

Indigenous Legal Perspective: The One Thing Missing from Canada's Legal System

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Introduction

Indigenous peoples view askîy, the land, as where our stories come from; they nourish our minds and spirit. More than only the human world that lives around the humans of the world,

our societies would not be able to survive without the presence and actions of the ecology around us. Unfortunately, Canada's legal system is based primarily on colonial legal orders, which created injustices for Indigenous peoples in Canada. This paper will explore and deepen the argument that Indigenous ways of knowing are increasingly important, especially in the context of legal orders. Focusing on Kirsten Anker's article titled "Law as Forest," this paper will look at current academic scholars and the contemporary perspective on Indigenous legal traditions and continue the argument for Indigenous governance to be given back to the Indigenous communities that lost that power due to colonial power. It is essential to understand all aspects of Indigenous legal orders and how it differs from the ways of Eurocentric legal traditions. The Ways Indigenous ecological knowledge can aid in the ever-growing issue of climate change with their teaching of only taking what is needed and giving nourishment back to the land for the resource it has provided for us. Not only will respecting Indigenous legal orders help incorporate their governance back into their communities, but it can also help Canadian society with ways to adapt their culture. As a result, the reconciliation process will be able to progress forward with a change in the Canadian legal perspective in hopes of amending the colonial ways in which Canada confederated.

Indigenous Ways of Ecological Knowledge

Law as Forest

This article by Kirsten Anker asks what it is to take forests, mountains, and rivers as law. If there is no definite distinction between humans and nature, our understanding of ecology is legal, just as it makes our law ecological.¹ She talks about squirrels as an example of eco-logics, where their actions, along with the actions of forests, rocks, and rivers, represent properties of

¹ Kirsten Anker, Law as Forest: Ecologic, Stories and Spirits in Indigenous Jurisprudence, 21 Law Text Culture 191 (2017) 194

the world that we can model, an ecologic.² Many within the principles of Earth Jurisprudence resonate with and have been influenced by Indigenous cosmologies, including the personhood of non-humans and holistic understandings of the condition of interdependence.³ There is to task in Indigenous ways of knowing and cosmologies as they relay a foundation of values and ways of living. Wâhkôhtowin. Law stories are about places and ecologies; landscapes provide social reference points, a memory archive.⁴ One of the many origins stories is the ācimowin, the story of Skywoman; it is about gift-giving between human and animals, the bonds of gratitude that binds us. It exemplifies the fusion of facts and norms in longstanding habits that have led Haudenosaunee people to survive.⁵ As said by Sakej Henderson, "To Mi'kmaq people, every stone, tree, river, coastline, ocean and animal is a discrete spirit (mntu). The asiskiy, earth is an external reality that is in a continuous state of transformation."⁶ Just as the earth continues to transform, so should the law within Canadian society with the change of how society functions and how they are governed to align with the way society requires it. While it may be assumed that the community in question is human, attending to the ways in question is human, attending to how our linguistic, cognitive and bodily habits exist in relation to the world and emerge as a higher level of patterning against constraints around us, is one way of grounding our jurisprudence by admitting a broader sense of community with life on earth.⁷ Overall, Anker states that the environment around us is just as important as the humans surrounding us; law should also relate to and concern the ecosystems surrounding the societies we call home. It is also essential to view the legal decisions that humans use to make their decisions will affect not

² *Ibid* at pg 195

³ *Ibid* at pg.198

⁴ *Ibid* at pg. 200

⁵ *Ibid* at pg.202

⁶ *Ibid* at pg. 203

⁷ *Ibid* at pg. 208

just society but the life around them, which means ecosystems. These decisions should be made considering all communities affected by this legislation.

Respecting Indigenous Legal Orders

Naiomi Metallic, a constitutional law professor, acknowledges that the Charter of Rights and Freedoms does not consider Indigenous ways of governing but only the system upon which Canada is built. According to the TRC, for Canadian law to cease being a means to subjugate Indigenous people to an absolute sovereign Crown, it is critical for Indigenous people "to recover, learn and practice their one distinct, legal traditions."⁸ Aboriginal organizations, especially First Nations leaders, have argued for some time that the Charter does not represent their value systems because it does not embrace social and economic justice, nor does the litigation style of rights redress suit their history and traditions.⁹ If reconciliation is to work as intended, then Indigenous peoples are to be in control of how their communities are governed, as their ancestors once did without colonial influence. There should be more emphasis that the Charter, as a foundation of constitutional law, does not consider governing practices of Indigenous nations. Connecting this reading to Anker's, both bring light to the importance of revitalizing governing practices and resisting the colonial ways of the Canadian justice system. The legislation that entails Indigenous peoples' rights and freedoms differs from other Canadians because colonization affects them differently. From the start of colonization, the European way of governing was foreign to Indigenous peoples. It continues to be a foreign system they have been forced into, assuming they will adapt. They also viewed land differently; for Europeans, it was known to be a part of your social class; if you were to own more land or property, you were known to be of a higher class. Property ownership is a European construct that only looks at the

⁸ Metallic, Naiomi. "Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments." *Constitutional Forum*, vol. 31, no. 2, spring 2022 at pg. 4

⁹ *Ibid* at pg. 6

land as something that can be owned; they view the land as how their society can become economically stable. In Indigenous ways of knowing, the land holds everything we know how we know it. The land contains stories, teaches lessons, and nourishment for our bodies and spirit. When the two worlds collided, there was an imbalance between what land meant to both groups of people with different understandings of land. Regardless of how European settlers when about land, it must be addressed how Indigenous peoples viewed the land as more than something that could be owned.

Indigenous Inherent Rights

Within the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), there are many ways in which Indigenous peoples have distinct inherent rights that pertain to them. The section below talks about the legal relationship with water. However, the article in the following section explicitly discusses the Anishinaabe legal relationship with water. Still, many of the concepts do apply to many other Indigenous nations.

Navigating Our Ongoing Sacred Legal Relationship with Nibi (Water)

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states that in Article 25, Indigenous peoples have the right to maintain and strengthen distinctive spiritual relationships with water. This is a recognition of an inherent right of Indigenous peoples to govern as self-determining peoples under Indigenous systems of law.¹⁰

¹⁰ Schwartz, Risa, et al. “Chapter 10: Navigating Our Ongoing Sacred Legal Relationship with Nibi (Water)” in *Braiding Legal Order: Implementing The United Nations Declaration on the Rights of Indigenous Peoples*, ed (Center for International Governance Innovation, 2019). at pg.2

This article enables the assertion of Indigenous legal jurisdictions over lands and territories based on our legal principles and values and through their legal mechanisms.¹¹ This allows for dismantling the management, ownership and access to water based on a jurisdictional approach Canadian governments often use. The rights of water and the legal personhood of Water have been recognized internationally; many Western legal mechanisms fall short of the legal relationships between Indigenous peoples and water. There is much danger when using non-Indigenous legal mechanisms for the affirmations and framing of sacred relationships in non-Indigenous languages. With that, they may lose the spirit of the relationship itself.¹² In Canadian law, corporations have the rights as legal persons, but water is much different since a corporation is a non-living being, whereas water is a living being. There should be a distinction drawn between the two as both do not carry the same rights; where one is non-living and the other is living, it should be held up to a different standard on the basis that it is living.¹³ There can be a shift within Canadian domestic law where Indigenous legal concepts can be woven into that law that is already in place. It is important to note that just because the article has been implemented into UNDRIP does not mean it has been incorporated into Canadian law.

To Anishinaabe, water law tells us that water is life, that we are born from water and primarily composed of water.¹⁴ We come from nipyi, water and for our bodies to be nourished to stay alive, we need water for everything it provides. It provides us with the nutrients we need. Still, it also is a living being that relies on a more extensive web of relationships to be well and to bring wellness to other beings.¹⁵ By contrasting the Indigenous relationship with water to the relationship with European settlers, there are significant differences in the use of water between

¹¹ *Ibid*

¹² *Ibid*

¹³ *Ibid*

¹⁴ *Ibid*

¹⁵ *Ibid*

the two. For example, settlers used the waterways to travel and, more recently, dump hazardous chemicals into rivers that negatively impacted the Indigenous nations living near them, resulting in many people dying or contracting cancerous diseases. As mentioned above, for Indigenous peoples, water is viewed as a living being that gives and takes life, just like all the humans living off the land. From various creation stories from different Indigenous nations, there is the same lesson that we were given the land as a way to survive. Within the Anishinaabe creation story, humans were the last to be placed on earth; we have something to learn from the land since, according to creation, they were there before us. Still, just as the land gives us the nutrients and ability to survive, we have to reciprocate that care back to the land; resources that have been used need to be grown for more to be taken in the future. The land is what gave us life and will continue to give us life as we grow within the generations to come. This understanding of the land is not apparent in Western society, especially in Canada; the land needs to be considered when legislation is created and implemented.

Circling back to the main argument of this paper, understanding and implementing Indigenous ways of ecological knowledge and legal orders are essential when reconciling with the Indigenous peoples on Turtle Island. Although Article 25 speaks to the relationship with water, many sections of UNDRIP speak to the importance of maintaining the relationships with the land. Maintaining these relationships will allow the Indigenous legal traditions to stay alive despite all it has been through, with colonialism taking away the authority it once had.

Conclusion

In closing, the Indigenous legal perspective is essential, especially in modern law, where Indigenous knowledge is becoming more looked upon with the increased awareness of the knowledge of their land. Aside from that, it is also a large part of the Reconciliation efforts between the Indigenous peoples and the Canadian government to heal and move forward from

the violent acts of colonialism. A substantial part of this is implementing the UNDRIP articles, especially ones that deal with the relationship with the land and that the state is to give Indigenous peoples legal recognition and protection to the lands and the customs, traditions and land tenure systems of the Indigenous peoples concerned.¹⁶ Along with UNDRIP are the TRC Calls to Action, which have been available since 2015 for governments to implement. There are still many calls that have been acted on that deserve to be looked at and action taken. Throughout this paper, different academic scholars have discussed the Indigenous legal perspective as one that should be implemented into the Canadian legal system to accommodate a large percentage of the population better. Work is to be done within the space of incorporating Indigenous legal traditions within the Canadian legal system for the two societies to live in harmony.

Works Cited

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¹⁶ United Nations Declaration on Rights of Indigenous Peoples, Article 26.3

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[NDRIP](#)

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Cree/Nehiyawewin Words used

Askîy – land

Wâhkôhtowin – relationship/ law

Nîpiy – Water

Âcimowin – story

Asiskiy – earth