Whose Law? Whose Justice?
Two Conflicting Systems of Law and Justice
In Canada’s Northwest Territories

Allan L. Patenaude

A Publication of the Northern Justice Society™ and Simon Fraser University
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ABOUT THE AUTHOR

Allan L Patenaude is the former Co-ordinator of Probation Services for the Baffin Region in the Northwest Territories. During his time in the North, Mr. Patenaude has lived in both Yellowknife and Frobisher Bay and has travelled to the communities throughout the Eastern Arctic. He is currently enrolled in graduate studies in the School of Criminology at Simon Fraser University.
ABSTRACT

During recent years there has been a renewed interest in the cross-cultural study of law in the interaction between indigenous and incursive legal systems. Inuit cultural and social organization have been studied since the late-nineteenth century (cf. Boas, 1885; Hantzsch, 1911-1913; Jenness, 1923; Rasmussen, 1925) yet few researchers have concentrated upon the various aspects of the legal culture of Inuit in the Canadian Northwest Territories. Notable exceptions to this paucity of research have been Rasing’s (1984) examination of Inuit conflict resolution and van den Steenhoven’s (1955, 1959, 1962) work on Inuit legal concepts. Few studies have been conducted which compared Inuit legal concepts to non-Inuit, Westernized concepts of law through the use of identifiable criteria. This exploratory essay attempts to address this lack of cross-cultural, comparative studies on Inuit law and legal beliefs through the use of Pospisil’s four criteria of law (authority, universal application, obligatio, and sanction) and a review of the corpus of ethnographic literature. As the socio-political environment of the North continues to change so, too, will the nature of Inuit interaction within the non-Inuit criminal justice system continue to develop and new issues concerning Inuit participation in the criminal justice system will emerge.

RESUME

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Finally, as it becomes increasingly difficult to ‘re-invent’ the wheel, I found that previously completed works on Inuit and their socio-legal environments could not be improved upon at this time. Therefore, I would like to acknowledge that this current effort is part of an on-going program of research and will, it is hoped, form a cornerstone for the building of future research.

A.L. Patenaude
Burnaby, British Columbia
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PREFACE

As with many of life’s endeavours, this text has developed quite differently from the proposal which preceded it. The initial proposal was aimed at presenting a description analysis of the manners by which legal anthropology has been used by the Canadian government as a tool in their colonialization of the Northwest territories and its peoples. Rather than attempting that monumental task, this essay has chosen a simpler, more manageable task concerned with the juridical aspects of a single process such as colonization/colonialization in the Canadian North.

This change in focus has served to reduce the overall length of the essay and clarify the concepts which it contains. These concepts were field tested during the delivery of a session titled “Historical Development of Northern Justice Issues” at the Northern Justice Society’s conference on Preventing and Responding to Northern Crime at Thompson, Manitoba. Instead of becoming the painful, intellectual exercise which it first appeared, this essay served as a unique learning experience which, in turn, taught both brevity in writing and humility in approach. The latter was learned through the process of being forced to learn to write explicitly rather than implicitly and how to avoid the temptation to write on, and on, and on, and...
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I. INTRODUCTION

If your subject is law, the roads are plain to anthropology…it is perfectly proper to regard and study the law simply as a great anthropological document.

Oliver Wendell Holmes
Chief Justice, U.S. Supreme Court
(1889) 12 Harvard Law Review, 443

In recent years there have been a great deal of debate concerning the role of law in societies and the relationships between legal systems and the social, political and cultural contexts in which they operate. Of considerable interest is the manner in which traditional systems of social control interact with codified, Western-style legal systems (Allot and Woodman, 1985; Bohannan, 1965; Falk-Moore, 1978; Griffiths and Patenaude, 1988a 1988b; Hoebel, 1954; Pospisil, 1971, 1972, 1978). This history of European exploration and subsequent colonization illustrates that law may also originate from outside rather than within the culture.

In situations where law has been imposed upon an indigenous population by an incursive nation, the former has often been subjugated through either conquest or peaceful occupation (Lester, 1984). The imposition of incursive law and legal systems has often been accomplished with neither recognition of existing indigenous legal systems nor concern for the results of that imposition. Indeed, the ethnocentric use of jurisprudence and evolutionist beliefs by the dominant power has served solely to rationalize its actions and improve its already advantageous position.
Recently our work has noted increased concern about the effectiveness of adversarial systems of criminal justice, particularly where these systems have been imposed on cultures which have traditionally utilized mediation, negotiation and other forms of dispute resolution. Concurrently they argue, there has occurred a world-wide resurgence of interest in the attributes, functions and processes of law as well as their expression in traditional, community-based justice structures, including village courts and the involvement of elders in responding to the problems of crime and delinquency (Griffiths and Patenaude, 1988b).

This essay will explore the conflict between traditional Inuit law and the mechanisms of social regulation and the modern, codified laws of the Qallunaat (Euro-Canadians in the Eastern Arctic dialect of Inuktitut). The comparative framework for this discussion is based upon Pospisil’s (1978) anthropology of law perspective. This approach provides a useful method of answering the question “What is the nature and extent of the relationship between Inuit and Euro-Canadian legal systems?” The finding of this analysis is that these two legal systems are in conflict, especially as regards to the recognition of legitimate authority to adjudicate disputes and the relative emphasis on obligatio and sanction. Indeed, obligatio and sanction are distinguished from each other on both an ideological level as well as at applied levels within Inuit culture as restorative justice and within Euro-Canadian society as retributive justice. Having answered that question this essay will explore possible solutions to the question “How can this conflict be reduced in a manner which is amenable to both cultures?” This will be accomplished through a discussion which emphasizes the similarities rather than the differences between these two belief systems and offers pragmatic alternatives to the present conditions.
II. THEORETICAL ORIENTATION

Law as a generalized concept is difficult to define adequately. Gall (1983) presents this difficulty noting that:

the perfect definition of law is elusive, but perhaps the most realistic approach is to avoid attempts at defining law at all. Rather, the law should be regarded as the core matter which those persons and those institutions in any legal systems utilize in order to effect an ongoing process in regulating the affairs and conduct of persons in society. With this fundamental notion, it is probably necessary to search for an all-encompassing definition of law...Since virtually all aspect of life are affected by the omnipresent influence of the law, the law simply defies a single, all-encompassing definition (1983:16).

From this discussion emerges the belief that law is simply the “core matter” of any legal system regardless of whether that system is based on the application of custom or statute. Gall is correct, therefore, when he echoes Falk-Moore’s comment that “not only does every society have law, but virtually all significant social institutions also have a legal aspect” (1978:215).

One perspective which is often ignored or overlooked by legal scholars in their search for a single definition of law is the processual one: law as a process. Falk-Moore (1978) presents the essence of this perspective by stating:

The continuous making and reiterating of social and symbolic order is seen as an active process, not as something which, once achieved, is fixed. The view is taken that existing orders are endlessly vulnerable to being unmade, remade, and transformed, and that even maintaining and reproducing themselves, staying as they are, should be seen as a process. To try to understand something about law and society in these terms is to address the question how such processes and counter-processes operate together, and what the preconditions are for reproduction or transformation. It is far more than the study of a set of enforceable rules and the logical principles which may be inferred to lie behind them (Falk-Moore, 1978:6).
Yet, are we able to ascertain these same logical principles within and across cultures at a specific temporal location? According to Wilkins (1964), for example, the social meanings attached to law similarly change both spatially and temporally, to the extent that “at some time or another, some form of society or another has defined almost all forms of behaviour that we now call criminal as desirable for the functioning of that form of society” (1964:46).

The changing nature of society is often presented by the outward expressions of its social institutions. This process has been noted, not only by Falk-Moore and Wilkins but, by other legal anthropologists. Falk-Moore’s (1978) view that the making of laws and the symbolic order was an active and dynamic process was also shared by Pospisil (1971, 1972, 1978). Indeed, Pospisil regarded law “as an integral part of culture [that] is not a static phenomenon, as some protagonists of the doctrine of Natural Law would have it” (1978:61). One premise to Pospisil (1978) was the need for cultural content within the study of law rather than the ethnocentric imposition of Western legal concepts on non-Western cultures. This cultural content may also obscure rather than facilitate the study of law across cultures as investigators may focus on the expression of the legal phenomenon rather than the underlying principles.

Pospisil points out that many of his predecessors have erred in this same manner in this regard and has argued for the use of a series of indicators to determine the existence and levels of law in a given society (1971:11-18; 1978:22-51). As the result of his fieldwork, he determined that the use of indicators to gauge legal mechanisms in primitive societies were appropriate for cross-cultural studies but their use was both limited and in need of further refinement (1978:30-51). Beginning with the Roman legal principles of *longa consuetudo* (long use) and *opinio necessitatis* (opinion on the need for law) he developed his four criteria of law. Briefly, these include:

1. **Authority**: the individual exercising social control has the functional powers, either absolute or by reason of their position, to enforce the decisions of social conduct. This may also be found as “consensual” or
“lateral” authority in so-called leaderless societies where influential individuals may perform leadership roles on an *ad hoc* or situational basis; Authority is distinguished from “leadership” as the latter’s exclusive decision-making power places it in the political rather than legal arena.

2. **Universal Application**: the intent of the legal authority is that the accepted principles and decisions on conduct should be applied to all cases involving members of the social group, in the same circumstances, now and in the future. Often this has been delineated between status groups where one group, such as the ruling elites, is treated differentially from the whole.

3. **Obligatio**: (not to be confused with obligation). This attribute is not to be interpreted as a consensus between the disputants but as an awareness of the mutual rights and duties of both the involved parties and society are known by all members of the society; These mutual rights and duties aid in distinguishing legal from non-legal relationships as well as religious phenomena from religious law.

4. **Sanction**: a sanction may be a negative device such as withholding rewards that would normally be granted or a positive measure which inflicts a painful experience of either a physical or psychological nature (Pospisil, 1978:30-51).

Indeed, Pospisil (1978:30-51) argues that the presence of these criteria define a social control as law and social system. The internalization of these attributes within a society would be expressed, according to Pospisil (1978:64), by their adoption in one of two forms: **authoritarian law** based upon the societal acceptance of external persuasion or **customary law** based upon an internal acceptance by individual members of that society. The legal scholar is, thus, able to establish cross-cultural and trans-national comparisons as through the acceptance of these four criteria and “the principles contained in the decisions as a form of law, we make the concept of law exact, cross-culturally comparative, and universal” (Pospisil, 1978:27).

Both custom and law contain these four criteria, or local expressions of them, within the culture’s legal system. Yet, for Pospisil (1978) the distinction was contained in the recognition and use of custom by the political authority. In order for the elements of custom
to be transformed into ‘customary law’ that authority must give custom legal recognition and validation. Thus, Pospisil appears to be in agreement with Falk-Moore’s comment that:

some discussions in the past have focused on deciding whether to look on them [legal concepts] as cognitive categories that shape behaviour, or whether to look on them as abstract reflections of social and technological conditions. Surely legal ideas can be both or either at the same time. But there is a third component that changes the significance of the first two: the way in which allusions to these legal ideas and legal norms are used and manipulated in particular social situations to legitimate or discredit behaviour, to affect social relationships, and to communicate all manner of messages (1978:255).

Having accepted Pospisil’s argument that law is universal and contains the four basic attributes, universal application, obligatio and sanction, an examination of the indigenous and incursive legal systems found in Canada’s Northwest Territories becomes possible. Indeed, the implications of this acceptance is that these four attributes may co-exist within the two legal systems in Canada’s North and elsewhere.

One of the major problems encountered by legal scholars of all disciplines is identifying the various circumstances under which law operates. Pospisil recalls Weber’s earlier comments on the importance of the individual’s role in social control and the “multiplicity of legal systems pertaining to the society’s pattern of associations” (1978:53) and elaborates upon that theme. He disputes the “persistent traditional view of law as an autonomous entity, unrelated to the society’s system of subgroups and pertaining only to the society as a whole” (1978:53). He notes that not only the social regulation occurring within such subgroups may be examined using his four attributes of law but, that this same social regulation constitutes a separate system of law within the broader societal system of law and legal beliefs. Indeed, Pospisil claims:

that every functioning group or subgroup of a society possesses not only a leader but its own legal system, which permits the group to function by compelling its members to conform to common principles of behaviour. Since
these principles, of necessity, differ from one sub-group to another, there are in a society as many legal systems as there are functioning subgroups (1978:54).

and,

that any functioning social subgroup, no matter how small or large, whether based on kinship or residential principle, whether conforming or not to the legal provisions of the state, has its own authority, which applies in its own particular legal system. Even such criminal gangs as the Cosa Nostra have their rules, judicial authorities, and sanctions that are more immediate and severe than those of the state. Since the decisions of the criminal gang’s authorities possess all the attributes of law, their social controls merit being called a legal system, in spite of objections that the orthodox, ethical, or state law-based legal scholar may have (1978:56).

Keesing (1981) also discusses this multiplicity in law. For his part, Keesing notes that different subsystems within a society may involve different kinds of standards being invoked based upon the status or membership of the actor. He states:

The different legal subsystems in a society may involve different spheres of life. They may involve different kinds of violations...Or they may involve different groups. Thus cases involving members of a lineage may activate one set of legal mechanisms, cases involving members of a larger community another, and cases involving members of different communities a third (Keesing, 1981:321).

Thus, it is possible to behold several types of “law” and legal systems operating within the same culture or society at any one moment. The modern, pluralist states of the industrialized world, such as Canada, are excellent examples of this claim. Within the Canadian North, for example, it is possible to discern the existence of law based upon the existence of Pospisil’s four legal attributes in both traditional Inuit and modern Euro-Canadian legal systems.

Of interest to this discussion is the notion that “since society and its power structure constantly change, one can reasonably expect that the centre of power is not static but that it shifts its locus in accordance with the sociopolitical changes” (Pospisil, 1978:57). This is
especially the case where a new system of law and legal beliefs has been imposed by an incursive society and a colonial relationship, such as exists between Canada’s aboriginal peoples in the North and the federal government in Ottawa, has been established. Unfortunately colonialism is a power relationship which Pospisil fails to explore.

Colonialism is regarded by Anderson (1974:32) as a form of imperialism whereby a foreign power is not only involved in the extraction of wealth but in the direct political rule of the subjugated nation. One of the later stages of development in a colonial relationship has been defined as “internal colonialism” by numerous authors including Kellogg (1980), Keesing (1981), and Watkins (1977). Keesing, for example, notes that this type of relationship often occurs:

within an ethnically diverse nation-state the cultural domination, and economic and political domination and exploitation of its minorities often through the legislated jurisdiction of one government agency over a specified segment of the populace (1981:513).

Within the Canadian context, colonialism and its variants include the actions of a ‘government within a government’ as the Department of Indian Affairs and Northern Development acts within the overall federal government structure but, with legislated jurisdiction over a specified segment of the population. Referring to the American situation van den Berghe describes Amerindians in the United States as having:

at least the residues of territoriality, of separate nationhood and of distinctive languages and cultures. They are conquered micronations, engulfed in a huge neo-European representative government that treats them as a microcolonial empire (1985:175).

Indeed, van den Berghe’s commentary is equally applicable to both Canada’s Amerindian and Inuit populations and their treatment by the federal government.
Let us now link together the two concepts, law and colonialism, as they have been discussed thus far. This may be accomplished by first exploring the range of relationships which are possible between different systems of law and legal beliefs. Morse (1983) identifies four possible adaptations when legal systems come into contact and conflict with one another:

1. **Total Avoidance**: the two systems of law would both function without any, or only negligible, interaction. Neither system would then assume jurisdiction over the activities adherents of the other. A parallel could be drawn with this situation by pointing to the position of neighbouring states whose governments deal with each other in an international sense.

2. **Co-operation**: both systems function side-by-side, but this time they formally interrelate by dividing their jurisdictions along clearly defined boundaries such that specific circumstances determine which system has authority in a given case. The dividing lines could consist of any or all of the three traditional criteria for assessing judicial jurisdiction, namely, territorial or geographic limits, subject matter, and the person [or on-site authority].

3. **Incorporation**: one society can come to dominate the other to such a degree that the dominant society can choose to incorporate selection portions of the other’s law or all aspects of it which do not fundamentally conflict with its own. A more direct approach is simply to accept the appropriateness of indigenous law continuing to control the affairs of the original population but to have it administered by the courts established by the dominant society.

4. **Rejection**: outright rejection of the validity of indigenous law by the colonial governments and/or their courts...It also can more bluntly reflect a racial or ethnocentric bias by declaring the indigenous law to be so “primitive and uncivilized” as to unrecognizable as a system of law at all but merely so-called “lewd practices” (Morse, 1983b:4-6).

Examples of these four adaptative strategies may be found in most countries which have a colonial past. For example, the Canadian government imposed its own codified system of law upon Inuit and other Northerners in a manner which Morse (1983) described as “outright rejection”. This rejection seems incongruous in light of the governments continued funding of research into Inuit legal beliefs and practices (cf. Briggs, 1970; Finkler, 1975, 1980, 1986;
Graburn, 1986; Irwin, 1988; Jubinville, 1971; van den Steenhoven, 1955, 1959) and the sentencing practices of the Northern judiciary.

The introduction of the agents of colonialism and the presence of the colonial model of interaction have had effects upon the relations between Inuit and non-Inuit, including legal relations, since the beginning of the twentieth century. Paramount within these relations were the concomitant strategies of modernization and westernization. In this regard the traders, missionaries, teachers, policemen and others sought to bring Inuit into the complex and technological world of the twentieth century. The Euro-Canadian goal was, then, to recreate Inuit society in their own cultural, economic and political image.

These actions have resulted in increases in material standards of living and accompanying decreases in cultural persistence among Inuit. Unfortunately these changes have been interpreted as Inuit adoption of Qallunaat ways and lifestyles (Wenzel, 1985:87). These changes have also engendered a psychological re-orientation and dependency on the part of many Inuit who have either internalized the belief that the new ways of the Qallunaat are both desirable and superior to traditional Inuit ways or the belief that they must conform to the new ways or the services of the Qallunaat will be withheld temporarily or withdrawn completely (Patenaude, 1988).

As this discussion has pointed out, exploring the nature of traditional Inuit law, Qallunaat perceptions of that law, and the changing Northern legal environment requires an understanding of these processes of colonialization and its results as well as that which constitutes an anthropological or juridical understanding of law. It should become evident during the course of the subsequent chapters that if, as has been argued here, the mandate of successive Canadian governments was to colonialize its Arctic, then it has successfully used its own law and legal system to maintain its dominant position. Law under a neo-colonial regime functions to express, regulate and maintain the general nature of the dominant society at the expense of the subjugated society, which in this case, are Inuit throughout Canada’s North.
III. ETHNOHISTORICAL ORIENTATION

a. Introduction

Any research inquiry which addresses issues surrounding Inuit and the law must proceed with an awareness that, contrary to the assumptions of many observers, Inuit are not a homogeneous population. There are, however, common threads which bind together Inuit across the circumpolar North, notably similarities within their intellectual and material cultures. Within the realm of intellectual culture, for example, the concept of law and its daily application through traditional Inuit methods of social control, which were aimed at the resolution of conflict and the restoration of peace, appear to be constant across the circumpolar North. Inuit communities differ in key attributes, including community size, local resources, contact with non-Inuit society, and cultural persistence (see Patenaude and Griffiths, 1989). These differences occur not only transnationally but, as well, within national jurisdictions and may have a significant impact upon the patterns of contact and the degree of conflict with the criminal law.

In order to help the reader gain an understanding of the legal developments which are currently occurring in the Canadian Arctic, a discussion of Inuit socio-cultural adaptations during both the early- and intermediate-contact periods is presented at this time. For example, the extreme environmental conditions of the Canadian Arctic imposed specific constraints upon persons living therein during both traditional and contemporary times. Prior to sustained contact with European and Euro-Canadian cultures, Inuit lived in harmony with their environment. Their methods of adaptation reflected the carrying capacity of the region, or ability of the local ecosystem to support mixed human and animal populations, and the technology that it demanded. Since their initial contact with Euro-Canadians, Inuit social organizations and culture have both changed dramatically.
The earliest written accounts of the lifestyle of Inuit at the time of contact with Europeans or *Qallunaat* were those of various explorers, missionaries and traders. Unfortunately such accounts were often as discontinuous as the patterns of contact from which they originated. The historical value of many of these early accounts has been described by Fortuine (1981) as limited due to their containing inaccurate, uniformed or prejudiced materials. Indeed, Fortuine noted:

The whalers and some fur-traders, despite intimate and often prolonged contact with the Eskimos, rarely recorded their impressions of them. Although such men were usually literate and kept good business records, they cared little for descriptive accounts. In any case, they had little interest in the Eskimos as people, although they often employed them and were not above using them in less honorable ways on occasion.

Missionaries on the other hand, were inveterate diarists and often recorded their observations of the Eskimos at length... (Fortuine, 1981:21-22).

Ethnohistorian Trigger has also identified difficulties which have emerged from these early accounts as:

native history is primarily an extension of colonial history, and a vital part of it if colonial history is to be understood properly. It can even be argued that, in most cases, it is impossible to write histories of native groups that are substantially independent of White colonial history (1982:11).

Trigger (1986:255-256) further advanced the belief that the history of contact between Natives and Europeans/Euro-Americans throughout North America has been coloured by the circumstances of contact and preconceptions of both parties.

The implications of this statement and the practices which Trigger described are enormous for social scientists. If these early accounts were written, for example, in the aftermath of a battle between Inuit and non-Inuit explorers then the accounts might denigrate the actions of the former while glorifying the actions of the latter. This may be seen in the
following account of Inuit/European contact by Francker (1566) in which an Inuit woman and her daughter were being kidnapped from the coast of Labrador by the crew of a Dutch ship:

the husband was shot through his body with an arrow. However he would not surrender but took his stand bravely to defend himself; and in the skirmish he was severely wounded in the side by another Frenchman with a broadsword, then he took his own blood from his side in his hand and licked it out of his hand, and took his stand to defend himself still more fiercely than before. Finally he was struck and wounded in his throat so severely that he fell to the ground and died from his wound. This man was 12 feet tall and had in twelve days killed eleven [12] people with his own hand, Frenchmen and Portugese, in order to eat them, because they like to eat no flesh better than human flesh... then they took the woman with her child and brought her away; and none of the Frenchmen could understand a single word of hers or speak with her at all. But she was taught enough in 8 months that it was known that she had eaten many men... The paint marks she has on her face are entirely blue, like sky blue, and these the husband makes on his wife [when he takes her for his wife] so that he can recognize her [his wife] by them, for otherwise they run among one another like beasts... Let us thank God the Almighty for His blessings that He has enlightened us with His word so that we are not such savage people and man-eaters as they are in this district... (in Sturtevant, 1980:48-49).

As for the explorers, the fifty years following the First Ross Expedition (1818) were dominated by the ships, officers and ratings of Britain’s Royal Navy. This excellence in exploration was offset by a lack of information on the groups of Inuit whom they encountered other than descriptions of their physical conditions at the time of contact.

This lack of active social science research continued until the late 1800s. The earliest ethnographies on Inuit culture which proved to be of value were Franz Boas’ *The Central Eskimo*, (1885) and Bernhard Hantzsch’s 1911-1913 diaries *My Life Among the Eskimos* (1977). Boas (1885) captured the phenomena of everyday life amongst numerous camps and the evolving Inuit settlements around the European whaling or scientific stations, whereas Hantzsch (1909-1911), for his part, briefly encountered such Inuit groups but wrote primarily
about the daily subsistence activities of the two Inuit families with whom he travelled.\footnote{The differences between these two individuals and their areas of interest is evident within their respective accounts of the Cumberland Sound Inuit. It would appear, for example, that Boas’ main concerns were:}

Interestingly enough, however, their comments concerning the result of early Inuit contact with Europeans have proved to be early predictions of the subordinate and dependent status which was to befall Inuit in the late twentieth century. Indeed, Hantzsch commented on the results of the contact which had taken place since his arrival at Kekkerton:

> It was a real cause of distress to me that now I was to leave those mountains, hills, and valleys where I had passed so many hours of bitter complaint to find at least peace of mind, that I was to leave those folk down there, not the Europeans, for they were commonplace people, but the so-called “natives”, those poor dependent Eskimos, once the lords of the land, now in spite of all fine words, destitute and regarded as second rate human beings. But that they were not! Granted that many of them were dirty, ragged and with habits offensive to persons brought up as we had been. All the same, I loved them and was happy in their society. I think that they had been imbued with the calm and peace of great Nature and that was what I missed in the industrious toilers of the civilized world (Neatby, 1977:24).

The fieldwork of these two men, both inculcated with natural science methodology and thoroughness to detail, varied dramatically. This is understandable given the size differences in the groups studied. Boas captured the phenomena of everyday life amongst

1. The accurate representation of the culture with a respect for the accomplishments of the Cumberland Sound Inuit.
2. Noting the phenomena of culture contact and change.
3. Commenting on the relationships and dependence of the contemporary (1885) settlement patterns and migrations of the physical environment.

Unlike Boas, who was ostensibly an ethnographer who conducted limited geographic studies, Hantzsch was first and foremost a natural scientist. In the process of conducting his combined geographical/zoological survey of the region, Hantzsch became the first European to traverse Baffin Island overland from Cumberland Sound to Foxe Basin by way of Nettilling Lake.
numerous camps and the evolving Inuit settlements around the European whaling or scientific stations, whereas Hantzsch, for his part, briefly encountered such Inuit groups but wrote primarily about the daily subsistence activities of the two Inuit families with whom he travelled. Interestingly enough, their observations of Inuit social organization and predictions concerning the result of early Inuit contact with Europeans have proved to be quite accurate as may be discerned within the following sections. It is unfortunate for modern ethnohistorians that the works of these two men did not include the views of the culture-bearer towards regarding their contacts with the Qallunaat or the proceeding and subsequent events surrounding those contacts. Such information would contribute to the overall ethnohistorical record and could, possibly, form a baseline for future ethnohistorical research.

b. Increased Contact With the Qallunaat

The introduction of the whalers and a rudimentary system of trade, based upon barter, has irrevocably altered the Northern physical environment and the Inuit socio-cultural system. The whalers introduced a new way of life which, in turn, introduced a new dependence upon the use of western skills and articles, especially firearms, in place of traditional methods. The abundance of fur-bearing game throughout the Eastern Arctic, for example, identified it as an ideal region in which to conduct hunting and trapping as well as whaling operations. This fact was recognized by the Hudson’s Bay Company which began to establish trading posts from the mid-1890s onwards. They (the H.B.C.) would maintain the barter system and raise it to a dependency system during the first half of the twentieth Century.

As contact increased between Inuit and Qallunaat traders more Inuit began to migrate and settle near the winter harbours of the whalers and the new H.B.C. posts. The adoption of modern firearms, wooden boats, and other material goods by many Inuit foreshadowed a loss of traditional survival skills and increasing dependence upon western goods and methods. This adoption of western ways results in the disruption of the natural carrying capacity of the
region, a fact which was emphasized by depletion of the natural game levels due to overharvesting.

The missionaries also had an enormous effect upon the Inuit socio-cultural environment. Roman Catholic members of the Oblates of Mary Immaculate as well as Anglicans of the Church Mission Society began to “civilize” Inuit across the North. Both faiths provide new choices to Inuit, many of which, were accepted without more than momentary hesitation. These new choices included basic training in hygiene, manual and domestic labour, rudimentary medical care, and the demand for literacy based upon the new religious teachings and the introduction of the “syllabic” written alphabet by missionaries John Horden and E.A. Watkins (Balikci, 1970; Harper, 1985; Minor, 1979a; Swiderski, 1985).

The next major period of ethnographic research began as Hantzsch’s exploration concluded and was primarily with the Canadian Arctic Expedition (1913-1918) and the Fifth Thule Expedition (1921-1924). There were, however, other significant Arctic investigations conducted during this period. Both Canada and Denmark sent these and other expeditions northwards for purposes which may best be described as imperialist hegemony. The actions of the Dominion government were foremost carried out to enforce Canada’s claims to Arctic Sovereignty and forestall rival claims to the region through symbolic measures (Lester, 1982; Morrison, 1986; Smith, 1963; Laslow, 1971).

The Canadian Arctic Expedition 1913-18, under Stefansson and Jenness, conducted salvage anthropology of Inuit from the Mackenzie River delta to the eastern shores of Baffin Island. These symbolic measures culminated in the establishment of R.C.M. Police posts throughout the North to enforce the Queen’s law, collect customs tariffs and establish a Canadian presence.
Figure 1  Map of the Northwest Territories  
(Source: Government of the N.W.T., 1989)
Denmark, on the other hand, had established its legal claims to Greenland in the previous century and sought to both survey its possession and expand its territory into the disputed Arctic Archipelago. This resulted in the explorations of the Fifth Thule Expedition (1921-24) conducted by Rasmussen, Matthiassen, Birket-Smith and others. It is unfortunate that the monumental and wide-ranging investigations of this expedition, which included reports on: archeology, physical anthropology, physiography, geology, botany and zoology as well as detailed ethnographic accounts of the Caribou, Netsilik, Iglulik and Copper Inuit (Collins, 1984:11-12) are not included for reasons of brevity.

The results of the expeditions of both nations included increased knowledge concerning Inuit cultural, physical and social anthropology as well as the beginning of the Canadian colonization of the Arctic Archipelago. It is necessary to state, however, that both expeditions were conducted during the heights of the fur-trading period in the Eastern Arctic and thus was witness to rapid social and economic change among the region’s Inuit population. Their members were trained social and physical scientists whose choices of methodology involved efforts not to unduly influence or disrupt Inuit social and cultural activities. Unfortunately for legal scholars, neither of the expeditions were overly concerned with Inuit concepts of law and social control.

There was a hiatus of Arctic social science following these expeditions which was to last until the end of the Second World War. The thirty years following the Second World War were to be the most productive years for social science research in the Canadian Arctic. This may be partly contributed to the advances in transportation technology, the realization of the resource development potential of the North, and the political climate of the period. Unfortunately for scholars, as the political climates changed both within Canada and between the global superpowers during the late 1970s, the interest in Arctic social science research also declined.
In summary, it must be concluded from these discussions and the corpus of available literature that traditional Inuit culture was carried by a society in harmony with its environment. Inuit culture was, in turn, constrained by the available resources and technology in the region, and the group survival activities encultured and maintained by the primary influences within the culture: the elders, the family and the shaman. These factors influenced the -miut group’s organization and the social regulation/social control mechanisms which it employed.

c. The Primary Influences in Inuit Society

As this writer has previously advanced², the complexity of the Inuit socio-cultural environment may be due, in part, to the influences of the three major social positions within that culture and the various bonding situations presented within the extended family group (Patenaude, 1987:48-57). There were three key social positions within the traditional Inuit social structure: the family, elders and the shaman, all of whom had their respective power bases of influence within the extended family, or -miut group, and which contributed to the overall group survival.

The -miut group “generally consisting of several extended families, had a seasonal round which was maintained within a defined territory” (Rowley, 1953:3). As such, the members of these groups had numerous ties of interdependence: collaboration among

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² Portions of this chapter have been drawn from a program of continuing research into the Inuit socio-legal environment. For a fuller description of Inuit socio-cultural and legal beliefs, the reader is directed to Kingnait: Culture, Change and Criminal Justice in Cape Dorset, N.W.T. by A.L. Patenaude (1987: unpublished). Similarly those discussions concerning the role of the shaman have drawn upon “Saving Souls at the Expense of a Culture: The Destruction of the Inuit Shamanistic Complex by Christian Missionaries in Canada’s Northwest Territories.” by A.L. Patenaude (1988: unpublished). Both texts are available from the Northern Justice Society Resource Centre at Simon Fraser University, Burnaby, British Columbia.
members to ensure group survival, affinal and consanguineal kinship relations, and designated dyadic partnerships both within and from outside the -miut group.

Both Minor (1979) and van de Velde (1985) have described both the succour and survival necessities which were provided within the -miut group. Indeed, the former compares the extended family to a family co-operative, claiming that the nuclear family was incapable of ensuring the groups’ survival solely through its own resources. The size and density of these -miut groups varied according to the season, the migration and abundance of food sources and the social acceptance of new group members. The joining of several familially or affinally related groups into the larger camps have been alternatively reported as tribes, camps, or -miut groups since the arrival of the first Europeans.

The Arctic seasonal variations resulted in changes in Inuit subsistence and residential patterns. During the summer months the -miut groups would assume a dispersed pattern in order to cover a large tundra landscape, whereas their winter subsistence and residential patterns were based upon larger gatherings near or on the sea ice. These patterns placed demands upon the member so the -miut group which they overcame through the development of dyadic partnerships. Often these partners were chosen by their fathers shortly after birth. The partners were responsible to provide food and other support to their respective partner and his family. The value of inherent in such partnerships was in the solidarity and social cohesion created within the camps and -miut groups.

The influence exerted with the -miut group was based upon, personal characteristics, namely: age, knowledge, competency and personality factors (van den Steenhoven, 1962; van de Velde, 1985; Williamson, 1974). Thus, power and influence could vary between the members of a group to meet its temporal needs. Within the -miut group age and knowledge appeared to be the two primary factors which contributed to the power and influence bases of both the shaman and the camp boss. While this latter position was created by the Qallunaat for their own purposes, it is similar, in some ways to the role of issumatuq in Inuit culture.
The **issumatuq** is described as “the boss or person who gets what they want” (Minor, 1979a) and may be interpreted as a position of influence rather than one of leadership.

Within the nuclear family, for example, van den Steenhoven (1962) notes that the most common level of authority was that of the **ihumatar** or “he who thinks”. The **ihumatar** while appearing to correspond to Minor’s (1979a) description of the **issumatuqjuaq** (wise, old person) was usually the husband in a nuclear family unit but he would nonetheless defer to the authority of his elders. Van den Steenhoven describes the role of the **ihumatar** and his leadership as being:

In short, the husband, i.e., the **ihumatar** of the nuclear family, though being the autonomous authority within his own restricted field of daily affairs, is ideally **not sovereign** but subject to the higher authority of his father, grandfather, oldest uncle or brother, as the case may be. It can therefore be summarized that among the Netsilingmiut small numbers of nuclear families, closely related along the father’s line, co-operate under recognized common leadership. This leadership should, however, be regarded as “understood” and “recognized” rather than formally expressed...(1962:54).

Within the Eastern Arctic dialects of Inuktitut there are important roles for this discussion: **issumatuqjuaq** (wise, old person) and **issumatuq** (the boss or person who gets what they want). The relationships between these two individuals and the other members of the -miut group is best described by Minor as:

The composition of the extended family was consanguineously based and thus inclusive of all the members related by blood. The most important relationship in the extended family was that of the oldest member, regardless of sex, to the oldest, ablest hunter. According to many informants, the eldest member of the extended family assumed the role of advisor and confidant to all other members. This role was distinguished from that of the fatherhead, i.e. oldest, ablest hunter in that the aged advisor was supposed to possess “**issumatuq**” and thus have the demonstrated ability to listen carefully and respond with clear, accurate advice. At the same time, the fatherhead demonstrated, and had been accepted for his ability to maintain his authority and to delegate
responsibility for obtaining those items necessary for survival (Minor, 1979a:13).

Similar to the *issumatuqjuaq* were the *inummarit* or elders within either the extended family group or camp. Due to the need for the intermediate generation to gather food and other physical needs it was upon the *inummarit* that the burden of enculturating the new generation would fall. They would ensure, through the use of an oral tradition, that both the knowledge of the old ways and “the essence of being an Inuk” were passed on to the younger generation. This essence, known as *isuma* in Eastern Arctic dialects of Inuktitut, contained the spirit of both the individual Inuk and all Inuit as a people (van de Velde, 1986).

It was *inummarit* who provided the advice, guidance and the oral traditions to the youngest generation while members of the intermediate generation were engaged in subsistence food-gathering activities. This practice would continue until pre-pubescence when the child’s apprenticeship to a parent of the same sex would occur. This practice ensured the transmission of cultural traditions, survival skills, respect for elders, and the extreme sex-role differentiation within Inuit society. It is interesting that both Boas (1885) and Brody (1975) commented on the tendency of the contemporary adult generation to recall the respect and knowledge of *inummarit* they had known in their own youth. Indeed it was that early advice which they would often choose to follow even when modern alternatives were presented to them (van de Velde, 1986: personal communications).

The third key social position within the traditional Inuit social system was the *angakkoq* or shaman. The role of the shaman (*angakkoq*: singular, *angakkut*: plural) was pivotal within Inuit culture as their actions not only provided part of the oral tradition and its transmission but, were regarded by the culture-bearer as being capable of bringing weal or woe upon the -miut group based upon those actions. Early ethnographers reported the *angakkut* as performing the same subsistence activities as other Inuit in addition to their part-time religious functions. The *angakkut* have not been reported as being average or normal
individuals outside of their part-time religious activities, on the contrary their marginality within the culture is a common theme (Driver, 1969; Townsend, 1984; Turner, 1985). This is noted within, both, Saladin d’Anglure’s comment that “some shamans, despite their powers, were not good hunters so that they were largely materially dependent upon the group they joined” (1984:497) and van de Velde’s statement that:

...it could happen that he [the angakkok] was an exceptionally...I would say, smart and cunning man...who may be handicapped, not bring in much game, but intellectually he was very smart and a psychologist, he knows the very sort of people and their behaviours... (1985: personal communications).

Shamans could be of either sex although like the gender ratio in the general population, which favoured males over females as in the general population, there appeared to be a predominant of male shamans. Saladin d’Anglure (1984), for example, noted that Quebec Inuit groups regarded the angakkut as “the junction of the masculine and feminine domains” (1984:497). The shaman was not only the intermediary between those two domains, but served the same role between the supernatural and physical worlds. They served to bring these two worlds together and to maintain that union in a form of symbiotic relationship. This relationship illustrated that just as a male hunter would perish without a woman to manufacture and repair his clothing and who was dependent upon that male for raw material and food so, too, were the physical and supernatural worlds dependent upon each other for their own relative survival.

The roles of the angakkut were defined by the myth and personal influence which they could command. Generally speaking these roles were the same as those presented by Price-Williams (1980) and Townsend (1984). The general duties of the shaman included: applying the combinations of both herbal and psychic medicines to assist the ill and ease the passage of those near death into the spirit world, divining the location of game, and promulgating myths and taboos. The angakkut also provided psychological support to all members of the -miut through song, dance, mythological stories and rituals throughout the year but this was
accentuated during the large communal gatherings which occurred during the long, dark winter (Kemp, 1984:473). *Angakkut* supplemented *inummarit* in the cultural transmission process.

Today, elder Inuit point out that it was the *angakkut* who could bring weal or woe upon the camp through summoning the spirits of the sun, moon, sea, animals and the dead (van de Velde, 1983: personal communications). The life-history of accomplished Inuit artist Pitseolak Ashoona illustrates a similar perception:

> When a Shaman was jealous or hated another Eskimo, he would try to kill him...But I don’t like Shamans. Even the good Shamans belonged to the Devil... They had power over the Inuit - they could bring the animals - and they had the power to kill. There were good Shamans and bad Shamans but most people feared them. The good Shamans maybe were gods. A long time ago they could cure people’s sickness (in Eber, 1977:18-29).

The power base of the *angakkut* rested upon their abilities to cure illness, divine the location of game, and convince the members of the -miut group of their powers. The acquisition of shamanic powers continues to be debated among anthropologists and theologians. Damas (1984) reveals, for example, that *angakkut* received their powers from the *hilap inui* or spirits of the air and subsequently maintained those powers through visual trickery and ventriloquism. Similarly Foulks (1972) claims that these powers were found within the shamanic language, once learned, and then commanded from the spirits. On the other hand, van de Velde (1985) comments:

> I have met few of those people and they study you without having an air of studying you; They make a decision on whom or what they are facing. According to that, they were taught to act. So, with the other natives they have been living together for 20, 30...50, 60 years, maybe so they have seen the others grow up and they know each other perfectly. Having at the same time, the quality of being a psychologist, he has an advantage over the others. It has happened that somebody who had a mental handicap, so that his behaviour is a little more out of the norm, you would take advantage of the
others by saying that he is under the power of the spirits when he is not acting quite right. They made themselves feared... (van de Velde, 1985: personal discussions).

These, then, were the socio-cultural environments within which the angakkut, ihumatar, inummiarit issumatuqjuaq, issumatuq, and -miut groups operated. These authority roles would continue to influence Inuit life until the late post-contact period beginning in 1945. Yet, having identified these sources of authority and the roles which they played within the culture, how was political leadership exercised?

Birket-Smith (1929) may offer the first key to understanding leadership in the larger social contexts of the -miut group and camp by returning our attention to the authority of the ihumatar. Indeed, if one were to integrate Birket-Smith’s comment that the ihumatar’s “advice is often taken voluntarily; he has no legal authority and can not be called a chief in the ordinary sense” (1929:258-259) with Jenness’s observation that “one of the most noticeable features in Eskimo society almost everywhere is the absence of chiefs” (1922:93) then the logical impression that Inuit society lacks any supra-familial political organization would be correct. The ethnographic literature of the last one hundred years has departed from Boas’s incorrect descriptions of “Eskimo tribes” to show that there is neither tribal nor band organization among Canadian Inuit. Van den Steenhoven summarizes this perspective, stating:

On all levels outside the extended family, Eskimo society completely lacks the structure for leadership. At any given time there may be found individuals of general or specialized prestige whose influence is felt throughout the entire camp, or even band [meaning -miut group], but they have neither explicit authority nor recognized jurisdiction: their stars rise and fall, and to follow them remains a matter of voluntary choice for everyone else. Neither ideally nor in practice do we find any recognition of authority on band or even camp level. Not even the shamans seem, as such, ever to have enjoyed recognition as local chiefs or leaders...

The community, i.e., the camp which consists of families resorting under different “jurisdictions”, has as such no leader. Both functionally and formally it lacks the characteristics of “government”. Social stratifications is absent.
But if a camp consists chiefly of families resorting under the same family *ihumatar*, it is quite possible that the entire camp becomes more or less directed by the chief personalities of that family. In spite of all this, the non-related families retain their full freedom at all times, and such camps are in principle aggregates of families (van den Steenhoven, 1962:65-66).

Since this analysis is utilizing Pospisil’s four criteria of law as a comparative tool, it seems necessary that his views on the absence of authority in general and among Inuit should be recognized at this point. Pospisil does, indeed, recognize that Inuit society does not possess political authority, stating:

We must ask why the terms “authority” and “leadership” must be divorced from any consideration of personal prestige and personal achievement or of voluntary recognition by followers, when they represent the customary qualifications for leadership and authority. Leadership based, as we have seen, solely on such qualifications has actually been recognized in the literature as a type to which the term “headman” is applied.

The position of a Nunamiut headman was determined by two things. One was his attributes as a person—his personal qualifications for leadership. The other was his position in the societal structure (e.g. segmentation of society...), the subgroups to which he happened to belong, and the extent of his personal kindred and other quasi-group (i.e., ego-centered grouping) connections (1971:73).

However, he argues that an absence of legal authority rarely occurs even in segmented societies. Agreeing with van den Steenhoven’s (1959:17) claim that formal authority did not exist among Inuit, Pospisil pointed out that legal authority existed because the actors granted such recognition to and complied with the decisions of the group (1971:44-46).

Within any discussion of Inuit law and legal systems, it is essential that the researcher does not attempt to study traditional Inuit law as a concept which may be isolated from the cultural whole. This is the trap into which many juridical enquiries have fallen and one which Pospisil’s methodology attempts to avoid. Again, it is mandatory that the social scientist
understand the roles which these primary influences played within the culture on a general basis and their specific roles within traditional Inuit law and social control. The next chapter will explore not only traditional Inuit legal beliefs but the interaction between those beliefs and the three primary influences.
IV. TRADITIONAL INUIT LEGAL VALUES AND BELIEFS

a. The Traditional Belief System

This chapter will present a description of traditional Inuit legal values and beliefs and their methods of applying those values and beliefs in the situations which they encountered. While these principles will be discussed from an analytical perspective using Pospisil’s four criteria whenever possible the Inuit worldview will be included in the discussion.

Similar to Pospisil, Hoebel (1954) was concerned with the distinctions between custom and law as well as the wholesale applications of Western legal concepts to early societies, a practice which he also condemned. Yet, unlike the former, he sought to generalize currently-identified legal concepts in order to increase their applicability and usefulness (Hoebel, 1954:21-29).

Hoebel (1954) saw a ‘fusing’ of law and custom but attributed that fusing to the failure of Western legal experts to define and adequately apply their concepts to other cultures. Members of the functionalist schools of thought in both anthropology and law, for example, have generally denied the existence of law in cultures where the legal concepts did not match their own ethnocentric labels. Indeed, those differing concepts would be denigrated through their labelling as “custom” rather than law (Hoebel, 1954:21-29).

Rather than adopt this practice, Hoebel chose to search for what he termed “jural postulates” or legal comparisons which he claimed were inherent in every social system. Sharing Pospisil’s earlier beliefs in the need for cross-cultural comparisons of legal systems, Hoebel (1954) regarded:
1. **Legitimate Authority**: which could rage from public opinion, headmen, elected officials, etc.; and

2. **Physical Coercion**: which could range from group gossip, physical sanctions, threats, etc.,

as mandatory criteria to be used when discussing law in any society. Indeed, it was his belief that these two postulates were present in both custom and law and sought to identify them among traditional Inuit customary law and social control mechanisms.

At that time, Hoebel was able to identify nine postulates among the Nunamiut of Alaska which he felt were juridically significant. Indeed, it is advanced here that these postulates are applicable to this analysis of the Canadian context. Pospisil presented the following:

**Postulate I.** Spirit beings, and all animals by virtue of possessing souls, have emotional intelligence similar to that of men.
Corollary 1. Certain acts are pleasing to them; others arouse their ire.

**Postulate II.** Man in important aspects of life is subordinate to the wills of animal souls and spirit beings.
Corollary 1. When displeased or angered by human acts they withhold desired things or set loose evil forces.

**Postulate III.** Life is hard and the margin of safety small.
Corollary 1. Unproductive members of society cannot be supported.

**Postulate IV.** All natural resources are free or common goods.

**Postulate V.** It is necessary to keep all instruments of production (hunting equipment, etc.) in effective use as much of the time as possible.
Corollary 1. Private property is subject to use claims by others than its owners.
Corollary 2. No man may own more capital goods than he can himself utilize.

**Postulate VI.** The self must find its realization through action.
Corollary 1. The individual must be left free to act with a minimum of formal direction from others.
Corollary 2. The measure of the self for males is success as a food-getter and in competition for women.
Corollary 3. Those who are no longer capable of action are not worthy of living.
Corollary 4. Creation or person use of a material object results in a special status with respect to “ownership” of the object.

**Postulate VII.** Women are socially inferior to men but essential in economic production and childbearing.

**Postulate VIII.** The bilateral small family is the basic social and economic unit and is autonomous in the direction of its activities.

**Postulate IX.** For the safety of the person and the local group, individual behaviour must be predictable.

Corollary 1. Aggressive behaviour must be kept within defined channels and limited within certain bounds (Hoebel, 1954:69-70).

It is my belief that if one were to analyze traditional Inuit law and legal beliefs using these postulates, it then becomes quite easy to understand Hoebel’s beliefs in legitimate authority and physical coercion. Indeed, Hoebel’s (1954) two criteria would appear to provide a comparison which is easier to accomplish and more accurate than one which utilizes Pospisil’s (1971) four legal criteria.

Ultimate authority for individual and group actions, for example, is found to rest with the supernatural and disseminated through the agency of the shaman. This may be seen within Hoebel’s (1954:69) first, second, and third postulates. Functional authority, on the other hand, is far more difficult to discern within these nine postulates. The closest approximate may be found within his sixth and seventh postulates although functional authority within Inuit society was exactly that, for example, as the wisest or ablest hunter and his advice would be sought out in matters of the Inuit, the best mediator for dispute resolution, and so on as the situation required.

The universality of these nine jural postulates may be found throughout the accounts of the early- and intermediate-contact periods between Inuit and *Qallunaat* from Alaska to Greenland. Such accounts range from Boas’ descriptions of both the religious and social orders and law among his study groups (1885:578-598) and those of Balikci concerning conflict among the Netsilik (1970:173-193). Balikci, for example, provides several accounts
of Inuit social behaviour which support Hoebel’s nine jural postulates. One such account succinctly illustrates the latter’s fourth postulate in action:

An elderly man, N., used to camp alone with his wife and three grown sons at Oadliq, a crossing point for caribou west of Pelly Bay and an excellent hunting area. One day when N. was alone in his tent three hunters arrived there with their kayaks to catch caribou. They were coldly received by N., who told them: “Nobody should come here unless they want to look at the sky” (“looking at the sky” meaning to lie dead on the ground with the face turned up to the sky). The people said nothing, but went down to the lake shore where they waited until N.’s sons returned and then killed them. N. went insane with anger and ran about screaming, until the three hunters killed him also. After these murders the lake was open for hunting to everybody (1970:176).

Unfortunately, persons wishing to explore the legal aspects of this case are constrained by the lack of information concerning those events which may have preceded or occurred as the result of these action. Balikci (1970) leaves the reader left to discern on their own whether or not the three hunters were, indeed, Inuit or Qallunaat!

Pospisil’s criteria of obligatio also present within these nine postulates as the rights and duties of individuals are spelled out in postulates six (rights) as well as eight and nine (duties). Obligatio may also be found in postulates three, five and seven when applied to the context of unspecified or general duties.

The major limitation within Hoebel’s (1954) jural postulates is the lack of specific information concerning the application of sanctions in either his own or Pospisil’s criteria for sanctions. While the first two postulates contain corollaries which allude to sanctions there are no direct connections between the non-compliance with postulates and any form of imposed sanctions.
Within the example, provided by the murder of N. and his three sons it is difficult to discern any form of leadership or authority in Pospisil’s context as there does not appear to be any single individual who assumes that role in the same manner as either an *ihumatar* or *issumatuajuaq* would within the -miut group. This may be interpreted as an example of lateral authority, based upon group consensus, in action and that universal application of Hoebel’s fourth and fifth postulates is occurring. This example illustrates both a violation of *obligatio* by N. in failing to recognize the common nature of natural resources and the hardship his actions could cause others, as well as its application by the three hunters who exercised their rights to protect the survival of the larger group. Sanction was applied in a swift and severe manner which enabled the hunting patterns of the area to be restored to their former state.

As shown these postulates apply to women, the family unit, the aged and infirm (including otherwise non-productive members of the society), as well as to hunting activities. Providing an Inuit perspective to these postulates and the concept of law is becoming increasingly more difficult as the number of elders decreases. During interviews conducted in the Baffin Region, N.W.T. during 1983-1987, it was concluded that Inuit did not conceive law as an abstract but as a behavioural code transmitted through oral tradition from their elders; Indeed numerous informants stated that “we acted the way we knew to be right...the right way from what our parents told us” (1987: fieldnotes).

Graburn (1969) is the next scholar to be discussed here in relation to the existence and possible use of jural postulates among Inuit populations. Using both Hoebel’s (1954) theoretical model of jural postulates and Willmott’s (1960) earlier research among Quebec’s Inuit population, Graburn (1969) was able to identify several jural postulates and their corollaries during his own fieldwork among the same Inuit populations. These postulates according to Graburn (1969), included:

1. For men life is a competition for prestige involving:
   a. the acquisition of women by any means possible;
(b) the production of as many children as possible (especially males); and
(c) the procurement of sufficient game to feed as many wives and children as possible with enough left over to be generous to others.

(2) Times of plenty are a time for co-operation and generosity. In such times, the company of everyone else is to be enjoyed, but the search for prestige remains a salient consideration.

(3) Life goods and some of the marks of prestige are frequently so scarce as to be unavailable to a seeker unless he makes a concerted effort to deprive another of these goods.

(4) The future is by no means entirely predictable and is often subject to forces beyond one’s control.

(5) Life loses its value for one when one can no longer participate effectively in the prestige competition.

The correlates of these belief statements are found in behavioural directives, personal strategies employed in realization of life goals and the avoidance of life traumas.

(1) Consider one’s own self above all others in all things.

(2) Take every opportunity for self-enhancement of prestige or self-preservation.

(3) Never risk self or prestige unless such risks are unavoidable.

(4) Test every situation and person to see how much one is likely to be able to get away with safely.

(5) Manipulate one’s social situation to every advantage.

(6) Beware of and take steps to appease the many forces of the supernatural.

(7) Accept situations when they cannot be helped, when they are beyond one’s control (afurngaumut). In such situations, there is no use in “crying over spilled milk” (Willmott in Graburn, 1969:47-48).

An interesting case example, one which contains several of Graburn’s postulates, is provided by van den Steenhoven (1962). This involves the intervention of Irkowaktok in a dispute:
Sudden fights do sometimes emerge, as some years ago between Inotjuk and Kaiaitok on the ice of Kellett River (informants: Inuksak and Arkowaktok [Irkowaktok]). Inotjuk resented that Kaiaitok had put his net under the ice so close to his own. They quarrelled and started fighting on the spot. But the ice was slippery and “it was most funny to watch them”. The quarrel would have been fought out to the end if Irkowaktok, Inotjuk’s younger brother, had not come in between and separated them. “When someone separates fighting men, it is custom that they must not resume the fighting; even if nobody says one word, it suffices that a third man comes in between and pushes them away from each other”.

The ideal norm among these Eskimos, as among the Caribou Eskimos, is that everyone, even a total stranger is allowed to hunt, fish, or trap wherever he pleases, even next to somebody else. But his presupposes at least among camp-fellows a certain attitude of fairness which Kaiaitok apparently was felt to lack. In fact, Kaiaitok has a reputation for often being too “smart” in food getting and for disregarding the highly-esteemed fairness which Kaiaitok apparently felt towards his fellow hunters; he has been openly criticized by others for so behaving (van den Steenhoven, 1962:75).

Within this discussion it is possible to discern behaviour which complies with Graburn’s second, third and fifth postulates as well as his first five correlates. The initial actions of Inotjuk could be interpreted as an attempt to gather prestige by depriving Kaiaitok of resources in harmony with Graburn’s first, second and third postulates. These actions are followed by the prestige-gathering actions of Irkowaktok, who knowingly shows his courage by stepping into a volatile situation where custom dictates his success rather than failure. As times of plenty are a time for co-operation, generosity and companionship which may, in turn, lead to increased prestige Irkowaktok provided an opportunity to restore the situation to its previously productive and harmonious status.

Such conflict, as reported, over the location of Kaiaitok’s fishnets provides an opportunity to apply Pospisil’s four criteria. The first criterion, authority, is present as Irkowaktok exercises a social control function in ensuring that common custom is followed. The interventions of the third party and the subsequent halting of hostilities may be interpreted as examples of both universal application and obligatio as all members of the dispute are
cognizant of their rights and duties once the intervention has occurred. It is difficult to distinguish the application of sanction within this case example. What is assumed by van den Steenhoven is, however, knowledge that there will be either a physical or psychological sanction applied if the actions continue.

Legal scholar Rouland (1979) also employed jural postulates in his attempts to validate Inuit legal beliefs as “law” in the Western context. It was his belief that the denial of legal status to indigenous, non-Western systems of social regulation, including Inuit legal beliefs and practices, was merely ethnocentric bigotry on the part of Western legal anthropologists and jurisprudences. Rouland recognized among the Nouveau-Quebec Inuit whom he studied the lack of codified sanctions and juridical manifestations familiar to Western jurisprudences and was able to identify a series of indicators of juridical phenomenon among his study group which he, then, compared to literature on Alaskan and Greenlandic Inuit (Rouland, 1979:18-39). The two primary indicators of juridical or legal phenomena which he was able to define were:

1. **Predetermination** of the wrongfulness of the act by the participant and the culture;
2. **Psychological sanctions** applied by the actor and the community to the situation as it occurred.

Rouland went further than the identification of legal phenomena and argued that such legal phenomena, rather than the underlying reasons for such phenomena, are recognized by sanctions in Western societies. Sanctions, Rouland states, are forms of expression by the collectivity (Rouland, 1979:67-68). Most important, however, was his noting that the main objective of Inuit social regulation methods were the resolution of conflict and the restoration of peace rather than the punishment of offenders and the deterrence of further crime through such punishments; Points which continuously emerge throughout the corpus of ethnographic literature written about Inuit (cf. Balikci, 1970; Birket-Smith 1929 Lester, 1982; Rasing, 1984; van den Steenhoven, 1955, 1959, 1962; van de Velde, 1984-1986).
Birket-Smith (1929) provides two examples of behaviour, both related to the sharing of food, which may be interpreted through the prism of Rouland’s two criteria:

At Kazan River I met a Harvaqtormio, an idle and unreliable fellow, who had gambled away his rifle and other property. Two months later his father-in-law took his daughter away from him and he was obliged to move to another settlement. The following year he travelled round to different camps as an undoubtedly very unwelcome guest. Such a man will not starve to death, for no one will deny him a meal; but he will more or less be regarded by everybody as a pariah (1929:261).

and,

I know an Iglukik shaman who, when his fellow-inhabitants of the settlement went over to Christianity, averred that out of regard for his familiar spirits he must not allow the Christians to share in his booty, whereas of course he could quite well partake of theirs. This gave rise to much scandal and some grumbling, and it was undoubtably only his capacity as a shaman that made his behaviour possible, and then probably only for a time (Birket-Smith, 1929:261).

Indeed Birket-Smith’s examples illustrate the predetermination of wrongfulness, such as understanding the wrongfulness of the bad manners and failure to share food with the group, by the members of the -miut and the psychological sanctions which they levied against the offender to induce changes in his behaviour. These sanctions included the former’s treatment as a pariah and the use of scandal or gossip rather than law.

Rouland’s (1979) indicators bear a rough resemblance to Hoebel’s (1954) concepts of legitimate authority and physical coercion. Indeed, what better sources could be found other than individual and collective predetermination of guilt although it appears that such condemnation is stronger than public opinion yet not as legitimate as headmen or elected officials. More often, the psychological sanctions applied by the collective are more effective than the Western use of the physical sanction of incarceration. The latter sanction approximates both Hoebel’s (1954) concept of physical coercion as well as Pospisil’s (1971) definition of what constitutes positive sanctions.
Yet, although in this case “social postulates” might be more appropriate, these three jural postulates point the readers’ attention towards the basic concepts of Inuit legal beliefs: the resolution of conflict and the restoration of order. Unfortunately, as increasing numbers of Inuit became acculturated in the new ways of the *Qallunaat*, including the law and methods of dispute resolution, these postulates were discarded as archaic and impractical rather than applied without exception within and across -*miut* groups. It is interesting to note, however, that interwoven throughout the traditional and modern beliefs may be found the prestige-gathering ethos identified by Graburn (1969).

As I have noted earlier (Patenaude, 1987:124-128), Inuit traditionally employed a consensus style of decision-making which, in turn, they applied to every aspect of social life, including conflict resolution and social regulation. Once consensus was attained regarding the situation at hand, another consensus would be sought to determine the appropriate action required to help the concerned individuals and ensure that group survival was not jeopardized (Rasing, 1984; Rouland, 1979). Yet, for all of their efforts to attain consensus and co-operation, Inuit behavioural responses were based upon compliance with taboo restrictions as well as the previous notions of self- and group-interest presented by Graburn (1969) and Hoebel (1954).

The charter for all Inuit values and belief statements, including behavioural responses, may be found within the traditional Inuit worldview which included intervention, and often control, by the supernatural of the physical world. Nowhere was this more pronounced than in the area of law and social regulation as Inuit burdened under an incredible number of taboo restrictions which had a supernatural base and a mortal voice in the shaman. Violations of taboo were regarded as sin on the part of the individual, however, supernatural influences were accepted within Inuit culture in much the same manner as the demonic perspective was regarded within early criminological theory (Nettler, 1985; Pfohl, 1985).
The angakkoq would often then be involved in assisting the ‘occasional’ offender in expiating their sins. However, where major transgressions of taboo or recidivist offenders were involved, the -miut group would become involved in correcting the situation and helping the involved parties. Thus, the subjective beliefs of the rightness or wrongness of the event was adjudged first by the actor and secondly for the group for whom it served as a psychological release for feelings of individual and collective guilt as well as a social function during which the supernatural was appeased and the belief system reinforced. Indeed, the impact of the supernatural was felt in every aspect of daily life among Inuit populations. This point is noted by both Graburn (1969) and Hoebel (1954) who comment on the importance of the supernatural to the physical world and that steps must be undertaken to appease the spirits.

From the perspective put forth within these same postulates may be gained an understanding of traditional Inuit methods of social regulation as well as the legal beliefs which underlie them. Within the cultural norms an individual could commit nearly any act until the larger -miut group was irritated or collectively affected, group survival jeopardized, or the injured party had lost prestige and was demanding corrective action. An interesting example of this latitude and the manner in which the elders and others apply this concept in contemporary cases may be necessary at this time. Within the case of A.B. the survival of the group, defined as the settlement’s Inuit population, is not immediately threatened:

A.B. was born and raised by a prominent family in a predominantly-Inuit settlement. He left for a short period to receive his secondary education at the regional centre and, upon completion, chose to remain there and work as a reporter for one of the local media organizations. One evening he committed an armed robbery against a taxi driver; The following morning he interviewed his victim as an assignment and was subsequently arrested. He received a sentence of incarceration. During his incarceration he was the subject of

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3 The name of this individual and his community and residence have been changed in order to protect both his identify and the identities of other individuals involved in this recent case.
numerous community-based requests for an early parole which included offers of aid and employment. He received his parole and returned home where he, then, committed numerous break-ins (and other offences) and was re-admitted to a regional correctional facility. His community continued to stand behind him as the only individuals and organizations whom he victimized were non-Inuit. This pattern continued until A.B. victimized a prestigious Inuit organization, an act which could have had monetary implications for the hunters and guides of the settlement as well as their families. At which time the entire community, including his family, turned against him. This resulted in requests that he not be released, either, early or to that community (1986: fieldnotes).

It is interesting to note that the actions of the settlement’s Inuit population were, in this case, both an example of how Inuit defer to contemporary Qallunaat social control methods and how to maintain prestige while ensuring a sanction is imposed. In the case of A.B. the settlement’s desire for him not to return is quite similar to the traditional Inuit sanction of banishment.

As previously mentioned, consensus would be sought and actions taken to restore order would be undertaken. In this sense, Inuit law is restorative (rather than punitive) although the previously mentioned case illustrates the changing nature of Inuit law and legal beliefs.

b. Conflict and Restoration of Order

The ethnographer Rasing (1984) conducted field research among the Iglukik during the early 1980s and has since discussed his findings as well as those major works undertaken on Inuit customary law, including those of Hoebel (1954) and Rouland (1979). Indeed, while his discussions on specific Inuit methods of conflict resolution are excellent, his comments concerning the nature and types of conflict within traditional Inuit culture illustrate a pattern of behaviours similar to those found within many other hunter-gather societies. Rasing (1984) summarizes the nature of Inuit conflicts when he states:
Conflicts about material things (like theft) seldom occurred; the significance of property was too small for that. What one can consider as conflicts was mutual friction, feelings of discord or irritation concerning other people’s behaviour...Most conflicts, however, concerned the possession of a woman. In fact, a man was rather helpless without a woman. Therefore, a man took someone else’s wife as a co-spouse, or lent his wife to a relative or friend, e.g. if the latter wanted to undertake an extended journey and his own wife could not accompany him for some reason (like illness or pregnancy). In addition to practical reasons, women were exchanged to satisfy sexual needs. This could confirm a friendship, but also distort it. If the other would not accept his wife a man could feel insulted. Nor was the woman supposed to protest against such an exchange. If she did, she would lower herself and affect her husband’s prestige. A woman who refused to go along with such sexual hospitality was not only held in contempt, but also found guilty (Rasing, 1984:39).

The importance of women within traditional Inuit culture has been noted nearly as often as their role as the source of conflict. Sexual behaviour within traditional Inuit society was overt rather than hidden or separated from the daily routines, according to those community elders who have been interviewed (1986: fieldnotes). This may have been due, in part, to the physical openness and close proximity within the -miut group (1987: fieldnotes). The concept of sexual activity is extremely difficult to translate or discern within Inuktitut because of this openness. Such openness was paramount in avoiding conflict and sexual liaisons became adulterous only when they were concealed or conducted without the husband’s permission as such acts threatened the prestige of that individual (Hoebel, 1954; Graburn, 1969).

The outright theft of a wife or unmarried daughter warranted formal intervention as not only prestige but the economic well-being of the entire -miut group. Van de Velde (1984: personal communications) notes that such sanctions would also be levied against the errant wife or unmarried daughter who left the family for a non-arranged relationship. Thus, it must be concluded that the functional interrelationships between the economic bonds of marriage and the sex-role differentiation were reflected in traditional Inuit legal beliefs and conflict resolution methods.
Returning to the economic limitations within the -miut group is not surprising to note that the ethnographic literature (cf. Brody, 1975; Graburn, 1969; Hoebel, 1954; Minor, 1980; Schrire and Steiger, 1981) supports the view that traditional Inuit legal beliefs did not regard the execution of the weak, deformed, or otherwise non-productive members of that group as any form of homicide. Against the backdrop provided by Graburn’s (1969) and Hoebel’s (1954) postulates any liability to the economic or physical survival of the group needed to be reduced or removed.

The loss of prestige based on reduced economic contributions to the overall group survival was often incentive enough for either elderly or infirm members to commit suicide or be deserted by the collective. Minor (1980) argues that such decisions were reached in a logical and reasonable manner which reflected the belief that suicide was “an honourable way to die because it was an acknowledgement to the other camp members of their importance and need to survival without necessary burdens” (Minor, 1980:2). The incidence of infanticide, whose reporting by Europeans may have been ethnocentric exaggeration (Brody, 1975; Schrire and Steiger, 1981), was based upon the same economic considerations exacerbated by the extreme sex-role differentiation present within the culture. Similarly those hunters who failed to provide adequate game as well as those who hunted wastefully or to excess also jeopardized the group’s economic travel. These actions could have resulted in major economic hardships and traditional Inuit methods of social regulation reflected the seriousness of both the act and its implications.

The need for stability and predictable events within a hunting and gathering society are paramount as such societies and their economic well-being are often at the mercy of the environment. Since Inuit could not control their physical environment they sought predictability within their social environment. This was manifested, for example, in the universal application of “restraint”. Rasing (1984) argues that while the restrictions on direct confrontation required restraint and these restrictions were often internalized as “the control
of one’s emotions and reserve towards others” (1984:32) that such restraint could result in censure if the individual Inuk was too reserved or restrained.

The importance of both familial and affinal relationships among Inuit cannot be underscored, however, there were those individuals who did not benefit from such support. These included the insane, witches or sorcerers, and murderers.

The insane were a dangerous threat to the physical and economical well-being of the -miut group as their presence could disrupt subsistence food-gathering activities. Van de Velde (1985) described this disruption as:

If there was an insane person in the camp then all were affected. That person might be left at home, back in the camp, when the hunters left to get caribou. Since the youngest people and some of the equipment were left behind and the crazy person was there...Suppose for a moment that this crazy person destroyed the tools and the igloos then the hunters would return to find these destroyed things. Perhaps this crazy person would kill someone when the hunters were away...they would be worried about who would get killed next and would have to stay in camp to protect their families. This would cause the group to starve unless something was done. That night the whole camp would get together and decide what should be done. It would follow that they would decide that the crazy person must be killed and who should do it. This would be done with the group’s approval and was not a case of murder...Thus order would be restored (van de Velde, 1985: personal communications).

Once again the functional interrelationships between efficient economic production and family harmony remained strong. Two other offences warranted such form intervention and sanctioned execution: witchcraft and murder. This type of formal intervention and sanction illustrates the seriousness of the offence. Similarly, the angakkut presented a serious threat to group survival if they sought to serve their own interests rather than those of the group. Indeed, the shaman’s ability to summon the spirits could be seen as a boon to the group or by shifting game and other resources elsewhere the shaman became a liability. Rather than being
limited to assistant by family members or friends, the execution or banishment of the insane or the witch could be accomplished by many techniques.

Many anthropological and criminological journals regard murder as the most serious offence within any society or culture. Within traditional Inuit legal beliefs, murder could be initiated by actions ranging from a real or perceived insult to retribution for an earlier murder. These actions would be seen within the context of the prestige gathering ethos presented by Graburn (1969) and others (cf. Balikci, 1970; Hoebel, 1954; Jenness, 1923; Remie, 1983; Sonne, 1982; van den Steenhoven, 1955, 1959). Often, the most violent and seemingly irrational outbursts of anger could be traced to an earlier and unresolved insult. The influences of the concept of restraint and the prestige-gathering ethos may have contributed to such outburst rather than having resolved them.

The methods of resolution which could be applied to the situation at hand were themselves dependent upon the consensus of the -miut group and the injured parties compliance with that consensus. As with many other societies the sanctions applied could be mitigated by the persons prestige and social standing, whereas lower social standing could result in stricter adherence to more severe sanctions while the opposite might be true of cases involving a valued hunter.

The final act of social control which may be evoked was the “blood-feud” which Sonne (1982) identified as a three stage event involving the injured party’s family and relatives taking action against a transgressor for a loss of prestige or murder. Present within Inuit mythology, the blood-feud was rare among Canadian Inuit while not uncommon among Greenlandic Inuit (Sonne, 1982:22-41). Moving through the stages of insult/revenge/counter-

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4 While these methods were limited by the group consensus, they were further influenced by the type of resolution method and persons involved in that resolution. Table 1 presents these types of conflicts/resolution methods and those persons who may become involved in the process.
revenge this type of activity could involve several generations and extended-family alliances as each party sought to equal or improve the insult previously made. This type of action was preempted within the Canadian Arctic as, in the case of murder for example, an avoidance mechanism had evolved. This mechanism involved the use of a family member to carry out the will of the -miut group to carry out a sanctioned execution or the most respected member of the community to intervene and resolve the situation (Patenaude, 1987).

<table>
<thead>
<tr>
<th>Type of Conflict</th>
<th>Resolution Method</th>
<th>Persons Involved</th>
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</thead>
<tbody>
<tr>
<td>1. Insult</td>
<td>Informal/Formal</td>
<td>Insulted Party</td>
</tr>
<tr>
<td>2. Failing to Share Food/ Poor or Lazy Hunting</td>
<td>Informal</td>
<td>Family/Partner</td>
</tr>
<tr>
<td>3. Theft of Property</td>
<td>Informal</td>
<td>Group/Victim</td>
</tr>
<tr>
<td>4. Offenses Related to Women</td>
<td>Informal/Formal</td>
<td>Family/Spouse</td>
</tr>
<tr>
<td>a. Theft of woman</td>
<td>Informal</td>
<td>Spouse</td>
</tr>
<tr>
<td>b. Failure to Accept Spouse as Gift</td>
<td>Informal</td>
<td>Spouse</td>
</tr>
<tr>
<td>c. Failure of Wife to Accept Other Man</td>
<td>Informal</td>
<td>-miut Group</td>
</tr>
<tr>
<td>5. Meeting Strangers</td>
<td>Formal</td>
<td>Duty</td>
</tr>
<tr>
<td>6. Infanticide</td>
<td>Duty</td>
<td>Parents</td>
</tr>
<tr>
<td>7. Suicide</td>
<td>Duty</td>
<td>Suicide/Family</td>
</tr>
<tr>
<td>a. Assisting Suicide</td>
<td>Duty</td>
<td>Family</td>
</tr>
<tr>
<td>8. Senilicide</td>
<td>Formal</td>
<td>Family</td>
</tr>
<tr>
<td>9. Witchcraft</td>
<td>Formal</td>
<td>Any Person</td>
</tr>
<tr>
<td>10. Insanity</td>
<td>Formal</td>
<td>Any Person</td>
</tr>
<tr>
<td>11. Murder</td>
<td>Formal</td>
<td>Family</td>
</tr>
<tr>
<td>12. Retributive Murder</td>
<td>Formal</td>
<td>Family</td>
</tr>
</tbody>
</table>

Key:
- Informal Methods: gossip, mockery, derision, ignoring, fear of magic retribution
- Formal Methods: song/drum duels, physical contests, banishment, execution
- Individual Duty: action by individual is required in accordance with custom

Sources:
These, therefore, were the traditional Inuit concepts of law and social control. As may be seen throughout these discussions was a lack of any formal authority or power among individuals to enforce the group’s norms and desires. Utilizing Pospisil’s (1978) four criteria, it is possible to understand that ultimate authority was vested within the mythology and spirit world while functional authority was held within the overall -miut group rather than by a single individual or class of persons.

The legal beliefs and value system which Inuit employed was neither class-oriented nor aimed at controlling the actions of any group to the advantage of another group even though it was influenced by their subsistence lifestyle. These beliefs controlled or regulated the subsistence economy (with which these beliefs were intertwined) through their universal application to all members of the society, each of whom understood their rights and duties towards themselves, other immediate family members and partners, and to the larger -miut group (obligatio in Pospisil’s terms).

Finally, traditional Inuit law contained both physical and non-physical sanctions. These sanctions differed from Western legal sanction although they also set the tone for the future integration of traditional Inuit sanctions into the Euro-Canadian courts in the North. Traditional Inuit legal sanctions differed from their Western counterparts as they generally sought to resolve conflict and restore order through the correction and aid given to the offender. Western legal sanctions, on the other hand, sought to punish the offender and deter further transgressions through such punishment. Yet, what other value and belief differences are inherent in these two legal systems?
a. The Evolution of Common and Positive Law

The systems of criminal and civil law practiced by Euro-Canadians have been based upon the Common Law of England since the time of Confederation. The sole exception being the province of Quebec which practices a French-based civil law system. Indeed, as there may be more than one legal system operating within Canada, it is important to understand the second and dominant system of law: the Anglo-Canadian legal system.

The origins of the legal concepts used by most Western nations may be traced to their conception in either the Roman *ius gentium*, the law of nations, or the *lex naturalis* or natural law beliefs defined by Saint Thomas Aquinas. These legal concepts may be categorized as part of the *lex humana* or positive law. Europe’s Middle Ages may be perceived as the gestation period for many of those beliefs and their birth in the legal forms we have seen throughout the last two hundred years. Prior to the last two centuries the natural law treatises of Aquinas dominated nearly all speculative thought in Europe. Primary within those treatises were two belief statements: first, the *unity* of all aspects of life having originated with the Christian God and, secondly, the *supremacy of law* originating within *lex aeterna* or God’s divine will, and defined through God’s law as contained in Scriptures; The latter is termed *lex divina* (Lloyd and Freeman, 1985:92-111).

*Lex humana*, or positive law, has grown from its birth in the form of natural law into the different modern forms of law seen today. This growth is regarded as acceptable for three reasons. First, Western societies have developed differentially; Law as an institution evolves in tandem with the society of which it is part. Legal scholar von Savigny (1981) commented on this tandem evolution when he stated his belief that “law grows with the growth, and
strengthens with the strength of the people, and finally dies away as the nation loses its nationality” (in Lloyd and Freeman, 1985:868-869).

The notion of law and society developing or ‘evolving’ from an early ‘primitive’ stage to a modern ‘civilized’ stage was not restricted to anthropology but has been a common feature in jurisprudence, notably during the nineteenth and early twentieth centuries. This was characterized by the anthropological and legal works by proponents of the “evolutionist” perspective.

Archetypical of the evolutionists were the works of legal anthropologist Lewis Henry Morgan and jurisprude Sir Henry Maine. The former believed that mankind passed through three common stages of development each possessing its own level of technology and social institutions. Progressing through these stages man would instinctively develop the need to strive further according to Morgan. Each revolutionary stage was assumed to possess law or legal aspects although its form would be dictated by the environment and the stage itself. Morgan sought to reconstruct these stages and their social institutions (Honigmann, 1976; Kaplan and Manners, 1972). The latter rejected the natural law and social contract theories of the past for being “unhistorical” in favour of an evolutionary framework. Maine, for his part, believed that as the society changed so, too, would the institutions of that society change, including law although it has been the slowest institution to change. Society and law were envisioned by Maine as progressing through “phases”.

The four phases which law progressed began with a form of kinship-based law and progressed through the two intermediate phases of socially recognized leadership-based law and the control of law by a dominant-elite or aristocracy to the final phase of legal development wherein it is part of a written, codified law and legal principles. Like many of his predecessors and successors, Maine assumed the existence of law in every society and believed that the level of legal development would correlate positively to the cultural development of that society (in Lloyd and Freeman, 1985:895-896).
Based upon the arguments presented by the evolutionists, it is generally accepted that each society, whether primitive, developing or mature, possess some form of customary law which has developed out of its folkways and mores. It is similarly believed that the progression of these same ‘folkways’ has been an adaptation from the mass acceptance of customs based upon common experience while ‘mores’, as such, have developed from “the intelligent reflection upon experience coupled with an analysis of the necessary social good” (Cotterrell, 1984:20).

It becomes important to recognize the elementary differences between the evolution of juridical beliefs of law as an abstract and the concomitant evolution of anthropological beliefs of law as a functioning social institution. The inherent difficulty of this duality is discussed by Williams (1948) who stated:

Now it is a fact that it is practically impossible to frame a definition of “law” in short and simple terms that will both include early customary law and exclude modern conventions [of the Constitution]. If it includes the one it will include the other, and if it excludes the one it will exclude the other. This leads the single-proper-meaning theorists to argue among themselves whether conventions are to be put in or early custom to be left out. The misconception again comes from supposing that there is an entity suspended somewhere in the universe called “law”, which cannot truthfully be described as both including custom and excluding custom. When we get rid of the entity idea and realize that there is no absolute need to use words consistently. The word “law” has one meaning in relation to early customary law and a different meaning in relation to municipal law (Williams [1948] in Lloyd and Freeman, 1985:81-82).

Thus, Williams presents a contradiction that both includes and excludes custom and law from each other as well as the unicentric arguments of Bohannan (1965). It further advances the concept of the creation of municipal law from a unicentric power base among a single culture and the “form or function” argument current among ethnographers and jurists. Legal scholar Fuller (1969) discusses the common use of the term “customary law” as being:
the expression “customary law” is a most unfortunate one that observes almost beyond redemption, the nature of the phenomenon it purports to designate. Instead of serving as a neutral pointer, it prejudges its subjects; it asserts that the force and meaning of what we call “customary law” lie in mere habit or usage (in Lloyd and Freeman, 1985:911).

In searching for an adequate definition which would appease this duality the works of Fuller and Williams continue to emerge prominently. The former provides an excellent definition of customary law whereas the latter’s writings present the importance of customary law in non- and proto-urban cultures.

As Fuller previously noted, it is impossible to understand “ordinary” or statute law without obtaining an understanding of customary law and its evolution into positive or statute law. Due to the nature of both his definition and method of advancing his reader’s understanding of concerning customary law, Fuller’s definition is presented unedited whereby he states that:

the phenomenon called customary law can best be described as a language of interaction. To interact meaningfully men require a social setting in which the moves of the participating players will fall generally within some predictable pattern. To engage in effective social behaviour men need the support of intermeshing anticipations that will let them know what their opposite numbers will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn. We sometimes speak of customary law as offering an unwritten “code of conduct”. The word “code” is appropriate here because what it involved is not simply a negation, a prohibition of certain disapproved actions, but also the obverse side of this negation, the meaning it confers on foreseeable and approved actions, which then furnish a point of orientation for ongoing interactive responses. Professors Parsons and Shils have spoken of the function, in social action of “complementary expectations” indicates accurately the function I am here ascribing to the law that develops out of human interaction, a form of law that we are forced - by the dictionaries and the title headings - to call “customary law” (in Lloyd and Freeman, 1985:911).
The importance of custom as a basis for law in urban societies should not be discounted. Custom gives validity to the common law of the land, whether in oral or written form, as it is “often the embodiment of a society’s most deeply felt principles of justice and public utility” (Yabsley, 1984:4). This becomes increasingly important as the society evolves from a stateless society into a stage-organized society. Williams (1947) aptly described the importance of custom law in society as:

Custom is to society what law is to the state. Each is the expression and realization, the measure of men’s insight and ability, of the principle of right and justice. The law embodies those principles as they commend themselves to the incorporate community in the exercise of its sovereign power. Custom embodies them as acknowledged and approved, not by the power of the state, but by the public opinion of the society at large. Nothing, therefore, is more natural than that, when the state begins to evolve out of the society, the law of the stage should in respect of its material contents be in great part modelled upon, and coincident with, the customs of the society. When the state takes up its function of administering justice it accepts as valid the rules of right already accepted by the society of which it is itself a product, and it finds those principles already realized in the customs of the realm (in Yabsley, 1984:4-5).

Prior to discussing the ‘positivist’ nature of modern interpretations of Western law legal beliefs, it seems that it has become necessary to decide on whether or not customary law is, in fact, a form of law which has a role in modern Western law. The best possible answer might be found in Fuller’s comment that:

[anthropology]...seems to define law by imperfection. If the function of law is to produce an ordered relationship among members of a society, what shall we say of a system that works so smoothly that there is never any occasion to resort to force or the threat of force to effectuate its norms? Does its very success forfeit for such a system the right to be called by the prestigious name of law? (in Lloyd and Freeman, 1985:914).
The affirmative answer to this latter question is unfortunate when the modern, Western concepts of law are defined. The reason for this may be found in both the legacy of evolutionism and ethnocentric beliefs left to jurisprudence by Maine and Morgan.

There has been a tendency among Western jurisprudes to regard any unwritten, non-codified system of law and legal principles as mere custom rather than law (cf. Griffiths and Patenaude, 1988a; Lester, 1982; Rouland, 1979). The basic premise of Western law is that each transgression is an act against the state rather than an act against an individual thus requiring state intervention to punish and deter the offender (Gall, 1983:20). Following the traditions of Maine and Morgan the state and its institutions are regarded as the ‘highest’ evolutionary stage which man has attained and therefore any lesser form of social organization and law are denigrated by the ethnocentric anthropologists and jurisprudes (Bohannan, 1965; Cotterrell, 1984; Fuller, 1969; Hoebel, 1954; Falk-Moore, 1979).

Removing the individual and replacing it with the state in the dispute resolution process has had the effect of destroying any individual ‘ownership’ of the problem or its solution. The state becomes the instrument of the public interest and its initiatives are regarded as the collective efforts of the society. This is not interpreted in the same manner by political economists who regard the states as “a class-biased structure of manipulation...its legal apparatus an instrument of ruling-class domination” (Ratner, McMullan and Burtch, 1987:98). If the use of law by the aristocratic order, caste, or the judicial oligarchy is injected at this point then the political economy views of Marx and others become apparent. The state is regarded, within most Western societies, as being capable of preserving and protecting the society and its citizenry as well as the rights of the accused individual from societal abuse or abuse by the processes of the state. Yet, as grand as these beliefs and concepts appear, they fail to recognize their common origins in customs and observances.

Codified legal principles and statutes have evolved along similar paths in most Western societies although its peculiar manifestation has been the result of the specificity of national
history. In general, it is understood that “common customs” were known by citizens throughout the land which, in turn, evolved into the “common law” of the emerging nation. This body of common law originated in the beliefs of natural law and the emerging body of statute law.

This historical approach was a necessary evil in order to adequately explain the custom-law debate within Western legal concepts. Since the written form or ‘codification’ of law is based upon the growth of the society in terms of technology, social institutions, and methods of social control many legal anthropologists and jurisprudes discount the value of earlier, non-written, common-law based systems of law and social control. Therefore, the Western concept of law evolves as being:

1. appropriate to the level of socio-political evolution of the society from savagery to barbarism and civilization,
2. based upon natural law principles and common-law practices, as they evolved from custom and precedent,
3. the exclusive right of the society of enact, enforce and change in its written codified manner,
4. what the state law defines the law to be in the realist tradition.

Accordingly custom and customary law are relegated to the status described by Allot and Woodman (1985) as:

Customary and other similar laws were official laws, in the sense that they were (and indeed often still are) the generally recognized legal systems within the societies which they governed. Unofficial “laws” and codes within state systems are precisely what the adjective suggests, viz. bodies of rules and modes of settlement at best tolerated and at worst prohibited by the official state power. In this sense...unofficial laws can be found within the most sophisticated polity as well as the less developed (Allot and Woodman, 1985:1-2).
These comments have pointed towards that group of legal theorists which has been commonly referred as both “judicial realists” and “judicial positivists”. Lloyd and Freeman argues that:

The Positivist answer tends to reduce the common law to a system of rules laid down by the will of the law maker. This is clearly unsatisfactory, rather as Austinian attempts to explain judge-law in terms of tacit agreement are unhelpful. Simpson prefers instead the view that the common law system is a customary system of law, consisting of a body of practices and ideas received by a caste of lawyers (1985:1097).

Yet, it is important to remember in the Anglo/Euro-Canadian system of law that it is, indeed, the lawyers and judges who determine the applicability of common and customary law in the Canadian legal system.

b. The Queen’s Law as Absolute

This section will illustrate the basic tenets of the Euro-Canadian system of law and criminal justice with a focus that is systemic rather than conceptual. Throughout this section, a brief description of the historical development of this system will be presented. Due to both the nature of this essay and the need for brevity, this section will concentrate on the non-procedural or non-adjectival components of the Euro-Canadian system of law. The following discussion will not present the history of the application of Euro-Canadian criminal laws upon the various ‘native’ groups since the colonization, and later colonialization of Canada as they will be addressed in a subsequent section.

As previously stated, the basic premise of the Euro-Canadian system of criminal law is that each criminal act is an act against the state, which is serving the public interest, rather than an act against an individual (Gall, 1983:20). This has had the effect of removing individual ‘ownership’ of the problem (in both the emotional and psychological contexts) and any resultant responsibility for seeking redress. The ‘system’ is believed to be the collective
efforts and will of the entire society in dealing with the criminal act and actor.\(^5\) The state is often regarded in Western society as being capable of preserving and protecting the collectivity as well as the rights of the accused individual from either societal or procedural abuse.

Yet, as grand as these beliefs appear they fail to recognize their common origins in customs and observances which, according to numerous legal anthropologists, are the basis of legal authority. Indeed, through the continued use of these principles some theorists of the social contract genre might argue that the individual has granted *authority* to the state to enact and enforce the rules of social conduct on their behalf. These social contract-style beliefs contradict Pospisil’s correct view that the judiciary has been granted legal authority to enforce the rules of social conduct. Through internalization of this latter belief that both the individual and the collective seek and, possibly, achieve the *universal application* of those rules.

The mechanism which operationalizes this basic premise is the ‘adversarial’ system of criminal justice. Thus preserving the rights of both the collective and the individual by having the ‘Crown’ prosecuting the accused offender on its behalf. The individual accused’s rights are preserved by the need for the Crown to prove its case beyond the shadow of a reasonable doubt, which, if it fails to do so results in an acquittal of the accused. A system of checks and balances against abuse by either party, more notably the states abuse of the individual.

The basis for these legal beliefs may be found within the history of English common and statute law and the development of legal institutions, such as a hierarchy of courts, to deliver the law. The concept of the King (or Queen) as the single repository of all law and

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\(^5\) This has been interpreted through numerous theoretical perspectives. The political economy perspective, for example, regards the “system” mentioned here as a synonym for the “state”. They argue that the state may be regarded as “a class-biased structure of manipulation...its legal apparatus an instrument of ruling-class domination” (Ratner, McMullan and Burtch, 1987:98).
justice gradually evolved in the various levels of courts and the ‘common law’. These courts of law and equity were presided by a magistrate or justice in the King’s stead. Such courts would rule upon the guilt or innocence of an accused in accordance with the statutes of the day and the ‘common law’ which preceded that particular case. This new common law evolved from common customs, which were known throughout the land, into the common law or case law. Lawyer Gall attempts to trace this evolution:

Eventually, they began to take on a formal aspect and the judges of the various courts held themselves bound by past decisions, and therein lay the origin of the common law as a body of jurisprudence of past decisions upon which judges rely in deciding the cases before them (1983:42).

This body of common law perpetuates the concepts of natural law and integrates them with the statute law of the land. While not evoking debate on the origins and types of law (cf. Hart, 1958, 1969; Dworkin, 1983; Fuller, 1958) the three basic concepts of Western law may be seen, namely:

1. that all law originates from the divine will of God (or Gods) and contain certain universal beliefs such as the value and rights to life; this is known as ‘natural law’.

2. the law is based upon what the law says the law to be, or ‘positive law’; This is primarily the case where statute or codified systems of law are involved.

3. the relative context within law contained in the legal realist school of thought which deals with the situational factors involved in trial and sentencing processes of the case. This area deals not with the common law but the environment of the court.

These concepts have, and continue to, shape the evolution of the common law in similar fashion to statute law which, in turn, determines the base of future common law (Lloyd and Freeman, 1985:683-709).
These origins may be regarded as appropriate since the codification of criminal law in the Euro-Canadian legal system. The written form and subsequent codification of law are based upon the growth of the society, in terms of physical geography and social control methods, and the positive law belief that “nullum crimen sine lege, nulla poena sine lege - that there must be no crime or punishment except in accordance with fixed, predetermined law” (Stuart, 1982:13).

Through his previous mention of the tendency for judicial reliance upon past decisions Gall (1983) has provided an introduction for a discussion on two major principles within English common law: stare decisis and ratio decidendi. The former, stare decisis, is based upon the belief that both continuity and consistence must be maintained in law and legal proceedings. Placing obligations on the judiciary to preserve the rights of accused parties and to act in a manner it provides both legal reliance and certainty of sanctions based upon past decisions from similar cases. This was commented upon by both Lord Eldon who stated in Sheddon v. Goodrich (1803)⁶ “it was better that law should be certain than that every judge should speculate upon improvements” and in this century by Wasserstrom (1961). Wasserstrom provides support for Pospisil’s concept of obligato when he states that a “person’s reliance [on the legal and judicial system] would be justifiable if and only if that person was justified in assuming that legal rules would be unswervingly applied” (in Lloyd and Freeman, 1985:113).

The second legal principle which Gall (1983) introduces is that of ratio decidendi. This principle is essential to the operation of any legal system which utilizes case precedents in the same manner as found within the Anglo-Canadian common law. Ratio decidendi is regarded as the binding principle of the case at hand. This may be seen in the comments of Gall (1983) and Lloyd and Freeman (1985). The latter authors, for example, note that the principle:

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⁶ Sheddon v. Goodrich (1803), 8 Ves. 481, 497; 32 E.R. 441, 447.
is well recognized in the orthodox theory, which confines the ratio decidendi (or binding principle of the case) to the formulation of the applicable rule in the case so far as it is necessary to the matter which is being decided, the remainder being mere obiter dicta. This leaves open the question how such necessity is ascertained, though it has long been accepted that a case only binds as to “like facts” (Lloyd and Freeman, 1985:1115-1116).

The decision of what constitutes the ratio decidendi, or binding principles of the case, and the non-binding comments, or obiter dicta, are those of the trial judge alone who is required to comply with the common law principle of precedence.

Having created a codified system of laws, the Euro-Canadian legislators and jurists continued to follow the English common law mode which was based upon knowledge of the law and the concept of free will. In so doing, they imported the concepts of actus reus and mens rea into the criminal law. The former concept, actus reus, is simply defined as “the guilty act or deed of crime” (Yogis, 1983:8) while the latter, mens rea, is simply “the culpable state of mind” (Yogis, 1983:134). While these complex concepts have been debated among active jurists and their scholarly brethren, it is generally accepted that the guilty mind or intent (mens rea) is required to turn any guilty act (actus reus) into a criminal offence. This is presented in Figure 2 as a schematic of the elements of a criminal offence.

The Anglo-Canadian system of law and legal institutions provides an excellent opportunity to apply Pospisil’s schema of legal components to an industrialized nation-state. The locus of political authority, rather than legal authority, within this system of codified laws is initially found in the natural law beliefs of Aquinas and more contemporarily within
A) General Offences:

Actus Reus (Guilty Act) → Criminal Act

Mens Rea (Guilty Mind) → Criminal Act

B) Offences Requiring Intent:

Actus Reus (Guilty Act) → Subjective Test (Aware, Intent) → Criminal Act

Mens Rea (Guilty Mind) → Objective Test (Carelessness, Inadvertence) → Criminal Act

C) Offences Not Requiring Intent:

Actus Reus (Guilty Act) → Criminal Act

Legal Premise: *Actus non facit reus, nisi mens sit rea* or “the intent and the act must concur to constitute the crime: (Mewitt and Manning, 1985:105)

Sources:

Figure 2 Elements of a Criminal Offence - A Schematic Version.
the Parliament of Canada. As previously stated, the locus of legal authority is within the judiciary and its hierarchical structure which exercise social control on the local levels.

The intent of the Canadian legal system is to protect, both, the collectivity from the actions of aberrant individuals as well as individuals from the abuse of the state. Thus the universal application of the criminal law is held by the dominant culture as fair, equitable and normal.

While the rules of social conduct are applied to all members of the society, unfortunately as noted within the political economy perspective, the results of that application vary considerably between socio-economic status groups. Indeed, this application of the rules of social conduct is mirrored by the differential obligatio to various status groups such as immigrants and native peoples. Although the great majority of Canadians are aware of either their individual or collective rights and duties, there are groups which may suffer from socio-structural deprivation (Griffiths, Yerbury and Weafer, 1987) and are unaware of either their rights or obligations as members of the state.

The final component of law which Pospisil (1971) identified is the application of sanctions. The codification of law within the Euro-Canadian legal system details a range of sanctions which may be levied against transgressors. Throughout the body of Euro-Canadian case law one basic principle emerges: punish offenders and deter further criminal activity, both specific to that individual and to the general public, through that punishment, the nature of the sanctions it applies are negative in nature and application. Once again, the reader is able to appreciate the similarities between Pospisil’s (1971) concept of sanctions and Hoebel’s (1954) jural postulate of physical coercion.
These criteria of law, both Hoebel’s (1954) and Pospisil’s (1978), are currently present within the body of Canadian case law. Indeed, the case of *R. V. Moffit* [1984] presents the opportunity to examine an actual case of decision and to abstract Pospisil’s four criteria from the actual behaviour and the legal decision. In brief, the case involved:

The accused, a police officer, was charged with assault causing bodily harm contrary to § 245.1 of the Criminal Code. The Crown alleged that the accused used excessive force in order to effect the arrest of a drunken patron in a crowded bar. The bar manager had called for police assistance after the victim and his companion caused a disturbance and refused requests by the manager to leave. When the accused and another officer approached the victim’s table and requested him to leave, he defiantly refused and struck the other officer in the chest when he was informed that he was under arrest. Both officers and the victim fell to the floor, while a third officer attempted to keep the crowd back from the melee. It was only after the victim had the other officer to keep the crowd back that the accused pulled out his flashlight and struck him on the head with it. The blow caused a fracture of the skull. The fracture was not depressed and there was no evidence of injury to the brain.

Held - Accused acquitted.

On the evidence, there existed a reasonable doubt that the force used was excessive. The accused had reasonable and probable grounds to act as he did in all the prevailing circumstances. Bearing in mind the crowded bar and the efforts which the third police officer had to make to keep the crowd back from the melee on the floor, it was only common sense to conclude that the sooner the potentially dangerous situation was dealt with in a conclusive way the better it would be for all concerned. Had the victim’s brain been injured, or had there been bleeding under the fracture, the Crown’s case would have been much stronger *R. v. Moffit* [1984] N.W.T.R. 313-314).

The trial judge, Mr. Justice M.M. DeWeerdt, is the legal authority in this instance as he has the functional powers, in the fullest measure of our interpretation of Pospisil’s attribute of authority, to decide if the rules of social conduct, namely those contained in § 241.1 of the Criminal Code, were broken and to cause that rule to be enforced by sanction.
Reviewing the actual behaviours presented in this case, it is possible to see that the victim, and the individual with whom he had caused a disturbance, was treated in a manner that was common and without exception in similar occurrences. The discerning of the attribute of universal application from within the case decision, was, indeed, made easier by the fact that the accused is a police constable and one who is, normally, charged with enforcing the rules of social conduct. This case example illustrates, both, the intent and the application of the principles of conduct to all members of the society regardless of their status group.

The rights and duties of the disputants while engaged in the actual behaviour may be seen in both the victim’s demand to be informed of the reason for his arrest and the constable’s duty to inform him of those reasons. These rights do not include resisting arrest on the part of the victim nor the use of excessive force by a peace officer to effect that arrest. It is these principles, notably the latter, which distinguish the legal relationships in this case. The breaking of that principle, as contained in the rules of social conduct, did not occur in the view of the trial judge and his decision was to not proceed any further.

The trial judge’s authority, in this case, could have included the application of sanctions to enforce compliance with the rules of social conduct. This was not necessary in this instance as he adjudicated that the rules were not contravened. Had the trial judge decided that an offence (actus reus) had occurred and the constable had the unlawful intent (mens rea) while he committed it, then he could have imposed sanctions ranging from a discharge to imprisonment from one day to ten years duration.

8 The “Reasons for Judgement” delivered by Mr. Justice DeWeerdt in this case show, however, that while the victim was handled in a manner common for patrons of the Mad Trapper’s Lounge in Inuvik, N.W.T., that his actual behaviours were monitored more closely than other patrons due his history of brawling.
Once again, there may be observed within the Euro-Canadian legal system an inherent bias towards written and codified types of legal systems. Hoebel (1954:19-21) identified this bias in his comments on the tendency of western anthropologists and jurisprudes to discount the importance of non-written, customary-based systems of law. This ethnocentric attitude\(^9\) has caused an unfortunate division between those two groups of scholars and internal disagreements concerning the value of non-codified legal systems.

Yet, what biases and ethnocentrism abound within both those non-literate cultures which practice forms of customary law and those Western cultures which practice forms of statutory law? An examination of the manner in which traditional Inuit legal values and beliefs have been regarded by the Anglo-Canadian courts will reveal many of those same biases and ethnocentrism. Let us look, first, at that system of Anglo-Canadian criminal courts and how they interact within the overall criminal justice system in the North.

\(^9\) Similar attitudes are present within the study of history. In that area there is a definite bias against the acceptance of folk history, based upon an oral tradition, as genuine history. Various ethnohistorians, including Carmack (1971), Hudson (1966), Sturtevant (1966) and Trigger (1982, 1986), have commented on this bias towards the written record of economic, political and military events and the subsequent relegation of non-written histories as “pre-history”.

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VI. COMPETING NOTIONS OF SOCIAL REGULATION

There are few areas where the competition between cultures is more evident than in the legal arena or the courts. The dominant culture establishes its position of advantage in that arena by the very nature of the court system: a set of symbols and practices which reflect the values and beliefs of the culture which establishes it. Often these courts or similar legal institutions merely reflect those values, however, there are occasions within pluralist countries that the courts reflect the values of the subordinate groups. Hunt (1988) notes this has resulted in enriching the Canadian law and legal institutions. However, the introduction of an incursive system of law and legal traditions upon an indigenous population more often results in confusion, conflict and occasionally the overrepresentation of the indigenous peoples among the prison population as evidenced in Australia, Canada and the United States.

This chapter will present examples of that enrichment in three broad areas: hunting law, family law and criminal law. Indeed, if there exists any conflict between traditional Inuit law and legal beliefs and those of the Qallunaat it should become apparent at this time.

a. Criminal Law

The approach of the Canadian criminal courts towards customary law, whether Native Indian or Inuit, has been based upon total rejection since the early years of this century. This judicial tradition may have its origins in the ethnocentricity of the Anglo-Canadian criminal justice system as well as the power relations between the federal government and the indigenous peoples. Indeed, the insertion of Inuit customary law into the common law may occur if it can be shown that such customary law complies with certain judicial prerequisites as detailed by the dominant society (Yabsley, 1984).
The history of the N.W.T. and the administration of justice in the North have been marked by change since the transference of the region from Great Britain to the Dominion of Canada in 1870. Since that time, the Euro-Canadian agents of social control have also moved North. Their reasons were varied: the missionary sought to save souls, the government agent to establish Canadian Arctic sovereignty and the police to further the national policy and to enforce the *lex patriae* or law of the land.

The criminal law of the N.W.T. is the federal *Criminal Code* and is applied to all adult citizens of the Territories. As such, the criminal law is based upon the principles inherent to the common law and has the ability to incorporate the values of indigenous population into the case law or precedent. However, this flexibility has not always been utilized as the decisions of Chief Justice Harvey of the Alberta Court of Queen’s Bench and Mr. Justice Marshall of the N.W.T. Supreme Court illustrate. Indeed, the former jurist stated that:

> they have a right to have their case considered fairly, and fully and honestly; but on the other hand they owe a corresponding duty...the laws are the same for all; they are all equal before our laws, and what would be an offence for one would be an offence for all (in Moyles, 1979:79-80).

whereas the latter justice echoed those thoughts by stating:

> No matter how these matters are seen in a particular community, there is only one criminal law for all Canada and for all Canadians...This is where there is a conflict between their Native custom and valid criminal law. Canadian criminal law applies to all Canadians. This, of course, does not mean that Native traditions and customs will not be honoured; they will. But where they conflict with the criminal law of Canada, the criminal law must be followed (in *R. v. J.S.B.* [1984]).

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Yet, these two decisions have not discounted the inclusion of custom and customary law into the criminal law and courts of Canada.

The inclusion of customary law into that arena must again be carried out in a manner which complies with those juridical prerequisites mentioned by Yabsley (1984). Since the creation of the Territorial Court of the Northwest Territories, the courts there have attempted to include the cultural and social values of Northerners into the criminal courts. The realist of the imposition of the Anglo-Canadian legal system in the North was not as trouble-free as many romantically perceive it had been. Inuit were ignorant of the intent, form and content of the Qallunaat laws, although they deferred to the power and authority of the police and other Euro-Canadian agents of social control in harmony with Graburn’s analysis. As Hunt (1988) has presented Northern lawyers have framed and jurists have accepted legal arguments which rely on customary law and practices.

In the area of sexual assault, for example, several cases have been argued on the basis of custom, in particular, the open attitude to sexuality among Inuit. During recent discussions with Inuit elders and linguists, it was possible to discern a fuller understanding of traditional Inuit beliefs and practices concerning sex and sexuality. One of the problems encountered by the Canadian courts was the ethnocentric attitude on the privacy of the sexual acts as within traditional Inuit culture sexuality was open as the confines of a snow or sod house or tent precludes a high degree of such privacy. This problem was compounded by the lack of adequate translations for sexuality or sexual activity, in general, although the terms “sexual assault”, or arngnaniaqsimavit ilalluaqsiarnik, and “incest” or arngnaniaqsimavit paninqnik/ilningnit (for females/males) are easier to translate. In the latter area, incest, it was interesting to note that the incest taboo, while quite strong, did not apply outside the biological family. Thus, sex with members of a remarried family unit (step-children or adopted children) was not regarded as incest (1989: fieldnotes).
Another problem emerges from the sexual assault provisions of the *Criminal Code*, notably §139, which does not permit sexual activity, whether sexual openness of the -miut group did not extend to having sexual activity with young children yet, it often permitted “sex to occur when the young people were ready to have sex” (1989: fieldnotes) which may have been extended to consensual sexual activity between persons under fourteen years and older individuals, including adults. This latter area was the subject matter in *R. v. Curley, Issigaitok and Nagmalik* [1984]11 where a young girl in a remote Inuit settlement went looking for alcoholic beverages and, possibly as a result of that consumption, sexual partners. During the course of the evening and early morning she had separate consensual intercourse with each of the accused. The offense was not reported by the young girl but was detected through other means within the settlement.

During the process, a favourable Pre-Sentence Report was prepared by a Qallunaat social worker wherein she stated that the act was acceptable sexual conduct within traditional Inuit culture as she understood it to be. Rather than accepting this fact as a mitigating factor in adjudicating legal guilt or innocence the trial judge applied it in sentencing. Thus, valid Canadian legal principles would continue to be applied in determining guilt but the sentence could reflect traditional values and beliefs where they did not fundamentally contradict or oppose the former.

Two further examples of this type of conflict may be seen in *R. v. L.J.; R. v. B.N.* [1985]12 and *R. v. Naquitarvik* (1984) [1986].13 In the first instance, one of the appellants L.J. was unaware of the victims true age, involved with her in a romantic relationship and claimed that he was unaware of the wrongfulness of sexual activity with a person under fourteen years of age; The sentence reflected these factors and was varied downward. The appeal of *R. v.*

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11 *R. v. Curley, Issigaitok, and Nagmalik* [1984], NW.T.R. 281 (N.W.T.C.A.)


There have been numerous unreported cases involving Inuit offenders attempting to use traditional disciplining of a spouse as a defence. These include: *R. v. Kailek* (1980) (unreported) and *R. v. Krenenektak* N.W.T.S.C., Tallis, J. 1981 (unreported).

A most interesting application of traditional Inuit practices occurred in the second sexual assault case, *R. v. Naquitarvik* [1986], where the trial judge imposed a sentence that included, among intermittent incarceration and community service, counselling by the local *Inummariiit* committee. Although the appeal court varied this sentence upwards, this original sentence was successful in helping the offender reintegrate into the community.

Assault is one area which presents contradictory sentencing practices to any reviewer. In the areas of common and aggravated assault as well as assault causing bodily harm, the Courts have followed the principles and practices of Anglo-Canadian law in sentencing offenders who have injured strangers (in the legal context). The opposite appears to occur when *intra*-familial assault occurs. Unfortunately, there is a paucity of reported Inuit cases, however, a number of Dene (Native Indian) cases illustrate how this interpretation of cultural norms has been approached by the courts.

The first example may be found in Mr. Justice Marshall’s earlier comments in *R. v. J.S.B.* [1984] concerning the applicability of custom in the Canadian courts. The second case, *R. v. Baillargeon* [1986] resulted in a similar outcome for the accused who had inflicted grievous bodily harm on his wife over a lengthy period of time. There Mr. Justice Marshall stated:

> Spousal assault is no less serious because it occurs in a Dene village rather than a depressed or even affluent section of Toronto or Halifax...In my view, to

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14 There have been numerous unreported cases involving Inuit offenders attempting to use traditional disciplining of a spouse as a defence. These include: *R. v. Kailek* (1980) (unreported) and *R. v. Krenenektak* N.W.T.S.C., Tallis, J. 1981 (unreported).

take account of culture, isolation and other attitudes which are not in accord with clear Canadian law is just to delay the day of atonement. It only puts off the inevitable (in *R. v. Baillargeon* [1986]:126).

One area where the courts have attempted to impose culturally relevant sentences where the offender has committed a firearms offence yet requires the use of a firearm in their daily, subsistence lifestyle. In *R. v. Tobac* [1985]16, a Dene offender was convicted of assault with intent to wound with a firearm and was not prohibited from carrying a firearm, as is the norm, for those same reasons. Similarly, the courts have supported the traditional use of banishment as a method of dealing with recalcitrant and major offenders. In *Saila v. R.* [1984]17, the Supreme Court upheld the banishment of a recalcitrant offender by a Justice-of-the Peace while the Territorial Court banished a young offender in *R. v. J.K.* [1984]18 from the area of his home community as part of the sentence for murder.

These different cases present the reader with opportunities to understand the differences in approach to crime between the Euro-Canadian and Inuit systems of law. Let us examine the four criteria of law presented by Pospisil (1978) as they exist within the realm of criminal law expressed by those two systems.

Reviewing the previously presented cases, it becomes apparent that conflict exists in the application of authority and sanction between Inuit and *Qallunaat* systems. Authority was found within Inuit society to exist in the overall -miut group rather than in a single individual. This may be seen in the examples in the previous chapters as well as throughout the ethnographic literature. This is in dire contrast to the Euro-Canadian perspective on authority which holds that the political authority to enact law and social control methods is the exclusive jurisdiction of the federal government; Legal authority is also held to be the


exclusive jurisdiction of the judiciary. This latter point may be seen in the prosecutions of Sinniksiak and Uluksuk in 1917, R. v. Curley, Issigaitok and Nagmalik, R. v. J.S.B. and R. v. L.J. whereby the courts held that they alone held the authority to adjudicate criminal cases and the “criminal law must be followed” (Marshall, J. In R. v J.S.B. [1984]).

The cases presented in this section similarly illustrate that both the principle and practice of universal application differ between Inuit and non-Inuit legal systems. The Qallunaat practices of universal application is based within their common law heritage. This may be seen in R. v. L.J.; R. v. B.N. where sexual intercourse with a minor occurred. In this case the courts upheld the principle that young girls could not give informed consent for sexual intercourse and that any male who had sex with them would be punished with imprisonment. This would not have been the case within traditional Inuit law as the situation and the status of the participants would be taken into account. In this specific case, L.J. was in a romantic relationship with the victim and would not have contravened traditional Inuit law, whereas the latter, B.N., was a sexual predator and would be subject to formal intervention by either the girl’s extended family or the larger -miut group.

Pospisil’s (1978) concept of obligatio may be seen in the banishment of Saila v. R. and R. v. J.K. Within traditional Inuit culture the sanction of banishment was not only extreme but, the circumstances in which it could be evoked were known to all. The recidivist or recalcitrant offender Saila and the murderer J.K. both understood, as did their communities, that banishment could occur.19 Within the Euro-Canadian context these banishments could not have occurred as such sanctions do not exist as legal sentences within the body of statute law, although the community members may have wished for it.

19 During the trial in R. v. J.K. [1984], this writer conducted a survey to determine the community’s desire for justice and an appropriate sentence. Within that traditional community, the sanction of banishment was strongly held as appropriate.
The attribute of sanction is an area of major ideological conflict between these two legal systems. As the principle of restorative justice underlies traditional Inuit legal beliefs, it was the group’s objective to resolve conflict and restore harmony among its members. It sought sanctions which would help the offender to become a better person. In R. v. Naquitarvik, for example, the offender would be required to apologize to the victim and the inummarit involved in counselling him towards better behaviour. Within the Anglo-Canadian system of law, the sanction sought by the Crown prosecutor was one-third of the maximum ten-year term of imprisonment. This sanction was not aimed at restoring harmony but at punishing the individual offender and deterring both he and others from further crimes of this sort.

b. Family Law (Adoption/Marriage)

Within the area of family law, the courts have generally upheld the application of customary practices such as custom adoption and marriage (Morse, 1980a; Zlotkin, 1984). This section will not present a detailed description of Inuit extended family organization nor marriage and adoption practices, but rather the manner by which these practices are held by the courts. What is important to note, however, is the unique contribution of Northern courts in the areas of family law.

The judicial recognition of Inuit customary adoption practices first occurred in the case Re: Adoption of Katie, E7-1807 (1962). Mr. Justice J.H. Sissons pronounced, at that time, his court’s view that Inuit customary adoptions were not only legal but as binding as the statutory law of the Territories. Indeed, this view was soon to be enacted within the provisions of the Child Welfare Ordinance and Regulations the result due, in part, to this ruling and that contained in Re: Deborah [1972] nearly ten years later.

\[\text{Re: adoption of Katie, E7-1807 (1962), 32 D.L.R. (2nd) 686 (N.W.T. Terr. Ct.).}\]

In *Re: Deborah* [1972] the appeal court reaffirmed the legitimacy of Inuit customary adoptions rather than extinguishing their right to do so. This was noted by Mr. Justice Johnson, of the N.W.T. Court of Appeal, who stated:

Custom has always been recognized by the common law and while at an earlier date proof of existence of a custom from time immemorial was required, Tindal, D.J. in *Bastard v. Smith* (1838) 2 M.O.O.D. and R. 129 at 136, 194 E.R. 238, points out that such evidence is no longer possible and that the evidence extending ‘as far back as living memory goes, of a continuous, peaceable and uninterrupted user of custom’ is all that is now required. Such proof was offered and accepted in this case (*Re: Deborah* [1972]:690).

Since these two landmark decisions, reviews of the *Child Welfare Ordinance* have taken place and revisions to the legislation has occurred. As I have noted earlier, the practices in the adoption and child welfare legislation were incorporated wholesale from Southern Canada and failed to recognize the realities of the North especially the nature of the extended family whereby the primary care-givers were mostly grandparents or aunts and uncles (Patenaude, 1987:155-156). Crawford (1984) comments that:

Community people are aware that custom adoptions are recognized by the legal system, and make use of the procedures developed to get official recognition for this family decision. This recognition is useful because it makes for easier dealings with outsiders for matters (such as Family Allowance applications) which are conducted at a distance and require the ‘proper papers’. To a lesser extent, the recognition is useful for dealings with local schools or explaining to some official exactly how many children you have (1984:14).

However, the recognition of Inuit customary adoption practices may be in jeopardy in the light of recent decisions by the Supreme Court of the Northwest Territories. In *C.K. and E.K. v. C.E.* [1986]22, Mr. Justice Marshall awarded custody of a child to its natural father rather than the parent to which it was adopted through custom, stating “the law in regard to

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Native custom adoption...juxtaposed as it is with current social development in the North, leaves the rationale in that process somewhat cryptic and dubious (C.K. and E.K. v. C.E. 1986:42).

Within the general area of marriage law one case Re: Noah Estate (1961) stands alone. As with the decision in Re: Adoption of Katie, E7-1807 (1962), Mr. Justice Sissons set the tone for future cases involving the recognition of Inuit customary marriages which he upheld to be as legal and binding as those performed by the clergy or civil officials. The exceptions to such recognition would require the marriage to be bigamous or between children.

The specifics of the Noah Estate case were simple: (1) an Inuit employee at a DEW Line station possessed a company insurance policy which did not list beneficiaries; (2) upon his death his common or customary-law spouse applied for benefits but was refused as they had not been married by the clergy; (3) judicial remedy was sought in the Supreme Court of the N.W.T.; (4) the N.W.T. Marriage Ordinance was ruled to be inadequate by the trial judge as it did not contain provisions to recognize customary marriages; and (5) the court awarded the estate to the customary-law widow of the deceased.

The effects of Mr. Justice Sissons decision would be felt in most of the following cases as:

This recognition has been used in relation to other areas of law, making a traditional spouse exempt from testifying in matters involving a partner, ensuring that adoptive children receive the inheritance as other children are entitled to, and determining questions of custody (Crawford, 1948:7).

It is possible to discern here that the Euro-Canadian courts have followed a course of incorporation similar to that defined by Morse (1983). They have recognized that the community’s consensus-based authority was not only valid in recognizing marriages, adoptions and inheritance but, for example, that custom adoptions could also occur among non-Inuit. The parties to the adoption were under a legal duty to keep the children aware of their natural parents under Inuit law and to have a Social Worker process the adoption through the courts under Euro-Canadian adoption law. Sanction is absent within the area which the Euro-Canadian legal system terms “family law”.

c. Hunting Law

The hunting law of the North continues to be based upon resources, both renewable and non-renewable, and their management. The latter rarely affects Inuit, however, the management and harvest of renewable resources affects nearly every Inuk through the North. Indeed, for many elderly Inuit the jurisdictional split between the two governments and their respective legislation can be extremely confusing. The legislated mandate of the federal government in the area of hunting and fishing is concerned, mainly, with migratory birds and salt-water fisheries. The territorial government, on the other hand, has jurisdiction over hunting and trapping land mammals and fresh-water fishing. Discussing hunting law, Crawford (1984) notes that such law:

...can be serious, or it can be entertaining. The laws about hunting ducks are seen as being largely for entertainment. They are known widely, but equally widely violated. The law doesn’t make any sense. People have a right to shoot geese in the way and at the times they always have. By the same token, a family who has always hunted in a park is unlikely to be deterred by new laws refusing them that right (Crawford, 1984:12).

Indeed, the various rights granted Inuit under the Royal Proclamation (1763) and subsequently the Canadian Bill of Rights (1960) may be needed to preserve their aboriginal hunting and fishing rights. Yet their rights have not always been protected.
In *Sikyea v. The Queen* [1964],\(^{24}\) for example, a treaty Indian who was supposedly protected by the *Royal Proclamation* (1763) and *Treaty 11* in exercising his aboriginal hunting rights was arrested and charged for killing a duck contrary to the *Migratory Birds Act*. Having pled not guilty to having killed the bird, his pleas and conviction were overturned by Mr. Justice Sissons who argued that indigenous peoples had not voluntarily extinguished their aboriginal hunting rights and, therefore, such unilaterally enacted legislation as the *Migratory Birds Act* could not restrict or extinguish those same rights. Incidentally, this case is often referred to in the North as “The Case of the Million Dollar Duck” in reference of the cost of proceedings for one duck to the Supreme Courts of Canada.

Further cases that were adjudicated by Mr. Justice Sissons which how broadly he wished to apply customary hunting law in the criminal courts. One case, *R. v. Kogogolak* (1962)\(^{25}\), was concerned once more with out-of-season hunting, albeit a musk-ox rather than a duck, by an Inuk. In his decision Mr. Justice Sissons stated his belief that:

> There has been no treaty with the Eskimos and the Eskimo title does not appear to have been surrendered or extinguished by treaty or by legislation of the Parliament of Canada. The Eskimos have the right of hunting, trapping and fishing game and fish of all kinds on all unoccupied Crown lands in the Arctic (*R. v. Kogogolak*, 1962:384).

Indeed, this philosophy is illustrated in that jurist’s subsequent decisions concerning violations of fish and game regulations. In *R. v. Koonungnak* (1963)\(^{26}\) he stated that “The Indians and Eskimos had their aboriginal rights and English law has always recognized these rights. Indian and Eskimo hunting rights are not dependent on Indian treaty or even on the *Royal Proclamation* (1963:302).”


This type of decision was indicative of the trial judge’s view that territorial legislation was not sufficient to extinguish aboriginal rights although similar actions had previously occurred in British Columbia near its entry into Confederation. The Supreme Court of Canada however, expressed an opposing view in *Sigeareak E1-53 v. The Queen* (1965)\(^{27}\) and ruled that territorial legislation “was capable of, and in fact had, restricted if not extinguished certain aboriginal hunting rights (Yabsley, 1984:29).

Yet the courts are interpreting modern legislation in traditional terms at the moment of adjudication rather than merely at the moment of sentencing in hunting and fishing cases. In the case of *R. v. Rocher* [1982]\(^{28}\) a non-Native fisherman was accused of breaking the NWT Fishery Regulations when he caught fish for his dogs without a license. Rocher argued that the legislation discriminated against non-Natives, a point lost on the appeal court which held the priority accorded Natives to be part of a valid conservation program after hearing testimony from the Dene Nation and the Metis Association of the N.W.T. on that point. A second similar case involved a non-Native married to a Slavey woman arguing for his inclusion as a member of a Native group by virtue of that marriage. Thus, in *Beattie v. Bergasse* (1975),\(^{29}\) the court upheld the aboriginal hunting provisions of the legislation.

The final example of this type of judicial action is found in *Shimout v. R.* [1985]\(^{30}\) where the accused was convicted of killing a walrus merely for the ivory tusks and leaving the meat to spoil. This type of activity violated both traditional Inuit and modern *Qallunaat* law. The trial court chose to order a fine, part of which was to go to the local Hunters and

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\(^{27}\) *Sigeareak E1-53 v. The Queen* (1965) 57 D.L.R. (2nd) 536 (S.C.C.)


Trappers Association (HTA) to assist their walrus hunting. The appeal court followed the letter of the law and overturned the fine, however, and ordered the accused to perform one hundred hours of community service to the H.T.A. and educate young persons on proper hunting practices.

This last case, *Shimout v. R.*, presents another opportunity to study the appropriateness of Pospisil’s four criteria of law in a colonial situation. Legal authority is once again retained by the dominant society rather than shared between the two cultures. Within traditional Inuit society, the -miut would have gathered to determine what actions should be taken to correct the situation and authorized someone to undertake that action. This type of adjudication would have occurred regardless of the individual’s status within the group although their status as a hunter, mediator, leader, etc. would have influenced the sanction imposed within Inuit society while this factor is formally ignored within non-Inuit society. *Obligatio* existed in Inuit society through the fact that each hunter understood his rights and duties regarding the hunt and game distribution, although the Euro-Canadian legal system holds only those legal rights as contained within the statutes. Sanctions normally reflect the same principles mentioned earlier, namely punishment and deterrence, although this case presents the positive sanction of community service and the payment of fine to the H.T.A. (this latter point was subsequently overturned on appeal). Thus, in the areas where traditional offences and sanctions are identified the Northern Courts often attempt to integrate traditional sanctions with those of the modern jurisprudence.
This essay began with two broad questions concerning the imposition of the Anglo-Canadian legal system in the Inuit regions of the Northwest Territories, Canada. Both questions were framed globally in their scope yet, this essay attempted to narrow that scope and focus into manageable terms which dealt with customary law, codified criminal law and the history of their interaction in the North. The first question, “What is the nature and extent of the interaction between Inuit and Euro-Canadian legal beliefs?”, is descriptive in nature. The finding of this analysis is that these two legal systems are in conflict, especially as regard the recognition of legitimate authority to adjudicate disputes and the relative influence on *obligatio* and sanction. The subsequent question, “How can this conflict be reduced in a manner which is amenable to both cultures?”, is exploratory. The methodology which was applied in this instance was the comparative analysis of both traditional Inuit and modern Euro-Canadian legal systems using Pospisil’s (1978) four criteria of law and an ethnohistorical perspective. Once this analysis was complete, the second question would be answered. Indeed it is the purpose of this chapter to answer that question.

In the Northwest Territories the written, codified laws of the *Qallunaat* followed the explorers, missionaries, traders, policemen and other government officials northward. With the goals of establishing the Dominion’s sovereignty over the North and westernizing its indigenous population, it should not be surprising that Anglo-Canadian law was imposed in the region. Bayley (1985) noted that:

As a result, the laws which have developed to govern northern native peoples derive not from their cultural values, social customs and behavioural rules, but are borrowed and often copied verbatim from laws in force in Southern Canada, laws which have grown out of British traditions, history and experiences (Bayley, 1985:286).
Since its arrival in the North, the Anglo-Canadian legal system has been imposed with little or no recognition for the existence of Inuit customary law nor the effects of its displacement by the new ways. While there has been a paucity of research on either Inuit customary law or on the effects of the displacement of Inuit customary law, neither of these concerns have vanished in the North. As we have noted, in those communities which still retain a high degree of cultural persistence such as Arctic Bay, Igloolik and Pond Inlet, the customary law and legal values continue to exist, albeit within the structures of Qallunaat legal system (Patenaude and Griffiths: forthcoming). The content of the customary law has changed and adapted as the culture itself was modified through contact with the Qallunaat. Yet, fundamental differences still persist between Inuit customary law and Qallunaat common law.

The two most noticeable differences are in the recognition of authority and the imposition of sanctions. The overall objectives of the two systems of law may also be perceived as being in conflict, however, this is open to dispute. Inuit customary law has always held that the object of any legal action should be the resolution of conflict and the restoration of peace and order. This was motivated by the survival motive as the nuclear family could not sustain itself, but neither could the larger -miut group if conflict existed within it. The foci of responsibility in ensuring conflict resolution was the group’s rather than a single individual’s. This would reduce the possibility of blame being attached and further violence from ensuring as the decision was reached through group consensus. The imposed sanctions were aimed also at helping the offender so as to prevent further transgressions.

The modern, adversarial-based legal system of the Qallunaat has evolved from a system of torts under common law, similar to Inuit beliefs in reparations, into its current form. With the evolution of society from a non-literate and non-institutionalized entity into a literate, institutionalized society its customs and customary laws would similarly evolve into “laws” which could be enforced upon the individual by the society as a whole (Yabsley, 1984). Indeed, the notions of individual criminal responsibility and the responsibility of the society
to both punish that individual and deter further crime through that punishment are hallmarks of an institutionalized system of laws. Crawford (1984) comments:

The law is the sledgehammer of social intervention. It ensures not simply that people will profit or gain by the acting as the system desires but also that a failure to comply with the prescribed standard will result in intervention and punishment (1984:20).

While Inuit customary law possessed the support of the society due to its use of consensus decision-making and restorative justice, it must be argued that the various Western systems of law have “become the property of the law-makers and does not reflect the generally held values of the population”(Crawford, 1984:20). Thus, Western legal systems require the use of force and, in turn, repressive or punitive measures against offenders whereas a customary law system has increased internalization of its values and less repression. Nowhere is this comparison more accurate than in a colonial situation such as exists in Canada’s North.

At this time there remain two Inuit notions of traditional law which need to be addressed. In the first instance, Inuit traditionally distinguished a ‘crime’ from ‘bad manners’, yet is this determination transferrable to the Euro-Canadian legal system. As we have noted earlier, while the general components in the Euro-Canadian concept of a criminal offence are actus reus and mens rea: the guilty act requires, for the most part, the guilty mind to create an offence, this is not the case within traditional Inuit culture or its current transitional phase. Inuit traditionally held an offence in a subjective and situational context (Patenaude, 1987:160-161). Indeed, the actus reus may have occurred in conjunction with the necessary mens rea yet the offence may be considered a non-offence or ‘bad manners’ in the traditional context if:

1. The act occurred, such as theft, and the offender intended to return the items or pay restitution at a later date;
2. The act occurred and the offender apologizes to the victim;
3. The act occurred although it was carried out for reasons of prestige-gathering; and,

4. The act was attempted or in choate, for example, a young person who broke into a house specifically to steal liquor but, once inside found none, had committed the Qallunaat offence of break and enter with intent to commit an offence, even though the second act was incomplete. However, within traditional Inuit beliefs it would be held that the actor did not complete the act as intended so, therefore, nothing wrong was done (Patenaude, 1987:161).

The second notion is based upon the recognition of juridical change in both ‘custom’ and ‘law’. Whereas one of the strengths which the common law has always boasted is the ability to change and adapt and it has been exhibited an ethnocentric ‘blind spot’ where change within a customary law system is concerned. Indeed, this would require the recognition of both customary law and changes to it. Lord MacMillan (1949) noted that:

Now the common law is, in essence, the customary law. As Blackstone says: It is one of the characteristic marks of English liberty that our common law depends upon custom; which carried this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people...(MacMillan: 1949:19).

The validity of customary law is established, therefore, within the English common law system and those countries which, like Canada, practice it. Therefore, all that is required is its formal recognition as a valuable component in the current Canadian common law.

These discussions illustrate that Inuit customary law has a similar origin to English common law in that it, too, developed from a body of common customs and may be compared to other legal systems using Pospisil’s four criteria. The most striking differences are in the area of authority and sanction as well as the level of acceptance among Inuit than the Qallunaat codified law has among its membership. Once the basic differences between the two systems have been illustrated the extent of those differences need to be explored. Since the imposition of Anglo-Canadian law in the North it has been the policy of courts to
hold the primacy of the “valid Canadian law” as earlier stated by Mr. Justice Harvey (1971) and Mr. Justice Marshall (1984).

It has been the practice of those same courts to discount customary law as “folkways”, “norms” and “mores” rather than grant it official recognition. This practice discounted on a wholesale basis the authority of traditional Inuit law to adjudicate offences yet, on the other hand, it has gained limited acceptance in the sentencing process. Similar discounting of traditional beliefs and practices have occurred in the areas of constitutional law and the settlement of land claims.

These power relations are not likely to change as it could be perceived as the first step down the path towards eventual decolonization. Indeed, decolonization (the dismantling of the colonial structure and attitudes) is one evolutionary step which is not likely to occur in the Northwest Territories for some time in the future.

As noted earlier, there appears to be increasing social disorganization occurring among Inuit communities in the Northwest Territories, although cultural persistence has been noted in some settlements (Patenaude and Griffiths, 1989: forthcoming). Some of this social disorganization may be originating in the rejection of Inuit customary law by the dominant society and its courts. Yabsley (1984) argues:

that the preservation of Inuit laws and practices is essential to the Inuit society. The effects of the imposition of Euro-Canadian law on individuals within Inuit society often tend to be harsh. More importantly, for the Inuit society and Inuit culture, the long-term effects may be devastating. The erosion of their customary law constitutes an erosion of their entire cultural system.

It is important to recognize, however, that by asserting that Inuit customary law deserve recognition, the Inuit are not seeking to lock themselves into a way of life and a system of rules that have long since passed. As stated, customary law, in order to maintain social acceptability must be dynamic. It must reflect the reality of the society at the present time. Customary law, therefore, entails a process of adaptation. As such, the demand for the
recognition of customary law is inseparately tied to the right of self-determination (Yabsley, 1984:15).

The recognition of the legal authority Inuit customary law and the pertinence of its sanctions could herald the beginning of its enforcement in the courts, however, as Morse (1983) presents the incorporation of one legal system into another intimates a dominant-subordinant relationship. In this regard Pospisil (1978) and Morse (1983) provide two excellent sources which may be used in understanding the nature and extent of the interaction between two or more legal systems.

In the area of land claims, there are significant differences between Inuit and Qallunaat beliefs concerning the land and the game it provides. Inuit possess a dynamic, cultural perspective based on land use rather than land ownership (Patenaude, 1987). This difference in perspectives was expressed by Mr. Justice Hall who held that recognition of land claims constituted ipso facto recognition of customary rights to the land, in Calder et al v. Attorney-General of British Columbia (1973). Mr. Justice Mahoney in The Hamlet of Baker Lake et al v. The Minister of Indian Affairs and Northern Development [1980] identified a four-part test to establish the existence of aboriginal title and customary rule at common law. This may be seen as limited judicial recognition of Inuit law but only when it meets the standards of the incursive legal system.

Once this discussion entered the area of land claims and judicial or legislative recognition of traditional Inuit law it became concerned with the second question which this


essay sought to answer, namely “How can this conflict be reduced in a manner which is amenable to both cultures?”

The anthropology of law approach may provide an insight into this problem and its possible solutions. That perspective is best characterized as the cross-cultural study and comparisons of that social institution which control and regulates a people’s social activities. A structuralist approach to legal studies, the ethnology or anthropology of law, perspective offers a window on a culture. Rasing (1984) notes that:

From this view it is evident that the specific manifestation of law is culturally (socially) and historically determined. It indicates that the way in which a society is organized is expressed in a specific juridical form that reflects the organization of society (1984:19).

Law from a functionalist perspective, however, is present in every social institution and refers to any function of social control regardless of its form and originates within the customs and habits of that society and it’s earlier manifestations. Similarly, this points towards the processual notions of law and society developing in tandem. This perspective has shown that laws develop from custom and rise as the level of society evolves until codified laws are attained. Vinogradoff (1925) noted this process as “The best opportunities for observing the formation and application of custom are presented when primitive societies are living their life before the eyes and control of more advanced nations” (in Falk-Moore, 1979:14).

This argues for both the inclusion and recognition of customary law as law. Custom is not the residual category for what is not law but is, both, as binding and coercive as codified law and through continued use may develop the force and status of law.

33 For a more complete understanding the reader is directed to Lester (1982, 1984). Indeed this author’s earlier text provides the definitive source on Inuit territorial and legal rights in Canada.
Table 2
Comparisons of Anglo-Canadian and Traditional Inuit Justice Concepts

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<thead>
<tr>
<th>Anglo-Canadian Justice</th>
<th>Traditional Inuit Justice</th>
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<tbody>
<tr>
<td>• Laws formulated by elected representatives</td>
<td>• Laws formulated by the community tradition and consensus</td>
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<tr>
<td>• Laws tied to man-made economy and therefore complex and numerous</td>
<td>• Laws tied to the natural environment; only a few universally condemned actions in Inuit customary law</td>
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<tr>
<td>• Protestant Ethic and Christianity the moral foundation of the law</td>
<td>• Traditional Inuit religions the moral foundation of Inuit codes of behaviour</td>
</tr>
<tr>
<td>• Personal offences seen as transgressions against the state as represented by the monarch</td>
<td>• Personal offences seen as transgressions against the victim and his/her family; community involved only when the public peace is threatened</td>
</tr>
<tr>
<td>• Law administered by representatives of the state in the form of officially recognized or operated social institutions</td>
<td>• Law usually administered by the offended party, i.e., the family, clan, or tribe, through a process of mediation or negotiation</td>
</tr>
<tr>
<td>• Force and punishment used as methods of social control</td>
<td>• Arbitration and ostracism usual peace-keeping methods</td>
</tr>
<tr>
<td>• Individualistic basis for society and the use of the law to protect private property</td>
<td>• Communal basis for society; no legal protection for private property; land held in trust by an individual and protected by the group</td>
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The most necessary step in the reduction of the conflict between traditional Inuit law and modern Euro-Canadian law must, therefore, be its judicial and legislative recognition as a valid form of law. The legislative empowerment exists within §27 of the *Canadian Charter of Rights and Freedoms* (1982) which declares “§27 This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canadians.”
This would result, in effect, with the inclusion of Inuit customary law within the established legal pluralism which has existed in Canadian law since the enactment of the Quebec Act (1776), but has not been extended into the area of Inuit customary law. Richstone stated:

voices the hope that this type of action would “articulate” in broad terms the rights of a cultural minority to maintain and develop their distinctive under the laws of the majority of society which has rejected ethnic assimilation and cultural uniformity (Richstone, 1983:582).

Unfortunately, the spuriousness of the land claims issue retards such legal recognition of customary law for the same reasons stated by Mr. Justice Hall in Calder v. The Attorney General of British Columbia (1973).

The manner by which the legal recognition could take place is another area of contention. Morse (1983) provides two possible alternatives in his co-operation and incorporation models. As the latter model has been explored through the partial use of tradition sanctions in criminal cases, the use of custom adoption and marriage practices in the area of family law and the incorporation of traditional sanctions in hunting cases, it would appear to be the most appealing option.

It must be noted that this method is not without its difficulties as incorporation would include many aspects of Inuit culture which may clash with the societal norms of the Euro-Canadian society. Richstone (1983) points out the legal trap which exists where a non-Native moral standard is used to determine the validity of an Inuit cultural norm when he states that “For a Canadian court to judge an aboriginal custom “barbaric” and unenforceable, implies a certain moral arrogance and superiority which the very purpose of entrenching aboriginal customs attempts to overcome” (1983:584).
However, as certain concepts of law are fundamentally different between the two legal systems it is believed that the former method, co-operation, would be more appropriate and attainable given the current political climate. This has been attempted within the United States, notably among the Navajo of the Southwest and the Alaskan Natives (Indians and Inuit) of that state. The enactment of federal legislation in that country has granted aboriginal peoples therein a unique constitutional position in terms of self-government and the administration of justice. Tribal police and courts have been established with specific jurisdiction and powers.

The enactment of legislation and subsequent establishment of tribal police and tribal courts has occurred successfully with the Navajo Tribal Court and Tannana Chiefs Council (Alaska). This had the effect of removing many of the cultural biases inherent in aboriginal peoples contact with the judicial system, through the establishment of a “peacemaker” ethos whereby aboriginal peoples enacted summary conviction (misdemeanor) offences and settled civil disputes (including limited child welfare matters) within their jurisdictional boundaries (reserve lands). Serious or indictable offences (felonies) are handled by the state and/or federal police forces as required.

These aboriginal police forces and judiciaries had limited jurisdiction over not only aboriginal peoples but also over non-aboriginal persons who committed offences on the reservation or tribal lands. At the moment, this type of arrangement is proposed by the First Nations of South Island Tribal Council on Vancouver Island (Thorn, 1989: personal discussions). In this case, they propose to create tribal police and courts which would reflect local customary law and would, in turn, operate in much the same manner as their American Indian counterparts. This would replace local Justices-of-the-Peace and province court judges with indictable offences being tried and appeals being heard in the superior courts of the province (District/County/Supreme Courts and the Court of Appeal).
These actions are integral in a much larger issue which may either precede or follow the entrenchment of customary law and traditions in the legal and legislation arenas. Indeed, such recognition and entrenchment is integral to the settlement of the issues of self-determination and self-government. The creation of Nunavut courts and justice system within an Inuit homeland, Nunavut, has been the stated goal of the Nunavut Constitutional Forum.

Yabsley argues that “true protection of Inuit customary law is afforded only to the degree that Inuit are insured the right to exercise political control in their own societies (1984:43). This type of action would require not only the incorporation of Inuit law in the larger legal system and the creation of Inuit mechanism for an actual self-government but as Yabsley (1984) suggests a redefining and elaboration of Inuit customary law.

In closing, it must be noted that the competition between Inuit traditional legal beliefs and those of the Qallunaat has not occurred from equitable positions in terms of power to ensure that one’s wishes are carried out. There are differences between their systems of law and social control which will continue to inhibit rather than prevent the creation of a unique system of justice in the North. The Northwest Territories for example, is a paper creation of the federal government which is therefore not bound by the Constitution Act in areas of judicial or political self-determination and able to enact changes in a less restrictive manner. The co-operative or incorporative methods of adapting legal systems to accommodate differing legal philosophies appear to be the most realistic methods of enshrining customary law in the Canadian justice system. Efforts such as those could only serve to reduce the dependency of Inuit communities upon ‘outside’ intervention to achieve social justice. As noted in Patenaude and Griffiths (1989) although a paucity of research exists on Inuit socio-structural dependency, such dependency has contributed to the social disorganization in Inuit communities. An integral social justice system as proposed by Inuit political organizations may assist in overcoming such dependency.
APPENDIX  I

S.A. 499-8 Honours Essay
Proposal & Selected Bibliography

Whose Law? Whose Justice?
The Role of the Custom-Law Debate in Understanding
The Legal Relations Between Inuit and Non-Inuit in the N.W.T.

1. Introduction: Law as an entity is present within every culture and society in a form and structure which is appropriate to the needs and aspirations of that group. These needs are often influenced by the economic base of the society in question and their expressions in law are held by the culture-bearer as the best possible methods of social regulation. Unfortunately such ethnocentrism is both inherent and unavoidable. From these social and cultural foundations arise formal and informal methods of law and social control which are as dynamic in nature as the society itself.

The history of European exploration and the systems of colonization and colonialization which followed illustrates that law may also originate from outside rather than from within the culture. In these situations law has often been imposed upon an indigenous culture by an incursive nation which has subjugated the former through either economic, political or other means (such as way or conquest). The imposition of incursive law and legal systems has often been accomplished without attention to the existence of indigenous legal systems nor concern for the results of that imposition. Indeed, the ethnocentric use of legal anthropology by the dominant power has served solely to rationalize its actions and improve its already advantageous position.

It is the writer’s belief that the study of law must be carried out within a comparative framework rather than through the study of a single system of jurisprudence. Therefore it is held that the ethnographic approach offers the best opportunity to reduce any biases which arise from the study of law and, secondly, that while law as an institution is universal to all human groups it is culture-specific in its form and function.

2. Objectives: To present a descriptive analysis of how legal anthropology, specifically the custom-law debate, has been used by the Canadian government as a tool in their colonialization of the Northwest Territories.

Within this overall framework the backdrop of the custom-law debate will form the first component. The origins and role of law within both the structuralist and functionalist as well as Marxist perspectives will be discussed; Included within this component will be the positions put forth by Bohannan (1965), Falk-Moore (1979), Hoebel (1954), Malinowski (1934) and Pospisil (1978). The second component will be formed by a discussion of Western concepts of law, from the perspective of Anglo-Canadian jurisprudence, followed
by a similar discussion of traditional Inuit concepts of law and conflict resolution. The third component will examine the historical application of Canadian law to Inuit in the Northwest Territories and attempt to explain those same applications within the paradigm which Kellough (1980), Watkins (1977) and others have defined as “internal colonialism”.

3. Potential for Further Research: It is envisioned that this essay will form the theoretical base of a chapter in a graduate-level thesis concerned with dependency and deviance amongst Inuit of the Eastern Arctic. While attempting to portray law as a dynamic process which is culture-specific it is believed that this essay will both contribute to the corpus of literature written on Inuit and non-Inuit relations and give modern examples of the conflict between westernized notions of law and those of indigenous peoples in the Fourth World.

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BIBLIOGRAPHY


Northwest Territories Act, R.S.C. 1952.


Morse, Bradford W. 1980b. *Indian Tribal Courts in the United States: A Model for Canada?* Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan.


Northwest Territories, Government of the. Legislative Assembly of the Northwest Territories. 1977. *Priorities for the North*. A Submission by the Northwest Territories Legislative Assembly to the Honorable Warren Allmand, Minister, Department of Indian Affairs and Northern Development, for inclusion in his Northern Policy Statement. Yellowknife, N.W.T.: Legislative Assembly of the N.W.T.


