

6-24-2011

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Recommended Citation

Ellis, Jaclyn (2009) "First Nations Justice Initiatives in Canada," *Totem: The University of Western Ontario Journal of Anthropology*: Vol. 17: Iss. 1, Article 12.

Available at: <http://ir.lib.uwo.ca/totem/vol17/iss1/12>

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Keywords

First Nations, justice, Canada, legal system

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First Nations Justice Initiatives in Canada

Jaclyn Ellis

Reports on the over representation of First Nations people in the Canadian and American legal systems have been widely publicized in the media. In Canada this has led to a questioning of the legal system and a push to have alternative, traditional forms of First Nations justice recognized in the hope that they will lessen the number of First Nations people in prisons and prevent recidivism. Traditional forms of addressing crimes are also influencing non-First Nations concepts of justice and have inspired new approaches to justice such as the restorative justice movement.¹ There has been, however, pressure to standardize First Nations justice initiatives. As standardization does not take into account the great variety of cultures and values between and within First Nations communities it can only be detrimental to the effectiveness of First Nations justice initiatives. If alternative justice initiatives are to be effective, the diversity of values held by community members must be taken into account and each initiative must be developed with input from the community in which it is to be implemented.

While the over representation of First Nations people in the Canadian legal system has been linked to systemic injustice, racism, and the social-economic problems associated with colonialism, it has also revealed a conflict between traditional First

Nations values and beliefs about justice, and the beliefs and values which the Canadian legal system is based upon. First Nations justice systems generally view offenders as good people, who are in need of healing or guidance. They often include traditional healing practices. The community is encouraged to consider the circumstances which led to the commission of a crime and alter them in hope that future crimes can be prevented. This usually includes restitution to the victim (Ross 1992).

The Canadian legal system on the other hand focuses on punishing the offender in hopes that it will deter others from committing similar crimes. This system often works from the viewpoint that committing an illegal act makes an individual a “bad person”. Many First Nations people who maintain traditional values feel that such punishment is inappropriate and requests are often made to prevent First Nation offenders from becoming isolated from their communities through the prison system (Ross 1992).

For First Nations, the issue of restoring traditional justice practices is closely linked to that of self-determination. In 1973, The Supreme Court ruled on the case *Calder v. A.G.B.C.*, finding that First Nations title was a right because First Nations people had occupied the land prior to European contact. This decision also recognized that First Nations people had legitimate governmental and legal systems prior to European contact. *R. v. Sparrow* acknowledged that First Nations hunting and fishing rights were valid regardless of whether the methods used were traditional or contemporary (Borrows 2001). This publicly acknowledged that First Nations

¹ Restorative justice is a philosophy which views punishment as an inadequate method of addressing crime. It has resulted in a variety of grassroots programs which encourage active participation of the offender, victim and community in ensuring offender accountability, support for the victim, restoration of harmony in the community, and the prevention of future crimes. Generally such programs are holistic and focus on the future (Gilman 2009).

cultures are not static, but are subject to change over time.

Both of these cases argue for the legitimacy of First Nations governmental, social, and judicial systems prior to European contact. Many First Nations justice initiatives today are not new programs developed in accordance with First Nations values, but old systems which were forced underground and are now emerging to be recognized and reinstated (Borrows 2001). Through the restoration of traditional justice systems First Nations People are re-affirming their inherent rights to self-determination and in doing so they are beginning to reverse the effects of colonialism on their communities (Rudin 2003).

One such initiative is the Unlocking Aboriginal Justice Program which was implemented by the Wet'suwet'en in British Columbia. The program offers workshops addressing culture, self-esteem, and abuse, and has a strong focus on prevention and strengthening cultural identity in the community. When a crime does occur, the victim and the offender's clan and family develop a plan for the rehabilitation of the offender. The program works in accordance with the traditional laws of the Wet'suwet'en and is guided by an advisory board of elders and chiefs who have a knowledge of the traditional laws (George 2003). The Inuit also have begun reviving traditional laws. A program in Nunavut called Akitsiraq has been implemented to train students in both western law and traditional Inuit knowledge. The Nisga'a, also in British Columbia, have succeeded in gaining recognition for their traditional legal code, Ayuukhl, in their treaty with the Canadian government (Borrows 2001).

Because First Nations justice systems derive from traditional justice practices, they are distinct from the restorative justice movement, which is

gaining some momentum among non-First Nations people. While this movement has been heavily influenced by First Nations values, it is looking for new, restorative approaches to justice within the Canadian legal system, and is not seeking to promote traditional systems or attempting to adapt traditional systems to work within a contemporary context. First Nations justice systems are specific to the cultures out of which they developed. In contrast, restorative justice initiatives are more generally targeted towards the Canadian public (Simon Fraser University School of Criminology n.d.).

There is a strong emphasis on standardization of restorative and First Nations justice programs. One argument for this is that it creates equality for offenders across communities. A standardized system should, theoretically, ensure that individuals who commit like crimes are treated similarly, receiving comparable sentences. Another argument is that restorative systems are easier to implement in communities wishing to take part in a justice initiative, and they would simply have to follow what other communities have done before, rather than work out a new system themselves. Finally, a standardized system would be easier to administrate. If communities used comparable systems with analogous needs, funding requirements would be predictable (Rudin 2003).

Arguments for a standardized system in which equality is taken to mean that everyone receives identical treatment do not hold up well in practice. Each community and individual case is unique and has its own unique set of circumstances. Giving different individuals the same sentence for similar crimes does not necessarily achieve the same results. Restorative justice and First Nations justice programs aim to achieve the same results even if it means treating individuals differently. The

Supreme Court of Canada has made recommendations that Canada use these types of programs more frequently (Rudin 2003).

Two models which have been suggested for a standardized system are the Maori family conferencing model and the sentencing circle (Miller 2003). In New Zealand, the Maori family conferencing model either serves as an alternative to courts or makes recommendations for the sentencing of offenders in cases where youth are the offenders. The offender's family, the victim the offender's lawyer, the police, and any person invited by the offender or the victim are involved in the process which is overseen by a youth justice coordinator. The group meets to determine what the response to the offence should be, and the decision of the group is binding in so long as a consensus is reached (Morris 2004). Sentencing circles are similar in that those involved reach a consensus on how to respond to the offence and they take the place of sentencing hearings. However, the decision of the sentencing circle is not binding but serves as a recommendation. Most judges abide by these recommendations when sentencing the offender (Spiteri 2001).

These models are supported by the state mainly because they are controllable from the outside (Miller 2003). They have been critiqued because they do not reflect the values of individual communities and have been imported from the outside. Sentencing circles, while allowing community involvement, are limited because the structure of the system is the same. An individual is still tried in a traditional Canadian court system, they are still found guilty by that system, and sentenced to some form of punishment. This is not First Nations justice because it is based on foreign laws and was developed by non-First Nations judges to fit within a system based

on retribution (Spiteri 2001).

Perhaps the greatest critique of sentencing circles is that they are reactive, dealing only with a crime which has occurred and not directly addressing the prevention of crime (Spiteri 2001). Most traditional First Nations justice practices were future oriented. They accepted that the crime which had occurred could not be undone and focused not on the crime itself, but on restoring peace in the community. This includes offering support and healing to the victim and offender and addressing the circumstances which contributed to the crime in order to prevent future crimes (Ross 1992).

While critiques of packaged initiatives such as sentencing circles are valid and require serious consideration, there are some aspects of these initiatives which should not be quickly discounted. In sentencing circle initiatives community members' values are taken into account in the type of sentence that the offender receives. This typically results in sentences which do not remove the offender from the community and incorporates some element of holistic, traditional healing (Spiteri 2001). These initiatives are also accepted by the state. This is an important point as any initiative will have to work in conjunction with the existing Canadian legal system in order to be recognized by the Canadian government and receive funding (Miller 2003).

It should also be noted that many First Nations people have adopted at least some European values concerning justice (Miller 2003). Like other cultures, First Nations cultures are subject to change. While many First Nations people value tradition, their way of life has adapted to changing circumstances. These circumstances include contact with other cultures, both European and First Nations. This is not to assume that First Nations people have

been assimilated into European culture, or that one cultural tradition is in any way better than another. The fact remains, however, that First Nations people are in the process of deciding which traditional values should be kept as they have always been, which should be adapted and, perhaps, which are no longer relevant in today's social context (Ross 1992:98).

Initiatives such as sentencing circles have been adopted First Nations values concerning justice to fit within the context of the Canadian legal system. However, there are approaches which go beyond this to blend First Nations and Western systems. These approaches show great promise. These are instances where Western treatment programs have been modified to work in conjunction with traditional First Nations healing practices. The Western practices are usually altered in order to be less confrontational and more communal. What makes these initiatives successful is that it is First Nations people themselves who decide what elements of Western practices they will incorporate into the initiative and how those elements will be applied (Ross 1992).

An example of one such system comes from the community of Muskrat Dam in northern Ontario. The community has developed a family healing centre which utilizes Western family counselling techniques such as discussing stresses and problems as a group. The four week program also incorporates traditional healing methods such as sweat lodges which make it a more holistic approach than typical Western family counselling programs. The program addresses a wide range of issues relevant to the community, including substance abuse, violence, and trauma. So far it has received positive feedback from the community and those involved in the program (Ross 1992).

There is a perception that when

participating in a First Nations Justice system offenders "get off easy" with little or no jail time. It is true that in many cases the community recommends that the offender not receive a jail sentence even in cases when a relatively serious crime has been committed. This reduces the likelihood of recidivism, as rather than being isolated from the community and possibly becoming angrier and anti-social, the offender is given support as they begin a process of healing (Spiteri 2001). Far from "getting off easy", sentences are often relatively difficult as the offender must work towards their own healing and make restitution to their victims and the community. In one instance a young man charged with being intoxicated on a dry reserve received a sentence which included counselling for alcoholism and marital issues in place of the usual fine (Ross 1992).

Every community has its own unique needs. It has been suggested that a major contributor to many of the social problems faced by many First Nations communities is the lack of attention on the part of the Canadian government towards the unique social and cultural dynamics of First Nations groups when it encouraged and often forced settlement into year-round, centralized communities. For some this meant that families which usually lived independently, coming together with other families only in the summer, were now living side by side. Often this led to conflict as there were cultural rules regulating such extensive interaction with people outside the extended family. There was often some level of mistrust or even animosity between families. These inter-family politics still exist today creating unique political dynamics which vary from community to community (Ross 1992).

Some communities, however, already lived in large year-round settlements. As such, they had different political dynamics and were affected

differently by the social changes which came with colonization. As a result, First Nations communities are far from homogenous, even within a particular cultural group. If First Nations justice initiatives are to successfully address these problems they must take into account the specific needs and situations within each community. What works well in one community may not be appropriate in another. A system in which the community enforces compensation may work well in communities which had similar systems in the past, such as the Mohawk. In communities such as the northern Anishinaabek such a system may need to be adjusted to be less confrontational. This may include the use of police as a third party to allow community members to feel that they are not intruding on the rights of others. Justice initiatives need to be flexible in order to meet community needs (Ross 1992).

An emphasis on cultural differences taken to extremes, however, can be equally detrimental as a universal approach. This approach runs the risk of self-stereotyping and can lead to the perception that First Nations justice systems are simply the opposite of Western justice systems. Self-stereotyping can also lead to rigidity in cultural practices, something which is not consistent with the traditional flexibility of First Nations justice systems. Evidently, there has been an overlap in First Nations and Western values, and there is great diversity within and between First Nations, both in what traditional values and practices include and in how extensively Western values have been adopted (Miller 2003).

First Nations justice systems are slowly gaining acceptance in Canada, due in part to the hope that they will effectively address issues of over representation of First Nations people in the Canadian legal system and reduce recidivism. For First Nations people these systems offer another avenue

for self-determination and opposition to colonialism. There is, however, increasing pressure for the use of standardized initiatives such as the Maori family conferencing model and the sentencing circle. Standardization of First Nation justice systems is not desirable, as it does not allow for enough flexibility in dealing with the diversity of cultures and social circumstances within First Nations communities. However, an indiscriminate reinstatement of traditional practices is also not effective. This is because First Nations people have adopted some European values concerning justice, and because the social contexts wherein these justice systems must function have been altered by contact and the passing of time. If First Nations justice initiatives are to be effective they must be developed by the communities themselves to meet their changing and individual needs and values.

References Cited

- Borrows, J. 2001. Indian Agency: Forming First Nations Law in Canada. *Polar*. 24(2):9-24.
- George, B. 2003. Center for Restorative Justice: Wet'suwet'en Unlocking Aboriginal Justice. March 8. <http://www.sfu.ca/crj/advanced.html>
- Gilman, E. 2009. The Center for Restorative Justice: What is Restorative Justice? March 9. <http://www.sfu.ca/cfrj/fulltext/gilman.pdf>
- Miller, B. 2003. Justice, Law, and the Lens of Culture. *Wicazo Sa Review*. 18(2):135-149.
- Morris, A. 2004. Youth Justice in New Zealand. *Crime and Justice*. 31: 243-293.

Ross, R. 1992. *Dancing With a Ghost: Exploring Indian Reality*. Markham, Ontario: Octopus Publishing Group.

Rudin, J. 2003. The Center for Restorative Justice. Pushing Back: A Response To the Drive for the Standardization of Restorative Justice Programs in Canada. March 8. http://www.sfu.ca/crj/database/scholar/210_11_11.htm.

Simon Fraser University School of Criminology 2008. The Center for Restorative Justice. March 8. <http://www.sfu.ca/crj/index.html>.

Spiteri, M. 2001. Sentencing Circles For Aboriginal Offenders In Canada: Furthering The Idea Of Aboriginal Justice Within a Western Justice Framework. Unpublished master's thesis, University of Windsor, Department of Sociology and Anthropology, Windsor, Ontario.