

Beyond *Sui Generis*: Situating Postmodern Legal Pluralism as a Framework to  
Reconstruct the Relationship Between Indigenous and Canadian Law

by

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# DEDICATION

*For my mother, Jeanne Moulton, who taught me how to be strong.*

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# ABSTRACT

This thesis examines the relationship between Indigenous and Canadian law at points of interaction, including, for example, in the litigation context. In doing so, it draws on the theory of legal pluralism in order to advance a normative framework through which to reexamine how institutional settings view and acknowledge legal normativity. In doing so, this thesis draws on legal pluralist scholarship in challenging the nature and function of legal centralism which delegitimizes and invisibilizes the normative authority of Indigenous law. The purpose of challenging this received wisdom about “law,” which largely stems from Western jurisprudence, is to facilitate intercultural conversations which aim to respect the organic sources of, and local knowledge inherent within, various iterations of Indigenous law.

In undertaking a legal pluralist methodology, this thesis surveys, and then subsequently rejects, “social scientific” legal pluralisms. It is argued that these versions of legal pluralism essentialize the concept of law, which tends to ignore the cross-cultural complexity of different conceptions of law. As such, this thesis rejects “social scientific” legal pluralisms, and proceeds to build on the insights of critical legal pluralists in fashioning a postmodern version of legal pluralism. This version of legal pluralism, I argue, allows more more nuanced understandings of localized and contingent legalities, including Indigenous law. It argues for an analytical approach which resists external conceptualizations of legal normativity, instead focusing the inquiry inward on the legal actors participating in various normative spaces.

Moreover, it draws on the insights of postmodernism in rejecting that there can be any “truth” or “universality” to law, and argues that modern law’s claims to universality produce a monist and unidimensional version of legal normativity. Given these claims, this thesis proceeds to illustrate the violence inherent in state law, arguing that such a state of affairs delegitimizes and marginalizes Indigenous law and the worldviews from which it is drawn. Deconstructive methods are employed to help illustrate the flawed ideological presuppositions underlying state domination.

Finally, given the postmodern legal pluralism that I develop in this thesis, I move on to think about how such a framework could be implemented in the context of land-based disputes. I look to processes of translation and negotiation as spaces to rethink legal process in arguing for a more decolonized approach to the intercultural conversation between Indigenous and Canadian law.

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This project has been greatly influenced by a large number of people. While my name appears on it, it is the product of a great number of people who contributed in different ways. As such, I wish to take the time to offer what little thanks I can for the tremendous amount of support I have received in the course of writing this thesis.

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Reflecting on this journey after 10 months, I do not know how I managed to complete this project. Yet, it is done. *And I am proud.*

# CHAPTER 1: INTRODUCTION

*Canadian governments and churches and others sought to erase from the face of the earth the culture and history of many great and proud peoples. This is the very essence of Colonialism, leaving in its path the pain and despair felt by thousands of Indigenous people today.*

Justice Murray Sinclair, Chair of the Truth and Reconciliation Commission of Canada<sup>1</sup>

*This story does not have an end. It goes on and on and on. When I am done telling this one, I can tell you another one and another one and another one and another one. I want to know and I want to believe that it makes a difference. That what I have struggled with will make a difference to my son and to his children and to those who come after. We have an obligation to those children to see that there is something here for them, but I am scared that that is not happening and it is not happening fast enough and that it is not happening quick enough. How many hundreds and hundreds of years have we been doing this? And when is it going to stop?*

*Tonight these questions are just too big and too hard and I am too alone.*

Patricia Monture<sup>2</sup>

## 1.1 OVERVIEW

Justice Sinclair's poignant words offered in the epigraph above demonstrate Canada's legacy of indifference and subjugation of its Indigenous peoples. It is unremarkable to lament the relationship between Indigenous peoples and the Canadian state. It is a troubled relationship that stings with the legacy of the European colonization of North America. Indigenous peoples have been dispossessed of their culture, land, heritage, traditions, and, indeed, their lives, in the imperial quest to settle and claim Canadian territory.<sup>3</sup> It has been recognized by Canada's highest court, and its now Chief

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<sup>1</sup> Murray Sinclair, Address (Delivered at the Truth and Reconciliation Commission, 2 June 2015), as cited in "For the Record: Justice Murray Sinclair on Residential Schools", *Macleans* (2 June 2015), online: <<http://www.macleans.ca/politics/for-the-record-justice-murray-sinclair-on-residential-schools/>>.

<sup>2</sup> Patricia Monture, "Kin-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah" (1986) 2 CJWL 159 at 170.

<sup>3</sup> There is no shortage of literature on the effects of colonization on Canada's Indigenous peoples. There is even recognition of the impacts of colonization at the governmental level, see, e.g., the conclusions reached in the Royal Commission on Aboriginal Peoples: Canada. *Report of the Royal Commission on Aboriginal Peoples*, 5 vols (Ottawa: Minister of Supply and Services Canada, 1996).



Justice, that “[p]ut simply, Canada’s Aboriginal [sic] peoples were here when Europeans came, and were never conquered.”<sup>4</sup> This profound statement is juxtaposed against government inaction, policies of assimilation meant to erasure Indigenous ways of being,<sup>5</sup> and the Supreme Court of Canada’s acceptance of the deeply flawed fiction of Canadian sovereignty.<sup>6</sup>

Given this bleak portrait, there is persistent need to renegotiate the foundations of the colonial relationship. With an eye toward decolonization, I enter this conversation to explore the the relationship between Indigenous law – law which finds its source and authority in traditional and emerging Indigenous customs, knowledge, practices, and relations<sup>7</sup> – and Canadian law – law which finds its source and authority in the Canadian

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<sup>4</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 at para. 25. More recently, McLachlin J has stated that Canada has perpetuated cultural genocide against Indigenous peoples. See, *infra*, note 26.

<sup>5</sup> See, for example, the 1969 “White Paper” which was the Government of Canada’s approach to assimilation of Canada’s Indigenous peoples. See: Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy*, Presented to the 1st Session of the 28th Parliament (Ottawa, 1969).

<sup>6</sup> For a good analysis of the problems underlying the assumption of Canadian sovereignty, see: John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*” (1999) 37 Osgoode Hall LJ 537 [Borrows, Sovereignty’s Alchemy].

<sup>7</sup> Indigenous law is a broad term that does not restrict its definition to any one particular Indigenous group, but is a blanket term for law that finds its source within, and authority from, Indigenous peoples themselves. Moreover, the choice to use the word “Indigenous” is a conscious methodological choice that stems from Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples*, 2d ed (London: Zed Books, 1999) [Tuhiwai Smith] at 7. Linda Tuhiwai Smith argues that “Indigenous” is a more apt word for researchers given its connotations within public international law and its connection to self-determination. It is also a conscious choice to separate Indigenous law from Aboriginal law, which is a Canadian common law doctrine. Aboriginal law deals with how the common law responds to Indigenous peoples, which has its source and authority in the Canadian state.

I also wish to comment on my use of the word “law”. While it may appear reductionist to use the term law, as it is a Western word with Western connotations, there is indeed much support for its use within Indigenous peoples themselves. For example, Professor Val Napoleon states:

state and its formal institutions. As this thesis will attempt to show, this relationship is problematic and, oftentimes, violent: colonial mechanisms have perpetuated the erasure of Indigenous culture, including Indigenous law. The erasure of Indigenous law is fostered by dominant Western legal theory, which presumes an internally-coherent system, even across complex cultural differences, and that the classification of law is monopolized by the state.<sup>8</sup> As such, a legal “hierarchy” emerges that serves to privilege state legal institutions, rules, and actors to the detriment of Indigenous legalities. As Henderson notes, “[w]ithout 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*.”<sup>9</sup> This thesis, then, serves as a means of reflecting on the failure of current legal frameworks and institutions in order to explore new methods of working toward decolonization.

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Indigenous law can be hard to see when we are used to seeing law as something the Canadian government or police make or do. Some people may even have been taught that Indigenous people did not have law before white people came here. This is a lie. Law can be found in how groups deal with safety, how they make decisions and solve problems together, and what we expect people “should” do in certain situations (their obligations)... They are often practiced and passed down through individuals, families, and ceremonies. This is why many still survive, after all the government’s efforts to stop them and sneer at them.

While Professor Napoleon states that it is preferable to speak in traditional Indigenous terms themselves, like, for example, the Gitksan people whose word for law is *ayook*, I do not believe that Indigenous scholars would argue that the use of the word “law” is misplaced, so long as it is put in an Indigenous perspective. See: Val Napoleon, “Thinking About Indigenous Legal Orders,” in Colleen Sheppard and René Provost, eds, *Dialogues on Human Rights and Legal Pluralism* (New York: Springer, 2013) [Napoleon, Thinking About Indigenous Legal Orders] at 229. The problem that I face here is that I am not referring to any one particular form or source of Indigenous law. That is not my place. Merely, I am using the word Indigenous law as a blanket term to couch the multiplicity of different legal orders (that invariably differ in form, sites, and modes) that stem from and find legitimacy in Indigenous peoples themselves.

<sup>8</sup> William Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000) at 232, as cited in Kevin Walby, “Contributions to a Post-Sovereignist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism” (2007) 16:4 Soc & Leg Stud 551 at 554.

<sup>9</sup> James [Sákéj] Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (2002) 1 Indigenous LJ 1 [Henderson, Postcolonial] at 21.

The subjugation of Indigenous law serves to conceal the jurisgenerative agency of Indigenous communities. However, countering the suppression of Indigenous law involves responding on both a theoretical and instrumental level: how can we recognize the fact that Indigenous law not only exists, but plays a vital role in structuring Indigenous societies? This poses a challenge to our orthodox view of law, and involves thinking critically about how institutions conceptualize the nature and origins of law, especially given the unique cultural worldviews that underlie understandings of law. This thesis argues that the theory of legal pluralism provides us a means to think deeper about the roots of legal normativity in recognizing that law exists outside of state apparatuses. Legal pluralism's *raison d'être* is to challenge legal centralism, which is the claim that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions."<sup>10</sup>

As presently situated, Western legal ideology presumes that law and the state are inextricably linked, producing a unidimensional concept of law. This theoretical *status quo* denies that law can exist outside of, or in conflict with, state institutions. The only source of law and legal meaning, then, is vested in the state.<sup>11</sup> Given this theoretical predicament, this thesis explores how legal pluralism can be used in the Canadian

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<sup>10</sup> John Griffiths, "What is Legal Pluralism" (1986) 32:24 J Legal Pluralism 1 [Griffiths] at 3.

<sup>11</sup> Roderick Macdonald and Thomas McMorow make the historical and ontological connection between legal centralism and evangelicalism. They state:

The core exclusionary beliefs of legal orthodoxy reflect an incontestable apostolic credo and, like the Gospels, are four. First, monism: the belief in the unity of normative activity. Second, centralism: the belief in the law and state as co-terminus. Third, positivism: the belief that a hard ex ante criterion may be propounded for distinguishing between that which is, and that which is not, law. Finally, prescriptivism: the belief that law is a social fact existing outside and apart from those whose conduct it claims to regulate.

See: Roderick Macdonald and Thomas McMorow, "Wedding a Critical Legal Pluralism to the Laws of Close Personal Adult Relationships" (2007) 1:1 European Journal of Legal Studies 319 [Macdonald and McMorow] at 321.

experience to offer a normative framework through which to displace state law's claim to supremacy over legal meaning and ordering. This quest involves a rethinking (or unthinking) of law in a way that moves beyond simply valuing and giving status to Indigenous legal orders *within* Canadian legal structures.<sup>12</sup> Instead, we must see Indigenous law as constituting its own normative horizon rooted in Indigenous ways of viewing and being in the world.

In examining the theoretical purchase of legal pluralism, this thesis surveys two competing strands in the legal pluralist literature, and ultimately builds on critical versions in arguing for a postmodern conception of law.<sup>13</sup> Such a version of legal pluralism calls for the “end of the monopolies of legality,”<sup>14</sup> and, instead, argues that law cannot be reduced to one specific definition or “truth.” Rather, it is dispersed, historically and socially contingent, and constantly being renegotiated.<sup>15</sup> A postmodern version of law contends that legal pluralism, as a mode of analytical inquiry, must resist attempts to posit external criteria for delimiting law, instead looking to legal actors themselves in discovering how law and legal meaning is created. This mode of inquiry allows us to see

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<sup>12</sup> Melissa Williams notes that “[...]state recognition practices have as often been a vehicle for sustaining structures of domination over indigenous people and subaltern groups as an instrument by which justice is served.” Melissa Williams, “Introduction” in Glen Coulthard, et al, eds, *Recognition versus Self-Determination* (Vancouver: University of British Columbia Press, 2014) at 5.

<sup>13</sup> These two constituencies will be discussed in detail in the Chapters to follow. For the purposes of introducing my thesis, I am situating the theoretical underpinnings of this thesis upfront to illustrate how I aim to orientate my discussion of legal pluralism.

<sup>14</sup> Boaventura de Sousa Santos, "The Postmodern Transition: Law and Politics" in Austin Sarat and Thomas Kearns, eds, *The Fate of Law* (Ann Arbor: University of Michigan Press, 1989) [de Sousa Santos, Postmodern Transition] at 153.

<sup>15</sup> Roderick Macdonald argues:

[Legal pluralism requires us] to accept that interaction is fundamental to all normativity-however formalized, however explicit, however informal, however implicit. The meaning of the word is to be understood in actions and interactions. It is to be understood not just in the institutional rites of dogmatic interpreters but in the continuing interpretive communion of the congregation.

law as emerging through the transformative function of human agency: legal actors construct, and are constructed by, their interactions with various normative phenomena, including both state institutions and more localized and culturally contingent normative communities.<sup>16</sup>

As such, this thesis argues for the emancipatory potential of a particular conception of legal pluralism that combines postmodern elements of law with deconstructionist praxis.<sup>17</sup> Given colonialism's tumultuous and violent past, and the tensions underlying the current Indigenous-Canadian relationship, deconstruction provides a means to disinter the ideological foundations of state law as a means to decenter them. It argues that the state's normative domination is predicated on brute force and normative violence rather than its ideological superiority. Given such a reality, a legal pluralist inquiry should quarry law's colonial and imperialist qualities as a means to deconstruct the spurious presuppositions underlying state domination.

This thesis argues that a postmodern version of legal pluralism recognizes the need for the destabilization of the seemingly incorrigible statist version of law that supports the erasure of Indigenous legal meaning. Legal centralism must not only be

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See: Roderick Macdonald, "Custom Made-For a Non-Chirographic Critical Legal Pluralism" (2011) 26 CJLS 301 [Macdonald, Non-Chirographic] at 311.

<sup>16</sup> This is not to say that law is rooted in human beings' foundational principles, such as the Kantian appeal to reason or some form of natural rights. Rather, it argues that law's source is within legal actors and how they create and interpret their own legal worlds through their interactions with various sites of normativity. This is the constructive function of human agency, which recognizes that the "self" is constructed by a concatenation of different forces; the "self" is a site of multiple normative identities. See, e.g., Martha-Marie Klienans and Roderick Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12 CJLS 25 [Klienans and Macdonald] at 39. I will unpack my claim to situating the locus of inquiry in this fashion in Chapter 3.

<sup>17</sup> In this thesis I use the term emancipatory. Tracey Lindberg states that emancipation in the Indigenous context means "to be able to be free to make decisions with an understanding of the content and fullness of our own Indigenous terminology and framework without impact of colonial mandate, intrusion or subjugation." See: Tracey Lindberg, *Critical Indigenous Legal Theory* (PhD Dissertation, University of Ottawa, 2007) [unpublished] [Lindberg] at 16.

critiqued, but decentered, destabilized, and problematized in the quest to move toward a postcolonial future.<sup>18</sup> In situating a postmodern legal pluralism, this thesis seeks to accomplish two goals. The first is to review and consider the emancipatory potential of such a conceptualization of law for Indigenous law. As will be argued, recognizing the heterogeneity of law provides a means of resisting unidimensional versions of normativity, which is important given that Indigenous law is founded in culturally-specific ways of viewing and understanding the world.

The second goal is to build on this conception of law by drawing on deconstructionist praxis specifically attuned to challenging the specious assumptions underlying state law's monopoly. Given the fissures in the relationship between Indigenous peoples and the Canadian state, Indigenous law has a particularly potent claim to decentralize the position of state law. This thesis argues that the need to dislocate the coercive colonial relationship should be reflected in a normative framework through which the relationship between Indigenous and Canadian law can be reexamined and renegotiated.<sup>19</sup>

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<sup>18</sup> Avril Bell argues that “[w]hite settlers have historically centered themselves through myriad institutional arrangements, discourses and practices of domination and marginalization of indigenous peoples. The challenge now is to modify our modes of relating to make way for, or give way to, the indigenous project of recentering.” See: Avril Bell, “Recognition or Ethics? De/centering and the Legacy of Settler Colonialism” (2008) 22:6 Cultural Studies 850 at 852.

<sup>19</sup> In speaking of the importance of Indigenous agency, Indigenous scholar Tracey Lindberg argues:

It is therefore important that we endeavour not just to respond to colonial action, inaction and thought. We must be sure that we are actors. The task then requires us to participate in a meaningful exercise which shifts the dialogue and paradigm to one predicated on the mutuality of obligation and continuing relationship of colonizers and Indigenous peoples. In this way we will see a shift in which colonizers have to respond to our nations, our actions and inactions. . . . Resistance and renewal will allow us to not only re-frame our continuing relationship with colonizers; it will facilitate meaningfully addressing and resisting sub-oppression, lateral violence and acts of omission.

See: Lindberg, *supra* note 17 at 12.

In espousing a normative framework, this thesis also attempts to ground a postmodern legal pluralism within legal and political institutions. In this sense, it attempts to implicate legal pluralism in political praxis. While I do not prescribe the institutional output of a postmodern legal pluralism, I wish to offer some preliminary comments on the mediation of the relationship between Indigenous and Canadian law so that the two forms of law can interact on more consensual and decolonized terms wherein state law is decentered as law *par excellence*. In order to do so, this thesis traces a postmodern version of legal pluralism through the processes of *translation* and *negotiation*.<sup>20</sup> Both of these processes allow us to re-envision points of interaction and contestation between Indigenous and Canadian law as a means to expose the chimera of legal centralism.

The normative framework espoused in this thesis cannot be understood as a process of *ad hoc* policy recommendations. That is, the final product will not provide specific policy recommendations about legal process. Rather, it provides us – as legal scholars, lawyers, and judges – a framework for rethinking (or unthinking) law. This rethinking involves a renegotiation of the boundaries of legal discourse which recognizes the heterogeneity both internal to Indigenous law, and between differing conceptions of law. The goal of this thesis, then, is to offer a conceptual agenda to redefine the relationship between Indigenous and Canadian law within the current moment. As such,

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<sup>20</sup> I draw these two processes from Kirsten Anker's book. See: Kirsten Anker, *Declarations of Interdependence, A Legal Pluralist Approach to Indigenous Rights* (Burlington, VT: Ashgate, 2014) [Anker, *Declarations of Interdependence*]. Both of these processes, I believe, help to better get at some of the more problematic features of the relationship between Indigenous and Canadian law. Both speak to larger processes that help to reinscribe the mechanics of the interaction between Indigenous and Canadian legalities.

it offers a normative framework from which discussions about the relationship, interaction, and future of Canadian and Indigenous law can be built.

In introducing my thesis, this Chapter begins by framing the problem, and examining how the relationship between Canadian law and Indigenous law is currently situated. It will expose the problems inherent in current frameworks, situating the need for new pathways centered on refocusing the concept of legal pluralism. It will move on to introduce the jurisprudential backdrop of this thesis and briefly present the theory of legal pluralism. Consequently, this Chapter will raise some initial considerations of how I aim to use this theory throughout this thesis. Then, this Chapter will move on to introduce some methodological considerations concerning this thesis, illuminating my choice to examine the relationship between Indigenous and Canadian law through a legal theory lens. I end this Chapter by providing an outline for the rest of the thesis, introducing the reader to how I will trace my argument throughout.

## **1.2 FRAMING THE RELATIONSHIP BETWEEN INDIGENOUS LAW AND CANADIAN LAW: COLONIALISM AND THE “ABORIGINAL PERSPECTIVE”**

It should be noted here that this thesis does not investigate the relationship of Indigenous peoples and the Canadian state on a historical level. Rather, its purpose is to examine the relationship between Indigenous and Canadian *law*, and to attempt to provide a framework that is responsive to the legal normativity that is generated within Indigenous contexts. This requires Canadian lawyers, scholars, judges, and broader institutions to re-orient how they view and interpret law. As such, it is first necessary to posit how the relationship between Indigenous and Canadian law is currently constructed and interpreted by Canadian courts, and how and why it is problematic. Inevitably, the



tensions underlying this relationship are both a symptom and a consequence of colonization. Given the legacy of colonialism, and the transplantation of British law into the colony of Canada,<sup>21</sup> it is important to examine how colonial Canadian courts continue to treat and interpret Indigenous law.<sup>22</sup> This raises questions such as: are litigants successful in bringing claims based on Indigenous law? What happens when Indigenous and Canadian law conflict within institutional settings? Accordingly, this section will provide a brief overview of how the relationship is currently situated in common law doctrine.

Examining how Indigenous law is treated is even more important given the rich and complex legal orders that exist in Indigenous communities. Many Indigenous scholars have written extensively about various Indigenous legal traditions, including those of the Gitksan people of the Northwest coast of British Columbia,<sup>23</sup> the Mi'kmaq peoples of Atlantic Canada,<sup>24</sup> and Cree, Anishinabek and Saulteaux societies.<sup>25</sup> No doubt there are other scholars working in both these societies and other Indigenous social

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<sup>21</sup> Tamanaha coins this phenomenon “legal transplantation.” He traces the idea of legal transplantation as a challenge to the idea of the “mirror thesis” – that is, that law mirrors society. His propositions raise interesting questions for (socio-)legal theory. See Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) at 107-120.

<sup>22</sup> There is evidence that Indigenous law helped to shape the relationship between early European settlers and Indigenous peoples. While Indigenous law was seen to survive the Crown’s assertion of sovereignty, it has been subsumed into the common law as “rights”. See: John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 Wash U JL & Pol’y 167 [Borrows, Indigenous Legal Traditions].

<sup>23</sup> See the work of Val Napoleon on this front, including her PhD thesis: Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished].

<sup>24</sup> See for example the work of Dr. Jane Macmillan, an Anthropologist: Leslie Jane McMillan, *Koqgwaja’ltimk: Mi’kmaq Legal Consciousness* (PhD in Anthropology, University of British Columbia, 2002) [unpublished] [McMillan].

<sup>25</sup> Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies— Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta, 2009) [unpublished].

spaces, but these are astute examples where scholars engage with Indigenous law at its source: in the communities and with the people who practice and provide meaning to it.

Rather than undertake an exposition of the richness of these various legal traditions, I leave it up to these authors to explicate how these various legal traditions are constructed and the normative commitments they endow. However, it is worthwhile to emphasize at this point the diversity and complexity of these various legal traditions, and how they have continued to survive despite the violent forces of colonization.<sup>26</sup> They do not require Crown approval to be meaningful. They do not necessarily require institutionalization to be persuasive.<sup>27</sup> It will suffice to note at this juncture that they have continued to exist within Indigenous communities despite colonial attempts to erase Indigenous peoples' culture and histories.

However, within the colonial state, courts have been one avenue of redress for Indigenous claims against the Canadian state as a means to challenge government action (or inaction) if political avenues fail. From the "duty to consult", the "honour of the Crown", and Aboriginal rights, Indigenous peoples and Canadian courts have been in constant tension in attempting to forge new routes to improve Indigenous peoples' place

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<sup>26</sup> At various times in this thesis I will draw on a particular law (or laws) to demonstrate my theoretical propositions. It is important to note that I refer back to the scholars who are doing on-the-ground work with Indigenous communities in this regard. In this way, I do aim to not essentialize Indigenous law or provide meaning to them without the cultural authority to do so.

<sup>27</sup> For example, Val Napoleon illustrates the decentralized nature of Gitksan societies. These societies are made up of kinship "houses":

The House is the basic political unit of Gitksan society, and each one is closely interrelated with other Houses through kinship, marriage, and other relationships. All the Houses are part of the four larger clans. While each Gitksan person is born into the mother's House, there are many reciprocal obligations to the father's House, spouse's House, and so on. Territories are held in trust by the House chiefs on behalf of the House members. This is a decentralized system because there is no big boss of all the Houses.

See: Val Napoleon, *Thinking About Indigenous Legal Orders*, *supra* note 7 at 233-234 [footnotes omitted]. With regard to "persuasiveness," I undertake some of these issues in Chapter 2 when I respond to the notion that law must have some form of concomitant violence in order to be persuasive or legitimate.

within the Canadian state, and to reconcile their claims with Canadian sovereignty. The modern era of Aboriginal rights jurisprudence has seen incremental improvements in the Canadian common law as it relates to Indigenous peoples, but, as some scholars note, Canadian courts still serve a key role in the subjugation of Canada's Indigenous peoples.<sup>28</sup> There is an inherent tension in attempting to redress Indigenous claims within colonial courts given the fact that Indigenous peoples have been operating by their own laws long before European contact. So, the question then becomes how have these laws been treated by courts when Indigenous litigants come before them?

In cases involving Indigenous parties, the term "Aboriginal perspective" is often used as a heuristic device whereby courts give consideration to Indigenous laws, customs, and traditions when resolving cases involving Indigenous parties.<sup>29</sup> This term reveals the status given to Indigenous law within Aboriginal law jurisprudence. It was first used in *R v Sparrow*, where, in defining the scope of the Indigenous claimant's right to fish on traditional lands, Dickson CJ and La Forest J held that: "While it is impossible to give an

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<sup>28</sup> For example, Andrew Orkin notes that:

[w]e are now in the "modern" era of the *Van der Peet* trilogy, *Mitchell*, and the rights yank-back in *Marshall II*, not to mention the frozen and inherently discriminatory judicial conceptions applied to Aboriginal peoples' land and resource title in *Delgamuukw* as well as its inherent legitimation of the extinguishment of constitutionally-affirmed Aboriginal rights. I believe that courts' applications of the Rule of Law and the supreme law of the land going into the twenty-first century unfortunately still serves on balance as a very blunt instrument for the dispossession and subjugation of Aboriginal peoples [footnotes omitted].

See: Andrew Orkin, "When the Law Breaks Down: Aboriginal Peoples in Canada and Governmental Defiance of the Rule of Law" (2003) 41 Osgoode Hall LJ 445 at 459. Moreover, there is no shortage of academic commentary on the Supreme Court of Canada's vision for the relationship between Indigenous peoples and the state, and this commentary usually flows after a Supreme Court of Canada case is released. A review of such literature is outside the scope of this thesis, and generally unneeded for my purposes, but I thought it was prudent to note how scholarly commentary has noted the failure of courts to adequately address law's role in the subjugation of Indigenous peoples.

<sup>29</sup> I make extensive comment on this issue in a recent publication, see: Matthew Moulton, "Framing Aboriginal Title as the (mis)Recognition of Indigenous Law" (2016) 67 UNBLJ (forthcoming).

easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the *aboriginal perspective itself* on the meaning of the rights at stake [emphasis added].”<sup>30</sup>

There has been much use of the phrase “Aboriginal perspective” in Aboriginal law litigation. In *R v Van der Peet*, a case concerning fishing rights and their interaction with s. 35 of the *Constitution Act, 1982*, Lamer CJ stated that courts must take into account “the perspectives of the Aboriginal peoples themselves.” However, the “Aboriginal perspective” is qualified in that...

...[i]t must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada” [emphasis added].<sup>31</sup>

As such, the “Aboriginal perspective” – which looks to a concatenation of forces, including Indigenous cultural practices and laws – must be framed in terms cognizable to the common law. This paradoxical assertion is indicative of the treatment of Indigenous law within courts: while Indigenous law is recognized to exist (or have existed), it only plays a role in litigation when it is translatable to the Canadian common law.<sup>32</sup> This

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<sup>30</sup> *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

<sup>31</sup> *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*] at para 49. See also Professor Brian Slattery’s comments where he states: “[w]hen the Crown gained sovereignty over an American territory, colonial law dictated that the local customs of the native peoples would presumptively continue in force and be recognizable in the courts, except insofar as they were unconscionable or incompatible with the Crown’s assertion of sovereignty.” Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can Bar Rev 727 at 738, as cited in *Mitchell v Minister of National Revenue*, [2001] 1 SCR 911, 2001 SCC 33 at para 141.

<sup>32</sup> Kirsten Anker is critical of this paradox given the inability for direct correspondence in “translating” Indigenous law into something recognizable by the common law. She states:

means that when disputes arise between Indigenous peoples and the Canadian state, the state requires Indigenous peoples to frame their understandings of the world within the confines of the common law.<sup>33</sup> Indigenous law, then, loses its organic meaning in order to meet common law conceptualizations such as, for example, “property” or “ownership.”<sup>34</sup>

Similarly, within the scope of determining Aboriginal title, a doctrine which seeks to acknowledge the fact that Indigenous peoples were occupying lands in their traditional ways before settlers arrived in Canada, the Supreme Court of Canada has stated that while Indigenous laws serve some relevance in determining whether title exists, they are not determinative of the issue. As the Court stated in *Delgamuukw v British Columbia*:

[T]he aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples. ... As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which

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Where Indigenous ways and perspectives are held as the measure of success in recognition by law, a fundamental error is committed in understanding the nature of translation. There is an assumption, shared by the courts, of an objective realm of Indigenous law and custom the recognition of which consists in the application by the common law of labels (inappropriate or otherwise) in order to protect aspects of those laws and customs. Justice then hinges on the accuracy of the labelling process. I argue instead that there can only ever be mistranslation and misrecognition because the ideal of direct correspondence – adequation – is a myth.

See: Kirsten Anker, “The Law of the Other: Exploring the Paradox of Legal Pluralism in Australian Native Title” in Pierre Lagayette, ed, *Dealing with the Other: Australia's Faces and Interfaces* (Paris: Sorbonne University Press, 2008) [Anker, Law of the Other] at 41.

<sup>33</sup> In responding to the increasing use of Canadian law by Indigenous litigants to assert claims, Tracey Lindberg argues:

We are becoming really strong (if we have money or resistant and rejuvenating citizens) at responding using Canadian law. Legal responsiveness is important, but it too is reactive. It is like being invited as an Indigenous person to participate in a translation exercise, but upon arriving discovering that you are being invited to speak Latin wearing a headdress. The fundamental point is lost.

Lindberg, *supra* note 17 at 13-14.

<sup>34</sup> See, e.g., Paul Patton, “The translation of indigenous land into property: the mere analogy of English jurisprudence...” (2000) 6:1 Parllax 25 [Patton].

are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.<sup>35</sup>

As such, this illustrates the extent to which Indigenous law is ignored (or masked) in the real-politik of litigating Indigenous claims. It is only seen to play a role insofar as it does not challenge the core structure of the common law, being, of course, the invocation of Crown sovereignty. In this sense, cases involving Indigenous parties only shallowly respond to the fact that Indigenous peoples themselves have law.

Two key themes arise within this conceptualization of the relationship between Indigenous and Canadian law insofar as the Canadian state is concerned: the first is that Indigenous law is not determinative in determining the scope of rights or practices which may be subject to litigation. In other words, Indigenous law may be considered by courts, but ultimately is not persuasive or determinative if in conflict with state law. The second theme is that when faced with Indigenous litigants, Canadian courts are to give consideration to Indigenous law only when those laws are, to use the language of Lamer CJ in *Van der Peet*, “cognizable to the Canadian legal and constitutional structure.”

The “Aboriginal perspective” illustrates the contested nature of Indigenous ways of being, including the nature and role of Indigenous legal traditions. What this contestation suggests, then, is that Indigenous law is devalued, and exists in a hierarchy as against state law. John Borrows argues:

The intersection of [...] various legal genealogies is sometimes portrayed as a conflict, in which one source of law is incompatible with, or should gain pre-eminence over, the others. In such instances, the Aboriginal source of law is

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<sup>35</sup> *Delgamuukw v. British Columbia*, [1997] 3 SCR 10, 153 DLR (4th) 193 [*Delgamuukw*] at para 148. What we see here is the court decontextualizing Indigenous practices from their normative setting. See: Nigel Banks, “*Marshall and Bernard: Ignoring the Relevance of Customary Property Laws*” (2006) 55 UNBLJ 120.

generally not applied because of its perceived incompatibility with, or supposed inferiority within, the legal hierarchy.<sup>36</sup>

Within this hierarchy, Indigenous law is subservient to Canadian law. Moreover, not only is it considered less *legal* than Canadian law, to the extent it conflicts with Canadian law it is to be dismissed.

Kirsten Anker suggests that “[t]he recognition of Indigenous law by the state adopts the bare bones of a legally pluralist vision: the co-existence in one territory of Indigenous law and state law.”<sup>37</sup> This is the vision currently espoused by the Supreme Court of Canada: while it recognizes – in some narrow cases – the existence of Indigenous law, that law is subsumed under state law, and recognized only insofar as it comports with the common law.<sup>38</sup> This is a “weak” form of legal pluralism where there is not a plurality *of* law, but a plurality *in* law. As Natalie Oman suggests, a weak form of pluralism is one in which the legal system recognizes plurality insofar as there are distinct legal orders, but these legal orders are subsumed under the overarching state legal order. Plural legal regimes, then, find their source of authority through recognition by dominant

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<sup>36</sup> John Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill LJ 629 [Borrows, With or Without You] at 633.

<sup>37</sup> Anker, Declarations of Interdependence, *supra* note 20 at 87.

<sup>38</sup> See also the statement of McLachlin J, as she then was, in *Van der Peet*:

The history of the interface of Europeans and the common law with aboriginal peoples is a long one ... Yet running through this history, from its earliest beginnings to the present time is a golden thread – the recognition by the common law of the ancestral laws and customs [of] the aboriginal peoples who occupied the land prior to European settlement.

See: *Van der Peet*, *supra* note 31 at para 263 [emphasis added].

legal and political institutions.<sup>39</sup> This formulation countenances the persistence of the state law's supremacy to the detriment of Indigenous legal traditions.<sup>40</sup>

The foregoing points to a tenuous relationship between Indigenous and Canadian law within a “weak” legal pluralist framework. This relationship is perturbing, and is especially so given the colonial roots of Canadian law and assertions of the superiority of Canadian law.<sup>41</sup> Moreover, the context of the relationship between Indigenous and Canadian law is particularly distressing given that it rests on the legal fiction of Canadian sovereignty. As Patrick Macklem notes:

...[L]aw was instrumental in legitimating colonization and imperial expansion in two key respects. The law accepted the legitimacy of assertions of Crown sovereignty, thereby excluding or at least containing Canadian legal expression of Aboriginal sovereignty. And the law accepted the legitimacy of assertions of underlying Crown title, thereby excluding or at least containing Canadian legal expression of Aboriginal territorial interests.<sup>42</sup>

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<sup>39</sup> Natalie Oman, “The Role of Recognition in the Delgamuukw Case” in Jill Oakes, et al, eds, *Sacred Lands: Aboriginal World Views Claims and Conflicts* (Edmonton: Canadian Circumpolar Institute, 1998) at 250.

<sup>40</sup> Noted Indigenous political scientist Glen Coulthard argues:

Indeed, one need not expend much effort to elicit the countless ways in which the liberal discourse of recognition has been limited and constrained by the state, the courts, corporate interests, and policy makers so as to help preserve the colonial *status quo*. With respect to the law, for example, over the last 30 years the Supreme Court of Canada has consistently refused to recognize Aboriginal peoples' equal and self-determining status based on its adherence to legal precedent founded on the white supremacist myth that Indigenous societies were too primitive to bear political rights when they first encountered European powers [emphasis in original].

Glen Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada” (2007) 6:4 Contemporary Political Theory 437 [Coulthard, Subjects of Empire] at 451.

<sup>41</sup> As Richard Devlin argues, “...legal knowledge is itself a terrain of political struggle, and that dominant legal interpretations are only so because of their superior force, not because of their superior truth.” Richard Devlin, “Law, Postmodernism, and Resistance: Rethinking the Significance of the Irish Hunger Strike” (1994) 14 Windsor YB Access Just 3 [Devlin, Postmodernism] at 7.

<sup>42</sup> Patrick Macklem, “What's Law Got to Do with It?: The Protection of Aboriginal Title in Canada” (1997) 35:1 Osgoode Hall LJ 125 at 134.



As such, while there is some weak recognition within Canadian legal institutions that Indigenous law exists, this conjecture relegates Indigenous law to the margins of legal discourse for the purposes of maintaining colonial domination.<sup>43</sup>

This troubling account is juxtaposed with statements from members of the Supreme Court of Canada of the need to reconcile Canadian and Indigenous culture, and particularly the Chief Justice of Canada's recent statements that Canada has committed "cultural genocide" of Indigenous peoples.<sup>44</sup> Moreover, in June, 2015, the Truth and Reconciliation Commission of Canada's scathing report called for the integration of Indigenous orders within the Canadian legal structures.<sup>45</sup> As such, the current "weak" pluralist relationship between Indigenous law and Canadian law is conceptually and morally inadequate. The creation of a legal hierarchy as between Indigenous and Canadian law reconstructs colonial tropes in devaluing Indigenous ways of being in the world.

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<sup>43</sup> There is also a fundamental injustice in the use of the "Aboriginal perspective" within Aboriginal law litigation, especially given that if a court is willing to recognize Indigenous law, it will only do so to the extent that it is cognizable to the common law. As Anker notes:

...in arguments influenced by postcolonial theory, the process of native title claims is said to require Indigenous ways to be judged – as law, as tradition, as truth – by the non- Indigenous system in a way that submits them to universalising European discourses; because translations can never accurately reflect "Indigenous perspectives" then recognition is said to be always and already a failure of justice.

Anker, *Law of the Other*, *supra* note 32 at 41. See also Glen Coulthard who argues that: "[s]o today it appears...that colonial powers will only recognize the collective rights and identities of Indigenous peoples insofar as this recognition does not throw into question the background legal, political and economic framework of the colonial relationship itself." Coulthard, *Subjects of Empire supra* note 40 at 451.

<sup>44</sup> Sean Fine, "Chief Justice says Canada attempted 'cultural genocide' on aboriginals", *The Globe and Mail* (28 May 2015), online: < <http://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/>>.

<sup>45</sup> For example, part of Call to Action Number 45 is to "[r]econcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements."

Thus, a new approach is needed to reexamine and resituate the relationship between these two legal orders. This begs answers to questions such as: how can we reconcile colonial assertions of the superiority of Canadian law with the complex legal traditions that exist within Indigenous communities? How do we reformulate the relationship between these two legal orders, both of which impact the daily lives of Canada's Indigenous peoples? How can Canadian institutions respond to normativity that arises from Indigenous knowledge, practices, and relations in such a way that it does not circumscribe recognition of the differing worldviews and understandings of Indigenous peoples? In order to provide some answers to these questions, this thesis utilizes the theoretical context of legal pluralism as a space for a discussion of the reconstruction of the relationship between Indigenous and Canadian law.

### **1.3 THEORETICAL CONTEXT: LEGAL PLURALISM**

Legal pluralism offers alternative ways to observe and identify legal phenomena apart from the state. At a very base level, legal pluralism denotes “the presence in a social field of more than one legal order.”<sup>46</sup> Its theoretical vigor lies in its ability to challenge legal centralism – that is, the idea that there is one version or source of law, which is typically seen as the law of the state. Legal pluralism is enticing to observers who seek to challenge the dominance of state law, and who observe the law-making potential (or reality) of non-state communities. It is idiosyncratic in its focus on observing and

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<sup>46</sup> Griffiths, *supra* note 10 at 1.

describing legal phenomena; it is a discourse on legal discourse, and, as Emmanuel Melissaris argues, it is a *meta*-theory.<sup>47</sup>

Moreover, Melissaris argues that its value lies in the theory's inherent diversity. Legal pluralism offers a "radicalization of the way we think about the law, which must permeate and inform all theorizing of the law."<sup>48</sup> In this way, it challenges legal scholarship to look beyond closed legal systems and to examine how law emerges from social processes. Consequently, legal theorizing is broadened to examine the legal discourses of non-state communities. The recognition of non-state legal orders signals a shift away from a vision of law as solely a product of the state to a vision of law as the product of different social actors and communities.

One of the central claims of legal pluralism is its challenge to orthodox legal theory. Roderick Macdonald posits five characteristics of legal orthodoxy that are opposed by legal pluralism. These include: legal monism (the idea that law is unitary), legal centralism (the idea that law is a product of the state), legal positivism (the idea that there are neutral criteria to identify the legal), legal prescriptivism (the idea that law exists apart from legal subjects), and legal chirographism (the idea that law is expressible only in written terms).<sup>49</sup> Legal pluralism offers the ability to challenge the fundamental tenants of orthodox legal theory by arguing that they are flawed and do not appropriately reflect the reality of legal life. This view of legal pluralism as a *challenge* to centralism

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<sup>47</sup> Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13:1 Soc & Leg Stud 57 [Melissaris, The More the Merrier] at 58.

<sup>48</sup> *Ibid.*

<sup>49</sup> Macdonald, Non-Chirographic, *supra* note 15 at 310.

can be seen as far back as 1986 with John Griffiths' seminal work where he argues:

“[L]egal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion.”<sup>50</sup>

While legal pluralism offers a crucial perspective in challenging legal orthodoxy, it faces constant metaphysical crisis. While legal pluralists agree as to what they are challenging, it seems that there is little consensus about what constitutes the legal in *legal* pluralism. That is, where is the line between legal orders and normative behavior patterns that are not given the status of “law”? This debate can be whittled down to two distinct constituencies within the literature. On the one hand, there are the social-scientific legal pluralists who seek to find objective criteria to differentiate legal from non-legal forms of social behavior. These theorists are essentialists,<sup>51</sup> who seek to objectify law as an external force, consisting of essential characteristics that can be observed within, and that exist across, various legal orders. In this way, law has specific characteristics that differentiate legal and non-legal forms of behavior.

On the other hand, there are postmodern or critical legal pluralists who dispense with the quest for definition given the indeterminacy of such a proposition. These scholars reject that the essence of law can be captured by particular characteristics or identifying criteria. For these scholars, law is relational, discursive, unfixed, and interactive. These scholars imbue legal actors with agency in determining, creating, and interpreting law. They emphasize that legal actors are not “subjects” of law, but law and

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<sup>50</sup> Griffiths, *supra* note 10 at 3-4.

<sup>51</sup> See: Brian Tamanaha, “A Non-Essentialist Version of Legal Pluralism” (2000) 27 *JL & Soc'y* 296 [Tamanaha, Non-Essentialist Legal Pluralism].

the creation of legal meaning are products of legal actors within particular social spheres and cultures.<sup>52</sup>

Given the multiplicity of perspectives on legal pluralism, I survey both sides of the debate in Chapters 2 and 3. As will be introduced in Chapter 3, the approach that I take draws on the insights of critical theory and postmodernism in expanding the conceptual horizons of legal pluralism. In an attempt to situate a more decolonized and de-Westernized version of law that adequately portrays the inherent diversity of social life, and which respects differing cultural understandings of law, I adopt a postmodern legal pluralism that rejects the conceptual shackles of objectivity and essentialism in law. In demonstrating the utility of such a vision of legal pluralism, I posit four “themes” that arise from a postmodern legal pluralism, which I will return to and unpack in Chapter 3: first, law has no essential characteristics. Second, legal actors themselves are constructive agents in creating and sustaining law outside of formalized and positivized legal institutions and rules. Third, legalities are interdependent and often interact in discursive patterns. Finally, state law’s monopoly is an illusion; a socio-historical product of modernity which requires deconstructionist praxis.

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<sup>52</sup> For example, Kirsten Anker argues: “...the shift from thinking of law in functional terms to thinking of it as a discourse is productive for postcolonial jurisprudence in that it turns us away from ‘universal’ attributes of law that are derived from only certain peoples’ experiences with law, and towards the linguistic worlds – the ethos – of peoples who live their law.” See: Anker, *Declarations of Interdependence*, *supra* note 20 at 88.

## 1.4 METHODOLOGY, VOICE, AND DECOLONIZATION<sup>53</sup>

### 1.4.1 LEGAL THEORY AND DECONSTRUCTION

This is, in its essence, a legal theory project. While it is driven and grounded by Indigenous law, it is concerned broadly with the nature and function of law as an important social institution. This is a project that uses legal theory as a tool to reconcile the existence of Indigenous and Canadian legal orders. In examining legal pluralism, I hope to bring to light the problematic nature of how law is conceptualized in Western theory to expose space for an approach that is respectful of the nature, function, and role of Indigenous law in Indigenous societies. In this way, I hope to use theory as a critique of the pervasiveness of colonial-based iterations of law that marginalize and silence Indigenous legalities. In setting out my methodological approaches, I will first discuss the role of legal theory in legal scholarship and later draw out *how* and *why* I am using it in this thesis.

Legal theory is both revered and dreaded. Lawyers, judges, and even some academics, seem to question its use and function within the legal academy. On its face, it appears abstract, and far removed from everyday concerns.<sup>54</sup> This hesitation with legal theory presents problems for any researcher. The challenge, then, is to situate legal theory as a necessary methodological perspective. However, an examination of legal theory's purpose and goals illustrates its importance as a methodological approach for examining legal problems. The purpose of legal theory, as I see it, is to question, to dig beneath the

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<sup>53</sup> Parts of this section is drawn from my Methodological Prospectus which was prepared for the Graduate Legal Seminar at the Schulich School of Law, Dalhousie University, during the 2015-2016 academic term.

surface, and to provide critique. Hanoch Dagan and Roy Kreitner provide a particularly apt synthesis of the purposes of legal theory:

Legal theory focuses on the work of society's coercive normative institutions. It studies the traditions of these institutions and the craft typifying their members while at the same time continuously challenging their outputs by demonstrating their contingency and testing their desirability.<sup>55</sup>

Thus, underlying legal theory as a methodology are inquiries into law's normative institutions, actors, and rules, and the function and nature of those same institutions, actors, and rules.<sup>56</sup> Moreover, it also serves as a way to examine law's effects on other social actors and institutions.<sup>57</sup> As F.C. DeCoste states, "What legal theory is finally about – and what makes it something worth doing – is the relationship between law and life."<sup>58</sup>

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<sup>54</sup> In attempting to explain my project to a lawyer friend, she questioned the value of my work. She asked: "Why do you think Indigenous people would care about your work? Many of them are starving and have no running water, so legal pluralism is likely not the first concern on their list." I am paraphrasing her a little bit. It is likely that her critique was proffered in jest, but she has raised a formidable critique to theorizing about law, and a critique that scholars must confront.

<sup>55</sup> Hanoch Dagan and Roy Kreitner, "The Character of Legal Theory" (2011) 96 Cornell LR 671 [Dagan and Kreitner] at 672.

<sup>56</sup> For Richard Devlin, the process of theorizing involves "...the active process (theorizing) of self-consciously making explicit and reflectively interrogating: a) the underlying presumptions; b) the methodological assumptions; c) the definitional boundaries; d) the procedural norms; e) the criteria for validity; and f) the preferred justifications for any or all of these in relation to a social or intellectual phenomenon." See: Richard Devlin, "The *Charter* and Anglophone Legal Theory" (1997) 4 Rev Const Stud 19 [Devlin, Charter and Anglophone Legal Theory] at 22.

<sup>57</sup> Dagan and Kreitner, *supra* note 55 at 684 where the authors note that theorizing about law often entails discussing law's consequences, particularly its distributive consequences.

<sup>58</sup> FC DeCoste, "Taking a Stand: Theory in the Canadian Legal Academy. A Review of Canadian Perspectives on Legal Theory by Richard F Devlin" (1991) 29 Alta LR 941 at 955. See also: Catharine Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1998) at 92 where Mackinnon attempts to understand how social relations between men and women have impacted the failure of law to adequately protect women. For example, in the context of law's claims to be gender neutral, she states that:

[t]here are gender-neutral formulations of these issues: law and order as opposed to depression, Victorian morality as opposed to permissiveness, obscenity as opposed to art and freedom of expression. Gender-neutral, objective formulations like these avoid asking *whose* expression, from whose point of view? Whose law and whose order?

Furthermore, Aaron Rappaport synthesizes the purposes of legal theory into two goals: empirical goals and normative goals.<sup>59</sup> For Rappaport, empirical goals attempt to identify facts. He uses the example of the jurisprudential debate over the term “law” to illustrate the empirical goals of theorizing about law given that theorists attempt to posit some empirical “fact” about the term. Empirical questions about law attempt to identify facts about events or ideas, whether temporally located in the past, present, or future.<sup>60</sup> Normative theorizing, on the other hand, seeks to postulate about what *should* be rather than what *is*. Utilizing a normative methodology seeks to resolve questions about how institutions and actors should act, or what rules should be.<sup>61</sup>

Using a legal theory methodology is a distinct intellectual choice that should both be recognized and made explicit. As Aaron Rappaport suggests, “[a]n initial step in bringing some clarity to the field of jurisprudence, therefore, is for theorists to be clear about the purpose of their analyses and to articulate the implications of that purpose for legal theory's methodology.”<sup>62</sup> As such, the legal theorist must be clear in *what* theory they are using and *how* they are using it. In this light, I wish to offer some comments on

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Theory – in Mackinnon’s case, feminism – helps us to attempt to understand the link (or occlusion) between law and the lived experiences of human beings. As such, theory helps us to interrogate gaps in the law, exposing spaces for reform.

<sup>59</sup> Aaron Rappaport, “The Logic of Legal Theory: Reflections on the Purpose and Methodology of Jurisprudence” (2003) 73 Mississippi LJ 559 [Rappaport] at 570.

<sup>60</sup> *Ibid* at 570. Empirical goals are not static by any means, and the questions asked in a research project may differ depending on what the ultimate goal of empirical theorizing is.

<sup>61</sup> *Ibid* at 572. Rappaport makes the delineation between empirical and normative theorizing clear when he states: “To be sure, normative claims might rely, in part, on empirical judgments. To assess whether the current Supreme Court jurisprudence on privacy is “justified” we need to have some empirical knowledge about what the Supreme Court said. But normative claims, unlike empirical ones, are not simply questions about the facts. They also require an evaluation of whether those facts are authorized, justified or obligatory.”

<sup>62</sup> *Ibid* at 563.



my purpose for using legal theory as a method to answer my research question: “How do we reconcile Indigenous law and Canadian law?”

My purpose in using legal theory is to offer a critique of the ideological and conceptual difficulties of Western legal theory’s positivist and prescriptive roots, which serve to privilege particular understandings of the concept of law. Because of this, I draw on the insights of legal pluralism as a means to criticize the favouring of state-based legal discourses that subjugate non-state legal orders. In this way, I hope to show that the legacy of Canada’s colonial history and dispossession of Indigenous culture creates ideological roadblocks to respecting Indigenous law. Legal pluralism flips legal centralism on its head as it is a challenge to the self-referential nature of state law. Legal pluralism rejects the notion that there is “one law” – being the law of the state – and instead argues that non-state communities regularly do build law, legal meaning, and legal institutions.

However, my methods are particularly critical of modern jurisprudence for its focus on state-based legal discourses. Such discourses, I argue, marginalize Indigenous ways of being in the world which force Indigenous legalities to fit into the typologies of the common law. State-based discourses provide a benchmark for demarcating what is considered “law” and what isn’t. This ideological position poses a threat to Indigenous-based legalities which may not fit into arcane legal categories as are presently situated in Aboriginal law discourse.<sup>63</sup> In deconstructing these ideas, I intend to use legal pluralism as a *normative* theory. I do not wish to simply note that there is a plurality of legal orders in Canada, but rather seek to use legal pluralism as a means to theorize on how it can be

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<sup>63</sup> This is the pathology of the “Aboriginal perspective” which I discussed earlier in this Chapter.

used in disassembling the monistic nature of state law. That is, I hope to show how my theoretical propositions provide a normative framework for reassessing the relationship between Indigenous and Canadian law.

Moreover, Richard Devlin provides a typology of theorizing.<sup>64</sup> He claims there to be different “levels” of viewing the scope of legal theory: high order theories, middle order theories, and working level order theories. High order theories are quintessentially philosophical. They seek to examine fundamental issues, such as the nature of law itself, or the relationship of law and morality.<sup>65</sup> Middle-order theorists operate somewhere between high order theorizing and doctrinal work. It is an introspective mode of theorizing that serves to connect ground-level legal discourse to theoretical frameworks.<sup>66</sup> It seeks, I believe, to test the internal consistency or intelligibility of a particular law or doctrine. Working level order theorists seek to reveal the underlying assumptions of particular legal actors to allow for rational critique of those suppositions.<sup>67</sup> To my mind, this level of theory connects theory to action in examining how and, most importantly, *why* particular actors act in particular ways. These theorists do not postulate about “law” as an illusive concept, but seek to connect theory to how law operates in the courtroom or legislature.

I intend to use legal pluralism on both a high level and a middle level basis. On a high level, I will use legal pluralism to answer questions such as “what is law?” and “what is the nature of law?”. By exploring the internal debate within legal pluralism, I

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<sup>64</sup> Devlin, *Charter and Anglophone Legal Theory*, *supra* note 56.

<sup>65</sup> *Ibid* at 32. Devlin also suggests that the conceptualist approach to jurisprudence – that is, that law is a system of ideas and rules in need of study – operates at a high level of theory.

<sup>66</sup> *Ibid* at 44.

<sup>67</sup> *Ibid* at 47.

hope to bring some clarity to the question of what constitutes the “legal” in “legal pluralism.” Once I develop a successful high theory in relation to how we can conceptualize “law,” I aim to bring that theory down to legal institutions, rules, and actors. As Devlin postulates about middle-order theory: “[w]hereas the conduit and high theory approaches to jurisprudence have a centrifugal dynamic, middle-order theory is more centripetal, or inward looking. It is an exercise in filling the gap between high theory and the pragmatics of practical legal discourse and, as such, attempts to be a *functional discourse*.”<sup>68</sup> As such, I aim to utilize legal pluralism in a functional way to theorize about how it can be used in the interaction between Indigenous and Canadian law. I seek to examine what this normative framework can tell us about respecting and giving value to Indigenous legal orders.

The small amount of literature that I have been able to find (and read) concerning legal theory as a methodology also mention that legal theory is not insulated from other disciplines.<sup>69</sup> Devlin asserts that jurisprudence performs a “conduit role” in that it is able to venture into other disciplines for insights to examine law as a social phenomenon.<sup>70</sup> This is not lost on me, especially given the fact that legal pluralism, while, as its name indicates, examines law as a social phenomenon, it is not confined to legal theory. Disciplines such as anthropology and sociology, among others, have taken an active interest in examining legal pluralism. While the anthropologist may (or may not) have a different goal than the legal theorist, there is no reason to dismiss her

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<sup>68</sup> Devlin, *Charter and Anglophone Legal Theory*, *supra* note 56 at 44 [emphasis added].

<sup>69</sup> See, e.g., Rappaport, *supra* note 59 at 571; Dagan and Kreitner, *supra* note 55 at 672; Devlin, *Charter and Anglophone Legal Theory* *supra* note 56 at 29.

<sup>70</sup> Devlin, *Charter and Anglophone Legal Theory* *supra* note 56 at 29.

insights.<sup>71</sup> For this reason, I am not limiting my theoretical inquiries to one self-contained discipline, and will be drawing on scholars from disciplines other than law in examining legal pluralism.

#### 1.4.2 DECOLONIZING METHODOLOGY

Indigenous scholars argue that scholarship has been another tool of imperial domination over Indigenous peoples. As Linda Tuhiwai-Smith argues:

...it is surely difficult to discuss research methodology and indigenous peoples together, in the same breath, without having an analysis of imperialism, without understanding the complex ways in which the pursuit of knowledge is deeply embedded in the multiple layers of imperial and colonial practices.<sup>72</sup>

To this end, research, scholarship, and methodology about, or pertaining to, Indigenous peoples must be sensitive to this challenge. Indeed, as Tuhiwai-Smith argues, methodology must be actively *decolonized* to divorce scholarship from its colonial roots.

The colonial relationship between researcher-subject was perhaps most stinging in the anthropological field where researchers sought to give meaning to Indigenous customs, practices, and ways of being.<sup>73</sup> In this context, research and scholarship were used as tools to construct and sustain the “Other.” Indigenous peoples felt (and still feel) left out of research, and regarded scholarship as a tool to sustain their oppression. These

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<sup>71</sup> For example, one of the preeminent legal pluralists is Sally Falk-Moore, an anthropologist and current Professor Emerita at Harvard University’s Department of Anthropology.

<sup>72</sup> Tuhiwai Smith, *supra* note 7 at 2.

<sup>73</sup> However, Tuhiwai-Smith notes that anthropology is not alone in its colonizing tendencies: “...and although many indigenous writers would nominate anthropology as representative of all that is truly bad about research, it is not my intention to single out one discipline over another as representative of what research has done to indigenous peoples. I argue that, in their foundations, Western disciplines are as much implicated in each other as they are in imperialism. Some, such as anthropology, made the study of us into 'their' science, others were employed in the practices of imperialism in less direct but far more devastating ways.” See: *Ibid* at 11.

considerations present significant considerations for scholars working with, or in relation to, Indigenous peoples.

This may be expressly the case of legal scholars working within Canadian law. The Canadian common law is a system of law specifically transplanted from Britain to Canada in an effort to colonize Canada. In this way, Canadian law is, at its very root, a product of the erasure of Indigenous methods of normative social structuring. It denies the existence of alternate normative worlds in creating, and sustaining, unequal power structures. Indeed, perhaps using the word “law” is colonizing as Canadian law provides the lens – at least my lens – through which visions of the “legal” are filtered. Within this frame of reference, the need to “decolonize” legal scholarship is ever more pressing.<sup>74</sup>

I am cognizant of the need for “decolonization,” and even more so given my status as a White Anglo-Saxon Protestant. As such, I enter into research with preconceived presuppositions about political, legal, and social structures. I am a settler and, at the time of writing this thesis, living on unceded Mi’kmaq territory known as K’jipuktuk. It is with this “Imperial gaze” that I enter into research about Indigenous law. My voice can be particularly potent in working against decolonizing efforts.<sup>75</sup> As such, I need to *actively* engage with methodology to ensure that I unweave myself from my Imperial gaze. This is especially important in legal theory given that most Western legal

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<sup>74</sup> Richard Devlin argues that “[j]urisprudence, like history, is written by the victors; it is structured by a view from the top down, rather than from the bottom up.” In this way, traditional legal theory is rooted in colonial appropriations of law, and cloaked in euro-centric views of the legal world. He argues that there is a need to see jurisprudence – or legal theory – in a new light, seeing it from the bottom of the pyramid, rather than from the top. See: Richard Devlin, “Nomos and Thanatos (Part A). The Killing Fields: Modern Law and Legal Theory” (1990) 12 Dalhousie LJ 298 [Devlin, Nomos and Thanatos] at 316-317. Devlin’s call-to-action for jurists is thus important, and is reflected in my own critical methodology. I aim to view law from a significantly critical perspective by destabilizing the “sacred cows” of jurisprudence. This, I hope, adds to a methodology of decolonization of the concept of law and legal institutions, actors, and rules.

theory centers on state-centered discourses. While there have been movements in legal theory toward critical and postcolonial theory,<sup>76</sup> it is important to keep in mind that the “legal” in “legal theory” is predominantly defined in reference to Western ways of knowing.

Moreover, it is important to identify that I am non-Indigenous, and, as such, I cannot attempt to speak for Indigenous peoples. So, when I speak of the term “Indigenous law” I am not attempting to assign meaning to that particular concept. It is used more as a heuristic device to denote the varied and diverse legal traditions of Canada’s Indigenous people. As such, I am not attempting to give *effect* or assign meaning to Indigenous law because of my own Imperial bias for how law functions. Moreover, as a non-Indigenous person, it is not my place to ascribe such meaning – it is better left for Indigenous scholars to define the parameters of their own legal traditions. I am merely using Indigenous law – in its broadest sense – as a form of non-state law, one that I believe has a particularly potent claim to recognition.

That is not to say that using the term “law” is misplaced. Indigenous legal scholar John Borrows has written that Indigenous peoples across Canada have, and continue to have, rich and varied legal traditions. He argues that Indigenous law is wide in scope and source: it encompasses sacred law, natural law, deliberative law, positivistic law, and customary law.<sup>77</sup> As such, I rely on Indigenous scholars to construct legal meaning as it is not my place to do so. In using the term “law” I am relying on

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<sup>75</sup> Tuhiwai Smith notes that typically scholarship presumed that Indigenous peoples were primitive, unable to “use their minds or intellects.” As such, it was presumed they could not undertake research – at least Western forms of research. See: Tuhiwai Smith, *supra* note 7 at 25.

<sup>76</sup> The work of Indigenous scholars such as James [Sákéj] Youngblood Henderson, Taiaiake Alfred, and Glen Coulthard are noted in this regard.

Indigenous peoples' own articulations of the "legal." In this way, I am not reducing legal meaning to something which must resemble Western law.

Second, I am utilizing a particularly critical approach to state law which I believe heeds Tuhiwai-Smith's call for decolonization. I approach state law (Canadian law) with a critical eye in an effort to expose both ideological and normative commitments that sustain colonial patterns of power and oppression. I am also critical of some legal pluralists who seek to find social-scientific definitions of "law." I argue that these theorists are actively engaging in reductionist strategies as any "definition" of law will inevitably be based on Western ways of being in the world. My thesis adopts the work of more critical and postmodern versions of legal pluralism that recognizes the role of legal actors. These visions of legal pluralism provide agency to actors: they are more than legal "subjects," but are actively involved in creating and sustaining legal meaning.

It is within this critical and postmodern jurisprudential approach where I argue reconciliation can best flourish. Given the impacts of colonization, Indigenous peoples are undergoing a resurgence of law building, looking to their past and their cultures in building their legal commitments as Indigenous peoples. By recognizing agency<sup>78</sup> within legal pluralism, the normative account that I offer spurs this process by recognizing that law is found within social actors themselves, in this case, being Indigenous peoples. By acknowledging that Indigenous peoples continue to construct meaning around their own legal traditions outside of Western paradigms, this approach, I hope, will allow for a

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<sup>77</sup> See: John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Canada's Indigenous Constitution*] at 23-55.

<sup>78</sup> I draw inspiration and importance for the recognition of agency from John Borrows, "Indian Agency and Taking What's Not Yours" (2003) 22 Windsor YB Access Just 253.

more nuanced understanding of reconciliation concomitant with my theoretical endeavors.

But, this methodology, while appealing, is limited. In describing her book, Tuhiwai-Smith uses the formation of “deconstruction,” but is quick to urge caution in using this term. She states:

This is a book which attempts to do something more than deconstructing Western scholarship simply by our own retelling, or by sharing indigenous horror stories about research. In a decolonizing framework, deconstruction is part of a much larger intent. Taking apart the story, revealing underlying texts, and giving voice to things that are often known intuitively does not help people to improve their current conditions. It provides words, perhaps, an insight that explains certain experiences - but it does not prevent someone from dying [emphasis added].<sup>79</sup>

Thus, my account is limited. While I aim to create a normative framework for reconciliation, my methods may expose anomalies in current legal doctrine, institutions, rules, and actors, but it may do little to move the political agenda forward. Indigenous peoples are still hurting, still dying from inadequate resources, still being over-incarcerated, and still being marginalized. However, that is not to say that they are passive victims. Indigenous peoples have cultivated and continue to cultivate their own legal traditions in lieu of the state’s colonial aspirations which forms part of my motivation in writing this thesis. Alas, I still need to keep decolonization at the forefront of my methodology so that my thesis works for, rather than against, decolonization efforts.

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<sup>79</sup> Tuhiwai Smith, *supra* note 7 at 3.



## 1.5 OUTLINE

This thesis will continue in Chapter 2 with an examination of legal pluralism's theoretical origins, and its development through the two aforementioned strands. First, I will explore the social-scientific or empirical versions of legal pluralism. I will explore the work of two main theorists: Sally Falk-Moore and Gunther Teubner. However, I trace various critiques of these theorists for their adherence to essentialism. The argument that I put forward is that these theorists restrict, rather than expand, the potential of legal pluralism. By offering a coherent concept of law based on particular essential characteristics, these theories are invariably ignoring the cross-cultural complexity of various conceptions of law. This undercuts the possibility of legal pluralism as a postcolonial tool as it serves to privilege Western ideals about the world and, as such, circumscribes the legal agency of non-majoritarian worldviews.

Chapter 3 will provide alternate theorizations of legal pluralism that offer more critical and postmodern approaches to theorizing about law. Specifically, these theorists focus on the diversity in legal normativity by imbuing it within everyday social practices. The theorists explored, Roderick Macdonald and Martha-Marie Klienmans, Brian Tamanaha, and Kirsten Anker, reject social-scientific or function-based definitions of law. Rather than being the product of essential characteristics, law is heterogeneous and formed through a discursive and constructive relationship between legal actors and the various normative universes to which they belong. I then build on the insights gleaned from these theorists by exploring the role of postmodernist theory in law. In so doing, I build a normative framework that provides an alternate means of thinking about legal pluralism. It is what I call a "postmodern legal pluralism" which seeks to expand legal

pluralism's potential for examining the relationship between Indigenous and Canadian law.

Chapter 4 explores the insights gleaned from deconstructionist praxis. The technique of deconstruction was first made famous by French philosopher Jacques Derrida as a means of textual interpretation, however it also has potential as a means of challenging the underlying ideological constructs of Western legal theory. I attempt to show why deconstruction is necessary given the violence of state law in silencing non-state discourse and the state's role in cultural imperialism as necessitating the challenge to the false ideological precepts underlying state law. I argue that deconstruction allows legal pluralism to offer a method of challenging the dominance of state law. This reveals how state law imports the flawed assumptions of sovereignty, the vitality of hegemony, and the dehumanization and subjugation of Indigenous peoples. In this way, I interweave my version of legal pluralism with deconstruction to allow non-state Indigenous law to flourish by destabilizing the flawed nature of state law.

Chapter 5 seeks to implicate my version of legal pluralism within legal institutions as means of recognizing the mutual entanglement between Indigenous peoples and broader Canadian society. In exploring how the insights from a postmodern legal pluralism may be brought to bear institutionally, processes of translation and negotiation will be explored. Translation is important as it implicates the role of the intercultural conversation and how both legal orders are able to translate their legal obligations to the other. As presently situated, Indigenous legalities are forced to comport with common law concepts, which elides the cultural contingency and normative authority of Indigenous law. Conversely, a postmodern legal pluralism aims to provide a

more nuanced understanding of the translation process by bringing the fluidity and contingency of law into focus, exalting it instead of stifling it. This respects the autonomy and agency of Indigenous peoples as law-creating agents who build law based on local knowledge and Indigenous worldviews.

I move on then to describe the process of negotiation, which considers the interaction of Indigenous and Canadian law at sites of contestation and deliberation, including courts. I illustrate how institutional sites reconstruct colonial power relations by, for example, clinging to the myth of Crown sovereignty. Bald acceptance of the supremacy of the Crown serves to inhibit the prospects of legal pluralism, and, as such, a postmodern legal pluralism problematizes and undercuts the normative domination of the state. While absolutist policy considerations are not offered, I trace the processes of translation and negotiation broadly through land-based disputes, showing how a postmodern legal pluralism creates room for the emergence of Indigenous legalities, respect for Indigenous agency, and broadens the conceptual horizons of law. These insights aim to decolonize legal institutions as a means to respond to the inevitable disputes that will arise in an intercultural context.

# CHAPTER 2: OBJECTIFYING LAW – TRACING AND DISMISSING “SOCIAL SCIENTIFIC” OR “EMPIRICAL” LEGAL PLURALISMS

*It is, obviously, much easier to conceive of law and legal change as exclusively a matter of those artifacts with which one is familiar, over which one has control, through which multi-lingual versions may be easily produced, and by which one can avoid the messiness of social and political diversity. Yet preoccupation with these formal artifacts of law and their subjacent ideology of universalizing formal rationality occludes the informal localization and particularity that inevitably accompanies over-reaching generality.*

Roderick Macdonald<sup>80</sup>

## 2.1 INTRODUCTION

Legal pluralism has been described as a socio-legal reality.<sup>81</sup> It seeks to connect law to its social origins, positing that law exists in normative spaces other than the state.<sup>82</sup> As Brian Tamanaha states, “[l]egal pluralism is everywhere. There is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level.”<sup>83</sup> This bold statement demonstrates the extent to which legal pluralism posits that law is omnipresent in our daily lives: from the law of the state, to customary law, to Indigenous law, to religious law, to international law, there are no shortage of concepts that lay claim to the force of “law.”

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<sup>80</sup> Roderick Macdonald, “Unitary Law Re-form, Pluralistic Law Re-Substance: Illuminating Legal Change” (2007) 67 La L Rev 1114 at 1115-16.

<sup>81</sup> Fauzia Shariff, “Power Relations and Legal Pluralism: An Examination of ‘Strategies of Struggles’ Amongst the Santal Adivasi of India and Bangladesh” (2008) 40:57 J L Pluralism 1 [Shariff] at 4.

<sup>82</sup> As Zorn points out:

The law and development movement believed that law is the product solely of the state and that laws have a direct effect on behavior. Against this, legal pluralism posited a plethora of lawmaking bodies and laws, jostling for place, competing, ceaselessly changing, with no law directly able to impact through competing legal fields to individual behavior.

See: Jean Zorn, “Lawyers, Anthropologists, and the Study of Law: Encounters in the New Guinea Highlands” (2006) 15:2 Law & Social Inquiry 271 at 293.

<sup>83</sup> Brian Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Sydney L Rev 375 [Tamanaha, Understanding Legal Pluralism] at 375.

On this front, Sally Merry Engle posited that there is an inherent tension implicated in legal pluralism. In seeking to find a “legal” pluralism, she asked:

Why is it so difficult to find a word for nonstate law? It is clearly difficult to define and circumscribe these forms of ordering. Where do we stop speaking of law and find ourselves simply describing social life? Is it useful to call these forms of ordering law? In writing about legal pluralism, I find that once legal centralism has been vanquished, calling all forms of ordering that are not state law by the term law confounds the analysis. The literature in this field has not yet clearly demarcated a boundary between normative orders that can and cannot be called law.<sup>84</sup>

The lack of agreement in defining non-state law provides a formidable barrier to the advancement of legal pluralism. In this sense, there exists a conceptual debate that must be overcome in order to advance the pluralist agenda: what do we mean by *legal* pluralism? The lack of consensus on a conceptualization of law poses a threat to the conceptual potency and precision of legal pluralism, and has also prompted scholars who are opposed to legal pluralism to argue against it as it threatens to unnecessarily expand how we define law.<sup>85</sup> In response to this lack of consensus, Chapters 2 and 3 of this thesis will canvas the legal pluralist literature in order to comment on the two broad constituencies within legal pluralism. The purpose in doing so is to attempt to find a conceptualization of legal pluralism that is both attentive to, and inclusive of, the heterogeneity of Indigenous legalities.<sup>86</sup>

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<sup>84</sup> Sally Engle Merry, “Legal Pluralism” (1988) 22:5 Law & Soc’y Rev 869 [Engle Merry] at 878-9.

<sup>85</sup> See: Simon Roberts, “Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain” (1998) 42 J L Pluralism 95.

<sup>86</sup> What I mean here is that Indigenous legalities are not static or unified. Rather, they emerge from localized processes which differ from space to space. As such, “Indigenous law” is not indicative of a universal system of law that exists across all Indigenous societies as the site, manner, and meaning ascribed to legal normativity is fluid and contingent. For a discussion of the heterogeneity inherent within Indigenous legalities themselves, see *e.g.*, Borrows, *Indigenous Legal Traditions*, *supra* note 22; Borrows, *Canada’s Indigenous Constitution*, *supra* note 77.

As will be seen in this Chapter, there are no shortage of conceptualizations of “law” for the purposes of exploring legal pluralism. While legal pluralist scholars agree that law exists outside of the state, scholars diverge on the boundary line between law and other forms of normative behaviour. Part of the reason for the debate may be that the scope of legal pluralism spans disciplines other than law, including anthropology and sociology, and that anthropologists, for example, are particularly concerned with conceptualizing law in a way that allows them to observe and record non-state legal behaviour within the communities they study.<sup>87</sup> However, for the purposes of study and critique this thesis situates the legal pluralist literature into two constituencies: the “social-scientific” or “empirical” legal pluralisms, which will be the focus of this chapter, and “postmodern” or “critical” legal pluralisms, which will be discussed in Chapter 3.<sup>88</sup> While the theories internal to these categories differ quite substantially, they all share similar perspectives on how to conceptualize law and define legal orders.

These two constituencies are indicative of the debate within legal pluralist literature between scholars who seek to provide an essential definition or set of characteristics explicit in the concept of law, and those who take a more critical approach, recognizing that there can be no universal definition of law. While it provides significant academic fodder, the lack of consensus presents difficulties for the advancement of the

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<sup>87</sup> See, for example, the comments of anthropologist Franz von Benda-Beckmann: “Like many anthropologists and, I would assume, many legal historians and comparative legal scholars, I am concerned with concepts that are useful for looking at similarity and difference in cross-societal and diachronic comparison.” Franz von Benda-Beckmann, “Who’s Afraid of Legal Pluralism?” (2002) 34:47 *J Legal Pluralism* 37 [von Benda-Beckmann] at 40. Thus, it may have been comparative necessity which has spurred the rise of social-scientific concepts of legal pluralism.

<sup>88</sup> These are self-groupings which I have created based on my own reading of the legal pluralist literature. There very well may be more “constituencies” in the pluralist literature, and the lines between them may be less refined than I am supposing in this thesis. Nonetheless, I am utilizing these two “constituencies” as a means to show the divide between two different modes of conceptualizing law.

legal pluralist project.<sup>89</sup> The result is a “plurality of legal pluralisms.”<sup>90</sup> However, the conceptual irresolution that stifles legal pluralism, while a challenge for legal theorists, does not mean that it is without theoretical potency.

As has been stated, scholars from different fields have different motives in studying legal phenomena. This is why Melissaris argues that legal pluralism is a *meta*-theory: it is often a theory about how to theorize legal orders and discourses.<sup>91</sup> As such, I believe that legal pluralism holds great promise in its theoretical opposition to legal centralism. However, given the cyclical debate that has emerged in differentiating between normative legal orders and non-legal behaviours and processes, there remains the question of which conception of law provides the most emancipatory potential for Indigenous law.

The result of this thesis is to argue that there is no one *concept* of law, but rather that there are many dispersed *conceptions* of law. This implicates the concept/conceptions distinction inherent in jurisprudential literature: a *concept* has a fixed meaning that is generally shared and common across all planes. *Conceptions*, on the other hand, are predicated on the idea that there can be no shared conceptual meaning,

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<sup>89</sup> In describing social-scientific approaches to law, Brian Tamanaha states:

There are [many] tests. None have gained universal acceptance. A group of prominent legal pluralist scholars announced their conclusion that non-state 'law' cannot be identified as a type; the most that can be identified is 'the differentiation and organization of the generation and application of norms'. Again the question must be asked, in view of this admitted inability, how can adherents so insistently (and aggressively) use the label *legal* pluralism? [footnotes omitted; emphasis in original].

See: Brian Tamanaha, “The Folly of the 'Social Scientific' Concept of Legal Pluralism” (1993) 20:2 *JL & Soc'y* 192 [Tamanaha, Folly] at 201. This lack of consensus about an external definition of law will be utilized as an argument for adopting a postmodern version of legal pluralism where the basis of inquiry will start with legal agents themselves. Such a process, I argue, removes the necessity – and, indeed, the truth – of positing an external and objective definition of law.

<sup>90</sup> Tamanaha, *Understanding Legal Pluralism*, *supra* note 83 at 375.

<sup>91</sup> Melissaris, *The More the Merrier*, *supra* note 47 at 58.

and, rather, that meaning is fundamentally contested. As such, there is not one shared or common meaning, but rather a host of different meanings that are all associated with particular concept.<sup>92</sup> Thus, some concepts have no underlying stability. Rather, they are fluid in the sense that there are a number of differing and often competing *conceptions* of the same *concept*. The argument of this thesis is that there is no stable concept of law in the manner advanced by HLA Hart in his positivist treatise *A Concept of Law*.<sup>93</sup> Not only are there contested concepts in law – such as “fairness” or “justice”<sup>94</sup> – that give rise to a number of competing conceptions, but the concept of law *itself* is fluid and subjective: there are a number of different conceptions associated with the concept of law. As will be argued further in this thesis, this is inevitably a result of the differing worldviews between Indigenous and Canadian peoples.

A number of legal pluralists have attempted to provide a universal concept of law by postulating external parameters around what a coherent concept of “law” would look like. This first constituency of legal pluralists, what I call “social scientific” or “empirical” legal pluralists, argue that “law” is endowed with essential characteristics which explicitly distinguish it from other social phenomenon. This categorical approach has evoked the proliferation of a number of different social-scientific theories that would allow researchers to clearly “see” law in social arenas other than the state. Law is manifested in such a way that it has essential characteristics – like the institutionalization of rules, for example – which distinguish it from other phenomena. As Melissaris notes,

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<sup>92</sup> See, e.g., W. B. Gallie, "Essentially Contested Concepts" (1956) 56 Proceedings of the Aristotelian Society 167 and Maite Ezcurdia, "The Concept-Conception Distinction" (1998) 9 Philosophical Issues 187.

<sup>93</sup> HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994).

<sup>94</sup> Though, John Rawls would probably disagree that law is an *essentially* contested concept in the way that there can be no underlying agreement on the characteristics of a just society. See: John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 2001).



“[social scientific legal pluralisms] apply formal criteria in order to identify non-state legal orders and their relationship with state legal orders.”<sup>95</sup> As I will argue, such an approach is theoretically untenable as it ignores the cultural, social, and historical contingencies inherent in law. Instead, legal pluralism must acknowledge that there are a number of differing, and sometimes competing, conceptions of law. In this way, a unified concept of law cannot exist cross-culturally given that law is predicated on localized understandings of how we view the world around us.

In surveying the first constituency of legal pluralism, I will introduce the reader to two approaches which are illustrative of the “empirical” or “social-scientific” trend in legal pluralism: first, I will examine Sally Falk Moore’s “semi-autonomous social field,” which attempts to recognize non-state legal orders by its ability to internalize rule systems and induce coercion to those rules. Second, Gunther Teubner’s autopoietic or “systems theory” approach to defining non-state legal orders is explored. In his approach, Teubner attempts to delineate legal systems along a communicative binary of “legal/illegal.” He believed that law could be seen as a social process flowing from the communicative processes of citizens in the ways through which they code behaviour or actions. Thus, he hypothesized that social norms could be differentiated from legal norms as they did not lay claim to a “legal/illegal” binary.

However, as will be argued, such attempts to objectify and posit universal characteristics of law decontextualize it from its source (being legal actors), and ignores that conceptions of law are deeply culturally embedded. By seeing law as solely the product of particular essential characteristics – such as power or the institutionalization of

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<sup>95</sup> Melissaris, *The More the Merrier*, *supra* note 47 at 59.

rules – legal pluralism runs the risk of overlooking the inherent normativity of social life: law is not a “thing,” but a process that is fluid in its nature. As such, I conclude this Chapter by offering a critique of social-scientific legal pluralisms by arguing that these essentialist theories are inevitably under-inclusive in examining social life. As will be argued below, social-scientific legal pluralisms tend to view law as a product of Western ways of understanding the world. What this means is that when they posit that law has “essential characteristics,” those characteristics are inevitably predicated on Western ideals.

## **2.2 SALLY FALK MOORE AND THE “SEMI-AUTONOMOUS SOCIAL FIELD”**

Anthropologist Sally Falk-Moore is perhaps best known for her concept of the semi-autonomous social field (hereinafter referred to as the “SASF”) as a theory of legal pluralism.<sup>96</sup> In 1988, Sally Engle Merry, another pluralist of similar fame, called Falk Moore’s concept “[t]he most enduring, generalizable, and widely used conception of plural legal orders.”<sup>97</sup> Falk Moore was one of the leaders of the law and society movement, and the SASF is an attempt to resituate the relationship between law and society by recognizing that law is not merely the product of state institutions and exists in other social fields.<sup>98</sup> As a theory, it has been widely accepted by legal pluralists, and is

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<sup>96</sup> Sally Falk Moore, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study” (1973) 7 *L & Society* R 719 [Falk Moore].

<sup>97</sup> Engle Merry, *supra* note 84 at 878. See also, John Griffiths who supports argues that the SASF is the best lens to identify law when looking at legal pluralism. See: Griffiths, *supra* note 10 at 38.

<sup>98</sup> See, *e.g.*, Falk Moore, *supra* note 96 at 720.

one of the earliest attempts to systematically identify the criteria that are essential to legal orders.<sup>99</sup>

Falk Moore attempted to advance a medium that provided for clear observation of legal phenomena. As a legal anthropologist, she was intimately concerned with how to observe non-state legal orders. She theorized that there were different social fields that existed outside of the state, and these social fields are demarcated by the ability to generate rules and the means to induce compliance with those rules. However, these social fields are not completely isolated; rather, they are set in a larger social web of overlapping and interacting social fields. As such, its *semi*-autonomy stems from the fact that these SASFs are susceptible to the external social forces within which it is situated.<sup>100</sup> As such, the SASF recognizes the fact that people exist in one or more social fields and, as such, are subject to a number of competing normative forces.

Moreover, Falk Moore recognizes the inherent power of the state, but “between the body politic and the individual, there are interposed various smaller organized social fields to which the individual ‘belongs’.”<sup>101</sup> This is what makes Falk Moore’s concept a legal *pluralist* concept and this statement goes to the heart of recognizing the jurisgenerative capacity of non-state communities. However, it is also an anthropological concept and as such it seeks to provide criteria to observe and measure legal phenomena. As stated, the observable boundaries of the SASF are its ability to (1) generate rules and (2) induce coercion to those rules, without, necessarily, the formalities of the power of

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<sup>99</sup> It has been accepted by Griffiths in Griffiths, *supra* note 10.

<sup>100</sup> Falk Moore, *supra* note 96 at 720.

<sup>101</sup> *Ibid* at 721.

formal state institutions, like the police or courts.<sup>102</sup> Thus, it does not have a geographic or temporal boundary, but rather is bounded insofar as it is able to have people comply with its internal set of rules.

However, as Falk Moore notes, the SASF, while isolated, it is still subject to external forces, rules, and processes – notably, those of formal state institutions. In this way, Falk Moore does not presume that actors are subject to only one social field, but they may be part of different, and sometimes overlapping and conflicting, social fields. However, these social fields are always subject to external stimuli even though they may have already set internal rules and customs.<sup>103</sup> Central governments often invade the social fields within their geographic boundaries: governments implement legislation, and courts impose rules or decisions which invade the rule autonomy of social fields.<sup>104</sup> As such, her concept links both *internal* and *external* rules that help shape the normative and legal commitments of citizens.

Falk Moore’s concept presents a concerted attempt to delineate legal orders in a systematic way that can be translated from social space to social space, and which can always identify “law” or “legal orders” within those spaces. The SASF’s utility was to develop a format to study legal pluralism and to answer the central question: how do we

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<sup>102</sup> Falk Moore, *supra* note 96 at 722.

<sup>103</sup> *Ibid* at 723.

<sup>104</sup> While Falk Moore recognizes the incursion by the state, she is skeptical at how much of an impact legislation has on social fields that already have adopted strong rules and customs. She states:

But innovative legislation or other attempts to direct change often fail to achieve their intended purposes; and even when they succeed wholly or partially, they frequently carry with them unplanned and unexpected consequences. This is partly because new laws are thrust upon going social arrangements in which there are complexes of binding obligations already in existence. Legislation is often passed with the intention of altering the going social arrangements in specified ways. The social arrangements are often effectively stronger than the new laws.

See: *Ibid* at 723.

identify non-state legal orders? Falk Moore focuses on semi-autonomy, rule-making, and the ability to induce compliance as factors which delineate specific legal orders.<sup>105</sup> She recognizes that law can be formalized, or it can be spontaneous, erupting from special social settings and the interactions among people. As Falk Moore argues:

Some semi-autonomous social fields are quite enduring; some exist only briefly. Some are consciously constructed, such as committees, administrative departments, or other groups formed to perform a particular task; while some evolve in the marketplace or the neighborhood or elsewhere out of a history of transactions.<sup>106</sup>

However, Falk Moore is cognizant of the power of the state upon non-state social fields – this why the SASF is *semi*-autonomous.

One of the examples that Falk Moore uses to substantiate her claim is the dress-making factory district of New York. In this case, the SASF is predicated on the relationship between production workers, union management, and production owners. Within this industry, Falk Moore notes a complex interaction of different rules and different social fields. She states:

Some of the rules about rights and obligations that govern it emanate from that environment, the government, the marketplace, the relations among the various ethnic groups that work in the industry, and so on. But many other rules are produced within the field of action itself. Some of these rules are produced through the explicit quasi-legislative action of the organized corporate bodies (the Union, the Association) that regulate some aspects of the industry. But others, as has been indicated, are arrived at through the interplay of the jobbers, contractors, factors, retailers, and skilled workers in the course of doing business with each

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<sup>105</sup> There is also some interesting commentary in Falk Moore's work, which suggests a decentering of state law. She states in her conclusion:

The law (in the sense of state-enforceable law) is only one of a number of factors that affect the decisions people make, the actions they take and the relationships they have. Consequently important aspects of the connection between law and social change emerge only if law is inspected in the context of ordinary social life.

See: Falk Moore, *supra* note 96 at 743.

<sup>106</sup> *Ibid* at 745.

other. They are the regular reciprocities and exchanges of mutually dependent parties. They are the “customs of the trade.”<sup>107</sup>

Its status as an SASF, she theorized, stems from the ability to produce internal rules as between the workers, the union, and the broader business structure. These are not just simple obligations that arise, but are part of a broader set of internal rules that guide how one is to act within this social space.

She further emphasizes the relationship between the workers and the union in times of high demand: in order to be able to work overtime, the union must not enforce the terms of the contract strictly.<sup>108</sup> This is a relationship based on mutual dependence: the workers are able to work, and, in return, “the union representative receives many favors from the contractor.”<sup>109</sup> These can include the contractor giving the union representative whiskey at Christmas, making a dress for his wife, or other gifts. On their face, these do not look like legal obligations in the sense that one cannot take another to court to enforce them. However, as Falk Moore notes, there is no need for state force given the *strength* of the obligations which exist within the SASF. These obligations, which are based on maintaining reciprocity, produce the requisite coercion to induce compliance with the social field’s internal rules.<sup>110</sup>

Thus, Falk Moore stresses the jurisgenerative capacity of the industry – it has the ability to generate and enforce law. Internally, it has the ability to set its own rules and induce compliance with those rules. These rules do not have to be formalized (insofar as they are written down), but they can be generated through an interactive process.

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<sup>107</sup> Falk Moore, *supra* note 96 at 728.

<sup>108</sup> *Ibid* at 725. Presumably, the contract sets a maximum number of hours worked or overtime allowed.

<sup>109</sup> *Ibid* at 725.

<sup>110</sup> *Ibid* at 726.

However, the SASF is influenced by external rules, like labour law, contract law, and other forms of law that impinge on the operation of the field.<sup>111</sup> Consequently, while the internally-based rules denote strong obligations and the ability to induce compliance (based on reciprocity), they are never fully autonomous given that they are situated within a broader social matrix of overlapping and sometimes conflicting obligations.

Falk Moore's concept is a useful anthropological tool for observing and delineating legal orders.<sup>112</sup> However, Falk Moore herself is unsure as to whether all of the SASFs which are potentially observable can be categorized as law – for her, it is a “question of what one is trying to emphasize for analysis.”<sup>113</sup> Nonetheless, its focus on discovering the essential characteristics of law – that is, rule inducement and enforcement – are what place it squarely in the social-scientific pluralist constituency. Consequently, Falk Moore provides that there is a stable concept of law based on the characteristics she proposed. The question, then, is what can Falk Moore's theory tell us about the interaction of Indigenous and Canadian law? This question will be discussed later in this Chapter.

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<sup>111</sup> Falk Moore, *supra* note 96 at 726.

<sup>112</sup> She concludes that “[t]he place of state-enforceable law in ongoing social affairs, and its relation to other effective rules needs much more scholarly attention. Looking at complex societies in terms of semi-autonomous social fields provides one practical means of doing so.” *Ibid* at 745.

<sup>113</sup> *Ibid* at 745. While Falk Moore herself has perhaps resisted the label of law, what is interesting is how legal pluralists have coopted Falk Moore's concept. As one scholar comments:

It is possible that [Falk Moore's] avoidance of using the term ‘law’ in relation to rules in the social field was intentional – not to negate the legal character of those rules, but to avoid a discussion that might see definitions of law, and hierarchies of laws, privileged over an examination of the power of social rules. Although she did not describe the social field as legal she did refer to it as having a ‘legal order’ (referencing Weber), and in describing the nature of their rule generating capacities cites Pospisil's ‘legal levels’. But it is not the legal or non-legal nature of social rules that is important – even this discussion of the ‘legal’ character of non-state law seems to misappropriate and misunderstand her writing. She was indirectly concerned with a subtle dethroning of law's privileged position in the discourse...

See: Shariff, *supra* note 81 at 6. Shariff provides a good synopsis of why her concept was overtaken by legal pluralists.

## 2.3 GUNTHER TEUBNER AND THE SYSTEMS THEORY OF LAW

Gunther Teubner is a German legal scholar and current Professor of Private Law and Legal Sociology at Goethe-Universität Frankfurt am Main. His theory of legal pluralism envisions law as a self-regulating or “autopoietic” system that constantly recreates itself – in this sense, law, as a system, “produces and reproduces its own elements by the interaction of its elements.”<sup>114</sup> Teubner argues that his theory can be looked at as “reflexive law” or “self-referentiality.”<sup>115</sup> The purpose of viewing law in this way is to bring into clearer focus the relationship between law and autonomy: self-referential systems are both closed and self-producing but also, at the same time, open systems with “boundary trespasses.” Legal systems are effectively based on internally-directed self-referential mechanisms (such as legal acts and discourses) and externally-directed environmental exchanges (such as political forces) which show how legal subsystems are both *internally closed* but also *externally vulnerable* to the environments within which they find themselves.<sup>116</sup>

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<sup>114</sup> See: Gunther Teubner, “Autopoiesis in Law and Society: A Rejoinder to Blankenburg” (1984) 18:2 Law & Society Review 83 [Teubner, Autopoiesis] at 84. The use of the concept of autopoiesis comes from science. As Beck explains:

The human body is made up of millions of cells. Within each cell thousands of chemical reactions are taking place all the time, the responsibility of microscopic enzymes which, with infinite subtlety build and re-build the functional chemical elements of the cell, which literally builds itself over and over and reproduces itself by splitting. The 'picture of the cell as a self-regulating mechanism, continually changing, yet continually stable, is one of the most important and significant results of modern bio-chemistry'. All body components are in a constant state of flux. Protein, lipid, and nucleic acid molecules are constantly being renewed, old molecules being broken down and new ones synthesized to take their place. In the last fifty years 'It became clear that one, perhaps the major, function of the living cell was the constant re-creation of itself from within' [Footnotes omitted].

See: Anthony Beck, “Is Law an Autopoietic System?” (1994) 14:3 Oxford J Legal Stud 401 at 403.

<sup>115</sup> Teubner, Autopoiesis, *supra* note 114. Moreover, Teubner draws on a definition of an autopoietic system which describes it as: "... a unity by a network of productions of components which (1) participate recursively in the same network of production of components which produced these components and (2) realize the network of productions as a unity in the space in which the components exist." See *Ibid* at 87.

<sup>116</sup> *Ibid* at 85.



A legal system is considered autonomous if “...its elements – legal acts – are components in the sense that their interaction is operatively closed with respect to legal acts and recursively reproduces legal acts.”<sup>117</sup> In this sense, the circular division between legal decisions (from a court, for example) and normative rules helps to create the insular self-referentiality of a legal system: “decisions defer to rules and rules to decisions.”<sup>118</sup> This is how the autonomy of legal systems arise: they arise in the sense of the construction and reconstruction of its internal mechanisms cast as “legal acts” which are predicated around discourses. However, self-referentiality does not insulate or close law from its environment: autopoietic legal systems are also vulnerable to external forces, such as politics or religion.<sup>119</sup>

Moreover, Teubner’s approach is also presented as a “systems theory” approach to law. Nobles and Schiff synthesize what a “systems theory” looks like:

As a theory of society, systems theory has a level of abstraction that seems far removed from the study of concrete legal orders, let alone the empirical study of particular aspects of those legal orders. Because the theory identifies society with its communications, the global nature of modern communications requires it to be a theory of world society, rather than one limited to a spatially bound community. And further, by identifying society with communications, the theory uncomfortably places the biological and thinking human being outside of society. Its hermeneutics are rooted not in the intentions of human actors, but in the meanings generated by those actors through their participation as communicators within subsystems of communication such as law, the economy, science, politics, and education [emphasis added].<sup>120</sup>

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<sup>117</sup>Teubner, *Autopoiesis*, *supra* note 114 at 87.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid* at 88.

<sup>120</sup> In explicating a systems theory of law in more depth, Nobles and Schiff argue that:

According to systems theory, modern society contains separate subsystems of communication: the economic system, the political system, mass media, science, the education system, the legal system, and so on. Each system is autopoietic: it forms its elements (communications) from itself (those of its communications that are available). Each subsystem’s communications apply a code unique to that subsystem. In the case of law, the code applied is legal/illegal; that of the economy is payment/nonpayment; that of the mass media is information/noninformation; and so on.

Thus, a systems theory approach to law emphasizes the linguistic elements of social interaction as legal systems are created and maintained through communicative action: “[a legal system’s] basic units are legal communications.”<sup>121</sup> A systems theory approach to law seeks to find meaning in communicative processes that, in turn, prescribe actors’ involvement in defining the social world around them.

Teubner’s use of systems theory attempts to add stability to the legal pluralist debate. Systems theory, he posited, allows for a greater expansion of the term “law” and “legal system” without equating it with state-based law, but it also helps to create distinct lines between the legal and the non-legal.<sup>122</sup> Said another way, he believed his theory would not be too exclusive or inclusive, and, as such, it posited a turn in the legal pluralist literature. In distinguishing the legal from the non-legal, Teubner articulates that law consists of communicative processes that fall within the binary of “legal/illegal.” Thus, this binary excludes simple social processes or non-legal normative behavior such as custom or habit. However, it is able to be inclusive as a concept of law because it does not refer to the site of law (that is, if institutionalization is imperative) but rather looks to the actual discourses that are produced in legal communication. It shifts the focus from locating a structure of law to a process of law characterized by the linguistic code of legal/illegal. In discussing this shift to linguistics, Teubner states:

Legal pluralism is then defined no longer as a set of conflicting social norms in a given social *field* but as a *multiplicity of diverse communicative processes that*

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Richard Nobles and David Schiff, “Using Systems Theory to Study Legal Pluralism: What Could Be Gained?” (2012) 46:2 Law & Soc’y Rev 265 [Nobles and Schiff] 266-7, 270.

<sup>121</sup> He further states that: “[t]he legal system is seen as a system of actions, comprising not only legal discourse about norms or organized action like court decisions and legislation, but any human communication which has reference to legal expectation.” Teubner, *Autopoiesis*, *supra* note 114 at 86.

<sup>122</sup> Nobles and Schiff, *supra* note 120 at 268.

*observe social action under the binary code of legal/illegal. Purely economic calculations are excluded from it as are sheer pressures of power and merely conventional or moral norms, transactional patters or organizational routine [emphasis added].*<sup>123</sup>

Accordingly, Teubner seeks to move legal pluralism from simply examining the characteristics and boundaries of a legal system to examining their internal social processes: law can be found by examining how these closed systems code legal meaning under the binary of legal/illegal.<sup>124</sup>

The value in Teubner's theory is that a linguistic binary allows us to distinguish the legal from the non-legal as human beings code normative behaviors in different ways. Thus, we are able to clearly see where legal worlds exist because of how citizens code normative schema around the "legal/illegal" binary as opposed to another binary, such as, perhaps, "ethical/unethical" or "accepted/not accepted" which he believes informs other aspects of social life, like custom, ethics, or other normative discourses which are not "legal."

For example, Teubner makes the argument that "global law" can best be explained by a turn from examining groups or "orders" to discourses. He argues that "[such a turn] should focus its attention on a new body of law that emerges from various

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<sup>123</sup> Gunther Teubner, "'Global Bukowina': Legal Pluralism in the World Society" in Gunther Teubner, ed *Global Law Without a State* (Aldershot: Dartmouth Publishing, 1997) 3 [Teubner, Global Bukowina] at 14 [emphasis added].

<sup>124</sup> There is an interesting tension in Teubner's theory. Autopoiesis generally denotes a conceptual closing of systems in order to test their ability to recreate themselves through the linguistic binary. How does this situate with legal pluralism, which embraces the hermeneutic opening up of legal systems? How do legal systems interact? Teubner notes that there are "interdiscursive" relations between law and society and between legal systems. When legal systems interact, meaning is something inevitably distorted in the process. The binary "legal/illegal" facilitates communication across these otherwise closed legal systems. Thus, the object of study for Teubner's legal pluralism is not social actors themselves, but their communicative processes. Concepts called "linkage institutions" provide the means for communication, as these concepts with contested meaning which mean different things depending on the context. These linkage concepts facilitate the ability to communicate across orders. For further discussion of this tension, see: Melissaris, *The More the Merrier*, *supra* note 47 at 62-3.

globalization processes in multiple sectors of civil society independently of the laws of the nation states.”<sup>125</sup> He argues that given the fragmented nature of globalization, we cannot posit a global legal order that resembles state law.<sup>126</sup> As such, this results in a variety of disintegrated discourses that do not arise from “institutions” or “states.” Global law and its various legal postulates (which can be observed as legal discourses) emerge from the interaction of “highly technical, highly specialized, often formally organized and rather narrowly defined, global networks of an economic, cultural, academic or technological nature.”<sup>127</sup> The idea is that the *legal* normativity which flows from these processes and interactions – whether they be economic, cultural, academic, or technological – does not emerge from positivistic incarnations because there is no one “command center” from which legal declarations can flow.<sup>128</sup>

Accordingly, Teubner states that global law, as a system of law, is

...to be identified is a self-reproducing, worldwide legal discourse which closes its meaning that boundaries by the use of the legal/illegal binary code and reproduces itself by processing a symbol of global (not national) validity. The first criterion – ‘binary coding’ – delineates global law from economic and other social processes. The second criterion – ‘global validity’ – delineates global law from national and international legal phenomena.<sup>129</sup>

In this sense, global law can emerge as a legal system that is differentiated from other social processes because of how norms are coded as “legal” or “illegal” not because there

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<sup>125</sup> Teubner, *Global Bukowina*, *supra* note 123 at 4.

<sup>126</sup> That is, there is no one central command order. Teubner states: “[t]oday's globalization is not a gradual emergence of a world society under the leadership of inter-state politics, but is a highly contradictory and highly fragmented process in which politics has lost its leading role.” See *Ibid* at 5.

<sup>127</sup> *Ibid* at 5.

<sup>128</sup> Of course, he recognizes that there is in the international arena nation states which inevitably adapt and codify international legal norms. But he claims that positivist theory cannot account for all aspects of international legal norms, as they differ from place to place and often develop from different interactions, processes, and discourses. See: *Ibid* at 8.

<sup>129</sup> *Ibid*.

is a state or center of command which issues and demands conformity to law. Rather, law turns on the linguistic coding of legal phenomena: law emerges because of how it is coded by legal actors (in this case states) as such. Accordingly, sanction, institutionalization, and other once privileged organizing principles of legality fall to the background in legal analysis.<sup>130</sup>

For example, Teubner notes the emergence of the global trading norms of *lex mercatoria*, which is the “most successful example of global law without a state.”<sup>131</sup> As such, while it has no state to enforce compliance with it, it nonetheless emerges to produce legal norms that are followed by various states.<sup>132</sup> Legal norms emerge from “worldwide commercial practices, unitary directives, standardized contracts, activities of global economic associations, codes of conduct and the awards of international arbitration courts. This legal order, they claim, is independent of any national sovereign.”<sup>133</sup> In this sense, *lex mercatoria* breaks a “double taboo.”<sup>134</sup> It does so by first suggesting that private orders or non-state orders produce law without authorization from the state. Second, not only does law exist without state authorization, but it claims to exist in the absence of state law or even international law.<sup>135</sup>

Global law, then, is a highly sophisticated system of “legal self-reproduction”<sup>136</sup> and *lex mercatoria* fits Teubner’s definition of a legal system as a “self-reproducing, worldwide legal discourse which closes its meaning that boundaries by the use of the

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<sup>130</sup> Teubner, Global Bukowina, *supra* note 123 at 12.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid* at 4.

<sup>133</sup> *Ibid* at 9.

<sup>134</sup> *Ibid* at 10.

<sup>135</sup> *Ibid.*

legal/illegal binary code and reproduces itself by processing a symbol of global (not national) validity.”<sup>137</sup> From an analytical perspective, what emerges from Teuber’s account is less about rules and sanctions and more about how we can observe legal phenomena from linguistics. As such, the starting point to understanding and analyzing law lies in actual legal discourses which are coded around the binary “legal/illegal.” This is the case, he argues, with *lex mercatoria*:

If a specialized legal discourse, such as the commercial one, claims worldwide validity then it does not matter where the symbolic backing of its claims by means of sanctions comes from, be it from local, regional or national institutions. It is the phenomenological world constructions within a discourse that determine the globality of the discourse, and not the fact that the source of the use of force is local.<sup>138</sup>

As such, we can view “speech acts” as the main source of legal normativity. These speech acts are then reproduced which give legal discourse legitimacy and ultimately help to recreate a system of legal norms. However, as will be demonstrated in the next section, such a conceptualization of normativity ignores the cross-cultural complexity of legal discourses. Teubner’s conceptualization thereby risks being too exclusive of legalities, including Indigenous legalities, who code behavior in dissimilar means from the Western experience of legal/illegal.

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<sup>136</sup> Teubner, *Global Bukowina*, *supra* note 123 at 11.

<sup>137</sup> *Ibid* at 8.

<sup>138</sup> *Ibid* at 13.

## 2.4 CRITIQUES OF ESSENTIALISM, FORMALISM, AND THE QUEST TO OBJECTIFY THE CONCEPT OF LAW

Anishinaabe legal scholar Aaron Mills implores us to “[i]magine a world view in which truth value is derivative of lived experience, not a claimed association with objectivity.”<sup>139</sup> As I have attempted to demonstrate in this Chapter, early legal pluralists objectify the concept of law, producing a “one-dimensional level of discussion, in which authors look for ‘the one’ correct or useful concept” of law.<sup>140</sup> This is what Tamanaha has coined “neo-formalism”<sup>141</sup> and what will be referred to in this Chapter as “essentialism.”<sup>142</sup> Legal pluralism, then, remains a site of immense internal struggle which reveals a core epistemological debate: how do we *conceptualize what law is*? Is law a system of formalized rules concomitant with an institution that serves a coercive function to induce compliance? Or, is law embedded within “a language of interaction?”<sup>143</sup> The two theorists surveyed in this Chapter have posited an externalized view of law that presumes that we can posit essential characteristics as to what law *is* or what law *isn't*. In this sense, they attempt to theorize a coherent and universal concept of law.

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<sup>139</sup> Aaron Mills, “Aki, Anishinaabek, kaye tahsh Crown” (2010) 9:1 Indigenous LJ 107 [Mills] at 110.

<sup>140</sup> von Benda-Beckmann, *supra* note 87 at 41. Van Benda-Beckmann, however, notes that different concepts emerge because scholars are involved in different enterprises.

<sup>141</sup> Tamanaha, Folly, *supra* note 89 at 196.

<sup>142</sup> Tamanaha also uses this characterization. See Tamanaha, Non-Essentialist Legal Pluralism, *supra* note 51. In utilizing the word essentialism, I draw on Tamanaha’s definition where he states that essentialist theories of law presume that “law is a fundamental category which can be identified and described, or an essentialist notion which can be internally worked on until a pure (de-contextualized) version is produced.” *Ibid* at 299. Effectively, my reading of essentialist theories of law is that they presume that law is conceptually universal and that it has fundamental characteristics, which can be observed across all social spaces, and which distinguish it from other normative phenomena.

<sup>143</sup> Lon Fuller, “Human Interaction and the Law” (1969) 14 Am J Juris 1 at 1.

This section argues that social scientific legal pluralisms share an adherence to essentialism which, I argue, is conceptually and analytically unhelpful in providing a framework to study the emancipation of Indigenous law. As such, this section will illustrate the deficiencies inherent in an essentialist formulation of legal pluralism on two interrelated grounds: first, they inadvertently ignore the cross-cultural complexity in different conceptions of law that are rooted in fundamental disagreements about the nature and formation of the universe, especially as between Indigenous and Canadian legalities. Second, social-scientific legal pluralisms serve to privilege particular worldviews – largely those of colonizers and the Western world – about what law is or should be. In this way, essentialist theories elide the “historically specific and socially contested”<sup>144</sup> nature of differing conceptions of law. Because of both of these reasons, essentialist versions of legal pluralism risk being under-inclusive in examining non-state legalities, which may serve to erase or obscure Indigenous law.

By prescribing specificity in delimiting legal phenomena, such as “the ability to induce compliance” or “coercion,” the scope of analysis of non-state legalities is impeded

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<sup>144</sup> Thanks to Prof. Richard Devlin for helping me work through some of these criticisms.



as such essentialist definitions are invariably rooted in Western worldviews.<sup>145</sup> As Val Napoleon states, law is founded in our own belief systems and worldviews, which are, at their root, a formative understanding of the nature of human beings, and their relationship to the larger world.<sup>146</sup> By artificially constructing “essential” characteristics of law, we are inevitably privileging one worldview over another as what we construe as “essential” are a product of own subjective (but nonetheless culturally-constructed) views on what law is and what it should do. At its core, the idea of essentialist approaches to law, as Tamanaha states, is that:

(i) there is a particular phenomenon - a form of normative order or social control - which can be identified cross-culturally and across all sorts of groups; (ii) this phenomenon is 'law'; (iii) there is a plurality of social groups everywhere, each with their own attendant normative (now 'legal') demands; (iv) thus legal pluralism is a fact.<sup>147</sup>

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<sup>145</sup> By this I mean that Western liberal ideals (perhaps latently but nonetheless problematically) permeate social-scientific pluralisms. In espousing anti-positivist views, social-scientific legal pluralisms tend to reify many of the attributes of Western law. Western law (steeped in liberal theory) tends to have a rather technical understanding of law that is rooted in very specific ideas of what law is and its role in society, which inevitably diminishes the worldviews of non-majoritarian communities who may not understand the world in the same ways. As such, Western conceptions of law claim universality but, in so doing, serve to exclude differing understandings of the world. Devlin asserts that “Liberalism, working on the assumption of consensus, perceives the state as a subject, a neutral arbitrator and great leveller.” See: Richard Devlin, “The Rule of Law and the Politics of Fear: Reflections on Northern Ireland” (1993) 4:2 *Law and Critique* 155 [Devlin, *The Rule of Law and Politics of Fear*] at 156. Moreover, Christie states that within liberal societies, “[t]he law is conceptualized as essentially an ordering system (and is built around this conception); its primary task is to ensure the fair allocation of resources to parties with valid interests, so they may then pursue projects involving these interests, thereby facilitating the self-creation of their lives.” See: Gordon Christie, “Law, Theory and Aboriginal Peoples” (2003) 2 *Indigenous LJ* 67 [Christie] at 89. As such, social-scientific legal pluralisms, while arguing against the normative monopoly of the state, tend to reconstruct ideals that are inevitably rooted in Western views about the core elements of law, including ideals about the nature of the relationship between law, coercion, and power. The problem with this view is that it is but one perspective about law, and it ignores the ontological cross-cultural differences about basic ideas about the formation of the universe.

<sup>146</sup> Val Napoleon, *Thinking About Indigenous Legal Orders*, *supra* note 7 at 235. Further, Mary Ellen Turpel offers a potent critique of the “cultural self-image” of the Charter. She suggests that we must be sensitive to the variance in cultural differences that exist between Indigenous peoples and broader Canadian society. See: Mary Ellen Turpel, “Aboriginal Peoples and the *Canadian Charter*: Interpretive Monopolies, Cultural Differences” (1989) 3 *Can Hum Rts YB* 3 [Turpel].

<sup>147</sup> Tamanaha, Folly, *supra* note 89 at 199.

This approach, however, runs the risk of being ethnocentric: the idea that there can be a “universal” definition of law, which posits “essential” characteristics, fundamentally misses the ideological and ontological differences between cultures. In this way, since law is a product of our cultural understandings of the world, there is not one uncontested *concept* of law, but rather diverse and localized *conceptions*.

Indigenous scholar Tracey Lindberg states that the problem of orthodox legal theory – that is, law predicated on Western worldviews – lies with acknowledging the validity and value of Indigenous law. In the Canadian context, value is equated with valuation: “[v]aluation with cost, cost with loss. Loss with blame and blame with liability.”<sup>148</sup> The problem, at its core, is that understandings of value are different cross-culturally.<sup>149</sup> This is the conundrum we face when Canadian institutions are presented with Indigenous law: state institutions cannot understand the value of Indigenous law

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<sup>148</sup> Lindberg, *supra* note 17 at 54. Moreover, as Professor Henderson notes:

Abstract Eurocentric legal principles were never the best means for describing or understanding Mikmaq remediation processes. Typically there was no intent, malice, negligence, accident, omission, or excuse or other elements to be weighed and no exclusive focus on individual causation and responsibility for an act. But, there was vast consideration of mitigating forces and circumstances in determining satisfaction. In Mikmaq law the operative concept was shared liability within one's extended family, rather than personal liability. Culpability or guilt, as grounded in English and French laws, mattered far less than that causation was shared equally by one's family and the forces of the environment.

James (Sakej) Youngblood Henderson, “First Nations Legal Inheritances in Canada: The Mikmaq Model” (1996), 23 Manitoba LJ 1 [Henderson, First Nations Legal Inheritances] at 16.

<sup>149</sup> *Ibid* at 16.

because it is not valuable to them.<sup>150</sup> This does not mean that Indigenous law is not inherently valuable for Indigenous peoples, especially given that it maintains an important place within their lives despite the fact that broader circles tend to ignore its importance. However, to the state, Indigenous law is founded on antiquated ideas about the world. As such, it problematically presumes that Indigenous legalities have little to add because they are not rooted in particular ideologies about the world. This is the same with essentialist legal pluralisms: they tend to disregard the value of Indigenous (or other non-Western) conceptions of law unless they are rooted in particular understandings about the world. As such, as Lindberg notes, “[n]o system [of law] is neutral if it is predicated on the values and beliefs of one society to the exclusion of or having an entirely negative impact on another society.”<sup>151</sup>

Accordingly, essentialist legal pluralisms tend to deny the irreducibility of law as the ways in which we conceptualize it are rooted in our own worldviews.<sup>152</sup> The

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<sup>150</sup> Let me unpack this point a bit further. When I say that Indigenous law is not valuable to Canadian institutions I mean that it does not further the normative goals of the state. Devlin asserts that law (as a construct of the state) plays a constitutive role in a variety of ways, including an ideological and facilitative role in constituting the full realization of the goals of the Western liberal state – that is, consensus, order, and neutrality. The ideological role of law is to “direct” the structuring of social relations along the lines of the norms and vision of those with power in society. As Devlin states, “[law’s] purpose is to achieve an acceptable level of consensus and to create sufficient stability in order that existing social relations may continue.” Moreover, law’s role is facilitative as it helps direct social relations toward the “maintenance and continuation of ... patriarchal social relations.” Law facilitates the direction of law toward the “attainment of a hegemonic condition.” See: Devlin, *Nomos and Thanatos*, *supra* note 74 at 339-41. Since Indigenous law does not fulfill both the ideological and facilitative function of maintaining hegemony, it is largely dismissed. Value, in this sense, is equated with helping to perpetuate a particular set of social relations.

<sup>151</sup> Lindberg, *supra* note 17 at 54.

<sup>152</sup> As Christie notes:

sometimes spiritual nature of Indigenous law is an example of how essentialist theories risk being under-inclusive because, as Val Napoleon argues, the Western worldview is hard to equate with sacred law as it is premised on very specific notions of how the legal and political system views individuals, non-human life forms, and the universe.<sup>153</sup> As such, spiritual law is often dismissed within the Western worldview. However, Indigenous teachings and ceremonies that are predicated on the spiritual order are vital aspects of Indigenous ways of life, and help to construct peace, harmony, and good relations.

These teachings do not induce coercion in the same way that Canadian law induces compliance through the use of force; rather, these laws are a means to restore peace and harmony in times of personal and community conflict.<sup>154</sup> Spiritual laws help to structure relationships between people, between people and the Creator, and between people and the environment.<sup>155</sup> Lindberg states that the Western world is largely predicated on neutrality: the liberal view is that the law and religion must be separated.

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...it is not so much that liberalism lacks the capacity and legitimacy to adequately address the needs and wants of Aboriginal communities, but that as one thread emerging from a particular cultural and intellectual history, *legal liberalism merely illustrates the danger posed when a legal theory grounded in one intellectual history and tradition attempts to cast its web of principles, values and fundamental arguments onto the lives of peoples grounded in separate and unique cultural and intellectual histories*. It is this fundamental intellectual colonialism that underlies the perception that while the law now ostensibly protects “Aboriginal rights,” it remains alien and oppressive [emphasis added].

See: Christie, *supra* note 145 at 70.

<sup>153</sup> Napoleon, Thinking About Legal Orders, *supra* note 7 at 235. To my mind, the normative goal of legal pluralism is not to *prima facie* ascribe value judgements on law, such as *prima facie* dismissing legalities to which we disagree, which would stifle any intercultural conversation. As such, while Western lawyers resist spiritual-based law, this does not mean it does not have normative authority for Indigenous peoples. However, it is only once these legalities are recognized as such that we may have a true intercultural conversation about the competing worldviews at play.

<sup>154</sup> Harold Cardinal and Walter Hildebrant, *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples will One Day be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) [Cardinal and Hildebrant] at 15, as cited in Lindberg, *supra* note 17 at 51.

However, this is largely dismissive of the idea that Indigenous philosophies are incepted from highly spiritualized and sacrosanct contexts.<sup>156</sup> Accordingly, in order to encapsulate the full portrait of non-state law, legal pluralism must be attuned to recognizing that law – in the cross-cultural context – emerges in diverse ways and in sites atypical to the Western experience.<sup>157</sup>

On a more instrumental level, in thinking about the potential under-inclusiveness of essentialist versions of legal pluralisms, the problem of spiritual law is illuminated in the context of Teubner’s binary coding of legal/non-legal phenomena. His approach presumes that *every* culture inscribes legal phenomena across a binary of “legal” or “illegal.” For example, in the context of Mi’kmaq conceptions of their relationship to the land, Professor Sakéj Henderson argues that:

[t]he relationship between the Mi’kmaq and the land embodies the essence of the intimate sacred order. As humans, they have and retain an obligation to protect the order and a right to share its uses, but only the future unborn children in the invisible sacred realm of the next seven generations had any ultimate ownership of the land.<sup>158</sup>

The legal relationship that exists in this context is less concerned about coding behavior as “legal” or “illegal,” but seeks to delineate on a broad scope how the Mi’kmaq are to live in the world, and defines their relationship to the world around them. Of course, there is the possibility that conventional practices emerge which seek to delimit the scope of

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<sup>155</sup> See, e.g., John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 46.

<sup>156</sup> Lindberg, *supra* note 17 at 53.

<sup>157</sup> Lindberg argues that requiring Indigenous peoples to completely separate law from its spiritual context is “comparable to asking the Canadian government to discuss constitutional rights in the absence of law. It is also like asking Canadians to think of themselves without any reference to their histories. It is too much to ask and it is, if we are being honest, impossible.” *Ibid* at 48.

<sup>158</sup> James (Sakej) Youngblood Henderson, “Mikmaw Tenure in Atlantic Canada” (1995) 18 Dalhousie LJ 196 [Henderson, Mikmaw Tenure] at 232.

what is acceptable within any relationship. Indeed, as Borrow notes, Indigenous societies have historically and presently developed large-scale customs and conventions to guide their relationships both spiritually and politically.<sup>159</sup> But, the point here is that they may not necessarily revolve around a particular inscription of “legal/illegal.”

The point of using the example of spiritual law here is not necessarily to illustrate that social-scientific legal pluralisms *completely* miss the mark in the context of Indigenous law. In fact, it may be that many elements of law can be compared cross-culturally. Moreover, some forms of Indigenous law will posit rules concomitant with a source of coercion to induce compliance with those rules akin to institutionalization. As such, the emphasis of my critique of essentialist legal pluralisms is to show the potential defects that threaten to erase or hide Indigenous law if it does not fit a Westernized worldview of what law is and how it should look.<sup>160</sup> Enfolded in these universal definitions of law are the specific worldviews of colonizers and Eurocentric ideations of law which may circumscribe what can be included in a legal pluralist analysis.

Moreover, it is fallacious that essentialist theories of legal pluralism appeal to conventional wisdom. For example, they posit that *of course* legal orders should be able to induce coercion; and, *of course* law codes behaviours as legal/illegal. However, by subscribing to such “conventional wisdom” we limit the potential analytical vigour of

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<sup>159</sup> Borrows, Indigenous Legal Traditions, *supra* note 22 at 190.

<sup>160</sup> As Christie argues, “[t]he perception of oppression through the application of a liberal structure through the law ultimately rests on incompatible theories of (a) knowledge, (b) the place of value in the world and (c) the self and its relationship to others.” Christie, *supra* note 145 at 100. Moreover, Henderson argues that:

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 the surrounding ecology. It continues to ignore or marginalize Indigenous legal systems, their procedures, and laws.

legal pluralism. As Kirsten Anker notes, utilizing some “conventional wisdom” about law negates the plethora of phenomena which lay claim under the label “law.” What ends up happening is that “conventional wisdom” becomes a means to undercut the authenticity of non-state discourses because they do not meet the essence of “conventional wisdom” about what law is.<sup>161</sup> In discussing Teubner’s legal/illegal binary, Anker notes that these methods of delimiting legality...

...do not seem sufficiently nuanced to distinguish between the different ways in which legal language may be used: as a joke, a metaphor or a bald-faced lie. In order to do justice to the many ways in which language both communicates and performs, it seems necessary to subscribe to the fuller sense of legal language as a “culture of argument” or a form of rhetoric in which there is a community of speakers with a background (and often implicit) sensibility towards how to read specific statements or practices via which we could identify the legal.<sup>162</sup>

It is necessary, then, to look beyond how communicative discourses are coded; a binary is simply too under-inclusive to fully capture a full portrait of legal life.

The conundrum mentioned above is also a function of the limitations of language as the imposition of “legal/illegal” takes on Western meanings: “legal” takes on connotations whereby prescribed conduct is adjudged and subject to potential sanction.<sup>163</sup> In viewing legal life in this way, autopoietic theory limits the possible range of normative

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Henderson, Postcolonial, *supra* note 9 at 12-13.

<sup>161</sup> Kirsten Anker, “Law, Culture and Fact in Indigenous Claims: Legal Pluralism as a Problem of Recognition” in René Provost, ed, *Centaur Jurisprudence* (Cambridge: Cambridge University Press, 2016), online:

<<http://poseidon01.ssrn.com/delivery.php?ID=080024092024099110120097106119094110032078062093055026025127003112114071070020107113098018058015020038053118006109086072085102054075021079031074099072119086065026052008016027093083083096072067120092090020007006111088095086083016089072124096113003112&EXT=pdf>> [Anker, Law, Culture and Fact] at 27-28 [forthcoming publication, cited with permission of author].

<sup>162</sup> Anker, Law, Culture and Fact, *supra* note 161 at 27-8.

behaviours and relationships which are encompassed in law. Legal relationships are not always so easily reduced to “legal” or “illegal,” and, as such, it becomes difficult across cultures and languages to fully address how to sufficiently code such conduct.<sup>164</sup> Kirsten Anker argues that “[i]n the Indigenous context, linguistic translation *per se* is an issue... Where communities themselves start to articulate their lifeworlds using the English language of law (mostly in response to the need to make cognizable claims), we might see an ‘emergence’ of the legal in the conventional sense.”<sup>165</sup> Accordingly, in order to be viewed as “law,” Indigenous law must conform to binary inscriptions of “legal/illegal” which transforms Indigenous law into some sort of Westernized artefact.

In undertaking a critique of essentialist forms of legal pluralism, I do not intend to outright dismiss their persuasiveness in many contexts. However, as I have argued above, they are largely structured on particular ideologies and worldviews which negate the cross-cultural complexities inherent in law. The structure and orientation of social-scientific legal pluralisms tend to miss the idea that law is deeply a social construct – that it exists and is constructed only in relation to someone or something<sup>166</sup> – and that it is not

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<sup>163</sup> Kirsten Anker makes the point that the labels we often ascribe to legal conduct are ethnocentric and assimilationist “since the differences, the uniqueness, of the other can only every be identified in terms of the self.” She further states we must be skeptical of recognition practices as “...[d]ifference is erased ‘by the very gesture that purports to recognise it.’...the problem of the ethnocentric universal seems to pose itself as a cognitive problem, as Kelly Oliver puts it, of being unable to recognize that of which we have no cognition.” See: Anker, *Law, Culture and Fact*, *supra* note 161 at 16.

<sup>164</sup> I discuss later in this thesis (see *infra* Chapter 5) the problems of translation for legal pluralism and how we may overcome them. The problem is that in articulating (translating) Indigenous concepts into English, “each of these terms can be argued to be only an approximation or reduction to the familiar English terms.” See: *Ibid*. The problem here is that Indigenous concepts cannot readily be reduced to English as there is no true “one-to-one mapping.” Rather, all we ever get in this cross-linguistic context is an approximation of the intended meaning behind the concept. Thus, if we are to look *only* to the linguistic coding of legal/illegal then we miss the contingent nature of those approximations and risk excluding a host of normative behaviour which may not directly translate to “legal” or “illegal.”

<sup>165</sup> *Ibid* at 28.

<sup>166</sup> See, e.g., Jan Broekman and Larry Catà Backer, *Lawyers Making Meaning: The Semiotics of Law in Legal Education II* (Dordrecht, Netherlands: Springer, 2012).



an anthropomorphic entity that can be replicated across culture and worldviews.<sup>167</sup> This view tends to externalize law from its social origins, and ignores that there can be no “essential” characteristics of law because the concept of law itself is a contestable and fluid enterprise. As such, essentialist versions of legal pluralism appear to be analytically untenable in exploring the often diverse and complex instantiations of Indigenous law which challenge Western worldviews. Accordingly, as stated in this section, we must move away from positing a universal *concept* of law and recognize that there are many culturally diverse *conceptions* of law. The challenge that is faced by legal pluralism in the context of Indigenous law does not completely empty the concept of law of value, but rather requires us to refine our analytical inquiry.<sup>168</sup> While these conceptualizations appeal to a Western worldview of law, social scientific legal pluralisms miss that “there is no unmediated access to law”<sup>169</sup>; law is experienced, created, and given meaning in diverse ways.

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<sup>167</sup> For example, Kirsten Anker argues that “[t]aking the West-Coast Gitksan *yukw* (traditional feast hall) on its face as a dispute resolution institution, for example, *reduces the specificity of a Gitksan form of life to a universal derived from non-Indigenous categories and reifies this one aspect of law*” [emphasis added]. See: Anker, Law, Culture and Fact, *supra* note 161 at 25. The point is that when we prescribe essential features of law that are rooted in non-Indigenous ways of life, we miss that these criteria are sometimes different than, or antithetical to, Indigenous ways of being in the world. It ends up removing the organic features of that law which serves to reify pieces of Indigenous normative life to conform to essentialist characteristics. We end up not with a richer portrait of normative life, but one that is piecemeal and reductionist.

<sup>168</sup> As Tamanaha argues, “... current versions of legal pluralism flatten and join together distinct phenomena, resulting in less refined categories, leading to less information and a reduction in the ability to engage in careful analysis.” Tamanaha, Non-Essentialist Legal Pluralism, *supra* note 51 at 299. See also: Tamanaha, Folly, *supra* note 89 at 199 where Tamanaha makes the bold claim that:

The social sciences generally, at least on the level of theory, are currently undergoing the uncertainty (and imposed humility) which accompanies deep critical self-examination, to the point of questioning even their own nature and validity. Considering this state of affairs, legal pluralist claims to authority from the perspective of an overarching version of 'analytical' or 'empirical' social science are difficult to fathom. There can be no single social science view of law because there are many different scientific perspectives and many different objectives of enquiry [footnotes omitted].

<sup>169</sup> Tamanaha, Folly, *supra* note 89 at 198.

This presents a problem for scholars looking to explain the validity or persuasiveness of law if it is not premised on institutional sanction.<sup>170</sup> This proposition is based on flawed thinking that (a) institutionalized violence necessarily makes law meaningful in peoples' lives and (b) that law cannot exist without the threat of force. Henderson notes that the result of viewing law as a system of coercion helps to maintain the "cognitive imprisonment" of Indigenous legalities:

[Colonial law attempts] 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.<sup>171</sup>

However, while Indigenous law does not necessarily require institutionalization nor violent persuasion, Val Napoleon suggests that law must have *legitimacy*: "[a]ll peoples have to believe that the legal order and law are legitimate before they will countenance them; if they do not, decisions will have no meaning."<sup>172</sup> For example, Napoleon notes the decentralized nature of Gitksan society and illustrates how obligations are shared horizontally; the level of commitment is illustrated by the continuing levels of acceptance

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<sup>170</sup> This correlates to the "command, duty, sanction" trinity as espoused by Austinian jurisprudence: in order to be law there has to be an effective compliance mechanism that is able to exert power over the subjects within its field. See: John Austin, *The Province of Jurisprudence Determined*, W. Rumble, ed (Cambridge: Cambridge University Press, 1995). However, what is interesting is how Austin was explicit in arguing that Indigenous peoples did not have law. As Borrows notes about Austin's jurisprudence:

Behind Austin's formulation is the idea that Aboriginal peoples did not have law because they were "savage" and "living without subjection" because of their "ignorance" and "stupidity" in not submitting to political government. Opinions that indigenous societies were lower on a so-called "scale of civilization" because of their non-European organization have not withstood scrutiny.

See: Borrows, *Indigenous Legal Traditions*, *supra* note 22 at 177. I highlight this correlation to show how early pluralist theory can be viewed as simply another vehicle for maintaining a positivist-like appreciation of law. This may not be intentional, but as I have attempted to explain in this Chapter, is predicated on Western ideals of what should look like.

<sup>171</sup> Henderson, *Postcolonial*, *supra* note 9 at 16.

<sup>172</sup> Val Napoleon, *Thinking About Indigenous Legal Orders*, *supra* note 7 at 237.

and integration within Gitksan society.<sup>173</sup> We know that Gitksan people are committed to their law because we *see* how it shapes the ways in which the Gitksan people move through the world, not because there is necessarily a retreat to institutionalization or violence.

Of course, this does not deny that law sometimes has consequences which aid in its persuasiveness or legitimacy, but rather the argument is that violence is not a *de facto* condition of legitimacy. Melissaris draws our attention to the fact that commitment to law emerges in many different ways, such as through psychological means (for example, the internalization of rules), practical reasoning, or emotive reactions. The key to commitment is examining how law is entrenched within peoples' lives.<sup>174</sup> However, as Melissaris notes, if we are not part of these normative spaces then we cannot appreciate how commitment is built and shared. As such, we cannot come to understand how commitment is developed unless we are a *participant* within that group.<sup>175</sup> For example, as Western lawyers it is hard to envision how decentralized societies come to entail a level of commitment to law in the absence of institutional force; yet, as Napoleon states, "we know it exists because we can see it at work."<sup>176</sup> Moreover, John Borrows argues that the validity of a legal tradition is not dependent on how it is viewed externally and whether it fits external criteria nor how it is accepted or rejected by other traditions. Instead, "[a] mark of an authentic and living tradition is that it points us beyond itself."<sup>177</sup>

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<sup>173</sup> Val Napoleon, Thinking About Indigenous Legal Orders, *supra* note 7 at 238. See also *supra* note 26 for a discussion of the political units of Gitksan decentralized orders.

<sup>174</sup> Melissaris, The More the Merrier, *supra* note 47 at 74.

<sup>175</sup> *Ibid* at 75.

<sup>176</sup> Napoleon, Thinking About Indigenous Legal Orders, *supra* note 7 at 238.

<sup>177</sup> Borrows, Indigenous Legal Traditions, *supra* note 22 at 175.

Napoleon states that any framework or concept of law must be able to “(i) reflect the legal orders and laws of decentralized (i.e., non-state) Indigenous peoples, and (ii) allow for the diverse way that each society is reflected in their legal orders and law.”<sup>178</sup> This leads to a fundamental flaw in social-scientific legal pluralisms: while they provide analytical tools to help us to potentially observe non-state law, they run the risk of being reductionist in scope. In citing the French sociologist Pierre Bourdieu,<sup>179</sup> Mariano Croce criticizes theories “that look at social practices as if they were the application of some supra-subjective structures or schemes, of which the observed agents are supposedly unaware and which only an observer may come to outline.”<sup>180</sup> The problem with externalizing or objectifying social practices is that these theories tend to misread the objects that they are observing: the observer tends to reveal more about their own relationship to and understanding of law than what they reveal about the nature of the social practice that they are studying.<sup>181</sup> This reveals a problem in attempting to posit essential characteristics about law: they inevitably are far more about the observer or theorist’s worldview than the participants within any given social practice or space.

If we are to think about points of interaction and contestation between Indigenous and Canadian law, what can either Falk Moore or Teubner tell us that provides an emancipatory framework for Indigenous law? They, indeed, may be able to tell us that based on a systems theory analysis or the existence of an SASF that Indigenous law *exists*, but that does not get to the root of the problem of how we decenter the hegemonic

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<sup>178</sup> Val Napoleon, Thinking About Indigenous Legal Orders, *supra* note 7 at 243.

<sup>179</sup> See, e.g., Pierre Bourdieu, *The Logic of Practice*, trans Richard Nice (Stanford: Stanford University Press, 1990).

<sup>180</sup> Mariano Croce, “All Law is Plural: Legal Pluralism and the Distinctiveness of Law” (2012) 65 J L Pluralism 1 [Croce] at 5.

nature of state law which constrains the Indigenous legal consciousness. For example, if we think about the nature of Aboriginal title claims – that is, land-based disputes – which are rooted in differing worldviews about the nature of property and formation of law, through a social-scientific analysis we may be able to note that Indigenous laws relating to the organization of human beings’ relationships to land *exist* as a starting point of legal analysis, but the universalizing tendencies of state law will, inevitably, circumscribe and subjugate Indigenous legalities.<sup>182</sup>

As such, social-scientific legal pluralisms present a number of conceptual and instrumental limitations which inhibit, for the purposes of this thesis, how effectively they can be used in examining the interaction of Indigenous and Canadian law.<sup>183</sup> The characteristics implicated in an “essential” view of law are rooted in Western worldviews which limits the extent to which they can encompass Indigenous legalities. Instead, we should look to the *legal actors* (or what Melissaris would call participants) who are participating in normative communities as a starting point for examining the foundations of law. In this sense, this approach takes on a much looser analytical perspective of law which dispenses with rigid formulae or definitions: law means different things to different people or groups, and any attempt to posit essential characteristics of law across *all planes* is an attempt to reduce cultural diversity to something that is translatable to the dominant paradigm. By turning the inquiry inward toward legal actors we are able to

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<sup>181</sup> Croce, *supra* note 180 at 5.

<sup>182</sup> This is not necessarily conjecture. As will be demonstrated throughout this thesis, the nature of the liberal Western legal system is that it seeks to impose “unified meaning.” In doing so, it seeks to erase or subjugate the jurisgenerative potential of other normative communities. See, *infra*, Chapter 4.

<sup>183</sup> I draw the notions “conceptual and instrumental” limitations from Tamanaha, Non-Essentialist Legal Pluralism, *supra* note 51, but I use them in quite different ways as the focus of my critique is much different than Tamanaha’s.

provide a “normative texture to reality”<sup>184</sup> by instead observing how participants share normative experiences; “that is, the way they perceive themselves collectively in the world and their ability to transform it through their normative commitments.”<sup>185</sup>

Locating law within legal actors also allows for the important task of Indigenous transformation as a site of resistance to colonially-imposed forms of law. It allows for the rebuilding of Indigenous thinking constructed at the local level and based in Indigenous worldviews. In speaking about the need for Indigenous re-thinking of colonially-imposed laws, Lindberg, an Indigenous scholar, argues that...

...[t]o reconfigure our resistance we need to honor those traditions of inclusion, those rights of Indigenous citizenship, and our right to self-definition. We cannot critique colonization without an understanding of our strengths, abilities and capacity...If we are to examine onus and obligation, we need to do so with the certainty that we as Indigenous citizens are not solely responsible for the identification, growth, re-growth and entrenchment of those belongings that accompany us as Indigenous citizens (potentially, an Indigenous understanding of Indigenous rights). Assigning fault may be less important than taking responsibility; apportionment is meaningless without a full and respectful discussion about revitalizing our understanding of the import of Indigenous conceptualizations of law, legality and good relations.<sup>186</sup>

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<sup>184</sup> Emmanuel Melissaris, “The Chronology of the Legal” (2005) 50 McGill LJ 839 [Melissaris, Chronology of the Legal] at 841.

<sup>185</sup> *Ibid* at 841. It is necessary here to distinguish between shifting the lens toward legal actors and systems theories of law. The key to understanding the difference is the locus of inquiry: systems theory inevitably looks for different “systems” of law, which is an externalization of legal normativity from the actors who are involved within those systems. It also ignores that social life is not so easily reduced to neat “systems,” as actors are invariably involved within a number of different normative fields, which produces a complex web of normativity. Moreover, it focuses on the labelling of various forms of communication, at least in the context of Teubner, which risk excluding different non-Western forms of law which are not situated as neatly along a binary.

<sup>186</sup> Lindberg, *supra* note 17 at 14. See also: Glenn Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) [Coulthard, Red Skin, White Masks] where Coulthard argues for “anti-colonial empowerment” amongst Indigenous peoples themselves as a means to transcend colonialism; Taiaiake Alfred, *Peace Power Righteousness: An Indigenous Manifesto* (Don Mills: Oxford University Press, 1999) [Alfred] at 60 where Alfred argues that any product of self-determination must constitute the “heart and sole of indigenous nations: a set of values that challenge the homogenizing force of Western liberalism and free-market capitalism; that honor the autonomy of individual conscience, non-coercive authority, and the deep interconnection between human beings and other elements of creation.”

As such, in rejecting an objective truth to law, this thesis is thus rejecting the power of the state to define what is law and what is not. As Melissaris notes, “[l]egal pluralism will remain disabled for as long as it is believed that one can experience, understand and report the way a legal discourse operates in identical ways irrespective of whether one is a participant in the discourse or not.”<sup>187</sup> As such, it is within Indigenous peoples *themselves* where we have our starting point for ascertaining legal normativity in the context of exploring Indigenous law.

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<sup>187</sup> Melissaris, *The More the Merrier*, *supra* note 47 at 75.

## CHAPTER 3: UNTHINKING LAW – TOWARD A POSTMODERN LEGAL PLURALISM

*To say that truth is not out there is simply to say that where there are no sentences there is no truth, that sentences are elements of human languages, and that human languages are human creations. Truth cannot be out there— cannot exist independently of the mind — because sentences cannot so exist, or be out there.*

Richard Rorty<sup>188</sup>

The last Chapter proceeded to survey, and subsequently reject, the trend in legal pluralist literature to speak of law in empirical or objective terms. These versions of legal pluralism, it was argued, are buttressed by Western ideological presuppositions which potentially exclude and marginalize the worldviews of non-majoritarian communities, including those of Indigenous peoples. However, there are legal pluralists who reject the social-scientific approach, and this constituency of legal pluralists – noted herein as postmodern or critical versions of legal pluralism – question the emancipatory potential of the quest to locate a universal concept of law. Instead, these scholars posit that law is an inherently social construction that cannot be reduced to a universal concept. Rather, law is a product of a number of subjective, contingent, and culturally-produced conceptions.<sup>189</sup>

Law is not an object that can be found or grasped with any sense of precision. As Anker argues, within current jurisprudential paradigms “[l]aw is assumed to exist as an objective entity – a finite legal system whose components are fixed and known. Humans,

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<sup>188</sup> Richard Rorty, *Contingency, Irony, and Solidarity* (New York: Cambridge University Press, 1989) at 5.

<sup>189</sup> As Klienmans and Macdonald argue, “[w]e undervalue and circumscribe human agency when we attempt to impose, through explicit discursive text, automatic answers to conundrums of human interaction.” See Klienmans and Macdonald, *supra* note 16 at 327.



and their world, are prior to law, independent from it: law is applied *to* them.”<sup>190</sup> While this critique applies to modern legal theory, it can arguably apply to early social-scientific or empirical versions of legal pluralism, as well. While early theories contend that law in some form exists outside of state institutions and apparatuses, they still attempt to advance universal and objective parameters to delineate the legal from the non-legal.

Since I have proceeded to reject social-scientific legal pluralisms, this Chapter enters this conversation to survey the insights of critical or postmodern legal pluralisms.<sup>191</sup> In keeping with legal pluralism’s rejection of legal centralism, the postmodern constituency offers insights which recognize the cultural contingency of law, and, as such, serve to be inclusive of the various iterations of Indigenous law. In this regard, this Chapter focuses on three key conceptualizations. Martha-Marie Klienmans

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<sup>190</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 20.

<sup>191</sup> It should be noted here why I use the term postmodern. As de Sousa Santos’ literature makes clear (See, eg, Bonaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London: Routledge, 1995) [de Sousa Santos, *New Common Sense*]), legal centralism is not an inherent “truth,” but rather is the product of a particular set of historical and social conditions which led to the need for a robust centralized unit of law. I use postmodern in describing these versions of legal pluralism in the sense that these versions reject that there can be true objectivity to law. Law is not a phenomenon that can be decontextualized as outside of the practices of social actors, but is directly constituted by them: “[w]hat postmodernism achieves is a shift from a concept of language as representation to language as practice (meaning as use). It is a move from picturing to competence, with competence being a manifested ability with and facility in a language.” (Dennis Patterson, “Postmodernism”, in Dennis Patterson, ed, *A Companion to Philosophy of Law and Legal Theory* (Cambridge, MA: Blackwell Publishing, 1999). Moreover, Richard Devlin argues:

[P]ostmodernists challenge the idea that we can ever have an immediate interaction with, or conception of, "reality." They suggest that because our relationships with reality are always and already filtered - and therefore socially mediated - knowledge is a (once removed) representation rather than an (automatic) experience. If this is so, then reality and knowledge must be understood as lacking an objective or non-contingent foundation and are therefore flimsy, fragmentary, unstable, heterogeneous and plural. In this light, "authenticity" and "reality" are re-encoded as "fabrication" and "simulation."

See: Devlin, *Postmodernism*, *supra* note 41 at 13. While this is a cursory analysis of postmodernism, the purpose here in using it is to show that there cannot be a viable reality of “law” that can emerge as “truth”. Objective formulations are inherently rooted in majoritarian worldviews. Thus, postmodern approaches to legal pluralism dispense with the ability to find or capture the essence of law, and, even if there were an “essence of law”, that essence is a construction created by the powerful as a means of sustaining a particular worldview. Thus, there is a need to shift the conversation from the idea that there can ever be a definitive approach to “law” in any objective fashion. More will be said on this subject below.

and the late Roderick Macdonald offer a version of “critical” legal pluralism which seeks to shift the legal pluralist inquiry away from legal orders (that is, an external view of law) inward toward the legal actors and agents participating in normative communities. Brian Tamanaha posits a “non-essentialist” version of legal pluralism that, quite simply, states that law is whatever legal actors choose for themselves to be law. Kirsten Anker’s legal pluralist approach is perhaps the most recent version, and emphasizes the value of legal pluralism for Indigenous rights. She underscores the discursive elements of law, and seeks to understand the normative potential of an intercultural conversation between state and non-state law.

This Chapter will first survey each of these strands of critical or postmodern legal pluralism as a means to flesh out the key insights that they bring to the inquiry of how to conceptualize legal normativity. These insights help to inform the version of legal pluralism which will be offered in this thesis: a postmodern legal pluralism. This Chapter then continues on to connect the insights of the work of the theorists noted above with postmodernist theory, drawing on criticisms of state law’s claims to universality and monism, which serve to suppress subaltern discourses. It then proceeds to unpack the claim to a postmodern version of legal pluralism that draws upon the history, philosophy, and the insights of postmodernism, as well as the critical legal pluralists surveyed in this Chapter, to defend a vision of law as a localized, contingent, and subjective enterprise.

Instead of constructing external parameters around law that reify colonial patterns of oppression and marginalization, a postmodern legal pluralism looks instead to legal actors as constructive agents and the point of analytical inquiry in examining legal pluralism. Shifting the locus of inquiry in this way invigorates the analytical purchase of

legal pluralism in examining Indigenous law for two key reasons: first, it recognizes that Indigenous ways of being are rooted in differing understandings of the world. Indigenous scholars have called for the dissociating of the Indigenous legal consciousness from colonial patterns of knowledge which mask Western thought as inherent truths.<sup>192</sup> As such, a postmodern version of legal pluralism, in looking to legal actors as jurisgenerative agents, recognizes the constitutive potential of local Indigenous knowledge as a source of legal normativity.

Second, it recognizes that the cognitive supremacy of state law is a historical contingency rather than an inevitable or necessary trajectory. In this sense, this Chapter rejects that legal centralism is necessarily the way that things have to be. As such, by questioning patterns of normative domination, we are able to bolster the analytical purchase of legal pluralism as both a means of describing legal phenomena, and as a normative framework that seeks to reframe how Indigenous and Canadian legalities are situated within the contemporary moment. In explicating a postmodern version of legal pluralism, this Chapter concludes by postulating four “themes” that accentuate my vision of law, and which I argue provide a more nuanced framework for the emancipation of Indigenous law.

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<sup>192</sup> In describing Eurocentrism as the obstacle to the emancipation of the Indigenous legal consciousness, Henderson states:

Eurocentrism is the gentle label academics apply to the legacy of colonization and racism... 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 prejudice.* 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’* [emphasis added].

Henderson, Postcolonial, *supra* note 9 at 5.

### 3.2 RODERICK MACDONALD: A CRITICAL LEGAL PLURALISM

The late Roderick Macdonald was a preeminent Canadian legal pluralist. In challenging what he coined “legal republicanism,”<sup>193</sup> legal pluralism offered a new way of examining law and diversity by challenging the dominant socio-legal narrative of “the Law” as a universal and uncontested concept. Before offering a detailed overview of Macdonald’s version of legal pluralism, I first explicate his concept of “legal republicanism,” the antithesis of legal pluralism, which evolved from the political climate of the 18<sup>th</sup> and 19<sup>th</sup> centuries. It understands the state as a “political reflection of a single people.”<sup>194</sup>

Macdonald’s work on legal pluralism constitutes an intellectual challenge to the dominance of legal republicanism. Specifically, he challenges the state’s monopolization of law which denigrates citizens as legal *subjects* rather than agents who are actively producing, creating, and interpreting law. He questions the focus in traditional scholarship on positivistic law – or, “lawyer’s law” – as it does not offer a satisfactory intellectual framework for inquiry that is grounded in socio-legal diversity. In this sense, it suppresses organic normativity in favour of “legal evangelicalism” which...

breeds a reliance on the rituals, catechism, and creed of official institutions that focuses on the word (especially on the definitive pronouncements of the *curia* that

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<sup>193</sup> See, e.g., Roderick Macdonald, “The Legal Mediation of Social Diversity” in Alain Gagnon, Montserrat Guibernau & François Rocher, eds., *The Conditions of Diversity in Multinational Democracies* (Montreal: Institute for Research on Public Policy, 2003) at 87-8.

<sup>194</sup> Roderick Macdonald, “Legal Republicanism and Legal Pluralism” in Mauro Bussani & Michele Graziadei, eds. *Human Diversity and the Law* (Brussels: Bruylant, 2005) 43 at 45. Moreover, there are those who argue that this form of law is linked back to the principle of territoriality, which has allowed monism to ferment and structure our legal frameworks. In this way, territoriality is “...characterized by its function of grounding exclusive and plenary sovereignty in a formally delineated physical space.” Given this, legal republicanism can be seen to be linked to the spatial limits of sovereignty. See: Ghislain Otis, “Custom and Indigenous Self-Determination: Reflections on ‘Post-Territoriality’” in Glen Coulthard et al, eds, *Recognition versus Self-Determination* (Vancouver: University of British Columbia Press, 2014) at 253.

sits at the top of an institutional hierarchy) and disparages local interpretive *collegia* that also rely on self-generated rite, practice, and custom to inform meaning.

As such, a centralist view of law unnecessarily privileges text and prescriptive rules as normative artefacts, and, consequently, trivializes other sites of implicit and inferential normativity. This is what Macdonald has coined a “nomopoly (a *nomos* monopoly).”<sup>195</sup>

While Macdonald has produced a thicket of rich material on legal pluralism, I cannot do all of his work justice in this thesis. However, I will focus on several emergent themes and how they are produced through his work insofar as they are relevant to glean insights on the nature of his version of legal pluralism. The first of these themes is the role of legal actors as constructive agents of law. The second theme is the importance of non-written symbols and actions for legal normativity, and the blurred boundaries of how formal and informal mechanisms of law-making become meaningful in our lives.

Macdonald, though an ardent legal pluralist, is however critical of the social-scientific versions of legal pluralism for they “have succumbed to revolutionary Cabbalism: they have sought to historicize and to essentialize legal pluralism; and they have focused more on extirpating heresies than on propagating their myth.”<sup>196</sup> What he means by this is that legal pluralists have treated the concept of law as a mystical entity that exists “out there,” and as a sacred institution that has inherent properties that exist outside of human action. In so doing, legal pluralists reconstitute orthodox understandings of law rather than posing much of a challenge to them. While he is critical of legal pluralist theory to-date, he doesn’t reject it all together; on the contrary, he seeks

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<sup>195</sup> Macdonald, Non-Chirographic, *supra* note 15 at 310.

<sup>196</sup> Klienans and Macdonald, *supra* note 16 at 29.

to bolster the legal pluralist challenge to republican ideals. He embraces the legal pluralist “rejection of the State legal order as the lynch-pin of legal normativity.”<sup>197</sup> However, as stated, he is critical of how social-scientific versions of legal pluralism attempt to provide essentialist definitions of law which profess cultural authority in determining requisite legal postulates.

Macdonald, in an article with colleague Martha-Marie Klienans, argues for a conception of law that imbues legal actors with agency. As they see it, within social-scientific versions of legal pluralism,

[l]egal subjects are exclusively constituted by law, and legal subjectivity is concomitant with the criteria of identification in each such legal order. Legal subjects are abstracted as individuals without a particular substantive content.<sup>198</sup>

As such, a *critical* legal pluralism rejects this notion and instead argues that knowledge is a subjective enterprise that emerges in discursive patterns between actors and their various normative worlds. As such, legal actors have a constructive capacity as “law originates in their own actions and interactions.”<sup>199</sup> That is, law is not a metaphysical phenomenon, but rather emerges through conscious human action. Law obtains its status because legal actors treat it as such.

This “transformative capacity” is manifested by critical legal pluralism’s capacity to “[endow] legal subjects with a responsibility to participate in the multiple normative communities by which they recognize and create their own legal subjectivity.”<sup>200</sup> As such, the first theme that arises in Macdonald’s version of legal pluralism is that legal

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<sup>197</sup> Klienans and Macdonald, *supra* note 16 at 30.

<sup>198</sup> *Ibid* at 37.

<sup>199</sup> Macdonald, Non-Chirographic, *supra* note 15 at 311.

<sup>200</sup> Klienans and Macdonald, *supra* note 16 at 38.

subjects are themselves jurisgenerative agents.<sup>201</sup> In this way, the focus of legal pluralism shifts from locating *legal orders*, such as Falk Moore’s attempts to delineate different SASFs, to recognizing that law is created by *legal actors*. As such, legal actors create and sustain their own legal realities. The focus of legal pluralism, then, should be recognizing and fostering this creativity. As will be demonstrated in my discussion below, Klien hans and Macdonald’s version of legal pluralism is influenced by discursive, narrative, and hermeneutic processes.

### 3.2.1 SHIFTING THE FOCUS OF INQUIRY TOWARD LEGAL ACTORS

It is necessary here to unpack Klien hans and Macdonald’s claim in shifting the locus of pluralist inquiry from *legal orders* to *legal actors*. In attempting to find a “legal order” that can be empirically observed and analyzed objectively, traditional scholarship treats legal subjects as abstract “individuals” who come before the law, rather than active participants in it. The question within social-scientific legal pluralisms, then, becomes “which legal order has jurisdiction over a given legal subject in a given situation at a given time?”<sup>202</sup> This question, however, is blind to an examination of the myriad of normative orders to which a legal subject “belongs.” By focusing on this question, empirical approaches to legal pluralism problematically assume that “legal subjects still are being subsumed under one (or even several) homogenous labels instead of being allowed to persist as heterogeneous, multiple creatures.”<sup>203</sup>

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<sup>201</sup> However, Klien hans and Macdoanld do not suppose that every person creates their own law. Rather, they argue that “[s]ubjects construct and are constructed by the State, society and community through their relations with each other.” Klien hans and Macdonald, *supra* note 16 at 43. Law is, therefore, *relational*.

<sup>202</sup> *Ibid* at 36.

<sup>203</sup> *Ibid* at 36.

Consequently, social-scientific legal pluralism has “established monism within each social field.”<sup>204</sup> Legal orders are presumed to exist within a social field and possess normative domination within that field. But, as stated, this ignores the multiplicity of normative forces that overlap, compete, and influence how we perceive law. In contrast to attempting to find a singular or discreet legal phenomena – the “legal order” – Klien hans and Macdonald view their approach as *constructivist* in nature, seeing law and individuals in a mutually constructing relationship. As such, law does not exist outside of the individual; it doesn’t exist “out there,” but rather is made real through the creative capacity of individuals who are themselves constructed by a plethora of normative instantiations. For Klien hans and Macdonald, the conventional approach misses a key element of legal life if legal pluralists fail to “[address] questions about those who spin its filaments.”<sup>205</sup> This reveals both the heterogeneity of legal normativity and its relationship with the different constitutive identities of legal actors.<sup>206</sup>

There are two key pieces to understanding this view of legal pluralism: first, it does not attempt to discover a plurality of empirically observable legal orders, nor is the focus on these orders in determining what is legal/non-legal for the purposes of inquiry.<sup>207</sup> Rather, their version “requires no boundary criteria for sources of legal rules, for the geographic scope of determinate legal orders, for the definition of its subjects, or

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<sup>204</sup> Klien hans and Macdonald, *supra* note 16 at 39

<sup>205</sup> *Ibid* at 37.

<sup>206</sup> As Amy Jackson argues, “[essentialist-based definitions of law are not needed] because law is viewed as only existing in the human imagination, generated within the minds of legal subjects from whatever belief they have of the law-like qualities of different normative orders.” See: Amy Jackson, *A Critical Legal Pluralist Analysis of the Begum Case*, Research Paper No. 46/2010 (Toronto: Osgoode Hall Law School Comparative Research in Law and Political Economy Research Paper Series, 2010), online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1696191](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1696191)> [Jackson] at 21.

<sup>207</sup> Klien hans and Macdonald, *supra* note 16 at 38.



for normative trajectories between legal orders.”<sup>208</sup> They instead take the starting point of inquiry that all normative orders or processes merit analysis from a legal point of view. There is no *a priori* distinction between “law” and something else, as “these normative orders cannot exist outside the creative capacity of their subjects.”<sup>209</sup> That is, law does not exist until it is perceived to be such by individual legal actors, which are formed and shaped through their interactions with the various normative forces to which they belong, including the state, local communities, and other normative regimes.

As such, legal pluralist analyses are not simply delineating the different legal orders competing for attention in a given social field, and then assigning them space within a hierarchy or other system of relation whereby each field is somehow compared to the others. Instead, Klienmans and Macdonald posit that the goal of pluralist scholarship should be to understand how each normative force or regime is part of a whole; they are interwoven because of the multiplicity of identities carried by the legal actor which are then interwoven with a number of other processes.<sup>210</sup>

Second, in examining legal normativity, the focus of inquiry falls to the transformative capacity of legal actors. This rests on the view that knowledge creates and maintains realities. Legal actors “are not wholly determined,”<sup>211</sup> but rather they possess the capacity to produce legal knowledge and construct the content of legal normativity. Legal actors control law as much as law controls legal actors. It is not merely that a multiplicity of legal orders *exist* in a given social field, but that legal actors carry with them a multiplicity of identities that exist in relation to each other. Consequently, the

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<sup>208</sup> Klienmans and Macdonald, *supra* note 16 at 38.

<sup>209</sup> *Ibid* at 40.

<sup>210</sup> *Ibid* at 41.

locus of inquiry becoming the “subject”<sup>212</sup> displaces objective inquiries into the delineation of legal orders.<sup>213</sup>

Emmanuel Melissaris argues that...

[o]nly when the legal commitment of clubbers who queue patiently at a bouncer’s orders is treated as seriously as the legal commitment of communities with religious or other moral bonds will the pluralistic study of the law be able to move away from the essentially positivistic external study of groups to the study of legal discourses.<sup>214</sup>

The idea that clubbers who queue in a line is a “legal commitment” offends our Western sense of law. Viewed externally, we would question how such behaviours could be viewed as law. However, when viewed internally, as part of the normative perceptions of the individuals involved, a different normative picture may emerge. This does not necessarily mean that it *is* a legal commitment, but rather implores us to shift the locus of inquiry to those individual legal actors involved in this enterprise to examine how they perceive it. Legal pluralism will remain stifled in its attempt to posit a significant challenge to legal centralism so long as it presumes that “one can experience, understand and report the way a legal discourse operates in identical ways irrespective of whether one is a participant in the discourse or not.”<sup>215</sup> As such, as a method of analytical inquiry, legal pluralism must look inward, toward the legal actors within that interaction to examine “what it is that they do when entering that discourse and why.”<sup>216</sup>

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<sup>211</sup> Klienmans and Macdonald, *supra* note 16 at 40.

<sup>212</sup> Again, by utilizing the word subject here Klienmans and Macdonald are not arguing for a liberal view of the the individual as an autonomous free agent, but rather the individual as a socially constructed agent.

<sup>213</sup> Klienmans and Macdonald, *supra* note 16 at 40.

<sup>214</sup> Melissaris, *The More the Merrier*, *supra* note 47 at 75.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*

However, this vision of legal pluralism also requires us to understand what is meant by “legal actor,” “legal subject,” or “legal agent.” Klienhans and Macdonald argue that

...[t]he subject posited by a critical legal pluralism is best characterized as a multiplicity of selves and not the modern anthropomorphized individual of economics, political science and Charters of Rights. The life of the subject is a continuing autobiography of meaning. Subjects seek to explore the variety of possible worlds and possible selves that they can reflect and project. In their relations with other subjects and in their biographies of themselves, subjects evaluate how they want to live in the worlds open to them. Hence relations among the subject's multiple selves will always be relations of reflexive evaluation. Whatever else these legal subjects may be, they are, like the communities in which they participate, normatively heterogeneous. The subject multiply identified and multiply identifying in a congeries of biographies.<sup>217</sup>

The idea is that an individual, as part of their larger community, is a legal actor when he or she is interacting with the normative fields through which they create and perceive law, as the actor himself or herself is a site of internormativity. This is because the “[s]ubjects of knowledge are also its objects. Legal knowledge is the project of creating and maintaining self-understandings.”<sup>218</sup>

The key to understanding a critical legal pluralism is that communities, structures, and institutions shape how legal actors interact with the world around them and the knowledge they obtain. This does not mean that the legal actor is an anthropomorphic “blank slate” to which law is applied, but rather the legal actor constructs, and is constructed by, the normative force fields around them. As such, “...the institutionalized subject reciprocates by shaping and reformulating the hypotheses of state, society and community that are inhabited.”<sup>219</sup> All actors are “legal” actors as they are constantly

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<sup>217</sup> Klienhans and Macdonald, *supra* note 16 at 42.

<sup>218</sup> *Ibid* at 39.

<sup>219</sup> *Ibid* at 43.

engaged in constructive processes of creating and sustaining legal normativity.<sup>220</sup> As such, there is no *prima facie* distinction as to when one is merely an “actor” or “legal actor” as “[t]he self is the irreducible site of normativity and internormativity. And the very idea of law must be autobiographical.”<sup>221</sup>

Accordingly, there is no objective or essential individual that is theorized, but rather it is an appeal to the way in which the modern “individual” perceives itself to be “individualistic.” As such, the “modern self” is a construct that itself has constructive capacity, and Klienmans and Macdonald argue that it is upon this constructive capacity that the focus of inquiry of legal pluralism should rest.<sup>222</sup> Their version of legal pluralism envisages the connection between the legal subject and the normative forces around them as a circle, rather than a hierarchical linear link between ruler and ruled. This is a hermeneutic process that sees law and legal actors as both constituting and being

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<sup>220</sup> As Macdonald and McMorrow note, “Legal actors engage in the jurisgenerative process by imagining, inventing and interpreting legal rules. Through their beliefs, behaviour and practices, they instantiate the rules they conceive and perceive. There is neither singularity, nor coherence, nor stability, nor boundary to an agent’s normative commitments.” See: Macdonald and McMorrow, *supra* note 11 at 322.

<sup>221</sup> Klienmans and Macdonald, *supra* note 16 at 46. As Emmanuel Melissaris notes, in order for the meta-jurisprudential aspects of legal pluralism to occur, we must look at the actual discourses which are entered into by legal actors to analyze how they treat and observe the normativity that emerges from these interactions. However, he notes:

... for a law to exist, for the decision of a third party to be respected and followed, whether that third party be a bouncer or a disciplinary committee or indeed a court, it needs to be accompanied by a certain degree of commitment from all the parties. This means that the parties must be participants in those legal discourses so that the latter are genuine cases of communication. How participation is to be explained is immaterial at this stage. It might be a psychological process of internalization of the rules. It might be the outcome of practical reasoning each and every time such discourses are entered. It might even have to do with emotive reactions, which are so often and so lightheartedly rejected over rational reasons as explanations and justifications of rule following. What is crucial is that those legal discourses must be part of the participants’ lives or, to allude to Cover, of their world- and jurisgenerative narratives.

See: Melissaris, *The More the Merrier*, *supra* note 47 at 74.

<sup>222</sup> Klienmans and Macdonald, *supra* note 16 at 44.

constituted.<sup>223</sup> It is in this relationship – when actors are engaged in this circular process – that we can claim that a subject is acting in a legal capacity.<sup>224</sup>

In order to help demonstrate this conceptualization of law as a mode of analysis, I draw on Amy Jackson’s research paper utilizing a critical legal pluralist analysis of the *Begum*<sup>225</sup> case in the UK.<sup>226</sup> The case queried whether a state school’s decision to exclude a student for wearing an Islamic veil (in this case it was a *jilbab*, which is a long robe-like veil) infringed her right to manifest her religion, as well as her right to an education, under the *European Convention of Human Rights 1950*. As Jackson notes, by utilizing a critical legal pluralist methodology she is able to see past the essentialized normative orders that are said to exist. Instead, she is able to explore how the claimant subjectively perceives law. In doing so, she argues, this type of analysis can challenge some base assumptions about the practice of veiling which may have altered how the various actors and institutions conceptualized the claim.

Rather than review the various UK court decisions, the issue key to understanding the decision is whether religious dress should be accommodated by a state school uniform policy. The case made its way to the House of Lords, who decided that:

Begum [the aggrieved plaintiff] had not been unlawfully excluded from school; even if she had been, her right to manifest her religion under Article 9(1) had not been infringed; in any event, the school was justified in infringing the right under Article 9(2) in order to protect the rights and freedoms of others; and, finally, there was also no infringement of the right to an education under Article 2 of the First protocol.<sup>227</sup>

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<sup>223</sup> Klienans and Macdonald, *supra* note 16 at 45.

<sup>224</sup> As Klinehans and Macdonald posit, “[t]he perspective of legal meaning moves through a circle of narrative construction by a dynamic, creative subject.” See *Ibid* at 45.

<sup>225</sup> *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2007] 1 AC 100, [2006] UKHL 15.

<sup>226</sup> See: Jackson, *supra* note 206.

<sup>227</sup> *Ibid* at 10.

Effectively, the decision held that each school had the ability to decide its own policy on uniforms and to reject Begum's request to adorn her veil. On the question of whether there was a breach of her right to manifest her religion, the House of Lords stated that the right was engaged as she held a sincerely-held religious belief on wearing the veil, but it held that Article 9 did not protect *every* act motivated by belief in a specific religion and the individual needs to take the "specific situation" into account.<sup>228</sup> The House of Lords stated that her right was not infringed: she could have attended another school as she had chosen to attend to the school in question.<sup>229</sup>

Part of the case also suggested that the school was told that the policy was consistent with mainstream Muslim opinion on veiling. Some supporters of the decision held that it "supports the dialogue between state schools and mainstream religious opinions when formulating uniform policies, which highlights the importance of an *objective* element in relation to an individual's subjective religious belief."<sup>230</sup> By treating law as a fixed enterprise we presume that instead of being a participant in it, Begum was merely a legal subject who has to fit her claim into one or more predetermined categories that may or may not suit her understanding of law. She consequently becomes "othered" by law as it remains alien to her. Moreover, this approach assumes that law can be criticized – insofar as being immoral, unjust, or exclusionary – but, after all, the law is the law. It can be changed by legislatures or judges but "at the end of the day, what is passed

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<sup>228</sup> Jackson, *supra* note 206 at 9.

<sup>229</sup> *Ibid* at 10.

<sup>230</sup> *Ibid* at 11 [emphasis added].

by parliament, interpreted by courts, and enforced by agents of the state alone constitutes law.”<sup>231</sup>

However, Jackson implores us to look at the case through a legal pluralist lens, recognizing the “multi-faceted nature of human experience.”<sup>232</sup> Jackson attempts to view the case through two different lenses: orthodox legal pluralism (à la Falk Moore or Teubner) and critical legal pluralism (à la Klienmans and Macdonald). An orthodox legal pluralist image of the case...

draws attention to the multiplicity of normative orders which operate, interact and conflict with one another. Several laws operate in the present case. For example: state-law is apparent in the various court judgments; human rights law on which Begum’s case was made; institutional policies (notably the uniform policy) of Denbigh High School; and the religious laws Begum viewed as obligating Muslim women to wear a *jilbab*.<sup>233</sup>

As such, this type of legal pluralist analysis will examine the conflicts between these competing normative orders including, whether, and how, state incorporates non-state law, such as the tenants of religious law. The purpose of this traditional view, she states, is “that the operation, interaction and conflicts of an array of normative orders is illuminated.”<sup>234</sup>

However, a critical legal pluralist analysis yields differing considerations of the case and the normative forces at play. As Jackson states, “[t]he right to manifest one’s religion under Article 9 of the Convention is relied upon as one way to view the wearing of the veil is as a religious obligation.”<sup>235</sup> Viewing the dilemma as a “rights-based”

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<sup>231</sup> Thomas McMorrow, “Reflections on Law in Light of Everyday Life at L’Arche” (2015) 4:3 Canadian Journal of Disability Studies 50 at 51

<sup>232</sup> Jackson, *supra* note 206 at 17.

<sup>233</sup> *Ibid* at 19.

<sup>234</sup> *Ibid*.

<sup>235</sup> *Ibid* at 22.

approach limits the analysis because it requires a claimant to label the practice of veiling as either a religious, cultural, or private practice which fails to capture the multi-faceted nature of Muslim women's experiences wearing the veil. As such, the interaction of various cultural and religious forces is complicated as...

the nuances between religion and culture may be clear to an insider, but appear interchangeable to an outsider. The relationship between culture and religion is further complicated for first, second, and beyond generations of immigrants who may create themselves a hybrid identity which interweaves two (or more) very different cultures.<sup>236</sup>

Instead, a critical legal pluralist analysis allows us to look at how law is situated in the mind of the claimant, Begum, who felt that the wearing of the *jibab* was obligatory for Muslim women and, as such, she was following the law.

The benefit of this approach is that it looks to the legal actor as a site of internormativity and “highlights the circularity of the relationship between law and legal subject as Begum, and others, view the practice as legal and by regulating her behaviour, she demonstrates this legality.”<sup>237</sup> This allows for more nuanced understandings of the competing normative forces at play that looks beyond essentialist or “objective” instantiations of law and legal obligations. Instead, we are able to look to how legal actors perceive law in their everyday lives and what they consider to be binding.<sup>238</sup> This, it is argued, provides a more robust approach to examining the competing normative forces at play – like, for example, the state and the normative ordering of the Muslim

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<sup>236</sup> Jackson, *supra* note 206 at 22.

<sup>237</sup> *Ibid* at 23.

<sup>238</sup> It should be noted here that at no point does Jackson argue that this should be determinative of the case. Rather, what it suggests is that state law becomes decentered and we are able to undertake a more robust analysis of the competing interests at play. By seeing the obligation to wear the veil as legal we are not automatically deferring to this obligation (nor is there a *prima facie* privileging of this view), but rather we are able to see it as part of a broader spectrum of competing and interacting normative sites (including the state, for example) in performing analyzing and undertaking legal reasoning.



community – in such a way that no one site of law becomes privileged. It deems a number of perspectives as equally valid, and enhances our understanding of law as a plural enterprise, and as a broader experience of conflicting normative orders. The point that Jackson makes, as I gather it to be, is that a critical legal pluralist approach provides an alternate perspective to looking at the case. It challenges the normative domination of state-based law (by questioning how adequately veiling practice can fall into an essentialist category such as “human rights”) and exposes the contingency and fluidity of law that exists beyond the confines of the state.<sup>239</sup>

### **3.2.2 THE IMPORTANCE OF IMPLICIT AND INFERENTIAL BEHAVIOUR IN DEVELOPING LEGAL NORMATIVITY**

In a more recent article expanding on his vision of a critical legal pluralism, Macdonald argues for a “non-chirographic” critical legal pluralism. As he makes clear in a footnote, “[he uses] the word chirographic to signal any approach to legal theory that holds that law is primarily (if not exclusively) about norms (policies, principles, rules, concepts) that can be, and usually are, fully expressible in written words arranged discursively.”<sup>240</sup> Instead, he makes the case for “implicit and inferential normativity in

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<sup>239</sup> In noting the potential drawbacks of this approach, Jackson states that:

However, a critical legal pluralist analysis of Begum may perpetuate assumptions in relation to a legal subject’s perspective of law: as what a legal subject views as law can only be assumed. Overcoming these assumptions entails actually asking Muslim women the critical legal pluralist question in order to expose the multiple beliefs and reasons for wearing the veil which exist, and which are often ignored. This requires utilising critical legal pluralism as a legal methodology, rather than a legal analysis. Nevertheless, a presupposition of critical legal pluralism is that law is formed in the imagination of a legal subject. What if Muslim women who wear the veil do not think in normative terms? I suggest that the limits of this approach can only be tested by utilising the critical legal pluralism as a legal methodology, which requires further empirical work to be undertaken in this interesting area of law.

Jackson, *supra* note 206 at 25.

<sup>240</sup> Macdonald, Non-Chirographic, *supra* note 15 at fn 1.

life and law.”<sup>241</sup> Legal pluralism should reject that law, as a concept, is always capable of reproduction to words that are written down, but rather it should recognize that normativity can be expressed in many different ways. In this way, Macdonald celebrates the implicit and inferential rather than the explicit and authorized.

Law originates in the actions and interactions of legal actors. In this sense, normativity is generated within the discursive interactions of agents and their worlds. This is not to say that legal actors should reject the idea of “written law,” but rather it recognizes that words are but only one method of representing and symbolizing normativity: “[a] critical legal pluralism requires human beings to appreciate their own norm constituting potential, that is, to accept that interaction is fundamental to all normativity-however formalized, however explicit, however informal, however implicit.”<sup>242</sup> Normativity, then, can be expressed in non-formal modes: it can be expressed through art, dance, rite, gesture, and many other means. In this way, law emerges not just from words but from many different expressive processes. Words are only but one site for the creation and application of legal normativity.

Macdonald argues that orthodox legal theory is unable to appreciate or account for the complex methods through which legal normativity is established and how informal or “implicit law” – that is, law which is not “written down” like legislation and may include such things as custom or inferential normativity – comes to bear on institutionalized legal rules. Informal unwritten rules become significant in our lives because “they are independent forms of regulation and because they are resources from

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<sup>241</sup> Macdonald, Non-Chirographic, *supra* note 15 at fn 1.

<sup>242</sup> *Ibid* at 311.

which explicit, written rules typically draw their power and content.”<sup>243</sup> Thus, “implicit law” becomes important because it provides an important milieu in structuring formalized law, such as rules, regulations, and legislation. The two are not so far removed, but rather act in a symbiotic relationship. Thus, the boundaries between the written and formal, and the symbolic and informal, become blurred in examining how law and normativity become meaningful to legal actors.<sup>244</sup> Consequently, legal normativity does not rest solely on the necessity of the written word as inferential normativity itself is as an important force in developing and shaping legal obligations.

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<sup>243</sup> Macdonald, Non-Chirographic, *supra* note 15 at 316. For instance, if we are to think about the context of common law definitions of property ownership, it is simply not enough for judges to spill ink on a page conjuring up ideas on ownership. Rather, the prescriptive set of rules stem from social practices about how people recognize their relationship to land. Those practices evolve over time, making the distinction between the written words and informal practices blurred. As such, in exploring normativity, we cannot rely on the word alone.

<sup>244</sup> Though, Macdonald draws attention to the fact that just because formal norms emerge from informal interaction and custom, this does not mean that primary (written) practices displace informal experiences as the bearers of the normativity. He argues that the situation is “quite the reverse” as formal norms continue to be interpreted and reconstituted by social practices. He argues that “[c]ustomary practice is the vehicle by which off-the-shelf legislation is tailored for individual circumstance.” See *Ibid* at 319. In order to demonstrate that formal/informal norms are really two sides of the same coin, Macdonald uses the example of cricket (he does not argue that the rules of cricket are law, but uses it metaphorically to help explain informal/inferential norms their relationship to “official” or canonized norms). He argues that while there are “official” cricket rules, the game can be played out without ever making explicit reference to the canonized “rules of the game.” These canonized rules are put in place (similar to official laws) in order to maintain normative hegemony, and to assert authority over the playing of cricket. He states that “[s]ometimes, however, the official rules fail to take hold of the human situation to which they are directed.” *Ibid* at 314. For instance, it is not enough to just know the rules. For Macdonald, knowing the rules does not mean that they are understood or given normative texture. He uses an example of a scene from the Quebec film, *La grande seduction*, where, in order to entice a cricket-loving doctor to take up residence in their community, members of a small community watch videos and study the rules of cricket in order to play a fake game. From afar it looks as if they are playing cricket, but they have no context or understanding of the motions that they are doing. See: *Ibid* at fn 44. Given this conundrum, Macdonald states that, “[t]o know the rules, or even to dress and act in conformity with the rules, is no proof that the rules are being followed, let alone understood. Normativity is more than a rote practice or an unthinking habit. It is not enough to know the rules.” *Ibid* at 314. As such, the complexity of the interactions between the canonized rules and actual human behaviour illustrate that rules are not enough to understand normativity: “[j]ust as the rules themselves are in part derivative of practice, the practices and the possibilities of play are derivative of the rules. This complex interaction between word and deed opens an inquiry that challenges both orthodox legal theory and social scientific legal pluralism.” *Ibid* at 315. As such, the point Macdonald is making is that prescriptive rules from an “official” institution do not fulfill the avenues of normativity. Sometimes implicit or inferential forms of normativity become just as important as canonized forms.

Law comes to be rational and important in peoples' lives not because of its "internal literary casuistry" but because it is meaningful to them. As such, the rationality of law "emerges from the often unconscious social interaction from which the political trade-offs of rule-making arise and to which they relate (a collective rationality)."<sup>245</sup> This brings attention to the sometimes implicit features of human relationships and the generative potential of human interaction. For instance, as will be illustrated later in this thesis in the context of the Mi'kmaq principle of *Netukulimk*, legal normativity can emerge from Indigenous ceremonies. As such, law is not just "made" through legislation and the pronouncement of judges, but rather it has the potential to emerge from informal sites, such as interaction and expression. While orthodox legal theory privileges written legal norms, Macdonald's argument is that even these written norms are often premised on the implicit and inferential exchanges of human relationships.

In connecting these ideas back to legal pluralism, Macdonald makes three points about the importance of a non-chirographic conception of law. The first is that legal claims do not always rest on formal concepts, but flow from the recognition that human agency and interaction are constantly shaping and reshaping normative discourse. The second point he makes is the importance of legal actors as legal agents. These agents are constantly engaged in generating juridical norms. Thus, legal pluralism should look to how "social actors negotiate and create their own normative commitment through *interactions*."<sup>246</sup> The third point is the recognition that actors shape their legal experience in ways that recognize their multiple subjectivities, morphed through our interactions as

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<sup>245</sup> Macdonald, Non-Chirographic, *supra* note 15 at 317.

<sup>246</sup> *Ibid* at 323 [emphasis in original].

actors with unique experiences, commitments, and senses of self.<sup>247</sup> We live with plural identities which pluralize our experiences with the world, thus pluralizing the normative experiences through which law is generated. How we ground our conduct is produced and reproduced in our experiences as human agents, capable of constituting and reconstituting our multiple selves.

We see in Macdonald's theory, however, the importance of normative destabilizing of legal hierarchies, thus displacing legal centralism. The point Macdonald makes is that there can be no scientific or formalized method of privileging certain normative systems over others. The idea that formal orders trump informal orders is turned on its head. As Macdonald argues,

[r]efusing to acknowledge a natural hierarchy among normative regimes does not obviate the need to develop some method of achieving comity, of promoting mutual recognition, which would be metaphorically similar to practices and principles which have led to non-hierarchical relations among nation states. Such practices and principles would allow each normative regime to operate more or less peaceably within its own domain, to defer to neighbouring regimes similarly engaged, and to defend itself against intrusions deemed illicit.<sup>248</sup>

Macdonald believes that we "live" legal pluralism. We cannot, *a priori*, determine legal commitments without looking to the constructive capacity of legal actors.

I argue that these two elements of Macdonald's theory – the importance of the constructive agency of legal actors and the emergence of inferential or informal law as sites of legal normativity – become key to understanding a postmodern legal pluralism. It recognizes that legal actors themselves create and sustain their legal realities in ways that recognize that our legal experiences are multiple, engaged, and dynamic. These insights provide us with a framework that dislocates legal theory from colonial assumptions about

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<sup>247</sup> Macdonald, Non-Chirographic, *supra* note 15 at 324.

<sup>248</sup> *Ibid* 15 at 325.

what law is and what it should do by looking instead to how legal actors construct and come to understand law.

### 3.3 BRIAN TAMANAHA'S NON-ESSENTIALIST LEGAL PLURALISM

Tamanaha's version of a non-essentialist legal pluralism adopts a conceptualization of law that is found in the social practices of local agents. He argues that there can be no definition or essence of law. As such, he defines a non-essentialist legal pluralism as follows: "Law is whatever people identify and treat through their social practices as 'law'."<sup>249</sup> This is a particularly abrupt, but potentially accurate, portrayal of the legal. In constructing this non-essentialist version of law, he builds on the notion of a "social practice" which links behavior and meaning to law.<sup>250</sup>

His concept is quite simple. Rather than have a social scientist or anthropologist develop a "theory of law," he argues it is better to look to how law is "determined by the people in the social arena through their own common usages."<sup>251</sup> In adopting this view, he rejects that law has one definition or function. He argues that his conception of law can be applied to a host of different phenomena "sometimes involving institutions or systems, sometimes not; sometimes involving institutions or systems, sometimes not; sometimes connected to concrete patterns of behavior, sometimes not; sometimes using

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<sup>249</sup> Tamanaha, Non-Essentialist Legal Pluralism, *supra* note 51 at 313.

<sup>250</sup> *Ibid* at 314. He states:

One must keep in mind that the notion of a social practice is a heuristic device that helps frame and isolate activities within the social field for the purposes of study. Paying heed to this reminder, the use of social practices as a primary tool for the identification of law has several beneficial effects. It insures that the particular convention regarding the existence of law is sufficiently shared, and hardy enough, to surpass a threshold of substantiality that would qualify it as a social practice. It recognizes and understands that a particular social practice generating a given manifestation of law has a history, and therefore it can change, and it may differ from other practices going by the same name. Most important, it views meaning and activity, as they give rise to a particular instance of law, as inseparably connected.

force, sometimes not.”<sup>252</sup> In this way, he argues that his conception is neither too broad nor too narrow as it allows for the application of the label law wherever people characterize normative action as “law.”<sup>253</sup>

Tamanaha argues that his conception allows for more “refined distinctions” to be made between law and non-law.<sup>254</sup> There is conventional wisdom in Tamanaha’s characterization of law. “Law is whatever people identify and treat through their social practices as “law” (or recht, or droit, and so on.)”<sup>255</sup> However, as Kirsten Anker questions, beyond its “conventional wisdom,” what does such a simplistic definition do “when brought to bear on Indigenous law and the translations that entails?”<sup>256</sup> There are conceptual difficulties in translating Indigenous practices into the terminology of law.<sup>257</sup> What if such a Westernized concept does not exist within Indigenous societies? This presents a problem: what is seen as “conventional wisdom,” as was argued earlier in this thesis, is a product of majoritarian views and Western ideals. We associate law with the

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<sup>251</sup> Tamanaha, Non-Essentialist Legal Pluralism, *supra* note 51 at 314.

<sup>252</sup> *Ibid* at 315.

<sup>253</sup> He uses some examples to illustrate the use of his concept:

Commonly, this involves state law (usually identified at some level of specificity, like the law of New York State, US federal law), but in certain social arenas (especially in postcolonial societies) people also commonly refer to customary law and indigenous law (or specifically, to *adat*, or to Yapese customary law); and in certain social arenas people refer to international law or the law of human rights or the *lex mercatoria*; and people refer to religious law (or specifically, to Islamic Law, or the Sharia, or the Talmud, or canon law), or to natural law. And in some social arenas, all of these forms of law are referred to. This list is not exhaustive, as other or new forms of 'law' can be said to exist whenever recognized as such by social actors.

See: *Ibid* at 313-14.

<sup>254</sup> *Ibid* at 316.

<sup>255</sup> *Ibid* at 313.

<sup>256</sup> Anker, Declarations of Interdependence, *supra* note 20 at 92.

term “law” because that is how Western society structures itself.

As such, despite its simplicity, Tamanaha’s theory suffers from a number of conceptual weaknesses. As Jeremy Webber argues, Tamanaha’s conceptualization is missing a sense of normativity: “[Tamanaha’s conceptualization] avoids the problem of obligation [by legal actors] only by eschewing (at least ostensibly) any serious engagement with normative argument.”<sup>258</sup> He argues that it is important to see law as a product of conscious human action, contained in how we see and view the world.<sup>259</sup> Thus, while Tamanaha offers a method of overcoming essentialist versions of legal pluralism, his theorization falls short in two respects. First, it offers no account of how law is meaningful in peoples’ lives. Second, it may hinder the project of legal pluralism to conceptualizations of law that do not readily apply themselves to the label “law” in a Western sense. Nevertheless, I believe that there is some wisdom and elements of analytical purchase in Tamanaha’s rejection of essentialism. It will be this aspect of his theory which will be drawn upon later in this Chapter as I unpack the claim to a postmodern legal pluralism.

### **3.4 KIRSTEN ANKER AND THE INTERDEPENDENCE OF LEGALITIES**

Kirsten Anker provides perhaps the most recent account of legal pluralism in her book, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous*

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<sup>257</sup> As Anker notes, in a subsequent article Tamanaha asserts that while translating certain practices into the terminology of law are difficult, they are nonetheless possible. Moreover, “the possibility remains that people who speak other languages will have their own socio-linguistic ‘thing’ that might be studied in terms of its functional equivalent to law.” See: Anker, *Declarations of Interdependence*, *supra* note 20 at 92.

<sup>258</sup> Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44:1 Osgoode Hall LJ 167 [Webber] at fn 5.

<sup>259</sup> *Ibid.*



*Rights*, which extends a critical lens to legal pluralism, and, notably for the purposes of this thesis, its role in the recognition of Indigenous rights. The thrust of Anker's argument is that legal pluralism involves the recognition of the interdependence of various legalities – state law and non-state law are interdependent, and, as such, are constantly being constituted and reconstituted through their interactions with each other. She frames interdependence through the use of three themes: law is *dialectic*, *dialogic*, and *discursive*. The key piece of analytical purchase which I will ultimately draw on, and which mirrors to some extent parts of Macdonald's theory, is its emphasis on the *interaction* between Indigenous law and state law in the sense that neither exists wholly exclusive of the other.

Her aim in writing her book was to “develop a more consistently critical and discursive legal pluralist narrative of Indigenous rights.”<sup>260</sup> It seeks to engage with Indigenous legal traditions that is critical of the institutionalized differences that perpetuate the colonial relationship. Through an examination of key Australian native title cases, Anker demonstrates persuasively that state law presumes a dominance over law in time and space. That is, state law's claim to unitary domination arises from a claim to domination within both physical space (in terms of sovereignty and territorial exclusion) and time (based upon the assertion of sovereignty any claim to Indigenous law has been essentially eroded or stayed).<sup>261</sup>

Anker begins her book by drawing our attention to the problems inherent in the recognition of Indigenous law by state institutions. As mentioned earlier in this thesis,

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<sup>260</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 24.

<sup>261</sup> Anker asserts: “...unity in time is read in native title jurisprudence as stasis, a hangover from earlier theories of Indigenous peoples' traditions as primitive law that is incapable of change.” See: *Ibid* at 65.

this is the work of a “weak” form of legal pluralism.<sup>262</sup> Recognition of Indigenous law within state institutions is “immediately undone by the language of totality.”<sup>263</sup> It has been noted that Indigenous laws were subsumed by the common law upon the assertion of sovereignty, and, in the present moment, take the form of Indigenous rights.<sup>264</sup> That is, since the point of reception of English law in Canada, the common law has perpetuated the myth that Indigenous laws do not exist outside of the narrow scope provided to them in the form of “rights.” As such, this allows the state to maintain a monistic conception of law rooted in its claim to territorial sovereignty. It is only through state institutions that these rights can be recognized. This is problematic for Indigenous peoples because these “rights” are based in traditional Indigenous knowledge which did not cease having normative effect or importance upon the arrival of European settlers.

However, as has been stated elsewhere in this thesis, the quest for recognition of Indigenous law within state institutions has been particularly precarious. Institutional recognition forces Indigenous claimants who base a claim on Indigenous law to fit their traditional understandings into common law doctrine. Given that recognition seeks to either validate or invalidate a particular understanding of the world, the current conjuncture leads to the potential misrecognition of Indigenous law as it misreads the inherent and continuing normativity of Indigenous law. As Anker argues, “in the context of a continuing colonial relationship, the systematic treatment of Indigenous ways as inferior or unrecognizable is driven by a desire to maintain non-Indigenous control over

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<sup>262</sup> For example, see *supra* note 36.

<sup>263</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 64.

<sup>264</sup> See: Borrows, *Indigenous Legal Traditions*, *supra* note 22.

the nation and its resources.”<sup>265</sup> In this sense, Indigenous laws continue to exist and develop over time and within Indigenous peoples and their communities, but the common law demands a unity or conformity with its own standards in order for Indigenous claimants to seek institutional validation of their laws. Problematically, Indigenous peoples are not able to express their own laws as grounded in local knowledge as they may not meet the necessary standards imposed at common law. It is within this frame of reference, the subordination of Indigenous law by the vices of state domination, where Anker’s theory takes hold.

Anker argues that state and non-state law exist in a dialectic, dialogic, and discursive relationship. As will be demonstrated later in this section, these facets of the relationship between Indigenous and Canadian law are borne out in the doctrine of Aboriginal title. For Anker, both state and non-state law exist in a *dialectical* relationship, in the sense that two wholes are mutually constituting in relationship with each other, driven by a process “that link things, rather than as a result of cause and effect.”<sup>266</sup> This recognizes that social relations, including laws, are not fixed, but fluid and dynamic which respond to encounters between heterogeneous entities.<sup>267</sup> As such, in the context of points where state and non-state law conflict, each legal order contributes to each other’s progress and understanding of itself. Moreover, state and non-state law exist in a *dialogic* relationship in the sense of bringing the “horizon of understanding” of one form of law into contact with the horizons of another form of law: this dialogic encounter provides a

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<sup>265</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 28.

<sup>266</sup> *Ibid* at 22.

<sup>267</sup> *Ibid* at 22 where Anker also states that “[f]or instance, ‘Whitefellas’ and ‘Blackfellas’ constitute one another through processes of relation as raced people, and my body and the surrounding air constitute each other through the process of breathing.”

new frame of reference based on the interaction, and a new assessment of internal law.<sup>268</sup>

For instance, in the context of litigation, both legal orders come into the purview of the other, which help to facilitate intercultural conversations. This recognizes the human element of law wherein courts are forums where representations are made and conversations are spurred.<sup>269</sup>

Additionally, state and non-state law exist in a *discursive* relationship whereby each form of law helps to shape and reshape each other's internal meaning and coherence. That is, state and non-state law exist in conversation with each other at various points of interaction. Drawing on discourse theory, Anker argues that "discursive" interactions constitute the constant reconstruction of things – of speech, of understanding law, and of power. Looking at law through discourse theory, she argues, illuminates the privileging of certain concepts over others: "[d]iscourse is thus not only relational and productive. It is meaning grounded in practice and the physical instance, and so does not privilege the abstraction of language, words and text, but entails a comprehensive sense of human communication."<sup>270</sup> For instance, the Aboriginal title doctrine is illustrative of how the internal meanings of each legality are impacted in light of the interaction. This is a communicative process whereby each form of law is represented in its own legal language, and these conversations therefore help to shape and transform how the other sees itself.

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<sup>268</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 23.

<sup>269</sup> *Ibid* at 22.

<sup>270</sup> *Ibid* at 23. As well, inherent in discursive relationships is power. Discursivity, she argues, "...leads to the observation that, even if language is radically undetermined, the powerful are always trying to fix and determine it."

In examining the interdependence of state and non-state law, Anker examines three distinct elements of that relationship: translation, proof, and negotiation. These processes help to illustrate how both forms of law become implicated in the other at points of conflict or interaction. That is, in navigating the intercultural relationship, both state and non-state law are transformed in light of the interaction. In relation to translation, Anker argues that, in cases involving native title, courts act a site for Indigenous claimants to articulate the text of their own law, translating it from their traditional practices into language which can be read by the common law. However, this process also involves a transformation on the part of the common law. Anker argues that...

...[i]f translation is the means of recognizing the *sui generis* of native title, then something proper to Indigenous peoples is captured and brought into the common law. The etymology of “translation” – to carry across – matches a common understanding of linguistic translation as a transfer of something – information or an essential meaning – from one language to another. Language, in this view, is a representation of meaning, and each word names an object in a platonic link between world and world.<sup>271</sup>

Nevertheless, Anker recognizes the inherent power relationship in this process. As such, she argues for the importance of context in understanding cultural practices. She uses the language of anthropology as a method of translation, bridging the gap between cultural practices and the courts. For Anker, the solution is “the negotiation of meaning between participants implicated in the production of evidence that undermines the claim of evidence in court to be a neutral description of fact.”<sup>272</sup>

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<sup>271</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 104. I draw from, critique, and build on this process in Chapter 5.

<sup>272</sup> *Ibid* at 105.

Interestingly, Anker devotes considerable time dismissing, and rightfully so, social-scientific theories of legal pluralism. She argues that shifting the conversation of law as part of linguistic practice broadens the critique of the social scientific approach. However, Anker is also concerned about the linguistic use of the term “law” that may not be directly translatable by other cultures. She uses the work of Clifford Geertz to argue that pluralism should “[place] local terms of categories at the center of analysis and then engage in dialogic acts of interpretation in order to talk about them beyond their immediate context.”<sup>273</sup> Thus, the crux of this argument is to situate versions of “law” within their local context, which aims to connect linguistic elements within the actual legal practices undertaken. Moreover, as Anker asserts, “the point is not that these terms are key to any universal sense of law; they are merely a way into a “cycle of terms” in order to unpack their resonances and point to a web of ideas that structure the local legal sensibility.”<sup>274</sup>

I believe that Anker’s conceptualization of “law” clearly falls into the postmodern/critical camp as it does not attempt to find a stable and universal definition of law. Anker suggests a turn to using the language of a *nomos*, that law is a form of life for people within their own social spaces.<sup>275</sup> This imbues law with some normative quality<sup>276</sup> in that it is meaningful for and part of how people live. However, given the diversity of

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<sup>273</sup> Anker, *Declarations of Interdependence*, *supra* note at 92.

<sup>274</sup> *Ibid* at 93.

<sup>275</sup> Robert Cover, “The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative” (1983) 97 Harv LR 4 [Cover, *Nomos and Narrative*].

modern life, law is situated locally but is part of a broader normative horizon. In this way, law is communicable, and sometimes involves an “‘interlegality’ or ‘cross-cultural conversation’ that contributes to the development of both legal theory and meta-legal theory.”<sup>277</sup> For Indigenous law, this means that the subjective enterprise of law is bounded within a matrix of a number competing normative universes, including state law. As such, this often entails a “cross-cultural conversation” between Indigenous law and state law at moments of interaction or contestation.

Anker argues that a discursive and critical legal pluralism “allows for both state law and Indigenous law to be understood *as law* and highlights how they can, and already do, exist in a mutually constituting relation to one another.”<sup>278</sup> The problem inherent in interdependence is the displaced burden in that relationship, skewed toward the power and totality of state discourses. In this way, she argues that the independence of Indigenous law free from outside interference is no more logical or possible than the fiction of a unitary state law.<sup>279</sup> However, by recognizing the interdependence of legalities, we are able to constitute a new path forward in light of fact that neither site of law exists completely independent of another.

Her claim is that state and non-state law are implicated with each other, and that their engagement with each other constantly shapes and reshapes internal versions of law.

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<sup>276</sup> Contrast this with Tamanaha’s non-essentialist definition. Tamanaha’s “conventionalist” definition is criticized as it is missing a sense of normativity. It misses how and why law is important in people’s lives. It misses that law does not exist or emerge in a vacuum, but is rooted in people’s everyday lives. As Anker puts it, “[Tamanaha’s theory] is missing a sense of an ability to read the context in which people speak, and thus the difference between propositional statements that are simply logically operative, and performative ones that bring law to life in their making.” See Anker, *Declarations of Interdependence*, *supra* note 20 at 94.

<sup>277</sup> *Ibid* at 95.

<sup>278</sup> *Ibid* at 195.

<sup>279</sup> *Ibid* at 194.

However, Anker herself recognizes that colonialism skews the recognition project toward state-based versions of law. The “monopoly of sovereignty”<sup>280</sup> poses significant barriers to the full realization of a legal pluralist vision. If we accept a weak pluralist vision, then “engagement with Indigenous law takes place as recognition through the sociological gaze, [and] the pathologies of recognition will follow.”<sup>281</sup> Moreover, if we are to accept that judges have the ability to “choose” a law to apply in contests between state and non-state law, this approach appears “antithetical to legal pluralism itself.”<sup>282</sup>

Anker’s solution is a negotiated one, embodied in the practices of “political solutions.” For example, she offers the example of treaty making processes where Indigenous peoples and their normative commitments have a direct stake.<sup>283</sup> She states:

The alternative most often suggested is a negotiated one – whether at the large scale of a treaty or the small scale of community justice programmes, sentencing circles and so on – and usually referred to as the “political solution”, although we should see this also as very much a legal process. At the very least, institutional change is required to accommodate legal pluralism in a practical way, as Indigenous commentators have argued. However, we should not assume that judges actually do what they purport to do – fix a legal meaning and apply it to the facts. Discursive approaches would allow individual judicial decisions far less control over legal meaning and its finality, even as they authorize the enforcement of their decisions.<sup>284</sup>

As such, Indigenous law is constantly being constituted and re-constituted through its interactions with state law, and vice-versa. Anker’s key point is that actual points of interaction – for example, when Indigenous and common law conceptions of property contest in Aboriginal title cases – help to shape and re-shape methods of understanding

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<sup>280</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 98.

<sup>281</sup> *Ibid* at 99.

<sup>282</sup> *Ibid*.

<sup>283</sup> *Ibid* at 163.

<sup>284</sup> *Ibid* at 99.



law. She argues that both Indigenous legal obligations relating to land and state-based discourses are read anew during the cross-cultural conversation. The new legal meaning that emerges, then, is not an either/or situation, but rather new meaning read in light of the two differing conceptions of law. In Aboriginal title cases, the emergence of new legal meaning is then rooted in a discourse based on competing visions that are informed by the respective legalities of the participants in this cross-cultural conversation.

In this sense, Anker's theory is consistent with that of Klienmans and Macdonald in that law is not presumed to exist in watertight legal orders, but as an ongoing enterprise that reshapes legal meaning in light of discursive encounters between Indigenous peoples and the state. Neither iteration of law exists apart from the other as human beings are subject to multiple and competing normative universes. Anker rejects that law can be presumed to be a static entity that we then take and apply to a set of facts to produce a result, but rather law emerges from an ongoing production and reproduction of legal meaning. For the purposes of this thesis, I accept, and will build on, Anker's conceptualization of interdependent legalities which, I believe, is consistent with Macdonald's theorization of the multiplicity of normative identities carried by legal actors. As such, no one legal standpoint exists independent of the various other sites of normativity as our perceptions of legal normativity are shaped by a number of competing, overlapping, and interconnected sites and forces.

### 3.5 UNPACKING THE CLAIM TO A POSTMODERN LEGAL PLURALISM: FROM THE “MONOPLOIES OF LEGALITY” TO THE “CONTINGENCY OF LEGALITY”

*What is most important is to cease legislating for all lives what is liveable only for some, and similarly, to refrain from proscribing for all lives what is unlivable for some.*

Judith Butler<sup>285</sup>

This thesis has surveyed a number of different conceptions of legal pluralism, which, I argue, demonstrates its internal heterogeneity as a response to the nebulous assertions of legal centralism. Legal pluralists have differed in their approach to defining and analyzing non-state law, but all claim to offer a critique to the problematic assertions of legal centralism. However, in this section I seek to unpack the claim to a postmodern legal pluralism which I formulate in this thesis, drawing on the insights of the various scholars noted above, but also the insights of postmodern theory.

There is a strong relationship between legal pluralism and postmodernism. In fact, de Sousa Santos argues that legal pluralism itself is a postmodern phenomenon.<sup>286</sup> It is a reaction to the “utopian dream of unity or synthesis.”<sup>287</sup> This connection comes into focus when we view legal centralism as a project of a particular historical and social trajectory. As de Sousa Santos notes, modernism privileges the constitutional state as the “natural order.”<sup>288</sup> Given the connection between modernity and the rise of state law, I utilize postmodern theory to supplement critical versions of legal pluralism in

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<sup>285</sup> Judith Butler, *Undoing Gender* (New York, Routledge, 2004) at 8.

<sup>286</sup> Boaventura de Sousa Santos, “Law: A Map of Misreading. Toward a Postmodern Conception of Law” (1987) 14 *JL & Soc'y* 279 at 297.

<sup>287</sup> Desmond Manderson, “Modernism, Polarity, and the Rule of Law” (2012) 24 *Yale JL & Human* 475 [Manderson] at 483.

<sup>288</sup> De Sousa Santos, *New Common Sense*, *supra* note 191 at 95.

challenging the dominance of legal centralism by rejecting the ideals of truth, reality, and objectivity in law which seek to universalize the human experience.

Because state law maintains a particular claim as an irrefutable truth and a universal enterprise, this suggests that law – as a concept and an institution – is dependent on sovereign authority. However, the insights of postmodernism aid in challenging state law’s dominance by rejecting that it holds any claim to *truth* or *objectivity*. In this sense, state law’s claim to being *the* law arises not because of its superior claim to truth, but because of its superior strength.<sup>289</sup> The state has armies, police forces, and courts which serve to facilitate its vision of monistic authority and help to reproduce the majoritarian social order.

Given the insights of postmodernism, there is a “crisis of modernity” as both an intellectual tradition and a historical trajectory.<sup>290</sup> In order to overcome the explicit challenges of the modern era and its role in positioning legal centralism as a universal enterprise and a natural truth, a paradigmatic shift is required: de Sousa Santos argues for an “unthinking of law” as that which is coupled with the state.<sup>291</sup> As such, as will be argued below, the utility of postmodernism for legal pluralism is that it argues that there can be no objective truth to state law. Moreover, rather than being solely the product of “official” institutions, our experiences of law are filtered, subjective, and contingent.<sup>292</sup>

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<sup>289</sup> Devlin, Postmodernism, *supra* note 41 at 7

<sup>290</sup> Manderson, *supra* note 287 at 476 where Manderson argues that “[r]ight across Europe and in America, the “crisis of modernity” unleashed by that cataclysm profoundly undermined the faith of the West in its systems, mechanisms, structures, and institutions.”

<sup>291</sup> De Sousa Santos, New Common Sense, *supra* note 191 at 84.

<sup>292</sup> As Bryan Druzin asks: “What then are we left with when we consider the possibility that these legal principles are not extracted from immutable natural truths, but rather are largely subjective concoctions of the cultures that formulate them, specific to the values of that particular age?” See: Bryan Druzin, “Finding Footing in a Postmodern Conception of Law” (2012) 3:1 Postmodern Openings 41 [Druzin] at 43.

Given this contingency, a postmodern legal pluralism turns the locus of inquiry toward legal agents themselves in postulating that law is constructed and maintained through the interactions between legal actors and their various normative worlds. As such, recognizing the subjective nature and fluidity of law does not empty it of analytical purchase as a point of inquiry. Instead, it requires us, as legal scholars, to refine our approach to analyzing law.

Within the large corpus of scholarly work that has emerged, it may be impossible, and perhaps antithetical, to grasp a clear conceptualization of postmodernism. From my own reading of the postmodern literature, it appears that postmodernists do not hold universal understandings of what the concept is. As such, it may be difficult to grasp a coherent exegesis of postmodern law. However, as Richard Devlin argues, there are several “motifs” running through postmodernist thought that can be captured in an attempt to provide some lucidity to the concept.<sup>293</sup> I will summarize here these motifs and philosophical propositions for the purpose of connecting postmodernism to insights on law and legal pluralism.

As stated, there are four key motifs that emerge from postmodern theory: first, there is a historical and spatial dimension to postmodernism.<sup>294</sup> As Devlin postulates, there appears to be some overlap between 20<sup>th</sup> century capitalist societies and the emergence of postmodern thought: the rapid pace of technological advances, the movement away from industrialization, and the “mediaization” of society have created the impetus for important cultural shifts within the era of modernity.<sup>295</sup>

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<sup>293</sup> Devlin, Postmodernism, *supra* note 41 at 11.

<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid* at 12.

Bonaventura de Sousa Santos offers a historical analysis of the modern era, arguing that modern law was marked by the dual pillars of regulation and emancipation, which arose from Enlightenment intellectual knowledge and history. Modern law, as we understand it, encompasses both regulatory and emancipatory aspects: the principle of regulation is noted by the rise of the state's role in society and the promulgation of formalized rules and procedures. On the other hand, the pillar of emancipation is "constituted by the logics of rationality," which is marked by "the aesthetic expressive rationality of the arts and literature, the cognitive-instrumental rationality of science and technology, and the moral-practical rationality of ethics and the rule of law."<sup>296</sup> These emancipatory aspects of modern law highlight the role of law in advancing social goals. As Sieder notes,

[b]y codifying rights and setting out the obligations of states to uphold those rights, law raises the prospect that those rights will be enforced. In this sense it holds out a utopian promise and has long been invoked by the weak and marginalized – for example, appeals to the ideal of citizenship by those, such as women or slaves, who were systematically denied formal citizenship rights.<sup>297</sup>

However, as will be illustrated below, these dual or conflicting social goals illustrate the extent to which the project of modernity is (or was) "internally contradictory."<sup>298</sup>

De Sousa Santos argues that both the pillars of regulation and emancipation attempted to maximize their potential, thus designing conflicting social values. As such, within modern society we have an attempt to generate the maximization of the state or

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<sup>296</sup> De Sousa Santos, Postmodern Transition, *supra* note 14 at 81.

<sup>297</sup> Rachel Sieder, "'Emancipation' or 'Regulation'? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala" (2011) 40:2 *Economy and Society* 239 at 240-41.

<sup>298</sup> De Sousa Santos, Postmodern Transition, *supra* note 14 at 82. Moreover, de Sousa Santos argues that: "This double binding-of one pillar to the other and of both to social praxis-will ensure the harmonization of potentially incompatible social values, of justice and autonomy, of solidarity and identity, of equality and freedom."

the market, and, on the other side of the coin, the maximization of utopian projects, and calls for freedom and equality.<sup>299</sup> Accordingly, the nature of modern law was to simultaneously codify, legislate, and intervene, but also to emancipate human beings from domination. As a result, both pillars of regulation and emancipation become infused and blurred, and this infusion created conflicting social goals which stagnate progress and produce social unrest.<sup>300</sup>

Moreover, as Manderson notes, the Great War brought with it a crisis in modernity, and it “stood as the graveyard of not one but two nineteenth-century ideologies: romantic fantasies of unity and progress and positivist fantasies of logic and system.”<sup>301</sup> These conflicting social values, regulation by the state and the concurrent efforts to realize on the ideals of freedom and equality, brought a level of discontent with modern society. As such, post-war society brought with it a clash between regulation and humanity, as the more we came to understand ourselves as human beings the less faith we had that rules, systems, and logic could “save us from ourselves.”<sup>302</sup> That is, the more we regulated, the less confidence we had that regulation and formalization could achieve emancipation. Accordingly, a statist and centralist state could not achieve the emancipatory goals that were concomitant with the modern era.

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<sup>299</sup> De Sousa Santos, *Postmodern Transition*, *supra* note 14 at 82.

<sup>300</sup> As Eve Darian-Smith notes,

[w]hat is important to Santos is that [the pillars of regulation and emancipation] produce two main categories of knowledge in the paradigm of modernity. Over the past 200 years, knowledge-as-regulation won primacy over knowledge-as-emancipation, allowing it to recodify emancipatory knowledge in its own terms that had little to do with equality and freedom. This set up an uneasy equilibrium that in recent years has become unbalanced.

Eve Darian-Smith, “Power in Paradise: The Political Implications of Santos’ Utopia” (1998) 23:1 *Law & Soc Inquiry* 81 at 91 [citations omitted].

<sup>301</sup> Manderson, *supra* note 287 at 482.

<sup>302</sup> De Sousa Santos, *New Common Sense*, *supra* note 191 at 483.

Nevertheless, the modernist enterprise and the Enlightenment thought also brought with it the era of European imperialization and colonization. Linda Tuhwai-Smith argues that imperialism was not just a process of the dispossession of lands and resources, but also a process of colonizing knowledge and culture. She states that “Western knowledge and science are ‘beneficiaries’ of the colonization of indigenous peoples. The knowledge gained through [Indigenous peoples’] colonization has been used, in turn, to colonize [them] in what Ngugi wa Thiong’o calls the colonization ‘of the mind’.”<sup>303</sup> This engenders the “positional superiority of Western knowledge”<sup>304</sup> over Indigenous ways of being in the world. In this sense, in instances of colonization, Enlightenment claims to universality and rationality also necessitated a social praxis of the erasure of Indigenous language, culture, and laws.<sup>305</sup>

The paradigmatic shift from modernity connects to the second motif of postmodernism – that is “post” something. That is to say that it is “after” or “against” something, being modernity and the “false promises of enlightenment thought.”<sup>306</sup> Postmodernists reject the virtues of the period of modernity, its social and cultural practices, and the ideologies that sustain modernist thought. Devlin argues that:

...[postmodernists] question whether the ambitions of modernity - and the correlative faith in humanist universals such as "mastery", "growth", "development" and "progress" - are as desirable or sustainable as we might once have thought. Specifically, they highlight our stalled economies and interrogate the price of our so called civilization. The concern seems to be that for all our

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<sup>303</sup> Tuhwai Smith, *supra* note 7 at 59.

<sup>304</sup> *Ibid.*

<sup>305</sup> See also the work of Frantz Fanon who shows how Enlightenment values of rationality and humanism necessitated a pathological need for the colonized to adopt the worldviews and view themselves through the structures of power which perpetuate their domination. See: Frantz Fanon, *Black Skin, White Masks*, translated by Charles Markmann (New York: Grove Press, 1967), Frantz Fanon, *The Wretched of the Earth*, translated by Richard Philcox (New York: Grove Press, 1963) [Fanon, *Wretched of the Earth*].

<sup>306</sup> Devlin, Postmodernism, *supra* note 41 at 12.

“advancements”, we have ended up with a culture of monotony, banality and sameness.<sup>307</sup>

Thus, postmodernity represents a break with modernist thought, and questions the use of “meta-narratives,” which seek to provide hyper-explanations of society and politics in narrow and objective terms. Arguably, legal centralism takes the form of a “meta-narrative” given its claim as an objective method of regulation over all aspects of social interaction. By claiming to be *the* account of reality, such as state law’s claim to be *the* account of law, these meta-narratives marginalize and silence other experiences.<sup>308</sup>

In drawing on noted postmodernist Jean-François Lyotard, Devlin suggests that postmodernists argue against such “meta-narratives” for they claim a monopoly to “truth” at the expense of non-majoritarian narratives. Postmodernist thought challenges the validity of meta-narratives as explanations which diminish, and are ignorant toward, the inherent diversity in society. This silences and delegitimizes the worldviews of minority communities. In claiming to be “objective,” these meta-narratives suppress, rather than nurture, the diversity of social communities. An injustice occurs in the selection of one narrative over another. For instance, in the context of Indigenous peoples, Tuhwai-Smith

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<sup>307</sup> Devlin, Postmodernism, *supra* note 41 at 13.

<sup>308</sup> *Ibid* at 15. See also the idea of the creation of the “*nomos*” and the use of narratives offered by Robert Cover. Cover argues that there are multiple normative worlds (a concept which he calls the *nomos*) within society that help define and influence our commitments to the world. Law, he argues, is situated within narratives that help filter how we experience the legal world. Cover argues that:

To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the “is” and the “ought,” but the “is,” the “ought,” and the “what might be.” Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.

See: Cover, Nomos and Narrative, *supra* note 275 at 10. Thus, narratives help provide intelligibility to how we see the world, and, as postmodernists argue, the conceptualization of “meta-narratives” thus pose legitimacy problems in seeking to offer “super explanations of reality,” because the legal meaning provided by narratives are a product of our local communities.



notes that “[t]he globalization of knowledge and Western culture constantly reaffirms the West's view of itself as the centre of legitimate knowledge, the arbiter of what counts as knowledge and the source of 'civilized' knowledge.”<sup>309</sup> As such, modernism ensures the acclamation of dominant narratives to the detriment of non-majoritarian experiences and discourses. The effect of this selective process is to render alternative narratives unintelligible for the purpose of examination. In response, Lyotard calls for the “justice of multiplicity” which seeks to nurture the diversity of narratives which exist as explanations of the relationship between human beings and the world around them.<sup>310</sup>

There are also several philosophical traditions associated with postmodernism which are related to its skepticism toward dominant discourses and its exaltation of the experiences of the alterity: first, postmodernism is a challenge to the very idea that there can be a concept of “reality.” Instead, postmodernism argues that our experiences are filtered through our social context and subjectivities which make knowledge “a (once removed) re-presentation rather than an automatic experience.”<sup>311</sup> Thus, there can be no objective sense of reality as any account of “reality” is mediated through our social experiences, our culture, our values, and so on. The effect of this philosophical tradition is to shatter any notion of an “objective reality” from which other normative experiences can be measured. For example, objectivity is merely a guise for the West’s colonization of its own experiences as “truths.”<sup>312</sup> As a result, postmodernists claim that there are a

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<sup>309</sup> Tuhiwai Smith, *supra* note 7 at 64.

<sup>310</sup> Jean-François Lyotard, *The Differend: Phrases in Dispute*, trans. G. Van Der Abbeele (Minneapolis: University of Minnesota Press, 1988) at xi, as cited in Devlin, *Postmodernism*, *supra* note 41 at 17.

<sup>311</sup> Devlin, *Postmodernism*, *supra* note 41 at 13.

<sup>312</sup> As Tuhiwai Smith notes, “[t]he nexus between cultural ways of knowing, scientific discoveries, economic impulses and imperial power enabled the West to make ideological claims to having a superior civilization. The 'idea' of the West became a reality when it was re-presented back to indigenous nations through colonialism.” See: Tuhiwai Smith, *supra* note 7 at 69.

plurality of different, equally valid, experiences. This denotes a shift to the embracement of “otherness.”<sup>313</sup>

Second, postmodernism involves significant deconstruction of dominant cultural and social practices. Given that postmodernists reject the idea that there can be unfiltered experiences, “[postmodernism] posits that social structures and narratives are so pervasive that we can no longer be confident in the humanist faith in an essentialist, presocial, coherent, unified and autonomous self, because an ontology of this kind is based on ‘the fantasy of autogenesis.’”<sup>314</sup> Thus, this profound level of skepticism with humanism produces a rigorously critical theory that challenges even our very notions of the individual, and concepts such as freedom and autonomy. This philosophical tradition posits a formidable challenge to modernist values of reason and the liberal glorification of “rights.” In drawing on Foucault, Litowitz suggests that postmodernism views the concept of “rights” with skepticism as they can serve as a smokescreen for unjust power relations.<sup>315</sup>

Third, postmodernists are skeptical of liberal society’s celebration of “‘freedom’, ‘liberty’, ‘choice’ and ‘opportunity’, positing instead that given the twentieth century's less than impressive history...it may be better to think in terms of ‘imperialism’, ‘colonization’, ‘domination’ and ‘control.’”<sup>316</sup> Thus, postmodernism tends

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<sup>313</sup> Devlin, Postmodernism, *supra* note 41 at 14.

<sup>314</sup> *Ibid.*

<sup>315</sup> Douglas Litowitz, *Postmodern Philosophy and Law* (Lawrence, KS: University of Kansas Press, 1997) [Litowitz] at 31.

<sup>316</sup> Devlin, Postmodernism, *supra* note 41 at 14. See also Litowitz who suggests that postmodern legal theorists promulgate radical antifoundationalism. That is, postmodernists suggest that the foundations upon which the liberal system are built become untenable. “Postmodernism wants to problematize (and, in extreme cases, reject) these foundations as if they no longer deserved the sanctity that has been lavished on them over the past few centuries.” See Litowitz, *supra* note 315 at 34-35.

to extol the celebration of the alterity and otherness, and it embraces the “contingencies of legality.”<sup>317</sup> Connected to this ideological commitment is the fourth philosophical turn of postmodernism, which requires a reconceptualization of the notion of power: “[s]pecifically it is proposed that we should abandon our idea of power as concentrated, top down and unidirectional, and replace it with a dispersed, pluralistic and multi-directional conception of power.”<sup>318</sup>

Consequently, ideas of power become dispersed and deconstructed, which allows for the emergence of alternate (or suppressed) discourses of power. The postmodern project decenters and relativizes modernist legal concepts which privilege objectivity. Moreover, it challenges the foundational liberal values that underpin our political and legal system. In so doing, and this is the final philosophical motif of postmodernism, the virtue of the “discursive paradigm” emerges which gives attention to language and linguistics in terms of thinking of how to examine our social experiences.<sup>319</sup>

It is worthwhile to think about these ideas in the context of law. What can postmodernism say, if anything, about law, other than that there can be no rational concept of law other than a multiplicity of multiplicities? Is postmodernism so contingent and fragmented that it says nothing about law?<sup>320</sup> In response, de Sousa Santos postulates that there is ground within postmodernism to conceptualize law with a “pluralist view of

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<sup>317</sup> Costas Douzinas, Peter Goodrich & Yifat Hachamovitch, eds, *Politics, Postmodernity and Critical Legal Studies: the Legality of the Contingent* (London: Routledge, 1994) [Douzinas, Goodrich and Hachamovitch] at 1.

<sup>318</sup> Devlin, Postmodernism, *supra* note 41 at 15.

<sup>319</sup> *Ibid.*

<sup>320</sup> See, e.g., the critiques of Emmanuel Melissaris in Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (London: Ashgate, 2009). Melissaris’ argument is that postmodern versions of law are too contingent that they reduce all social phenomena to law.

essences, of a controlled dispersal of social structures.”<sup>321</sup> Differentiation, de Sousa Santos argues, is neither “infinite nor chaotic.”<sup>322</sup> The idea that social beings are configured by different subjectivities or networks, and that the idea of the “self” is fragmented, does not empty the idea of law of any and all value. Rather, it acknowledges that human beings are sources of internormativity who are often subject to a complex web of contingent and localized normative forces which help to shape how they view law.

In this vein, de Sousa Santos calls for an “end of the monopolies of legality.”<sup>323</sup> As such, postmodern theorists recognize that there can be no objective foundation to law akin to state law’s claims to monism and universality “because all knowledge is contingent on social convention.”<sup>324</sup> This is also consistent with the celebration of the “contingency of legalities.” As Douzinas, Goodrich and Hachamovitch state, “[t]he contemporary contingency of legality is aligned to the prolonged collapse of certain specific beliefs in a positivized and closed world of abstract legal rules.”<sup>325</sup>

While modernism confines conceptualizations of law to domination and the canonization of rules and procedures, postmodern law, on the other hand, recognizes that there are no immutable truths in law.<sup>326</sup> As such, there can be no universal concept of

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<sup>321</sup> De Sousa Santos, Postmodern Transition, *supra* note 14 at 106.

<sup>322</sup> *Ibid.*

<sup>323</sup> *Ibid* at 110.

<sup>324</sup> Druzin, *supra* note 292 at 46.

<sup>325</sup> Douzinas, Goodrich and Hachamovitch, *supra* note 317 at 1

<sup>326</sup> Moreover, it is important to note that scientification of society marked by modernism also brought about the need to classify Indigenous peoples “alongside the fauna and the flora.” Moreover:

These systems for organizing, classifying and storing new knowledge, and for theorizing the meanings of such discoveries, constituted research. In a colonial context, however, this research was undeniably also about power and domination. The instruments or technologies of research were also instruments of knowledge and instruments for legitimating various colonial practices.

law. Rather, law is contingent, local, and based on our subjective experiences as internormative beings. The result of the glorification of contingency is that colonial and imperial mechanisms of dominance are placed into question because of their claims to totality and universality, which, as postmodern theory claims, serve to repress more localized forms of legal normativity. As such, postmodernist theory places into question the legal institutions, actors, and rules which promulgate adherence to modernist ideology, while arguing for “law’s morality of the contingent.”<sup>327</sup>

Rethinking legal pluralism in this way provides an active site for what de Sousa Santos calls the “democratization of law.”<sup>328</sup> Law becomes a site (or sites) of multiplicity (or multiplicities). However, these sites are shifting, never completely independent, and open to reconstruction. The meaningfulness of law is found in the legal agents for whom it forms part of their normative experiences. As such, conceptions and understandings of law are a product of the interplay of differing and interconnected forces. Accordingly, law is a product of local diversity and contingency, and is nothing more than a localized referent which is made meaningful through discursive patterns of interaction between legal agents, their communities, and outside legal forces.

Moreover, as Minda argues, postmodernists bring attention to the exclusionary effects of modern discourse by bringing attention to the “relationship between knowledge

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See: Tuhiwai Smith, *supra* note 7 at 59. In this way, Indigenous epistemology because imperialized and subjected to science rather than actively participating in it. It brought about the colonization of ideas and culture as much as the colonization of land and resources. As such, Eurocentric thought permeated the process of colonization, and this included laws. Thus, Eurocentric law became “true law” to the detriment of more localized forms of law.

<sup>327</sup> Douzinas, Goodrich and Hachamovitch, *supra* note 317 at 24.

<sup>328</sup> De Sousa Santos, Postmodern Transition, *supra* note 14 at 111.

and power.”<sup>329</sup> In the context of Indigenous law, the result of the relationship between knowledge and power produce claims to “objectivity” and “universality” which have, in fact, brought about the imperialization of Indigenous culture and ways of being in the world.<sup>330</sup> These postmodern considerations guide us to a particular understanding of law that is subjective and fluid, and which challenges the potency of the state law paradigm. The experiences of dispersed legalities provide the potential to “unthink law” in examining the concept (or different conceptions) of law in a new light.

I argue that a postmodern conceptualization of law offers the most emancipatory potential for Indigenous law. It provides a philosophical backdrop upon which to build a version of a legal pluralism for the purposes of decomposing state law’s hegemony, which, I argue, restricts the potential of Indigenous legalities.<sup>331</sup> Law, as a subjective enterprise, emerges from the jurisgenerative capacity of Indigenous peoples and their relationship with the broader world around them. Consequently, Indigenous law forms part of the constellation of legalities which compete for normative space. This implicates legal normativity in the everyday practices, relationships, and knowledges of Indigenous peoples. As such, conceptualizing normativity in this manner views “law not as artefact

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<sup>329</sup> Gary Minda, *Postmodern Legal Movements* (New York: New York University Press, 1995) [Minda] at 231.

<sup>330</sup> Tuhiwai Smith states that “[b]y the nineteenth century colonialism not only meant the imposition of Western authority over indigenous lands, indigenous modes of production and indigenous law and government, but the imposition of Western authority over all aspects of indigenous knowledges, languages and cultures.” Tuhiwai Smith, *supra* note 7 at 64.

<sup>331</sup> Moreover, Anishinaabe legal scholar Aaron Mills asserts that:

For many indigenous peoples, including the Anishinaabek, truth is generally considered a relative concept. It isn’t that there’s no such thing as truth, but rather that truth can never be understood outside of agency—it inheres always in a given perspective, based in lived and inherited experience.

See: Mills, *supra* note 139 at 111.

and instrument, but law as process and aspiration.”<sup>332</sup>

In coming to understand a postmodern version of law for the purposes of examining legal pluralism, this section will examine four key themes which build on the insights of postmodernism, as well as the critical pluralist theory of Macdonald, Anker, and, to a lesser extent, Tamanaha. These themes posit that law has no essential characteristics. Instead, law is embedded in the constructive capacity of legal actors. Moreover, the version of legal pluralism developed herein acknowledges the interdependence of state and non-state law, and argues that our legal subjectivities are often impacted by heterogeneous normative forces, including more formalized forces (such as state law) and more localized forces (such as Indigenous law). In this way, legal actors interrelate with a multiplicity of normative forces (from the state all the way down to the local level) which impact how they come to understand legal phenomenon. Finally, it argues that legal centralism is a product of a particular social and intellectual history and, as such, does not maintain a normative claim to truth. However, modern law’s role in colonization and maintaining dominion over Indigenous peoples requires deconstructionist praxis for the full realization of an emancipatory framework of legal pluralism.

### **3.5.1 BARRIERS TO POSTMODERN THINKING: RESPONDING TO CULTURAL FRAGMENTATION**

I pause here to consider the consequences of postmodernism and its impact on a particularly marginalized group. At the realpolitik level, cultural categories provide a potent method for subaltern groups to present their claims and find common ground to

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<sup>332</sup> Macdonald and McMorrow, *supra* note 11 at 322.

confront the injustices they face as peoples. In this vein, I am not deconstructing the very notion of being Indigenous, though that may seem like a necessary consequence of postmodern law. What I am deconstructing is the idea of state law *itself* claiming to be an objective truth, or an enterprise other than a product of a particular historical, cultural, and social trajectory.

In expounding the conceptual barriers of postmodernism, Wicke suggests that because postmodernism challenges the idea of a coherent or objective identity – like, for example, “female” or “Muslim” – this contingency obstructs the positioning of a unified legal identity – like “female” or “Muslim” – which diminishes the ability of underprivileged social groups to take advantage of the legal system to pursue justice claims.<sup>333</sup> Wicke states:

Postmodern theorizing helpfully can point out the fluid borders of such a staging and the ways they overlap with legal norms; nonetheless, to efface or erase the legal subject, however much predicated on an illusory unity, singularity, intentionality, would be an enormous political loss.<sup>334</sup>

However, as Mary Joe Frug points out in response, the error of this response to postmodernism is that Wicke suggests that the subject becomes “postmodernized” before they even come before the law.<sup>335</sup> In this way, Wicke problematically assumes that subjects have already been “fragmented,” which then limits their potential justice claims before courts who require a unified and coherent identity.

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<sup>333</sup> Jennifer Wicke, “Postmodern Identity and the Legal Subject” (1991) 62 U Colo LR 455 [Wicke] at 461-466. For example, we see this in rights-based approaches where members of an underprivileged group come together under a coherent legal identity to pursue a claim, like the struggle for the rights of women. However, postmodernism would likely argue that there is no coherent identity of being a woman as women experience their domination in many different ways. For example, racialized women experience oppression in a different way than white women. See: Mary Joe Frug, “A Postmodern Feminist Legal Manifesto” (1991) 105 Harv LR 1045.

<sup>334</sup> Wicke, *supra* note 333 at 462.



As such, Wicke focuses on the contingencies of the subject rather than the demands which liberal legal institutions impose on legal claimants. That is, dominant legal institutions require that legal subjects come before them with a coherent legal identity, which elides the fact that social groups are not homogenous and unified, but heterogeneous and varied. As such, as Frug points out, Wicke operates on the “assumption that law is more powerful than postmodernism, that it has more to offer [...] groups [seeking emancipation from the dominant order] than postmodernism.”<sup>336</sup> In this sense, Wicke dismisses the idea that the legal system’s focus on demanding conformity with a coherent identity is less problematic than postmodernism’s deconstruction of the legal subject.

However, Wicke’s arguments offer an astute conceptual hurdle for postmodernism; indeed, it is the danger of relying on postmodernism’s lure toward deconstruction. In her article, Wicke focuses on various examples to prove how the loss of coherent identity would fracture the pursuit of legal rights. As one example, Wicke explores the attempt by the Mashpee Indians on Cape Cod to reclaim land from the New Seabury Corporation in a 1976 court decision. She argues that the reason that the Mashpee Indians lost was because they couldn’t meet the definitional requirements of a “tribe” under law to be afforded “Native American status.”<sup>337</sup> She utilizes this example to show how the fragmented legal subject has no recourse before the law which doles out “rights” and status largely to coherently-defined groups.

Wicke argues that in the context of self-determination:

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<sup>335</sup> Mary Joe Frug, “Law and Postmodernism: The Politics of a Marriage” (1991) 62 U Colo LR 483 [Frug] at 484.

<sup>336</sup> *Ibid* at 484.

To seek to dissolve [...] "rights" away under the acid bath of postmodern multiplicity simply erases the grounds for self-determination, which can only be coded as an identity (collective or individual) possessing rights. Self-determination would seem to entail the embrace of legal subject-hood, as the vocabulary of rights may still be the only viable means to secure that selfhood. A postmodernism that ignores or deplors this necessity reveals its supposition that "rights" are already adequately secured and that the legal arena cannot be bent to a variety of discursive purposes.<sup>338</sup>

However, as Frug notes, "Professor Wicke's use of these cases in her argument indicates to me an exaggerated respect for the reliability of legal rights as well as a mistaken impression that change would necessarily make law less potent."<sup>339</sup> In this way, Wicke presupposes that "rights" can be assigned by the dominant polity as a means of pursuing justice, and without a coherent legal identity, the legal system simply cannot do so. However, she ignores the irony in such a claim: in order for Indigenous peoples to be recognized by the broader political and legal apparatuses, they must conform to a coherent identity which the dominant group can recognize in order to be accorded "rights" that should exist for them regardless of whether a coherent legal identity can be carved out. In this sense, she caves to thinking that a rights-based liberal framework is somehow the *sine qua non* of justice or emancipation.

The example of the Mashpee Indians that Wicke uses is tenuous. While there may be a coherent enough "Indian" identity for the practical purpose of pursuing legal "rights," this ignores the complexity of forces which sustain Indigenous identity, and may end up essentializing the "Indian" legal subject.<sup>340</sup> Postmodernism, however, allows us to

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<sup>337</sup> Wicke, *supra* note 333 at 465-466.

<sup>338</sup> *Ibid* at 467.

<sup>339</sup> Frug, *supra* note 335 at 487.

<sup>340</sup> As Manuhua Barcham explains:

recognize that fragmentation is not detrimental to justice claims, but rather requires a reformulation of the processes through which we adjudicate claims. Further, postmodernism interrogates what we come to see as objective “truths,” whether those “truths” are pre-inscribed identities (like “Indian”) or what we come to understand as “law” for the purposes of adjudication. Instead of requiring strict definitional requirements of what constitutes an “Indian,” which can then be accorded liberal “rights,” postmodernism allows us to instead recognize the internal heterogeneity of such identities. In each case, identities are anchored in something that is “real” or “true” to those specific groups (or whichever process a group comes to self-define itself as Indigenous), but there can be no *objective* or *privileged* identities. This, I argue, expands the ability for law to be reactive to contingency and heterogeneity.

However, if we shift the focus inwards to the legal structures that subordinate these groups in the first place, we see that the focus of deconstruction should be the legal system itself. In this way, the differences underlying particular social groups themselves are celebrated as postmodernism recognizes that legal subjects are internormative creatures. Recognizing that individuals are constructed by a concatenation of different forces, to my mind, provides greater emancipatory potential. As Frug argues, as presently situated, “[l]aw requires all legal claimants to assume a particular posture – a partial identity – in seeking judicial assistance; we must leave aside much of the multiplicity and

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Theorists and practitioners alike have created and reified an ahistorical idealization of the indigenous self whereby the constitution of oneself as an ‘authentic’ indigenous self has been conflated with special ahistorical assumptions concerning the nature of indigeneity, a process intricately linked to the continued subordination of difference to identity.

See: Manuhaia Barcham, “(De)Constructing the Politics of Indigeneity” in Duncan Ivison, Paul Patton & Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: University of Cambridge Press, 2000) at 137-8. As such, the experiences of Indigenous peoples are not always homogenous, and can vary quite widely.

complexity of our lives in order to engage in legal discourse.”<sup>341</sup> As such, the dogmatic nature of modern legal rules and institutional processes fails to recognize the inherent diversity in society.<sup>342</sup> Consequently, law must become adaptable to contingency and subjectivity rather than defensive against it.

However, there is a certain logic to Wicke’s arguments about the potential theoretical and instrumental dangers inherent in the fragmentation of the legal subject. If we take for example the doctrine of Aboriginal title, postmodern fragmentation may hinder the pursuit of a successful title claim as a colonial court may be unsure to whom it is granting title. There are, of course, political dimensions to assuming coherent identities as leaving identities open-ended (or “fragmented”) may have unintended consequences, such as the according of “rights” or legal “status” to those who do not share mutual characteristics. This is especially so in the context of colonized peoples as it may be an affront to suggest, for example, that those who have not faced subjugation somehow share legal status based on historical exclusion.<sup>343</sup> As such, I hesitate in positing the absolute value of postmodernism for the purposes of examining legal pluralism.

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<sup>341</sup> Frug, *supra* note 335 at 487.

<sup>342</sup> This is important in the Indigenous context. As many scholars note, Indigenous identity is not fixed as many Indigenous peoples create and sustain their identities in different ways. In this sense, Indigenous peoples are not a unitary homologous unit but rather diverse. As Patrick Macklem notes, “Native difference is denied where its acceptance would result in the questioning of basic premises concerning the nature of property, contract, sovereignty or constitutional right. Native difference is acknowledged where its denial would achieve a similar result.” Patrick Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1991) 36 McGill LJ 382 at 392

<sup>343</sup> For example, after the Supreme Court of Canada’s decision in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, there was some concern about how the Supreme Court framed who may qualify as Métis. For example, Chris Anderson argues that the Court relied on an ahistorical foundation of “Métis-as-mixed” definition rather than personhood or self-identification. He asks, “if Métis identity really is simply about mixed aboriginal and non-aboriginal ancestry, can a distant ancestor located in an archival document or even a DNA test now serve as bases for adjudicating claims of Métis identity rather than culture, community or link to the Métis people?” See: Chris Anderson, “The Supreme Court ruling on Métis: A roadmap to nowhere”, *The Globe and Mail* (April 14, 2016) online: <<http://www.theglobeandmail.com/opinion/the-supreme-court-ruling-on-metis-a-roadmap-to-nowhere/article29636204/>>.

However, for the purposes of this thesis, I argue that there are particular *insights* which may be drawn from postmodern theory that aid in understanding a view of legal pluralism which understands and acknowledges the heterogeneity and cultural contingency of law.

Accordingly, the purpose of a postmodern view of law, I argue, is to recognize that there can never be any Truth to law, with a capital “T”. However, as Druzin argues, while there does not exist any objective truth, in considering that our values arise from “our own subjective constructions, or, in the terminology of Foucault, that we create entire belief structures through the ‘discourses’ through which we engage the world,” these processes do create value.<sup>344</sup> As Druzin states, it is not a direct denial of “things in themselves. It is not solipsism.” He argues that:

[Postmodern law is not] a complete denial of the objective validity of the value systems we construct around the external world. That is, the views that proliferate in relation to the objective world. Thus, as there is no ‘real’ in this sense, there is simply no hope of objectivity, only perspective. All we can ever know is one particular view as an alternative for another. And we are forever swimming in these perceptions.<sup>345</sup>

As such, I argue that this is not a denial of the “realness” – that is, the meaningfulness – of cultural or contingent views for non-majoritarian groups. It is not to suggest that these cultural constructions have no value. Rather, postmodernism celebrates the contingencies inherent in social and legal life, and recognizes that our subjective identities are formed through our interactions with a myriad of different forces, whether they be institutional, community-based, or cultural.

Many fear the disembodiment of the subject within postmodern thought. That is not what I propose here. Postmodern law, I argue, instead recognizes that our subjective

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<sup>344</sup> Druzin, *supra* note 292 at 47.

<sup>345</sup> *Ibid.*

identities are constructed by a concatenation of a number of different social forces<sup>346</sup> that create and sustain our perceptions of reality. What postmodern law challenges is the idea that there can be *one* reality, being the modern legal subject, a largely abstracted and objectified being, which neither reflects nor privileges the subjective experiences of particular groups. As Coombe posits, “[s]ubjects, after all, are not made from whole cloth but are forged in social practices. Identities are emergent from political struggles and the transformations effected by new identifications.”<sup>347</sup>

There are perhaps utopian connotations to a politics of non-identity,<sup>348</sup> which, to my mind, is not the denial of identity *qua* identity, but the denial of an *objective* or *privileged* identity. As Coombe argues:

[A postmodern polity] would not posit a privileged subjectivity but enable subjectivities to emerge continuously from encounters with difference, opening up sites for identity's alteration and community's contestation in restless quests for recognition and connection. Such quests would never be finally realized, however, because alterity is always and ever emergent.<sup>349</sup>

Objectivity stifles agency and encourages assimilation, and it is only through a rejection of objectification that there can ever be emancipation from the relations of domination and colonization.<sup>350</sup> There can be no objective truth; rather, there exist a number of divergent *truths* about law, all of which are regarded in their localized spaces as real.

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<sup>346</sup> Thanks to Prof. Richard Devlin for helping me work through some of these issues. See also Richard Rorty who argues that “[t]he crucial move...is to think of the moral self, the embodiment of rationality, not as one of Rawls’ original choosers...but as a network of beliefs, desires, and emotions with nothing behind it – no substrate behind those attitudes.” See: Richard Rorty, “Postmodernist Bourgeois Liberalism” (1983) 80:10 *The Journal of Philosophy* 583 at 586. The self, then, is a product of a number of forces rather than an objective “blank slate.”

<sup>347</sup> Rosemary Coombe, “Finding and Losing One's Self in the Topoi: Placing and Displacing the Postmodern Subject in Law” (1995) 29 *Law & Soc'y Rev* 599 [Coombe] at 607.

<sup>348</sup> Coombe, *supra* note 347 at 607.

<sup>349</sup> *Ibid.*

Accordingly, there are no universal perspectives, but rather a host of historical and contingent perspectives situated in local communities which are nevertheless “real” to those who inhabit and create them. As Druzin notes, “[w]hatever perspective the individual or culture engages in, takes on the illusion of truth for that individual or culture.”<sup>351</sup>

Druzin explains objectification with the metaphor of Bartley, a man who is deathly afraid of unwashed grapes. While his fear seems objectively invalid, that does not make his experience less real. Druzin states that “[w]hile his value system may not reflect what we understand as real, his fear is very real. We cannot deny this fact, no more than we can tell a man who hears beauty in a particular piece of music that it is not beautiful.”<sup>352</sup> The idea is not that there is no truth for particular groups, but that there is no *objective* truth from which all of society can be compared.

As such, the utility of postmodernism for legal pluralism is the denial that law is anything other than contingent and fluid. Accordingly, a postmodern view of law rests on the assumption that there exist a number of normative forces within society, which develop from different sites and present themselves in different ways, whether textual or not, but which particular legal actors construe as legal. For essentialists, this cannot be. Law is either ‘x’, or it is ‘y’. It cannot be both. Postmodernist versions of law reject this notion, and accept that law can be both ‘x’ and ‘y’. The meaningfulness of law is not found in its adherence to objective criteria. Rather, law is an organic construction, rooted

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<sup>350</sup> See also, Pamela Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Vancouver: Purich Publishing, 2011) where Palmater argues for the development of an Indigenous identity at the Indigenous level – in communities, families, and nations, rather than resorting to singular identity markers.

<sup>351</sup> Druzin, *supra* note 292 at 47.

<sup>352</sup> *Ibid* at 48-9.

in human action and relationships, and its meaning is both diversified and contestable.

This means that the “truth” in law – if it can be called that – is only tied to those particular subjectivities which are parlayed as “truths” without one being (metaphysically speaking) superior to another. In relation to the example proffered above of Bartley,

Druzin states:

If we could step beyond these patterns of belief that bind us to the blind acceptance that our values are self-evident truths, we would see clearly that, in the final analysis, our value system is wholly relative and no less arbitrary than Bartley’s.<sup>353</sup>

In this sense, our “value system” – that is, our beliefs in what is law and what is not law – are constructed and meaningful only to us. This does not mean that they possess no value because they are tied to our subjective understandings. The purpose of a postmodern legal pluralism is to step outside of our fortifications of objective and universal claims to law to show that there are no inherent “truths” in state law discourses, which are made up of majoritarian ideals and ideologies. Rather, multiple realities about law can be equally valid.

### **3.6 THEMES OF A POSTMODERN LEGAL PLURALISM**

The “themes” that I articulate in this section are drawn from the insights of postmodernism and critical legal pluralist scholarship. They are an attempt to espouse normative frameworks which arise from postmodernism’s embracement of antifoundationalism, the recognition and celebration of contingency and subjectivity, and the rejection of objectivity and essentialism. Specifically, by challenging state law’s claims to objectivity, truth, and domination, I aim to un-privilege state-based

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<sup>353</sup> Druzin, *supra* note 292 at 50.



conceptualizations of law and refocus attention on previously marginalized legal orders. In doing this, I seek to provide a framework that can be used when scholars or policymakers approach the interaction of state and Indigenous law. I hope these insights can help to fashion a more decolonized and de-Westernized understanding of the creation of legal normativity.

### **3.6.1 THEME 1: LAW HAS NO ESSENTIAL CHARACTERISTICS**

Much to the chagrin of many legal scholars and jurists, law has no essence.<sup>354</sup> Law, even pluralized law, is not bounded by particular characteristics or definitions. Seeing law as a social fact that exists externally to legal agents limits the possibility of a legal pluralist analysis by reducing what we can observe as legal phenomena to what we perceive as essential in terms of Western liberal discourse. Conversely, a postmodern legal pluralism recognizes the inherent complexity of law: it is a human-oriented practice that emerges not just from the prescription of rules, statutes, and cases, but from the normativity which emerges from human interaction. Any conception of law cannot be held out as “objective” as any such measure is invariably rooted in Eurocentric visions of the world. A more nuanced understanding of law as a reflection of social reality recognizes its contingency: many different cultures develop legal obligations which are not reflective of Westernized ideals or ideologies, but that does not lessen or deter their normative and jurisgenerative capacity and authority.

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<sup>354</sup> Tamanaha, Non-Essentialist Legal Pluralism, *supra* note 51 at 313.

Law is a living<sup>355</sup> practice, developed and sustained in our relationships and interactions with the world around us. Simply defining law in terms of a particular essential characteristic – such as coercion, power, or violence<sup>356</sup> – limits any analysis of law as it serves to conceal the many varied formations of non-state law. For the purposes of this thesis, a non-essentialist conceptualization of law allows for a more exhaustive analysis of non-state legalities, and it recognizes the inherent diversity in the many

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<sup>355</sup> I take this from the title of John Borrows chapter, John Borrows, “Living Law on a Living Earth: Aboriginal Religion, Law, and the Constitution” in Richard Moon, *ed.*, *Law and Religious Pluralism in Canada* (Vancouver: University of British Columbia Press, 2008).

<sup>356</sup> I pause here to again respond to the idea that Indigenous law cannot be viewed as law because there is no enforcement mechanism *qua* Western institutional violence, whether it be the courts or police. As I have stated earlier in this thesis, often we can look to the fact that these legal systems are operating to see that they are effective without consciously looking for an enforcement mechanism. Interestingly, Professor Henderson responds to this by looking back into history upon some of the first encounters between Europeans and Indigenous peoples. He states that European discoverers commented on the personal liberty of Indigenous peoples and the fact that they had effective societies without monarchic rulers. However, these early explorers made no attempt to understand the rich legal traditions at work and disregarded them as presocial and archaic. For Hobbes, the natural state of man was chaos and human beings needed to be ruled so that an individual could be protected from others. As such, Henderson argues that:

The indigenous people came to be seen as either governed by pure arbitrary will...or living in a rude democratic chaos...These theories were constantly contradicted by the abundant evidence from their own writings for the existence of routine, orderly, customary processes, especially in the area known to English law as family law. Despite this, almost all foreign observers agreed that the First Nations people lacked systematic, positive law.

This theory had certain self-serving implications. If First Nations had nothing resembling English laws and institutions, then they had nothing, at least not until they acquired the English ways... The absence of law therefore implied an absence of scarcity. The "fact" that Indians had no law conveniently proved that they would not mind giving up at least a portion of their lands to the English...

With some pride, Frenchmen and Englishmen looked upon their own laws as the most rational, efficacious, and perfect in the whole world; hence the crown in each case was initially uncritical of any proposals to transplant English legal traditions alongside Aboriginal societies [footnotes omitted].

Henderson, *First Nations Legal Inheritances*, *supra* note 148 at 3-4. The point here is that if we look only to institutional violence/rule as the source of law we obfuscate the worldviews of people who live by different means, and whose social structures are established according to differing ways of life. This does not minimize their “legality,” but instead requires us to have a more robust understanding of law cross-culturally.

variations of Indigenous law.<sup>357</sup> Envisioning law in this manner is a form of resistance against colonial knowledge. As Henderson reminds us:

The knowledge base of the First Nations remains mostly in indigenous worldviews, languages and rituals. Learning them is an intimate process which takes time and patience. Not unlike learning a new language, there are no shortcuts to understanding the First Nations' legal inheritances. Our learning process, however, must take the non-Native beyond language, into the deep structure of another worldview. And before all else, one must be prepared to recognise that First Nations had their own legal systems, before the arrival of the Europeans, and that they still do.<sup>358</sup>

Henderson's point is that from an outside perspective we risk undermining the rich legal traditions which exist in Indigenous societies as we may not understand them or their importance. We must recognize that as non-participants in Indigenous culture we – as Western lawyers – cannot fully understand how legal normativity is formed through Indigenous practices and relations. In recognizing the ontological differences between Indigenous and Canadian law, I argue that legal pluralism should acknowledge and foster the organic qualities of Indigenous law that are rooted in traditional Indigenous knowledge, rather than force them to remain shackled by the formalism required by Western knowledge.

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<sup>357</sup> As John Borrows notes, “[t]hough negatively affected by past Canadian actions, Aboriginal peoples continue to experience the operation of their legal traditions in such diverse fields as, inter alia, family life, land ownership, resource relationships, trade and commerce, and political organization.” John Borrows, *Indigenous Legal Traditions in Canada* (Report) (Ottawa: Law Commission of Canada, 2006) [Borrows, *Indigenous Legal Traditions in Canada Report*] at 5. Moreover, Henderson argues that:

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.

Henderson, *Postcolonial*, *supra* note 9 at 14.

<sup>358</sup> Henderson, *First Nations Legal Inheritances*, *supra* note 148 at 1.

Rejecting essentialism is important for emancipatory frameworks on both a theoretical and instrumental level. First, non-essentialism is necessary to transcend the “colonization of the mind.”<sup>359</sup> Imperial expansion initiated not only the colonization of land and resources, but also of culture, laws, and governance. In order to decenter Westernized conceptions of law that limit or disregard Indigenous knowledge and worldviews, we must reject that law can be abstracted solely in Western ways of understanding, whether that be in terms of formalization, canonization, or brute violence.<sup>360</sup> While there is Indigenous scholarship to the effect that Indigenous law can be positivistic – or Western-like – in nature,<sup>361</sup> it also encompasses many other traditions that cannot be reduced to a particular essence. As such, Indigenous laws *themselves* may differ in how they function, what they are supposed to do, and how they are recorded and transmitted. John Borrows argues that...

[Indigenous laws] can be based on supernatural declarations, naturalistic observations, positivistic proclamations, deliberative practices, or local and national customs. Some Indigenous laws are regarded as divine, given by the Creator in precise fashion for the world to follow. Others may be regarded as more naturalistic; some derive from the Creator, but others are timeless and independent of any external force. Natural law understandings that are not regarded as divinely formed are often discovered through observations of the physical and spiritual world.<sup>362</sup>

The variation in scope, source, subject, and function of Indigenous law necessitates an unthinking of law in purely essentialized terms. In order to do so, we must resist an

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<sup>359</sup> Tuhiwai Smith, *supra* note 7 at 59.

<sup>360</sup> Of course, this does not mean that Indigenous law could not have any sanctions or be coercive. The point here is that if we look solely to these characteristics to find law we run the risk of excluding legalities which do not fit such a model.

<sup>361</sup> See: Borrows, Canada’s Indigenous Constitution, *supra* note 77.

<sup>362</sup> Borrows, Indigenous Legal Traditions in Canada Report, *supra* note 357 at 7.

*external* analysis of whether a particular law fits a Western conception of what law, and instead look toward legal actors as a method of fully appreciating law's heterogeneity.

Additionally, we must reject the false consciousness that there can be a consensus about law – that is, consensus about what law's inherent qualities or essential characteristics are. Assuming that we can have an overarching concept of law ensures the continued erasure of non-Western ways of being. Jean-François Lyotard argues that the idea of consensus within society is a myth, and is a means of erasing minority interests which become disguised in the manufacturing of a brand of consensus. Consensus is an example of a “masternarrative” which offers a super-explanation of reality, but, in so doing, disguises other narratives – what Lyotard calls language games –which provide meaning in peoples' lives. As Devlin explains, “by claiming that its interpretation is *the* account of reality, the masternarrative imposes an orthodoxy and framework of analysis that aspires to be complete and, in so doing, denies legitimacy to alternative experiences and marginalizes other interpretations.”<sup>363</sup> In this way, consensus acts a kind of “terrorism.” Lyotard states that “[c]onsensus does violence to the heterogeneity of language-games.”<sup>364</sup> As such, a postmodern legal pluralism rejects that there can ever be a “consensus” about the essential elements of law because how we understand law is contingent our belief-systems and worldviews. Any “consensus” would merely serve to privilege one worldview over another.

I offer a few examples rooted in Mi'kmaq law to illustrate these points. As will be seen, the Indigenous legalities described differ from Western law in terms of the sites

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<sup>363</sup> Devlin, Postmodernism, *supra* note 41 at 15 [emphasis in original].

<sup>364</sup> Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, translated by Geoff Bennington and Brian Massumi (Minneapolis: University of Minnesota Press, 1984) at xxv.

from which law is created, including non-institutional sites, as well as the ontological understandings sustaining how legal normativity is constructed. Mi'kmaq legal scholar Sákéj Henderson describes Mi'kmaq law as being rooted in ecological relationships that find meaning in linguistic expression.<sup>365</sup> Accordingly, Mi'kmaq law is built upon “ecological considerations mediated through [Mi'kmaq] experiences, knowledge, spiritual understanding or interpretation and relationship to a local ecological order.”<sup>366</sup> Law emerges from the Mi'kmaq peoples' foundational relationships with the physical world, and their experiences with ecological phenomena provide teachings on how to live in the world. As John Borrows notes, “[b]uilding upon the earth's teachings in this manner, the Mi'kmaq people describe and apply legal responsibilities for their behavior.”<sup>367</sup> In this sense, the Mi'kmaq legal order provides a means of understanding “right conduct and shared responsibilities.”<sup>368</sup>

However, while Mi'kmaq law provides understandings on how to live right in the world, they are communicated through oral traditions rather than being reduced to written laws similar to Eurocentric versions of law. Henderson argues that Mi'kmaq language is constantly in a state of flux: there are no “universal” norms, and their language is centered around verbs rather than “noun-based system of positive law.”<sup>369</sup> He argues that to codify law is to change the meaning of Mi'kmaq law as it is counter to the idea that

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<sup>365</sup> Henderson, First Nations Legal Inheritances, *supra* note 148 at 14.

<sup>366</sup> Kiera Ladner, “Governing Within an Ecological Context: Creating an AlterNative Understanding of Blackfoot Governance” (2003) 70 *Studies in Political Economy* 125 at 150.

<sup>367</sup> Borrows, *Indigenous Legal Traditions in Canada Report*, *supra* note 357 at 16.

<sup>368</sup> Henderson, First Nations Legal Inheritances, *supra* note 148 at 14.

<sup>369</sup> *Ibid.* Also, Henderson notes that “Indigenous reasoning knew no distinction between “is” and “ought,” or the “what might be,” or between theory and practice, which so dominated European theory. Mi'kmaq reason was not broken into distinct faculties, into the choice of means for achieving one's private interest by juxtaposing what is with what ought to be.” *Ibid* at 15.

law is constantly in flux: “[to] freeze understandings into rules violated processes designed to balance the inherent flexibility of their worldview.”<sup>370</sup>

One example, and one which will be discussed again in Chapter 5, is the Mi’kmaq ideal of *Netukulimk*. It is a norm that is predicated on respect: “respect for one another, the wisdom of elders, [and] the bounty of the earth...”<sup>371</sup> which are vital precepts to understanding how the Mi’kmaq interact with other people and the broader world around them. Respect is embodied in all relationships, whether they be relationships with the earth, plants, and animals or relationships with other people. As Prosper et al note:

*Netukulimk* is expressed through the performance of rituals and the keeping of customary practices. Particular sets of spiritual rules are performed to guide behavior and foster sustainability. Their performance may be interpreted as an expression of Mi’kmaq law ways, or patterns of interaction that are observed and regulated within communities. Special persons in the Mi’kmaq community, gifted people, who possess extraordinary abilities, usually led the rituals and practices, which were witnessed and observed by others.<sup>372</sup>

For example, these ceremonies and rituals sometimes are centered around expressing gratitude to the spirits of animals for their meat, hides, and body parts. These ceremonies

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<sup>370</sup> Henderson, *First Nations Legal Inheritances*, *supra* note 148 at 14. Moreover, Henderson argues that

The very core of indigenous community was, and remains, the sense of having a view of the world in which others participate, a view whose hold over the groups was so strong that it never needed to be spelled out. This cognitive solidarity was precisely the condition of moral and social communions that were the foundation of customary federations, their laws and their indigenous freedoms.

In this worldview, European types of legal abstractions and fictions were rare. The Mikmaq worldview was not an expression of esoteric ideas and -isms but more of a cognitive realm created by a verb-centred language. This verb-centred language emphasised the flux of the world, encouraging harmony in all relationships. This was the centre of their legal institutions and heritage. It reflected their belief that the world was made according to an implicit design that could be at least partially apprehended and enforced by them, not simply as a matter of balancing rights and wrongs or of reducing conflict resolution to trial by battle, trial by ordeal or adversarial denunciations characteristic of medieval Anglo-French laws.

See: *Ibid* at 13.

<sup>371</sup> McMillan, *supra* note 24 at 66.

<sup>372</sup> Kerry Prosper et al, “Returning to Netukulimk: Mi’kmaq Cultural and Spiritual Connections with Resource Stewardship and Self-Governance (2011) 2:4 *The International Indigenous Policy Journal* 1 [Propser et al] at 5.

are meant to impart *Netukulimk* as a means of understanding the sacred relationship between the Mi'kmaq people and the animals who share the earth: “[t]he success of the hunt and the availability of the moose depended on the maintenance of this connection by respecting the moose during life and death. Rituals were carefully constructed to ensure the cycle of regeneration was not interrupted.”<sup>373</sup>

The perils of essentializing law is that the legal normativity arising from these Mi'kmaq rituals may be obscured in legal pluralist analysis as they do not adhere to a formalized structure, whether it be institutionalization or the canonization of rules. However, just because *Netukulimk* is not (or cannot be) reduced to prescriptive rules does not prevent its normative authority in guiding how the Mi'kmaq live in the world. Rather, at the heart of the problem of positing essential characteristics of law is an ontological conflict that is predicated on differing understandings of one's place in the world: Mi'kmaq law is based on a worldview that the self was not an independent entity, but rather part of a larger ecosystem that interacted with the earth and other people, both past and present.

The Mi'kmaq value conflict-resolution as opposed to aggression and seek to solve issues before they came to conflict.<sup>374</sup> As such, Mi'kmaq law requires no institutional coercion because their laws are placed in a larger set of values that encourage collective responsibility. As Henderson notes, early foreign observers of Indigenous societies noted that there were “few coercive sanctions with which to punish wrongdoers.”<sup>375</sup> However, this does not mean that there could not be sanctions or consequences for the actions of

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<sup>373</sup> Propser et al, *supra* note 372 at 5.

<sup>374</sup> Henderson, First Nations Legal Inheritances, *supra* note 148 at 15.

<sup>375</sup> *Ibid* at 17.



Indigenous peoples, but these patterns of dispute resolution focused on “forgiveness and forgetfulness”<sup>376</sup> rather than punishment and individual responsibility. Any remedies were decided communally and reconciled within familial relations.<sup>377</sup> The goal was harmony, not justice or retribution.

As such, when we attempt to look for a “rule/sanction” model, we potentially inhibit any examination of Indigenous law. Eurocentric ideals understand law as institutionalized violence and punishment to ensure retribution or, in common law speak, “liability.” However, Mi’kmaq laws were not premised on “guilty/not guilty” or “liable/not liable.”<sup>378</sup> We must “unthink” these ideals as essential characteristics and instead look inward towards the participants (the Mi’kmaq peoples themselves) in deciphering whether something is law or not. Rejecting these legalities because they do not fit Westernized conceptions of law – that is, they do not have the “essential characteristics” of what “law” looks like – reproduces the “positional superiority of Western knowledge.”<sup>379</sup>

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<sup>376</sup> Henderson, First Nations Legal Inheritances, *supra* note 148 at 17.

<sup>377</sup> As Henderson states:

Coercive law by an artificial institution was generally absent, if not vigorously opposed [by Mi’kmaq societies]. Aggressiveness within the family was thought of as wrongful and contrary to human dignity and responsibility. The very fact that a human solution was needed to resolve a conflict created an uneasy disharmony, a crisis of conscience. The place to find solutions to most predicaments was in the extended family structure... Like the weather, solutions were not predictable, not always based on a logical sequence.

See: *Ibid* at 15.

<sup>378</sup> If we think of Canadian law, generally we have criminal and civil law. Criminal law is usually premised on an imposition of guilt; civil law is premised around liability. Either way, the state, as an institution, ensures that sanctions are imposed. In the civil law an example is contract law whereby we attempt to hold parties to their promises or else the state will step in and enforce compliance through the courts. Either way, it is premised on a particular understanding of law that correlates with violence. However, Indigenous law is not necessarily violent. Of course, there may be consequences for actions but consequences are not reflected in individual responsibility. People were not punished. Rather, “[c]ollective responsibility increased certainty in the management of behaviour and harmony.” See: *Ibid* at 16.

<sup>379</sup> Tuhiwai Smith, *supra* note 7 at 59.

Consequently, postmodern legal pluralism rejects that there are any essential characteristics to law, or any empirical formulation of what delineates the legal from the non-legal. In this way, there is no “objective truth” to law, nor are there any foundational characteristics to the concept of law. Rather, what exists are differing conceptions of law, rooted in localized and cultural understandings of the world. This does not threaten our Western ideals, but rather forces us to unthink them as a starting point of pluralist inquiry. We cannot judge *a priori* whether something is law or not by resort to external prescriptions of what law *must* look like, whether it be the requirement of rules, coercion, or the threat of force, because law is ultimately a subjective enterprise. As such, we must shift our analytical focus inward, looking instead to the participants in these various normative spaces to seek to comprehend how they come to understand and participate in their legal worlds.

### **3.6.2 THEME 2: LEGAL ACTORS CONSTRUCT LEGAL NORMATIVITY**

Legal actors are not merely legal “subjects.” They actively construct legal normativity meaning through their relationships with each other, other legal forms, the state, and the world around them. Postmodern legal pluralism requires a recognition of the creativity of legal agents: “[s]ubjects of knowledge are also its objects. Legal knowledge is the project of creating and maintaining self-understandings.”<sup>380</sup> As such, legal normativity is built around the multiplicity of identities that legal agents carry with them, and is created through their understandings of the world around them. Consequently, the root of jurisprudential inquiry is placed squarely on the understandings and creative capacity of legal actors. This requires that we start from the presumption that

any normative force is potentially legal, but in examining its normative force we look to the actors who are actively engaged in those practices to determine legal normativity. That is, we cannot ascertain *a priori* whether any normative force is legal or not until we examine the understandings of those who are actively engaged with it.

In speaking of the complexity of legal normativity, McMorrow and Macdonald postulate that “[t]he multiple moods and voices of interaction reflect the plural *sites and modes* of legal normativity.”<sup>381</sup> As such, they posit that the creation of legal normativity may be imagined along two spectra: sites (“the manner of the elaboration of legal norms”) and modes (“the way in which meaning is extracted from legal norms”). When these spectra are envisioned as intersecting, a “four-cell table of normativity emerges,” which is a normative mapping of diverse behaviours and ultimately leads to the creation of different forms of legal normativity.<sup>382</sup> In imagining legal normativity as emerging from different sites (like, for example, from judicial pronouncements or legislation) and in different modes (like, for example, norms that emerge from a period of customary behaviour), McMorrow and Macdonald are not attempting to draw boundaries around law. Rather, they are trying to explain how legal normativity arises in different contexts and at different times.

This presents a plurality of normative processes, institutions, and artefacts. Law exists between and within normative spaces, and fluctuate and transform, but are nonetheless dependent on the creative capacity of human interaction and behavior.<sup>383</sup> Accordingly, “[w]hile all law is normative, all legal normativity [...] is hypothetical. The

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<sup>380</sup> Klienhans and Macdonald, *supra* note 16 at 39

<sup>381</sup> Macdonald and McMorrow, *supra* note 11 at 327 [emphasis added].

<sup>382</sup> *Ibid.*

obligatory nature of a norm depends on the agency of the purported ‘norm-subject’.” In this way, norms obtain their status through conscious human action, not because they exist somewhere “out there,” but because they become real through legal actors’ interactions with the world. As such, “[b]ecause legal subjects are legal actors that play a role in constituting their normative reality, every person is the irreducible site of law. All human agents ultimately decide the relative weight of different normative regimes and different types of norms, and the precise bearing they have on their normative lives.”<sup>384</sup>

When we look to the different *sites* within which law is constructed, we see how they may be explicit or implicit, as they either arise from deliberate creative process or not. Explicit norms, for example, could be statutory or judicial pronouncements as they arise from conscious human action, granted as part of deliberate institutionalization.<sup>385</sup> On the other hand, implicit norms “emerge from behavioural practices at home, at work or in the community. An implicit norm may result directly or indirectly from an identifiable social practice.”<sup>386</sup> For instance, implicit norms can take the quality of customary norms which are built around habitual practice within a social group.

Along a second axis, the *mode*, or meaning which can be extracted from a norm, arises from how a particular norm is articulated. McMorrow and Macdonald explain:

On the one hand, there are formal norms that are presented canonically and typically reflected in words like those of a statute. However, a formal norm may not necessarily be explicit in terms of the fact they may never have been consciously elaborated. Thus, norms derived from commercial practice are at once formal and implicit. On the other hand, there are inferential norms. Unlike

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<sup>383</sup> Macdonald and McMorrow, *supra* note 11 at 329.

<sup>384</sup> *Ibid* at 330.

<sup>385</sup> By this I mean that institutions help to constitute how legal actors view themselves and law, but are also constituted by the multiplicity of identities that legal actors carry. It is a constant circle of normativity that begins and ends with the legal actor.

<sup>386</sup> Macdonald and McMorrow, *supra* note 11 at 330.

formal norms, these do not possess a fixed textual or practical formulation. Thus, judicial decisions constitute examples of explicit yet inferential norms. While the courts are conscious of the fact they are elaborating legal norms, the ratio decidendi of a court judgment cannot be reduced to a precise rule through the simple application of a succinct formula; it must be inferred from the entire text of the judgment. Inferential norms may also be implicit. For example, the general principles at the foundation of a normative system like justice or equity are fluid concepts that are nowhere either written out or summed up in canonical form.<sup>387</sup>

Consequently, the interaction of the axes of the sites and modes of law create four “archetypes” of legal normativity: “explicit and canonical norms (manifest or patent norms); explicit and inferential norms (allusive norms); implicit and canonical norms (customary norms); and implicit and inferential norms (latent norms).”<sup>388</sup> This results in a patchwork of different conceptualizations which emerge from the different sites and modes of legal normativity, and which may help us to explain how normativity emerges from the complexity of social life.<sup>389</sup>

Some norms emerge from conscious human action, like, for example, institutional processes such as those imagined by the modern state. However, as legal pluralism represents, these do not fulfill the entire spectrum of legal normativity as legal norms emerge in other ways, but are nonetheless still “legal.” Legal positivism would trace hard

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<sup>387</sup> Macdonald and McMorrow, *supra* note 11 at 330.

<sup>388</sup> *Ibid.* Moreover, as noted in a footnote, and elaborated further in Roderick Macdonald and Hoi Kong, “Patchwork Legal Reform” (2006) 44 Osgoode Hall LJ 11, norms can shift and change character as they interact with other norms. This “internormative” function or transfer can occur, thus causing norms to shift character in the process. For example, a formal norm in one space (i.e., institutionalized norm in one social space) can shift to be an informal norm in another space and vice-versa. See Macdonald and McMorrow, *supra* note 11 at fn 37.

<sup>389</sup> As McMorrow notes in his doctoral thesis,

[t]hese categories constitute a frame of reference for evaluating how law emerges in a myriad of forms. The point of elaborating a sociological typology of norms is not to provide a set of discrete compartments in which to pack away such legal artefacts as concepts, institutions, processes, methodologies, and the basis of legitimacy or legal authority itself. It is intended to expose and challenge our assumptions about what form these legal artefacts can and do take.

See: Thomas McMorrow, *Critical to what? Legal for whom? Examining the implications of a critical legal pluralism for re-imagining the role of high school students in education law* (DCL Dissertation, McGill University, 2012) [unpublished] [McMorrow] at 63.

boundary lines between what is legal and what is not which owes to a direct value judgment on law. However, given the plurality of ideations of legal normativity, norms emerge from different, and often informal, sites, and meaning is sometimes inferentially derived, which serves to illustrate the heterogeneity of law. We must, as scholars, pay attention not only to patent and formalized norms (that is, norms which are backed up by formalization or institutionalization), but also to the latent and inferential.

The purpose that I gather from this sociological presentation of normativity is not to provide a taxonomy of legality, but instead to provide a conceptual framework through which to understand how the constructive capacity of legal agents is undertaken in different means. Sometimes that constructive capacity is influenced by the formalization or institutionalization of norms, sometimes it is not as legal normativity may arise from less formalized sites and meaning ascribed in more implicit ways. We cannot reject the influence of implicit or inferential norms merely because they do not stem from formal institutions or practices, like judges or legislatures. As McMorrow states:

...the focus [of a critical legal pluralism] is on the individual human being negotiating the heterogeneous plurality of norms, normative orders, methodologies, institutions, and modes of authority to which she is subject, and of whose meaning she participates in the construction. Acknowledging law as normative, and seeing it where a human being chooses to govern his or her behaviour according to a norm that in his or her view has a legitimate basis, Macdonald argues that “the legal decision-making process in reality consists in finding and recognizing, beyond the formal manner of the resolution of disputes, the interplay of implicit and inferential norms.”<sup>390</sup>

This is not to say that formal sites like institutions do not help to shape legal normativity, but rather the argument is that they do not have a monopoly in shaping the normative commitments of legal actors.

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<sup>390</sup> McMorrow, *supra* note 389 at 69.

A postmodern legal pluralism subscribes to the idea that legal actors are the locus of legal inquiry, not external entities such as legal orders or systems. As McMorrow posits, “[t]he question, what is law?, is thereby treated as concomitant to the question, what does the human agent treat as normative in fact?”<sup>391</sup> As such, postmodern legal pluralism conceptualizes law as localized, contingent, and constituted in our relationships with, and our understandings of, our multiple normative worlds. In the way that Falk Moore’s empirical legal pluralism focused on the SASF and the formalization of legal rules, postmodern legal pluralism shifts the locus of inquiry to legal agents themselves in examining jurisgenerative properties.

This conceptualization of law offers the ability to look to the actual practices of legal agents in discovering how law is created and sustained, and how it becomes meaningful in the lives of those to whom it applies. This process decenters orthodox law as law *par excellence*, and instead looks to how law is created at the local level. In this way, law is decentralized, insofar as it un-privileges canonical forms of law or institutionalization, and contingent as it develops from the self-understandings posited by legal actors. As Klienmans and Macdonald argue:

A critical legal pluralism seeks neither a separation, nor an eventual hierarchical reconciliation, of multiple legal orders. Normative heterogeneity exists both between various normative regimes which inhabit the same intellectual space, and within the regimes themselves. How legal subjects recognize and react to relations within and between these regimes is contributive to their own recognition and self-understanding in any given time-space.<sup>392</sup>

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<sup>391</sup> McMorrow, *supra* note 389 at 71.

<sup>392</sup> Klienmans and Macdonald, *supra* note 16 at 39.

Thus, this version of law offers immense emancipatory potential for examining Indigenous law: it simultaneously expands and blurs the borders between legal regimes without proposing totalizing discourses based on Western knowledge.

For instance, Clifford Geertz argues that we should focus on structures of meaning in the generation of normativity, including symbols and systems of symbols (which may be textual or otherwise). As he states, "... 'law' here, there, or anywhere is part of a distinctive manner of imagining the real."<sup>393</sup> Symbols – such as words or phrases – help us to locate how law is conceived at the local level as every culture may express law in ultimately different ways. These symbols are key to understanding localized social processes and understanding their cultural context.<sup>394</sup> Geertz uses three examples: one from an Islamic culture, *haaq* (which, roughly translated, has to do with “reality” or “truth”), one from an Sankrit language, *dharma* (which implicates notions of “duty, “obligation,” and “merit”), and one from Malaysian culture, *adat* (which is taken to mean something halfway between “social consensus” and “moral style”).<sup>395</sup>

All three of these textual expressions are symbols representing law, but all of which connect to a different legal sensibility.<sup>396</sup> As such, all three of these words are symbols of local legal sensibilities, but are presented in different means. Each formation of law illustrates something peculiar to the local culture about law. Rather than trace the development of each of these words, I use them merely to illustrate Geertz’s argument that law is a hermeneutic process of meaning generation which presents itself in different

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<sup>393</sup> Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: BasicBooks, 1983) [Geertz] at 184.

<sup>394</sup> *Ibid* at 187.

<sup>395</sup> *Ibid* at 185.



ways as law is a “species of social imagination.”<sup>397</sup> Because law is a product of “local knowledge,”<sup>398</sup> we cannot deduce how meaning is created unless we look directly at those who build it: we cannot understand law unless we look at its social context and how it is interpreted by local actors.

For the Mi’kmaq of Atlantic Canada, Glooscap (or Gluskap or Kluskap) stories provide meaning and guidance for how the Mi’kmaq are to understand their place in the world. These are not positivistic declarations in that they do not prescribe one mode of behavior in the sense of what specific conduct is permitted and what is not permitted.<sup>399</sup> However, these stories guide how the Mi’kmaq view their relationship to the world around them, including how they treat and interact with the physical world. As McMillan states, for Mi’kmaq peoples their traditional stories about Glooscap help to provide meaning for how they live their lives in the world as told from the Creator. She states that “Mi’kmaq cosmogony tells us that Kisukwl, the Creator, taught Kluskap how to live right, and he in turn, instructed the Mi’kmaq on how to live right.”<sup>400</sup>

If we examine these stories along the axes of normativity offered by McMorrow and Macdonald, we see that normativity may emerge from implicit (that is, non-institutional) sites and law’s meaning is rooted in implicit (they provide generalized ways of understanding the world and defining how one is to live that perhaps cannot be

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<sup>396</sup> One of the points here is that neither of these words directly translates to “law” in English, but they are representations of local language in representing the legal.

<sup>397</sup> Engle Merry, *supra* note 84 at 886.

<sup>398</sup> See the title of Geertz’s book, *Local Knowledge*, at Geertz, *supra* note 393.

<sup>399</sup> As Henderson notes, “[t]he Mikmaq, similar to other First Nations peoples, recognised binding obligations only if they derived from *consent*. This may be called dialogical sovereignty. They resolved difficulties, rather than avoided them” [emphasis added]. See: Henderson, *First Nations Legal Inheritances*, *supra* note 148 at 13.

<sup>400</sup> McMillan, *supra* note 24 at 58.

reduced to specific written or prescriptive form) modes. In situating the locus of legal inquiry on legal actors themselves, we see how their traditional ways of being in the world shape how they view and provide meaning to law. From a methodological perspective, this means that we do not *a priori* attempt to extract some kernel of “legality” which fits a Western view of law. Rather, these stories represent a general ethos of how to live right.<sup>401</sup> Their meaning *as law* is embedded in how the particular legal actors, in this case the Mi’kmaq, come to interpret and provide meaning to them.

In the context of Indigenous law, shifting the locus of inquiry inward towards legal actors becomes important from a legal pluralist point of view as it is predicated on the notion that law is what is meaningful to Indigenous peoples, and is derived from how their cultural worldviews help to structure their lives and relationships. Transferring the locus of inquiry in this way begets the possibility of expanding the cognitive horizons of legal pluralism to truly reflect how normativity arises in ways that are not just formalized and canonical, but also implicit and inferential, similar to the Glooscap stories. By seeing human beings as inherently social creatures who interpret and perceive law in different ways, a postmodern version of legal pluralism acknowledges the internormativity of the modern self. It is upon this internormativity that the starting point of legal pluralist inquiry should rest.

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<sup>401</sup> Borrows, *Indigenous Legal Traditions in Canada Report*, *supra* note 357 at 18.

### **3.6.3 THEME 3: LEGALITIES ARE ULTIMATELY INTERDEPENDENT AND OFTEN INTERACT IN DISCURSIVE PATTERNS**

In many ways, the legal pluralism that I have espoused in this thesis recognizes that legal actors do not exist independently of the various social forces that help to construct their identities. We, as legal actors, are subject to a multitude of different normative forces, including our communities, our cultures, and state institutions. This means that state law and Indigenous law are ultimately implicated in each other as they both touch the day-to-day lives of Indigenous peoples. This recognition denotes that law does not exist in a vacuum as the legal agent carries a “multiplicity of identities”<sup>402</sup> based on their interactions with the world around them.

As such, the goal of legal pluralism is not to seek out and isolate the myriad of normative forces that exist within a given social field, nor is it a quest to hierarchize these forces on a scale of important to non-important. Rather, “it is to understand how each hypothesized legal regime is at the same time a social field within which other regimes are interwoven, and a part of a larger field in which it is interwoven with other regimes.”<sup>403</sup> Law is not predicated on closure, but rather the contingent nature and complexity of social life suggests that diverse normative forces are constantly interacting with each other. State norms inevitably are interwoven with, and sometimes conflict with, non-state norms. However, the result of this commingling is that state law affects the constitutive generation of non-state law, but state law is also affected by localized legal forces. This normative *mélange* could take the form of resistance, incorporation, or more productive dialogic encounters that create new legal meaning in light of the interaction.

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<sup>402</sup> Klienans and Macdonald, *supra* note 16 at 40.

<sup>403</sup> *Ibid* at 41.

Therefore, the question for legal pluralism should not center around which legal order takes precedence in a given situation, but rather legal pluralist inquiry should be attentive to the interaction and competition of differing social forces, and how this internormativity helps to constitute and shape law within these encounters. Law is not a neutral phenomenon that claimants can isolate and conjure as fact in a judicial proceeding. Rather, it is relative to our understandings of the world that are impacted by our place within a complex web of different social forces. For instance, how we come to understand concepts as basic as “property” are impacted by our place within a web of forces. For settlers, for example, the common law and our place within communities (as landowners, as tenants, and as squatters) help guide us to a particular understanding of property. Indigenous peoples, on the other hand, may come to understand property in a different way, but which is nonetheless dependent on a number of competing social forces.

People and their social worlds are connected, and, as such, do not exist in isolation to one another. Some Indigenous cultures already recognize this. As Indigenous legal scholar Sákéj Henderson notes:

...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.<sup>404</sup>

As such, law and legal life are not predicated on hermeneutic closure. Rather, the openness of cognitive and intellectual space re-shapes our existence. As Anker argues,

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<sup>404</sup> Henderson, Postcolonial, *supra* note 9 at 45.

Indigenous law and state law are constantly renegotiating each other. She states that “decisions and their consequences will always be taking shape in relation to other communities and governments, at different scales.”<sup>405</sup>

By recognizing interdependence, we acknowledge that a completely unidimensional view of law is impossible. To take an example raised by Anker, the law of Aboriginal title (or Native title in Australia, as is the example that Anker uses) provides an opportunity to observe how internormative forces coexist and conflict. Aboriginal title often involves tense clashes over land, but the understandings at play between the Indigenous claimants maintaining a claim to title and the state are differing and often contradictory. The implication of interdependence is that we cannot examine law – either state law or Indigenous law – in isolation of one another at points of interaction or contestation.

It is when these forms of law contest that we see how a dialectic emerges that helps reshape the intercultural understandings of title. That is, Indigenous claimants provide their own interpretations of their obligations to and relationships with the land based on Indigenous law, and the state provides its interpretation rooted in state doctrine. In the current moment, resolution of these competing claims involves an adjudicator attempting to find a neutral balance between the two laws. However, this overlooks points of contestation as dialogic encounters *themselves* wherein Indigenous law impacts state discourses and vice-versa. As such, it is not a neutral decision predicated on facts but rather a co-constitutive process of meaning creation rooted in the coexistence and interaction of differing normative forces.<sup>406</sup>

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<sup>405</sup> Anker, Declarations of Interdependence, *supra* note 20 at 194.

<sup>406</sup> *Ibid* at 191.

Interdependence recognizes our mutual dependence on others via interactions that structure our legal identities. However, state law developed qualities of isolation “as distinctness from the social and the political, and as a determinative control over the constitution of legal meaning.”<sup>407</sup> This isolation illustrates resistance to interdependence: state law presumes it can be insulated from other normative forces through an explicit cycle of epistemic and physical violence. By presuming a monopoly over legal representation, state law discourses tend to be resistant to change in order to acknowledge its entanglement with Indigenous law:

[t]ry as it might to be the one law, the court is too dependent on uncontrollable and efflorescent meaning made elsewhere. It is already responsible to Indigenous law; it has constructed its own law against and in dialogue with, the arguments of Indigenous peoples. It participates in the rituals that mark Indigenous difference and that give rise to particular understandings of traditional laws and customs.<sup>408</sup>

However, this also means that Indigenous law cannot be conceived completely free from external forces, even if, in the current moment, those forces are rooted in colonial oppression.<sup>409</sup> But, it is *because* of our entanglement that patterns of colonial domination must be acknowledged so that they may be problematized and ultimately destabilized.

As such, legal pluralism must acknowledge the instability upon which state law’s monistic claims rest. The question, then, becomes not how to achieve complete autonomy of non-state legalities, which are then insulated from external forces. Rather, the question becomes how we work toward an intercultural conversation that acknowledges the cultural subjectivity of law so that state law’s claims to unidimensional authority and universality are not taken as an irrefutable fact “while Indigenous peoples have to

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<sup>407</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 191

<sup>408</sup> *Ibid* at 194.

<sup>409</sup> *Ibid*.

establish their authenticity according to terms that are not of their own making.”<sup>410</sup> As such, the next theme of a postmodern legal pluralism elucidates the need to decenter patterns of oppression that maintain state law’s normative claim to uniformity and “unencumbered control of things within a boundary.”<sup>411</sup>

#### **3.6.4 THEME 4: STATE LAW’S MONOPOLY IS A SOCIO-HISTORICAL PRODUCT OF MODERNITY**

Given the interdependence of various normative forces, a postmodern legal pluralism must also recognize the state’s normative monopoly over law is linked to a particular social and historical trajectory. That is, it is not a preordained fact, but as de Sousa Santos argues, the naturalization of a monist conception of law was a product of the modern era wherein the constitutional state became seen as the “perfect machine of social engineering.”<sup>412</sup> As such, legal pluralism is a reaction to the fact that the modern era strived to achieve “some promised land of solidarity or harmony or peace [but] [m]aterialism, technology, bureaucracy, capitalism, and rationalism had undermined the illusory rhetoric of such naïve alternatives but no creditable replacements had been found.”<sup>413</sup>

In thinking about the value of postmodernism to legal theory, it is first useful to think about the construction of the modern conception of law, built around ideas of reason, objectivity, and truth as formations which emanate the Austinian sovereign

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<sup>410</sup> Anker, Declarations of Interdependence, *supra* note 20 at 194.

<sup>411</sup> *Ibid.*

<sup>412</sup> De Sousa Santos, New Common Sense, *supra* note 191 at 67.

<sup>413</sup> Manderson, *supra* note 287 at 483.

state.<sup>414</sup> Law is explicitly anchored in a sovereign power which has the capacity to command obedience to a set of laws. Within “modern jurisprudence the law is public and objective; its posited rules are structurally homologous to ascertainable ‘facts’ that can be found and verified in an ‘objective’ manner, free from the vagaries of individual preference, prejudice and ideology.”<sup>415</sup>

Modern law dovetails obedience with objectivity as it seeks to impose a determinate set of rules and obligations on an otherwise diverse and conflicting society. These are the master-narratives that attempt to provide a holistic and unified portrait of social organization.<sup>416</sup> In contrast to dutiful adherence to positivism and objectification, postmodernists decry universality and monism. Indeed, postmodernism is profoundly critical of the foundations which privilege certain conceptions of law to the detriment of others.<sup>417</sup> Instead, we must look to the plurality of normative forces that encompass the world in which we live. We must understand that social life is complex, and it is only upon acknowledging law’s heterogeneity that productive encounters between various normative regimes can occur.

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<sup>414</sup> See, e.g., John Austin, *The Province of Jurisprudence Determined*, ed by W. Rumble (Cambridge: Cambridge University Press, 1995).

<sup>415</sup> Douzinas, Goodrich and Hachamovitch, *supra* note 317 at 17.

<sup>416</sup> Gary Minda argues that postmodernists “seek to expose how intellectual practices in the law are mediated and constructed by their own ‘self-referential end [which is] coextensive with the operation, performance, reproduction, and proliferation of bureaucratic practices and institutions’” (changes in original). See Minda, *supra* note 329 at 238.

<sup>417</sup> Some may suggest that postmodernism is effectively nihilism, and, as such, it cannot offer any value to law. I disagree. Litowitz suggests that the perennial problem for postmodernism is “finding a new, nonmetaphysical basis for the law.” He also heeds Lyotoard’s query of “where, after the meta narratives, can legitimacy reside?” See Litowitz, *supra* note 315 at 37. I, however, do not believe that postmodernism’s tendency toward criticism, skepticism, and antifoundationalism collapses any jurisprudential value. Rather, I argue that a theory of law can be built on antifoundationalism by recognizing the contingent and dispersed nature of law which provides agency and autonomy to legal subjects.



The only way to decenter the totalizing effects of the normative domination of state law is to recognize that it is not an unassailable fact but a product of a particular social and political history. In Chapter 4 I will provide a means of reacting to this theme by drawing on the insights of deconstruction as a reaction to, and praxis for, decentering state law's hegemony. These techniques allow for the deconstruction of state law's flawed ideological foundations, thus exposing how they are predicated on the subjugation of non-state forms of law. Chapter 4 will also illustrate the need for deconstruction given the normative (and often physical) violence of state law. Moreover, it will illustrate how modern law is predicated on cultural imperialism given modern law's claims to domination, especially in regard to Indigenous peoples. Thus, while a postmodern legal pluralism opens up the conversation to the existence of subjective, localized, and diversified legalities, deconstruction offers the promise of decentering hegemonic discourses in the interaction of state and non-state law.

# CHAPTER 4: IMPLICATING DECONSTRUCTIONIST PRAXIS – DECENTERING THE DOMINANCE OF STATE LAW

*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.*

*James [Sákéj] Youngblood Henderson<sup>418</sup>*

## 4.1 INTRODUCTION TO DECONSTRUCTION

This thesis also draws on the insights of deconstructionist praxis as a reaction to the problematic assertion of state law's monopoly over law making and normative meaning production. It is argued that deconstruction, as a method of legal inquiry, dovetails with postmodernism's criticisms of objectivity and truth. As Devlin suggests, "[a]lthough postmodernism as political philosophy and deconstruction as critical method do not share an identity, there are certain elements of homology, continuity and overlap between them that are of interpretive value in the understanding of social phenomena."<sup>419</sup> Thus, both postmodernism and deconstruction offer co-constitutive practices for the promulgation of a critical approach to legal pluralism that seeks to challenge the ideologies sustaining orthodox theories of law.

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<sup>418</sup> Henderson, Postcolonial, *supra* note 9 at 14.

<sup>419</sup> Devlin, Postmodernism, *supra* note 41 at 10.

The theory and practice of deconstruction originated with French philosopher Jacques Derrida. It has largely been utilized as a method to approach textual interpretation, and began as a tool to analyze philosophical and literary texts with an eye to exposing the contradictory meanings embedded therein by raising concerns about language, truth, and meaning.<sup>420</sup> By negotiating the denial of an objective truth or meaning in text or ideas, deconstruction provides pivotal praxis to decentering hidden ideologies. As Devlin postulates, Derrida most significantly criticized the idea of “logocentrism” – that is, the idea that humans can have an “immediate, transparent and uncontaminated interaction with the context in which they find themselves.”<sup>421</sup>

Thus, for Derrida, when we approach an issue or text, we approach it with our own pre-set and subjective worldview. In this sense, that text or idea cannot be anchored to an original or universal truth or reality from which we all are abstracted or from which ideas can be adjudged.<sup>422</sup> As Devlin asserts, “[t]he problem with ... essentialist or foundationalist conceptions of reality, according to Derrida, is that in adopting a naturalistic and necessitarian belief structure, they become totalizing and hierarchical,

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<sup>420</sup> Jack Balkin, “Deconstruction’s Legal Career” (2005) 27:2 *Cardozo LR* 719 [Balkin, *Deconstruction’s Legal Career*] at 719.

<sup>421</sup> See: Jacques Derrida, *Of Grammatology*, translated by Gayatri Spivak (Baltimore: Johns Hopkins University Press, 1976), as cited in Devlin, *Postmodernism*, *supra* note 41 at 19.

<sup>422</sup> Some Indigenous scholars may disagree with my use of Derrida given that Indigenous law is often anchored in sacred and sacrosanct ideals. I accept criticism in this regard. However, my use of Derrida here is not to romanticize deconstruction or to suggest that Indigenous law is not “real” to Indigenous communities. Rather, I use deconstruction to show how majoritarian belief systems posit that they are an “objective truth” or *the* account of reality, which serves to delegitimize non-majoritarian systems of thought. That is, if we take the Western intellectual system as “essential” or “foundational,” we exclude and delegitimize understandings of the world which are rooted in different cultural contexts. However, within those cultural contexts, both Western and non-Western, these cultural understandings are nonetheless “real.” Consequently, no identity or system of belief becomes “privileged.” As such, from an intercultural perspective, we must approach competing cultural settings with a curious and open mind and, consequently, neither belief system can be seen as “foundational.” However, as will be noted in this Chapter, the often violent and pervasive nature of state law necessitates this decentering of Western ideals in order to have a fruitful intercultural conversation.

thereby excluding other conceptions of reality or truth.”<sup>423</sup> As such, deconstruction rejects that there can ever be “objectivity” as it amounts to nothing more than a totalizing claim to “truth” to the detriment of other ideas or discourses. Deconstruction, then, is an attempt to undermine these objective claims to truth or reality – or, logocentrism – which underlie particular texts, ideas, or institutions.

Logocentrism serves to delegitimize the diversity of thought, truth, and reality that exists in society. As such, deconstruction is a form of critique aimed at dismantling claims to logocentrism which are rooted in particular ideologies, and which serve to hierarchize systems of thought or meaning, such as law. For instance, the ideology or worldview underlying state law – Western liberalism – serves to deliberately hierarchize state and non-state conceptions of law. Deconstruction provides a philosophical tool aimed at exposing the illegitimate or problematic assumptions that underlie these hierarchies as a means of destabilizing them. As such, deconstruction as praxis involves taking hierarchical or opposing ideas or concepts and *inverting* them to reveal new insights (and problems) inherent in how that relationship is structured.

Jack Balkin argues the deconstruction is a useful technique in analyzing law: it is a method that can be employed in analyzing legal doctrines and texts, as well as the underlying presuppositions of our legal system.<sup>424</sup> However, it is important to see deconstruction as more than a process of radical critique; it is also an active method of unearthing the underlying inconsistencies in particular patterns of thought. Balkin states:

By the term "deconstruction," however, I do not have in mind merely stinging criticism, but specific techniques and philosophical ideas that Derrida and his

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<sup>423</sup> Devlin, Postmodernism, *supra* note 41 at 19.

<sup>424</sup> Jack Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 Yale LJ 743 [Balkin, Deconstructive Practice].

followers have applied to various texts. These techniques often do involve teasing out the hidden antinomies in our language and thought ... However, I hope to demonstrate that "deconstruction," as I use the term, is not simply a fancy way of sticking out your tongue, but a practice that raises important philosophical issues for legal thinkers.<sup>425</sup>

As such, deconstruction offers a particularly attractive claim as a process of interpretation and critique with regard to systems of legal thought, which are presumed to be "natural" and "universal," but which actually serve to marginalize and exclude other worldviews.

This Chapter will be broken up into two further parts. First, I illustrate the necessity for deconstruction by examining how power and violence are invariably intertwined with state law. I trace some critical insights which attempt to explain how state law attempts to suppress and delegitimize the jurisgenerative character of non-state legalities. By bringing the violence inherent in law to the forefront of analysis, I underscore why deconstructionist praxis is necessary. As a corollary of the violence inherent in state law, I also examine the concept of "cultural imperialism" to illustrate how dominant and orthodox systems of thought serve to delegitimize and perpetuate the colonization of Indigenous culture and knowledge.

Second, this Chapter illuminates aspects of Derrida's thought, specifically as they apply to conceptions of law, legal rules, and legal institutions. This is an attempt to demonstrate how deconstructionist methodology can invert the hierarchical relationship between Canadian and Indigenous law as a means to expose and critique the

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<sup>425</sup> Balkin, *Deconstructive Practice*, *supra* note 424 at 744. Moreover, it is important to note that Balkin sees deconstruction as having two particularly useful purposes in legal scholarship. It has the most relevance, he argues, to "the study of ideology and the social and political theories underlying our legal system." See: *Ibid.* In this sense, this thesis will draw on the insights of deconstruction to help unearth the ideological constructs of state law: it looks to how state law and a monistic conception of law are products of a particular way of thinking about the world that is rooted in liberalism and social control. As such, statist versions of law are a product of a particular ideological framework, and through deconstructionist methods I hope to bring these to light in an attempt to decenter them to expose how they are predicated on the subjugation of non-majoritarian worldviews.

philosophical ideals sustaining this hierarchy of legalities. As such, deconstruction, insofar as it relates to legal pluralism, seeks to expose how state law's claim to universality is not rooted in truth or superiority, but rather on problematic philosophical and ideological constructs that are structured by colonization, and which help to facilitate the erasure of non-state legalities. In this sense, the aim of deconstruction is to illuminate how and why Indigenous law remains suppressed as a means to challenging it.

#### **4.2 WHY DECONSTRUCTION? VIOLENCE AND CULTURAL IMPERIALISM<sup>426</sup>**

*Colonialism is not satisfied merely with holding a people in its grip and emptying the native's brain of all form and content. By a kind of perverted logic, it turns to the past of the oppressed people, and distorts, disfigures, and destroys it. This work of devaluing pre-colonial history takes on a dialectical significance today.*

*Frantz Fanon<sup>427</sup>*

It is not a novel claim that state law has been complicit in the colonization of Indigenous peoples. Law has facilitated the de-legitimization of Indigenous culture and the dispossession of Indigenous lands and resources. Given the violent realities of colonialism, I bring to the forefront in this section what noted jurist Robert Cover claimed was the violence inherent in law. Cover's jurisprudence aimed to demonstrate how violence is deeply embedded within institutional systems of law. Law's violence is perpetrated at both the physical level and epistemic norm-killing level: it can be carried out on the bodies of citizens, but also on their normative ideals. Devlin postulates that the violence of state law is a self-reinforcing mechanism – that is, by denying other normative worlds, like Indigenous ways of being in the world, state law legitimizes its

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<sup>426</sup> Portions of my discussion here on Robert Cover's jurisprudence will be drawn from my paper completed for my Aboriginal Law class at the Schulich School of Law during the 2015-2016 academic year.

own dominance. This is what he called the “genius of law.” Devlin argues that “[t]he genius of law stems from its capacity for *legal and legitimate violence*. Legal violence and legal ideology co-exist in a permanent, threatening, mutually reinforcing unity, for ‘repression never comes unpackaged’.”<sup>428</sup>

This section will first examine the “self-image of law”<sup>429</sup> which is a process by which state law monopolizes violence as a means to re-entrench its claims to universality. State law – hereinafter referred to as simply “law” in this section – is in a constant quest to impose unified meaning on an otherwise heterogeneous society. Its quest for objectivity and domination influence and legitimize its violent function: it is through law – legislatures, courts, judges, and legal interpretation – that this state of affairs is fortified. Second, this section explores the concept of “cultural imperialism.” This term is one of the five “faces of oppression” within Iris Marion Young’s post-structural analysis of social relations.<sup>430</sup> Largely, I draw on this concept to examine the role of the state in the domination and subordination of cultural minorities. Canadian imperialism brought with it not only the dispossession of Indigenous land and resources, but also of Indigenous culture and worldviews. By bringing issues of violence and cultural imperialism to the forefront, this section aims to reveal the need for deconstructionist praxis within legal pluralism.

Jurist Robert Cover argues that outside of the confines of the state, we all live within a *nomos*, or a normative world, which helps to create and provide meaning to law.

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<sup>427</sup> Fanon, *Wretched of the Earth*, *supra* note 305 at 210.

<sup>428</sup> Devlin, *Nomos and Thanatos*, *supra* note 74 at 344 [emphasis added].

<sup>429</sup> Bo Carlsson, “A Visual Self-Image of Legal Authority: ‘The Temple of Law’” (2002) 11 *Social & Legal Studies* 185.

Cover states that “[w]e constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.”<sup>431</sup> However, the existence of the *nomos* – or various *nomi* – threatens the dominance of the state because it illustrates that the intelligibility and richness of law is produced within communities outside of the confines of the state. As such, the law is always simultaneously in a state of creating – and destroying – legal meaning: “[o]n the one hand, state law participates in the generation of normative meaning; on the other, state law plays in the domain of social control, and uses violence to enforce just one (namely its own) concept of order.”<sup>432</sup> As a result, this illustrates what Cover calls the “jurispathic qualities”<sup>433</sup> of state law: in order to substantiate claims to monism and universality, the state needs to quell or delegitimize the jurisgenerative capacity and authority of these non-state normative worlds. The threat to institutionalized legal meaning provides the impetus for law’s violent mandate.

Cover’s “jurisprudence of violence”<sup>434</sup> encompasses two themes. The first theme is the jurisgenerative capacity of non-state communities, and the creation of the “*nomos*.” These normative worlds develop through citizens’ membership in various communities and the communal obligations that they entail. The second theme that emerges from

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<sup>430</sup> See: Iris Marion Young, *Justice and the Politics of Difference* (Lawrenceville: Princeton University Press, 1990) [Young, *Politics of Difference*] at 58.

<sup>431</sup> Cover, *Nomos and Narrative*, *supra* note 275 at 4.

<sup>432</sup> Devlin, *Nomos and Thanatos*, *supra* note 74 at 112. Moreover, as Cover states, “[w]e ought to stop circumscribing the *nomos*; we ought to invite new worlds.” See Cover, *Nomos and Narrative*, *supra* note 275 at 68.

<sup>432</sup> Austin Sarat, “Robert Cover on Law and Violence” in Martha Minow, Michael Ryan, and Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992) 255 at 259.

<sup>433</sup> Cover, *Nomos and Narrative*, *supra* note 275 at 40.

<sup>434</sup> Austin Sarat and Thomas Kearns, “A Journey Through Forgetting: Toward a Jurisprudence of Violence” in Austin Sarat and Thomas Kearns, eds, *The Fate of Law* (Ann Arbor: University of Michigan Press, 2009) [Sarat and Kearns].



Cover's thought is the violence that state law inflicts on these non-state normative worlds at both the physical and epistemic levels. The purpose of exploring Cover's thought is twofold: first, it aims to explore, on another level, how non-state communities provide a normative texture to law. The *nomos* illustrates how legal meaning is proliferated at the local level. The second reason for exploring Cover's work is to illustrate the inextricable link between state law and violence.

The first theme arising out of Cover's jurisprudence explores the narrative dimension of law. He argues that everyone lives within a "*nomos*," or a normative universe, that shapes and influences their commitments with, and interpretations of, legal systems. The legal world – "the rules and principles of justice, the formal institutions of the law, and the conventions of a social order"<sup>435</sup> – are part of one's normative universe. *Nomi* are epistemic grids that provide a way of making sense of the world, not just of evaluating it.<sup>436</sup> Additionally, law is situated within narratives, which influence and substantiate legal meaning. Narratives flow from the *nomos* in which they are situated, and are influenced by particular social, cultural, and political factors. The richness of narrative gives meaning to the legal world; they provide a "bridge linking a concept of a reality to an imagined alternative."<sup>437</sup> For Cover, narratives provide intelligibility to law:

To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be." Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly

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<sup>435</sup> Cover, *Nomos and Narrative*, *supra* note 275 at 4.

<sup>436</sup> See, e.g., Jason Beckett, "The Violence of Wording: Robert Cover on Legal Interpretation" (2011) 8 *NoFo* 3 at 3 [Beckett] at 7.

<sup>437</sup> Cover, *Nomos and Narrative*, *supra* note 275 at 9.

simplified set of norms.<sup>438</sup>

Thus, narratives situate law within context, provide meaning, and link law back to the normative universe inhabited by citizens.

The jurisgenerative potential of non-state communities poses a paradox for the state: in the search for unified legal meaning – that is, enforcement or the “world-maintaining”<sup>439</sup> function of the state – the state only holds minimal creating potential because, as Cover notes, citizens’ attachments with the state are weak as they are premised only on the threat of force or coercion. In this sense, attachment with non-state communities is premised on rich shared discourses and practices that contribute to building and providing intelligibility to law. For instance, Cover uses the example of religious communities to show how they contribute to the *nomos*, and help to shape and inform the legal commitments of religious adherents.<sup>440</sup> As such, as Judith Resnik argues, the relationship between “public/private”<sup>441</sup> holds no weight in determining the jurisgenerative force of communities. That is, the fact that the creation of legal meaning emerges from non-formal or non-state sites (*i.e.*, religious law, customary law, Indigenous law) does little to deter the jurisgenerative capacity; the creation of legal

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<sup>438</sup> Cover, *Nomos and Narrative*, *supra* note 275 at 10.

<sup>439</sup> *Ibid* at 13.

<sup>440</sup> Cover uses biblical texts to illustrate the narrative dimension of non-state communities and how they help to shape how legal meaning is created. As Steven Fraade argues in the context of Cover’s example, “[i]n Cover’s terms, then, the [ten] commandments serve as a “bridge” not just between an unredeemed present and a redemptive future, but also between a perpetual present and an originary, law-giving past, or, perhaps more aptly, as a shuttle line between all three. To employ David Damrosch’s phrase, the Bible in form, content, and meaning is a ‘narrative covenant.’” See: Steven Fraade, “*Nomos and Narrative Before Nomos and Narrative*” (2005) 17:1 *Yale JL & Human* 81 at 83.

<sup>441</sup> See Judith Resnik, “Living Their Legal Commitments: Paiedic Communities, Courts and Robert Cover” (2005) 17 *Yale JL & Human* 17 at 18 where Resnik states: “[a]s Cover described community-based lawmaking, its generative capacity comes from a membership for whom the public/private delineations have little relevance. Rather, through regular acts of affiliation, community members *live* law’s meaning [emphasis in original].”

meaning can – and does – stem from private (non-state) institutions, actors, and normative worlds.

However, I pause here because there appears to be an apparent tension between Cover's work on *nomi* – and legal *communities* – and the focus in this thesis on the methodological importance of the legal actor. This is a quintessential epistemological debate between the individual and the group as the point of normative inquiry. Cover's argument is that non-state communities play an important role in providing meaning to law for the people who inhabit them. In this sense, Cover believes that people are already part of communities which have strong normative commitments. However, he fails to examine the role of law in the constitution of identity or belief, or how individuals help to shape and inform communities.<sup>442</sup> As Beckett explains:

...[Cover] assumes that, although groups construct their members, the groups themselves have a fixed identity, which is reflected in their law... It is the problematic of how we can constitute and maintain a group, how we can create and sustain the conditions for an over-arching group solidarity, while at the same time recognising and valuing difference between the various (sub)groups. In Cover's analysis, the most valuable difference is not the specificity of individual human beings, but the world views constructed and maintained by distinct sub-groups and, more importantly, the normative advantages of recognising these... Such communities are groups, presupposed as extant, presumptively good, and also efficacious. These groups help to construct their members' world views.<sup>443</sup>

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<sup>442</sup> Beckett, *supra* note 436 at 8. In *Nomos and Narrative*, Cover argues that “[t]he intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common "script" renders it "sane" - a warrant that we share a *nomos*.” See Cover, *Nomos and Narrative*, *supra* note 275 at 10. Thus, normative communities are made up of individuals with communal understandings of the world. But Cover seems to ignore here the role of the individual – as a constituted entity – in the constitution of *nomi*.

<sup>443</sup> Beckett, *supra* note 436 at 8. See also the insights of Julen Etxabe, who, in articulating Cover's communitarian approach, states that:

In this sense, there appears to be a rift between Cover and other theorists surveyed in this thesis. However, while this thesis has drawn on the work of Klienmans and Macdonald in resituating the locus of pluralist inquiry on legal actors, this is by no means a suggestion that the world is full of isolated individuals who exist independently of the communities and social spaces in which they inhabit. Legal actors are not abstracted individuals in the sense that they are alienated from any community or collective commitments. As Macdonald and Klienmans argue:

[A conception of a legal actor is not] an appeal to some “essential” or “anthropomorphic” individual, but rather to the way the modern self perceives itself to be individualistic. The self-perception of one as an individual is indeed a signal feature of the modern self. The modern self is a construct, but this construct has itself a constructive capacity, and it is upon this constructive capacity that the internormative character of legal pluralism must be focused.<sup>444</sup>

Accordingly, Macdonald is not “reducing law to the individual” but rather is stating that the “individual [is] the irreducible site of law.”<sup>445</sup> Individuals are not isolated from broad social forces, but broader structures such as communities exist in a constitutive/constituting relationship.

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This notion of community is not grounded on blood, race, ethnic origin or any other ‘essentialist’ attribute. Rather, it is closer to the idea of a social group bound together by the belief in forming such a group, which includes socially constructed accounts about their own constitution and sets of authoritative texts and values. In contrast to the famous Sophist dichotomy between *nomos* and *physis*, here the law is not imposed upon the individual, as it were externally, but comes naturally through a process of acculturation and is learned gradually from childhood. The individual accesses the normative life through the group or groups to which she belongs, even though she may switch membership in the course of her life. Hence different individuals may inhabit different normative worlds (perhaps more than one), but once internalised, the *nomos* becomes part of the psycho-social structure of the individual as much as do the physical phenomena of mass, energy and momentum [footnotes omitted].

See: Julen Etxabe, “The Legal Universe After Robert Cover” (2010) 4:1 Law and Humanities 115 at 118-19.

<sup>444</sup> Klienmans and Macdonald, *supra* note 16 at 44.

<sup>445</sup> McMorrow, *supra* note 389 at 85.

Moreover, legal actors belong to a plethora of normative sites, including local communities, schools, workplaces, and religious communities, which help influence how law is constructed, but to which legal actors also contribute. Human beings are inherently social and the normative communities in which they inhabit do not exist outside of them. Rather, they exist in a discursive relationship where legal actors help to create normative communities through their interactions, and their legal sensibilities are simultaneously created (or shaped) by the internormative universes in which they inhabit. In this sense, the rift between Cover and this thesis is not as wide as initially thought.<sup>446</sup> Cover recognizes that communities shape how members view the world around them.<sup>447</sup> This is congruous with the idea that the legal actor is shaped by the various normative communities within which they are situated.

The key point of departure is that Cover appears to ignore the role that legal actors themselves play in the creation of communities. As Cover postulates, “[j]urisgenesis is a process that takes place in communities that already have an identity.”<sup>448</sup> Cover appears to believe, then, that communities are already constituted. But that does not necessarily mean that Cover’s focus on the community is irreconcilable with the actor as the site of normativity.<sup>449</sup> In this sense, it is not the quintessential liberal

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<sup>446</sup> Cover is also of the view that law is the product of conscious human action: “A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures.” See: Cover, *Nomos and Narrative*, *supra* note 275 at 9. As such, there is a recognition of human agency in the creation of the *nomos* as it does not just exist “out there,” but is the product of *conscious* human will or participation.

<sup>447</sup> Beckett, *supra* note 436 at 9.

<sup>448</sup> Cover, *Nomos and Narrative*, *supra* note 275 at fn 137.

<sup>449</sup> There is some recognition of this in Cover. In describing what he calls *paiedic* – or world-creating – communities, because the term suggests “(1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) *a sense of direction or growth that is constituted as the individual and his community work out the implications of their law*” [emphasis added]. See *Ibid* at 13.

dilemma of the individual posited against his or her community. Cover does not believe that normative universes could exist without the individuals who inhabit them and to which they provide meaning.

Albeit, despite the variances between the conceptualizations of legal actors and Cover's normative communities, this section nonetheless focuses on Cover's conceptualization of *nomi* to illustrate that non-state communities (whether inhabited by constructive agents or not) are often subjugated and marginalized despite the strong normative commitments that individuals have with them. Consequently, the richness of legal meaning, and the creation of strong normative forces, is most readily seen at the non-state level:

The systems of normative life that they maintain are the products of 'strong' forces: culture-specific designs of particularist meaning. These 'strong' forces ... create the normative worlds in which law is predominantly a system of meaning rather than an imposition of force.<sup>450</sup>

The creation of a *nomos* imbues a world that is rich in legal meaning and "[the] *nomos* is as much 'our world' as is the physical universe of mass, energy, and momentum."<sup>451</sup> As such, Cover argues that the commitments that are formed at the community level are stronger than those formed with the state. It is the rich bonds that connect people, the "social bonds, common beliefs and cultural possessions" that become fundamental in the law-creating commitments of non-state communities.<sup>452</sup>

The inherent tension that exists between state and non-state communities gives rise to Cover's second theme: law and violence are inextricably linked. The violence of law is experienced both physically, on the bodies of citizens, as well in the form of norm-

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<sup>450</sup> Cover, *Nomos and Narrative*, *supra* note 275 at 105.

<sup>451</sup> *Ibid* at 5.

killing violence. For Cover, “there is a radical dichotomy between the social organization of law as power and the organization of law as meaning.”<sup>453</sup> State law perpetuates violence by subjugating non-state normative worlds in the pursuit of social order, which is sometimes felt on the bodies of citizens or their normative ideals. Courts, legislatures, and other institutions of the state help to perpetuate such a state of affairs: “[t]he sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, impose the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease.”<sup>454</sup> It is the search for unified meaning where the violence of law takes hold.

In perhaps Cover’s most infamous article he speculates that “legal interpretation takes place on a field of pain and death.”<sup>455</sup> For Cover, the very act of judging is fraught with violence upon the bodies of litigants: judges make interpretative decisions that affect the rights, liberties, freedom, and, sometimes, even the lives of litigants. In this way, legal interpretation is a proponent of, and intimately linked with, the violence of law. As Devlin argues, “[l]aw, is so far as it sanctions the coercive power of the state, enables people to do frightening – even deadly – things to each other.”<sup>456</sup>

Cover traces this theme through the idea of criminal sentencing to examine how law imposes violence on the bodies of citizens. For Cover, the experience of being a prisoner “...is, from the outset, an experience of being violently dominated, and it is

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<sup>452</sup> See: Melissaris, *The More the Merrier*, *supra* note 47 at 67.

<sup>453</sup> Cover, *Nomos and Narrative*, *supra* note 275 at 18. This is what Cover calls “jurispathic” violence.

<sup>454</sup> *Ibid* at 16.

<sup>455</sup> Robert Cover, “Violence and the Word” in Martha Minow, Michael Ryan, and Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992) [Cover, *Violence and the Word*] at 203.

<sup>456</sup> Devlin, *Nomos and Thanatos*, *supra* note 74 at 298.

colored from the beginning by the fear of being violently treated.”<sup>457</sup> The physical violence of law is most pervasive in the imposition of punishment for a criminal offence, especially in the imposition of imprisonment or the death penalty. From the elimination of liberty, to the pain and punishment of a death sentence, the state’s role in violence is palpable, even though the state portrays itself as being shielded from violent praxis.<sup>458</sup> In this way, Cover resituates the point of inquiry directly upon the imposition of state violence, a thought which challenges the liberal ideal of the state as the neutral arbiter of social order.

There is a connection between the “violence of the word” – or epistemic violence – and the raw physical violence occasioned with law’s explicit sanction. Judges, who “deal in pain and death,”<sup>459</sup> impose violence through their acts and words. While they may not be the executioner, by their words – legal judgments – they authorize the infliction of violence: “[t]he judicial word is a mandate for the deeds of others.”<sup>460</sup> Law and those involved in enforcing it are caught up in a violent practice – law creates a “pyramid of violence.”<sup>461</sup> While legal interpretation endeavours to detach itself from the violence it inflicts, the acts and words of judicial interpretation empower such violent

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<sup>457</sup> Cover, *Violence and the Word*, *supra* note 455 at 212. While Cover makes this assertion, he is so bold as to say that in certain circumstances, this state of affairs is “just as [he] would want it.” Cover eventually reconciles the necessity for violence, which I argue is intellectually defeatist. He brings us into a world that paints law as *inherently* violent, then stops short of calling for its elimination. I disagree with Cover’s hasty reconciliation with violence, and it is for the very violent tendencies of state law that I argue deconstruction is necessary.

<sup>458</sup> The illusion of social control allows law to perform this function. Under the auspices of “doing good” or, in effect, holding off anarchy, the state performs often quite violent acts without thinking twice about them. Nor do citizens think twice about them, except, perhaps, for public policy discussions surrounding issues like capital punishment.

<sup>459</sup> Cover, *Violence and the Word*, *supra* note 455 at 213.

<sup>460</sup> *Ibid.*

<sup>461</sup> *Ibid.* at 216.



deeds. In this way, legal interpretation is directly implicated in the infliction of state violence.<sup>462</sup>

Consequently, the banality of violence emerges. The state is authorized in doing the violent things it does through the contours of the modern state which underpin its legitimacy. As Devlin argues, this creates an untenable distinction between “legal” violence, that which is authorized by the state and legitimized under the guise of social control, and “illegal” violence, which is violence or opposition faced by the state.<sup>463</sup> The sum of this reality is the perpetuation of a monist conception of law whereby state law presumes that law, as a concept, is fixed rather than fluid and subjective. As such, the state predicates itself as being the holder of social control, and without it society would descend into anarchy. This is the genius of law – its function in delegitimizing and, in a

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<sup>462</sup> Melissaris argues:

When the judge resolves disputes by silencing one of the demands produced before her/him or when s/he deals with pain and death as for instance in the course of a criminal trial, s/he is never alone. S/he shares the responsibility of his/her actions and words with a number of people. The legal system invents its mechanisms of depersonifying its operations and thus making them more flexible and effective. These operations sit comfortably with legitimacy, because they are carried out with the vocabulary formed in reference to the predominant legal meaning.

Melissaris, *The More the Merrier*, *supra* note 47 at 68.

<sup>462</sup> Cover notes:

When judges interpret the law in an official context, we expect a close relationship to be revealed or established between their words and the acts that they mandate. That is, we expect the judges' words to serve as virtual triggers for action. We would not, for example, expect contemplations or deliberations on the part of jailers and wardens to interfere with the action authorized by judicial words. But such a routinization of violent behavior requires a form of organization that operates simultaneously in the domains of action and interpretation. In order to understand the violence of a judge's interpretive act, we must also understand the way in which it is transformed into a violent deed despite general resistance to such deeds; in order to comprehend the meaning of this violent deed, we must also understand in what way the judge's interpretive act authorizes and legitimates it.

See Cover, *Violence and the Word*, *supra* note 455 at 219.

<sup>463</sup> Devlin, *Nomos and Thanatos*, *supra* note 74 at 344.

sense, *killing* other normative worlds substantiates its very being, thus validating the violence it inflicts.<sup>464</sup>

Cover's purpose in using the example of criminal sentencing is to demonstrate that legal interpretation *necessitates* a violent act, even if it is once-removed from the actual "pulling the switch," so to speak. This act can be of the norm-killing kind that disintegrate the normative prospects of non-state actors or communities, or of the physically violent kind that takes its world-sustaining character out on the bodies of citizens. Cover believes that law cannot be divorced from violence. Given this, the violent function of law can be seen explicitly in the relationship between Indigenous peoples and the Canadian state. Law has been complicit in the realization of colonialism, as a tool to oppress and subjugate Indigenous peoples. A self-referential façade of social control allows state law to remain unfixed, unchallenged, and unabated in its violence against Indigenous peoples and their normative ideals.

Law plays an important ideological function in structuring the relationship between various social actors. Law facilitates the encoding a particular set of power relations that are structured from above – that is, by those with power in society. As Devlin argues:

[Law's] purpose is to achieve an acceptable level of consensus and to create sufficient stability in order that existing social relations may continue. To adopt the discourse of Antonio Gramsci, law as ideology aspires to generate "spontaneous consent" and "the will to conform", attitudes that indicate that some social group has attained a condition of hegemony.<sup>465</sup>

Law's ideological role, then, helps give its violent mandate purpose and legitimacy. Law helps to facilitate the dissemination of a particular ideological worldview which

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<sup>464</sup> Devlin, *Nomos and Thanatos*, *supra* note 74 at 344.

<sup>465</sup> *Ibid* at 340 [footnotes omitted].

structures social relations as a means to achieve consensus and to provide “stability” and “social order.” However, order and stability are axioms that legitimize violence and act as a site to maintain a particular ideological backdrop – that of the prioritization of Western liberal ideals and, to use the words of Devlin above, the attainment of a “condition of hegemony.”

For instance, the fallacy of state domination is rooted in colonial sovereignty which has sought to erasure and deny Indigenous culture, law, and ways of being. Given this, the violence of law must be specifically acknowledged in legal pluralist analyses. If we are to celebrate the diversity of normative sites that exist outside of the state, and decry the imposition of legal centralism, we cannot ignore that state law is interwoven with violence. That is, it is not sufficient for legal pluralist analyses to argue that law *exists* outside of the state as the realpolitik of the interaction of state and non-state legalities will serve to perpetuate legal centralism. It is because of state law’s violent mandate that I implore the need for deconstruction: in order to provide a framework that seeks to underscore the importance of Indigenous law as both a site and mode of normativity, we need to destabilize these violent tendencies. As Professor Sákéj Henderson argues:

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.<sup>466</sup>

Law, as an Eurocentric entity, requires not merely an attitudinal shift; it requires radical decentering. The result of law’s ideological goal of “social order” has been to sustain unequal power relations. By presuming a monopoly over law, the state reconstructs

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<sup>466</sup> Henderson, Postcolonial, *supra* note 9 at 5.

colonial assertions of dominance based on claims to empirical “truth:” state law is assumed to be “true” law because it emanates from state institutions.

Some may assert that this position is too harsh for the Canadian moment. Many will note the significant strides made in Canadian courts for Indigenous peoples.<sup>467</sup> This may be true. As stated elsewhere in this thesis, there has been judicial and governmental acknowledgement of the depravity of colonialism. Section 35 has brought about new thinking about the relationship between Indigenous peoples and the Canadian state. But, underlying these claims, have colonial assertions to domination, superiority, and unidimensional legal authority diminished?<sup>468</sup>

Until the underlying ideologies of legal centralism are unearthed and decentered, law will always play a role in legitimizing colonization.<sup>469</sup> For example, so long as Aboriginal title jurisprudence assumes colonial assertions of sovereignty, Indigenous law and ways of being in the world will remain subjugated in relation to state law’s hegemony: Indigenous peoples are required to concede their traditional understandings of law, and their historical relationships to the land, in order to advance a title claim.<sup>470</sup> As

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<sup>467</sup> For example, there was a swath of positive commentary following the release of the Aboriginal title case *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot’in*] wherein the Supreme Court of Canada seemed to reject some of its past jurisprudence which narrowed the scope of title claims.

<sup>468</sup> As Brenda Gunn argues, “[b]efore Indigenous legal systems can be recognized, the faults of the existing system must be exposed. Canadian jurisprudence based on liberal principles and rooted in doctrines such as the doctrine of discovery are unable to produce anything but racist legal principles.” See: Brenda Gunn, “Protecting Indigenous Peoples’ Lands: Making Room for the Application of Indigenous Peoples’ Laws Within the Canadian Legal System” (2007) 6:1 *Indigenous LJ* 31 [Gunn] at 40.

<sup>469</sup> Henderson argues that “[e]nfolded in...legal decisions are the normative visions that protect the colonizers’ prosperity, their system of rights, and their institutions of government and adjudication.” See: Henderson, *Postcolonial*, *supra* note 9 at 12.

<sup>470</sup> I made this explicit connection in Chapter 1, *supra*, in my discussion of the “Aboriginal perspective.”

Borrows notes, “[a]s current jurisprudence stands, Aboriginal peoples are being asked to harmonize their perspectives with the notion that they are conquered.”<sup>471</sup>

The purpose of fleshing out law’s jurispathic qualities is not to merely advance pessimistic observations about law’s imperialist or colonial mindset. Rather, it is to set out these tendencies upfront, unearthing the flawed ideologies that sustain this view so that we can address the barriers to the advancement of a legal pluralist model. Without exposing and deconstructing the violence and coercive tendencies of state law, rules, and institutions, the potential of legal pluralist models will always be attenuated. Law’s violence has provided a means to uphold colonial domination. This supposition inhibits the normative expansion of Indigenous law and engenders disrespect for Indigenous ways of being in the world. While the work of revitalizing Indigenous legal traditions is ongoing, we cannot forget the barriers to the progression of Indigenous law – that is, it will always either have to conform to common law standards, or that it will be relegated to the margins because of the violence of state law.<sup>472</sup>

As such, law and violence are inevitably intertwined with colonialism and oppression. Insofar as the liberal state structures social relations and perpetuates oppression, Iris Marion Young’s concept of “cultural imperialism” helps us understand how law facilitates the domination and subordination of Indigenous culture – to which

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<sup>471</sup> Borrows, *Sovereignty's Alchemy*, *supra* note 6 at 566.

<sup>472</sup> As Henderson notes, “[d]espite 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.” See: Henderson, *Postcolonial*, *supra* note 9 at 12.

law is inextricably linked<sup>473</sup> – within the Canadian state. In positing a definition of cultural imperialism, Young states that “to experience cultural imperialism means to experience how the dominant meanings of a society render the particular perspective of one's own group invisible at the same time as they stereotype one's own group and mark it out as the Other.”<sup>474</sup>

In relation to the modern liberal state, cultural imperialism privileges Eurocentric views of law, state, and community over those of the Indigenous peoples who first occupied the territory called Canada. These dominant cultural characteristics become the “norm” through which other cultural edifices are adjudged. Through the process of cultural imperialism, the dominant culture obtains precedence over processes of “interpretation and communication.”<sup>475</sup> Eurocentric modes of understanding the relationship of law and society become privileged and attain the status of the “norm.” In this sense, Eurocentric cultural constructs become the “true” modes of understanding the world.

Through this process of cultural imperialism, Young argues that the dominant culture's ideas, experiences, and norms become universalized; their culture becomes normalized to the detriment of non-majoritarian cultures. It becomes *the* “reality” or “truth.” As she states, “[o]ften without noticing they do so, the dominant groups project

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<sup>473</sup> See, e.g., Paul Schiff Berman, “The Enduring Connections Between Law and Culture: Reviewing Lawrence Rosen, *Law as Culture*, and Oscar Chase, *Law, Culture, and Ritual*” (2009) 57 *Am J Comp L* 101 at 102 where Schiff Berman states that culture is “...the necessary and inevitable mechanism by which human beings construct meaning out of reality. Indeed, the capacity for culture is seen as a crucial part of our very evolution as a species. Thus, culture is not simply a set of customs we can choose to put on or take off like clothing; it is woven into the fabric of our being.”

<sup>474</sup> Young, *Politics of Difference*, *supra* note 430 at 58-59.

<sup>475</sup> *Ibid* at 59.

their own experience as representative of humanity as such.”<sup>476</sup> This claim to universality becomes engrained within state institutions and processes as a reflection of these dominant narratives. Different experiences become the “Other” and, thus, not cognizable by dominant structures.

Indigenous peoples within Canada have experienced this cultural imperialism in its most blatant and brute form.<sup>477</sup> The result of imperialism, Young notes, is that “[t]hose living under cultural imperialism find themselves defined from the outside, positioned, placed, by a network of dominant meanings they experience as arising from elsewhere, from those with whom they do not identify and who do not identify with them.”<sup>478</sup> Indigenous peoples become parasitically defined through this process of Othering, which, inevitably, renders their laws pre-social, pre-modern, and unimportant in the modern world.<sup>479</sup>

Cultural imperialism is not a destined fact. The dominant culture does not retain this position because of a superior normative claim to cultural domination. Rather, it is a product of brute force and violence through which the dominant culture imposes its normative ideals on cultural minorities, including its laws. The dominant group becomes able to assert their experience as “natural” or “inevitable,” and it becomes the standard through which all other experiences are objectified. As Young notes, “[i]n the sphere of the polity, I argue, a claim to universality operates politically to exclude those understood

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<sup>476</sup> Young, *Politics of Difference*, *supra* note 430 at 59.

<sup>477</sup> We should not forget the specific and deliberate patterns of dispossession mediated through colonialism that sought to erase Indigenous peoples’ cultures, laws, languages, and, ultimately, threatened their lives.

<sup>478</sup> Young, *Politics of Difference*, *supra* note 430 at 59.

<sup>479</sup> This forms part of the “politics of recognition” as theorized by Charles Taylor. See: Charles Taylor, “The Politics of Recognition” in Amy Guttmann, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994). For critical reflections on the politics of recognition and resistance to colonial frameworks, see: Coulthard, *Red Skin, White Masks*, *supra* note 186.

as different.”<sup>480</sup> Thus, the result of cultural imperialism is that those considered culturally “inferior” experience the exclusion and subordination of their cultural artefacts – whether they be traditions, laws, or ways of viewing the world – by state institutions.

Moreover, Young postulates that there is a connection between cultural imperialism and violence. She states:

Cultural imperialism, moreover, intersects with violence. The culturally imperialized may reject the dominant meanings and attempt to assert their own subjectivity, or the fact that their cultural difference may put the lie to the dominant culture's implicit claim to universality. The dissonance generated by such a challenge to the hegemonic cultural meanings can also be a source of irrational violence.<sup>481</sup>

Consequently, the violence occasioned by law is then directly connected to the project of cultural imperialism: both act in a co-constitutive process reinforcing Eurocentrism against Indigenous peoples. As such, state institutions serve to reflect the cultural and ideological ambitions of the dominant social group. In Canada, governmental and legal institutions reflect Eurocentric ideals to the detriment of Indigenous worldviews. This is what Henderson refers to as the “obsidian quandary” for the Indigenous legal consciousness. Eurocentrism, he argues, “[a]s an institutional and imaginative context, [...] 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’.”<sup>482</sup>

The problematic nature of this Eurocentrism is evidenced by the violence that occasioned in the context of Indigenous knowledges, traditions, and relations: majoritarian experiences act to silence and marginalize minority cultures. It is in this

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<sup>480</sup> Young, *Politics of Difference*, *supra* note 430 at 60.

<sup>481</sup> *Ibid.*



silencing act that colonial law's violence is occasioned. Given law's violence, it is not theoretically tenable to simply assert that Indigenous law (or other forms of non-state law) *exist* outside of state apparatuses. As has been shown in this section, state law is not a neutral observer of legal pluralism, but an active agent in silencing non-majoritarian legal sensibilities. For this reason, this Chapter continues on to consider the value of deconstruction as a means of fleshing out the explicit (and sometimes latent) violent qualities of law. In doing so, state law becomes problematized and decentered, which allows us to have a richer and more nuanced discussion of a postcolonial future.

#### **4.3 PLURALISM AS DECONSTRUCTIONIST PRAXIS: ELIMINATING “COGNITIVE IMPRISONMENT”<sup>483</sup>**

As noted above, deconstruction first appeared as an interpretative strategy for reading and analyzing texts. It involves a decentering of seemingly hierarchical ideas to reveal the hidden antinomies that underlie philosophical ideas or rules. Balkin argues that lawyers should be interested in deconstructive techniques for three reasons. First, deconstruction provides a method to criticize and critique legal doctrine. For example, it allows the reader to examine how the arguments that support a particular doctrine actually undermine its own argument, thus creating incongruities in legal thought. Second, deconstructive technique can help expose hidden ideologies that sustain particular legal doctrines. Third, it helps to provide “a new kind of interpretive strategy and a critique of conventional interpretations of legal texts.”<sup>484</sup> Moreover, Balkin argues that:

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<sup>482</sup> Henderson, Postcolonial, *supra* note 9 at 5.

<sup>483</sup> *Ibid.*

<sup>484</sup> Balkin, Deconstructive Practice, *supra* note 424 at 743.

Legal theorists were primarily interested in using deconstruction for normative or critical purposes. They wanted to criticize some (but not other) doctrinal distinctions as incoherent, they wanted to show that some (but not other) parts of the law were unjust and needed reform, and they wanted to demonstrate that some (but not other) ways of thinking had undesirable ideological effects that concealed important features of social life and therefore promoted or sustained injustices.<sup>485</sup>

Thus, deconstruction offers a potent mechanism for the disintegration of problematic patterns of thought which underlie legal doctrine and discourse, and which serve to subjugate non-majoritarian normative ideals.

As Devlin notes, deconstruction encompasses a “double gesture,”<sup>486</sup> which is a two part strategy:

First, there is a reversal or overturning of the hierarchy to bring “low what was high” so as to demonstrate the epistemological arbitrariness of such a prioritization. Secondly, there is a displacement of the (new) binary opposition in order to destabilize hierarchy itself and thereby to allow for a burgeoning of multiplicity.<sup>487</sup>

This is the most fruitful aspect of deconstruction for my purposes here: the inversion of binaries and the consequential liberation that it provides to extricate legal thought from its ideological presuppositions. The inversion of hierarchies creates what is called “différance,” which, taken to its literal sense, means to defer meaning.<sup>488</sup> This provides an interpretative strategy that illustrates that:

(1) the terms of an oppositional hierarchy are differentiated from each other (which is what determines them); (2) each term in the hierarchy defers the other (in the sense of making the other term wait for the first term), and (3) each term in the hierarchy defers to the other (in the sense of being fundamentally dependent upon the other).<sup>489</sup>

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<sup>485</sup> Balkin, Deconstruction’s Legal Career, *supra* note 420 at 721.

<sup>486</sup> Devlin, Postmodernism, *supra* note 41 at 20.

<sup>487</sup> *Ibid.*

<sup>488</sup> *Ibid.*

<sup>489</sup> Balkin, Deconstructive Practice, *supra* note 424 at 752.

This strategy helps to show how what is encoded as defective and inferior actually helps to sustain that which is prioritized and superior. In this way, the deconstruction of hierarchies shows how artificial categories, like superior/inferior for example, are actually arbitrary and constructed rather than a product of inherent truths.<sup>490</sup>

Différance thus shows how hierarchies are artificially produced and sustained by relational meaning wherein particular concepts are mutually dependent on each other. As Devlin postulates:

Deconstruction - by emphasizing the relational nature of our concepts, by discovering the mutual dependency of centre and margin, by demonstrating that the primary and the secondary are mutually implicative, by bringing into sharp relief the play of différance - does not pursue a synergistic or dialectical third way. Rather, its aim is to uncover a plurality of possibilities and to demonstrate that what is centralized is dependent upon the repression of alternative contenders by relegating them to the margins.<sup>491</sup>

In this way, deconstruction does not reassign priority in hierarchical positioning, but rather allows for a plurality of possibilities. This allows minority or suppressed ideas to emerge to the surface. Derrida's purpose is to sew a web of "doubt" or what he calls "aporia"<sup>492</sup> by displacing what we have come to know as sacred and dominant. For example, law's violence has inscribed an artificial ordering or hierarchy as a means to privilege certainty and predictability, which actually depends on the repression and invisibilization of alternate ways of being in the world. Deconstruction radically alters this inscription by disrupting what is previously thought to be sacred and revered.

In taking the example of state law further, we can see the inherent allure of deconstruction as a praxis for displacing hegemonic discourse and ideology: state law's

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<sup>490</sup> Devlin, Postmodernism, *supra* note 41 at 21.

<sup>491</sup> *Ibid.*

<sup>492</sup> *Ibid.*

dominance is dependent on the subjugation of non-state legalities, including Indigenous law. This false construction of value – that is, that Canadian law is privileged and Indigenous law is suppressed – is an unjustified consequence of the colonial enterprise. However, deconstruction also allows us to dissolve the cognitive privileging of state law by showing how this dichotomy is supported by a false consciousness of certainty and predictability. Deconstructionist praxis allows for the dissolution of the ideological supports that sustains state law’s dominance, thus allowing for a reconceptualization of the boundaries of legal discourse. Devlin asserts that “[i]n favouring cacaphony rather than harmony, deconstruction creates conditions hospitable to the “return of the repressed.””<sup>493</sup> As meaning is not *a priori* inscribed – that is, no one experience is encoded as meaningful – formerly unprivileged discourses emerge.

Moreover, state law’s claim to dominance rests on philosophical constructs that delegitimize Indigenous ways of being in the world. Liberalism underlies our political and legal structures, and, as a philosophy, places value on individualism, personal autonomy, and equality.<sup>494</sup> For liberalism, “[t]he individual is conceptualized as the locus of moral worth, a being in whom value inheres, a fundamental source of value and meaning in lives lived.”<sup>495</sup> In this way, the goal of political and legal institutions is the advancement of individual rights. It is upon liberalism that “common law rules were organized around a principle of individual autonomy and consent.”<sup>496</sup>

Many Indigenous scholars argue that Indigenous worldviews run directly counter to liberal ideals. As Brenda Gunn argues:

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<sup>493</sup> Devlin, Postmodernism, *supra* note 41 at 21.

<sup>494</sup> Christie, *supra* note 145 at 81.

<sup>495</sup> *Ibid.*

The liberal interpretation of individualism, autonomy and equality conflicts with many Indigenous peoples' values. The fundamental principles underlying liberalism are alien to the belief structures of Aboriginal peoples. Thus, there is an inherent limit in the Canadian common law's ability to extend protection to Indigenous peoples' lands. Further the application of liberal laws to Indigenous peoples will perpetuate the racism within the legal system. Gordon Christie goes as far as to argue that the law as a liberal institution cannot protect the essential interests of Aboriginal peoples.<sup>497</sup>

It is important, then, to think about deconstruction not only as a means to critique the state's claim to domination, but also liberal ideology that suppresses and devalues Indigenous identity and culture. Deconstruction, then, offers a vehicle to disrupt the liberal ideals which underlie how we conceptualize law and its role in society. In deconstructing the idea that liberal ideals are essential features of law, we are able to turn our attention to the cultural contingencies of differing conceptions of law. Dismissing, *prima facie*, legalities which do not fit the liberal model serves to privilege Eurocentric understandings of the world. Instead, deconstruction provides an instrument to acknowledge that legal normativity can emerge from non-Western ideological constructs.

In challenging state law's normative claim to dominance, deconstructionist praxis reinvigorates legal pluralism's prospects as a normative framework. Suppressed legalities are validated and legitimized through the dismantling of the hierarchical foundations of state law. However, deconstruction is not a complete rejection or suppression of state law, as it would be antithetical to deconstruction to re-establish hierarchies. Rather, it dissolves the hierarchical structuring which keep Indigenous legalities suppressed. As Henderson asserts, "[t]o acquire freedom in any decolonized and de-alienated order, the colonized must end their silence and struggle to retake

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<sup>496</sup> Henderson, Postcolonial, *supra* note 9 at 11.

<sup>497</sup> Gunn, *supra* note 468 at 44.

possession of their humanities, languages, and identities.”<sup>498</sup> This freedom can only emerge from a conceptual dismantling of the interpretive monopolies that perpetuate violence against Indigenous normative worlds. Any other version of legal pluralism will only pay lip-service to non-state legalities as they keep in tact the intellectual traditions and institutional apparatuses which maintain state domination. There is much to be learned and discovered in an intercultural conversation about law. However, this conversation can begin only by un-privileging that which was privileged in legal theory and discourse. It is through deconstruction that the normative framework of a postmodern legal pluralism can emerge to begin the hard work of transforming our understanding of the place, importance, and value of Indigenous law.

As has been stated elsewhere in this thesis, the deferred meaning – *différance* – is constructed within legal actors and their encounters with different normative forces. Thus, legal meaning is not determined *a priori*, but rather is set in its cultural and subjective sense. In this way, neither legal order or meaning is privileged or considered foundational. As Balkin argues, deferring meaning ensures that “neither term of the opposition can be originary and fundamental because both are related to each other in a system of mutual dependences and differences. Each is continually calling upon the other for its foundation, even as it is constantly differentiating itself from the other.”<sup>499</sup>

However, as Henderson notes, in attempting to conceptualize a postcolonial legal consciousness, it is not enough to cry foul over the problematic ideologies that sustain colonialism. Henderson calls for a “legal transformation” in order to create awareness of

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<sup>498</sup> Henderson, Postcolonial, *supra* note 9 at 18.

<sup>499</sup> Balkin, Deconstructive Practice, *supra* note 424 at 751.

how Indigenous law is formed and its importance within Indigenous societies.<sup>500</sup> The “legal transformation” for which Henderson argues requires a rethinking of how law is conceptualized, and how legal meaning is created. The version of legal pluralism that I have proffered in this thesis, I hope, will begin that conversation as a means of thinking about how postmodern legal pluralism combined with deconstruction will offer an emancipatory framework for Indigenous law. These are not new ideas, but when combined they offer, I believe, a radical re-visioning of a presently bleak relationship.

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<sup>500</sup> Henderson, Postcolonial, *supra* note 9 at 25.

# CHAPTER 5: ENTANGLED WEBS – TOWARD INTERCULTURAL PROCESSES

*The colonized must be made to see that colonialism never gives away anything nothing.*

Frantz Fanon<sup>501</sup>

## 5.1 OUR MUTUAL ENTANGLEMENT

Given the normative framework which this thesis has offered, this Chapter moves on to think about postmodern legal pluralism in the context of intercultural conversations between Indigenous peoples and the Canadian state about law. That is, what, if anything, can a postmodern legal pluralism offer to help resituate the relationship between Indigenous and Canadian law? More precisely, how can a postmodern legal pluralism help us rethink how we approach the intercultural conversation when Indigenous and Canadian legalities interact or conflict? While this thesis does not offer a complete normative theory *qua* a theory of justice or democracy, it provides a self-critical reflection on the limits of Western law and legal theory as a means to reexamine points of interaction or contestation between Indigenous and Canadian law.<sup>502</sup> It also affords an opportunity to think about legal pluralism as both legal theory and political praxis: how can we better respond to the colonization and imperialization of Indigenous peoples and their laws?

In this vein, I have attempted in this thesis to reconstruct a more emancipatory framework that serves to unweave conceptualizations of law from colonial discourse,

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<sup>501</sup> Fanon, *Wretched of the Earth*, *supra* note 305 at 92.



thereby expanding how we theorize legal normativity. As Borrows suggests, a disconnect exists wherein Indigenous law exists and operates within Indigenous communities, but it has not been fully recognized as such by broader Canadian political or legal institutions.<sup>503</sup> However, in refocusing attention to legal actors as constructive agents of law, I postulate that courts and other institutional spaces would therefore be able to acknowledge and respect the jurisgenerative agency of Indigenous peoples. In this way, institutional sites would come to acknowledge that Indigenous peoples are not merely passive subjects of state law, but actively construct their own localized normative spaces which draw on their culturally-specific understandings of the world.

This Chapter argues that it is at sites of interaction and contestation between Indigenous and Canadian law where the insights from this thesis can be brought to bear. As such, this Chapter reflects on the institutional barriers that currently exist which diminish the extent to which legal pluralism can be acknowledged and reflected in institutional legal frameworks. However, it also reimagines these barriers in order to reformulate how institutions approach points of contestation or interaction between Indigenous and Canadian legalities. It is challenging to reformulate hard-ingrained

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<sup>502</sup> In this way, this thesis attempts to dismiss and reconstruct the flawed political, social, and ideological problems underlying current frameworks (such as courts) when Indigenous and Canadian law interact. Consequently, it is not a complete normative theory of Indigenous justice or self-determination. Rather, it offers an attempt to think about the problematic tendencies inherent in colonial law in a new light. It is an attempt – albeit my attempt – to offer new ways of thinking and acting in the intercultural conversation.

<sup>503</sup> Borrows, Canada's Indigenous Constitution, *supra* note 77. Moreover, Borrows notes that:

...if the common law cultivated a dogmatic intolerance of the civil law or Indigenous legal traditions, this could damage these traditions too... We tend to regard other traditions as potentially threatening, despotic, or sever, if our own ethnocentrism prevents us from seeing problems arising in our own systems. We must ensure that we turn a critical eye on each legal tradition, including [the Canadian system] to ensure it promotes respect and dignity for those who depend upon it.

See *Ibid* at 9.

patterns of imperialism, but this Chapter attempts to begin a conversation on how a postmodern legal pluralism may be realized.

In moving forward in this regard, this Chapter recognizes what John Borrows labels, as an ontology, “entanglement.”<sup>504</sup> we live in entangled webs. Our subjective experiences of the world around us are constituted by, and filtered through, a multitude of normative forces and relationships. However, through the process of entanglement, our histories become interwoven as Indigenous peoples and settlers live together, interact, and conflict. As Anker notes,

[e]ach of the actors in a web of communities has his or her own response to legal questions, and these influence the responses of other actors in a never-ending cycle of intensifying perturbations. Law is generated by constant iterations and reiterations, each related to the other but ultimately unpredictable.<sup>505</sup>

Given the “web of communities” which exist in a constituted/constituting relationship with legal actors, this means that no one community or force can have a monopoly over law. As such, entanglement forces us to recognize that law is not an autonomous and static phenomenon despite attempts by the state to claim it to be such. Consequently, as Anker notes, in critiquing legal centralism, the “justice question” focuses on whether the identity of the state and its claims are taken for granted or not, and whether an unfair burden is placed on Indigenous peoples to “establish their authenticity according to terms that are not of their making.”<sup>506</sup>

In attempting to articulate how to unthink the state’s unmediated claim to “reality” or “truth” in the context of law and the everyday interactions of Indigenous

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<sup>504</sup> John Borrows, as recounted by the author in LAWS 2260, Indigenous Law as Practice, March 2016; see also: James Clifford, “Indigenous Articulations” (2001) 13:2 Contemporary Pacific 467.

<sup>505</sup> Anker, Declarations of Interdependence, *supra* note 20 at 189.

<sup>506</sup> *Ibid* at 194.

peoples and the Canadian state, this Chapter does not offer absolutist policy solutions. The mediation of entanglement cannot be understood in a process of *ad hoc* policy recommendations, but rather involves a renegotiation of the boundaries of legal discourse and process, including how courts and other institutional sites adjudicate and facilitate intercultural conversations. In this sense, this Chapter invites us to think about what sites of negotiation or contestation *could* or *ought to* look like in the current moment as it provides support for institutional change for Indigenous peoples struggling for proper acknowledgement of their cultural understandings of law.

Accordingly, this Chapter examines institutional arenas where intercultural conversations occur, such as, for example, courts. While the understood goal of the Canadian court system is resolving disputes, these points of contestation nonetheless provide avenues in which intercultural conversations occur. This queries whether courts are legitimate institutions for such disputes given their role in perpetuating colonialism. However, this Chapter explains how the insights from a postmodern legal pluralism may increase institutional legitimacy so that courts may become sites for productive encounters between Indigenous and Canadian legalities. This could generate a commitment to reinvigorating institutional sites as arenas which foster the “ongoing cultivation of solidarity within, between, and across legal cultures throughout this land.”<sup>507</sup>

This Chapter focuses on two distinct processes which may act as sites through which to understand the insights gleaned from a postmodern legal pluralism. Given the intercultural context in which interactions between Indigenous and Canadian legalities

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<sup>507</sup> Borrows, Canada’s Indigenous Constitution, *supra* note 77 at 21.

occur, processes of *translation* and *negotiation* will be explored.<sup>508</sup> In fleshing out how these processes operate within the intercultural context, this Chapter will challenge both the ideological formation of state institutions, and illustrate how a fruitful and decolonized intercultural conversation requires us – as Western scholars, lawyers, and judges – to reconceptualize how we understand legal normativity, opening our minds to the fact that law arises, and is constructed through, a plurality of sites and modes.

Translation is an inevitable facet of the intercultural conversation that materializes from our mutual entanglement. Translation arises from the fact that Indigenous peoples and European settlers (which largely make up broader Canadian society) live law in very different ways. However, at points of interaction or contestation, there is an element of cultural translation that is required so that we may understand the laws of the other. While we do not speak on the same terms, any intercultural conversation must be responsive to the contingency of law as a cultural social practice. Given the need for cultural sensitivity, the process of translation requires a rethinking of what an intercultural conversation expects from participants in order to translate their perceptions of law. This will inevitably involve a reconsideration of the “law as fact” paradigm which requires that Indigenous law be translated into common law terms – such as “property” – then becoming something to which state law is applied. As Anker asserts, “the solidity demanded by positive law is not the eternity of the land or the knowledge of belonging to a community; it is the constancy of abstractions such as rules, systems or culture.”<sup>509</sup>

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<sup>508</sup> These two processes are drawn from Anker’s text, and are processes that become important in examining the interaction of Indigenous and Canadian law. See: Anker, *Declarations of Interdependence*, *supra* note 20, Chapters 4 through 6.

<sup>509</sup> *Ibid* at 193.

The second process to be explored in this chapter is negotiation. This, too, focuses on the intercultural conversation, and, specifically, on the ability for institutional sites to *facilitate* such conversations, and whether these sites effect reciprocity or maintain colonialism. As Michael Coyle notes, “[i]n principle, negotiation is a normatively attractive process because it is flexible and respects the parties' autonomy.”<sup>510</sup> However, Coyle warns that current negotiation frameworks, including courts and other institutional apparatuses, tend to reproduce unequal power relations between Indigenous peoples and the Canadian state.<sup>511</sup> In response, a postmodern legal pluralism aims to disrupt these hegemonic power relations by deconstructing the harmful ideological frameworks which maintain the state’s claim to monistic authority. This disruption, I argue, fundamentally changes the nature of the relationship between Indigenous peoples and the Canadian state.

In thinking about the processes of translation and negotiation in the context of a postmodern legal pluralism, two key insights emerge which, I argue, may facilitate more decolonized intercultural encounters. The first insight liberates us from the “law as fact” paradigm which requires that Indigenous legalities radically transform into common law concepts in order to be recognized by common law courts. Instead, a postmodern legal pluralism denotes a translation process which acknowledges the contingency of legal meaning, thus viewing translation not as a “one-to-one” mapping, but rather as a means of ensuring accessibility between differing legal sensibilities. The second insight to be fleshed out in this Chapter responds to the fact that institutions – whether they be courts

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<sup>510</sup> Michael Coyle, “Negotiating Indigenous Peoples' Exit From Colonialism: The Case for an Integrative Approach” (2014) 27 Can JL & Jur 283 [Coyle] at 284.

<sup>511</sup> *Ibid* at 284.

or otherwise – are laden with colonial power relations. Deconstruction allows us to disinter the ideological foundations which maintain oppressive relations between Indigenous peoples and the Canadian state. By disrupting deeply-embedded patterns of subjugation, we might be able to generate an ethos of reciprocity.

Further, in developing an exposition of postmodern legal pluralism's impact on legal process and discourse, this Chapter looks to land-based disputes as a space to examine the quandaries of translation and negotiation. These disputes invite us to think deeper about the relationship between state sovereignty and Indigenous conceptions of law, and what impact a postmodern legal pluralism would have on the exposition of land-based justice claims by Indigenous peoples. Consequently, this Chapter will explore Mi'kmaq legal obligations in order to demonstrate how these legalities would be preserved or contextualized under a postmodern legal pluralism.

## 5.2 TRANSLATION

Translation is a process of carrying across: it takes what is meaningful in one context and carries it to another context so as to make sense of it in a different space. As Anker asserts:

[I]anguage...is a representation of meaning, and each word names an object in a Platonic link between word and world. If meaning can be picked up and taken across, it is essentially separable both from the original words and from the context in which they are uttered. Translation then...is the extraction of the structural kernel of the message in the source text and its transfer to the equivalent structural elements in the receptor language, which are then built back up into the most appropriate expressions in the receptor language for the intended audience.<sup>512</sup>

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<sup>512</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 104.

For the purposes of legal pluralism, translation involves the process of understanding the legal sensibility of another cultural context. It is about carrying legal meaning from one normative space to another. In unpacking this even further, it is the process through which Indigenous peoples and Canadian settlers communicate their laws in ways that the other can understand and make sense of. Translation, in this sense, is not just about language barriers, but about fundamentally differing ways of viewing the world.

At the current moment, the translation process is enveloped by the “Aboriginal perspective.” As was demonstrated in Chapter 1, the usage of the heuristic “Aboriginal perspective” leads to a process whereby Indigenous laws are accepted by Canadian courts only insofar as they are cognizable to the common law structure.<sup>513</sup> Despite the fact that Indigenous laws are normatively authoritative for the Indigenous claimants involved, they will only be accepted by the courts when they accord with colonial discourse. As Henderson notes, this “favours the hardened prejudices against First Nations jurisprudence”<sup>514</sup> because framing translation in this way denies (or, at the very least, overlooks) the deep cultural differences between Indigenous and Canadian legalities, and solidifies state efforts to maintain domination over legal meaning.

Anker notes the difference between the “mirroring” and “boxing” of Indigenous legalities as two separate means of understanding translation frameworks. The “boxing” phenomenon is indicative of the current moment wherein Indigenous law and legal meaning is required to transform in order to fit Indigenous legalities into common law

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<sup>513</sup> See, Chapter 1, *supra*.

<sup>514</sup> James [Sákéj] Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) [Henderson, First Nations Jurisprudence] at 120.

“boxes,” which could be legal concepts or definition such as “rights” or “property.”<sup>515</sup> As Anker notes, the process of “boxing” “takes culture to be part of the world of fact from which law is separate and to which law is applied.”<sup>516</sup> What occurs, then, in the boxing process is that the internal (subjective) message or meaning as generated by the legal actors themselves – Indigenous peoples – is externalized from its context.<sup>517</sup> It presumes that “Indigenous law [is] a social fact rather than [...] a normative or authoritative discourse.”<sup>518</sup> On the other hand, in the context of land, mirroring provides the ability for Indigenous peoples to translate “something that is unique to, and reflective of, the way Indigenous people organize their relationships to the land.”<sup>519</sup> A postmodern legal pluralism, as will be discussed in this section, emphasizes a translation process which would allow Indigenous participants to “mirror” their legal sensibilities without eliding their normative significance or the fact that they are rooted in cultural understandings of the world.

When we articulate law into expressions that are meaningful to us, those expressions are inevitably contingent. We cannot disassociate our interpretations of law from the various normative spaces to which we belong as they help to provide a normative texture to our understandings of law. In this way, expressions of legal sensibilities cannot be considered “facts” or neutral understandings of the world, but rather as products of localized knowledge and intellectual structures. Meaning is not an expression of an *objective* reality, but a *subjective* manifestation which is anchored in

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<sup>515</sup> Anker, Declarations of Interdependence, *supra* note 20 at 107.

<sup>516</sup> Anker, Law, Culture and Fact, *supra* note 161 at 1.

<sup>517</sup> Anker, Declarations of Interdependence, *supra* note 20 at 108.

<sup>518</sup> *Ibid* at 3.

<sup>519</sup> *Ibid* at 106.



localized legal knowledge. Yet, the current conjuncture requires Indigenous claimants to transform legal meaning into terms to which they did not agree, which invisibilizes the fact that Indigenous legal meaning is rooted in divergent worldviews about human beings and their relationships to each other, the world around them, and sacred and spiritual phenomena.

As an example of the boxing process, Senwung Luk utilizes the example of (hypothetical) Anishinaabe claimants attempting to assert a title claim over a parcel of land.<sup>520</sup> As previously stated, one of the requirements of advancing a successful title claim is proof of exclusivity – that is, “the intention and capacity to retain exclusive control” of land.<sup>521</sup> However, one aspect of Anishinaabe law requires that members are not to disturb the ancient burial grounds of their ancestors.<sup>522</sup> As such, given that the Anishinaabe are required to not disturb the dead after they are buried, these hypothetical claimants do not go to the burial site as is consistent with their understanding of their legal obligations.

Given the requirement of non-disturbance under Anishinaabe law, the actions of the hypothetical claimants invariably do not directly comport with the common law requirement of exclusivity, as they retained no “control” over said land by not going to it. However, this does not mean that they do not engage in a relationship with the burial area. As such, given the differing understandings behind these conceptions of the

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<sup>520</sup> Sengwung Luk, “The Law of the Land: New Jurisprudence on Aboriginal Title” (2014) 67 Supreme Court LR 289 [Luk] at 307.

<sup>521</sup> *Tsilhqot’in*, *supra* note 468 at para 47.

relationships of human beings to the land, there is no possibility of a “one-to-one” mapping between the Anishinaabe law and what is required at common law.

However, as Luk notes, we could potentially view this situation in another way, as the behaviour of the Indigenous claimants could be translated into something the common law understands: courts have said that communicating to third parties that they are to be excluded from a piece of land is sufficient to ground exclusivity.<sup>523</sup> As such, instead of basing their claim for title in Anishinaabe law, the claimants could attempt to “box” their conduct into something the common law understands. However, this process of *transformation* elides the organic meaning of the Anishinaabe law, which is rooted in a particular worldview about human relationships to the land.

From the perspective of a postmodern legal pluralism, the radical transformation required by the boxing process is particularly perturbing. Boxing does not allow the Indigenous party claiming title to derive their claim from Indigenous understandings of law, thereby acknowledging the cultural contingency and normative authority of Anishinaabe law. Conversely, the Indigenous claimants are forced to radically transform their understandings of law to fit common law categories, which are not representative of the ways in which Indigenous people understand the world. As such, the boxing process completely ignores that the meaning behind the actions of the Anishinaabe is not premised on retaining “exclusive” ownership, but rather their actions are rooted in cultural understandings of their place in the world. This serves to completely displace the

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<sup>522</sup> It is the obligation of the Living to ensure that their relatives are buried in the proper manner and in the proper place and to protect them from disturbance or desecration. Failure to perform this duty harms not only the Dead but also the Living” See: Darlene Johnston, “Respecting and Protecting the Sacred”, paper prepared for the Ipperwash Inquiry (Toronto: Ministry of the Attorney General, 2006), online: <[http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy\\_part/research/pdf/Johnston\\_Respecting-and-Protecting-the-Sacred.pdf](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Johnston_Respecting-and-Protecting-the-Sacred.pdf)> at 6.

normative authority of the Anishinaabe law at play, instead validating one understanding of the world over another.

The boxing process perturbingly assumes that there is an objective “truth” – being state law – from which law or practices can be understood, even cross-culturally. Based on current translation frameworks, Patton states that:

...it is an act of translation in a metaphorical sense which instantaneously and incorporeally transforms foreign peoples into heathen souls which must be saved, or into the political subjects of some far off European crown. At this stage, colonization is an act of pure violence that appears first in linguistic form.<sup>524</sup>

In this regard, the process of translation itself becomes a site for the reconstruction of colonialism: by forcing Indigenous peoples to translate their legal commitments from their organic source and meaning, courts problematically presume that Indigenous language and culture are incapable of producing legal meaning unless they are translated into common law speak.

As Anker asserts, “[l]awyers and judges are still caught up in the pretention to temporal mastery over meaning.”<sup>525</sup> However, as we know from fact that Indigenous legal traditions have continued despite the violence of colonialism, Indigenous laws do not require translation to the common law to be meaningful, nor do they need to be converted to common law terms in order to be normatively authoritative for Indigenous communities.<sup>526</sup> Accordingly, a postmodern legal pluralism requires an acknowledgement that Indigenous laws, despite being rooted in differing understandings of the world, form their own normative space. This invites us to rethink what translation frameworks require

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<sup>523</sup> Luk, *supra* note 519 at 308.

<sup>524</sup> Patton, *supra* note 34 at 25.

<sup>525</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 192.

<sup>526</sup> See, e.g., Borrows, *With or Without You*, *supra* note 36.

of Indigenous peoples in the intercultural context, as what should be required is something closer to “mirroring” whereby Indigenous participants are able to express something reflective of how they understand the world.

This Chapter accepts that there is a necessity for translation in any intercultural conversation, whether it occurs in a court or elsewhere. Moreover, translation is an inevitable result of actors in one normative space attempting to understand the legal commitments of the other. As such, there must be a requirement of *accessibility*: in order to have a fruitful intercultural encounter between two divergent legalities, both sides of the conversation must have some understanding of the legal commitments of the other. Accordingly, the translations which occur in the intercultural context do not have to be “one-to-one” mappings, but rather they can involve a transfer of the “structural kernel” of legality as understood by the particular participants.<sup>527</sup> This acknowledges and respects that the representations made are rooted in specific understandings of the world. Accessibility, then, does not require radical transformation, but rather allows Indigenous peoples to anchor legal expressions in local knowledge.

For instance, if we think of the Anishinaabe example offered above, accessibility would merely require that the Indigenous claimants express legal meaning in a way which is reflective of the ways in which the Anishinaabe construct their relationships to the land. In this way, it would be satisfactory for the claimants to show how Anishinaabe law requires them to not disturb sacred places – being the “structural kernel” – without having to demonstrate how that understanding comports with, or is equivalent to, a common law referent in order for it to be considered within the intercultural conversation.

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<sup>527</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 104.

While the Anishinaabe obligation to not disturb sacred spaces may not comport with common law standards of how human beings organize their relationships to the land, this does not mean that it has no normative force. As such, the claimants would be capable of providing an accessible meaning of their law, which views their obligations to sacred spaces as authoritative despite not comporting with common law valuations of property.

A postmodern legal pluralist understanding of translation disinters the cultural facets of law: what is expressed as law in any encounter is informed by our sociocultural locales. As such, legal meaning is produced through lived experiences, not positivistic declarations that are removed from the sociolegal spaces within which they find themselves. This means that translation is not a simple “one-to-one mapping” because law is not a “*fact*” that can simply be translated from one space to another. Translation in this context is not the same as taking the word “la table” from French and translating it to “table” in English. This is because there is, generally, a stable uncontested structure behind what these terms are referring to.<sup>528</sup> While there may be some subjective interpretations for *what* determines a table – for example, is a night-stand a table? – for the most part, the meaning behind the word is stable enough to compose this one-to-one mapping. However, given the cultural contingency of law, the requirement of accessibility in translation denotes that what is to be transferred is not a stable meaning, but rather the subjective understanding of the “structural kernel” of legality.<sup>529</sup>

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<sup>528</sup> As Kruger asks: “If we remove equivalence from the translation brief, where is the sense in translating? Why would anyone want to pay a translator for a piece of work that offers no clarity, no final answers? After all, untranslatability seems to imply that equivalence is impossible and also that the “original” is untouchable.” JL Kruger, “Translating Traces: Deconstruction and the Practice of Translation” (2004) 25:1 *Literatur* 47 [Kruger] at 55.

<sup>529</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 104.

Understanding translation in this manner requires a recognition that law has no *a priori* meaning outside of legal actors. As such, law requires conscious human agency to construct and understand it. Without actors to construct meaning around law, it would not exist. Even if we think about legal positivism, a piece of legislation has no normative rhythm unless we have actors to interpret it and give it meaning (and, in the institutional context, enforce it). Otherwise, it is simply words on paper. However, the effect of the boxing process is that law becomes externalized from the normative forces which imbue and give it meaning. As such, this problematically presumes that law is something we can find, and which can be replicated between and across horizons. As Anker states, “[judges] assume [...] that rights and interests are actually there in the first place and able to be separated from their context.”<sup>530</sup>

The insights from a postmodern legal pluralism provide the possibility for courts to recognize the contingency of legal experience. As such, at points of interaction or dispute, Indigenous parties would be able to translate their own understandings of law into something that is accessible, but nonetheless still rooted in their traditional knowledge structures. Accordingly, this recognizes that law is not fixed, but fluid and relational. Language is not a representation of an objective truth that is somehow bubbling beneath the surface. In this way, meaning is not “out there,” but it is deferred, to use the words of Derrida, to the specific context. As Anker notes on Derrida’s work, “[I]language itself cannot ground truths outside of itself.”<sup>531</sup> Meaning is not found within a

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<sup>530</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 109.

<sup>531</sup> *Ibid* at 120.

text or idea, but is generated from looking and thinking about the material context within which legal representations or ideas are found.<sup>532</sup>

The key to understanding dispute resolution as meaning production is the goal of escaping the “violence of equivalency.”<sup>533</sup> Equivalency, in this context, presumes that there is only one way of looking at or viewing the world, being the Eurocentric worldview. Conversely, understanding translation as a process of mirroring, despite the variances in worldviews, provides acknowledgement that Indigenous peoples are legal agents capable of producing and reproducing legal meaning. It also respects that understandings of law are rooted in local cultural knowledge. As such, rethinking translation in this manner can help to ensure that intercultural encounters facilitate the representation of localized legal meaning.

### **5.3 NEGOTIATION**

Given the intercultural conversation that is an inevitable aspect of our mutual entanglement, it is necessary to think about how these conversations are structured within institutional sites such as courts. While the general understanding of courts is that they exist to resolve disputes, it is during these points of contestation, however, that intercultural conversations may occur. Still, as will be argued in this section, the ways in which institutional sites facilitate these intercultural encounters help to maintain unequal power relationships. If legal pluralism is to materialize as part of a praxis of decolonization, we need to understand how the terms of the game within formal settings such as courts have been pre-encoded by colonialism. This inevitably limits the extent to

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<sup>532</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 121.

which negotiations can occur on equal terms. By deconstructing the power structures which accept, *prima facie*, the dominance of state law, and, perhaps most disturbingly, the myth of Crown sovereignty, we encourage more productive encounters based on the reciprocity between worldviews.

In spaces of negotiation, Indigenous people face resistance to their ways of being in the world: their laws, their customs, and their attachments to the world around them. Historically, as Borrows notes, there has been a particular bias and prejudice against Indigenous law within courts and broader legal institutions as it was regarded as inferior.<sup>534</sup> Rather than attempt to impart an “ethos of receptivity,”<sup>535</sup> colonialism expects that Indigenous peoples negotiate on the colonizer’s terms in the colonizer’s institutions. This precarious pattern of domination and exclusion becomes even more prevalent in periods of conflict.

For instance, conventional practice within courts and modern jurisprudence dictates that Indigenous ideals are posited against an unwavering acceptance of Crown sovereignty. Indigenous claims, then, are always mediated against this framework which encodes, from the outset, unequal power relations. For instance, there is an inherent paradox with how the content and nature of Aboriginal rights are conceptualized institutionally. While the protection and recognition of Indigenous practices as translated into common law “rights” can be seen to broaden the scope of protection afforded by Canadian law, these “rights” are nevertheless subject to the Crown’s ultimate authority as sovereign power. For example, Aboriginal “rights” can be infringed so long as the Crown

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<sup>533</sup> Anker, *Declarations of Interdependence*, *supra* note 20 at 124.

<sup>534</sup> Borrows, *With or Without You*, *supra* note 36 at 658.



can justify it.<sup>536</sup> Moreover, Aboriginal title, in giving recognition of the pre-existence of Indigenous societies prior to the arrival of European settlers, is construed as a burden on the Crown's underlying sovereignty.<sup>537</sup> The Crown ultimately retains "radical title," yet, curiously, has not justified that assumption.<sup>538</sup>

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<sup>535</sup> Toby Rollo, "Mandates of the State: Canadian Sovereignty, Democracy, and Indigenous Claims" (2014) 27 Can JL & Jur J 225 [Rollo] at 225.

<sup>536</sup> See, e.g., *Sparrow*, *supra* note 30; *Van der Peet*, *supra* note 31. Moreover, former Chief Justice Lamer commented that infringement was a "necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part." See: *Delgamuukw*, *supra* note 35 at para 161.

<sup>537</sup> As McLachlin CJ held:

At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival.

See: *Tsilhqot'in*, *supra* note 468 at para 69.

<sup>538</sup> "Radical title" is seen as the underlying or ultimate sovereign title (see, e.g., *Ibid* at para 12). Furthermore, McLachlin CJ notes that the doctrine of *terra nullius* (the idea that Canada was vacant when European settlers arrived) was not applicable (*Ibid* at para 69). Yet, she forms no basis (other than judicial precedent) for justifying Crown sovereignty.

I believe it is prudent here to unpack the conceptualization of Crown sovereignty in clearer terms. Mark Walters describes the evolution of how the Supreme Court of Canada conceptualizes Crown sovereignty:

The previously accepted view was that expressed by Henry J. in *St. Catharine's Milling*. The Crown, he said, obtained sovereignty over natives and their lands by discovery or by the cession of Canada by France, but it chose to enter into treaties with Indians because "to assert sovereignty and to put that assertion into operation would have caused war" unless native consent for settlement was first obtained." In other words, the Crown had *de jure* sovereignty independently of native consent, and treaties were only necessary in order to assert sovereignty in a *de facto* or operational sense.

In *Taku River* and *Haida Nation*, McLachlin flips this analysis on its head: the sovereignty asserted by the Crown is *de facto* sovereignty until it is transformed, through native consent obtained by treaty, into *de jure* sovereignty. But this conclusion should not be seen as a change in the law on sovereignty; on the contrary, it should be seen as the restoration of the proper legal position on sovereignty. From today's legal and moral vantage point, it may be said that the view of sovereignty expressed in cases like *St. Catharine's Milling* was erroneous, and that the legally correct position was the one that the Lieutenant Governor of Upper Canada, John Graves Simcoe, had communicated to aboriginal nations in the late eighteenth century: "that no King of Great Britain ever claimed absolute power or Sovereignty over any of your Lands or Territories that were not fairly sold or bestowed by Your ancestors at Public Treaties ...."

See: Mark Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's LJ 470 at 515. The result is that there is perhaps significant judicial occlusion on the nature and formations of Crown sovereignty. This indicates that Crown sovereignty rests on rather shaky footing rather than finding root in international law doctrine, such as *terra nullius* (vacant land) or conquest. See, e.g., Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

As such, Indigenous ways of being in the world – their practices and traditions, and their relationships to the land, for example – become sites for contestation wherein Indigenous identities and practices become, at best, malformed, and, at worst, erased. As Glen Coulthard argues, colonial domination “...rests on its ability to entice Indigenous peoples to come to identify, either implicitly or explicitly, with the profoundly asymmetrical and non-reciprocal forms of recognition either imposed on or granted to them by the colonial-state and society.”<sup>539</sup> This “deformation of Indigenous subjectivities”<sup>540</sup> limits the political agency of Indigenous peoples within institutional spaces, such as courts, which facilitate intercultural conversations based on competing worldviews. When Indigenous peoples are negotiating with their specific worldviews (such as in treaty or other political negotiations), or presenting their claims to an arbiter (such as a judge), the result of colonial domination is that Indigenous laws, culture, and ways of being come contested rather than sites for normative generation.

Given that governments have been resistant to political claims from Indigenous peoples, courts have been the traditional arbiters of disputes between Indigenous peoples and the state given that they provide the opportunity for Indigenous peoples to challenge state action (or inaction). Given that the colonizer’s courts have not historically been a neutral and welcoming space for Indigenous legalities, the asymmetry that exists within these spaces subdues the normative potential of such encounters. However, as stated, this is not to say that political processes harbour significant potential for conciliating the pervasive nature of dominant cultural and legal norms. For example, treaties – typically seen as instances where reconciliation can occur – are negotiated in a context where

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<sup>539</sup> Coulthard, *Subjects of Empire*, *supra* note 40 at 439.

<sup>540</sup> Rollo, *supra* note 534 at 230.

significant power imbalances exist that inevitably attenuate the outcomes of such negotiations.<sup>541</sup> As Coyle argues:

...three aspects of the colonial enterprise (power imbalance, cultural dominance, and the challenge of reimagining governmental relationships between Aboriginal peoples and the state) have not disappeared from Canada's political landscape and they will inevitably influence contemporary negotiations aimed at altering their relationship.<sup>542</sup>

The confluence of power and the colonial imagination stagnates all areas of negotiation.

This requires a rethinking of the process and structure of patterns of negotiation, whether those be institutional, such as courts, or political.

Drawing on the insights of a postmodern legal pluralism, we can see how colonial dominance rests on the ability to conflate colonial sovereignty as “truth,” and state-based discourses as “real” law. As Rollo states,

...the state's assertion of inviolable sovereignty over the land represents the most challenging context against which Indigenous claims are interpreted and judged. Functionally, the Crown's categorical assertion of radical title pre-determines the range of acceptable conclusions we can hope to achieve through dialogue. The power of voice is deflated by this assertion, which results in an arbitrary and undemocratic form of rule over Indigenous peoples.<sup>543</sup>

Accordingly, the potential for instituting a legal pluralist agenda is stifled by the ideological presuppositions which maintain colonial dominance. The issue, then, for legal pluralism is not so much the recognition that Indigenous law *exists* in some regard, but rather how it is articulated *as against* Canadian law.

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<sup>541</sup> Michael Coyle, "Transcending Colonialism? Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand" (2011) 24:4 NZUL Rev 596. For specific examples, see Claude Denis' article on the Nisga'a agreement's ability to recognize the "inherent right" of Indigenous self governance: Claude Denis, "The Nisga'a Treaty: What Future for the Inherent Right to Aboriginal Self Government" (2002) 7 Rev Const Stud 35 and Stephanie Irlbacher-Fox, *Finding Dahshaa: Self-Government, Social Suffering, and Aboriginal Policy in Canada* (Vancouver: UBC Press, 2009) where the author chronicles the self-government negotiations in the Northwest Territories.

<sup>542</sup> Coyle, *supra* note 510 at 286.

<sup>543</sup> Rollo, *supra* note 534 at 23.

As demonstrated here, sites of negotiation have pre-encoded ideological presuppositions about the nature and source of law: the Crown is the ultimate source of law and sovereign authority.<sup>544</sup> Consequently, deconstructive methods illustrate how the ideological and theoretical foundations of this framework are premised on colonial patterns of oppression, alienation, and dispossession of lands and culture.<sup>545</sup> Law and the political praxis of colonization are undeniably intertwined. From a postmodern legal pluralism point of view, these pre-encoded presuppositions within institutions are flawed and potentially harmful. As such, deconstructive praxis illuminates the ideological function of the assumption of Crown sovereignty: in order to justify its claim to universality, Crown sovereignty depends on Indigenous subjugation. Furthermore, Canadian law cannot maintain any perspective of “truth” or “objectivity,” because, as a postmodern legal pluralism argues, there can be no overarching essential characterization of law. Rather, what exists are a number of localized and cultural *conceptions* of law.

These insights lead to a conclusion that a pluralist image of law cannot materialize if law continues to be mediated through colonial tropes. Instead, we must decenter and disrupt the dominance of state-based discourses at sites of interaction and contestation in order to decolonize patterns of negotiation. As Rollo notes, Indigenous claims are not only claims for recognition of cultural identity, but also territorial and

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<sup>544</sup> It is interesting to note that part of the problem of state dominance lies in how the state is formulated as a relational enterprise, or “as the material condensation of the social relations of society.” This is the relational analysis of the state. See: Devlin, *The Rule of Law and the Politics of Fear*, *supra* note 145 at 156. As such, the state (and, through it, law) are condensed around colonial power relations as a means to achieve social cohesion. The state, and, consequently, its laws, work to sustain colonial dominance. This is the problem with confronting state dominance: it serves to facilitate the interests of colonizers, who yield power in social and political contexts, and, as such, the interests and worldviews of Indigenous peoples become silenced and marginalized.

<sup>545</sup> See, e.g., Alfred, *supra* note 186; Taiaiake Alfred, “From Sovereignty to Freedom: Towards an Indigenous Political Discourse” (2001) 3 *Indigenous Affairs* 22.

governance-based claims that challenge (or essentially undermine) the claim to Crown sovereignty which has held together Canada's claims to domination.<sup>546</sup> Accordingly, under the current regime, Indigenous claims are either reconciled with Canadian sovereignty, or they are dismissed.<sup>547</sup> However, Crown sovereignty does not hold any superior claim to truth as opposed to Indigenous sovereignty; rather, its role as an organizing ethos validates the sclerotic tendencies of orthodox legal theory and the imperialist mindset of the Canadian state.

The reality as posited requires innovative designs of institutional governance processes to meet the needs of a postmodern pluralist framework. The issues will not change: there is still a need to reconcile the dispossession of Indigenous lands, the recognition of cultural difference that does not amount to assimilation,<sup>548</sup> and the institution of Indigenous governance processes. This means a rethinking (or unthinking) of strategy, forum, and the methods used in coming to collective understandings of the pathways forward. It also means recognizing the normative capacity of Indigenous communities, and their desire to construct their own political and legal processes.

Creating what Borrows calls the "harmonization of between the interests of society as a whole and the rights, values, and laws of Indigenous peoples"<sup>549</sup> requires that negotiations do not simply take place on the colonizer's terms, but rather are seen as

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<sup>546</sup> Rollo, *supra* note 534 at 231.

<sup>547</sup> *Ibid* at 232. For example, if an Aboriginal title claim fails, then the status of the Indigenous groups' legal relationship to the land – at least insofar as the common law is concerned – is not recognized, validated, or provided legal status.

<sup>548</sup> See, e.g., Coulthard, *Subjects of Empire*, *supra* note 40. As Coulthard explains, the present political theory of recognition forces the colonized to identify with the power structures and cultural artefacts which normalize their subjugation. As such, recognition frameworks must be attentive to cultural diversity rather than assimilationist in their mandate.

<sup>549</sup> Borrows, *Canada's Indigenous Constitution*, *supra* note 77 at 273.

balanced upon the interests at stake for both parties. This is consistent with the plural nature not just of law, but of broader Canadian society. This challenges what Borrows calls “biculturalism” and “bi-elitism”<sup>550</sup> which problematically presume that Canada is home to only two distinct cultures (being English and French), rather than a multiplicity of cultural identities. As such, Canadian institutions must be reflective of this diversity in a way which does not encourage assimilation, but which emphasizes and respects cultural difference.

Given that the concern of this thesis is about protecting the cultural authority of Indigenous legalities, the framework that I have offered implores the rethinking of sites of negotiation – such as courts and other formal legal institutions – in order to recognize the localized nature of legal normativity. If the state is to be truly responsive to the cultural contingency of Indigenous legalities, as well as encouraging patterns of unity with Indigenous peoples, it must radically transform how it envisages normativity. It cannot, and should not, perpetuate the myth that legal normativity arises solely from the state. Indigenous legalities exist and will continue as sites of normative authority for Indigenous peoples, with or without state recognition of such.<sup>551</sup> As a means to think deeper about the how a postmodern legal pluralist framework may reinvigorate sites of negotiation and contestation, the next section will rethink these processes in the context of land-based disputes. This requires us to think deeper about what we – as Western lawyers and institutional actors – recognize as law: it is not simply a matter of evidence

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<sup>550</sup> Borrows, Canada’s Indigenous Constitution, *supra* note 77 at 272.

<sup>551</sup> I take this phrase from John Borrows’ article “With or Without You: First Nations Law (In Canada).” See: Borrows, With or Without You, *supra* note 36.

for a judge to accept or reject, but rather it emerges from broader patterns of normativity which exist in our encounters with the world.

## **5.4 TRANSLATING INDIGENOUS LEGAL OBLIGATIONS OVER LAND AND NEGOTIATING THE BOUNDARIES OF LAND-BASED DISPUTES**

### **5.4.1 COGNIZING LAND-BASED DISPUTES**

A recurring theme in the history of Indigenous-Canadian relations has been tense battles over land. The colonization of Canada brought with it the dispossession of Indigenous territories, often without consent. The doctrine of Aboriginal title attempts to reconcile Canadian assertions of sovereignty with the fact that Indigenous peoples were occupying lands when settlers arrived on Canadian soil. In *Calder et al v Attorney-General of British Columbia*, the Supreme Court of Canada held that the doctrine of Aboriginal title developed because “the fact is that when the settlers came, the Indians [*sic*] were [here], organized in societies and occupying the land as their forefathers had done for centuries.”<sup>552</sup>

However, in examining the current framework for resolving land-based disputes in terms of processes of translation and negotiation, problematic patterns of oppression and subjugation surface. First, in terms of translation, Indigenous peoples are forced to translate laws which structure their relationships to the land through the “law as fact” paradigm. This requires that claimants couch their traditional normative understandings of their relationships to the land in common law terms, which is indicative of the boxing process mentioned previously in this Chapter. Moreover, in terms of patterns of

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<sup>552</sup> *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145 at p 329.

negotiation, the doctrine of Aboriginal title serves to privilege and endure the fiction of Canadian sovereignty.<sup>553</sup> By forcing Indigenous claimants to present their claims before courts who maintain an unwavering acceptance of Canadian sovereignty (read in terms of the dominance of state law, and also known as the “Rule of Law”), the possibility of the institution of legal pluralist frameworks in the context of land-based disputes is invariably attenuated.<sup>554</sup>

For example, in *R v Marshall/R v Bernard*,<sup>555</sup> two Aboriginal title cases from the Maritime provinces which were heard together at the Supreme Court of Canada, the Court sustained in very clear terms how the translation of Indigenous law must comport with the common law. That is, in order to obtain *de jure* recognition of Aboriginal title, claimants must articulate Indigenous legal understandings in relation to the land in ways which comport with “property” at common law. However, as will be demonstrated in this section, Indigenous legal obligations are not easily reconciled with Westernized valuations of property ownership because of the dissimilar worldviews underlying these conceptions of peoples’ relationship to the land. As Gunn argues:

As Indigenous peoples have always had laws governing their land use, these laws must now be utilized and recognized as the laws governing Indigenous peoples’ lands. These laws are based on Indigenous peoples’ ecological knowledge and are grounded in other values. The inclusion of these values within Indigenous

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<sup>553</sup> While Aboriginal title is described as a “usufructuary right” (a burden on the underlying Crown title), there is both judicial and scholarly debate over whether Aboriginal title vests proprietary rights (i.e., a form of property ownership) in the claimants, or territorial rights (which include jurisdictional rights over the land in question). See, e.g., William W. F. Flanagan, “Piercing the Veil of Real Property Law: *Delgamuukw v. British Columbia*” (1998) 24 Queen’s LJ 279; Kent McNeil, “The Meaning of Aboriginal Title”, in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997), 135-54.

<sup>554</sup> Henderson notes that the “Rule of Law,” which requires conformity with dominant political and legal structures, is a key piece of the Eurocentric domination of Indigenous peoples. He states that “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.” See: Henderson, *Postcolonial*, *supra* note 9 at 26-7.

<sup>555</sup> *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 [*Marshall/Bernard*].



peoples' land laws has created legal regimes that recognize that humans are not the only beings with rights to the land. Further, the "rights" Indigenous peoples have to the lands is closer to a guardian/trustee relationship, than what is often viewed more as ownership rights under Western legal systems. These values also infused a more holistic or systemic approach to land use regulation, which focuses on the interrelations between all living beings.<sup>556</sup>

Accordingly, the variation between Indigenous and Westernized worldviews necessitates a rethinking of what we come to expect of participants in order to translate their understandings of law. As such, courts and other institutions must protect the contingent cultural meanings which underlie these understandings.

For example, in *Marshall/Bernard*, the Supreme Court of Canada held that the claimants, both Mi'kmaq citizens from Atlantic Canada, could not establish Aboriginal title. In order for them to do so, McLachlin CJ noted that the Indigenous claimants must establish that their Indigenous practices and laws demonstrate "possession similar to that associated with title at common law."<sup>557</sup> This is the paradox of Aboriginal title: in seeking to recognize the pre-existence of Indigenous societies, the common law will only do so insofar as Indigenous claimants are able to prove that their relationships with the land correspond to common law ownership. This judicial slight-of-hand suppresses the jurisgenerative structures of Indigenous peoples, and reveals the extent to which law and colonialism operate in violent unity, for "repression never comes unpackaged."<sup>558</sup>

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<sup>556</sup> Gunn, *supra* note 468 at 69.

<sup>557</sup> *Marshall/Bernard*, *supra* note 555 at para 54.

<sup>558</sup> Ben Fine & Robert Millar, eds, *Policing the Miner's Strike* (London: Lawrence and Wishart, 1985) at 10, as cited in Devlin, *Nomos and Thanatos*, *supra* note 74 at 344.

Moreover, this conundrum is further illuminated given that the Mi'kmaq of Atlantic Canada were semi-nomadic.<sup>559</sup> They could not establish that their Indigenous practices comported with the common law value of “exclusivity”<sup>560</sup> – that is, property at common law is held exclusively by the persons claiming “ownership.”<sup>561</sup> Given that Indigenous understandings of their relationship to the land may not equate to the “exclusivity” required at common law, local knowledge and Indigenous worldviews are rendered inapplicable to the contestation between Indigenous and Canadian law.<sup>562</sup> In this

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<sup>559</sup> I wish to qualify my statement here. I am not suggesting that the Mi'kmaq were semi-nomadic in the sense that they were persistently moving around and without a “home.” Rather, what it means is that, historically, the Mi'kmaq did not occupy a single space year-round, but rather moved through different sites throughout their known territory all through the year. Moreover, they did not exclude others from areas that they were not currently occupying. See, e.g., *Marshall/Bernard*, *supra* 555 at para 79 for a synopsis of the evidence on this point as accepted by the Provincial Court judge.

<sup>560</sup> See, e.g., *ibid* at para 66.

<sup>561</sup> See also Kent McNeil's work on the competing conceptions of Aboriginal title claims. A site-specific approach views title claims as generating effects given to occupation at common law. A territorial approach is more holistic, and attempts to take into account both common law and Indigenous law. It also has more governmental dimensions, allowing more determination over what occurs in the area claimed as Aboriginal land. See: Kent McNeil, “Aboriginal Title in Canada: Site-Specific or Territorial?” (2012) 91 *Canadian Bar Review* 745. I raise this distinction to show that while Aboriginal title is fundamentally a common law approach, differing conceptions of title may incorporate Indigenous worldviews. However, to get to that point, as I will show in this section, requires a rethinking of the translation process away from the “law as fact” paradigm.

<sup>562</sup> If we think explicitly about Mi'kmaq law, Professor Henderson states that “[t]he relationship between the Mi'kmaq and the land embodies the essence of the intimate sacred order. As humans, they have and retain an obligation to protect the order and a right to share its uses, but only the future unborn children in the invisible sacred realm of the next seven generations had any ultimate ownership of the land.” See: Henderson, *Mikmaw Tenure*, *supra* note 158 at 232. In this sense, Mi'kmaq legal obligations relating to the land are based in respect rather than ownership. Moreover, in explicating Mi'kmaq-based conceptualizations of law, Henderson states:

[...] an Aboriginal worldview is a spatial consciousness rather than material consciousness. Sharing and mobility discourages the accumulation of inessential resources. The sharing of space, then, is the meaning for all of Aboriginal life. The relations contained in those spaces shape both choice and placement and ultimately group life. Aboriginal people do not speak of living “there”; rather, each family or person “belongs” to the space. Belonging, then, is directly tied both linguistically and experientially to a space as well as to shared knowledge of a series of common places. Belonging to a space is more than just living in a place or using its resources; it is attendant with benefits and obligations. Belonging is viewed as a special responsibility.

Henderson, *Mikmaw Tenure*, *supra* note 158 at 219. In this way, relationships with the land are not conceptualized in the same manner that is required at common law. Exclusivity is not part of the Indigenous worldview, but rather Indigenous relationships to the land are based around common ownership and receptivity.

sense, the common law is held to be the “true law” or “reality” with which Indigenous experiences and ways of being in the world must always align.

Conversely, as Brenda Gunn argues, “[i]n order to provide adequate protection of Aboriginal peoples’ land, we must move away from the recognition based on these liberal concepts towards basing these rights on Indigenous legal traditions.”<sup>563</sup> In the context of Aboriginal title, it is problematic from a legal pluralist point of view to require Indigenous claimants to abandon their traditional understandings of law, which is predicated on a unidimensional view of law and normativity that privileges common law understandings of the relationship between human beings and the land.

While Aboriginal title is but one example of the ideological and political failure of orthodox law to respond to legal pluralism, it illustrates the necessity of rethinking processes of translation and negotiation. The present framework for resolving land-based disputes serves to deny or delegitimize the normative authority of Indigenous legalities relating to land. As Gunn argues:

If Indigenous peoples continue to pursue legal avenues to protect their lands, there must also be a continued push for the recognition of their rights on their own terms by showing the racist nature of the existing jurisprudence and providing a more appropriate alternative—through Indigenous legal traditions.<sup>564</sup>

As such, the remainder of this section examines how land-based disputes may be predicated on more decolonized terms. In doing so, this section draws on the Mi’kmaq principle of *Netukulimk* in order to demonstrate the insights which may be drawn from a postmodern legal pluralism.

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<sup>563</sup> Gunn, *supra* note 468 at 48.

<sup>564</sup> *Ibid* at 69.

#### 5.4.2 MI'KMAQ LEGAL OBLIGATIONS: UNDERSTANDING *NETUKULIMK*

This section will draw upon Mi'kmaq law in order to provide an illustration of Indigenous-based conceptions of legal obligations relating to land, which explain how the Mi'kmaq conceptualize their relationship to the land in ways that do not necessarily comport with the common law. This will provide a backdrop for rethinking processes of translation and negotiation in the context of land-based conflicts between Indigenous peoples and the state. It will show how adherence to orthodox theory potentially conceals Indigenous legalities because Mi'kmaq legal obligations are organized around the reciprocity of worldviews rather than coercion, institutionalization, or positivism. The point is to look at how meaning is constructed locally and to examine how normativity arises in the context of Indigenous worldviews.

The Mi'kmaq of Atlantic Canada are spread throughout the provinces of Nova Scotia, New Brunswick, and Prince Edward Island, and parts of Southern Quebec, for at least the last 12,000 years.<sup>565</sup> The Mi'kmaq have retained a resilient legal culture despite the harsh forces of colonization.<sup>566</sup> An understanding of Mi'kmaq relationships to the land is encompassed by the concept of *Netukulimk*. As McMillan states:

Within the concept of *netukulimk* were practices aimed at co-existence. These practices reflect the holistic interconnectedness of Mi'kmaq life ways embedded in their tribal consciousness, and governing their behavior, particularly in relation to establishing means for survival, such as sharing, providing, and honouring skills... *netukulimk* denotes the proper customary practice of seeking bounty provided by the Creator for the self-support and well-being of the individual, and

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<sup>565</sup> Stephen Davis, *Mi'kmaq: Peoples of the Maritimes* (Halifax: Nimbus Publishing, 1997).

<sup>566</sup> For some astute examples, see, *inter alia*: McMillan *supra* note 24; Jessica Asch et al, *Accessing Justice and Reconciliation: Mi'kmaq Legal Traditions Report* (Victoria: University of Victoria, date unknown) [Mi'kmaq Legal Traditions Report]; Henderson, Mikmaq Tenure, *supra* note 158; Propser et al, *supra* note 372; Leslie McMillan, "Colonial Traditions, Co-optations, and Mi'kmaq Legal Consciousness" (2011) 36:1 Law & Soc Inquiry 17.

the nation, and thus is intimately tied to traditional jural rights both individually and communally.<sup>567</sup>

Accordingly, *Netukulimk* embodies the ethos of respect, including respect for the lands which were bestowed upon the Mi'kmaq by the Creator. It provides a sense of interconnectedness between the Mi'kmaq people and the air, land, and water around them. In the context of an environmental dispute on Mi'kmaq territory in Northern New Brunswick in 2013, author and journalist Miles Howe recounts Elsipogtog resident Lorraine Clair stating that:

As Mi'kmaq women we've been given the gift to protect the water and protect the earth. We do that because we carry the water in us. When we carry our children we have that water in us. That water is there to protect our future generations and it's our responsibility to take care of that.<sup>568</sup>

Thus, embodied within *Netukulimk* is the notion of sustainability and providing respect for the land and water, which demonstrates the relational nature of Mi'kmaq law as between the Mi'kmaq and the broader world. Moreover, it is also envisaged as an ecological stewardship model.<sup>569</sup> The Mi'kmaq were bestowed the land by the Creator, and, as such, have the responsibility to protect it for future generations.

In discussing how normativity arises from *Netukulimk*, Prosper et al argue, “[m]ore than a spiritual connection, cosmology or value system, *netukulimk* encompasses a complete way of being and sanctions particular types of behavior from its adherents, the

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<sup>567</sup> McMillan, *supra* note 24 at 30. I note here that McMillan connects the principle of *Netukulimk* back to “jural rights both individually and communally.” Her reference here, as she continues on, is to tie the principle of *Netukulimk* to rights which have been developed judicially, such as the Mi'kmaq right to fish and hunt. Given that McMillan's work is anthropological in nature, I do not take her utilization of “jural rights” to encourage or accept colonial dominance of the common law, but as a means of illustrating the importance of *Netukulimk* to the Mi'kmaq way of life.

<sup>568</sup> Miles Howe, *Debriefing Elsipogtog: The Anatomy of a Struggle* (Halifax: Fernwood Publishing, 2015) at 92-3.

<sup>569</sup> See: Propser et al, *supra* note 372 at 5.

Mi'kmaq.<sup>570</sup> Thus, *Netukulimk* is a fundamental organizing principle of Mi'kmaq law. It structures how the Mi'kmaq view themselves in relation to the physical world as well as future generations. In its essence, *Netukulimk* taught the Mi'kmaq how to “live right.”<sup>571</sup> This informs and constitutes part of the Mi'kmaq legal consciousness and is embedded within Mi'kmaq relationships and interactions with the world around them.

While it encompasses some level of prescriptive action, it cannot be held out to be solely a code of positive rules. Prosper et al state that...

...[t]his life force is represented in and generated by all of the Mi'kmaq ancestors who are incorporated within cycles of life and death. Resources contain the remnants of the past ancestors and this belief is incorporated and expressed through spiritual understandings, spiritually guided interactions and ceremonial practices intended to demonstrate respect as well as to maintain balance between food, their hunters and all other forms. The primary responsibility of the living Mi'kmaq is to take care of and respect past relations that continue to provide wellbeing for the people by following the principles and practices of *netukulimk*.<sup>572</sup>

Therefore, there is a spiritual element to this relationship as well: Mi'kmaq peoples are significantly embedded within the world around them, and, as a consequence, the organizing ethos of Mi'kmaq legal normativity is respect – respect for the air, physical world, and respect for each other. It helps to guide conduct through the value systems

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<sup>570</sup> Prosper et al, *supra* note 372 at 6. I note here Prosper et al's use of the word “sanction” to illustrate how *Netukulimk* shapes Mi'kmaq behaviour. I take his point to be that *Netukulimk* provides the Mi'kmaq with guidance on how to live right, thus providing a means to structure one's relationships and behaviour. However, I do not take this to mean “sanction” in the formal institutional sense (that is, it is not necessarily structured on violence and coercion) but how it guides behaviour. For instance, since *Netukulimk* is predicated on sustainability, it would violate the principle of *Netukulimk* to flagrantly overhunt or overfish, thus depleting the availability of food for future generations or disrespecting the earth. For instance, in their article Prosper et al utilize an Algonquin example to show how there was a “control mechanism” which “guides the hunter and his actions during the chase. As Martin notes ‘The single most important deterrent to excessive hunting, in the Eastern Algonquian's mind at any rate, was the fear of spiritual reprisal for indiscreet slaughter.’” See: *Ibid*. Thus, *Netukulimk* was not predicated on institutional violence, but ensuring that there was enough sustenance and the fear of spiritual reprisal: “[*Netukulimk*] was reinforced by a set of values that expressed Mi'kmaq consciousness and which helped Mi'kmaq peoples understand their place in the biosphere.” See: *Ibid*.

<sup>571</sup> McMillan, *supra* note 24 at 66.

which construct the Mi'kmaq consciousness: in order to maintain sustenance and to ensure that the spiritual realm helped to provide the viability of their food sources, *Netukulimk* was to be respected.<sup>573</sup> In this way, *Netukulimk* arises in a number of different sites (spiritual and ceremonial practices) and modes (implicit or explicit obligations) which define how the Mi'kmaq interact with the spiritual world, the physical world, and the broader world around them. As such, meaning emerges largely in inferential or latent means as *Netukulimk* is not necessarily canonized or reduced to specific rules of conduct, but it is part of a broader understanding of the Mi'kmaq's place in the universe.

The concept of *Netukulimk* is illustrative of the troublesome elements of current translation frameworks. Part of the problem is that there is no common law “box” into which *Netukulimk* can fit as it does not easily comport with common law understandings of private property. I pause here to think deeper about the ontological conflict at play in translating *Netukulimk*. As illustrated here, *Netukulimk* embodies respect and interconnectedness: the Mi'kmaq are relationally connected to the land and are not as much the “owners” of it, but the spiritual keepers of it to ensure that it is protected for

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<sup>572</sup> Propser et al, *supra* note 372 at 6.

<sup>573</sup> For instance, in the context of hunting and the principles gleaned from *Netukulimk*, Prosper et al state that:

The Mi'kmaq depended on successful hunting to ensure survival particularly during the winter and early spring, the harshest times of the year. To encourage the success of the hunt during this vulnerable period, they developed a spiritual relationship with the moose, and all other forms and processes, in their environment. The Mi'kmaq practiced ceremonies and rituals that demonstrated respect and expressed gratitude to the spirits of the animals for their meat, hides and other body parts... The success of the hunt and the availability of the moose depended on the maintenance of this connection by respecting the moose during life and death. Rituals were carefully constructed to ensure the cycle of regeneration was not interrupted.

See: Prosper et al, *supra* note 372 at 5.

future generations.<sup>574</sup> However, common law understandings of property do not necessarily entail *obligations* to land, but are structured around *absolute rights* which arise therefrom.<sup>575</sup> This is what Blackstone classically observed that “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”<sup>576</sup> As such, it hard to conceptualize how we could advance a one-to-one mapping of *Netukulimk* into the common law conception of property as the “sole and despotic dominion” of ownership.

#### **5.4.3 USING LAND-BASED DISPUTES TO UNTHINK THE RELATIONSHIP BETWEEN INDIGENOUS AND CANADIAN LAW**

Consider this (somewhat hypothetical, somewhat factual) scenario: a Mi’kmaq First Nation learns that a multinational oil conglomerate has been given a permit by the Government to undertake hydraulic fracturing activities on land considered to be Mi’kma’ki.<sup>577</sup> The First Nation challenges the Government’s license to allow this conglomerate to undertake these activities without consulting with, or obtaining the consent of, the Mi’kmaq. Given the potential environmental impacts, the Mi’kmaq group

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<sup>574</sup> As Prosper et al note, as a result of settler contact and colonialism “*Netukulimk* was compromised as the moral basis framing and guiding Mi’kmaq relations with nature, due to the competitive character of the market economy, the decline in communal resource procurement strategies and the subservient position of Mi’kmaq within the settler economy.” See Prosper et al, *supra* note 372 at 10.

<sup>575</sup> For example, Larissa Katz states that:

The [common] law preserves the exclusivity of ownership not by excluding others but by harmonizing their interests in the object with the owner’s position of agenda-setting authority. The law accomplishes this in two ways. First, familiar property law doctrines, such as the rule against perpetuities, easements law, and finders’ law, carve out a position of authority for owners that is neither derived from nor subordinate to any other’s. These and other rules create the institutional structure that permits the owner to function as the supreme agenda setter for the resource.

See: Larissa Katz, “Exclusion and Exclusivity in Property Law” (2008) 58 UTLJ 275 at 278.

<sup>576</sup> See, e.g., as quoted in Jace Gatewood, “The Evolution of the Right to Exclude – More than a Property Right, a Privacy Right” (2014) 32:3 Miss C L Rev 447.

<sup>577</sup> Mi’kma’ki is the name used by the Mi’kmaq to describe land that is part of their traditional territory.



assert that the principle of *Netukulimk* must be engaged in order to quash the Government's license.<sup>578</sup> If such a scenario were to find its way into a courtroom or other institutional site, how would (or could) such a dispute be resolved by respecting the Indigenous understandings of *Netukulimk* at play? This set of facts provide an anchor to a potentially real scenario in which to think about reformulating our current approach to comport with the insights drawn from a postmodern legal pluralism.

As stated, the principle of *Netukulimk* encompasses a variety of normative processes. In some ways, it prescribes positive action, and, in other ways, it is a cosmological value that structures relationships between people and the physical and spiritual world. We can try to box these principles into essentialist definitions, picking and choosing certain elements that comport with our Western sense of law. However, at its base level, *Netukulimk* does not easily fit into any one definition of law as it encompasses a variety of levels of normativity, from the explicit to the implicit to the inferential. For instance, as illustrated elsewhere in this thesis, legal meaning can be ascribed to *Netukulimk* through ceremonies, paying respect to hunted animals.<sup>579</sup>

However, the fact that legal normativity arises from implicit sites does not deter or circumscribe the normative authority that it provides for the Mi'kmaq: it provides legal

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<sup>578</sup> At least in Nova Scotia, there is some statutory recognition of the importance of considering *Netukulimk* in assessing environmental impacts. The *Environmental Goals and Sustainable Prosperity Act*, SNS 2007, c 7 states at s. 3(2)(d) that one of the principles of the Act is that

the environment and economy must be managed for the benefit of present and future generations, which is in keeping with the Mi'kmaq concept of *Netukulimk*, defined by the Mi'kmaq as the use of the natural bounty provided by the Creator for the self-support and well-being of the individual and the community by achieving adequate standards of community nutrition and economic well-being without jeopardizing the integrity, diversity or productivity of our environment

As such, if this hypothetical dispute took place in Nova Scotia, there would still be a requirement that the Mi'kmaq provide meaning and context to the principle of *Netukulimk*, which engages the translation process.

<sup>579</sup> See: *supra* note 374.

obligations and helps to organize how the Mi'kmaq interact with each other, other people, and the physical and spiritual worlds. A postmodern legal pluralism provides possibilities to rethink how courts or other institutions approach *Netukulimk*: first, they must unthink what they come to accept as law. This is rooted in a non-essentialist interpretation of law wherein courts ultimately come to accept that there are many contingent variations and conceptions of law which arise cross-culturally.<sup>580</sup> As such, courts must examine how the participants in various normative spaces come to understand law. This would require courts to attempt to understand and acknowledge the obligations which arise from *Netukulimk* without circumscribing legal meaning through the “boxing” process. This would recognize the normative agency of Indigenous peoples as actors who are not only “subject” to law, but are also “those who spin its filaments.”<sup>581</sup>

As such, at any point of contestation, there is an element of translation involved: how do Mi'kmaq peoples communicate their understandings of law based in *Netukulimk*? Given the insights of a postmodern legal pluralism, sites of negotiation or contestation must recognize how meaning is constructed in its ecological context, which ought to be recognized and accepted by various institutional sites. Consequently, understanding law in its ecological context also requires an unthinking of evidentiary procedure, a largely Westernized canon. For example, evidentiary rules have expanded in recognition of the oral histories of Indigenous societies. Former Chief Justice Lamer noted that:

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<sup>580</sup> Of course, the first response to this assertion is that this basically reduces the concept of law to any and all normative behaviour. Moreover, it threatens the “rule of law” and “social order.” However, as I have argued in this thesis, postmodern theory helps us to understand the violence of these master-narratives which assume a heterogeneous population. Recognizing the cultural contingency of law (which may be rooted in differing understandings of human beings’ place in the world) does not appeal to anarchy, but, rather, provides a more nuanced understanding of what law is and how it emerges as a social phenomenon.

<sup>581</sup> Klienmans and Macdonald, *supra* note 16 at 37.

In practical terms, [Aboriginal claims require] the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past. Given that the aboriginal rights recognized and affirmed by s. 35(1) are defined by reference to pre-contact practices or, [...] in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of aboriginal rights.<sup>582</sup>

As such, there is at least *some* judicial recognition that Indigenous traditions differ in how they record and convey their histories, customs, and laws.

While the recognition of the importance of oral histories is perhaps a victory for Indigenous claimants, this is a specious form of recognition as oral traditions are not recognized for their inherent normativity. That is, courts do not give weight and effect to the meaning inherent in these histories and stories. Rather, courts require that these histories be translated to prove factual elements of the dispute – that is, “as proof of historical facts.”<sup>583</sup> This is demonstrative of the “law as fact” paradigm required by the common law: Indigenous laws are not able to emerge organically as independent sources of normativity. Rather, they obtain *de jure* recognition when they are able to be translated (transformed) into facts. This is a denial of the jurigenerative capacity of Indigenous societies – they only become “law” when they can be translated into such by the state, which is both culturally insensitive and theoretically unworkable from a legal pluralist point of view.

As noted, the difficulty with this approach is that Indigenous laws *do* exist and generate normativity *despite* judicial occlusion of such. In describing the drawbacks of utilizing oral histories as evidence, Lamer CJ noted that oral histories are not merely

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<sup>582</sup> *Delgamuukw*, *supra* note 35 at para 84.

<sup>583</sup> *Ibid* at para 87.

historical recordings of past events, but interwoven with political, social, and moral obligations (though he declined to say *legal*).<sup>584</sup> Accordingly, he commented that...

...[t]he difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial -- the determination of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.<sup>585</sup>

This problematic quote illustrates the extent to which the common law subscribes to the myth that state law is the arbiter of objectivity. As such, evidentiary procedure helps to facilitate judicial occlusion of Indigenous law.<sup>586</sup> This denial of the jurisgenerative capacity of Indigenous law requires us to think deeper about how sites of negotiation receive and adjudicate claims based on differing conceptions of law. It is not sufficient, from a pluralist perspective, to permit oral traditions as evidence going only to prove facts.

As such, institutions, such as courts, must look to legal actors themselves in understanding how legal normativity arises. That is, the role of litigation is not so much about eliciting testimony in order to prove a fact in dispute, but rather about teasing out the elements of the Indigenous law at play in order to understand the heart of the dispute.

This requires us to acknowledge that normativity often arises in implicit or informal ways.<sup>587</sup> As such, institutions must recognize that human beings wed their understandings

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<sup>584</sup> *Delgamuukw*, *supra* note 35 at para 86.

<sup>585</sup> *Ibid* at para 86.

<sup>586</sup> Moreover, we can think of evidentiary procedure in the context of the “facilitative” role of state law. As Devlin states, “[t]he facilitative role of law, like the ideological role, is oriented towards the attainment of a hegemonic condition.” See Devlin, *Nomos and Thanatos*, *supra* note 74 at 341. In this sense, state law, including evidentiary procedure, is structured toward ensuring the attainment of the state’s *nomos*. State law is facilitative of the ideological presuppositions of the state and helps to funnel toward hegemony.

<sup>587</sup> Macdonald and McMorro, *supra* note 11.

of law with their traditional sources of knowledge. The two cannot be removed, and expecting Indigenous claimants to divorce their understandings of the world from what they experience and understand as law is, to be blunt, the reconstruction of colonialism. We can tweak evidentiary procedure and flirt with progressive jurisprudential development, but the fact is that so long as sites of negotiation (whether they be courts or otherwise) fail to confront the deeply-laden ideological constraints to legal pluralism, Indigenous law will remain stifled, misunderstood, and marginalized.

As Macdonald argues, the richness of legal discourse does not end with the “formalization of entitlements” such as legal rules, statutes, and other doctrinal concepts. Instead, “[t]he richness of normative discourse that flows from recognition that agents are continuously negotiating their agency with one another and with those who would seek to control it is lost when the text that confers a power is read as simply commanding obedience.”<sup>588</sup> As such, by reading law as simply a product of rules and procedure, the inherent normativity of life is lost as the text itself becomes privileged, rather than the normative behavior (developed by legal actors) behind the text.<sup>589</sup> This serves to promote the domination of state discourses, institutions, and rules over Indigenous ecological knowledge. For instance, *Netukulimk* is not a static principle insofar as it is canonized and frozen, but rather is an organic process of renegotiation: in keeping with their

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<sup>588</sup> Macdonald, Non-Chirographic, *supra* note 15 at 323.

<sup>589</sup> That is, the process of *Netukulimk* does not exist outside of the actions and understandings of the Mi’kmaq themselves. Its normative authority, and its content as a cosmological value, are only ever present as the Mi’kmaq move through the world and apply their understandings of it. Therefore, the normative texture of *Netukulimk* is generated by a “never-ending cycle of perturbations” of *Netukulimk*’s place in the Mi’kmaq consciousness: “[I]aw is generated by constant iterations and reiterations each related to the other but ultimately unpredictable.” See: Anker, Declarations of Interdependence, *supra* note 20 at 189. As such, the point I make here is that *Netukulimk*’s normative content is only ever present when the Mi’kmaq apply it to particular situations: how it structures and provides prescriptive action, such as the need for ceremonial practices to pay thanks to the animals for a successful hunt, or how it arises in other contexts as the Mi’kmaq interact with each other and the broader world.

understandings of *Netukulimk*, the Mi'kmaq are constantly reengaging with this principle as new situations arise. It changes and becomes reconstructed as the Mi'kmaq interact with the world around them.

Furthermore, Macdonald argues that:

If the beginning does not lie with the Word, a critical legal pluralist must find an alternative conception of the relationship between formal and informal norms. If law begins with human action and interaction, the most important norms are informal, and formal rules of law are merely evidence of, but do not themselves function as, operative legal norms. Why then the preoccupation with transforming informal norms into formal legal rules (statutes, regulations, by-laws)?<sup>590</sup>

The focus, then, should be developing the legal normativity embedded within, and constructed through, social life as law and culture are not bounded, but open to constant regeneration.<sup>591</sup> If we are to think about the translation of Indigenous law, this requires us to not look for formalization or canonization, but rather to focus on the representation of meaning as rooted in normative behaviours themselves.<sup>592</sup> This means that courts would seek to understand how legal normativity arises from informal sites, such as ceremonies, by looking to how actors generate and provide legal meaning to them.

This view of law necessitates an unthinking of translation: if state institutions are to resolve disputes or conflicts between Indigenous and Canadian actors in a way that has legitimacy for the Indigenous participants, they must appreciate the ontological and

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<sup>590</sup> Macdonald, Non-Chirographic, *supra* note 15 at 325.

<sup>591</sup> As Anker notes, if we have purely unbounded legal systems or cultures, how does law emerge as a “structured landscape” rather than “an indistinguishable cacophony...[of] white noise?” She states that “[t]he answer is that we cannot make meaning on our own. Individual acts of interpretation always take place in relation to others...” See: Anker, *Declarations of Interdependence*, *supra* note 20 at 188.

<sup>592</sup> Lindberg states that we must look beyond the fact that Indigenous peoples have not codified or legislated laws. She argues that “[w]ithout colonization, who knows what would have occurred in our celebration and provision of [codification and legislation]. However, in the absence of colonization and in an Indigenous world where things are as they should be, recording is not required because every citizen has not only the obligation to know the principles, values, laws and codes of conduct, they also have the obligation to live and emulate them.” *Lindberg*, *supra* note 17 at 48.

cultural variances which are rooted in conceptions of law. Accordingly, intercultural disputes are not resolved through readings of text, interpretations of rules, or the arbitration of doctrine, but rather disputes are resolved through understanding the nature and source of law, and how the legal meaning behind normative behaviours is constructed.

For example, if we think back to the *Marshall/Bernard* case mentioned earlier in this Chapter, we see how the various Courts characterized the required level of “occupation” to ground an Aboriginal title claim. This level of occupation is not grounded in Indigenous law, but rather in common law standards of property ownership, largely relating to exclusivity and individual ownership. For instance, the Provincial Court decisions of both *Marshall*<sup>593</sup> and *Bernard*<sup>594</sup> seriously disempowered Indigenous ecological knowledge. Instead of looking to how legal relationships with land are generated at the local level, the judges attempted to look to the Indigenous practices and evaluate them according to common law standards.

This led the Provincial Court judge in *Bernard* to hold that in the context of Mi’kmaq practices:

There was no evidence of capacity to retain exclusive control and, given the vast area of land and the small population, they did not have the capacity to exercise exclusive control. In addition, according to the evidence of Chief Augustine, the Mi’kmaq had neither the intent nor the desire to exercise exclusive control, which, in my opinion, is fatal to the claim for Aboriginal title.<sup>595</sup>

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<sup>593</sup> *R v Marshall*, 2001 NSPC 2, 2001 CarswellNS 105 (NS Prov Ct).

<sup>594</sup> *R v Bernard*, 2000 CarswellNB 539, [2000] 3 CNLR 184 (NB Prov Ct) [*Bernard*, NB Prov Ct].

<sup>595</sup> *Ibid* at para 110.

This is what Henderson refers to as “cognitive imprisonment”<sup>596</sup> as Indigenous knowledge is required to transform away from its organic meaning in order to meet standards and requirements that may be antithetical to their ways of being in the world. From a postmodern legal pluralist point of view, courts would be required to attempt to understand how the claimants understood their obligations to the land. The focus of inquiry is directed towards the Mi’kmaq participants: how did they come to understand their relationships to the land, and from what normative forces did these understandings arise? As such, the inquiry looks to what the Indigenous actors treat as law in guiding their behaviour and relationships. Instead of “boxing” the local meanings, points of contestation would be based on the interplay of knowledge structures, which are invariably dissimilar but do not preclude a culturally-sensitive approach.

As such, the end-result of the *Marshall/Bernard* case is not simply the application of the common law to the cultural artefacts of the Mi’kmaq claimants, but a more discursive approach which seeks to interplay the differing understandings of law.<sup>597</sup> This is the point of recognizing interdependence and our mutual entanglement: our approaches to resolving disputes must invariably be rooted in the appreciation that the end-result will not be linear, but dynamic and contextual. That is, how we move forward from the intercultural context will be seen as the generation of new meaning from, and answers to,

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<sup>596</sup> Henderson, *Postcolonial*, *supra* note 9 at 24.

<sup>597</sup> I pause here to state that I do not wish to prescribe the answer to the issues face by the judges in the *Marshall/Bernard* case, but rather to show how process does not have to be static and rigid, but can encourage the active reconstitution of new meaning based on the interplay of the worldviews at issue. As such, the end result would be one which encompasses both worldviews, situated within the broader context of how each party represents their relationship to the land. I am not suggesting that there are easy answers, but if we are to better recognize entanglement, the process through which we negotiate and adjudicate must at least attempt to responsive to contingency. This does not encourage radical unpredictability, but rather it encourages dynamism in resolving intercultural disputes. I draw some inspiration here from reading Desmond Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (Berkeley: University of California Press, 2000).



our entanglement, which emerge from the dialogic encounter itself. However, in order for such solutions to be sought, Indigenous legalities must be able to be translated based on their own worldviews, rather than being forced to comport with common law conceptions which differ from how they view their relationships to the world.

As Rollo argues, “[c]ommunicative democracy focuses on the cultivation of receptivity to difference and the incorporation of practices such as greeting, narrative, and story-telling into courts and other sites of negotiation.”<sup>598</sup> Consequently, within deliberative frameworks, such as political and judicial institutions, reformation of the processes of how people communicate and deliberate is essential: while we cannot speak on the same terms, the difference with which we view the world does not necessitate the conceptual domination of one worldview over another. We must not command the colonized to speak on the colonizer’s terms. While evidentiary procedure is one avenue of reform, the key to understanding reform principally lies in translation. That is, it is important that common law lawyers, scholars, and policy makers think about, and respect, the ways in which Indigenous people come to understand legal normativity. As such, representations of law should be permitted to be anchored in traditional Indigenous knowledge structures and beliefs about the world. As stated, this involves judges not seeking linear answers to complex problems. Recognizing entanglement means that the answers to our mutual co-existence cannot be seen as applying “the law” to “the facts,” but rather a dynamic approach which feed new understandings, agendas, and approaches.

By deconstructing the idea that the state exerts any superior claim to “truth” or “reality,” the translation process is radically transformed as it respects the localized and

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<sup>598</sup> Rollo, *supra* note 534 at 225

culturally contingent nature of previously obscured legalities by situating them in context and privileging them for their jurisgenerative capacity rather than their formalistic qualities.<sup>599</sup> As such, when judges or other institutional actors facilitate the interplay of ideas and worldviews, those worldviews are able to be representative of the ways in which Indigenous peoples view themselves and the world. As Lindberg notes,

[i]f [Indigenous peoples] cannot translate language fundamental to our legal conversation, we need to address our shared translation project in a meaningful way to arrive at terminology. In this dialogue we may find that some concepts and terms do not translate but the process of looking for shared language is important in itself. In this way, we may be able to approach interpretation of concepts in a meaningful way.<sup>600</sup>

Accordingly, a postmodern legal pluralism provides space for decolonized institutional sites by ensuring that the the perspectives offered are organic to the cultures and peoples represented. The insights of deconstruction displace the state's claim to hegemony over defining and creating law,<sup>601</sup> which allows for Indigenous peoples to negotiate with their own worldviews without having them repressed.

Moreover, if we think about disputes about land in the context of negotiating power, the requirements of the Aboriginal title doctrine are illustrative of how Crown sovereignty is, *prima facie*, accepted and something which has to be displaced by Indigenous peoples.<sup>602</sup> As mentioned, this serves to inhibit the productivity and reciprocity of intercultural encounters. Moreover, this is what Bohman refers to as

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<sup>599</sup> By this I mean that we look to the meanings Indigenous peoples present rather than whether they are rooted in doctrine, text, or other formal qualities.

<sup>600</sup> Lindberg, *supra* note 17 at 18.

<sup>601</sup> As mentioned earlier in this Chapter, deconstructive methods offer insights on how state domination is premised on Indigenous subjugation. By displacing this hierarchy, we come to acknowledge that a number of different perspectives can be valid.

<sup>602</sup> I say this with caution given that Aboriginal title itself is considered only a "burden" on the Crown's underlying title.

“asymmetrical inclusion:” the settlement of Indigenous claims must be made through the political and legal channels that simultaneously perpetuate their subjugation.<sup>603</sup>

Given this, if institutions are to obtain legitimacy in resolving intercultural conflicts, courts must not, *prima facie*, enter into the intercultural conversation with an unwavering acceptance of Crown sovereignty. This is especially so given that Crown sovereignty serves to inscribe, from the outset of any intercultural conversation, power relations which delegitimize Indigenous legalities and circumscribe the agency of Indigenous actors. This will not be an easy feat, but disrupting, at least in some capacity, the hegemony that is assumed by Crown sovereignty is required in order to resituate the negotiating positions of Indigenous peoples. We must also recognize that part of the problem lies with those who are adjudicating. As such, we – as Western scholars, lawyers, and judges – must accept some responsibility for the perpetuation of colonization and attempt to displace our own cultural biases. As such, deconstructing the underlying presuppositions of the current framework is necessary, “[o]therwise, the legitimacy of judging (the knowing and reasoning part) is nothing more than the power of the dominant culture to impose its knowledge-structure and cultural system upon an artificial totality like Canadian 'society'.”<sup>604</sup>

A postmodern legal pluralism therefore provides insights for rethinking legal process and discourse which institutions may draw on if they are to obtain “interpretive authority”<sup>605</sup> in the context of resolving intercultural disputes. By looking to the actors in the dispute in question, courts are able to have a more nuanced understanding of legal

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<sup>603</sup> James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge: MIT Press, 2000) as cited in Rollo, *supra* note 534 at 227.

<sup>604</sup> Turpel, *supra* note 146 at 25.

normativity. In the context of the hypothetical posed at the beginning of this section, the question is how do participants within Mi'kmaq cultural spaces come to understand and give meaning to *Netukulimk*? In situating the locus of inquiry in this way we are able to view normativity as a social process and a means of understanding the world rather than the prescription and application of rules. *Netukulimk* is invariably a cultural construct and we should not presume that we can come to understand and fully appreciate its normativity through Western eyes. Instead, by acknowledging the subjectivity of various conceptions of law, we are able to have a more productive intercultural conversation about the competing worldviews that are at play.

However, acknowledging legal pluralism is not an attempt to arbitrarily choose one or the other (or to invert hierarchies of privilege so that Indigenous law becomes privileged). As such, the value in having an intercultural conversation is the extent to which the clash of worldviews comes to create new meaning. As Kruger states, in the process of translation, "...the contract resulting from the contact between the two texts should not be viewed as a dichotomy between two binary opposites, but rather as a continuation, a relationship of mutual transformation, a symbiosis."<sup>606</sup> Rethinking institutional sites in the ways envisaged in this Chapter allows for an intercultural conversation which acknowledges that the answers to reconciling co-existence will be dynamic and fluid. As such, by viewing legal normativity as a process that is constantly being re-created, interactions between various normative spaces become an arena from which new pathways toward decolonization may be generated.

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<sup>605</sup> Turpel, *supra* note 146 at 25.

<sup>606</sup> Kruger, *supra* note 530 at 60.

## CHAPTER 6: CONCLUSION

This thesis has attempted to articulate an alternate vision of law to a statist, monist, and positivist concept of law. It challenges the idea that state law is law *par excellence* by acknowledging the cultural contingency of differing *conceptions* of law. As has been demonstrated, this is especially the case with reference to the interaction between Indigenous and Canadian law: Canadian legal institutions adhere to an orthodox ideological and jurisprudential framework which propagates imperialist and colonial myths about how legal normativity emerges. In addressing these concerns, this thesis has brought me to examine legal pluralism from a postmodern perspective, drawing on the resources of critical pluralists and postmodern theory in fashioning a framework which, I hope, allows for new understandings and conversations to emerge in moving toward a postcolonial future.

The postmodern legal pluralism that I have offered in this thesis requires us to unthink law. Once we question what were formerly “sacred cows” – that is, the monistic conception of law as espoused in orthodox legal theory – and expand how we view legal normativity, we are able to recognize that law is an ongoing process of building and renegotiating culturally contingent ways of being in the world.<sup>607</sup> Appreciating law as a

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<sup>607</sup> In discussing the representation of minorities and oppressed peoples in film and communications, Shohat and Stam argue that our subjectivities are constituted by historical and social contingency. They argue:

The issue, then, is less one of fidelity to a pre-existing truth or reality than one of a specific orchestration of ideological discourses and communitarian perspectives. While on one level film is mimesis, representation, it is also utterance, an act of contextualized interlocution between socially situated producers and receivers. It is not enough to say that art is constructed. We have to ask: Constructed for whom? And in conjunction with which ideologies and discourses? In this sense, art is a representation not so much in a mimetic as a political sense, as a delegation of voice.

discursive enterprise, flourishing locally despite the realities of imperialism, offers a framework that ultimately respects Indigenous peoples as jurisgenerative agents. The self-reinforcing mechanisms of state law demonstrate the sclerotic tendencies of orthodox legal theory. Legal pluralism implores us to look at how law emerges beyond the confines of state apparatuses. Law is ultimately a culturally significant phenomenon that is built on differing worldviews.

Judges, legislators, and other institutional actors do not hold a monopoly on “creating” law. Rather, law emerges from those legal actors for whom it becomes real, and for whose conduct and relationships it becomes meaningful. Legal normativity can be examined by looking to those who are actively engaged in the process of constructing, and being constructed by, circular patterns of legal normativity. In this sense, normativity is a circular process wherein legal actors negotiate “the heterogeneous plurality of norms, normative orders, methodologies, institutions, and modes of authority to which she is subject, and of whose meaning she participates in the construction.”<sup>608</sup> The focus of legal pluralist inquiry, then, is figuring out what these legal actors treat as law in actuality. As such, we look to how legal actors govern their conduct given the plethora of normative forces to which they are subject in order to appreciate what that actor treats as legitimate and authoritative.

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See: Ella Shohat and Robert Stam, *Unthinking Eurocentrism: Multiculturalism and the Media* (London: Routledge, 1994) [Shohat and Stam] at 180. In situating the contingency of the “reality” of state law, we must challenge the underlying historical and social determinants of this privileging. Why is state law privileged? How is this situation produced? It is also useful to think of this representation of “truth” in law as merely a product of social contingency, produced as part of a plethora of social and political processes which have attempted to produce an objective representation of social life, to the detriment of how others are socially constituted. Thus, the subjugation of Indigenous law is a representation produced to serve a particular contingency. The revitalization and privileging of Indigenous law, then, is not a threat to “reality” insofar as it is a call for us to unthink how that “reality” is produced in the first place.

<sup>608</sup> McMorrow, *supra* note 389 at 69.

Moreover, Western law posits that there is an objective “reality” to law, but that “reality” is only constituted as a partial representation of those who have come to dominate: the colonizers. As Henderson notes, “[t]he only sustainable category of universality is diversity.”<sup>609</sup> Universality ignores that law, as a concept, has no essential characteristics and is in a constant state of flux and regeneration. Once we stop assuming that law can exist and emerge in a vacuum, unperturbed by the influences of outside forces, whether they be the institutional or the enterprises of local culture and community, is when the potential of legal pluralism emerges. Postmodern legal pluralism paints a very different picture of law, which is one that is posited in the dialogical and discursive phenomena of social life. While we are informed by our narrative understandings of law, when we interact with each other, state institutions, and other community institutions, new meanings emerge. Ignoring the contingency of law maintains a top-down approach to understanding law which perpetuates violence masked as “social order.”<sup>610</sup>

The four themes that I have offered in this thesis which form part of a postmodern legal pluralism provide a methodology for rethinking how we can acknowledge the normative influence of Indigenous legalities within broader institutional structures. How we implement this version of legal pluralism in broader institutional and political settings is the difficult next task. The solutions to implementing legal pluralism are contextual and politically driven. However, in order to begin a conversation on how we can move forward, we must belie our adherence to orthodox legal theory and accept the legal

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<sup>609</sup> Henderson, Postcolonial, *supra* note 9 at 49.

<sup>610</sup> For Devlin, this is the “ideological” function of law. State law is defined by those at the top – the powerful – and they use law as guise for subjugation masked as an attempt to maintain “social order.” See: Devlin, *Nomos and Thanatos*, *supra* note 74 at 339.

normativity which arises from social life, including our interactions with the world around us. This does not dissolve the concept of law, or reduce all normative behavior to law. Instead, this requires us to look closer at how legal normativity is built and sustained.

I have attempted in this thesis to posit both a theoretical framework for addressing sites of interaction between Indigenous and Canadian law, as well as exploring how these insights may be borne in the context of land-based disputes. As discussed in Chapter 5, a starting point for reforming current frameworks for resolving land-based disputes is by implicating processes of translation and negotiation. Both of these processes reveal areas for rethinking how Canadian institutions approach, and come to understand, legal normativity. Expanding how courts view and engage with non-state legalities does not threaten some form of “social order,” or risk descending law into chaos. Rather, it invites us to imagine new worlds, formulated with the goal of moving toward a postcolonial future.

Current frameworks are maintaining colonialism rather than working against it. This is simply untenable given that the Canadian state now recognizes, to some extent, the harms that have been perpetrated against Indigenous peoples.<sup>611</sup> Moreover, we are reconstructing colonial harms when we delegitimize the diversity of ways through which Indigenous peoples come to understand legal normativity. Orthodox legal theory and Western polities have invariably acted as sites for this reconstruction of colonialism, and, as such, moving forward on instituting legal pluralist frameworks must be part of a broader political praxis of decolonization. We must encourage reciprocity between

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<sup>611</sup> See, for example, Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: National Centre for Truth and Reconciliation, 2015).



Indigenous peoples and broader Canadian society whereby we work together toward the decolonization of legal and political structures.

In conclusion, I end this thesis by returning to the beginning and posing the question: how do we move forward in reconstructing the relationship between Indigenous and Canadian law? By providing a normative framework, shaped by the insights of postmodernism and critical versions of legal pluralism, I anticipate that this thesis will provide some guidance on that front. As such, I hope the postmodern legal pluralism that I have set out in this thesis adds to the literature on both legal pluralism and Indigenous law. It offers, I believe, a potent critique of Western law and provides a framework for the emancipation of Indigenous legal thought. As Henderson states, “[t]he future of Indigenous peoples around the world is unwritten.” Given the failure of the current moment in Indigenous-Canadian relations, I believe that it is time to begin writing a postcolonial future.<sup>612</sup>

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<sup>612</sup> Henderson, *Postcolonial*, *supra* note 9 at 56.

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