UVicSPACE: Research & Learning Repository

University of Victoria

Faculty of Law

Faculty Publications

Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples

Jeremy Webber

1995

This article was originally published at:

http://digitalcommons.osgoode.yorku.ca/ohlj/vol33/iss4/1/

Citation for this paper:

Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33:4 Osgoode Hall LJ 623.

Osgoode Hall Law Journal

Volume 33, Number 4 (Winter 1995)

Article 1

Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples

Jeremy Webber

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj
Article

Citation Information

Webber, Jeremy. "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples." *Osgoode Hall Law Journal* 33.4 (1995) : 623-660.
http://digitalcommons.osgoode.yorku.ca/ohlj/vol33/iss4/1

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized administrator of Osgoode Digital Commons.

Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples

Abstract

This paper argues that Aboriginal rights are best understood as the product of cross-cultural interaction-not, as is usually supposed, the result of some antecedent body of law (English, international, or Aboriginal). Aboriginal rights are therefore intercommunal in origin. The paper does describe the process by which this body of law emerged, but its primary vocation is theoretical, concerned with the following questions: How can a normative community emerge in the presence of profound cultural divisions? How can relations of justice emerge in a context dominated by power and coercion? How does moral reasoning draw upon the factual relations of the past? Does the process create law, cognizable by judges?

This article is available in Osgoode Hall Law Journal: http://digitalcommons.osgoode.yorku.ca/ohlj/vol33/iss4/1

RELATIONS OF FORCE AND RELATIONS OF JUSTICE: THE EMERGENCE OF NORMATIVE COMMUNITY BETWEEN COLONISTS AND ABORIGINAL PEOPLES©

BY JEREMY WEBBER*

This paper argues that Aboriginal rights are best understood as the product of cross-cultural interaction—not, as is usually supposed, the result of some antecedent body of law (English, international, or Aboriginal). Aboriginal rights are therefore intercommunal in origin. The paper does describe the process by which this body of law emerged, but its primary vocation is theoretical, concerned with the following questions: How can a normative community emerge in the presence of profound cultural divisions? How can relations of justice emerge in a context dominated by power and coercion? How does moral reasoning draw upon the factual relations of the past? Does the process create law, cognizable by judges?

L'auteur affirme qu'il faut concevoir les droits autochtones, non pas comme le produit des règles préexistantes du droit anglais, international, ou autochtone, mais comme le résultat d'une interaction interculturelle. Les droits autochotones seraient donc intercommunautaires dans leur essence même. Cet article décrit le processus par lequel ces droits ont pris forme, mais son but principal est de nature théorique. Il tente de répondre aux questions suivantes: Comment une communauté normative peut-elle émerger en présence de divisions culturelles profondes? Comment peuvent être créées des relations de justice dans un contexte dominé par le pouvoir et la force? Comment le raisonnement moral se définit-il par rapport aux relations de fait? Ces processus d'expérimentation et de réflexion peuvent-ils être source de droit pour le juge?

I. INTRODUCTION 624

II. THE EMERGENCE OF NORMATIVE COMMUNITY BETWEEN COLONIZERS AND COLONIZED 630

© 1996, J. Webber.

* Associate Dean, Graduate Studies and Research, Faculty of Law, McGill University. This is an English version of J. Webber, "Rapports de force, rapports de justice: la genèse d'une communauté normative entre colonisateurs et colonisés" in J.-G. Belley, ed., *Le droit soluble: contributions québécoises à l'étude de l'internormativité* (Paris: L.G.D.J., 1996). The author wishes to thank René Brewer for her indispensable research assistance, and Jean-Guy Belley, Raymond Breton, Christine Bush, Mary-Pat Cormier, Mikaël Elbaz, Daniel Jutras, Nicholas Kasirer, Rod Macdonald, Brian Slattery, Bruce Trigger, and the participants in the colloquium of the Réseau québécois of the Canadian Institute for Advanced Research for their valuable comments on the manuscript. This study has benefited from financial support from the Canadian Institute for Advanced Research and from the Social Sciences and Humanities Research Council of Canada.

III. EXAMPLES OF INTERCOMMUNAL NORMS 638
A. *Responses to Murder* 638
B. *Land Rights* 644
C. *General Comments on these Norms* 647

IV. ABORIGINAL TITLE IN THE COURTS 651

V. CONCLUSION 655

I. INTRODUCTION

On 24 July 1534, Jacques Cartier erected a wooden cross at the entrance to Gaspé harbour. The original meaning of the cross is ambiguous. It undoubtedly marked the discovery of the territory on behalf of the French Crown, it affirmed the discoverers' Christian faith, and it served as a navigational aid to the harbour entrance. The cross eventually became the symbol of much more, however. It came to be seen as the material expression of all French claims to the lands of the St. Lawrence basin.[1] Over the years, it has become one of many images at the centre of a debate over the rights of indigenous and non-indigenous peoples—of colonizers and colonized—in northeastern North America. For the successors to the colonists, it represents (in its simplest interpretation) their right to sovereignty and to occupation of the land, a right obtained by reason of discovery. For the Aboriginal peoples, it is a symbol of the arrogance of the colonists, who claimed to take possession of an entire continent by a small, unilateral ceremony, in utter disregard for the complex societies that occupied and harvested the products of the land.

This opposition reflects a larger disagreement over the nature and origin of Aboriginal rights—by which I mean the set of special rights that Aboriginal peoples are said to possess within Canadian law, not the norms generated by and governing the internal affairs of Aboriginal

---

[1] For ambiguity in the meaning of the cross, see B. Slattery, "Did France Claim Canada Upon 'Discovery?'" in J.M. Bumsted, ed., Interpreting Canada's Past, vol. 1 (Toronto: Oxford University Press, 1986) 2 at 7ff [hereinafter "Did France Claim Canada"]; M. Trudel, *Histoire de la Nouvelle-France*, vol. 1 (Montreal: Fides, 1963) at 81-82; and R. Cook, "Donnacona Discovers Europe: Rereading Jacques Cartier's Voyages" in R. Cook, ed., *The Voyages of Jacques Cartier* (Toronto: University of Toronto Press, 1993) ix at xxiii-xxv.

communities.[2] According to one common perspective, Canadian sovereignty derives from an original taking of possession, similar to that attributed to Cartier, which was completed by the colonists' later occupation of the land. On this view, Aboriginal rights, if they exist at all, are based entirely on the law that governed the colonial power at the time of taking possession: that power's own internal legal system or the international law of European states.[3] According to another perspective, the persistence of Aboriginal sovereignty and territorial rights derives from the impossibility that mere discovery could displace Aboriginal institutions. On this view, Aboriginal rights find their source in the Aboriginal societies themselves, prior to colonization, rights which the actions of the colonizing powers have not extinguished.[4]

These two approaches are based on fundamentally different interpretations of the initial events. They are, however, surprisingly alike in their theory of sources. Both trace the origin of Aboriginal rights to positive rules existing independently of the relationship between the parties. In both, Aboriginal rights find their source in and derive their content from a set of norms existing before colonization, either the law of the colonial power, the law of the Aboriginal people, or the rules of international law. Events after contact are relevant only to determine if, according to the requirements of those norms, certain rights existed at the moment of contact and continue today. Events after contact, in the territory called New France, are merely the raw material for an analysis, the normative content of which was fixed before colonization. Aboriginal rights result from the application of a pre-existing body of law (application understood in its simplest sense), not the emergence of norms through the occult processes of social interaction.

---

[2] The literature often confuses these two meanings of "Aboriginal rights." This confusion flows from ambiguity concerning the source of the rights. If indigenous governmental or land rights were founded exclusively on indigenous normativity, there would only be one meaning, without any need to distinguish. But the protection of Aboriginal rights by Canadian law does not involve the direct application of indigenous law. At the very least, the protection of Aboriginal rights requires recognition within the Canadian legal order, and this in itself imports additional considerations. Moreover, this article's principal thesis is that Aboriginal rights are not simply indigenous norms, but the result of intercultural interaction.

[3] See, for example, H. Brun, "Les droits des Indiens sur le territoire du Québec" (1969) 10 C. de D. 415; K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon, 1989) at 176 and 193-243; and L.C. Green, "Claims to Territory in Colonial America" in L.C. Green & O.P. Dickason, eds., *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989) 1.

[4] See, for example, M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991) 29 Alta. L. Rev. 498; and P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382.

This way of approaching the issue is undoubtedly popular, but it is also wrong. It distorts the motives that underlie the evolution of Aboriginal rights, motives that give those rights their normative force. Do we recognize Aboriginal rights simply because our sense of justice is offended by the violation of an obscure law of the seventeenth or eighteenth century? The simplistic theory of sources outlined above is incapable of capturing the content of judicial decisions on Aboriginal rights. Would anyone pretend that those decisions truly apply the positive law of the period before colonization? Would Champlain himself recognize the rules that we now apply to his successors' actions?

This paper proposes a theory of the origin of Aboriginal rights that better explains their development and content. It suggests that they are the result of the interaction between Aboriginal and non-Aboriginal peoples, and the process of reflection on that experience, rather than the positive law of one people. They constitute a set of norms that are fundamentally intercommunal, created not by the dictation of one society, but by the interaction of various societies through time.[5]

At the moment of their encounter, Aboriginal and non-Aboriginal societies possessed their own sets of norms, each created in ignorance of the other. They constituted autonomous normative universes, without a common justice and indeed without intercommunal norms capable of regulating their relations with each other. The parties could have acquiesced in this situation. They could have refused all concessions to the other's sense of justice, settling their intercommunal conflicts through the use of force, as indeed was done in some colonial situations.[6] But for a whole host of motives, noble and ignoble, they generally sought to live peacefully with each other, hammering out a *modus vivendi* that became the foundation of a normative community that crossed the cultural divide.

The internal norms of the Aboriginal and non-Aboriginal societies did influence this emergent normativity, but not in the straight-

---

[5] For approaches that suggest a theory of sources similar to that presented here, see B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 [hereinafter "Understanding"]; J.G.A. Pocock, "Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi" (Iredell Memorial Lecture, Lancaster University, 10 October 1991) [unpublished]; Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communication Group, 1993) at 20 (Co-chairs R. Dussault & G. Erasmus) [hereinafter *Partners in Confederation*]; and J. Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*" (1995) 17 Sydney L. Rev. 5 [hereinafter "Jurisprudence of Regret"].

[6] Some explorers and colonists did use brute force in the region studied, especially at the beginning of the period: see the examples cited *infra* notes 18 and 19. That was not the dominant approach, however, once colonization was under way.

forward, deductive fashion often supposed. The distinctive norms of each society furnished the point of departure, determining the spirit of interaction, colouring the first interpretations of the other's customs, and shaping the beginnings of a common normative language. But the final product was above all the result of mutual adaptation, in which the structure of the relationship was formed as much from compromises on the ground as from abstract principles of justice. It was the outcome of trial and error, not the application of pre-existing rules.

This process created a new, cross-cultural community—one which did not, however, displace its constituent societies. Its aspirations were modest, restricted to intercommunal relations. The original societies continued to deal with internal conflicts through the application of their own standards (although in many cases these were modified by exposure to other modes of social ordering). Thus, individuals became members of at least two communities at the same time—their original society, which continued to govern most of their relations, and, for a much more limited set of questions, the community of all inhabitants, Aboriginal and non-Aboriginal.

This use of "community" may seem surprising. That term is frequently restricted to highly cohesive groups whose members express a strong sense of belonging, who share the same cultural values—perhaps only those groups that serve as the principal focus of allegiance for their members. Indeed, we often use "community" precisely in order to emphasize the intensity of members' commitment to a group, and, in that context, frequently fall prey to hyperbole. In this paper, I want to avoid such simplistic and ultimately misleading definitions. I want to retain the possibility of one member possessing multiple allegiances, multiple memberships, belonging to multiple communities. These possibilities should not be foreclosed by the very terms of the analysis. I therefore employ a concept in which a community's substance, its shared core, consists not in its members' adherence to a single set of beliefs or values, but rather in their participation in a common discourse through time. Such a discourse certainly has its own character, its distinctive reference points, its unique dynamic. Participation implies that one accepts, at least provisionally, the specific terms of that discourse, its vernacular. But it does not require that members have identical values or limit their involvement to a single discourse. This sense of community is more flexible than many competing definitions, more tolerant of internal disagreement and debate, more willing to recognize the presence of multiple allegiances, while nevertheless capturing the

distinctiveness—the sense of separateness and cohesion—of communities.[7]

In the end, the cohesion of a community is a matter of degree. The intensity of members' participation, the extent of commonality, occurs along a spectrum ranging from very minimal sharing up to virtually complete unity. In this paper I am concerned with the emergence of a normative discourse crossing the Aboriginal/non-Aboriginal divide. The critical point for me is thus the moment when a shared normative discourse first appears, even if that discourse is limited and even if it fails to prevent conflict between the participants. Others might confine the use of "community" to a higher level of integration. If they would prefer to call the order discussed here a proto-community or an emergent community, that suits me fine. My concern is simply that the emergence of a shared normative discourse be taken to be a significant development, that one admits that a single person might be a member of more than one discourse at the same time (some discourses being very rich, others more restrained), and that one does not fall back upon an implicit, restrictive definition of community to presume that a normative discourse must be single and exclusive.

I also use the term "community" even though the order described here was not the product of the parties' unconstrained consent, indeed even though it was shaped by relations of force and domination. Human interaction never occurs in a perfect world, free from the effects of social inequality, and this was especially true of the period of colonization, marked as it was by warfare, the seizure of lands, and the decimation of Aboriginal societies by disease. The intercommunal norms inevitably reflected, to some degree, the relative power of the Aboriginal and non-Aboriginal parties. They took shape against a backdrop marked by force, and there continued to be periodic eruptions of violence as one party sought to use its might to advantage. But the relationship was not simply a war of all against all. Alongside the violence—competing with it, displacing it, or at times simply restraining its exercise—there emerged a series of principles recognized by Aboriginal and non-Aboriginal societies as normative. These standards did not govern intercommunal relations in any complete or perfect way. From time to time, the parties pushed them aside, bluntly refusing to follow them. But they nevertheless furnished grounds for judgment independent of brute force alone. They enabled the parties to

---

[7] For a more detailed discussion of this notion of community, see J. Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994) at 183-228.

establish stable expectations regarding the other's conduct and provided grounds for criticizing that conduct (at times with telling effect) when it departed from the norms. Even if the standards were marked from the very beginning by relations of power, they formed a discourse of justification that possessed a measure of autonomy from those relations.[8]

The role of force is generally neglected in the literature on so-called "spontaneous" orders, indeed in the literature on legal pluralism generally. This body of work tends to assume that the norms that result from the autonomous interactions of individuals or that emerge within non-state institutions are, in some ways, superior to those created by the state. To recognize the role of power in private relations would, these legal pluralists fear, undermine these assumptions given the common myth that force is the implacable enemy of the just. It might even undermine the spontaneous orders' claim to be normative. Often, then, the pluralist literature minimizes or ignores the role of power. But this too is unacceptable. Social orders are marked simultaneously by relations of power and relations of justice. The challenge for the student of social normativity is not to deny the role of power, but to understand how standards can emerge from an interaction that is fundamentally imperfect, and yet acquire normative force.

Recognizing the normative character of these standards does not necessarily mean that we must submit to them. Standards of justice are shaped by their context; sometimes that context is so reprehensible that the norms based upon it deserve radical rejection. Rejection, however, has its costs. The most important is the loss of the constraints and stability flowing from respect for the standards, and the consequent need to depend on force alone. Occasionally, such radical rejection is justified. But much more often, perhaps always, we accept a degree of tension between what we want to achieve and what is. We seek to modify the way things are, exploiting the possibilities for evolution in the existing law, but all the time relying upon—indeed often insisting on—today's normative standards as a buffer against the unrestricted use

---

[8] This article therefore rejects the tendency to deny the possibility of a negotiated normative order in situations of domination. In those situations, the order may well be unequal and even repugnant, yet still be normative in the sense that it is not simply the temporary expression of the will of the more powerful party, but rather imposes standards that constrain that party. This article thus joins the growing body of literature on the existence of negotiated orders in situations of profound inequality, such as slavery or paternalism. See, for example, E.D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Vintage, 1972); M. Sobel, *The World They Made Together: Black and White Values in Eighteenth-century Virginia* (Princeton: Princeton University Press, 1987); and, concerning Aboriginal peoples, R. White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991).

of force. After all, a measure of peace and stability always depends upon the acceptance, at least provisional, of a normative order that is not the result of our will alone.

This paper argues that Aboriginal rights are best understood as the product of practical reason—a process of experimentation and reflection that begins from the concrete reality of a lived relationship, tries to understand its strengths and weaknesses, and derives from it workable conceptions of justice.[9] That process always takes place in a specific context, drawing on the attitudes and experiences of the parties involved. This paper therefore begins by describing the interaction between colonists and Aboriginal peoples in northeastern North America during the seventeenth and eighteenth centuries, focusing especially on the emergence of norms. It goes on to review the great Aboriginal rights decisions of the nineteenth and twentieth centuries, demonstrating how they too support the view that Aboriginal rights are the product of practical reason. Finally, it offers some general reflections about the possibility of justice across cultures and about the justiciability of Aboriginal rights before the ordinary courts.

II. THE EMERGENCE OF NORMATIVE COMMUNITY BETWEEN COLONIZERS AND COLONIZED

The colonization of northeastern North America cannot be understood as a clash between two actors, one Aboriginal, the other European. The differences between Aboriginal and non-Aboriginal societies were indeed profound, but important differences of interest and culture also existed within each of those two great constellations. These differences had a substantial impact on the pattern of cross-cultural relations, often permitting, for example, the conclusion of alliances across the cultural divide.

The colonial powers were far from united in their approach to the continent. The colonies that were most influential in the St. Lawrence Basin were established under the patronage of three European states—France, England, and Holland. Even within the English sphere there were often significant conflicts between colonies,

---

[9] For other attempts to conceive of legal normativity as the result of this kind of practical reason, see G. Postema, "On the Moral Presence of Our Past" (1991) 36 McGill L.J. 1153; B. Slattery, "Rights, Communities and Tradition" (1991) 41 U.T.L.J. 447; and "Jurisprudence of Regret," *supra* note 5.

and between colonial and imperial authorities.[10] England's American colonies had their own governments, their own popular assemblies. They embraced a range of ideological and economic aspirations which in turn generated diverse Aboriginal policies. Within each colony there were often profound differences over Aboriginal matters, especially among fur traders, missionaries, and agricultural settlers.[11] Moreover, colonial policy tended to evolve with the rhythm of settlement, in particular the decline of the Aboriginal population from disease and war, the increase in the numbers of colonists, and the transition from a predominantly commercial economy to one based on agricultural production.[12]

The Aboriginal side presented a similar complexity. Aboriginal peoples embraced a number of cultures and languages. There was considerable variation in their ways of life. Agricultural production was crucial to some peoples. Others did not farm, but gained their livelihood exclusively from hunting and gathering, exchanging the products of the hunt first with their indigenous neighbours and later with Europeans. The size of Aboriginal communities was modest and, in the region discussed here, their societies were characterized by a high degree of individual equality and consensual decision making, contrasting markedly with the hierarchical organization of contemporary European states (although Europe's local representatives, the colonies, themselves had small populations in which hierarchical discipline was often lax). The modest size and consensual nature of Aboriginal societies produced considerable autonomy of individuals and groups even within each people. The patterns of exchange between Aboriginal peoples, their geographical situation, and their military power generated complex relations of cooperation, dependence, and hostility both among themselves and with the colonists.

Given this context, the new interactions between Aboriginal and non-Aboriginal peoples did not conform to a single, simple model. They reflected, at least in their detail, the complexity of their surroundings.

---

10 See, for example, F. Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from its Beginnings to the Lancaster Treaty of 1744* (New York: Norton, 1984).

11 See, for example, B.G. Trigger, *Natives and Newcomers: Canada's "Heroic Age" Reconsidered* (Montreal: McGill-Queen's University Press, 1985) at 315-25 [hereinafter *Natives and Newcomers*].

12 See, for example, the transitions that occurred in New England: N. Salisbury, *Manitou and Providence: Indians, Europeans, and the Making of New England, 1500-1643* (New York: Oxford University Press, 1982).

But despite this variation, the Aboriginal policy of the colonies did tend to follow a similar trajectory.

All of the colonies, with the possible exception of New Netherlands, first claimed sovereignty over all the lands specified in their charters and refused to recognize, at least expressly, indigenous rights to the land. In some of the literature on Aboriginal rights this is presented as though it resulted from the pre-existing law of the European powers, but the very concept of positive law is problematic in this period.[13] International law was then undergoing profound transformation. The Catholic Church had lost its hegemony, eroding its claim to be the privileged interpreter of natural law. The sources of international law, always ambiguous, had become still more uncertain.[14] Most importantly, the issues raised in the Americas were just as new for the doctors of international law as they were for the subjects of that law, the colonial powers themselves. International law was more a matter of improvisation than the application of pre-existing rules. Of course, the elaboration of those rules took place without Aboriginal participation and in a manner that reflected Europeans' desire to ratify the facts of settlement.

It is clear, however, that the colonial powers did claim that they could acquire sovereignty over, and perhaps ownership of, land in North American colonies by unilateral acts of state. This was manifest in their conduct and in the founding documents of many colonies. The three charters granted at the beginning of the seventeenth century to the Company of London (the first authority entrusted with the colonization of Virginia) apparently granted that company full ownership of all lands in the colony, with an absolute right of alienation. The Mayflower Compact of 1620, the first constitution of the Plymouth colony concluded just before landfall, manifested that colony's claim to sovereignty over the land and persons of indigenous peoples. The

---

[13] See, for example, G. Stanley, "The First Indian 'Reserves' in Canada" (1951) 4 R. d'histoire de l'Amérique française 179 at 209ff; Brun, *supra* note 3 at 428-30 and 440-41; and Green, *supra* note 3. There is an interesting contradiction in these arguments. They say that one should judge the law of the period on the basis of its own norms and not according to today's conception of justice. But their very interpretive framework—their concept of law as a closed system, and the clear separation of international from domestic law—involves notions that were not yet dominant during the period of colonization. In other words, they invoke contemporary sources but use them in a thoroughly modern fashion. For more nuanced discussions of the law of the time, see "Did France Claim Canada," *supra* note 1; and B. Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of their Territories* (Doctoral Thesis, Oxford University, 1979) at 66-190 [hereinafter *Land Rights*].

[14] O.P. Dickason, "Concepts of Sovereignty at the Time of First Contacts" in Green & Dickason, *supra* note 3, 141 at 143-73 [hereinafter "Concepts of Sovereignty"].

French charters of the seventeenth century similarly granted the land to the colonization companies "en toute propriété."[15]

European philosophers had no doubt that European states could acquire sovereignty in this manner. They were much less agreed about indigenous rights to land. At the beginning of the colonial period, the most extreme authors denied non-Christians any right to governmental autonomy or to land. Others argued that indigenous societies enjoyed natural rights of ownership, although these might be subject to the right of Europeans to cross those lands, to preach Christianity, and to suppress customs that offended against the natural order. Later writers began to distinguish between sedentary and migratory peoples, arguing that the latter had insufficient presence on the land to be considered owners. The lands of migratory peoples—even the hunting territories of sedentary peoples—were *vacuum domicilium*, subject to unrestricted appropriation by colonists. For some authors, distinctions between types of land use had still more importance; the biblical command to render the land fruitful was itself sufficient justification for seizing and cultivating Aboriginal lands.[16]

There is thus considerable evidence that, in the early stages of colonization, the settlers did claim sovereignty and often ownership of Aboriginal lands, with little regard for the presence of indigenous peoples. This assertion was soon modified, however, as a result of the colonists' experience in North America. Arguments for sovereignty and ownership may well have been persuasive in the salons of Europe, but they had much less currency in America. Arriving in the new continent, the colonists encountered the power and autonomy of the Aboriginal peoples. If the colonists wished to benefit from the riches of the land—indeed if they wished to survive—they had to adapt to the societies that controlled and occupied that land.

The colonists chose a conciliatory approach for several reasons, the simplest being their sheer vulnerability. As late as 1663, the entire non-Aboriginal population of New France was only about 3,000 people. In 1627, it had been 107. By contrast, there were approximately 20,000 Hurons and 30,000 Iroquois before the epidemics of the 1630s, and these

---

15 See the summary of the colonization charters in *Johnson* v. *M'Intosh*, 5 U.S. (8 Wheat.) 543 at 575-80 (1823) [hereinafter *Johnson*]; W.S. Robinson, *Indian Policy of Colonial Virginia* (Doctoral Thesis, University of Virginia, 1950) at 16; Salisbury, *supra* note 12 at 113; and Brun, *supra* note 3 at 428-30. Slattery suggests that even the original claims were ambiguous and cites contradictory practices: see "Did France Claim Canada," *supra* note 1 at 66-190.

16 Green & Dickason, *supra* note 3. See especially the contribution of Dickason to that book, on which this paragraph is based: "Concepts of Sovereignty," *supra* note 14.

were only the strongest of the region's Aboriginal nations. Epidemics killed about half the population, but the survivors would nevertheless have been populous relative to the newcomers. It would have been impossible for such a tiny number of colonists to govern the Aboriginal nations by force, or indeed by any other means.[17] They therefore worked to maintain peaceful relations with their indigenous neighbours, especially those who were their closest allies.

The colonists' diplomacy was sometimes unsuccessful. Acts of violence were common as a result of attacks by hostile nations, disputes with allies over the occupation of land by colonists, fraud in land transactions, theft, drunkenness, the internal power struggles of Aboriginal nations, and the misunderstandings endemic to relations across cultures. All colonies were subject to such strife, including Virginia, which was then the largest European settlement in North America. In 1622, the Powhatan people massacred a quarter of Virginia's 1,200 non-Aboriginal inhabitants. In 1644, 500 more were killed.[18] The Europeans' vulnerability was even greater in colonies like New France because of the nature of the fur trade. There, a very small white population was dispersed across a vast territory, in constant contact with the indigenous population.

This sense of vulnerability was not confined to the colonists. The latter too could deploy considerable force, especially on a local level, because of their firearms and mobility along the coast. Economic competition and war among Aboriginal peoples meant that the First Nations were rarely united against the settlers. On the contrary, they frequently sought the settlers' help in their own indigenous struggles. Thus, Aboriginal peoples had their own reasons to secure peace with the newcomers. This was strikingly evident in the relations between the people of Stadacona and Jacques Cartier, at the very beginning of colonization in the St. Lawrence region. The actions of the Stadaconans demonstrated their persistent attempts to create a basis for co-

---

[17] *Natives and Newcomers*, *supra* note 11 at 233-42 and 330; and M. Trudel, *Histoire de la Nouvelle-France, Le comptoir 1604-1627*, vol. 2 (Montreal: Fides, 1966) at 405-34 and 437-40. The limits to colonial power were clearly demonstrated by the actions of the authorities of New France during the years 1653-1657, after the dispersion of the Huron Nation by the Iroquois. The Hurons were one of the principal allies of the colony. After the Hurons' destruction, the colonists felt very vulnerable and concluded a treaty of neutrality with their traditional enemies, the Iroquois. In order to maintain this neutrality, the colony even refused to help the 600 Hurons that the Jesuits had encouraged to relocate close to Quebec when the Iroquois continued to attack them. The colony decided to change its policy only after the Iroquois massacred a group of Hurons that the colony had encouraged to join the Iroquois. The killers were the Hurons' escort. See *Natives and Newcomers* at 273-81.

[18] Robinson, *supra* note 15 at 49-54 and 67-74.

operation, founded on reciprocity, even in the face of duplicity by Cartier. During his first voyage, Cartier seized two sons of the chief and took them to France. During his second, he seized the chief himself. The Stadaconans nevertheless tried on many occasions, sometimes from a position of weakness, sometimes from one of strength, to conclude an alliance with Cartier and even to transform the kidnappings into a reciprocal exchange of hostages.[19] They were unsuccessful, but their attempt demonstrates both their willingness to cooperate and the way in which this willingness prompted a search for stable norms of cooperation.

The second reason for a conciliatory strategy was economic interdependence. The fur trade was the *raison d'être* of New France, and its success was wholly dependent on the active participation of the Aboriginal peoples. If the French had alienated their Aboriginal allies, the latter would have sold their furs to the English, withheld them until relations improved, or, in the worst case, withdrawn completely from the trade. At the beginning of the seventeenth century, the English colony of Sagadahoc failed precisely because the Amerindians boycotted trade with it in reaction to the behaviour of its residents. Plymouth also suffered because of the intimidation practised by the settlers during the first years of the colony.[20] But the Aboriginal peoples too were firmly committed to the fur trade. It was the principal reason that they compromised to maintain the *modus vivendi*. The importance they attached to it was starkly demonstrated by the actions of the Hurons in the midst of the carnage wreaked by introduced diseases. A number of Jesuit priests were living in the Huron villages during the epidemics. The French authorities had insisted that the Hurons accept the missionaries as a condition of the fur trade. Many Hurons believed that sorcery by the priests was responsible for the frightening number of deaths. Two general councils debated whether they should expel or murder the Jesuits, yet in the end they let the Jesuits remain. A few years later, during the severe Iroquois attacks that resulted in the dispersion of the Hurons, the majority of the Hurons, who were not Christian, became very unhappy with Jesuit interference in their nation's affairs. One group killed a Jesuit *donné* (a lay assistant to the Jesuits) in

---

19 B.G. Trigger, *The Children of Aataentsic: A History of the Huron People to 1660* (Montreal: McGill-Queen's University Press, 1976) at 182-200 [hereinafter *Children of Aataentsic*]; and Cook, *supra* note 1 at xxv-xxxix.

20 Salisbury, *supra* note 12 at 92-94 and 139-46. For the French, see O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland and Stewart, 1993) at 166-67 [hereinafter *Canada's First Nations*]; and White, *supra* note 8.

order to provoke a debate on the value of the French alliance. The councils nevertheless decided to maintain the bond. Even during the two most important crises of their nation's existence, then, the Hurons refused to sacrifice the French trade.[21]

Trade was not just a commercial necessity. It was frequently crucial to the provisioning of both colonists and Aboriginal peoples. The parties exchanged not only furs and trade goods but also food, above all Indian-grown corn. This was another source of interdependence. After the massacre of 1622, for example, the Virginians began a war of extermination against the Powhatans. As a result, the colony ran short of supplies and eventually agreed to renew the peace.[22]

In all of this, competition between colonies played a very important role. Some colonies discovered the value of good relations precisely because they lost part of their commerce to their rivals. The Aboriginal peoples were fully capable of exploiting the manoeuvring room created by colonial competition in order to maintain their independence and the value of their product. Indeed, Amerindian alliances were often critical for grander reasons of non-Aboriginal strategy, spelling the difference between success and failure in intercolonial wars.[23]

The value that the colonies attached to good relations differed according to the nature of the colony, its stage of development, and even the specific pattern of interests it contained. Fur traders naturally tended to be the most sensitive to Aboriginal affairs. The intensity of their interaction with Aboriginal peoples often generated a high level of mutual understanding and respect.[24] Missionaries also manifested considerable solicitude toward Aboriginal peoples, although this was tempered by their desire to convert them to Christianity. Agricultural settlers, on the other hand, had much less affinity with Amerindians.

---

[21] *Natives and Newcomers*, *supra* note 11 at 246-65; and *Children of Aataentsic*, *supra* note 19 at 534-46. For the nature of *donnés*, see *Natives and Newcomers* at 252; and *Children of Aataentsic* at 575-76. Trigger notes that the commercial advantages that the French extended to Christians were responsible for many conversions among the Hurons: *Natives and Newcomers* at 254ff; and *Children of Aataentsic* at 546-50. For the interdependence of the Iroquois and the Dutch, see Jennings, *supra* note 10 at 47-52.

[22] Robinson, *supra* note 15 at 49ff.

[23] J. Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Department of Indian Affairs, 1981) at 29-237; and White, *supra* note 8 at 142ff.

[24] This phenomenon facilitated alliances across cultural lines, but sometimes also created deep divisions within colonies. See, for example, French opinions on sexual relations between Amerindians and colonists discussed in White, *supra* note 8 at 60ff.

They commonly had few amicable contacts with Aboriginal peoples and economic interdependence, if it existed at all, would generally have been indirect, with little opportunity for discussion and exchange. Moreover, the extension of agricultural settlement inevitably resulted in bitter clashes over land, as colonial farming displaced Aboriginal uses.

The balance of these divergent interests had an appreciable effect upon Aboriginal policy in the different colonies. The approach of the predominantly agricultural colonies of Virginia or New England, for example, was less flexible than that of New York or New France, in which the fur trade played a greater role. The representatives of the former often complained that the officials in Albany were too conciliatory towards the Iroquois.[25] However, during the first century and a half of colonization, this was more a difference of nuance than of kind. Even Virginia and the New England colonies sought a *modus vivendi* with their Aboriginal neighbours.[26] For its part, New France was fortunate to enjoy acceptable relations with its Amerindian allies even during the period of agricultural settlement. The Aboriginal inhabitants of the St. Lawrence Valley had been dispersed, probably by the Iroquois, before French settlers arrived,[27] and indigenous warfare had kept the valley depopulated. Consequently, French colonization did not displace a sedentary, indigenous presence. In fact, the Algonquins and Montagnais, who lived north of the St. Lawrence, appreciated the protection offered by the French against the Iroquois.

These, then, were the considerations that moved the parties to adopt a *modus vivendi*. They did not move all colonists equally. Some did try to assert sovereignty over the Aboriginal peoples. But the results demonstrated the limits to the colonists' power, their failures amply revealing the emergence of a normativity that was truly intercommunal. The following sections explore the creation of that normativity in two specific contexts: the pursuit of justice in cases of intercommunal murder, and the recognition of Aboriginal rights to the land.[28]

---

25 Robinson, *supra* note 15 at 122-217.

26 *Ibid.* See also Salisbury, *supra* note 12.

27 *Natives and Newcomers, supra* note 11 at 144-48.

28 There are obviously other illustrations. Familial relations across the cultural divide represent a particularly interesting case: see J.S.H. Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: University of British Columbia Press, 1980).

III. EXAMPLES OF INTERCOMMUNAL NORMS

A. *Responses to Murder*

Even in the absence of war, murder was a common event between Aboriginal peoples and colonists. There were many causes. Some murders were prompted by the usual sordid reasons: theft, jealousy, racial hatred, or vengeance for a real or imagined injury. There were political assassinations, committed in order to maintain a commercial monopoly, to prevent the encroachments of settlers, or to obtain an advantage in the internal politics of an Aboriginal society.

In their own societies, Aboriginal people and Europeans responded to murders in quite different ways. For Europeans, murder was a matter of individual responsibility. When a murder was committed, the authorities sought to identify, try, and execute the culprit. For the indigenous peoples of northeastern North America, murder was a matter between groups. When a killing occurred, the relatives of the victim sought vengeance from the murderer's family. Their simplest recourse was to kill the murderer or one of his kin, but in the case of conflicts among members of the same or allied peoples, a compensatory solution was usually substituted—either the gift of a slave to replace the deceased or compensation in goods. As Richard White rightly notes, the two normative universes were therefore directly opposed in the solutions they suggested to intercultural violence. In crimes between allied peoples, the French wanted to identify the murderer and kill him, but they were profoundly shocked when their Aboriginal allies killed prisoners of war. For the Aboriginal peoples, the execution of enemies in war was simply legitimate vengeance. What they found incomprehensible was the willingness of the French to kill members of their own nation![29] The two viewpoints were fundamentally opposed on a question that could threaten the very survival of any alliance. What to do?

In New France this question was posed very early in the history of the colony. In the spring of 1617, two Montagnais killed two Frenchmen because the latter had beaten a Montagnais. The discovery of the corpses in the autumn of 1617 provoked a crisis between the French and their principal trading partner when the French banned the Montagnais from entering the Habitation. A Montagnais chief began negotiations with the acting commandant of Quebec, *le sieur*

---

[29] *Children of Aataentsic*, *supra* note 19 at 59-61; and White, *supra* note 8 at 76-77 and 80.

Beauchesne, by presenting him with a number of pelts to cover the infraction. The commandant wanted to accept the compromise but two *Récollet* priests, Joseph Le Caron and Paul Huet, objected to the sale of "la vie [et] le sang des Chrestiens pour des pelleteries."[30] At French insistence and in order to maintain the alliance, the Montagnais surrendered one of the two murderers and two additional hostages to re-establish good relations until Champlain should return from France. Upon his return Champlain wanted to punish the murderers according to French law, but the old master trader Gravé-du-Pont persuaded him to accept the Montagnais compromise. Champlain remained unsatisfied, however, and in 1622 he insisted that the murderer be expelled from an official ceremony. After the intervention of another principal trader, Guillaume de Caen, the question was finally settled by the public confession of the accused and his accomplice.[31]

Champlain consistently resisted the kind of concessions championed by the fur traders. Again in 1628, after a second murder of two Frenchmen, Champlain imprisoned the Montagnais murderer, although he eventually freed him without confession or punishment in 1629. He insisted on the absolute sovereignty of France and the need to enforce French law, even among the Amerindians. Champlain even claimed the right to determine who would be chief among the Montagnais, and believed (wrongly, according to Trigger) that the Montagnais had submitted to his authority. His attitude put the alliance in danger. In 1629, because of Champlain's interference, the Montagnais helped the English capture Quebec (although the colony was later returned). After Champlain's first years at Quebec, his relations with the fur traders became increasingly strained. In 1619 the traders' agents prevented him from embarking from France for Canada, even though he was, at the time, Lieutenant to the Viceroy.[32] Champlain's views on Aboriginal policy did not prevail. During his mandate, he was forced to accept settlements dictated by the traders. After his death, the conciliatory approach exemplified by the traders became the dominant method for handling intercultural crime.

The colony's response to intercultural murder was not the result of a sovereign act, but it nevertheless became the norm, regulating

---

[30] Trudel, *supra* note 17 at 259.

[31] *Ibid.* at 258-59 and 359-60; *Natives and Newcomers, supra* note 11 at 198-99 and 318; and *Canada's First Nations, supra* note 20 at 165-66.

[32] *Natives and Newcomers, supra* note 11 at 198-200 and 314-25. For a discussion of this second murder, see Trudel, *supra* note 17 at 360. Trudel gives a much more positive evaluation of Champlain's role.

murder from Champlain's time until after the British conquest (at least for Aboriginal peoples who retained a substantial degree of independence). Its typical form was a mixture of French and Aboriginal justice: the Aboriginal community identified and surrendered the culprits to the French authorities who then pardoned them, the whole transaction accompanied by a ceremonial exchange of gifts. It was a synthesis of individual responsibility practised by the French, and the acts of compensation and reconciliation common among Aboriginal peoples. It was not premised on equality. The French clearly assumed the superior role. In these exchanges, the French Governor was recognized as the "father" of the Amerindians, guaranteeing peace not only between himself and his Aboriginal allies, but also among the various Aboriginal parties to the alliance. Indeed, the French often served as mediators in conflicts among their indigenous allies, providing the gifts that were indispensable to all Aboriginal diplomacy. Nonetheless, the superiority of the French was not expressed through the traditional forms of European sovereignty. They exercised the prerogatives of power through hybrid means, not the straightforward application of French law.[33]

As with all customary norms, the procedures were confirmed by continual repetition. White tells the fascinating story of the actions of Daniel Greysolon Dulhut following the murder of two Frenchmen near Lake Superior during the 1680s, a story that demonstrates clearly the process of creation and reaffirmation of the intercommunal norm. After the attack, Dulhut seized those responsible and submitted them to a European trial at Michilimackinac. The murderers were condemned to death. This was only the beginning of the story, however. A whole series of negotiations then began, the representatives of different Aboriginal groups attempting to provide acceptable compensation, the French inhabitants of the region requesting Dulhut to show mercy, and Dulhut himself trying to find a solution that he could propose to the Aboriginal peoples without losing face and that they would accept. Dulhut eventually decided to execute only two of the murderers, the same number as the French deaths, and this he did, attempting to justify his actions in terms adapted from the language of Aboriginal vengeance. He freed the others. The different Aboriginal groups around Michilimackinac then began the formal process of re-establishing friendship following these latest deaths. Dulhut participated actively in

---

33 See especially White, *supra* note 8 at 75-93 and 203-06. The response of colonists and Aboriginal peoples to murder is one of White's central themes, constituting an index of the existence of a "middle ground" between the cultures.

these efforts, giving presents to the father of one of the executed offenders. To Dulhut's knowledge, the father could well have been the person responsible for the initial attack.[34]

White offers many other examples in which the accused were pardoned outright. According to White, the instructions issued in 1754 by the Marquis Duquesne de Menneville, then Governor of New France, to the Sieur de Pean, appropriately summarizes the practice of the preceding century and a half: "He must manage to see that he obtains the murderers, to whom he will grant pardon in the customary manner."[35] Sometimes, new governors did not understand the demands of this implicit normativity and either refused or delayed the pardons. Their actions only served to increase the number of murder attempts and weaken the alliance, prompting them (or their successors) to return to more conciliatory policies. Such neglect for the customary ways occurred at the end of the 1740s, then again during the final years of New France. White suggests that the hardening of French policy during this last period contributed to France's ultimate defeat.[36] The *modus vivendi* was not unique to New France. Following the Conquest, the British under General Jeffrey Amherst attempted to impose a high degree of control on the Great Lakes region. Aboriginal resistance soon persuaded them to adopt the more subtle methods of the French, although this was persistently impaired by the violence of the settlers then moving into the Ohio country.[37]

The Aboriginal policy of New Netherlands evolved in a similar fashion. From the colony's foundation in 1624, the instructions issued to its governors authorized the punishment of Amerindians for crimes committed against colonists. Under the third Governor, William Kieft, colonial authorities laid seige to Aboriginal villages to force them to surrender members accused of crimes against settlers. These actions provoked violent reprisals from the Aboriginal population and many settlers lost their lives. Eventually, at the request of the colonists, the

---

[34] *Ibid.* at 75-82. White, at 82, notes that the murders of two French *donnés* in the same region during the same period were resolved by the traditional form of compensation, suggesting that the French had learned that it was not worth insisting on their own justice.

[35] *Ibid.* at 93. For other examples, see *Natives and Newcomers, supra* note 11 at 265 (in 1648, the Jesuits accepted a large indemnity from the Hurons to cover the murder of a *donné*); and J.D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Saskatoon: University of Saskatchewan Native Law Centre, 1985) at 78-79 (in 1708, the Marquis de Vaudreuil, then governor of the colony, accepted a prisoner from the Onandagas to compensate for the death of a Frenchman).

[36] White, *supra* note 8 at 198ff and 223ff.

[37] *Ibid.* at 248ff and 343ff; and Stagg, *supra* note 23 at 248ff.

Dutch government replaced Kieft with Peter Stuyvesant. Stuyvesant adopted a strategy of alliance rather than domination. He did ask Aboriginal communities to surrender their offenders voluntarily, but he renounced punitive expeditions. After the conquest of New Netherlands in 1664, the British continued in the same vein. That very year, they signed a treaty with the Mohawks providing that the Mohawks and the colonists would each be responsible for the punishment of their own members in cases of intercommunal crime. The parties generally respected this agreement, and attacks on British settlers were resolved through the Mohawks' payment of compensation.[38]

These arrangements were common in situations where Aboriginal peoples retained a high degree of political independence, especially in the context of the fur trade. They were less common but sometimes present at the frontier of agricultural colonization, where Aboriginal autonomy and colonists' vulnerability occasionally produced a rough equilibrium. Conciliatory strategies were, however, much less stable in agricultural areas, where the conflict over land was intense and economic interdependence less pronounced. Farmers could espouse an option that was unacceptable to fur traders: the expulsion or extermination of the Aboriginal population.[39] This aggressive strategy eventually predominated during the expansion of the United States. Mutual fear, as opposed to economic interdependence, was a poor foundation for normative community.

Compensation in goods or slaves, or the practice of procuring the surrender of murderers only to pardon them, was not the colonists' preferred response to intercommunal murder. They most wanted to punish this crime according to French (or Dutch or British) law, and this they did as Aboriginal political independence was eroded. In New France, for example, colonial authorities sought to apply French law to Aboriginal people who resided near their settlements, and above all to those that had adopted, with French encouragement, a way of life approaching that of the Europeans. In New York, the Amerindians of

---

38 A.W. Trelease, *Indian Affairs in Colonial New York: The Seventeenth Century* (Ithaca: Cornell University Press, 1960).

39 Following the massacre of 1622, for example, the colonization company in Virginia opted for a war of extermination. The Virginians committed atrocities incompatible with the recognition of any normative order, such as the poisoning of an entire group of Amerindians invited to a ceremony to celebrate, so they thought, the re-establishment of peace. The Virginians could not maintain this extreme position, however, even after the massacre. They eventually accepted an agreement with the Amerindians. See Robinson, *supra* note 15 at 54ff. This event also reminds us that normative standards, albeit very limited, can exist even in war. Respect for ambassadors is the most common example.

Long Island were placed under the jurisdiction of the ordinary courts at the same time that Aboriginal groups further away from colonial settlements retained their own control. In Virginia, there was a clear distinction in juridical status between tributary and non-tributary peoples.[40]

But even in these cases, colonial jurisdiction was exercised in very distinct ways—ways that acknowledged the collective identity of Aboriginal groups and that did not simply impose the colonists' law. In New France, the French sought the consent of the Aboriginal population to the application of the colonists' law. At Île d'Orléans in 1664, for example, an Algonquin raped the wife of a settler. The Aboriginal representatives protested against the impending execution of the offender, arguing that their people were unaware that rape was punishable by death. A discussion was held between the French Sovereign Council on the one hand and the Algonquin, Montagnais, and Abenaki chiefs on the other, which resulted in the Montagnais and Abenakis agreeing to be bound in future by French law regarding murder and rape. At Louisbourg, the French authorities similarly persuaded the Micmacs to accept the application of colonial regulations, after priests complained that the Micmac chiefs had failed to punish their own members. In British colonies, even when the colonial authorities insisted that an offender be punished, the punishment was frequently entrusted to the band's chief. When the colonists did assume direct jurisdiction over the Aboriginal population, they often made special allowances in judicial procedure. And, with very few exceptions, all these forms of involvement were limited to cases of intercommunal crime. Crimes that occurred among members of a single Aboriginal nation were left to the customs of that nation.[41]

The reasons for treating Aboriginal people differently were numerous. In some colonies, the settlers themselves wanted to maintain the separation between peoples. This was true, for example, of New

---

[40] For New France, see Trudel, *supra* note 17 at 353ff; *Canada's First Nations, supra* note 20 at 166-67; and O.P. Dickason, "Louisbourg and the Indians: A Study in Imperial Race Relations, 1713-1760" (1976) 6 Hist. & Archæology 1 [hereinafter "Imperial Race Relations"]. For New York, see Trelease, *supra* note 38 at 179-82 and 185-86. For Virginia, see Robinson, *supra* note 15 at 155-61, 196-202, and 279ff.

[41] Hurley, *supra* note 35 at 75-82; *Canada's First Nations, supra* note 20 at 166; "Imperial Race Relations," *supra* note 40 at 121-22; H.M. Neatby, *The Administration of Justice Under the Quebec Act* (Minneapolis: University of Minnesota Press, 1937) at 311-12; Salisbury, *supra* note 12 at 186-88; Robinson, *supra* note 15 at 196-202 and 279ff; and Trelease, *supra* note 38 at 186. See also the 1778 treaty between the United States and the Delawares, cited in *Worcester* v. *State of Georgia*, 8 U.S. (6 Pet.) 515 at 549 (1832) [hereinafter *Worcester*].

England, at least during the early years. It was less true of a colony like Virginia, in which the residents wavered between segregation and assimilation. In New France, the authorities clearly would have preferred assimilation, but it was not up to them alone. The Aboriginal peoples frequently maintained a high degree of cultural autonomy and collective identity, even when they lived in close proximity to Europeans. In such situations, compromise was unavoidable.[42]

These, then, were the solutions adopted for intercommunal murder. They were not universal, applied in all colonies and to all murders. They were subject to variation, depending on the erosion or integrity of indigenous structures, or the extent of economic interdependence. Nevertheless, for similar situations, during a given period, the solutions often became consolidated and standardized. They were generally robust, although not invariable. And, except in situations in which Amerindians had been completely assimilated, they were always adapted to the collective specificity of Aboriginal peoples.

B. *Land Rights*

The history of land rights is simpler than that of murder, the norms established more uniform.

The traditional consensus is that New France never recognized Aboriginal title to land. This has some justification—French grants to colonists purported to convey full ownership of the soil, and French authorities, unlike the British, did not systematically purchase Aboriginal title.[43] But this thesis requires considerable qualification. With the exception of New Netherlands, all colonies initially claimed ownership of the land. It is only as a result of the physical presence of the Aboriginal people, on the land that the colonists wanted to occupy, that colonies other than New France began to purchase Aboriginal title.

New France avoided a similar outcome largely because it faced a different situation. During the principal period of agricultural colonization, French settlers did not have to displace an established, sedentary, Aboriginal population. Cartier and Roberval had encountered such a population, the St. Lawrence Iroquoians, during their first attempts at colonization in the mid-sixteenth century. Indeed, the clumsiness of their Aboriginal diplomacy, including their seizure of

---

[42] Salisbury, *supra* note 12 at 110-40; and Robinson, *supra* note 15.

[43] See the works cited at *supra* note 13; and "Concepts of Sovereignty," *supra* note 14 at 220-24.

Aboriginal lands without the people's consent, had contributed to their eventual failure. It may also have been responsible for the exclusion of the French from the St. Lawrence above Tadoussac until the 1580s.[44] But, by the end of the sixteenth century, the Aboriginal populations of Stadacona and Hochelaga had been dispersed, leaving the land largely unpopulated. Moreover, for a very long time following Champlain's arrival, the French population increased very slowly, and the principal economic activity of the colony, the fur trade, did not require that the Europeans occupy large tracts of land. In these circumstances, formal purchases were unnecessary.

More importantly, focusing only on agreements for the sale of land ignores the broader nature of the French/Aboriginal relationship. Ownership in today's sense of the term—absolute control over a specific plot of land, conferring an exclusive right to exploit that plot in an intensive manner—was both irrelevant to the prosecution of the fur trade and inconsistent with Aboriginal peoples' relationship to the land. The fur trade required access to a vast territory, especially the right to travel across country subject to Aboriginal control. Rights to exploit a given territory were therefore regulated by means of political and commercial alliances. French officials certainly recognized, at least in practice, the necessity for these. They frequently entered into formal alliances with their Aboriginal partners. They sought the permission and help of their allies for the voyages of missionaries and traders. Even if there were no great treaties of sale, then, the French clearly acknowledged that the Aboriginal peoples controlled access to the land and that it was desirable to gain access to that territory by agreement, not force.[45]

In other colonies, where the competition for land was much more pronounced, formal sales were the norm. From the very beginning of New Netherlands, for example, colonists purchased their land in order to avoid war with the indigenous population. The British continued this practice after they seized the colony and renamed it New York. The practice was not universally followed, however.[46] By the middle of the eighteenth century, settlement had extended far beyond purchased areas, generating severe conflict with the Aboriginal population.

---

[44] *Natives and Newcomers*, *supra* note 11 at 133-35 and 302-03; and *Partners in Confederation*, *supra* note 5 at 10-13.

[45] *Land Rights*, *supra* note 13 at 66-94; "Concepts of Sovereignty," *supra* note 14 at 222-26; and *Partners in Confederation*, *supra* note 5.

[46] Trelease, *supra* note 38 at 193-99; and Hurley, *supra* note 35 at 95-100.

The practice in upper New York was the most liberal of all the British colonies because of both the fur trade with the Iroquois and the Iroquois alliance against the French. But even in colonies that were less conciliatory, the authorities quickly found that prudence required a measure of respect for the Aboriginal presence. This was so even in those colonies that initially claimed full ownership of the soil. In Virginia, the colony's charters apparently granted title to the London Company. The company was convinced of its rights and objected strongly when an early Governor, George Yeardley, submitted a land concession to Aboriginal approval. Similarly in New England, the colonies' leaders had no doubt that they held good title. But in both cases, the colonies soon began to purchase land in order to preserve peace—as was said in Massachusetts, to avoid "the least scruple of intrusion."[47] This practice responded to a very real danger: many conflicts, including two major massacres in Virginia, resulted from settlers' encroachment on Aboriginal territory.[48]

The colonists' hunger for land frequently outstripped purchases. These infringements generated serious unrest, which in turn prompted the colonial governments to restrain their people. In seventeenth century Virginia, the colonial administration tried to regulate settlement by reserving territory for the Aboriginal population, by insisting that lands be purchased before they were occupied, and sometimes even by forcibly removing colonists from lands that had not been sold.[49] Colonial authorities also enacted provisions against fraud. In 1634, Massachusetts required that all private purchases of Indian land receive the approval of the General Court. Similarly in Virginia, from 1658 on, land sales were subject to control by the courts. Further restrictions were imposed in 1700 and 1705.[50]

These measures did not quell the influx of settlers. Encroachments and clashes continued. In a further effort to solve the problem, the British colonies held several councils with their Aboriginal counterparts. These conferences often occurred at Albany, New York, at the request of the Iroquois. Several colonies participated, often represented by their governors and other members of their colonial councils. The negotiations resulted in policies similar to those already in

---

[47] Salisbury, *supra* note 12 at 180-81.

[48] *Ibid.* at 175ff; and Robinson, *supra* note 15 at 16-24, 49-54, 67-74, and 78ff.

[49] Robinson, *supra* note 15 at 78ff.

[50] *Ibid.* at 81 and 144-50; and Salisbury, *supra* note 12 at 192-93.

place in the individual colonies—Indian land would be purchased, colonization restricted, and private purchases prohibited.[51]

These conferences assumed added urgency during the land rush into the Kentucky and Ohio territories, which coincided with the renewal of war against the French. This interference with Aboriginal lands raised the level of intercommunal conflict at a time when the British most needed their Indian allies. In 1756, the imperial authorities established their own superintendents of Indian affairs, taking control of matters that until then had been left to the individual colonial governments—a centralization clearly designed to control illicit settlement more effectively. In 1758, the territory west of the Alleghenies was confirmed as Indian territory and the British took steps to remove squatters (with very limited success). After the elimination of the French threat with the conquest of Quebec in 1759, there was some indication that the British might renege on their policy of conciliation and cooperation. In the aftermath of the war with the French, General Amherst made land grants and promoted the colonization of New York's Mohawk valley. This provoked a strong reaction from the Aboriginal population, which eventually led to Pontiac's War. Even before that conflict however, the imperial authorities intervened to encourage Amherst to re-establish the policy of conciliation.

It was against this backdrop that the *Royal Proclamation, 1763*[52] was made. This proclamation confirmed the existing rules regarding the acquisition of Aboriginal lands. It fixed the limits of settlement and directed that purchases of Aboriginal land only occur through public meetings of the people concerned. As with all other attempts to constrain individual settlers, its effectiveness was limited. Nevertheless, the *Royal Proclamation* codified Aboriginal policy in North America and became one of the foundational documents of the law of Aboriginal rights in Canada.[53]

C. *General Comments on these Norms*

The colonists came to North America sure of their religious and cultural superiority, certain that their sovereign had given them

---

[51] Stagg, *supra* note 23 at 29-237.

[52] (U.K.), reprinted in R.S.C. 1985, App. II, No. 1 [hereinafter *Royal Proclamation*].

[53] Robinson, *supra* note 15 at 122-223 and 235ff; Stagg, *supra* note 23; and White, *supra* note 8 at 223-68. For conflict over the acquisition of land in the Great Lakes region after 1763, see White at 351ff.

ownership of the land, and convinced that their governments enjoyed full authority over the inhabitants of the colony, Aboriginal and non-Aboriginal. Confident in the existence of European sovereignty, they initially acted as though the colonial regime were the sole fount of law and justice. They quickly found, however, that they could not maintain their pretensions. Often against their will, they found themselves making significant compromises to Aboriginal peoples' political autonomy and material control of the environment. These compromises were consolidated through the interaction of the parties over time and eventually became a structure of expectations and practices that regulated Aboriginal/non-Aboriginal relations. They became the principal source of the arguments and procedures used to resolve intercommunal disputes. They became the substance of a new normative discourse.

But why normative, and what kind of normativity? Was this really a matter of justice, or were all these solutions mere compromises, departures from law, practical concessions that had nothing to do with law?

I do not want to embark upon a long argument over the "legal" or "non-legal" character of the practices described. The reader may wish to restrict the term "law" to norms affirmed by special institutions, perhaps to norms more consistent or certain than those we have seen. At this point, I simply want to speak of the emergence of norms. The determination of their legal or non-legal character would depend too much on the imposition of one's prior definitions on a continuing and evolving process of creation. My objective is not so much to draw the definitional line, but rather to understand the process as a whole. After examining the development of the case law on Aboriginal rights, I will return to address the most important question for our ends—the relevance of this experience for the recognition of Aboriginal rights in today's law.

For the moment, it is sufficient to note that the interaction of Aboriginal peoples and European colonists certainly created stable practices—practices that dealt with issues near the heart of any legal system and in a manner that was, in several respects, similar to that of other undoubtedly legal systems. The norms were used to resolve disputes between parties, including the most serious crimes against the person and controversies over the existence and transfer of real property rights. Even if the practices were not enshrined in formal acts of the imperial sovereign, they substantially and consistently modified rules derived from such documents. Sometimes, customary norms were codified in traditional legal sources, as occurred with Aboriginal title in

the *Royal Proclamation*. This codification, by clarifying the existence and nature of the norms, reduced the risks of misunderstanding of a set of customary rules that often suffered from the incomprehension and neglect of colonial officers, especially those recently arrived in the colonies. It might be tempting to say that the *Royal Proclamation* created rules of law where there had only been accommodations of fact, but we would then be faced with the realization that codification occurred incrementally over a long period of time. It would be very difficult to establish the point of transition from fact to law. Moreover, even without codification, the practices had become standard, supporting stable expectations and prompting claims that at least had the appearance of right.[54] Their resilience was demonstrated by the fact that even when colonial authorities tried to impose their own preferences, they were often driven back to the customary ways. The normative character of the practices was evident in their invocation, often with success, in subsequent disputes, and by the out-cry that resulted when they were ignored. They did not conform to a positivist theory of the sources of law. Their content was, at times, very different from that of our present law. But they nevertheless played a normative role.

The content of these norms was not the result of an act of will; it was not the product of some sort of social contract. The colonists and the Aboriginal peoples did not choose to live in such a community. They found themselves in it, and they then tried to work out an acceptable *modus vivendi.* They did make choices, but they were choices strongly conditioned by necessity.

Nor were the practices the manifestation of a natural or universal order. They reflected the specific identities of the parties, their economic relations, their balance of power, and their style of social organization. In particular, the norms did not conform to some transcendental law of contract. Some elements of the parties' relationship (compensation for murder, the creation of military alliances, or the activities of missionaries) far exceeded purely economic considerations (even if the pursuit of economic advantage was an important motive for collaboration). And these non-economic elements were far from marginal to the parties' interaction; they were central, an integral part of a comprehensive alliance. Even the core of the economic relationship—the exchange of furs—was more than simply a

---

[54] See, for example, the discussion of legislative prohibitions on the purchase of Aboriginal land in *Johnson, supra* note 15 at 604, where the court interprets the statutes as being the codification of a pre-existing policy that already had the force of law.

meeting of minds with respect to the transfer of goods. The exchange often served as the confirmation of a broader relationship of reciprocity, and thus drew upon the principles of distribution and generosity so important to indigenous societies. The trading of furs was always combined with gift-giving, without any clear separation between the mutual respect symbolized by the gifts and the individual advantage obtained through the exchange. The distinctive features of the fur trade produced interesting departures from the contractualist model: the general acceptance of the unilateral taking of goods by Aboriginal people (appropriations that the traders considered theft); and the extreme hostility of some Aboriginal peoples to changes in price.[55]

Even if they were not reflective of a natural order, the norms did have a measure of consistency across the various societies and colonies, for a number of reasons. First, settlement proceeded in stages; traders and colonists would discover workable approaches and would then use them in similar situations. Second, on the Aboriginal side, there had always been transfer of forms and customs among peoples. Long before the coming of the Europeans, Aboriginal peoples had their own extensive trade routes. These links had expanded rapidly with the start of the European trade, even before Europeans themselves penetrated the interior. Aboriginal peoples consequently possessed their own procedures for intercommunal diplomacy. The prevalence of Aboriginal commerce, together with wars or alliances, facilitated the diffusion of cultural practices among Aboriginal peoples. Finally, the structure of Aboriginal/non-Aboriginal relations was similar in the different colonies. In northeastern North America, the modest size and consensual organization of Aboriginal societies favoured reciprocity, rather than authoritarian imposition, as the principal means of social coordination.[56] The colonists' Aboriginal policies did vary depending on their reliance on farming or the fur trade, but the presence (to some degree) of both kinds of economic activity in most colonies meant that there was usually a gradation in policy, rather than a radical break, from one colony to another.

---

[55] See R. White's conclusion in "Native Americans and the Environment" in W.R. Swagerty, ed., *Scholars and the Indian Experience: Critical Reviews of Recent Writing in the Social Sciences* (Bloomington: Indiana University Press, 1984) at 193; White, *supra* note 8 at 94-141; O.P. Dickason, *The Myth of the Savage and the Beginnings of French Colonialism in the Americas* (Edmonton: University of Alberta Press, 1984) at 235-36 [hereinafter *Myth of the Savage*]; and *Natives and Newcomers*, *supra* note 11 at 184-94. For the institutionalization of theft and Aboriginal resistance to price changes, see White, *supra* note 8 at 75-76 and 116-19; and *Natives and Newcomers* at 188-90.

[56] On the importance of reciprocity in relations between Aboriginal groups, see *Myth of the Savage*, *supra* note 55 at 236; and Salisbury, *supra* note 12.

A kind of standardization therefore occurred, even without conscious coordination by the colonial governments. Sometimes the governments did try to standardize practices. The instructions of the Marquis Duquesne de Menneville with respect to murder are an example of this occurring through informal means.[57] The process that led to the *Royal Proclamation* was a clear example of more concerted consolidation and centralization. Standardization also occurred through the decisions of colonial courts, decisions that demonstrate the close link that existed between colonial practice and the emerging common law of Aboriginal title.

IV. ABORIGINAL TITLE IN THE COURTS[58]

The Canadian law of Aboriginal title is directly descended from three great decisions of John Marshall, Chief Justice of the United States Supreme Court in the first third of the nineteenth century—*Johnson*, *Cherokee Nation* v. *State of Georgia*, and *Worcester*.[59] These judgments, and the Canadian cases based upon them, refined and extended principles that had emerged out of the interaction of the colonists and Aboriginal peoples over the previous two centuries. In so doing, the courts demonstrated an empirical spirit similar to that apparent in the colonial practice itself. Starting from that practice, they sought to identify and enforce those norms that had made peaceful cooperation possible. They demanded that governments remain faithful to commitments undertaken with respect to Aboriginal peoples, especially concerning Aboriginal land. In this way, they formulated a body of law that was *sui generis*, derived from experience rather than sovereign decree, to regulate relations between the societies.

---

57 See *supra* note 35 and accompanying text.

58 For an insightful discussion of colonial law as it affects Aboriginal peoples, see "Understanding," *supra* note 5 at 736ff.

59 Respectively, *supra* note 15; 8 U.S. (5 Pet.) 1 (1831) [hereinafter *Cherokee Nation*]; and *supra* note 41. These judgments are the foundation for the principal Canadian decisions: *St. Catherine's Milling & Lumber Co.* v. *R.* (1887), 13 S.C.R. 577 at 610, Strong J. dissenting [hereinafter *St. Catherine's Milling*]; *Calder* v. *British Columbia (A.G.)*, [1973] S.C.R. 313 at 320-22, 352, and 380-85 [hereinafter *Calder*]; *Guerin* v. *R.*, [1984] 2 S.C.R. 335 at 377-78 [hereinafter *Guerin*]; and *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1103 [hereinafter *Sparrow*]. For commentary on these decisions, see J.C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality" (1969) 21 Stan. L. Rev. 500; J. Hurley, "Aboriginal Rights, the Constitution and the Marshall Court" (1982-83) 17 R.J.T. 403; and J. Norgren, "Lawyers and the Legal Business of the Cherokee Republic in Courts of the United States, 1829-1835" (1992) 10 L. & Hist. Rev. 253.

This process is patent in Marshall C.J.'s judgments. The Chief Justice derived his principles directly from practice, often in the face of contrary indications in the more formal sources of imperial law. The unilateral and presumptuous assertions made by the imperial authorities during the first years of colonization were subjected to restrictive interpretation, taking into account the context in which they had been made and the profound gulf between the early words and later actions. Marshall C.J. noted, for example, that the rule of international law that discovery of a territory gave the discoverer exclusive ownership of the land was designed to regulate competition among the colonial powers.[60] He therefore limited its application to the colonizing powers, thereby preserving Aboriginal title to the land. He mocked broad claims based on the charters of colonization, stating: "The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man."[61] This did not mean that Aboriginal peoples retained full independence. He acknowledged that the status of those peoples had been seriously modified by the assertion of British sovereignty so that they could not alienate their lands except to that sovereign and no longer constituted foreign nations.[62] He therefore arrived at a result that upheld neither the claims of the colonizers nor the sovereignty of the Aboriginal peoples in their entirety, but recognized instead a new structure, made from the interaction of the two.

Marshall C.J. freely admitted that this structure was based not on perfect justice or on pre-existing rules of law, but on a relationship of fact. Regarding the right of the Crown to the underlying title to Amerindian land, he said: "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."[63] As for the reasons for protecting Aboriginal land rights, Marshall C.J. did invoke feelings of humanity, but it is clear that for him the most important motive was captured in the phrase, "wise policy":

---

60 *Johnson*, *supra* note 15 at 573-74; and *Worcester*, *supra* note 41 at 543-46.

61 *Worcester*, *supra* note 41 at 544-45.

62 *Johnson*, *supra* note 15 at 574; and *Cherokee Nation*, *supra* note 59.

63 *Johnson*, *supra* note 15 at 588. See also *Worcester*, *supra* note 41 at 543.

> The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for the preservation of peace; and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites.[64]

The hybrid nature of Aboriginal rights was the result of conditions unique to North America. Marshall C.J. described these conditions in the simplistic and even racist terms of the period, but he nevertheless acknowledged the role of both societies in the creation of the normative order.[65] Marshall C.J. defined the contours of these rights by considering the actual conduct of the parties. In *Cherokee Nation*, the *quasi*-independent status of the Aboriginal nations was founded upon the factual relationship they possessed *vis-à-vis* the United States. In *Worcester*, the characteristics of Aboriginal title were defined by what had emerged in practice.[66]

Why did fact give rise to law? Marshall C.J. did not expressly address this issue, but there are, in his reasons, a number of hints concerning the answer. First, the parties themselves treated the practices as normative. These practices—and not the unilateral assertions of the colonial charters—furnished the norms by which the parties had lived. Marshall C.J. underlined the contrast between the recognition of Aboriginal title "which is evidenced by our history" and "the charters granted by the monarch of a distant and distinct region, parcelling out a territory in possession of others whom he could not remove and did not attempt to remove."[67] The respect for Aboriginal title had been fundamental to the establishment of North American societies; it had become part of their living constitutions. Regarding the restrictions on the alienation of Aboriginal land, Marshall C.J. said:

> However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.[68]

Second, these norms were based on a reciprocal interaction, in which each party received something of value.[69] To neglect these norms would

---

64 *Johnson, supra* note 15 at 589-91 and 596-97; and *Worcester, supra* note 41 at 546.

65 *Johnson, supra* note 15 at 590-91; and *Cherokee Nation, supra* note 59 at 17.

66 *Cherokee Nation, supra* note 59 at 16-18; and *Worcester, supra* note 41 at 546ff. See also *Johnson, supra* note 15.

67 *Worcester, supra* note 41 at 560.

68 *Johnson, supra* note 15 at 591-92.

69 *Worcester, supra* note 41 at 551ff.

expose the colonial power to "injury to his fame, and hazard to his power."[70] In the result, Marshall C.J. recognized that a body of norms had emerged that was *sui generis*, and he translated them into such novel juridical concepts as the notion of "domestic dependent nations."[71]

A similar approach is evident in the Canadian decisions founded upon Marshall C.J.'s judgments. Here again, the principles were derived from practice.[72] Strong J., in his summary of the American authorities in *St Catherine's Milling*, observed that colonial usage had ripened into the rules of colonial law. This usage was based not on benevolence but on the hard experience "of the great impolicy of the opposite mode of dealing with the Indians which had been practised by some of the Provincial Governments of the older colonies and which led to frequent frontier wars."[73] In Strong J.'s judgment and in the majority judgments of later cases, documents like the *Royal Proclamation* are cited not as the source of Aboriginal title, but rather as evidence of a relationship established outside the documents.[74]

The Canadian cases have adopted the unique concepts developed in the American authorities, often shaping them in ways that are rooted in a distinctively Canadian experience. This is especially true, for example, of the fiduciary obligation of the Crown. This obligation springs from reflection upon the principles implicit in the relationship between the Crown and Aboriginal peoples—the same kind of reflection evident in Marshall C.J.'s elaboration of Aboriginal title.[75]

All these judgments suggest that the binding character of the principles stems from an obligation on the part of the non-Aboriginal sovereign to adhere to the premises on which its powers are based. In *St. Catherine's Milling*, for example, Strong J. speaks of "breaking faith" with the Aboriginal peoples; the Supreme Court of Canada's decision in *Sparrow* emphasizes the importance of maintaining "the honour of the

---

[70] *Johnson, supra* note 15 at 590.

[71] *Cherokee Nation, supra* note 59 at 17.

[72] *St. Catherine's Milling, supra* note 59 at 608 and 612-16; *Calder, supra* note 59 at 320-23, Judson J., and 390-91, Hall J. See also the use of the colonial practice in the interpretation of a treaty in *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1037-43 and 1052-56 [hereinafter *Sioui*].

[73] *St. Catherine's Milling, supra* note 59 at 609, 612, and 615-16. These words were cited with approval by Hall J. in *Calder, supra* note 59 at 376-79. See also *Sioui, supra* note 72 at 1053-56.

[74] *St. Catherine's Milling, supra* note 59 at 626; and *Calder, supra* note 59 at 323, Judson J.

[75] *Guerin, supra* note 59. See the interpretation of the obligation's origin in *Sparrow, supra* note 59 at 1108-10; and "Understanding," *supra* note 5 at 753-56.

Crown."[76] These decisions clearly affirm that the norms of honourable conduct, once assumed, cannot be cast aside when they no longer serve the interests of the powerful.[77]

The origin of these norms in continual reflection on the intercommunal relationship is also evident in the norms' generality, their openness. It is the overall character of the relationship that is protected—the obligations of respect and fidelity—and not a detailed code of rights and responsibilities. The relationship is thus open to evolution and adaptation, permitting, for example, government regulation (on certain conditions) of Aboriginal fisheries.[78]

V. CONCLUSION

This paper has described the emergence, through practical reason, of a set of intercommunal norms to govern relations between Aboriginal and non-Aboriginal peoples in northeastern North America. These norms were not the product of a straightforward exercise of sovereign power, but rather a long history of interaction and experimentation. From a series of *ad hoc* and pragmatic accommodations, a structure emerged that the parties themselves recognized to be normative and that they customarily invoked to resolve intercommunal conflict.

In large measure, fact made law. At the very least, fact significantly altered the normative presumptions of the colonists and colonized alike. It is true that the demographic balance between the Aboriginal and non-Aboriginal populations, the relative extent of economic interdependence or conflict, the inability of the First Nations to expel the newcomers, and the inability of the latter to subjugate the former all played a role in the genesis of this *modus vivendi*. But despite the fact that their relationship was undeniably shaped by power, the

76 *Supra* note 59 at 1107-08, 1110, and 1114. See also *St. Catherine's Milling*, *supra* note 59 at 621. There is a marked resemblance between this language and Postema's argument: see *supra* note 9 at 1176ff.

77 This conclusion is especially apparent in the discussion of Aboriginal/American relations during and immediately after the American Revolution in *Worcester*, *supra* note 41 at 551. See also the Canadian reasoning concerning the extinction of Aboriginal rights, for example, in *Sparrow*, *supra* note 59 at 1101.

78 *Sparrow*, *supra* note 59 at 1109-10. See also the reasons of Strong J. in *St. Catherine's Milling*, *supra* note 59 at 608, where he recognizes that Aboriginal land rights are not "perhaps susceptible of any accurate legal definition in exact legal terms."

parties themselves came to conceive of their relationship in normative terms.

Why? What drove the parties to this normative turn—to create, out of fact, norms to regulate conduct? Why ratify the outcome of unequal power, granting it moral authority? The answer lies in the value of peace and stability. Even if the resulting order was marked by inequality and oppression, even if it was not "just" in any absolute sense, the parties gained real advantage from acknowledging it to be normative. In the place of the constant and arbitrary threat of force, the new framework provided moral constraints and stable expectations. The need to live together, founded as much on the cost of rupture as on mutual affection, demanded order, and the first source of order was the normalization of fact.

Fact served this foundational role simply because, at the start, it was all the parties had in common. They did not share a common moral tradition. There may have been points of similarity between their normative beliefs. Their common humanity may well have furnished some support for normative dialogue. But at the moment of contact, all these potential resources were expressed through cultural forms that had developed in complete isolation from each other.[79] It was impossible to embark upon a metaphysical debate aimed at identifying similar beliefs and common rules by rational deliberation. Nor was it conceivable that the parties could suddenly agree on transcendant principles applicable to all. If they had tried to establish intercommunal relations on such a basis, they would have quickly encountered resistance, for the absolute principles of one were merely the unjustified presumptions of the other.

A more modest objective was required: a mode of life that would reduce the number of conflicts and furnish ways of resolving those that remained. The parties therefore began a process of trial and error, initially seeking to establish good faith and mutual respect through the reciprocal exchange of gifts (if they were wise; some explorers began with intimidation, resulting in relations that were very tense, if not

---

[79] See N. Frye, *The Great Code: The Bible and Literature* (New York: Harcourt Brace Jovanovich, 1981) at xviii, speaking of the importance of one's cultural tradition to one's understanding of the world:

> Man lives, not directly or nakedly in nature like the animals, but within a mythological universe, a body of assumptions and beliefs developed from his existential concerns. ... Practically all that we can see of this body of concern is socially conditioned and culturally inherited. Below the cultural inheritance there must be a common psychological inheritance, otherwise forms of culture and imagination outside our own traditions would not be intelligible to us. But I doubt if we can reach this common inheritance directly, by-passing the distinctive qualities in our specific culture.

disastrous).[80] They then developed more elaborate forms and procedures, gradually creating the normative community described in this paper. Once they had acquired a common stock of solutions and experiences, the discussion could proceed, becoming richer and more complex, in which some solutions were refined, others extended by analogy, and still others rejected. What began by the normalization of fact, continued to develop through re-evaluation and criticism.

The Aboriginal peoples' and the colonists' own normative orders did not disappear in this new community. They retained their specificity; the new community was limited to intercultural matters. The peoples therefore combined the maintenance of autonomy with the need for common standards—standards derived not from their traditions of justice taken independently, but from a mediation across traditions. This mediation did not occur merely at the level of the individual case, but was a mediation of principle, producing a mediated justice.

The resulting norms were neither static nor perfect. During the period of colonization they did not completely suppress violence, just as international law today does not eliminate war. The parties' interpretations of the common norms were often discordant; the normative terrain remained an arena for struggle. Moreover, the intercultural normativity continued to evolve under the influence of ideological changes in each society, the impact of European diseases on indigenous populations, and the evolution of economic relations (especially the decline of the fur trade). Some of these changes, particularly the pressure on Aboriginal societies as a result of impoverishment and decimation by disease, severely undermined the relationship. Nevertheless, after these catastrophes and the disastrous paternalism that followed, the parties have returned to the initial structure of their interaction, trying to learn the lessons of the past and attempting to build on the more promising foundation of the period that followed first contact, before indigenous societies were undermined. The historical experience has become the principal horizon in the attempt to establish justice between peoples.

But given the continual evolution of these norms and their close connection to the conditions of the colonial period, how can that experience have created justiciable rights? It may well furnish

80 There are many examples in the ethno-historical literature of intimidation (especially at the beginning of the period), which often led to attacks against the Europeans. See the examples cited in *supra* notes 18 and 19; and Salisbury, *supra* note 12 at 63-66 (four Frenchmen were killed by Amerindians at Monomoy in 1606, after the former had erected a cross and tried to intimidate the latter).

interesting—perhaps even instructive—stories, but does it confer rights? And if rights do emerge from practice, why can't practice destroy them?

It is true that some aspects of the parties' experience, including the responses to intercultural crime, lacked the stability (at least in their detail) that one usually associates with law. Moreover, the relationship between the societies has changed to such an extent that some responses would be completely inappropriate today. I am not suggesting that we simply apply the eighteenth century precedents. Instead, I share the conception of the judicial role implicit in the judgments of Marshall C.J. and other great jurists. We are not irrevocably bound by the solutions of the eighteenth century, just as we are not bound by eighteenth century doctrines on delictual responsibility. Rather, that experience provides us with points of departure—with necessary normative presumptions—at the same time pushing us to refine those presumptions in order to render them more adequate.[81]

If we do adopt the solutions that emerged during the period of colonization, they will be solutions that have been reinterpreted, adapted to present circumstances. We will adopt them for reasons different from those that led to their emergence. We no longer seek to maintain alliances against a powerful colonial competitor. We no longer want to secure preferential access to furs. Rather, we have lived with the consequences of policies that attempted to suppress indigenous cultures. We have observed the damage that those policies have produced. We have come to realize that our recent conduct towards Aboriginal peoples has not been consistent with general principles of our legal tradition, such as respect for promises, security of property, and the importance of acquiring rights in a manner that is just and equitable. This realization prompts us to seek models in the period of our history during which Aboriginal people and their societies were respected, even if only because the balance of power lay more in their favour. This process of moral reflection does not proceed by deduction from fixed premises, but in a pragmatic and incremental manner. Through the legal techniques of interpretation and constant adjustment, we turn back towards a neglected aspect of our normative history.

But does this return to our prior experience fall within the competence of courts, involving, as it does, so much reconstruction? Negotiations may indeed be a better means for determining the precise content of Aboriginal rights. For that reason the courts may choose to

---

[81] The notion of "regret" is also, therefore, an integral part of our moral relation to the past. For the development of this notion, see Postema, *supra* note 9 at 1178-80; and "Jurisprudence of Regret," *supra* note 5.

limit their role to the declaration of general principles emerging from the history of Aboriginal/non-Aboriginal relations, such as the right to a measure of governmental autonomy or the fiduciary obligation of the Crown. But at least with respect to those general principles, the courts cannot avoid the obligation to decide.

All judging presupposes an appreciation of the legitimacy and extent of legal orders. Courts rarely discuss these presumptions, but nevertheless there are situations in which they profoundly shape the outcome. For example, if the British Parliament tomorrow repealed the *Canada Act 1982*,[82] the Canadian courts would find themselves forced to inquire into the basis of the Canadian legal order. Does that order still depend on the supremacy of the British Parliament, or does it have its own independent foundation? The judges could not avoid such questions on the pretext that the answers lay outside the field of law. The question of the norms applicable in such a situation is undoubtedly legal, going to the very identity of the Canadian legal order. In such a case, the courts could reasonably decide that British law no longer prevailed in Canada. That decision would be based not on rules proclaimed by the sovereign (precisely because the question demands that one determine who is sovereign) but rather on the judges' interpretation of the present relationship between the Canadian and British societies.[83]

Aboriginal rights pose an analogous problem. The courts cannot avoid the issue by applying the non-Aboriginal law and leaving the "political" problem of the Aboriginal peoples to the politicians. The issue is precisely about the extent of the non-Aboriginal legal order and the possible survival of another order whose origin lies outside the unilateral actions of a non-Aboriginal sovereign. A decision to consider the non-Aboriginal law as the sole source of justiciable norms, applicable without qualification to Aboriginal people, would presuppose an answer to this fundamental question. If it is true that the constitutional history of Canada has been marked by the coexistence of different societies, that those societies have retained their own normativity, and that they have regulated their mutual relations by a set of intercommunal norms, the survival of this normativity remains a legal issue, one that must be resolved in order to determine the scope of non-Aboriginal norms.

The possibility of an intercommunal normativity demands humility from jurists educated and functioning in an emphatically non-

---

[82] (U.K.), 1982, c. 11.

[83] For an illuminating discussion, see B. Slattery, "The Independence of Canada" (1983) 5 Supreme Court L.R. 369.

Aboriginal intellectual milieu. It is much easier to withdraw into limited and comfortable circles, where the foundations of justice are not directly challenged. But this approach would have two major disadvantages. First, if we seek constitutional principles rooted in the experience and structure of Canada's societies—if we want to avoid the blind reproduction of principles founded on colonial imposition or the rote copying of European models—we have to take account of the plurality of sources of Canadian law, an approach that respects, moreover, the plurality of peoples that have contributed to making Canada. Second, by adopting a strategy of withdrawal we would lose one of our principal sources of moral development. Like many colonists of the seventeenth century, we are often tempted to believe that the ideal of justice consists of imposing the order of reason on the disorder of fact. But the history of Aboriginal rights, like other forms of moral experience, teaches us that the obstinacy of fact provides eloquent evidence that our conceptions of justice are limited, provisional—always subject to revision and reconsideration under the impulsion of *la force des choses*.