SEPARATE ABORIGINAL JUSTICE SYSTEMS: SOME WHATS AND WHYS

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A view often asserted in Canada, by two recent Attorneys General of Canada, among others, is that separate Aboriginal justice systems should not be created because the same legal system ought to govern everyone. To allow separate justice systems for Aboriginal peoples, it is argued, would be to introduce an undesirable pluralism into criminal law. It is therefore appropriate that the Viscount Bennett Seminar this year deals not only with Aboriginal justice, but with military justice and young offender justice as well. These latter two areas illustrate that diversity in criminal justice is already established, in principle, in Canada. To allow the creation of separate Aboriginal systems of justice, therefore, is not to take an unprecedented step. Rather, the question becomes whether, and how, that step can be justified.

A number of justifications for separate Aboriginal justice systems can be put forward. My intention is to examine some of those arguments and to ask two questions: first, whether the arguments point to real problems, and second, whether these problems require a separate Aboriginal justice system as a solution. Separate systems can be justified, but not on all of the grounds that have been offered.

First, a definition of "separate Aboriginal justice system" is necessary. Primarily the term should refer to systems that give Aboriginal peoples full control over the response to criminal behaviour – systems such as the tribal courts in the United States. In that sense, Aboriginal justice systems do not exist in Canada, except to the extent that diversion programs created in the past few years (Ontario in 1991, Nova Scotia in 1992) give Aboriginal peoples a measure of control over cases channelled from the regular system. One can argue that the term should be expanded, to reflect more broadly programs that give Aboriginal peoples effective control over certain aspects of the justice system, such as bail supervision, sentencing, and police forces. These types of initiatives are more common, though it is not clear that they really should be called separate systems.[1]

Next, it is unfortunate that discussions of this and similar issues often seem tacitly to adopt an "us versus them" perspective. In some ways this is

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[1]Some examples include the Christian Island Lay Assessors program, which allows Elders to sit with a judge and advise on sentencing in young offender matters, the South Island Diversion program, giving Aboriginal peoples a say in bail and probation supervision, and a variety of Aboriginal police forces, such as the Dakota-Ojibway Tribal Police, the Six Nations Police Force and the Peacekeepers at Kahnawake, established under a number of different programs.

understandable, since Aboriginal peoples are asserting their right to be different, but it is unfortunate. First, less exclusionary language which does not assume that there is "ordinary society" on the one hand and Aboriginal peoples on the other, is preferable. Second, to treat Aboriginal peoples as "them" is to ignore the great differences that exist between different Aboriginal communities. Although Aboriginal peoples may not share the perspective of non-Aboriginal peoples on all matters, one cannot assume that they all share the same traditions and cultural assumptions. There are significant differences between Aboriginal communities.

Finally, a personal note: I am not an Aboriginal person. I am white, male, and middle class. The Irish-Catholic part of my ancestry would once have made me a member of a persecuted minority, but no longer does so, and my visual impairment is entirely correctable and is therefore not a disability. In short, I am one of the privileged members of society. One might therefore suggest that there are individuals better qualified to discuss this subject, and no doubt that is correct. In addition, there is a stronger school of thought which holds that I am simply not qualified to speak about these matters at all. Obviously, I do not accept that view. At the same time, it should be made clear that I do not purport to speak for Aboriginal peoples. In any event, I turn now to five possible justifications for separate Aboriginal justice systems.

The Over-representation Argument

The problems Aboriginal peoples face in the criminal justice system are exemplified for most people by the much greater rate at which Aboriginal persons are incarcerated. Aboriginal persons comprise only 2% of the total population, but 10% of the federal prison population. A sixteen-year-old Aboriginal boy has a 70% chance of going to prison, which is greater than the likelihood he will go to university. Aboriginal women make up over 70% of the inmate population in Manitoba, Saskatchewan, and the Northwest Territories.[2] However these statistics are expressed, they are shocking.

Nonetheless, we should not look unsceptically at these figures. To say that Aboriginal persons, or any group, are over-represented in prison solely on these direct comparisons is to assume that the prison population is, in other respects, a typical cross-section of society. This is clearly an incorrect assumption. The prison population is skewed towards younger men from a low economic background. The Aboriginal population is generally younger, and of a lower economic background, thus a portion of the over-representation might be accounted for in this way. I say "might" because, rather surprisingly, these types

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[2]See M. Jackson, "Locking Up Natives in Canada" (1989) 23 U.B.C. L. Rev. 215 at 218, and J. Hylton, "Locking Up Indians in Saskatchewan: Some Recent Findings" in T. Fleming & L.A. Visano, eds, *Deviant Designations, Crime, Law and Deviance in Canada* (Toronto: Buttersworths, 1983).

of factors are infrequently taken into account.[3] Further, the data is not uniform across the country. In Nova Scotia, for example, Aboriginal persons are incarcerated federally at a lower rate than their percentage in the population. In other words, they are under-represented in federal prisons, though they are over-represented in provincial institutions.[4]

Even if we are sceptical about exact incarceration ratios, there can be no doubt that a problem exists and that the figures call for action. The difficulty is that it is unclear what action they call for because over-representation is merely a sign of the problem, not the problem itself. Any number of explanations might account for these results. Perhaps the even-handed application of some sentencing criteria, for example, whether the offender will lose a job if sentenced to prison, has an unequal impact on Aboriginal peoples. Perhaps Aboriginal persons are less able to make use of the defences available in the criminal justice system, and so are convicted more frequently. Perhaps Aboriginal persons commit more visible crimes, or simply commit more crimes. We cannot ascertain from the mere fact of over-representation whether the problem lies in fair rules applied unfairly, from unfair rules, from prejudice on the part of actors in the system, or from some other cause.

While over-representation *is* the most obvious manifestation of the problems Aboriginal peoples face, it is a symptom of the larger problem *not* the problem itself. This factor alone does not show where the cause lies, and so does not necessarily lead to the view that a separate justice system is required.

The Substantive Law Argument

It might appear that a justification for a separate justice system can be found in our statutory criminal law, the things that we deem to be offences. Criminal law expresses a value system that is not shared by all Aboriginal peoples. In the United States, for example, members of the Native American Church use peyote, an illegal drug (and their right to do so was upheld in *People* v. *Woody*).[5] Australian Aborigines may be obliged by their customary law to commit acts which

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[3]The Law Reform Commission of Canada called for empirical research in this area see *Aboriginal Peoples and Criminal Justice*, (Ottawa: L.R.C.C., 1991) at 87. At present, most studies seem simply to ignore the possible impact of these factors. The most notable exception to this rule are various works by Dr. Carol LaPrairie: see, for example C. LaPrairie, *If Tribal Courts are the Solution, What is the Problem?* (Nova Scotia: Consultation Document for the Department of the Attorney-General, January 1990) at viii [unpublished].

[4]LaPrairie, *ibid.* at ii (fn. 3).

[5](1964) 40 Cal. Rptr. 69.

violate Australian law.[6] It is sometimes asserted that Aboriginal peoples have different property ideas than "white" society. Perhaps the *Criminal Code*[7] makes acts illegal which would be perfectly acceptable within Aboriginal society.

If such clashes do occur, our system is generally unwilling to accommodate them. Aboriginal treaty rights have precedence over provincial legislation, but not over criminal law.[8] It appears, for example, that *People* v. *Woody* would have been decided against Aboriginal peoples in Canada:

> The criminal law of Canada does operate to limit religious practices even when based upon sincerely or genuinely held religious beliefs ...to the extent that religious beliefs run afoul of criminal law proscriptions such as those relating to bigamy or the use of drugs, a belief in polygamy or the use of hallucinogenic drugs is not a defence.[9]

In theory, then, this justification might be correct: in fact, it is not. First, I suggest that it does not have a strong factual basis. The Indigenous Bar Association has suggested that Aboriginal problems with the justice system relate to procedures, not to substantive offences:[10] or as one prosecutor in northern Ontario has put it "for the most part 'our' crimes are crimes to them as well."[11] Secondly, even if such problems do arise, they alone do not justify a separate system of criminal law. Rather, it seems one could help address these concerns by means of exemptions, either statutory or judge-made, within the current system.

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[6]The Law Reform Commission (Australia), *The Recognition of Aboriginal Customary Laws (Report 31: Summary Report)*, (Canberra: Australian Government Publishing Service, 1986) at 37. They note the particular example of *R.* v. *Charlie Limbiari Jagamara*, where the accused was obliged under customary law to spear another person.

[7]R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

[8]*Indian Act*, R.S.C. 1985, c. I-5, s. 88.

[9]*Re Church of Scientology and The Queen (No. 6)* (1987), 31 C.C.C. (3d) 449 at 450 (Ont. C.A.). The court notes two unreported decisions of the Ontario Court of Appeal, *Tucker et al.* v. *The Queen* (28 November 1979, leave to appeal refused 22 January 1980) and *R.* v. *Baldasaro* (15 November 1982, leave to appeal refused 25 January 1983) holding that "notwithstanding the contentions of the accused persons as to the necessity for the use of marijuana in their religious practices, they were subject to the *Narcotic Control Act*." Both decisions concern facts predating the *Charter*, but the court does not note this fact as significant.

[10]See Indigenous Bar Association (L. Mandamin *et al.*), "The *Criminal Code* and Aboriginal People" (1992) U.B.C. L. Rev. (Special Edition) 5.

[11]R. Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" (1989) 3 C.N.L.R. 1 at 13. See also *The Code of Offenses and Procedures of Justice for the Mohawk Nation at Akwesasne (Draft 10)*, presented in "Toward A Native Justice System" (A Conference to Review Akwesasne's Draft Code of Offenses and Procedures). One is struck not by what this Code omits, but by what it includes: in addition to "regular" offences such as theft, assault, kidnap, and traffic offences, the Code also includes various "Offenses Against Nature."

The Cultural Dissonance Argument

A similar argument is that the behaviour and culture of Aboriginal persons is unique enough that it is difficult for the system to judge and treat them fairly. A well-known example is the question of eye-contact. Aboriginal persons who speak to police, prosecutors, or judges with downcast eyes are not being evasive, they are being respectful.[12] Similarly, translation difficulties arise in the courtroom when the request for a plea of guilty or not guilty is turned into the questions, "did you do it" or "are you being blamed."[13]

The problems go deeper than these relatively superficial matters. For example, some Aboriginal peoples are essentially non-adversarial and view criticism of other people as rude and socially unacceptable to a far greater extent than in non-Aboriginal society. As a result, they do not fare well in an institution that depends upon adversarial behaviour. The Indigenous Bar Association reports that traditional Aboriginal persons will be reluctant to testify, and in particular may be reluctant to tell the court, or even their own counsel, of evidence which is unfavourable to the opposing witness.[14] Similarly, an Aboriginal offender may be perceived by a probation officer to be unrepentant because he or she is uncommunicative and reluctant to talk openly about the offence. This approach assumes that individuals should deal with regret by exploring it and bringing it into the open. Peoples who are culturally ingrained to deal with anger or sorrow by burying it and putting it behind them will almost certainly be misunderstood. An accused who is taken to be uninterested in rehabilitation may, in fact, only object to the techniques used: "his refusal may stem not from indifference or from amorality, but from *allegiance* to ethical precepts which we have not seen."[15]

This justification has a stronger foundation in fact. Differences in the cultures of Aboriginal and non-Aboriginal societies have been noted in a number of sources, and the existence of translation and other cross-cultural confusions cannot be denied. But if this were the only justification, it would be difficult to claim that

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[12]An anecdote illustrative of these cultural differences, involving a clash between the Cree custom of eating all the food offered one and the Mohawk custom of offering more food than can be eaten, is discussed in R. Ross, "Cultural Blindness and the Justice System in Remote Native Communities", (Address to the "Sharing Common Ground" Conference on Aboriginal Policing Services, Edmonton: May 1990).

[13]*Aboriginal Peoples and Criminal Justice, supra,* note 3 at 31 (fn. 75).

[14]Indigenous Bar Association, *The Criminal Code and Aboriginal People* (Paper prepared for the Law Reform Commission of Canada, 1991) at 21 [unpublished]. See footnote 9 at 17: "The traditionally-minded Aboriginal person is predisposed to avoid conflict and argument, and thus will shy away from confrontation. Even if a not-guilty plea has been entered, he or she may not provide the court, *or even counsel,* with evidence unfavourable to the opposing witnesses."

[15]Ross, *supra,* note 11 at 9.

Aboriginal persons should be entitled to a separate justice system. Similar arguments could be mounted on behalf of, for example, Korean immigrants, but few of us are inclined to believe that they should have a separate justice system.

Further, I confess to a certain uneasiness about this argument, caused by a traditional liberal bias. To say "Aboriginal peoples are like this" seems like stereotyping, no matter how well-intentioned one may be. These are broad brush strokes with which to paint a diverse group of individuals. Furthermore, it is not always clear how this understanding of cultures actually assists one. Aboriginal peoples are said to value privacy, but does this mean that there should be special rules about search warrants where an Aboriginal person is involved? After all, non-Aboriginals also value privacy, and for that reason restrictions are already imposed on the freedom of the state to search. Should even more protection be offered to Aboriginal peoples? Are we importing a thin-skull doctrine by suggesting that various levels of protection should be provided, depending on how offended one will be? How would one measure this, in any event?

These are, however, relatively minor concerns, and the cultural dissonance argument demonstrates the need for special measures. Yet, the extent to which they justify a separate justice system is unclear. On the one hand, some of these concerns could largely be met by improved translation facilities, better cross-cultural training, or increased hiring of Aboriginal persons into the present justice system. On the other hand, cross-cultural training will not be a sufficient answer to all the concerns. For example, knowing that an Aboriginal offender is less likely to say critical things about an adverse witness is useful, but unfortunately it does not move a judge any closer to finding the truth. Perhaps the only appropriate way to deal with these concerns will be to establish separate procedures for some cases, and divert Aboriginal persons to those other systems. Whether a diversion program grafted onto the present justice system – perhaps a program dealing only with sentencing or probation – should be called an Aboriginal justice system is largely a question of terminology.

The Political Argument

One can argue that Aboriginal persons are entitled to a separate justice system on historical or political grounds. There are really two versions of this argument. The first is that the right of Aboriginal peoples to have a separate justice system is already implicitly recognized in the *Charter*,[16] either by treaty or included within "Aboriginal rights." The stronger version of the argument is that Aboriginal peoples are entitled to self-government, and therefore are entitled to establish their own justice systems, as well as other divisions of government.

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[16] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

No explicit recognition of a right to a separate Aboriginal justice system exists in any treaty. However, one can argue, for example, that the numbered treaties' provisions stating that the Government of Canada will deal with non-Aboriginal settlers who encroach on Aboriginal land implies that, in other circumstances, the Aboriginal peoples themselves retain jurisdiction. Anyone sympathetically inclined can mount a reasonable argument, but no unambiguous claim can be based on the terms of any treaty.

In any event, because of the variety of treaties across the country, and other differences in relations between Aboriginal peoples and governments in Canada, this justification for a separate justice system varies from region to region. Although Aboriginal justice systems are likely to vary from community to community, it is undesirable for the justification to be equally fragmented. For example, a solution that permitted separate systems in some parts of the country, but not in others, would be unsatisfactory.

One can mount a broader argument. The silence of treaties concerning criminal justice need not be taken to indicate that Aboriginal peoples have not been given that right. Rather, since the treaties were negotiated between self-governing nations, Aboriginal peoples retain all of the rights not specifically removed. Therefore, the silence of the treaties on this matter means that Aboriginal peoples still have the inherent right to separate justice systems, unless that right has later been extinguished.[17] This broader and better justification begins to overlap with the argument for self-government, particularly on the issue of inherency, and it will be appropriate to briefly touch on that subject.

Aboriginal leaders have insisted that the right to self-government is inherent.[18] As I understand it, the argument is that no one should purport to grant Aboriginal peoples the right to self-government because that right should be recognized as always having belonged to them. At one point, the independence of Aboriginal peoples was acknowledged. Lieutenant Governor Simcoe, speaking to Aboriginal peoples in 1793, referred to documents which:

> ...prove that your natural independency has ever been preserved by your predecessors, and will establish that the Rights resulting from such independency have been reciprocally and constantly acknowledged in the Treaties between the

[17]See the very informative discussion of treaty rights and criminal justice in B. Wildsmith, "Treaty Responsibilities: A Co-Relational Model" (1992) U.B.C. L. Rev. (Special Edition) 324 for this and other arguments.

[18]On the issue of inherency as it relates to criminal justice, see P.A. Monture-OKanee and M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) U.B.C. L. Rev. (Special Edition) 239 at 254ff.

> Kings of France formerly possessors of parts of this Continent, and the Crown of Great Britain.[19]

This broad recognition of independence did not continue. By 1929, Patterson J. was able to say in *R.* v. *Syliboy* that:

> The savage's rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.[20]

Historically, politically and morally, Aboriginal leaders may be correct in calling the right to self-government inherent. In practical terms, though, rights will need to be extended.

The sovereignty argument, if accepted, certainly justifies a separate justice system for Aboriginal persons: if Aboriginal peoples are entitled to create all of their own institutions of government, then they are entitled to create separate justice systems. However, gaining self-government is perhaps even more problematic than gaining a separate justice system. Thus, although the reasoning is sound, establishing the first premise may be difficult.

The Colonization Argument

This argument is the most frequently made today[21] and is probably the most effective. Essentially, the argument is that increased Aboriginal involvement with the justice system is only part of a larger problem. That problem is that many Aboriginal societies have simply broken down, and no longer have the type of informal social control that is necessary for ordinary day-to-day functioning.

In a healthy society, people behave lawfully not because they fear punishment, but rather, people obey the rules because they *are* the rules. This informal social control influences everything from not spitting in public to not breaking into the homes of other people. But many Aboriginal societies have broken down due to the process of colonization that is common not only in North America, but to aboriginal societies around the world. Traditional methods of social control have been severely weakened, and they have not been replaced with anything else. As a result, Aboriginal peoples manifest a variety of social problems.

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[19]J. G. Simcoe, *The Correspondence of Lieut. Governor John Graves Simcoe*, vol. 1 (Toronto: Ontario Historical Society, 1923-26) at 364.

[20][1929] 1 D.L.R. 307 (N.S. Co. Ct.); quoted in *R.* v. *Simon*, [1985] 2 S.C.R. 387 at 399.

[21]This explanation was adopted by the Law Reform Commission of Canada: *supra*, note 3. See also pages 14ff of that Report for further discussion of this explanation, and a list of other studies that have adopted it.

This sociological theory is not new. Émile Durkheim argued in 1897 that societies with inadequate control over their members will have a high suicide rate, accompanied by other social problems.[22] Aboriginal peoples have a suicide rate two to three times the national average. Their rate of violent death is three times the national average. Their alcoholism rate is higher and their rate of child apprehension is higher. Their level of education is lower.[23] Their crime rate is higher. Ironically, the reason that Aboriginal persons are over-represented in prisons *seems* to be that they commit more crimes, but the explanation does not end there.

Aboriginal crime, it has been suggested, is not typical of crime in society generally. The higher rate is due to increases in certain types of crime. *Amerindian Police Crime Prevention* states that:

> Native criminality has been shown to be quite different from non-Native criminality. For Native people, there are more violent offences, fewer property offences, more social disorder offences, higher overall rates of crime, and a strong relationship between alcohol abuse and crime. Almost conspicuously absent are crimes for profit such as drug trafficking, prostitution, frauds, and armed robberies. The crimes committed are often petty offences directed at the in-group, suggestive of the frustration-aggression model of crime causality.[24]

The cause for this breakdown in social control is easy to pinpoint. Throughout our shared history, non-Aboriginal society has looked on and treated Aboriginal society as primitive and less worthy. Stephen Leacock, whom you will recall was a Professor of Economics and Political Science, was not being satirical when he wrote in his history of Canada that:

> We think of prehistoric North America as inhabited by the Indians, and have based on this a sort of recognition of ownership on their part. But this attitude is hardly warranted. The Indians were too few to count. Their use of the resources of the continent was scarcely more than that by crows and wolves ...[25]

Particularly since Confederation, governments have undervalued and undermined Aboriginal societies. The policy of the federal government for many years was assimilationist. D.C. Scott, Deputy Superintendent of Indian Affairs,

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[22]É. Durkheim, *Suicide: A Study in Sociology* (Illinois: Free Press, 1951).

[23]S. Zimmerman, "The Revolving Door of Despair: Aboriginal Involvement in the Criminal Justice System" (1992) U.B.C. L. Rev. (Special Edition) 367 at 370. Also see *Unfinished Business: An Agenda for All Canadians in the 1990's* (Second Report of the House Standing Committee on Aboriginal Affairs, March 1990).

[24]M. Hyde & C. LaPrairie, eds, Research Division of the Ministry of the Solicitor General of Canada, *Amerindian Police Crime Prevention* (Working Paper No. 1987-21) (Ottawa: Solicitor General of Canada, 1987) at 55-56.

[25]S. Leacock, *Canada, The Foundations of its Future* (Montreal: Gazette Printing, 1916) at 19.

stated to the House of Commons in the 1920s that:

> I want to get rid of the Indian problem. Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian department.[26]

As recently as the Trudeau administration, these sentiments were being echoed: Aboriginal persons "should become Canadians as all other Canadians" the Prime Minister proposed in 1969.[27]

Earlier this century, Aboriginal traditions such as the potlatch were outlawed. In this generation Aboriginal children were removed from their families to be placed in residential schools. It is little surprise that Aboriginal societies have broken down.

Consultants with whom the Law Reform Commission of Canada met made observations, from their own experience, about how the imposition of our justice system had led to disorder. Within some communities, misbehaviour was dealt with publicly, by the community. In this way, not only were individual problems resolved, but values were passed on and reinforced through public recognition and condemnation of inappropriate behaviour. When police and judges began to be involved in those communities, the scope for that reinforcement and education was limited. As a result, crime became more common. By removing the opportunity for Elders to gain respect and for the society to re-affirm its values, the introduction of our justice system weakened the bonds holding those societies together.[28] This is not to say that we should look on the governments of those days as evil: many of the decisions that had negative effects resulting in destruction were nonetheless well-intentioned. At the same time, we cannot ignore the results.

Ironically, if this justification is correct, then the communities suffering most from the problem are also the ones least able to take advantage of the solution. The communities with the highest alcoholism, suicide, and crime rates are precisely those which cannot, at present, muster the personal resources to take control of a separate justice system. This problem, while not an objection to the justification itself, is a very real difficulty.

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[26]Quoted in B. Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill, 1989) at 11. Paradoxically, as a poet, Duncan Campbell Scott, showed respect and affection for Aboriginal societies.

[27]P.A. Cumming & N.H. Mickenburg, eds, *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972) at 331.

[28] See *Aboriginal Peoples and Criminal Justice, supra,* note 3 at 14 and the sources listed there, for further discussion of this issue.

This justification differs from those previously offered, in that nothing but a separate Aboriginal justice system can satisfy the concern raised. The problem identified is not some imperfection in the current form of our justice system, but rather, the very existence of that system. To be sure, the problem is broader than just the imposition of our police and courts. However, any imposed system will contribute to the problem. Tinkering with aspects of that justice system will not address the basic problem. By the same token, increasing the number of Aboriginal persons involved in the justice system, or indeed setting up an Aboriginal-run tribal court system, will not help. The imposition of Aboriginal police officers, judges, or lawyers is not a solution if it is not the model chosen by the Aboriginal society.

It would logically follow from a decision to cooperate in the creation of Aboriginal justice systems that the government should not try to exert any real control over the form of that system. If any purpose is to be served, then Aboriginal peoples must control the form that system takes. Indeed, in this respect, the 1991 *Report of the Aboriginal Justice Inquiry of Manitoba* is inconsistent. Although it consciously uses the term "Aboriginal justice systems" rather than "Aboriginal courts," much of the ensuing discussion assumes a system much like the present one. The Report speaks of Aboriginal peoples controlling "everything from police, to prosecutor, to court, to probation, to jails."[29] While tribal courts are one approach to returning control to Aboriginal communities, and might satisfy some communities, others may not want to mirror the present system so closely. The Kahnawake reserve in Quebec, for example, has created "peace-keepers," a police force without any official legal status (though they been classed as peace officers under the *Criminal Code*),[30] and also makes use of Justices of the Peace appointed under the *Indian Act*.[31] Perhaps Kahnawake would be content with a system that in many ways resembled a non-Aboriginal one, although even within their community a traditional "Longhouse" faction favours other approaches. Societies that do not recognize a distinction between tort law and criminal law, or that are more concerned about producing future harmony than with deciding past guilt, can be expected to adopt very different approaches.

Conclusion

It is unrealistic to think that the federal and provincial governments will agree to the creation of separate Aboriginal justice systems with no notion of what they

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[29]Manitoba, *Public Inquiry into the Administration of Justice and Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba*, vols 1 & 2 (Winnipeg: Queen's Printer, 1991) at 314 (Commissioners: A.C. Hamilton & C.M. Sinclair).

[30]*R.* v. *Norton* (27 September 1982), Longueuil 2286-81 (C.S.P.).

[31]See Mohawk Council of Kahnawake, eds, *Institutions of Mohawk Government in Kahnawake: An Overview* (Kahnawake: Mohawk Council of Kahnawake, 1989).

may entail, and with no say whatsoever as to their structure. The *Charlottetown Accord*, for example, would have made Aboriginal governments subject to the *Charter*, though it would also have given them the right to use the notwithstanding clause. Realistically, federal and provincial governments will want a say in these issues. On the other hand, Aboriginal peoples are increasingly speaking of their intention simply to go ahead and create the structures they need, without prior agreement or approval.

There are legitimate concerns about Aboriginal justice systems. Whether Aboriginal women would always be treated fairly and equitably is a concern often raised, for example. Yet, even granting that this problem is real, it does not follow that it is up to society at large to solve that problem. Strong spokespersons for Aboriginal women are present within the Aboriginal communities, and it seems reasonable to hope that their concerns will be addressed. Furthermore, it would be ingenuous in the extreme to claim that, in order for women to be treated fairly, it is essential that the current justice system be kept in place. The Canadian justice system's own record in this regard is not one of the highlights of the system.

This example encapsulates the relationship between the existing justice system and proposed Aboriginal justice systems. Some people seem to feel that calling for separate Aboriginal justice systems is equivalent to saying that Aboriginal persons simply should not be required to obey the law. Aboriginal communities have a great incentive to promote lawful behaviour, especially on-reserve. The proposal is not for lawlessness, but for a different system of laws.

The Canadian system has flaws, but it is for the most part reasonably fair and equitable, and does attempt to balance the interests of those charged with crimes against the interests of society. However, it is not a system well-suited to Aboriginal peoples, especially when it is imposed upon them.[32] To insist that Aboriginal justice systems cannot be created unless they meet a standard that the Canadian system is incapable of meeting is unreasonable, and a manifestation of the paternalistic attitude that most justifies change. Non-Aboriginal societies must let go of the idea that they know what is best for Aboriginal peoples.

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[32]At the other extreme, one must note idealistic views which suggest that the Aboriginal approach to criminal justice issues is inherently superior to the present justice system, for all people. We might benefit from some lessons drawn from the Aboriginal approach, but cross-cultural differences cut both ways: given a choice, I suspect I would rather be dealt with by the existing system than by an Aboriginal approach. These are not questions of right and wrong, or even of superiority, but of appropriateness.