TEACHING 'INDIGENOUS PEOPLES AND THE LAW'

Whose law?

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Imagine that you have been asked to teach a course on indigenous legal issues, or, as it might be called in Canada where I work, Aboriginal Peoples and the Law. Such a course might ordinarily be expected to cover Native Title and statutory land rights, criminal justice and policing issues, the *Racial Discrimination Act*, the stolen generation and stolen wages, heritage protection, environmental planning and assessment, traditional knowledge protection and intellectual property and so on. Perhaps being able to offer such a course in the first place seems like a victory for the inclusion of indigenous perspectives and social justice issues in the law curriculum. But it is clear that the 'law' of the course title is Australian state law; the legal issues are those that arise when indigenous people bring claims before the courts, or when aspects of the mainstream legal system impact in adverse or discriminatory ways on indigenous individuals or groups.

Why should this be so? Partly it is because law faculties largely see themselves to be undertaking the task of training lawyers, and the orthodox wisdom is that lawyers principally need to know about cases and statutes. However, lawyers representing indigenous clients arguably also need to understand something about indigenous law, particularly if the case involves some kind of recognition by the state of native title, sacred sites, kinship arrangements and so on. Further, it is always useful to be able to understand where a client is 'coming from;' their behaviour and motivations may be driven by a set of obligations and understandings that derive from traditional law.

More fundamentally, though, the 'law' of course titles is assumed because the state has such an imaginative monopoly on the idea of law that we mostly don't think about it as referring to anything else. This is so even though the High Court, through native title, has acknowledged that traditional law continues to exist in indigenous communities, and that aspects of it can be recognised by the state.[1] On the other hand, it declares that 'the common law is the only law in Australia.'[2] The apparent paradox arises because indigenous law and the common law are somehow seen to exist on different planes — one is merely a social fact that can be proved in evidence; the other is the law in force. So even when 'indigenous issues' courses inevitably encounter aspects of customary law in cases about recognition of sacred sites or native title, and in critical perspectives on the appropriateness of various state measures, the fact/law hierarchy is reproduced in the syllabus.

There are a couple of reasons to critique this. The first is that, because the idea of 'law as law' is bound up with sovereignty, the common law has not adequately answered the question of how British settlement extinguished indigenous sovereignty (or even why there need be only one sovereign law in a given geographical space).[3] Secondly, in terms of law as a social phenomenon — trying to understand how people use and are affected by law — it is not terribly satisfying to maintain the fact/law distinction. What I understand by the term 'native title' may be as much influenced by stories of Dreaming ancestors creating the land, desert paintings and images of elders giving evidence as it is by s 223 of the *Native Title Act*. Which one is the fact part and which one the law of 'native title'?

Christine Morris has argued that the constitution of Australia — 'the continent, not the post-1788 political entity' — was laid down at creation with the Dreaming as its manifesto, and that, rather than be ghettoised, indigenous law should be considered a general resource for the better governance of the country as a whole.[4] Irene Watson offers us stories such as the Sun Women's Dreaming in the hope that non-indigenous peoples can 'undress themselves' of colonial law and discover the 'raw law' of the land.[5] In Canada, one of the most vocal advocates for a greater role for indigenous law 'as law' is Anishenabek scholar John Borrows. He argues that the principles and lessons that can be drawn from First Nations and Inuit stories, ceremonies and traditions are as much a part of Canadian law as the common law and civil law traditions, and that judges and law teachers should work towards what he calls a truly indigenous Canadian legal community that seeks inspiration and imaginative resources from these multiple sources of law.[6]

What could this mean for the law curriculum? In the rest of this article, I will give an account of how what is known as the 'transsystemic legal education' program at McGill University in Montreal, Canada has opened one possible approach. In part it is the particular philosophy behind this program and the unique situation of McGill in civil law Quebec that has shaped the syllabus I developed for 'Aboriginal Peoples and the Law'. Nevertheless, I think its lessons are broadly applicable to those who are interested in integrating 'indigenous issues' into any course, and provide a general way of thinking about comparative pedagogy.

REFERENCES

1. *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

2. *Commonwealth v Yarmirr* (2001) 208 CLR 1, 115 (Kirby J).

3. See views canvassed in Sean Brennan, Brenda Gunn and George Williams, '"Sovereignty" and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307.

4. Christine Morris, 'Constitutional Dreaming' in Charles Sampford and Tom Round (eds), *Beyond the Republic: Meeting the Global Challenges of Constitutionalism* (2001).

5. Irene Watson, 'Indigenous Peoples' Law Ways: Survival Against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39.

6. John Borrows, 'With or Without You: First Nations Law (in Canada)' (1996) 41 *McGill Law Journal* 629; 'Creating an Indigenous Legal Community' (2005) 50 *McGill Law Journal* 153.

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What is 'transsystemic legal education'?

Quebec is what is known as a 'mixed jurisdiction' which combines procedural and substantive elements of both common law and civil law traditions. Historically, it was a French colony, governed by the customary law regime of the Paris region, canon law, Roman law and royal decrees. After the transfer of Quebec to Britain in 1763, and later, confederation, Quebec more or less retained a French system for land tenure and civil matters, with criminal and constitutional decisions following the federal common law of Canada. In 1866 a code based on the Napoleonic code was adopted, more recent versions of which have integrated some common law concepts, such as the trust. In terms of procedure, the doctrine of precedent does not formally apply, but nonetheless has a certain degree of influence.[7]

From its inception in the 1850s, McGill's law faculty curriculum reflected an eclectic range of legal sources, from Roman law and pre-revolutionary French law, to common law, lex mercatoria, and local legal practice. For various reasons of local politics, this diversity was subsumed into a more code-focused program until in 1968 the Faculty introduced two parallel streams — LLB and BCL (bachelor of civil law). Students inevitably engaged in comparative processes over the two streams and adopted two legal cultures or identities (although often not equally), the idea being that they would learn a dexterity of mind and multiple ways of thinking through legal problems. On the part of the lecturers, because there was always an 'other way' close to hand, they found that they had to rethink some basic assumptions such as the nature of law, or the sources of legal knowledge. But these experiences were ad hoc and in time the Faculty began to move towards explicitly building the curriculum around the comparative experience and the constant movement between different ways of thinking about law, rather than encouraging the idea that legal knowledge is discrete and spatially distinct.[8]

The most recent curricular incarnation, launched in the mid-90s, is the McGill Program, known unofficially as 'transsystemic legal education'. Transsystemic courses are those which would have been taught separately before — such as torts in the common law stream and extra-contractual obligations in the civil law stream: students now take Contractual and Extra-contractual obligations, family and family property law, judicial institutions and civil procedure, secured transactions, sale and lease with no systemic designation. Other topics (constitutional law and criminal law) are governed by common law in Canada, while others — property — have been kept separate so as to allow students to focus on the methods and conceptual structure of one tradition at a time.

How does a transsystemic course differ from what you might be used to? Because many of the concepts, principles and terms have no equivalent across common law and civil law — take consideration in common law contract, for instance, or 'intensity of obligations' in civil law — the syllabus has to be organised around broad themes or issues rather than specific doctrine. Traditional doctrines then serve the purpose of illustrating different ways to imagine law and solve legal problems rather than simply defining 'the law'. The focus when examining legal materials is then on how they articulate problems and solutions and on how the different traditions construct a particular vision of the world.[9]

Although the McGill curriculum is mainly focused on the common law and civil law, the philosophy of legal education extends to other legal traditions in the world such as the Sharia, Talmudic law, and indigenous law. In theory, any legal tradition is relevant to understanding the human phenomenon of law, and to developing flexible ways of thinking through legal problems. The broader implications for legal education of the transsystemic method, as a comparative practice, are the need to think beyond 'rules' to cultural context in order to explain existent differences. Further, transsystemic legal education aspires to a 'sustained dialog with otherness,' and to a multiplicity of perspectives on law. There is never only one way of thinking about law.

Bringing Canada's 'third family' of legal traditions into the curriculum

When I was asked to teach 'Aboriginal Peoples and the Law' and I thought about doing so transsystemically, I knew that my starting point would be that the state-based legal framework was merely one contingent way of framing questions of justice and of understanding lawful behaviour. To go further, I was faced with some of the same questions as teachers of our other transsystemic courses: what themes could be used to structure the course in a way that would bridge traditions, and what would we rely on as our legal 'materials' or sources of law? These questions quickly run into the radical differences between whole world-views of European and indigenous peoples and

7. See generally John Brierley and Roderick Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (1993), 5–97, 121–125.

8. See Roderick Macdonald and Jason MacLean, 'No Toilets in Park' (2005) 50 *McGill Law Journal* 721, 731–735.

9. Rosalie Jukier, 'Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom' (2005) 50 *McGill Law Journal* 789.

the difficulties of translating between them. The first stumbling block to designing a course that aimed to bring indigenous legal traditions into the conversation about law might even be that the university education system is itself so bound up in the epistemology and ontology shared by European-derived law — distinct subject matters, a reliance on written knowledge, the hierarchical structure of expertise, enlightenment rationality — that the class room setting may effectively exclude the learning of indigenous law.

Sakej Henderson, Research Director of the Native Law Centre of Canada, intimates as much in a recent talk in which he expressed difficulty even describing First Nations jurisprudence and legal concepts in English, because it differs so much from his own languages.[10] In addition, he noted that he was addressing a group of students who had not been through the relevant preparatory ceremonial work: for him, learning indigenous law came in dreams as a result of ceremonies. It was deeply tied to language, to place, and to the specific individual. As in Australia, it may be that aspects of indigenous law are sacred and explicitly not publicly accessible for study.

When western-trained researchers describe indigenous law, they often base the comparison on functional or structural equivalents: how do groups of people resolve 'trouble cases' (the common law method)? What are the rules or principles that guide peoples' behaviour? Henderson, on the other hand, understands his law as about peace rather than about trouble. A rule implies a ruler, and a principle a prince, he claims, and there is no such hierarchy in indigenous law. All these outside understandings are interpretations, translations that are not inherent to indigenous law.

Borrows has a slightly different take on translation. In his work, he frequently offers up a kind of case method based on Anishenabek stories as sources of legal principle. Although he acknowledges that he adapts these stories so that they appear analogous to common law cases (and that in writing them down, the fluidity of the oral tradition is affected) he sees this transformation as being entirely consistent with the trickster role of the First Nations story teller.[11] The trickster — shapeshifter, traveller, outsider, both cunning and foolish, honest and deceptive, kindly and mean — is there to confound established boundaries, introduce us to new perspectives and to help us look at ourselves in new ways. So even though teaching indigenous law in a University setting will always have to confront the issue of translation (who is doing it, how, and for what purposes), the trickster potential can be encouraged in transsystemic teaching because the terms of the translation that we use — whether rules, ownership, obligations or even law — become a contingent part of a conversation rather than end points in themselves. The lack of fit experienced by Henderson can be highlighted so as to destabilise foundational assumptions on which legal reasoning depends and emphasise that the translation *is* a translation and not an objective fact or reality.

I began planning the course by inviting about ten elders, teachers, lawyers and political leaders (Inuit, First Nations, Maori and Australian Murri) to speak with students. In the first class, I thought it was important to confront students with a different framework for understanding what could happen in a class room. Although 'welcome to country' ceremonies that might play this role are becoming more common in Australia, it is relatively rare for events in Quebec to make any mention of the Haudenoshaunee, Mi'kmaq, Huron, Innu, Cree or Inuit. The Haudenosaunee, whose territories include the Montreal area, traditionally begin meetings with Ohenton Karihwatehkwen, a thanksgiving prayer that for this class was recited by McGill Education Professor Michael Doxtater. Among other things, the prayer gave thanks to the ancestors of all those present for bringing us safely together, and to the birds and animals, the plants, water, air and land that surrounded the building where we were. This transformed the class room from a disembodied space in which information would be exchanged to a situated place that had different meanings associated with it, and was filled with concrete individuals who all had their different histories. Basically we began the class by reminding ourselves of who we were and where we were!

An historical overview is usually useful in any law course, but I did not want to engage the matter of history uncritically. The most basic historical question might well be where did law — and where did everything — come from? We were fortunate to have Keptin Steven Augustine, an hereditary Mi'kmaq chief and curator of the Maritimes collection at the Museum of Civilisation in Ottawa, agree to come and recount the Mi'kmaq creation story. There were a few key aspects of this story that stayed with us in the rest of the course. First, Steven carried seven bundles — containing pipes, tobacco and other things — that acted as mnemonics for parts of the creation story. In this we had the first challenge to the text as keeper of knowledge. Second he introduced us to several Mi'kmaq language terms which would later help confound some of the basic assumed categories on which western law operates. Finally, when he was describing Mi'kmaq seasonal movements between the coast and the river tributaries, he used a metaphor of sap moving and receding in a tree. The resulting image on the board — of tree-like patterns of land use — contrast powerfully to the geometrical image of bounded territory that forms the basis for Western property (and is particularly important considering recent findings that the Mi'kmaq were nomadic and unable to demonstrate sufficient occupation to support a claim to Aboriginal title).[12]

It would be too easy, however, to receive this creation story in the category 'myth' and to exoticise it without questioning the assumption that Western law is opposite to myth. Both the 'trans' in transsystemic and the trickster of First Nations stories would have us question the standard order of things, so we next asked where non-indigenous law comes from in North America, and read some of the canonical texts (John Locke, the Royal Proclamation, the Marshall decisions)

10. James (Sakej) Henderson, 'Comprehending First Nations Jurisprudence' (Paper presented at *indigenous Law and Legal Systems: Recognition and Revitalisation*, University of Toronto, Faculty of Law, 26–27 January 2007), webcast available at <indigenouslawjournal.org/?q=webcast> at 27 August 2008.

11. Borrows, above n 6, 653.

12. See *R v Marshall; R v Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43.

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with mythological lenses, looking to see what it is that myths do: cover up paradoxes, explain the inexplicable, and account for how we get something out of nothing by situating it in the very distant past.

I tried to repeat this back and forward motion for the rest of the topics in the course outline. The topics themselves were chosen in a way that allowed us to deal with the expected subject matter of such a course — Aboriginal title and rights, the Indian Act and so on — but using categories that weren't quite as laden with the baggage of the non-indigenous legal system. For instance, when we discussed major Aboriginal Title cases such as *Delgamuukw*, we did so under the heading 'Land', looking both at, for example, Gitxsan stories of their territories that showed the deep kinship relations between local species and particular houses or clans on the one hand, and on the other, at European accounts of property from feudal times that allowed us to interrogate the development of the idea of land as a commodity and all the economic, technological and demographic changes that accompanied that development.

The Indian Act, federal legislation that since the late 19th century has defined the boundaries of 'Indian' status, band membership, and reserve governance, was approached via the concepts of personhood and legal identity. The patriarchal structure imposed through the Act is frequently condemned as overriding matriarchal or egalitarian practices in First Nations, and yet the question of identity is also complicated by the incredible influence that the Act has had in shaping peoples' sense of individual and community identity.[13] In return we pulled apart the idea of the person that underlies Western rights discourse, questioning in particular the insular individual concept of the person that very often causes indigenous and other rights claims to be forced into pitting individual against collective rights. Understanding the centrality of relationships and kinship to indigenous peoples such as the Gitxsan, whose kin include animals and the 'natural' world, helped us to complicate this dichotomy between individual and collective.

In Australia, a transsystemic method could, for example, be used to address questions of land title and the monopoly of sovereignty through unpacking the representative technologies of cartography that in native title claims have come up against indigenous art and song as 'maps' of country. European histories of agriculture, cartography, art, property and government have a lot to teach us about the link between the empty map and the discourse of terra nullius that might, in the spirit of the trickster, lead to a new conceptualisation of what land and 'country' can mean.[14]

The McGill course attempted some alternatives to modes of teaching and learning that might be more appropriate to learning indigenous law. Subtly, storytelling is itself a different mode of discourse that resists the usual rational analysis of the academy. One visitor, Murri scholar Christine Black (formerly Morris), emphasised the dialogic processes of indigenous jurisprudence by working her presentation around several student 'witnesses' that she asked to join her. Like Keptin Augustine, she too used images and designs on the board to convey the meaning of law.

For another class, we were able to visit an important site for Kaniekehaka (Mohawk) law and governance, the longhouse at Kahnawake, where a guide from the local cultural centre took us to the longhouse and taught us about the Haudenoshaunee confederacy and system of governance. This was certainly interesting, but probably what most marked the students was a physical experience that could not have been communicated in writing — they were so close and yet so far from downtown Montreal, and their sense of space was further disoriented because of the lack of markings such as street signs (to top it off, our bus got lost in the maze of nameless streets). As our young host described holding a machinegun under the Mercier Bridge in Montreal during the 1990 Oka crisis, certain aspects of the violence of state repression of indigenous peoples came into sharp perspective.

Lastly, part of the assessment was a 'creative project' that encouraged students to respond to the course in ways other than through the production of academic text. While some struggled with this, others produced work that played very effectively with the imagery, aesthetics and form of law. The work was exhibited in the foyer of the law faculty at the end of semester.

The continuation of an experiment

Although the response of students and visiting speakers alike has been very positive, the course is still very much in the early days of experimentation. One of the first institutional moves that must be taken is to secure the permanent involvement of indigenous collaborators in running the course, whether by hiring indigenous faculty or engaging an advisory council (or both). My colleagues and I also need to keep building relationships with surrounding indigenous communities, some of whom have suggested a kind of 'teacher exchange' programme.

13. See Bonita Lawrence, 'Gender, Race and the Regulation of Native Identity in Canada and the United States: An Overview' (2003) 18 *Hypatia* 3.

14. See Kirsten Anker, 'The Truth in Painting: Cultural Artefacts as Proof of Native Title' (2005) 9 *Law/Text/Culture* 91 for an elaboration of this analysis.

Secondly, I observed that even when we did have indigenous speakers come to the class, notions of indigenous law tended to remain out of context and in the abstract. One way of addressing this might be to take the 'field trip' aspect of the course further, as do two summer courses run by the University of Ottawa, where small groups of students stay for a week in either Cree or Innu communities in Quebec. In small group discussions with elders, students learn about 'The Cree or Innu worldview and relationship with the earth, governance, private law relationships, rules of behaviour as well as changes to and continuity of the traditional legal order.'

Another way is suggested by the practical learning model of the Kawaskimhon Aboriginal Law Moot,[15] an annual non-competitive negotiation exercise that has law students from faculties across Canada representing parties to a current dispute involving Aboriginal issues. This year, where the fact pattern involved a purely intra-Aboriginal boundary dispute, students had to submit both a factum based on mainstream Canadian law, and a negotiation proposal based on the legal traditions of their First Nations clients. Over two days, the negotiation teams had to try to reach a consensus on the issues, with the guidance of two indigenous facilitators and an elder. These mentors would often suggest protocols and procedures for discussion, would remind students of the kind of language they were using, and of the need to refocus the discussion in certain ways (for instance by placing a bundle in the centre of the talking circle that represented the next seven generations, in whose interests we must try to act).

This 'learning by doing approach,' where indigenous law was present in the form of specific and directed guidance in how to speak and how to behave rather than in abstracted propositional rules and principles, was a particularly powerful learning experience for those involved. I am planning to adopt some aspects of this exercise for the course next year by focusing the syllabus around local case studies where students will have the chance to engage with members of the communities affected, to take on the role of the parties' representatives, and then to use some of what they have learnt to look elsewhere than the formal legal system for a solution to the dispute.

Some examples from Australia are also sources of inspiration, including a seminar led by Christine Black and others at Griffith University called 'Formations of Legal Theory' in which the focus was on ways in which Western and indigenous legal traditions might be brought into conversation, such as through the themes of journeys, protocols, ceremony, cosmology and belonging. Students were asked to reflect on how they belonged to their own law, for example, or what it means to 'follow' the law.[16] As with the McGill course, aspects of both traditions are used to reflect on the other, but Black's experience in her peoples' own *Talngai-garawima* jurisprudence grounded the course in a specific indigenous tradition. Lastly, the combined degree Bachelor of Laws and Bachelor of indigenous Knowledges offered at Charles Darwin University is promising for its curriculum designed around learning (principally Yolngu) languages, governance and kinship systems, economic and resource management and so on, and for its underlying philosophy that recognises 'the cultural, political and environmental contingency of all knowledge systems.'[17]

McGill still has much to learn from innovative courses such as these in considering how to make indigenous traditions a partner in the transsystemic conversation, and working on stronger collaborative models. What we offer in return is a more consistently thought-through pedagogy of the in-between, the comparative and the contingent than is usually found in law curricula. It is an approach that aspires to present all legal subject matter in this way rather than relegating the category of 'other' to the indigenous. In following a transsystemic, comparative or relational approach to teaching indigenous legal issues, Australian law teachers could both take seriously the recognition that other laws exist in Australia, and do the necessary 'undressing' or critical work on the more familiar legal system in order to make the necessary epistemological space for the co-existence of different laws.

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15. <law.ualberta.ca/kawaskimhon> at 27 August 2008.

16. <griffith.edu.au/courseoutlines/OLD/law/2005/s3/5128LAW_3058_CO.pdf> at 27 August 2008.

17. Charles Darwin University Bachelor of Laws/Bachelor of Indigenous Knowledges 'About the Course' <eagle.ntu.edu.au/NTU/Apps/coursere.nsf/> at 27 August 2008.