

February 4, 2009

To: Sybille Haeussler,
From: Richard Overstall
Re: Legal Orders as Complex Systems: a historical comparison

I compare the legal orders of the Tlingit, Tsimshian and Gitksan peoples of northwestern America on the one hand, and of the Irish, Icelandic and Anglo-Saxon peoples of early medieval northwestern Europe on the other. I show them to be strikingly similar, both in general form and in many of their details. This raises the probability of a common, emergent, implicit constitutionalism that is in contrast, and often in opposition, to the explicitly constructed constitutionalism of more recent nation states.

On the northern Northwest American Coast, groups defined by kinship and contract have migrated, interacted with other and interacted with the land in the 10,000 years since the last ice age. In the process, a number of distinct but compatible legal orders have emerged, three of which are those of the Tlingit, Tsimshian and Gitksan peoples. The Tlingit occupy what is now the Alaskan panhandle, the Tsimshian the lower Skeena River and adjacent coast, while the Gitksan occupy the upper Skeena and upper Nass River watersheds. All of them depend on intensive processing and storage of seasonally available fish, mainly salmon and eulachon, and other resources.

In northwest Europe, the introduction of writing during the first millennium AD enabled records to be made of a number of peoples. Here too, groups defined by kinship and contract migrated and interacted with each other. In Ireland, what has been called a Celtic culture existed until the early 17th century. In England, the Celtic inhabitants were displaced in a 5th century conquest by migrating Germanic groups who later called themselves Anglo-Saxons. In Iceland, an unoccupied and relatively unproductive land was populated by Scandinavians in the late 9th century in a seemingly unorganised migration. All of these peoples depended on intensive processing and storage of seasonally available livestock, mainly cattle, and agricultural products.

None of the peoples in the northwest American or the early medieval northwest European culture area had an overarching governance or legal system. Instead, various kinship and corporate groups contracted with each other and with supernatural beings to form clustered and nested networks maintained by delicately balanced duties and privileges. While certain individuals and their relatives had the legal capacity to embody a group and to represent its decisions to other groups, they were generally not given the power of command over others within their group. Rather,

they needed to demonstrate superior moral, physical and management abilities to encourage others to contract with them.

Contracts were variously for access to goods and services such as land, livestock, legal services, and raiding and trading opportunities. In return, contractors obtained access to the group's collective food production and storage capacity, as well as legal and military protection.

Each group and individual had an explicit level of legal capacity (generally categorised as "royalty," "nobles," "commoners," and "slaves") and a ranked status that mediated its contractual relationships and guided the amount needed to satisfy a wronged party with material compensation or with retaliation in a feud. For example: in medieval Ireland, a person's status and rank constrained the value of his contracts and sureties; in England, it established the legal weight of his oaths; and in the Pacific Northwest, it established the weight of his participation in the feast or potlatch (see attached tables).

The legal orders are incompletely recorded in oral histories and sagas, early written law codes and charters, and ethnographies and histories. As such, they tend to be records of an emerging leadership class as influenced and reported by ecclesiastical, civil and academic bureaucrats. Relations among so-called commoners and slaves are less well documented. Nevertheless, it is possible to show that the legal entities tended to be groups rather than individuals. The legal orders reflect the tension between maintaining group cohesion and benefiting from the competition among its constituent elements, be they individuals or smaller nested groups.

The two culture areas' mutual isolation precludes conquest, migration or cultural diffusion as a convincing explanation of their similarity. Instead, it is suggested that under certain conditions an inherent human sociability constrained by similar external factors allowed parallel legal orders to emerge. The process by which these inherent and external aspects interacted may be usefully compared with the behavioural biology and evolution of other social animals.

Two of the questions that arise from the comparison are:

What were the factors that caused European culture to develop monarchies and, later, nation states and the other culture to not do so?

How might consideration of the divergent legal and social evolution of these once similar legal cultures help reconcile the coexistence of the aboriginal and European aspects of today's legal order in Canada?

Northern Northwest Coast Terms for a Person's Legal Capacity (19C)

Legal capacity	Tlingit	Coastal Tsimshian	Gitxsan/Nisga'a/ Inland Tsimshian
Embody a tribe ¹ (and its leading lineage) ...and their heirs ("Royalty")	[weakly present?]	<i>smygygyet</i> <i>k'abawaalksik</i> or <i>alugygyet</i>	[not present]
Embody a clan ² (and its leading lineage) ...and their heirs ("Royalty")	<i>tingit llen</i> or <i>na cade hani</i> <i>anyadi</i>	[not present]	[not present]
Embody a property-owning lineage ³ or group of lineages ...and their heirs ("Nobles")	<i>hit sati</i> [not distinguished]	<i>manlik'agygyet</i> <i>lik'agygyet</i>	<i>simgiget</i> <i>laxgiget</i>
Full legal capacity ("Commoners")	<i>k'anac kide'h</i>	<i>k'algygyet</i>	<i>liksgiget</i> or <i>amgiget</i>
Temporarily with no or reduced legal capacity ("Debt- and Penal-slaves")	<i>xat'aq qu'u</i>	<i>wah'a'ayin</i>	<i>gagweey'</i>
Permanently with no legal capacity ("Slaves")	<i>gux</i>	<i>talungit</i>	<i>fitingit</i>

¹ Tribe: a local group that is the widest group to host a feast, or be one party to a feud/compensation process; made up of corporate groups that are defined by reference to identified ancestors (descent groups).

² Clan: a unilineal descent group descended from a known ancestor with unknown genealogical connections.

³ Lineage: a unilineal descent group descended from a known ancestor with known genealogical connections over a limited number of generations.

Northwest Europe Terms for a Person's Legal Capacity

Legal capacity	Ireland (7C – 12C)	Anglo-Saxon (7C – 9C)	Iceland (10C – 13C)
Embody a local group ⁴ (and its leading lineage) ...and their heirs ("Royalty") ... and their retainers ("Companions")	<i>rí</i> <i>tánaise rí</i> <i>rigomna</i>	<i>cyning</i> <i>aethling</i> <i>cyne cynn</i> <i>eorl</i> (7C Kent) <i>ealdorman</i> (7C Wessex – 10C) <i>gesith</i> (7C – 9C) <i>cyninges thegn</i> (10C)	(not present)
Holds contracts with a number of clients ("Lords") ...and their clients	<i>flaithe</i> (economic) <i>aire</i> <i>cleili</i>	<i>hlaford</i> (military & legal) <i>hlafeater</i>	<i>godi</i> (legal) <i>thingmenn</i>
Embody a property- holding lineage ⁵ or group of lineages ("Nobles")	<i>conn fine</i>	<i>gesith</i> (8C – 10C) <i>thegn</i> (9C - 10C)	<i>fyrirmadr</i>
Full legal capacity ("Commoners")	<i>féni</i>	<i>ceorl</i>	<i>bóndi</i>
Temporarily with no or partial legal capacity (including debt- and penal-slaves)	<i>fuidir</i> <i>deorad</i>	<i>laeti</i> (Kent) <i>wealh</i>	<i>skógarmadr</i> <i>skuldarmadr</i>
Permanently with no legal capacity ("Slaves")	<i>mug</i> (m) <i>cumal</i> (f)	<i>theow</i>	<i>thrall</i> (m) <i>ambátt</i> (f)

⁴ A local group is the widest group of lineages to be one party to a feud/compensation process.

⁵ Lineage: a unilineal descent group descended from a known ancestor with known genealogical connections.