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THE LEGAL WITHIN FOLKTALES: EMBEDDED LAW IN INDIGENOUS AND FRENCH CANADIAN ORAL STORIES

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ABSTRACT: This essay pertains to the discovery of legal concepts and principles within Indigenous and French Canadian oral folk stories to develop greater dialogue across legal traditions. This is done in two parts. The first part focuses on the literary study of Indigenous and French Canadian folklore. It is argued that oral folk stories are legitimate and relevant object of law in literature study as they constitute dense and potent source of legal principles, concepts and notions. The second part directly engages an archetype of Indigenous and French Canadian folktales. It looks to find legal principles, concepts and notions through the supernatural characters of windigo and werewolf.

KEYWORDS: Indigenous law; folk stories; oral tradition; law and literature; archetypes.

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Un peuple ne se sépare pas de son passé, pas plus qu'un fleuve ne se sépare de sa source, la sève d'un arbre, de son terroir.

Abbé Lionel Groulx

1 INTRODUCTION

This essay pertains to the discovery of legal concepts and principles within Indigenous and French Canadian tales in the hope of developing a common frame through which Indigenous and Québécois' respective grammars of law can be understood². This essay is as such not about positive law, but about legal theory. It is an inquiry of law *in* literature that is separated into two parts.

The first part focuses on the literary study of Indigenous and French Canadian folklore. Conducting such study is neuralgic in justifying the project of looking at Indigenous peoples and French Canadians' tales, and generally looking oral stories in the search for the legal. Important questions will be answered: Why are we looking at Indigenous and French Canadian folk stories in the first place? What is the purpose? What is folklore? What are folk stories and where do they come from? How do we read folk stories compared to other oeuvres of literature? In what legal, cultural and historical context are these Indigenous and French Canadian folk stories taking place? The second part directly engages with Indigenous and French Canadian folktales. Or more precisely, it engages with an archetype of their folklore: the windigo or *loup-garou* figure. The supernatural characters' importance in articulating the legal concepts and principles embedded within folktales will be explained through the centrality of archetypes. The presence of supernatural characters in folktales provides for rich legal meaning, which remains to be discovered. As it will be argued, while the windigo and the *loup-garou* are not quite

² The use of the French term *Québécois* is entirely deliberate for traditional reasons. On the notion of grammar of law, see Webber (2009).

the same figure, it will be contended that both represent the civilized individual who through his own actions and choices places himself out of the community. The windigo and the *loup-garou* are both humans transformed into monsters as they reject the norms and rules of their community, from political animal to threatening animal.

2 BREAKING FROM THE UNIVERSAL: FOLK STORIES AS AN OBJECT FOR LEGAL STUDY

Making Indigenous and French Canadian folktales the focal point of our law *in literature* inquiry is not only bold, it is unprecedented. Such project is new in the sense that it truly breaks away from the trend set by other scholars in the field who mostly emphasize on classics of literature, that is universalistic texts. Among the popular authors for law in literature research, we count Homer, Shakespeare, Melville, Dostoievsky, Kafka and Camus (Posner, 2009; White, 1984; 1973; Weisberg 1984; 1992; West, 1985). Because of their local character, Indigenous and French Canadian folk stories are better suited than universalistic texts to provide insights as to the *nomos* inhabited by Indigenous peoples and French Canadians which informs their respective legal traditions. In this, folk stories also constitute material of choice to generate greater and better cross-legal dialogues between these peoples.

2.1 Locality, *nomos* and narrative of folk stories

In his seminal essay *Nomos and Narrative*, Robert Cover argues that “we inhabit a *nomos* — a normative universe,” meaning that we all “constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void” (Cover, 1983, p. 4). Instead of conceiving law as a system of rules and interpretations or a set of institutions, one should conceive law as part of a normative world, a *nomos*, in which legal rules and institutions interact with other cultural forces in the production of legal meaning:

The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live (Cover, 1983, p. 4).

In other words, this normative universe is not identical with law, rather it contains both law and “the narratives that locate it and give it meaning” (Cover, 1983, p. 4). The normative world being the law connected with its narratives, the locality of narratives is of outmost relevance in giving meaning to legal traditions’ law and legal principles. Local narratives are culturally sensitive to the legal traditions that they inform, whether they are Indigenous legal traditions or Québec’s civil law. Individuals lives become sane when located within a common discourse, or community, where they can be shared (Cover, 1983, p. 10). In turn, the community generates the law – what it means and what it shall be – that defines the *nomos*; the community is *jurisgenerative* in the sense that it enacts *jurisgenesis* through “ideal-typical patterns for combining corpus, discourse, and interpersonal commitment to form a *nomos*” (Cover, 1983, p. 12). These patterns are of two sorts: the *paideic*, or world-creating, normative universe and the *imperial*, or world maintaining, normative universe.

The *paideic* universe is constituted by “(1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law” (Cover, 1983, p. 12-13). The *imperial* universe is constituted by universality and enforcement, effectiveness as opposed to education, objectivity and weak interpersonal commitments “premised only upon a minimalist obligation to refrain from the coercion and violence that would mark impossible the objective mode of discourse and the impartial and

neutral application of norms” (Cover, 1983, p. 13). A *nomos* is never one or the other, rather it is always constituted of both ideal-typical patterns, which are interdependent. Cover summarizes the relationship between the two universes this way:

Thus, as the meaning in a *nomos* disintegrates, we seek to rescue it — to maintain some coherence in the awesome proliferation of meaning lost as it is created — by unleashing upon the fertile but weakly organized jurisgenerative cells an organizing principle itself incapable of producing the normative meaning that is life and growth (Cover, 1983, p. 16).

Indigenous and French Canadian folk stories both constitute integral parts of their respective jurisgenerative community, whether the community is located in reserves, in Québec or elsewhere. It is of no surprise that they exhibit both paideic and imperial properties. These stories continually reinforce long-lasting established rules and norms, thus maintaining the normative universe, while simultaneously changing, adapting to new realities and new ideas, trying to give a direction to legal development. Such dynamic which will come to light first as we delve further into how folk stories come into being, are shared and developed, and into what their essential characteristics are, and second as we get familiar with the meaning of characters and figures featured in them.

2.2 Object of legal study: indigenous and French Canadian folk stories

It is important at this stage to precisely define our object of legal study. There are very relevant questions to be raised such as: What is folklore? Do both Indigenous peoples and French Canadians have a folklore? What are folk stories? How are folk stories created, developed and shared? It may be unclear at this point whether Indigenous peoples in fact have a folklore and that their oral stories effectively are folk stories. As it will be explained, they do. The perceived divide between the Indigenous peoples’ ways of life and the French Canadians’ western-influenced lifestyle is much bigger than reality would admit. This is especially true considering the important *métissage* in oral stories, where through contact between the peoples, Indigenous and French Canadian exchanged

and merged oral stories, giving light to new worlds and new adventures integration both experiences and traditions.

2.2.1 What is folklore?

The first immediate question raised by our study is what is folklore? Debates about how folklore should be defined or what is the proper definition of folklore have continuously been waged ever since William Thoms coined the word in an 1846 letter to *The Athenaeum* (Thoms, 1965, p. 4). Folklorist Alan Dundes claims that most definitions concern the “lore,” although some of them concern the “folk.” Lore refers to the materials of folklore rather than the people who use the materials — myths, legends, stories, traditions, culture, beliefs, superstitions, etc. The term “lore” has been described in four different terms: origin, form, transmission and function (Dundes, 1965, p. 1). Then, contrary to what was meant in the nineteenth century, the term “folk” is not a synonym for peasant, nor is it limited to one stratum of society, for example the *vulgus in populo* (Hultkrantz, 1960, p. 126–29). Folk can refer to any group of people whatsoever who share at least one common factor. The linking factor does not matter; it could be a common occupation, language, or religion. What matters is that a group formed will have some traditions which it calls its own (Dundes, 1965, p. 2; 1989, p. 11). In fact, a folk can be as small as a family and as large as a nation. However there has been no widespread agreement among folklorists about what folklore is. For Alan Dundes,

the problem... of defining folklore boils down to the task of defining exhaustively all the forms of folklore. Once this has been accomplished, it will be possible to give an enumerative definition of folklore. However, thus far in the illustrious history of the discipline, not so much as one genre has been completely defined (Dundes, 1964, p. 21).

This assessment is correct. Therefore, it is impossible for us to provide a more detailed or accurate definition of folklore here. Nevertheless, we can at least state with certainty that folklore includes

myths, legends, folktales, jokes, proverbs, songs, poems and riddles, beliefs, costumes, medicine, traditional foods, charms, curses, games, music, dances (Dundes, 1965, p. 2; Bascom, 1965a, p. 28). This explains how crucial folklore is for establishing a sense of identity or senses of identities.

Consequently, folklore is studied in anthropology because it is apart of culture. In reality, it clearly constitutes one of the most important, perhaps the most important, sources for the articulation and perpetuation of a group's symbols (Dundes, 1989, p. 8). Significant elements of culture like music, dances and heroes as identified by Edward Spicer (1971, p. 796-98), customs as identified by Max Weber (1968, p. 385-98) and traditions as identified by George De Vos (1975, p. 9, 116) all fall under the rubric of folklore. Anthropologist and folklorist Richard Bauman affirmed this premise by observing that “[f]olklore is a function of shared identity” (Bauman, 1971, p. 32). Because folklore is integral to culture, it can be analyzed in the same way as other customs, rules, laws and traditions in terms of form and function, or of interrelations with other aspects of culture (Bascom, 1965a, p. 28-29). It presents the same problems of growth and change, and is subject to the same processes of diffusion, invention, acceptance/rejection, and integration.

2.2.2 What are folk stories and how do they come into being?

Many genres of stories are encompassed under the label of folklore, among other myths, legends and folktales. Our object of study nevertheless is limited to folk stories, and so it is proper to identify their defining characteristics as well as the settings in which they come into being, are shared, developed and transmitted. This provides guidance as to how these stories as an object of law *in* literature study should be read, analyzed and understood. Doing so requires beforehand a discussion on the problem of genres in folklore, as the categories are not well defined at all.

The problem of “genre” in folklore and folk stories’ functions

Various genres of folklore exist, for instance myths, tales, legends, proverbs, riddles, etc. How can they be differentiated? Folklorist Dan Ben-Amos explains that these terms initially had meanings in English long before they acquired new their correlates in other languages, and long before they acquired new connotations from evolutionary, functional, and structural theories in folklore literature studies (Ben-Amos, 1976a, p. xiii). They were words of language, devoid of any theoretical significance, useful when speaking about speech and to describe categories of tradition (Ben-Amos, 1976a, p. xiii). Ever since, no consensus on their meanings have been reached. Unfortunately, the learned dialogues of scholarly literature have not achieved to set definitive descriptions for each of these genres (Ben-Amos, 1976a, p. xiii; Georges, 1971, p. 19).

For a long time, folklore scholars exhibited an anachronistic approach to folklore, regarding ballads, myths, and tales only as precursors of grands texts written by famous authors such as Shakespeare, Kafka or Melville. For example, starting with German literary scholar Walter Berendsohn, folklorists began to protest against famous scholar André Jolles and others who paid too little heed to the oral literature, which in their minds unquestionably precedes written literature (Berendsohn, 1933). This evolutionary approach to folklore genres was inadvertently patronizing since it assumed contemporary works to be better and more advanced (Ben-Amos, 1976a, p. xxxix). In the 1970s, there was a shift: folklore scholarship started to conceive forms of folklore not as mere antecedents of literary genres, but as rich and symbolic expressions that are equally complex (Ben-Amos, 1976, p. xxxix). They realized that the significance of oral epics for example was not simply in their being a literary model for the Shakespeares, the Kafkas and Melvilles of world literature. In fact, oral epics have detailed expressive complexities in their own right, and once these complexities untangled, reveal the processes of creative composition, thematic transformation, and linguistic

dexterity: “The search for legends, proverbs, or songs in the works of specific writers ultimately exhibits a primary concern with a literary work; the folklore genres are secondary” (Ben-Amos, 1976a, p. xxxix; Jolles, 1993). Four distinct approaches to classification were followed in the hope of discovering the formula for methodological definitions of genres by scholars, in an attempt to establish folklore studies on scientific grounds: the thematic approach, the holistic approach, the archetypal approach and the functional approach (Ben-Amos, 1976b; Aarne, 1961). Each of these four inquiry approaches aimed at the construction of a valid, objective order of folk literature categories. Unsurprisingly, Ben-Amos informs us that “the tools, terms, and concepts that emerged were generated by definite and rigid theoretics and geared toward distinct sets of problems” (Ben-Amos, 1976b, p. 216).

Nevertheless, the sum of these approaches’ findings establishes one certain thing: a folklore genre is an amalgam of many characteristics, factors and considerations. There are at least four distinct meanings to the term genre: (a) classificatory categories, (b) permanent form, (c) evolving form, and (d) form of discourse (Ben-Amos, 1976a, p. xv). Because folklore tales are multidimensional communicative acts, genre differentiation is not restricted to a single level, such as text, but also extended to the performance, texture, and context (Dundes, 1964 p. 251-65). In this sense, genres cannot be merely kinds of narrative texts. Rather, they are types of performances: to each genre are associated distinct and appropriate gestures, vocabulary, and formulas in addition to themes and plots (Ben-Amos, 1976a, p. xxxvii). With this in mind, we might not need to classify neither Indigenous nor French Canadian folk stories in genres. This is why Ben-Amos argues in his that the concern with analytical classification of folklore genres should shift, as the focus should be put ethnic systematization of forms. Folklore genres are conceptual categories of communication, not of classification (Ben-Amos, 1976b, p. 235).

Furthermore, it is possible that defining precisely the genre of both Indigenous and French Canadian folk stories would be outright harmful to our law *in* literature study. It is the opinion of Alan Dundes that the concept of genre generally tends to impede folklore research since it prevents scholars from examining the underlying folk ideas permeating verbal expressions (Dundes, 1971). The concept of genre is too narrow and too shallow as an explanatory principle for the dynamics of tradition. There is a wide domain of folklore elements that does not fit into the constraints of any existing categorization system. This domain has not been, and will not be, fully explored as long as the genre research paradigm prevails (Dundes, 1971). The focus should be on underlying and permeating ideas to oral stories. Therefore, Indigenous and French Canadian folk stories will be herein referred to as folktales, sometimes as legends; for the purpose of our legal study, these terms are synonyms.

It is relevant to briefly address the functions of folk stories too, even if merely superficially. The functional approach to folk stories provides a significant angle through which the underlying and permeating ideas of folklore can be analyzed from a law *in* literature point of view. In a major article published in 1954 title “Four Functions of Folklore”, Bascom (1965b) argued that folklore can serve four primary functions in culture. One, folk stories lets people escape from repressions imposed upon them by society. This is exemplified by tall tales, which are stories with unbelievable elements, related as if they are true and factual. Two, folklore validates culture, justifying its rituals and institutions to those who perform and observe them. Three, folklore is a pedagogic device which reinforces morals and values and builds wit. This function is especially found in nonliterate societies. For example, scary stories and moral lessons serve precisely this function. Four, folklore is a means of applying social pressure and exercising social control. That is,

it fulfills the important function of maintaining conformity to the accepted patterns of behavior. An instance of this is Aesop's famous fable "The Boy Who Cried Wolf". Bascom (1965b, p. 294) correctly points out that the last three are very much related. It should be emphasized that any one item of folklore may have several different functions, in fact the vast majority of them do.

Oral origins of folk stories and the centrality of belief

Folk stories initially come from oral transmission (Bascom, 1965a, p. 28). Indigenous and French Canadian folk stories are no exception to this. Therefore, working with written versions of these stories creates an authenticity problem which must be accounted for: a tale in print or in manuscript may be wholly authentic, but if it is not accompanied by an oral witness, it cannot be wholly trusted and must be classified among the literary versions (Utley, 1965, p. 14). Most of such tales are literary versions (Utley, 1965, p. 15). This means that we are in fact working with derivative folk stories. Even if carefully recorded, the modern folktale is necessarily doubtful because of its possible derivation (Utley, 1965, p. 16). This is more a problem for historians and folklorists than for jurists (Utley, 1965, p. 18). Nevertheless, the oral origins of folk stories mean that even jurists cannot read recorded folk stories like any literature (Taylor, 1965). As we will see, there are two main interrelated reasons to justify a different reading of folk stories compared to other literature. First, orality requires a certain degree of belief from the audience, which is maintained through dialogue between the storyteller and the crowd. Second, because there is such a dialogue and oral transmission, there are a plurality of authors; the storyteller cannot claim authorship of the story.

Legend scholars have long considered belief an indispensable and central ingredient to legend narration (Röhrich, 1964). Contacts with reality and attitudes toward it are pointed out as essential criteria in the numerous definitions of folk legend. The first legend theorist to encourage observing legends in their natural cultural environment, Friedrich Ranke, asserts that “[t]he folk legend is a popular narrative with an objectively untrue imaginary content. It is presented in the form of a simple account as if it would have really happened.” (Ranke, 1969, p. 14) Ethnologist Carl Wilhelm von Sydow, also an influential folklore theorist suggested that legends, “in the form they have taken [...] cannot have happened, rather they have been formed by the fabulating gift of the people” (Von Sydow, 1934, p. 74). Ranke and von Sydow’s idea that while the story of the legend does not contain objective truth, the narrator and his audience nonetheless believe it to be true, has been echoed by several folklorists (Röhrich, 1969; Tillhagen, 1964).

For the audience to believe in a legend, there must be a conversation between the storyteller and the spectators. Legend telling is a complex event; during the act of legend creation, cooperation between the speaker and his audience is much closer than in the composition of any other prose-narrative genre (Dégh & Vázsonyi, 1976, p. 101). Folklorists Linda Dégh and Andrew Vázsonyi mention that this intimate participation and involvement of the audience is one of the legend’s inherent features (Dégh & Vázsonyi, 1976, p. 101). The storyteller is not an artist recognized and admired for his creative fantasy, rather he is just one member of the group. The storyteller is on an equal footing with the other members whom share the same knowledge, act as audience and often as associate contributors to the story. At best the teller might be considered more competent in storytelling because he differs from the others in one particular area of knowledge by possessing extra information and expertise about the story (Dégh & Vázsonyi, 1976, p. 101).

The legend storyteller usually has a rather limited repertoire. Dégh and Vázsonyi explain that the average community raconteur knows

between ten and fifteen legends, yet many repeat only one that they know well. The stories are told in a setting where participants take turns and stay in the spotlight as long as their piece lasts, then they resume their place among the audience. The teller of only one story can be anybody and is welcome to speak up during these common community get-togethers. The legend storyteller does not claim authorship for his story: one, he cannot because the audience is helping him in creating it and two, he refers to others from whom he received his information to consolidate belief. You will find him assuring his audience that the information within the story is accurate and that nothing was changed of what was passed on to him. You will find him citing eyewitnesses and commenting on the statements of others. Sometimes, he might express his opposition or his uncertainty about certain facts, or he might simply repeat with the dispassionate neutrality of a chronicler what others told him (Dégh & Vázsonyi, 1976, p. 102).

Literary theorist Max Lüthi described the legend raconteur as a researcher who offers enlightenment and explanation by his story elaboration, rather than an inspired inventor (Lüthi, 1975, p. 15). At times, he also seems like an aware preacher: “In his effort to round off the narrative, to convince the sceptics or to disavow the believers, the narrator needs the data contribution and support of all who are present” (Dégh & Vázsonyi, 1976, p. 102). In the same vein, Albert Wesselski pointed out the significance of common awareness as a prerequisite for legend formation (Wesselski, 1935, p. 219-20). Furthermore, Austrian folklorist Leopold Schmidt highlighted that well-established familiarity with the legend topics is equally important as the act of telling (Schmidt, 1963, p. 108). Legends are produced in a community when it has possession of a common ground that supports them. The legend is brought to life through the interaction of the participants, and the nature of each telling-event has an impact upon the actual quality of belief (Dégh & Vázsonyi, 1976, p. 102). Dégh and Vázsonyi write:

The actual belief manifest at the time of the telling is always the result of the dichotomous relationship between the communal belief system, inherited in

tradition and sanctioned by enculturation, and the personal belief of the individual performers. The shared knowledge of the network of belief makes its presence felt in an overt or covert form in all phases of legend communication. The attitudes of the participants might express agreement or disagreement through open statement but more often by implication only (Dégh & Vázsonyi, 1976, p. 102-103).

Grounding the story in such a common frame of reference absolves the speakers of the need to include minor details or to explain things commonly known within the group. This keeps the story shorter, as well as easier to understand, remember and share (Dégh & Vázsonyi, 1976, p. 103).

To give credit to the functional approach to folklore, social functions are fully constitutive of the common frame of reference. This explains the many negative folk stories that are extremely popular in both rural and urban communities because of their application to important social functions (Dégh & Vázsonyi, 1976, p. 114). Stories are often used for educational, ritual, and fear-stimulating purposes, among other things. At the same time, legends might serve as simple enjoyment of the thrill of fear, that is for entertainment purposes (Dégh & Vázsonyi, 1976, p. 114). As a matter of fact, the raconteur generally takes considerable care to fit the particular tale to the immediate social context, and because of this he may be hardpressed by the audience or by himself to find other tales which could serve as a functional equivalent (Kirshenblatt-Gimblett, 1975). All this happens on a normative level of which the participants might not be aware. In this sense, belief also relates to the story's appropriateness or effectiveness in the face of its function in a given context, with a given structure of social interaction.

Legends are not always entirely believed, and each participant might reflect different degrees of belief (Dégh & Vázsonyi, 1976, p. 116). In truth, the question whether participants truly and fully believe in the legend would seem to be quite an oversimplification. Between the two extremes of unconditional belief and absolute denial exist a wide variety of accidental personal opinions; and most of the personal opinions likely fall somewhere in the middle of the belief spectrum. Dégh and Vázsonyi

report that often, the teller and his audience will open or close the storytelling time with an inconclusive discussion about its merits and its truth (Dégh & Vázsonyi, 1976, p. 109). Since legends are deeply rooted in social reality, their appreciation is influenced by a plurality of factors beyond territoriality, like age, sex, religion, occupational groups, language, customs, traditions, and so forth. In the end, what really seems to matter is that every legend states something about belief. It is not necessarily the belief of the narrator nor the belief of the receiver-transmitter that is the most relevant; rather we must consider the belief itself that makes its presence felt, at times quite abstractly, in any kind of folklore story. Almost without exception, the legend tells either explicitly or implicitly that its story's content is or was believed sometime, by someone, somewhere... whether it is “by the neighbor,” “by an old woman,” “by grandfather,” “by somebody,” or “by people somewhere else,” and that was a “long time ago.” Ergo, a general reference to belief is an inherent and arguably the most outstanding feature of the folk legend (Dégh & Vázsonyi, 1976, p. 119).

The folk story: familiar, brief and unidirectional

The common frame of reference which grounds the tale “absolves the speaker of the need to include minor details of their story or to explain things commonly known within the group” (Dégh & Vázsonyi, 1976, p. 103). Familiarity with the social and cultural setting in which the story takes place partly accounts for the brevity and the fragmented style of the folktale (Zender, 1969, p. 129). In folk stories, often characters and figures are not described in great detail because they are familiar or archetypal, meaning that we recognize their pattern, and thus a greater attention is brought to actions, to the plot.

As a matter of fact, there is a general principle in folk narrative that each attribute of a person and thing must be expressed in actions, otherwise it is nothing (Olrík, 1965, p. 137). To illustrate this, Danish

folklorist Axel Olrik uses Tale Type 480,³ *The Spinning-Women by the Spring* and explains in the following way:

If one were to begin “There was once a young motherless girl who was unhappy but beautiful and kind...” it would be entirely too complicated a thought for a *Märchen* [fairy tale]. It is much better when these ideas are expressed in action and when these actions are all connected; (1) the stepdaughter is sent out to the heath to gather heather and is given only ash-cakes as provisions; (2) she speaks kindly to the little red-capped man who peeks out from the knoll of heather and she gives him some of her ash-cakes; (3) the little man presents her with gifts; pearls fall from her hair when she combs it and gold pieces from her mouth when she opens it. Thus, her unhappiness, her kindness, and her beauty are conveyed as three phases of the plot (Olrik, 1965, p. 137).

On top of keeping the tale short, this focus on action makes folk narrative unidirectional, always moving forward. Very rarely will the story go back in order to fill in missing details. Any previous necessary background information will be provided in dialogue instead (Olrik, 1965, p. 137). The practical effect of this is that “[e]verything superfluous is suppressed and only the essential stands out salient and striking” (Olrik, 1965, p. 138). This might be the effect of psychological patterns. Psychologist Frederic Charles Bartlett notes that the reproduction/transmission process of folk stories is characterized by the omission of the irrelevant, the unfamiliar and the unpleasant (Bartlett, 1965). As a result, folk stories exhibit three characteristics: it is familiar, brief and unidirectional. Moreover, we have established that the storyteller cannot claim authorship of the story; the folktale is in fact a participative creation over years of gatherings, reproduced and transmitted orally, involving a great number of participants, each of which is the author. Consequently, analyzing what characters and figures symbolize as well as focusing on what their actions represent in a given context is a much more fertile field of study than others like characters

³ Tale types are based on the Aarne–Thompson–Uther classification system which is an index used in folkloristics to organize, classify, and analyze folklore narratives. For a discussion on the topic, see Dundes (1997).

descriptions, literary styles, particular vocabulary in dialogue and plot, stories' structures, etc.

2.2.3 *The French Canadian experience and the métissage question*

Contrary to English Canada where comparatively few European-derived folktales survive as a whole, French Canada has an incredibly rich folklore of stories and tales constituted by an amalgam of both French and Indigenous lore (Low, 1985). As previously mentioned, there is a real *métissage* between the peoples that permeates even their folk stories. This gave rise to a whole new corpus of folk stories incorporating elements of both Indigenous and French culture, as seen in tales such as *La chasse-galerie* and *Ikès le jongleur*. Canadian literary critic and theorist Northrop Frye adopt a very critical attitude towards Québec's folklore. In his book *The Bush Garden*, one of the best best-known studies of Canada and its arts. Damned by provinciality, Frye writes that Québec has become

a cute tourist resort full of ye quaint junke made by real peasants, all of whom go to church and say their prayers like the children they are, and love their land and tell folktales and sing ballads, just as the fashionable novelists in the cities say they do (Frye, 1971, p. 133).

In reality, Peter van Lent explains that Québec has always been identified with folk culture for the very good reason that for over two hundred years, and much like the Indigenous peoples, it was the only culture Québec had (Van Lent, 1985, p. 330). It is true that some aristocratic administrators of the French monarchy and of the Catholic Church came to colonize New France, and some noblemen to whom large holdings of land were granted joined as well. Nonetheless, the vast majority of the settlers were not wealthy nor cultivated; they belonged to the peasant class of Normandy, Brittany and other northwest France provinces (Van Lent, 1985, p. 330). They became known as *habitants*:

⁴ On the *métissage* question, contacts and relations between Indigenous peoples and French Canadian settlers, see White (2010).

uneducated yet hardy men and women of the land, who brought their folklore and their skills as artisans with them onto new territory (Van Lent, 1985, p. 331). Moreover, when France lost possession of Québec to England in 1763 with the Treaty of Paris, many of the educated élite of Québec's society decided to return to France (Van Lent, 1985, p. 331). In the decades that followed, disdain from the English never stop to manifest. Lord Durham, Governor in Chief of British North America wrote in 1839 that the French Canadians were “a people with no history and no literature” (Simard, 1975, p. 59; Durham, 2006, p. 149). This has had the effect of turning the *habitants* inwards; and Québec became in George Woodcock's pejorative words “a closed little society” (Woodcock, 1979, p. 119).

Folded on itself, Québec's people developed a distinctive, rich and profound *mentalité du terroir*, the homestead mentality. This ethic had a strong and durable influence on the social context within which Québec folk stories, which they call *contes* in French, flourished. According to Peter van Lent, it provided central themes for stories during nearly one hundred years, and its popularity as a dominant way of thought helped solidifying the Québec identity (Van Lent, 1985, p. 333). In simplest terms the homestead mentality advocates all things rural, traditional and integral to French Canada: men and women should speak French, stay on the land to farm it, be as nearly self-sufficient as possible, raise large families, and be good Catholics. As a matter of fact, the Catholic Church in Quebec actively supported this cultural movement, which only made it stronger. Strongly Jansenist in its doctrinal orientation, the Catholic Church “gave an early and vigorous blessing to the homestead ethic because its values were ‘simple’ and close to nature and therefore to God” (Van Lent, 1985, p. 333). As a consequence, religion permeated folklore in Québec the same way it permeated every single other aspect of the *habitant's* life.

The life of French Canadians was certainly a challenge: packed into tiny rowhouses, exhausted by long hours of tedious work, branded and repeatedly mistreated by the English, often isolated and bored during cold

and lasting winters. Such life, especially with regards to the climate and geographical situation, is recognized by folklore scholars like Aurélien Boivin as a significant factor for the prevalence of oral stories (Boivin, 2004, p. 8). Despite the differences, the French Canadians shared this particular experience with the Indigenous peoples. The general propensity to tell stories on winter nights is best presented by Morris Opler, quoting a Jicarilla Apache informant in the preface to his collection *Myths and Tales of the Jicarilla Apache Indians*:

The winter was the time when stories were told most, for then the nights were long and the people got tired of lying around. The story of the emergence can be told any time, day or night, and during any season, but it was most often told during the long winter nights. It is not dangerous to tell it at any other time, however. The story of the killing of the monsters by Killer-of-Enemies or stories about the bear, snake, any monster, or any of the evil ones can be told during the winter only, for then those dangerous ones go high in the mountains and are not where the people live. And those stories are always told at night.

The stories are of different kinds. Some make you happy, some make you sad; some frighten you. They have a little feast when stories are being told... (Opler, 1938, p. viii-ix).

The sentiment of boredom during winter nights most likely has pervaded all cultures. French Canadians were unique compared to their English counterpart in their homestead mentality, supported by the then powerful Catholic Church, coupled with illiteracy and an already strong oral culture. They were also unique in that they felt the social need for stories to embed law because the legal order of French Canada was completely fractured, plunged into chaos, from the settlement period up until the enactment of the Civil Code of Lower Canada (Brierley & MacDonald, 1993, p. 6-32). In their book *Québec Civil Law*, professors John E.C. Brierley and Roderick A. MacDonald, describe Québec as struggling with a major state of legal disorder where rules and laws were blurred and multiplied, often contradictory or at times simply unknown (Brierley & MacDonald, 1993, p. 6-28). For most of its history, Québec

was a state of laws, rules or norms plurality and no official law. This situation was not only confusing, it created a distance between the legal institutions and the people subject to the law, which *de facto* encouraged other means of regulating social behavior for the common good such as the Catholic Church and folk stories.

The homestead mentality and cultural folklore experiences were swept away in the 19th century by industrial revolution. The legal order in Québec also stabilized with the enactment in 1866 of the Civil Code of Lower Canada, codifying of all civil law legislation (Brierley & MacDonald, 1993, p. 32). The long, snowy and dark evenings were no longer devoted to *veillées* (vigils), or night gatherings where many stories were told and exchanged (Van Lent, 1985, p. 334). This change in culture kickstarted among more learned members of Québec's society a trend of putting down on paper traditional oral folktales and publishing them in newspapers (Boivin, 2004, p. 8). The tales listed in 19th century periodicals have been grouped by scholars into three main categories: supernatural tales, anecdotal tales and historical tales (Boivin, 2004, p. 8). Supernatural tales in particular were almost entirely based on earlier oral narratives that "intellectuals" such as journalists, lawyers and writers would fix in the writing (Boivin, 2004, p. 10).

3 LAW WITHIN INDIGENOUS AND FRENCH CANADIAN SUPERNATURAL FOLK STORIES

Indigenous and French Canadian supernatural tales include all stories where a supernatural being or a supernatural phenomenon manifests itself. Aurélien Boivin notes that these tales are similar to what folklore scholars call "legend" (Boivin, 2004, p. 9). Indigenous supernatural tales are quite common because they relate to the sacred. Indigenous peoples generally live in an integrated cosmology, which considers nature sacred (Borrows, 2010, p. 24-35; Webber, 2009, p. 611-617), along with other natural beings such as animals and plants as well as

supernatural beings like spirits, windigos, tricksters and giants to which they attribute purposive actions, thoughts and words. Highly influenced by the Catholic worldview, French Canadian supernatural tales also feature beings of the “magical” realm, notably the devil, his accomplices, werewolves, will-o’-the-wisps, revenants, and ghosts (Boivin, 2004, p. 9). To illustrate how law can be studied within Indigenous and French Canadian folk stories, two similar supernatural characters have been put into a comparative cross-cultural dialogical exercise: the windigo and the *loup-garou*.

3.1 Folktales’ supernatural characters as archetypes

Supernatural folk stories are more conducive to archetypal analysis than anecdotal or historical ones. This is supported by two important factors: the necessary emphasis on characters and actions of the folktale instead of other literary characteristics, which were herein extensively covered, and the tendency for significant cultural and psychological symbols or patterns to manifest in supernatural characters as well as in narratives (Frye, 1957; Lévi-Strauss, 1955; Frazer, 2002). This last observation was the main foundation for the field of study that is now called archetypal literary criticism, which was given impetus by literary critic Maud Bodkin’s publication of *Archetypal Patterns in Poetry* in 1934, applying the theories of psychiatrist Carl Jung to poetry (Bodkin, 1934). Jung explains in his seminal book *Man And His Symbols* that archetypes are neither specific or particular representations, but patterns of characters, figures or narratives:

My views about the “archaic remnants,” which I call “archetypes” or “primordial images,” have been constantly criticized by people who lack a sufficient knowledge of the psychology of dreams and of mythology. The term “archetype” is often misunderstood as meaning certain definite mythological images or motifs, but these are nothing more than conscious representations. Such variable representations cannot be inherited. The archetype is a tendency to form such representations of a motif—representations that can vary a great deal in detail without losing their basic pattern. There are for

example many representations of the motif of the hostile brethren, but the motif itself remains the same (Jung, 1968, p. 57-58).

The most influential contribution to archetypal criticism has been made by Northrop Frye in his prominent *Anatomy of Criticism*, a book of four essays (Frye, 1957). In his third essay “Archetypal Criticism: A Theory of Myths,” Frye is interested in the function and effect of archetypes found in myths, because he argues that they “play an essential role in refashioning the material universe into an alternative verbal universe that is humanly intelligible and viable, because it is adapted to essential human needs and concerns” (Abrams, 1999, p. 224-25).

In this sense, archetypes are fully constitutive of *nomoi*. It follows then that cultural and psychological symbols cannot be separated from legal theory in archetypal analysis. In truth, all supernatural characters in Indigenous and French Canadian folktales are archetypes which reveal meaningful insights on the various principles, rules and norms that inform their expressions. With them, it possible to reconcile two of the prevailing shortcomings of transsystemic legal study: these archetypes allow for the development of bridge principles, rules and norms which enable rich and deep comparative dialogues across legal traditions, all while remaining culturally sensitive and grounded within the peoples’ respective experience. The archetypal analysis, which is universal in essence, is indeed not contradictory to the particularism of a given cultural context because an archetype is a tendency towards a pattern or motif. Patterns and motifs transpire in specific cultural contexts, and so their analysis provide two layers of information, one universal and one particular.

3.2 The Windigo and the *Loup-garou*, monsters outside the community

While not quite the same figure, the windigo in Algonquian folklore and the *loup-garou*, or werewolf, in French Canadian folklore are very similar monsters. Upon contact between the Indigenous peoples and the French Canadian settlers, the motifs of windigo and werewolf in fact

mingled in the narratives about cannibal monsters, giving rise to *métissage* in folklore (Podruchny, 2004, p. 678-679, 693-694). The windigos and werewolves' narratives provided the peoples of North America “a framework for experiencing the material world,” (Cruikshank, 1998, p. xii) and as such they embedded parallel legal principles. Through the invaluable work of Hadley Louise Friedland, it has been submitted that supernatural characters like the windigo or the *loup-garou* represent the civilized individual who becomes harmful and/or destructive to himself and to his community members, transformed from law-abiding human being to violent, dangerous, law-breaking and monstrous animal (Friedland, 2009, p. 34, 39). Windigos and werewolves' folk stories consequently offer a corpus in which to find legal responses to deal with such issues (Friedland, 2009, p. 82-122).

3.2.1 *Windigo, a monster of Algonquian folklore*

The windigo is an important supernatural character part of numerous Algonquin-speaking peoples' folklore, including the Algonquin, the Ojibwe, the Saukteaux, the Cree, the Naskapi and the Innu (Brightman, 1988). In all accounts, the windigo is presented as a past human transformed into a malevolent monster which inflicts harm on the community⁵. Basil H. Johnston describes:

The Wendigo was gaunt to the point of emaciation, its desiccated skin pulled tightly over its bones. With its bones pushing out against its skin, its complexion the ash-gray of death, and its eyes pushed back deep into their sockets, the Wendigo looked like a gaunt skeleton recently disinterred from the grave. What lips it had were tattered and bloody [...] Unclean and suffering from suppuration of the flesh, the Wendigo gave off a strange and eerie odor of decay and decomposition, of death and corruption (Johnston, 1995, p. 221).

Great emphasis is put on the lips because the windigo “literally ate his own lips” (Savage, 1974, p. 3). Dirt, smell and general uncleanliness are also significant physical elements of the monster, often exhibiting

⁵ Although here the term *windigo* strictly refers to the folklore monster, please note that the term *wetiko* also refers to the singular evil spirit (Podruchny, 2004, p. 682).

long, shaggy and dirty hair, unwashed body, discolored teeth, long and broken fingernails (Savage, 1974, p. 3).

The windigo is a repulsive being, between man and animal, which is often featured as possessing superhuman strength and stamina (Teicher, 1960, p. 93), and a cannibal preying onto other human beings. As a matter of fact, cannibalism is an incredibly prevalent trait among windigos (Brightman, 1988), although not a necessary one (Norman, 1982, p. 3; Friedland, 2009, p. 22-23). For Friedland, sad persons with lack of self-care and self-destructive tendencies, struggling with distorted or obsessive thoughts and desires, are at risk of becoming windigos (Friedland, 2009, p. 63-68). She stresses that “no one ever wakes up as a wetiko,” since it requires transformation from human to animal, which is a process that could in some cases take years to complete (Friedland, 2009, p. 68). A person could turn into a windigo through possession, witchcraft, or cold, isolation and extreme starvation (Podruchny, 2004, p. 682). Friedland too emphasizes starvation and suffering among the factors leading one to transform into a windigo, as human flesh is tempting during extreme famine (Friedland, 2009, p. 70). She further lists abuse, misuse or loss of power as another factor, noting that this includes purposeful misuses of medicine power as well as giving up one’s personal power to giving into selfishness, or their dark side (Friedland, 2009, p. 73-75).

Johnston echoes this observation, giving into the weakness “of selfishness regarded by the Anishinaubae people as the worst human shortcoming” is the root of turning into a windigo (Johnston, 1995, p. 223). The common way for one to become a windigo is “by his or her own excesses,” (Johnston, 1995, p. 227) to the point where the person demonstrates

an abnormal craving, creating an internal imbalance to such a degree as to create a physical disorder. The Weendigo has no other object in life but to satisfy this lust and hunger, expending all its energy on this one purpose. As long as its lust and hunger are satisfied, nothing else matters — not compassion, sorrow, reason, or judgement (Johnston, 1995, p. 224).

While turning into a windigo requires conscious choices, decisions and actions by the human being, the transformation process cannot be reduced to the will of the person. There are important environmental factors at play. For instance, Friedland highlights social elements like prolonged isolation or group contagion (Friedland, 2009, p. 76), or even seasonal elements like cold winters, as having an impact on windigos who are reported to mostly turn during the winters and to have a frozen heart (Friedland, 2009, p. 79). And so, a plurality of causes lead humans to being transformed into windigos; this issue exhibits social, environmental and psychological dimensions which together make a complex whole.

3.2.2 *Loup-garou, a monster of French Canadian folklore*

French Canadian folktales feature a distinctive *loup-garou*, or werewolf, a malevolent and destructive creature between human and wolf which could be cured, meaning converted back to full humanity and reintegrated into the community (Ransom, 2015). Folklorist Aurélien Boivin explains that one can become a *loup-garou* through failure to observe Catholic obligations:

A werewolf is a miscreant who has not observed Easter rites [went to confession and attended mass] for seven years and who, from this fact, is condemned by Satan to take the form [of an animal] every night. According to other versions, a Christian is thus condemned for having refused to pay his tithe, to have made fun of the priest or to have failed to attend midnight mass [on Christmas Eve] (Boivin, 2004, p. 16).

Other accounts mention werewolves as people that have sold their soul to Satan or that live a bad life, that is outside of the precepts of the Catholic Church (Perro, 2007, p. 73). The *loup-garou* of French Canadian folk stories therefore has an anti-Christian orientation: it is a savage beast linked to the devil. The monstrous condition however remains tied to the choices, decisions and actions of the faithful. Contrary to other cultural beliefs, the *loup-garou* curse does not extend to others in that there is no transmission through the bite of the animal (Perro, 2007, p. 73).

Physically, the *loup-garou* most definitely looks like beast yet not necessarily a wolf. In truth, the most common description from encounters with werewolves in French Canadian tales speak of a giant dark dog, with red eyes sparkling like firebrands, flaming like lanterns, with hairy legs, fangs as long as a finger, and a pointed muzzle from which a burning breath exhales (Boivin, 2004, p. 16). This large black creature howls, has thick fur and moves without making a sound (Perro, 2007, p. 75). In their human form, werewolves are described as suspicious-looking humans with abnormal behaviour that inspire no confidence, who can be threatening and violent if discovered (Perro, 2007, p. 77). Werewolves in the French Canadian folklore are more easily recognized by their physique than by their behavior, as they do not necessarily become aggressive, even if their animal manifestations always are scary.

Condemned to wandering in an animal body, the victim often simply misunderstands what is happening and only seeks to be freed from the curse, to become human again (Perro, 2007, p. 77). The *loup-garou* may therefore be harmless, looking for attention; for this it is said that the werewolf remains first and foremost a transformed human, and that any attempt to kill him is considered attempted murder by both religious and civil authorities. The duty of a good Christian is not to murder the creature, but rather to deliver, or release, the human from the curse (Perro, 2007, p. 77; Ransom, 2015, p. 258). The French Canadian werewolf could be freed from its curse by the simplest of means, for instance merely by being cut or poked so that a few drops of blood can be shed (Ransom, 2015, p. 258). Humans released from the curse of the werewolf were fully cured and could reintegrate the community, which means that observing a life faithful to the Catholic Church and its teachings is equalled to being civilized, to be a moral law-abiding agent participating in society, following its norms and rules. The moral behind *loup-garou* stories is thus clear: humans who stray from the Catholic Church become beasts.

3.2.3 Legal principles embedded in Windigo and Loup-Garou stories

The Algonquian windigo and the French-Canada *loup-garou* are “clearly different social phenomena” (Podruchny, 2004, p. 683), yet the folk stories in which they are featured follow similar patterns. The cannibal animal-like creature is an archetype which illustrates, and embodies, the universal problem of the “ordinariness of human monstrosity” (Marano, 1982, p. 401). For Friedland, the windigo “as a legal categorization describes people who are already, or are at risk of becoming harmful or destructive to themselves and/or others in socially taboo ways.” (Friedland, 2009, p. 34, 39). The same could be said about the *loup-garou*. It follows that important legal principles embedded within windigo and werewolf folk stories can be revealed through a thorough study of law in literature, which is precisely the nature of Friedland’s work, and to which we are herein greatly indebted. Friedland separates the legal principles found in windigo stories in two categories, one of legal processes and the other about the individuals’ obligations and rights (Friedland, 2009, p. 82). For the most part, the principles that she identifies are equally present and valid in *loup-garou* stories.

With regards to legal processes, windigo folk stories indicate that legitimate decisions are collective and open; councils or groups are always involved to deliberate on the right decision to make, especially when the execution of the windigo is considered as an appropriate solution (Friedland, 2009, p. 84). Moreover, authoritative final decision makers are leaders, medicine people and the closest family members of the windigo. While the medicine people rarely pronounce the ultimate judgement, they are “almost always, at the very least, present and involved in the decision-making process” (Friedland, 2009, p. 86). Finally, the stories include procedural steps for determining legitimate and effective responses to windigos: first, the warning signs must be recognized; second, careful observation, questioning and evidence gathering must be conducted to determine whether an individual is a windigo; third, the

appropriate response must be determined (Friedland, 2009, p. 88-95). Legal response in windigo cases are informed by the principles of healing, supervision, separation, incapacitation and in occasional occurrences retribution, principles that “are constantly being blended and balanced based on a variety of factual and social factors” (Friedland, 2009, p. 95-104). The same principles of legal process and legal response can be inferred from French Canadian *loup-garou* stories.

As for the legal obligations flowing from windigo stories, Friedland begins by noting the responsibility members of the community have in helping and in protecting the vulnerable from a windigo, especially the children (Friedland, 2009, p. 104-107). Such responsibility is necessarily related to the ability of the members in question to help or even stop a windigo, and only becomes a legal obligation to the ones who can intervene. The same way, there is a responsibility to warn others of the dangers posed by a windigo, and failure to do so when possible is considered a fault (Friedland, 2009, p. 107-108). Further, any member of the community who discovers someone in the process of turning into a windigo, or who has already turned into one, has the legal obligation to seek help from others, notably from the windigo’s family, leading members of the community and medicine people (Friedland, 2009, p. 108-109). And when the windigo reintegrates the community, materializes an obligation for the other members, particularly his family, to provide support to their recovering peer (Friedland, 2009, p. 109-111).

Finally, windigo stories contain certain procedural and legal rights that are recognized to the windigo, which are also recognized to the *loup-garou* in the French Canadian stories. For procedural rights, Friedland emphasizes the right to be heard and the right to decide (Friedland, 2009, p. 112-113). These mostly apply to a person suspected of turning into a windigo: it is important that the community gives this person the chance to explain himself and share his perspective, just as it is important to let the person decide on certain measures to be taken with regards to himself, when possible. For their part, substantive rights for the windigo include

the right to life and safety, the right to be helped and the right to ongoing support (Friedland, 2009, p. 113-114). These rights are correlative to the obligations herein developed, that is the responsibility to help, protect and support. Windigo and *loup-garou* folk stories are thus dense and potent source of law, containing numerous legal insights and principles which inform Indigenous and French Canadian legal traditions likewise. Through these stories materializes a common frame of reference for a constructive dialogue across legal orders.

4 CONCLUSION

Universalistic texts are not the only appropriate object for law *in* literature study, in fact oral folk stories are just as much if not more appropriate when looking at specific legal orders. To this, Indigenous and French Canadian folk stories are no exception: they are incredibly dense and potent source of legal principles and notions. Law embeds in these stories in various ways, one of which is through the supernatural characters that they feature. This is exemplified among others by the Indigenous wendigo and the French Canadian *loup-garou*. Such development in thinking legally about Indigenous and French Canadian folk stories is a major step for further comparative study between the legal traditions, as it provides hope for the making of a common frame through which their respective grammars of law can be properly understood.

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