# An Argument for a Separate Aboriginal Legal System Based on the Notion of Need

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## I. INTRODUCTION

This paper recommends that the Aboriginal Peoples of Canada be given the power to organize their own separate criminal justice system, in keeping with their traditional values and procedures. The recommendation is based on three reasons:

(1) "More than any other group in Canada, [Natives] are subject to the damaging impacts of the criminal justice system's heaviest sanctions";[1]

(2) It is not clear that affirmative action policies within the presently constituted system would redress the immense and pressing sense of grievance which we have heard from Natives in the last few years (notably through the commissions of inquiry in Nova Scotia and Manitoba);

(3) To reflect on the possibility of a separate justice system — no matter how circumscribed with respect to territory and seriousness of offenses to be dealt with — is to raise important questions about the nature of pluralism and democracy in Canada, which I think need to be raised.

This proposal is now not new. But while it has been advocated by several people and organizations — both within the justice system and among Natives — who ought to be taken seriously, its advent onto the public stage is still relatively recent, and it is a proposal which has to be considered radical. It strikes at the roots of at least three cherished traditional notions:

(1) It undermines the notion that the criminal law sets forth absolutely inviolable standards without which the community cannot survive;

(2) It undermines ethnocentric notions of superiority which have legitimated our drive to colonize and assimilate aboriginal peoples; and

(3) It can be considered to offend against the ideal of equality before the law.

With respect to the first point, it is true that the values of a community are reflected in and protected by its criminal law (or the equivalent). However, it is an empirical question just how far towards a pluralism of values a modern state could go without being seriously fractured. I shall return to this point late in this paper.

It has been relatively easy for the settler community in Canada to entertain notions of superiority. Since the 1760s, our relation with Aboriginal peoples has been one of unalloyed dominance. One method of maintaining this dominance has been through the exclusivity insisted upon by the colonies and later the national state with respect to laws and

1. M. Jackson, *Locking up Natives in Canada: A Report of the Canadian Bar Association Committee on Imprisonment and Release* (1988) at 1.

legal processes.[2] Hooker remarks that in those territories where the indigenous people quickly became a minority (that is, the United States and what were known as the British Dominions) there was simultaneously a policy of assimilation and of the acceptance/protection of special status.[3] In Canada, at the political level, both policies were pursued under the *Indian Act*.[4] However, since the White Paper of 1969 it is arguable that the policy has unambiguously targeted assimilation.[5] The courts have shown a similar ambiguity, although dominance remains the primary presupposition in that it is assumed that unless and until an organ of the national state, such as a court, acknowledges the validity of a special competence or obligation on the part of an indigenous person, that right or duty does not exist. From this point of view, the courts' dealings with Canadian Natives could be seen as an exercise of power.

On the other hand, the legal tradition at its finest insists that such exclusive power ought not be exercised arbitrarily. Rational legal principles ought to govern the necessary exercise of power. Seen from this point of view, the exclusivity insisted upon by state and courts stems from the principle of equality under the law. It would be easy enough to view arguments about equality and universality as simply ideological defences for the exercise of exclusive power. It seems to me, however, that both points of view are valid, that the insistence upon the reasoned exercise of power is genuine. What follows, then, is an attempt to deal with the argument for equality before the law seriously, to see if it will bear scrutiny.

The argument which I shall propose is the following: even though some might argue against a pluralistic legal system on the grounds of equality of all before the law, Aboriginal communities in Canada ought to be able to develop their own legal systems because they need them. That is to say, I propose to reflect on the interrelation between "equality" and "need".

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2. According to Hooker, this insistence has been general in colonial situations. M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975) at 454-55.

3. *Ibid.* at 357-58.

4. J. Leslie & R. Maguire, eds., *The Historical Development of the Indian Act* (Ottawa: Treaties and Historical Research Centre, 1978).

5. S. Weaver, *Making Canadian Indian Policy: The Hidden Agenda, 1968-1970* (Toronto: University of Toronto Press, 1981). Despite the formal renunciation of the White Paper in 1970, most Native leaders remain convinced that the policy there enunciated has continued to be operative. The policies of the Nielson Report, ostensibly to carry out fiscal restraint, are simply the logical continuation of that basic assimilative thrust. See M. Angus, *"... And The Last Shall be First: Native Policy in an Era of Cutbacks"* (Discussion Paper prepared for the Aboriginal Rights Coalition, Ottawa, 1989).

## II. EQUALITY

Since Aristotle, we have distinguished between arithmetic and proportional equality. The most general maxim of justice is that equals should be treated equally, and unequals unequally, but in proportion to their relevant differences. Cases of commutative justice, so the tradition says, are those where arithmetic equality is operative. Questions of distributive justice are guided not by arithmetic equality, but by the proportion to be discerned among unequal claims. I do not believe these abstractions help much. Empirically, each person and each set of circumstances differ from all others in untold ways. The difficulty of disposition is deciding which among all those differences is relevant, i.e., reasonable grounds for making unequal but proportionate dispositions. But it might be noted that the operative word in that sentence is "deciding". There is nothing within the maxim of equality which gives anyone a sure guide to justice. The Canadian Parliament has, for instance, decided through the *Young Offenders Act*, that age can make a relevant difference. Thus, to take an extreme example, there was much comment recently when the teenage perpetrator of a multiple murder was back on the streets after a three year sentence. The other extreme was the recent decision of the U.S. Supreme Court which said quite explicitly that age (sixteen or seventeen years) was not a relevant ground for unequal treatment with respect to capital punishment.

### A. Equality with Respect to Rules and to Administration of Justice

To get closer to settling the issue of equality and pluralism, it is helpful to look at two separate questions, namely equality before the law as it governs the actual administration of justice and as a guide to the rules of the legal system itself.[6]

We need to sort these two questions carefully because Natives seem to take quite different positions on each of them. We have heard in a variety of fora in the past several years, most notably in the Nova Scotia and Manitoba judicial inquiries, that with respect to the administration of justice within the present system, the Natives are convinced that officers of the justice system at several levels show racial bias. They say, in effect, that if they are to be subject to the one presently constituted Canadian legal system, then racial origin — as we all would doubtless agree — ought not constitute a reasonable ground for different treatment, and that officers of the system who do make race into a ground for differential treatment are offending the canon of impartiality.

On the other hand, many of those same Natives call for separate — and, by implication, unequal — Aboriginal legal systems. Because this stance is taken with respect to a different question than the call for impartial administration of justice under the presently constituted system, the Natives are not contradicting themselves. We need to press this question of separate and unequal rules further.

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6. I have found especially helpful S.I. Benn and R.S. Peters, *Social Principles and the Democratic State* (London: Allen & Unwin, 1959) at 122-28.

That rules should apply equally to all within the same category is pleonastic, for that is simply a definition of "rule". It is as abstract — and as little help in settling cases — as the maxim of justice that equal cases should be treated equally. We are back to having to decide what counts as reasonable grounds for equal or unequal treatment. Some have tried to give content to this formal abstraction by saying that there should be equality of fundamental rights and duties. But we are once again faced with the question of how to decide what differentiates fundamental rights and duties from those which arise from being in a particular category or class of persons.

> *The principle that equals should be treated equally by the law is meaningful as a prescription, and not simply as a sort of definition of "a rule", only if we adopt non-legal criteria for determining what is a relevant difference. "Equality in law" is not an equality of attribute like equality in height, though by virtue of such specific equalities men may be equals in law. Legislation, however, is a selective process: it picks out attributes significant for the purposes the law is meant to serve and turns them into legal criteria for discriminating between persons. Other attributes, irrelevant to these purposes, will remain legally unrecognized.*[7]

On this line of reasoning, the notion of equality before the law turns out to be of no help in sorting the appropriateness or indeed the justice of a separate aboriginal legal system. Whether the move is appropriate must be decided on non-legal grounds. But if the notion of equality turns out to be itself rooted in decisions about relevant grounds for counting things, cases or persons as equal or unequal, where will we find the roots of reasonableness for those decisions?

I shall argue that the answer to that question is best found in an exploration of the notion of "need". However, before I move from "equality" to a discussion of "need", let me make two *obiter dicta*.

## B. Equality and Pluralism

In my introduction, I suggested that the insistence upon a unitary legal system could arise from an ethnocentric desire to impose the majority's cultural values upon a less powerful minority. It could, by contrast, be a reasonable and legitimate seeking to follow the dictates of the ethical norm of equality before the law. My argument has tended to collapse the use of equality into a mere legitimation for an ethnocentric exercise of power. Indeed, my aim here is to rework the notion of equality such that it can provide the grounds for a plurality of legal systems.

## C. Equality as an Essentially Contestable Notion

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7. *Ibid.* at 125.

Equality cannot stand on its own, but takes on a different meaning within the framework of various political visions.[8] To use the words of some philosophers, equality is an essentially contestable concept.[9] By saying this I am not suggesting that a notion such as equality is vacuous, nor, certainly, that ethical reflection on perplexing public issues is bootless. I wish only to argue that an uncritical appeal to some notions does not settle debate; indeed such an appeal often has the outcome of precipitating an endless debate. On the other hand, the usefulness of characterizing such notions as essentially contestable is that we are thereby invited to explore the cognate notions which affect the meaning of the essentially contestable one in order further to clarify the debate. Debates, especially those around complex political proposals, are never settled because one party proves conclusively that his or her position is the right one. Debates are concluded when people's ideas are altered in the course of argument in essentially contested areas.[10] I am aware, as I begin this quest for clarification by exploring the notion of "need" (a notion dear to social workers), that I am an outsider with respect to the legal system. Indeed, it has often occurred to me that the primary institutional objective of the legal system, namely social order, is often at odds with the proclaimed professional objective of social work, namely, the full personal development of the client. However, this kind of value-based debate is, I think, essential to progress in political matters. So let me explore "need" in the hopes that some clarification will result.

## III. NEED: AN INTRODUCTORY DEFINITION

"Need" is an appropriate notion to explore for two reasons. The first is that most English speaking philosophers[11] seem to agree that the notion of need implies a moral claim. Need is distinguished from a mere preference or want in that the lack of something needed results in a disturbance, a malfunction of the subject of the need. In the extreme, the result will be the death of the person whose needs are not met. Short of the extreme, harm can be physiological, psychological or social. This resultant damage, philosophers tend to agree, is the ground for the moral claim.

Secondly, historically "need" has been invoked as one of the key reasons for unequal but just treatment. That is, when one moves from the purely formal maxim of *suum cuique* to a substantive understanding of justice, there are historically three criteria given: right,

8. This is the theme of S. Lakoff, *Equality in Political Philosophy* (Cambridge: Harvard University Press, 1964).

9. See W.B. Gallie, "Essentially Contested Concepts", in *Proceedings of the Aristotelian Society* (1955-6); A. MacIntyre, "The Essential Contestability of Some Social Concepts" (1973) 84 Ethics 1.

10. For an enlightening discussion of this problem, see R. Plant, H. Lesser & P. Taylor-Gooby, *Political Philosophy and Social Welfare* (London: Routledge & Kegan Paul, 1980) at 7-18.

11. In the past twenty years, the notion of need has been the subject of fairly continual attention by moral philosophers. D. Braybrooke discussed earlier contributions in his *Meeting Needs* (Princeton: Princeton University Press, 1987). See also L. Doyal & I. Gough, "Human Needs and Socialist Welfare" (1986) 6:1 Praxis Int'l at 43-69.

desert and need.[12] These are competing criteria, flowing from three competing political visions. "Right" in this context refers to the conservative contention that differential treatment should stem from title already established. "Desert" sums up the competing liberal claim that if there is to be differential treatment it should be based on actions and personal qualities. "Need" as a basis for differential treatment found an early and well known expression in the *Communist Manifesto*, but has become in this century a widely accepted criterion by proponents of a variety of forms of the welfare state. The criterion of need is central to an ideal justice which is "prosthetic",[13] or corrective. Further, I take for granted that there are circumstances where the criterion of need should be preferred to that of desert, so I shall not pause to argue why this is so. I wish only to explore the notion of need as it sheds light on the question of a separate aboriginal justice system.

Given our initial definition of need, if I am to show that Natives in Canada need a separate justice system, I must prove first that they are suffering harm; I must further show that the harm is caused by the lack of their own justice system. The first point is a fairly straightforward empirical question; the second will require further discussion of the notion of need itself.

## A. Need: Natives Experience Harm

That Canadian Natives are suffering extraordinary harm within the present justice system has been repeatedly documented over the past fifteen years.[14] This harm is primarily seen in the extraordinary over-representation of Natives in Canadian jails. I agree with Morse's assessment that it is

> *self-evident that the indigenous peoples ... have suffered extensively and disproportionately from the negative effects of the application of state laws and legal apparatuses to them. It is no longer necessary, in my view, to have to prove the accuracy of this assessment by citing a litany of tragic indices regarding child welfare apprehension rates, arrest and conviction statistics, rates of incarceration, etc. It is now sufficient to state the obvious — namely, the legal system has taken a heavy toll in human misery from indigenous peoples throughout the former British Empire and especially so where the original inhabitants have been overrun by colonizers.*[15]

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12. D. Miller, *Social Justice* (Oxford: Clarendon, 1976) at 24-27. To deal with the argument that the very notion of justice entails the criterion of desert or merit, see Plant *et al., supra* note 10 at 28.

13. Miller, *supra* note 12 at 28.

14. See D. A. Schmeiser, *The Native Offender and the Law* (Ottawa: Information Canada, 1974); 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: Butterworth, 1983); Jackson, *supra* note 1.

15. B. W. Morse, "Indigenous Law and State Legal Systems: Conflict and Compatibility", in *Papers of the Symposia on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences* (Vancouver, 1983) at 383.

## B. The Need for a Separate Legal System

I must further show that the lack of their own justice system causes Natives the harm just described. The best way to begin is to turn the question around and ask what need will be met if Natives were to develop a separate justice system. To deal with the question in this form, a theory of needs has to be sketched out.

### 1. Needs as Empirically Determined Facts

Most of the philosophic thinking in English on needs has begun with the distinction between needs and preferences or wants — that is, with the basis of the moral claim implicit in the notion of need. Scholars have construed the notion of "need" and the correlative notion of "harm" as strictly as possible. Although few construe the notion of harm to mean only physical harm or, at the extreme, physical extinction, and although most add social or even emotional needs to their list of basic needs, they think of physical harm as paradigmatic and argue that mere subjective impressions of experienced harm do not establish a need. There must be objective, empirical evidence of harm.[16] Thus, these scholars insist that experts know better than the subject what the subject needs.

The philosophic argument that experts know better than subjects what the subjects need can be bolstered by sociopsychological findings as well. That we are not sure what we really need is a fairly common experience. Herbert Marcuse became quite famous by developing a critique of the manipulativeness of mass consumption society wherein "one-dimensional" people no longer had any idea what their true needs are.[17]

16. Among the most recent to develop this line of argument are Braybrooke, *supra* note 11; Doyal *supra* note 11; Plant, *supra* note 10.

17. H. Marcuse, *One Dimensional Man* (Boston: Beacon Press, 1966). A more careful analysis of this problem is given by W. Leiss, *The Limits to Satisfaction: An essay on the problem of needs and commodities* (Toronto: University of Toronto Press, 1976).

## 2. Expert Provision Engenders Dependency

At least three arguments can be made against this powerful line of thought that experts know better than subjects what the subjects need. The first is that such a point of view has led to what, by all accounts, is the weakest feature of the welfare state as we have experienced it in various countries since 1945, namely that its benefits have engendered dependency. Critics on the right insist that only the discipline of the market is a sound basis for self-reliance; critics on the left argue that the welfare state is the reinforcer of relations of domination and subordination which result from the market. It seems to me simpler to say that dependency is forced on to people when an expert — whether a policy maker or a social worker in the living room — has the authority to tell people what they truly need, as opposed to what they want or think they need. Natives criticize the Department of Indian Affairs for this very reason: because its policies and programs engender dependency.

## 3. Needs, Cultural Values and Colonization

The second argument against the notion of needs-as-known-by-experts is that it tends to overlook how thoroughly cultural values and social circumstances control the actual experience of needs. For instance, at a sufficiently high degree of abstraction, all human beings physically need food. But what food, in what amounts, and how food is prepared and eaten varies profoundly in different cultures. We have all heard of stories where, in response to a severe food shortage in some impoverished country, Canadian authorities have shipped wheat flour or milk powder — what we consider to be basic foods — only to find that the recipients simply cannot digest those foods. Recall if you will the context in which I introduced the notion of need: to help develop guidelines for deciding what might count as reasonable grounds for differential treatment in keeping with the moral ideal of equality. A very abstract notion of needs is of no more help than the abstract maxim of proportionately equal treatment. It is theoretically possible to find experts who can leap cultural gaps with a single bound and discover what people's needs are in other value contexts than their own. However, Natives' experience with Indian Affairs is that even with good will, Indian Affairs experts miss the mark.

This inability to transcend cultural gaps is compounded by the relation of domination and subordination entailed in the process of colonization. Many have argued that the heart of the problem Natives experience with the present legal system lies outside the legal system itself. Its roots are in the process of degradation, dispossession and marginalization which characterizes colonization.[18]

From the beginning, almost all Europeans found it impossible to view Indians as anything other than a problem, an obstacle in the path of progress. During the years when Canada was being colonized, Europeans — with the English in the lead — increasingly defined themselves in economic terms. By the 1830s, the English had effected what Karl Polanyi has called the great transformation to a market society. Indeed, many of the people

18. M. Jackson, *supra* note 1 at 5.

who emigrated to Canada came to escape the last vestiges of an earlier set of values and to live by the new economic market values. Such people were not about to have much sympathy for a group of peoples whose society was constituted by a quite different set of values.

This history is, I think, encapsulated in a remark made by Arthur Meighen in the House of Commons in 1918, when he was Minister of the Interior and Superintendent-General of Indian Affairs. He had proposed an amendment to the *Indian Act*, giving the government the power to lease uncultivated — that is, "unused" — reserve lands without a surrender. This violated the provisions of the numbered treaties. He explained his proposed amendment in the House as follows:

> *The Indian Reserves of Western Canada embrace very large areas far in excess of what they are utilizing now for productive purposes ... We want to be able to use that land in every case; but of course, the policy of the department will be to get the consent of the band wherever possible ... in such spirit and with such methods as will not alienate their sympathies from the guardian, the Government of Canada.*
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> *We would be only too glad to have the Indian use this land if he would; production by him would be just as valuable as production by anybody else. But he will not cultivate this land, and we want to cultivate it; that is all. We shall not use it any longer than he shows a disinclination to cultivate the land himself.*[19]

The symbolism of where the Federal Government has housed the Indian Affairs Branch also reveals that Indians have been considered little more than an obstacle to economic progress. As the focal point of economic development shifted from opening the West for agriculture to opening the North for mineral resource development, then to developing energy megaprojects, Indian Affairs was transferred to the department charged with fostering economic development on the new frontier.[20]

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19. Cited in Leslie & Maquire, *supra* note 4 at 112-13.

20. From 1873 to 1936, it was part of the Department of the Interior, which was responsible for opening up the West. From 1936 to 1966, it was part of Energy Mines and Resources. Since 1966 it has been a bedfellow with Northern Development.

## 4. Colonization and the Courts

Colonization explains the over-representation of Natives in the legal system. The dominant group is in a position to define the values and behaviour of the subordinate group as deviant. Thus, values foreign to Indians are imposed on them, and when hauled before the courts, they — as we have been hearing all across the country — are bewildered by the foreignness of the proceedings. In their brief to the Aboriginal Justice Inquiry, Legal Aid Manitoba puts the problem this way:

> *... our current justice system is ... a foreign system to many aboriginal people. This goes beyond the robes and calling judges "My Lord", and the complex rules of procedure. It goes to the very heart and fundamental concepts that form the basis of our current justice system. Our reading tells us that traditional aboriginal justice systems were based on a concept of conciliation and that is clearly incompatible with an adversary system. Our experience with aboriginal clients tells us that most are totally confused in spite of our best efforts to explain it, by the system that is about to have a significant impact on their life.*[21]

This sort of imposition is exactly what one should expect when it is widely assumed that experts (in this case the experts within the legal system) know better than the subjects themselves what the subjects need. It seems to me the only way out of the impasse is to accept:

(a) Natives have a historical and moral right to an alternative culture;

(b) Though that culture has been altered and indeed damaged by interaction with industrialized Euro-Canadian society, the Native culture is still sufficiently viable to provide the basis for some alternative legal system;

(c) Without such institutions with which to implement self-determination, Native communities will never become fully healthy and supportive of the realization of the human potential of their members. So far as I can determine, Natives themselves first put their finger on the underlying problem of colonization and began to argue for the scope to live according to alternate cultural values. After the 1969 White Paper galvanized them into political action, they first demanded land claims settlements. However, they quickly realized that to negotiate such settlements was to cede basic principles concerning cultural values to the federal government. In the mid-1970s, they began to use the language of colonization and to assert their status as nations and to seek self-determination. By 1980 one of their spokespersons had this to say before the NWT Legislative Assembly:

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21. Legal Aid Manitoba, *Brief to Aboriginal Justice Inquiry: An Aboriginal Justice System* (Winnipeg, 1989). See also S. Stevens, "Access to Civil Justice for Aboriginal Peoples" (Paper to Conference on Access to Civil Justice) (Toronto, June 1988) at 13.

> The problem [with the present form of government] is that those institutions are put to work to entrench a particular set of values rather than to treat the values of each distinct community of people equally. ... the governments' task is to make sure that all "value-communities" enjoy equal rights.[22]

## 5. Needs and Aspirations

I turn finally to my third reason for rejecting the notion of need-as-known-by-experts. While English-speaking philosophers have insisted on this notion and kept it as distinct as possible from subjective notions such as "preference" or "desire", a group of French sociologists has for a long time been charting the empirical connection between need and aspiration.[23] Basic needs, these scholars say, are relatively blind forces such that when not met, result in compulsive, "preoccupied" behaviour. However, once the "threshold of preoccupation" is passed, people in interaction with neighbours, fellow workers and other allies, begin to articulate their aspirations. Aspirations are based on a group's cultural values, but remain within the limits set by external circumstances. When these aspirations meet political and economic obstacles, people tend to organize more explicitly and their aspirations give rise to political demands. Success in articulating aspirations is an essential element in a marginalized group's ability to withstand assimilation by more dominant cultural forces.

The articulation of aspirations is exactly what Native communities in Canada have been doing since the 1969 White Paper galvanized them into political action. They have come to recognize clearly their need for self-determination as a distinct cultural group if they are to survive even physically. It only remains for me to argue that such an articulated aspiration is a basic need, in the sense that it gives rise to a moral claim.

Those who would object to such an expanded notion of need would say that it obliterates the distinction between a true need and a mere preference. However, history tends to show that to the extent which a group is successful in realizing its aspirations, those attainments become part of what is considered essential to a reasonable human existence within that community, that is, their aspirations take on all the qualities of what even the strictest English philosopher would call a need. Within our culture, scientifically based public health measures are probably a good example.

To insist on the disjunction between need and preference rests, I would suggest, on the supposition that human beings are (in C.B. Macpherson's telling phrase) essentially consumers of utilities, rather than developers and enjoyers of their own uniquely human and

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22. B. Overvold, "Address to the Ninth Legislative Assembly of the Northwest Territories" (transcript, March 1980).

23. P.H. Chombart de Lauwe, *Pour une sociologie des aspirations* (Paris: Denoel, 1969). P.H. Chombart de Lauwe, ed., *Aspirations et Transformations sociales* (Paris: Anthropos, 1970). P.H. Chombart de Lauwe *et al., Transformations de l'environnement, des aspirations et des valeurs* (Paris: Editions du Centre national de la Recherche scientifique, 1976). P.H. Chombart de Lauwe, ed., *Culture-Action des groupes domines:* Rapports à l'espace et développement local (Paris: L'Harmathan, 1988).

personal capacities.[24] Thus, individuals are viewed as rational maximizers of their own satisfaction though their strategic actions (based on suspicion) within a hostile market. Since no one can authoritatively prescribe limits to the amount of satisfaction which any one consumer can aspire to or attain, scarcity of resources is a definitional characteristic of the human situation, and thus the satisfaction of one person's wants is necessarily at the expense of another's. The stringently limited list of basic needs was developed to try to put some ethical order into this chaotic vision; and the insistence on the experts' role in determining what those basic needs are has been explicitly an attempt to get the meeting of needs out of the realm of political debate and make of it a matter of consensus.[25]

"Need" and "preference" are not disjunctive: "aspiration" is a third, intermediary notion, which participates in the qualities of the two extremes. Its grounds are subjective, but it gives rise to a moral claim. The claim is rooted in a basic moral obligation: if human beings are indeed essentially beings who develop and enjoy the development of their personal capacities, then it makes sense that a person's basic moral obligation is to develop personally, rather than simply to survive physically (as is implied in the stricter notion of needs as empirically necessary for survival).

This implies that even though it might be difficult to come to a clear understanding of what one needs, it is a basic need not to rely on others' expertise, not to become dependent on others' provision, but instead to engage in the developmental processes necessary for isolating just what resources are required to meet basic needs (in the more traditional sense of the word) and to muster the political and/or market power needed to gain control over those resources.

While those who have developed a stringently limited list of basic needs argue that the needs on their list are universal, others have long argued that such a universal list is hopelessly abstract.[26] People experience need — especially need as I have been describing it in this section — within the context of the values to which they subscribe. To meet the need to develop themselves, they also have a need to be members of a viable, self-determining community — a community that can determine for itself what resources are required for its members' development, and that can negotiate within political and economic fora to achieve command over those resources.

## 6. Aspirations and Pluralism

I see this as a moral argument for a larger sense of pluralism than the one currently in use among political scientists. If, for historical reasons such as executed treaties, a minority

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24. C.B. Macpherson, *Democratic Theory: Essays in Retrieval* (Oxford: Clarendon Press, 1973) at 4, 20, 30, 34-35, 56.

25. Braybrooke, *supra* note 11 at 67: "Once matters have been classified as needs, ... the tendency is to put them beyond politics, as matters that have been decided by consensus."

26. D. Lee, "Are Basic Needs Ultimate?" in D. Lee, *Freedom and Culture* (Englewood Cliffs, N.J.: Spectrum, 1959) at 72-73.

community has a right to remain intact; and if historical experience indicates that members of that minority community cannot develop their potential except within the cultural context of their own community, then members of the dominant community have a moral obligation to learn to respect the cultural values of the minority community so that a fundamental need of members of the minority community can be met.

## C. Limits

There are clearly limits to the autonomy which a separate legal system will obtain. Questions arise concerning jurisdiction, both with respect to territory and to the gravity of cases (both criminal and civil). If there is any worth to the arguments in favour of pluralism, then such questions ought to be settled through even handed negotiation. It should be noted that there were and are a variety of cultural traditions and legal forms among the Native peoples.[27]

However, on the basis of the argument I have developed here, some questions are no longer negotiable. Minority communities' claims to institutions which would enable them to exercise self-determination are based upon their members' fundamental need to self-actualization. This entails that any separate legal system would include safeguards at least as good as those in the present system "... to ensure that its weakest and least powerful constituents are protected from abuses of authority."[28]

# IV. CONCLUSION

If we agree that democratic forms of political authority are a genuine historical advance over other forms, then it seems to follow that pluralism is a hallmark of the advance of civilization. A man as civilized as Thomas More saw no alternative to executing religious dissenters for sedition. Beginning with remarkable breakthroughs achieved by Thomas Hobbes and John Locke, we have since learned superior ways to square the requirements of civil peace with pluralism. However, given the immiseration the settlers in North America have caused the original inhabitants, we still have lessons to learn about pluralism.

Need is not uniformly understood as a moral basis for pluralism. Most of the proponents of benevolent interventions by the state to ameliorate the conditions arising from the market have invoked a notion of need which is to be scientifically determinable, hence universal in application. I have argued in this paper that there is a viable notion of need which is tied closely to subjective development and dependent upon cultural values but at the same

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27. C.T. Griffiths & C. Yerbury, "Conflict and Compromise: Canadian Indigenous Peoples and the Law", in *Papers of the Symposia on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences* (Vancouver, 1983).

28. Legal Aid Manitoba, *supra* note 21 at 3.

time retains the hallmark of need, namely, entails a moral claim. Need thereby can constitute a moral basis for pluralism.

I have drawn on the testimony of others more knowledgeable than myself to the effect that Canadian Natives suffer extraordinary personal harm because of their over-representation within the justice system. The root of their suffering lies outside the legal system, in the historical process of colonization which has imposed a foreign value system on Natives, thereby consigning them to poverty and economic marginalization. Under present circumstances, Natives cannot meet their fundamental need for self-actualization; they require a viable community on their own terms, based on their own cultural values. An essential part of that community is a separate Aboriginal justice system.