses that create inclusive dialogue, creative decision making models and institutional reform. It requires improving the life chances of individuals, sustaining

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154. M. Rosenfeld, *Just Interpretations: Law Between Ethics and Politics* (Berkeley: University of California Press, 1998).

families within organized and capable communities. To care about people, however, Indigenous peoples and lawyers must be experimental about institutions and legal theory.

### VIII DREAMING AND ARTICULATING IMPOSSIBLE VISIONS



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Having survived five centuries of colonialization, Indigenous peoples have the duty of imagining a new destiny. Out of the tragic ambiguity of human consciousness and life, every generation must renew or discover its vision and its pathway. Mixed with memory and forgetting, the desire that creates, changes, and diminishes the very conditions of heritage, thought, relationship and life, every generation of Indigenous peoples must struggle with either fulfilling its heritage and language or betraying it. In the last five hundred years, the preceding generations of Aboriginal peoples have rejected betraying their teachings and rejected assimilation or copying of foreign values as well as they could. Their activities and visions created the intense context of our constitutional struggles today.

Indigenous peoples have been entrusted with the task of rebuilding our families, our peoples, and our nations. The endless cycles of fate have thrust us into this situation. We must recognize our people's arduous struggle to protect their teachings from the colonizers. Through law, these colonizers have sought and still seek to force us to duplicate their inherited political forms, conventions, and compromises. Our position is a celebration of the many other important steps Indigenous peoples have taken to remain free.

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155. Berlo, *supra* note 13 at 191 (Black Hawk (Lakota), "Dreams of Vision of Himself Changed to a Destroyer or Riding a Buffalo Eagle, 1880-81").

Their struggles, dedication and commitment have been generating the momentum that gives us the capacity to meet our challenges. We have reached a critical point in our aspirations and vision. Much is under way and there is much more to do. Our predicaments and challenges are an invitation to all Indigenous peoples who may not yet be involved, to encourage everyone to take part in actions, both big and small. To succeed, the circle of commitment must continue to grow. Our future is everyone's responsibility and everyone's opportunity to make a decent and prosperous life.

For five centuries we have experienced the colonial order, and we know its contradictions, its wretchedness and its pain. We must begin to create a postcolonial legal order that respects Indigenous law and thought and a distinct destiny to carry us through the next five centuries. We must have legal institutions that respect *sui generis* law and Indigenous languages. If Indigenous peoples want a better life, we must not be afraid of dreaming the seemingly impossible. Every impossible dream grows out of our spiritual and cultural teachings. We must articulate the visions that guide us and the visions that flow naturally from our teachings and ecology, as we understand them. Our ecological traditions breathe substance into our visions and life and give them meaning.

Dreaming the overtly impossible is a particularly onerous task for Indigenous peoples who are lawyers and who are trained in a colonial legal order. Yet this is part of our responsibilities, our duties. To gain the freedom to make alternative futures for Indigenous peoples, we must imagine them, talk about them, and act them out for others. We must ground these visions within our ecological sensibilities. Over the centuries, Indigenous magistrates and lawyers have dreamed the seemingly impossible. They have created and sustained political transformations based on ecological awareness. Key examples are Confucius in China, Benito Juarez in Mexico, Mahatma Gandhi in India, and Nelson Mandela in Africa. We must continue this heritage into the future.

Perhaps we can all agree that we want to rebuild for our families and allies good relationships with their surroundings. This is the fundamental remedy we need to develop. I am thinking about the quality and style of our relationships to the ecology and among people. It is difficult for me to imagine a nation or a people without strong and good families. Only dedicated families can overcome the worst experiences of life. Only good families can wage the never-ending struggle with the human weaknesses that are manifested in vice. The struggle to balance extravagant desires and self-interest takes place inside everyone. The manner in which people handle this struggle is what makes them human beings. Only united families can create the commitment to work toward things that are good and right. Only families can develop children who try to be decent, just, tolerant,

understanding, kind, and who try to resist corruption and deception. Only extended families can create a healing environment. Only a community of strong families can strive for kindness and courage in rebuilding an Indigenous order, which is based on the freely accepted responsibility to serve those around us and those who will come after us.

A legal system or a state cannot create these values. Only grandparents, parents and children can restore our nations and peoples. Families must guarantee spiritual and cultural teachings and value to our nations, our peoples and community. No scrap of paper or instrument of justice can rebuild Indigenous nations, peoples or communities. From our experiences, we know what can happen to decent laws if there is no communal solidarity or willingness to live a good life to back up these laws.

In the transitional period, Indigenous lawyers will face days of hard work and considerable difficulties. Every day we will be confronting an interlocking system of colonial assumptions, context, laws and remedies that prevents Indigenous peoples from realizing their just aspirations and restoring the families. We expect this because of the prejudices of Eurocentrism. Eurocentric lawyers and scholars have built all these legal orders in the context of the modern state, which in turn is built on the legacy of colonialism and on the jagged course of empires. Neither the United Nations nor its member states have decolonized or deracialized these legal orders or these biases.

Little trust exists in Eurocentric models of legal order, governance and public management. Indigenous lawyers and law students must carefully explore the conceptual assumptions and prejudices of these legal orders and expose their fallacies. Eurocentric utopian dreams are not constructed on a comprehensive view of humanity, nor are they constructed on a desire to seek harmony with the ecology. These dreams are artificial. A legacy of violence and vicious power struggles created them. In Eurocentric thought, it is rare to find the idea that kindness, honesty, and responsibility to others might actually change society, or respect for ecology might transform society.

By using borrowed Eurocentric languages and skills, Indigenous lawyers can participate in unraveling Eurocentric visions. We can participate in constructing a fair and just society and an innovative postcolonial legal consciousness and remedies based on Indigenous teaching or by blending those teachings with Canadian law. To strive for a good and just cause is never meaningless. We can legally stabilize the Indigenous languages, culture, and ecological theory of governance; however, we cannot exorcise the demons of five centuries of colonialism that live in our minds or heal the trauma of living with such demons.

Three obsidian challenges exist in the Indigenous resonance in Canada and other British colonies: the problem of partial and jagged worldviews,

causal narratives and comprehension. The first challenge is creating an inclusive or holistic worldview rather than fragmented and reductionistic worldview offered by Eurocentric thought. An inclusive worldview should define the fundamental ideas of one's place in ecology, a view of the bond between self and the world. It should inform the "meaning of life" and suggest new concepts of what we might or should become; these perspectives generate theories of mind, society, and law. Our attempts to create a holistic *sui generis* analysis of Aboriginal and treaty rights illustrates the conceptual problems of attempting to stand outside of Eurocentric traditions and methodologies and view or comprehend Indigenous worldviews as they are understood by Aboriginal peoples. A legitimate constitutional methodology does not yet exist; it is still being constructed from Indigenous legal traditions and eventually blended with Eurocentric traditions. Any judge, legal scholar, or lawyer must somehow anticipate what needs to be improved to establish respectful comprehension and balance between the two worldviews.

A second challenge is to overcome the paradox of causality and historical narratives in Eurocentric legal traditions. Any cognitive attempt to reconcile Canadian and Indigenous thought will be limited by the existing Eurocentric premises of the objectivity of truth and its paradoxical relationship with the principle of the historical relativity of ideas. Eurocentric thought views theory as the master of history. It asserts that if we think with sufficient clarity and patience, life will surrender its secrets to us. This arrogance ignores the wars and atrocity that illustrate the dark side of Eurocentric contexts. By working with Aboriginal thought, we can recognize colonial theory, its contradictions and its ideology as the accomplice of Eurocentric thought, without validating its causality or ideology as either master or witness.

The final obstacle is the questionable capacity of political and legal actors to blend Indigenous and Euro-Canadian thought into a comprehensive legal transformative. Indigenous thought and law exists in Canada as a constitutional whisper; a problem Eurocentric law has not been able to eliminate or remedy. Most Canadian and Aboriginal judges, lawyers and students have been immersed in Eurocentric thought and in its educational structure, with little awareness of Indigenous thought or experience. Awareness of those excluded traditions is the first step in creating a postcolonial order. The shared link is the belief that most stories and theories begin and end in the clarification of immediate experiences, and experience is the inescapable foundation for knowledge, politics and law. The resolution and reconstruction of Canadian incoherences will be complex and mutual effort. A synthesis of Canadian and Indigenous thought is needed to resolve the dilemma and respect the ecological and human diversity that we seek to heal.

Legal warriors have to be patient toward all that is unresolved. We must approach our issues as visions that must be lived and conflicts that must be shared. Gradually each of us will live our issues into equitable solutions. A vision is right when it tends to preserve the integrity, stability, diversity and beauty of a place or ecology; it is wrong if it tends otherwise. Obviously, the autochthonic vision of freedoms and rights contrasts with the traditional Eurocentric definitions of rights. And so our visions demand our courage. We must breathe spiritual meaning into our daily lives and actions. We must seek the human dimension in all our visions and strategies. Healing our people and ourselves is a wider problem, another truth and remedies hidden within our languages and within us.<sup>156</sup>

The future of Indigenous peoples around the world is unwritten. The power to write the future is in our visions, teachings and our shared consciousnesses and languages. Our elusive goal is to create a fair postcolonial legal order. This essay is a humble manifestation of a small part of these enduring searches. It is part of my search for a legitimate system of rules by which a transcultural, postcolonial society can flourish. It stands witness to my search for conscience or spirit in the law.

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156. For a personal attempt to grasp the therapeutic remedies, see “*Ayukpachi*: Empowering Aboriginal Thought” in Battiste, *supra* note 50 at 248-278.