The Role of the Victim in the Criminal Justice System — Circle Sentencing in Inuit Communities

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I would like to acknowledge and thank Linda Archibald for her insights and significant contribution to the development of this paper and her thoughtful and persistent editing. I would also like to acknowledge the work of Dr. Carol La Prairie, when not quoted directly within this work, it has proved to be a touchstone in my own work in this area. I also would like to extend my thanks to Pauktuutit and the many Inuit women who have allowed me the privilege of sharing their stories.

Today, you can become a target of criticism from all directions if you speak out against alternatives to the existing justice system. Especially someone like myself, a non-aboriginal, feminist lawyer.

While I will be addressing the role of Inuit women as victims in the criminal justice system, I do not speak on behalf of Inuit women, nor do I represent them. Rather I am here today to speak from the experiences I have shared with Inuit women over the past few years working on a justice project with the national Inuit women's association, Pauktuutit.

In many ways the privilege I have of working with Inuit women has exposed both the virtues and flaws of the existing justice system in a way that very few in this room are ever afforded : dealing with the justice system from the perspective of an Inuk woman as a victim of violence perpetrated by another Inuk in her own community.

This unique place in which I have been located often puts me, much like the women with whom I work, in direct opposition with those designing and implementing reforms to the criminal justice system — Inuit and non-Inuit politicians and judges alike. The opposition arises not because I do not share the same goals or objectives, but because the means advocated to achieving those goals create conflict.

Having said this, it is important to explain why I am here and what I intend to speak about.

I agreed to participate in this conference because I felt it provided a rare opportunity to share concerns and questions about alternatives being advocated for Inuit communities, in particular, the circle sentencing alternative.

In my presentation I intend to highlight the issues arising from the use of circle sentencing by focusing upon some of the assumptions made by those involved in the first sentencing circle proceeding that took place in a particular Inuit community in Nunavik (Northern Quebec).

Before examining these assumptions in greater detail and the issues they raise, it would be useful to review the context in which these alternatives are being presented — the justice system as it exists in Inuit communities today. This is followed with a brief discussion about the concept of circle sentencing.

I. THE EXISTING JUSTICE SYSTEM IN INUIT COMMUNITIES

There are approximately 40,000 Inuit in Canada. Until the 1960s, most Inuit lived a traditional lifestyle on the land. Today, they live primarily in the 52 communities scattered throughout the Western Arctic, Nunavut (the northern and eastern portions of the Northwest Territories) and along the north coast of Quebec (Nunavik) and Labrador. The official working language in most of these communities is Inuktitut.

In the six communities where Inuit live in Labrador — Nain, Hopedale, Makkovik, Postville, Rigolet and Happy Valley Goose Bay, only three have

permanently based police services. The other three communities receive police visits once a month for a few days or more frequently, if there is a specific emergency or crisis. The court is a fly-in court party, including the judge, Crown counsel and defence counsel, court worker if one is available. There is no judge based in any of the communities along the North coast. There is one judge who is an Inuk. There are no courtrooms in the communities. Court can be held in the community hall or other community building depending on what is available.

In the same three communities, there are no probation officers, or specialized victims service workers. There is only one shelter for women and that is located in the largest community and does not have any Inuit women employed.

In Nunavik, the court system is also a fly-in court system. There are no Inuit judges or lawyers. There are a few trained Inuit who provide legal interpretation for the court. Like Labrador, court is held in any building that is available. There are supposed to be three probation officers, one based in Kuujjarapik for the seven Inuit communities on the Hudson Coast and two based in Kuujjuaq for the seven Inuit communities on the Ungava Coast. There has been no probation officer for the Hudson coast for approximately the last eight months. With respect to policing, there is a minimum of one officer authorized for each community with the exception of Kuujjuaq which has four, Povungnituk which has 3 and Salluit, Inukjuak and Kuujjarapik which have two each. In addition to the Sûreté du Québec officers, the authorized police strength for Nunavik includes 22 Inuit special constables and nine liaison officers who assist, supervise and train special constables. In actual fact, the positions are rarely filled at any given time due to a high turnover rate. In a report prepared by the SQ in April 1993, the ratio of officers to inhabitants was 1 to 400 where the theoretical ratio is 1 to 350 if all the authorized positions are occupied. What this means is that, like Labrador, there are communities without any police presence.

Of the four major regions occupied by Inuit, the Western Arctic and Nunavut provide the best services in terms of policing, probation officers and court services. This is not to say the services are adequate. Perhaps with the exception of Iqaluit, where there is a permanently based judge, a courtroom, a legal aid service, an Inuit-women-run victims advocacy group, and a permanently based police force, the services are nominally better than in Labrador and Nunavik. There are Justices of the Peace being used in the Baffin communities quite regularly to deal with summary conviction matters, traffic matters and municipal by-law infractions. There are police in most communities in the Baffin, Kitikmeot region. In the Keewatin, there are police forces based in four of the seven communities. There are no legal aid services permanently based in the Kitikmeot and there is one legal aid lawyer based in the Keewatin region. For these two regions and the Baffin communities other than Iqaluit, the fly-in court, with judge, Crown and defence counsel, court worker and interpreter is the only thing available.

II. WHAT IS CIRCLE SENTENCING?

To many people "circle sentencing" or "sentencing circles" is a concept they have heard about but do not have any direct experience with. This is attributable to the fact that this is a very recent "traditional" practice being introduced within aboriginal communities in Canada.

Circle sentencing was introduced to many of us by the Honourable Justice Barry Stuart of the Yukon Territorial Court in his decision in *R.* v. *Moses*.[1]

In this 1991 decision, Judge Stuart explained the objectives of sentencing circles.

> *As many studies expose the imprudence of excessive reliance upon punishment as the central objective in sentencing, rehabilitation and reconciliation are properly accorded greater emphasis. All these changes call upon communities to become more actively involved and to assume more responsibility for resolving conflict. To engage meaningful community participation, the sentence decision-making process must be altered to share power with the community, and where appropriate, communities must be empowered to resolve many conflicts now processed through the criminal courts.*[2]

Since that decision, sentencing circles have been used in many aboriginal communities throughout Canada. These sentencing circles are attempting to incorporate what are identified as aboriginal traditions and values. It is important to be very clear on the point that the sentencing circle itself is not a "traditional practice" of aboriginal peoples in Canada now being reinstituted. It is very much a creation growing out of the existing system introduced within aboriginal communities, for the most part by the judiciary serving these communities.

While Judge Barry Stuart is not the only judge incorporating circles within his court hearings, among many he is seen as one of, if not, the most knowledgeable and experienced with this process. Accordingly, it is useful to reflect on his comments about circle sentencing.

> *Circle sentencing fundamentally shifts the focus in searching for solutions from symptoms to causes. The discussion in circles, unlike courts, does not isolate the criminal act from the social, economic and family environment fostering crime. Further, unlike courts, the circle focus extends beyond the offender to include the interests and concerns and circumstances of offenders, their families, the victim and the community.* [...] *The sentence attempts to redress the causes of crime generally within the community and specifically those conditions prompting criminal conduct by the offender.*[3]

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1. *R.* v. *Moses* (1992), 11 C.R.(4th) 357.

2. *Ibid.* at 360.

3. B. Stuart, "Sentencing Circles : Purpose and Impact", unpublished written statement presented by Judge Stuart while attending a mock sentencing circle in Ottawa, June 1995.

The interest and support being generated for this sentencing alternative in part is attributable to the over representation of aboriginal men and women in federal and provincial penal institutions.[4] New alternatives to incarceration are being sought by many living in the communities and those dealing with the communities because of the over-representation of aboriginal peoples in penal institutions, recidivism and increased levels of crime within Inuit communities, to name just a few of the reasons cited by Inuit political leaders and community members. Many have spoken out against incarceration as an effective response to social disorder and crime in Inuit communities. It is beyond the scope of this paper to delve further in to these reasons; however, suffice it to say, many Inuit see jail as an inadequate response.

Accordingly, this mechanism of "restorative" or "popular" justice is considered more desirable in dealing with crime and disorder than retributive mechanisms such as incarceration because, like other restorative justice models, it is intended to look beyond the narrow legal issues to craft a response that incorporates the broader social context. In her critique of circle sentencing, Dr. Carol La Prairie explains,

> [Sentencing circles] *are generally believed to be based on traditional aboriginal healing and talking circles, and on the belief that traditional forms of dealing with disorder, referred to compendiously as "aboriginal justice systems" used circles to facilitate reconciliation and peace rather than for retribution and deterrence* [...] *The pursuit is for social rather than for strictly legal justice; the focus is on empowerment of those marginalized by*

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4. Within Inuit communities, the statistics regarding the incarceration levels of Inuit men in comparison to non-Inuit men are not readily accessible. For example, a break-down of inmate status by ethnicity within the Northwest Territories ("NWT") was done by B. Kitchen in 1987. Kitchen's work relied heavily upon research undertaken by H. Finkler in the 1970s and 1980s. See B. Kitchen : *The Administration of Criminal Justice in Nunavut*. (Ottawa : Carleton University, M.A. Thesis, 1987). E. A. Tomaszewski presents a summary of Kitchen's data, in his thesis :

   Though aboriginals represented only 62% of the population in the Northwest Territories they comprised 84% of the inmate population in 1985-86, 40% of which were Inuit. (Kitchen, 1987 : 46) This figure increased each year and reached a peak in 1990-91, when 91% of the Northwest Territories' inmate population were Aboriginal (Canadian Center for Justice Statistics, 1994). The incarceration rate per captia in the Northwest Territories in 1991-92 was 184 per 10,000 total population, the highest among all provinces and territories. For comparison, Canada's incarceration rate per capita in the same period was 44 per 10,000. In the Northwest Territories, the incarceration rate for adult population is five times that for Canada. [...]

   See E.A. Tomaszewski, *Rethinking Crime and Criminal Justice in Nunavut.* (Ottawa : Carleton University, M.A. Thesis, 1995) at 39.

> *the mainstream legal systems; the objective is contextualized justice; the goal is to return the conflict to its rightful owners.*[5]

The process to determine which cases or type of cases will be eligible for the circle process, who will participate in the circle, the operation of the circle, and follow-up measures seem to vary depending on the community and judge involved. There are no standards or guidelines in place that direct how the process is to operate, to determine which cases are eligible for this approach, or who can or must participate.[6] While it is clear that judges outside of the Yukon have looked to Judge Stuart for guidance and direction, not all circles are the same. Some proponents of the approach support the need for flexibility and suggest this difference is attributable to the different communities. It is apparent that the process and structure of this approach turn very much on the level of community involvement in the design, implementation and operation of the process. Likewise the credibility and legitimacy of the approach among community members appear to relate directly with the level of community participation in the design, implementation and operation of this alternative.

The focus of this paper is on the approach being utilized in Inuit communities. Therefore I have not provided any detailed discussion about sentencing circles in other communities and especially the Yukon.[7] This being the case, I have limited my comments in response to the sentencing circle I observed in Nunavik.[8]

The specific issues of concern with regard to the sentencing circles taking place in Nunavik arise from certain assumptions that are made by those within the justice system who advocate the use of these approaches in Inuit communities. I would first like to discuss these assumptions, which are :

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5. C. La Prairie, "Altering Course : New Directions in Criminal Justice Sentencing Circles and Family Group Conferencing" (1995) *Australian and New Zealand Journal of Criminology* (Special Issue on Public Policy, December).

6. This will no doubt change with the recent amendments made to the *Criminal Code*, pursuant to Bill C-41 which now sanctions the use of alternative measures that are approved and part of a program instituted by the Attorney General of the territory or province. [Cite specific reference]

7. For further information on sentencing circles in the Yukon, Judge B. Stuart has written about the various processes and structures of the sentencing circles being utilized in the Yukon. Dr. C. La Prairie has written two articles on sentencing circles which provide detailed comments on the process of circles and critique and discussion on these restorative justice models. Please see her articles "Altering Course", *supra* note 5 and "Community Justice or Just Communities? Aboriginal Communities in Search of Justice" (1995) *Canadian Journal of Criminology*, October.

8. There were two sentencing circles held in a Nunavik community. The first circle dealt with a person convicted of assaulting his wife, while on probation for an earlier conviction for same crime, again involving his wife. The second involved a young offender and adult who plead guilty to burning down a community building. For a detailed critique of this circle please refer to a report I prepared : Canada Pauktuutit and the Department of Justice, *Report on A Sentencing Circle in Nunavik* (Ottawa : Pauktuutit, 1994).

a) the assumption that this alternative is rooted in Inuit culture and tradition;

b) the assumption that if the community is involved this is a community-based alternative;

c) the assumptions about "the" Inuit community; and

d) the assumption that this is truly an alternative to the existing justice system.

III. SENTENCING CIRCLES : AN INUIT TRADITION?

As indicated earlier, for the most part, sentencing circles have been introduced into Inuit and other aboriginal communities by "reform-minded judges" with a view to redressing what has been regarded as the failure of the criminal justice system and meeting the perceived needs of aboriginal people and communities in relation to the system.[9]

The alternatives are presented as something separate from the existing system and all of its shortcomings. This distinction created between the alternatives and the existing criminal justice system is rooted in this premise that the latter system is non-Inuit and therefore non-traditional. This dichotomy is artificial in my view. Many of the alternatives to the existing justice system initiated and used in Inuit communities such as diversion, mediation, and sentencing circles are also non-Inuit, have varying degrees of Inuit participation and, for the most part, are part and parcel and very much dependent upon the criminal justice system as it exists today. In fact, the Criminal Code amendments introduced in Bill C-41 regarding alternative measures explicitly incorporate these alternatives into the existing criminal justice system. So to suggest these alternatives are distinct from the existing system on the basis of being "Inuit-based" is erroneous.

I think it is fair to say that those advocating and introducing these alternatives perceive these approaches to be supportive of aboriginal values because aboriginal people are involved. There is an assumption made that if something is "community-based" and the majority of the community is aboriginal, this approach must be "aboriginal" and "traditional". There seemed to be an acceptance on the part of the judge in the Nunavik case that if sentencing circles were being used in one aboriginal community, they could be used in this aboriginal community. Like many outsiders, this particular judge appeared to have assumed, despite his good intentions, that there is not much difference between First Nations and Inuit communities. And accordingly, this "aboriginal" alternative would be better than the existing system which is "foreign" because it is non-aboriginal.

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9. *Supra* note 5.

The assumption that this approach would be suitable because it was believed to have some roots within First Nations cultures reflects a lack of understanding about the differences among aboriginal peoples and their cultures, traditions and practices.

The credibility and legitimacy of these alternatives, like the credibility and legitimacy of the existing system, turns on how the community perceives them to be working.

Accordingly, if these alternatives are truly seen as attempts to reflect and promote Inuit traditions and values, they would not simply be seen as alternatives to incarceration or any other component of the existing system.

In my view, Inuit who are looking to their past traditions or values for clues to deal with social conflict and disorder in the community would be hard pressed to come up with a community justice committee, a community-based sentencing circle or adult diversion.

In the context of Inuit culture, I am not aware of anything so exact or complete as a traditional justice "system" or traditional justice "practice" that you can immediately identify and implement. There are well known formal and informal traditional practices of social control such as a shaming song, individuals fighting one another, challenges of strength, ostracization, banishment, or in very rare cases, killing.

There seems to be a practice adopted by those who write about aboriginal justice reform to refer to "community-based initiatives" and "traditional practices" as if they were synonymous. People may be calling for more community-based participation in the justice system but that does not necessarily mean a return to "traditional practices" of the sort described above. While some call upon a return to traditional values, how these are manifested as alternatives to the existing justice system can only be known when Inuit are truly afforded the opportunity to define their own justice system, through such initiatives as self-government.

Until such time, community-based initiatives, as presently initiated from within the existing system will be severely challenged to reflect Inuit values or traditions. In my view, one of the major barriers that must be addressed, with respect to these new alternatives, is this concept of "community" and how it is defined. How community is defined affects who has the opportunity to participate in these alternatives and the role the community is required to play in resolving conflict.

If the community is understood to be all of the people within a particular hamlet or settlement, this means that anyone within the hamlet would and should be entitled to participate, in the absence of guidelines or criteria for membership or participation.

Ironically, before Inuit were relocated to settlements from their camps out on the land, the closest one could get to this concept of community was the camp.

> *There was a seasonal rhythm to community life among traditional Inuit* [...] *during the summer months, smaller groups composed primarily of one or two*

> *families would travel to a location considered to be good for fishing or caribou hunting. In winter, there tended to be larger groupings involving several extended families whose primary activity during this period was seal hunting.*[10]

The contemporary concept of community, with related and unrelated Inuit and Qallunaat[11] living together in communities that can vary in size from 150 to 1500 people, has no traditional basis for Inuit.

Within the camps, the social interaction was very different from that which takes place in contemporary settlements. Likewise, the social disorder and conflicts that arise and responses to them are also very different.

The members of this traditional "community" were individuals who were related "by birth, by marriage, by adoption and by sharing a name with someone — virtually, all the people in the camp were related to each other in some way."[12] The form of organization of the camp went a long way to maintaining harmony within the camp.

> *Membership in these groups was flexible and changed frequently to reflect changing alliances and tensions within the group. The layout of the camp reflected where the strongest alliances and antagonisms between households lay. Families on best terms live close to each other, even sharing a large igloo in winter or placing their tents facing each other during the summer. Families who did not get along would either not move to the same camp together or would inhabit opposite sides of the camp.*[13]

Two specific values that are identified as contributing significantly to maintaining the harmony within the camp were non-interference and responding to problems in a way that will not create more problems.

We know from Inuit stories that "Inuit place a high regard on the right of individuals to lead their lives free of interference." One of the explanations for this belief is that "...in a situation where people are forced to live very close to each other at times for extended periods, attempts are made to minimize points of conflict and abuses of others' rights."[14]

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10. Pauktuutit, *The Inuit Way* at 15.

11. In the Pauktuutit publication, *The Inuit Way*, *ibid.*, it states that "Qallunaat is the Inuktitut term referring to white people". An explanation of origin of the term is also provided. Its origin seems to be from the Inuktitut phrase meaning "people who paper their eyebrows" and can imply that these people pamper or fuss with nature, or are of materialistic nature, greedy.

12. *Supra* note 10.

13. *Ibid.*

14. *Ibid* at 17.

This respect for and belief in non-interference in others' lives directly impact on how individuals interact with one another. Namely :

> [...] *this belief [in non-interference] causes Inuit to often feel a certain degree of discomfort when exercising authority over other Inuit even if the position they hold warrants sufficient authority* [...] *Inuit are uncomfortable responding to direct questions concerning other people and their motives.*[15]

This first value of non-interference effectively meant that problems not affecting the whole community's well-being and survival were dealt with privately and informally by the immediate individuals involved.

The second value that is worthy of note is that in crafting a response to a problem, the basic rule was that "the punishment must not cause more problems than the initial infraction."[16]

In practice, what this appears to mean, is that what the individual did is less important than who the individual is. In other words, the identity of the individual causing problems was of primary consideration when determining the particular action taken in response to his or her particular conduct.[17]

If the person responsible for the problem in the camp was also one of the best hunters, the response would be very lenient. The community could not afford to alienate, ostracize or, worse yet, abandon the individual because they could not afford to lose one of their better hunters. Losing a good hunter would be a grave penalty and ultimately a much greater problem and danger to the survival of the camp. Yet if the person creating the problems was not a good hunter, and the problems were of a nature that presented a danger to the well-being of the camp, banishment or even death (where perhaps the person had killed someone in the camp or had gone insane) would be considered acceptable responses.

These traditional practices and values are very difficult to locate within the recent alternatives being introduced such as sentencing circles. It is evident the traditional alternatives to sentencing would not look at alternatives that are directed at punishment or, in fact, rehabilitation simply based on the type of crime. Rather, they would be measures taken to restore peace among those directly affected.

No doubt proponents of sentencing circles state that this is exactly what circles are designed to do, to look at the issue in its broader context and involve the

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15. *Ibid.*

16. *Ibid.* at 9.

17. In addition to the Pauktuutit materials cited in this paper, there are other works related to Inuit and "traditional justice". Please see Inuit Justice Task Force, *Blazing the Trial to a Better Future : Inuit Justice Task Force Final Report*, (Montreal : Makivik Corporation, 1993) E.A. Tomaszewski *Rethinking Crime and Criminal Justice in Nunavut* (Ottawa : Carleton University, M.A. Thesis, 1995).

community. However, alternatives such as sentencing circles rely upon others in the community to openly discuss, not only the conduct of specific individuals which has resulted in criminal offenses conviction, but also details about their lives that may be personal and private. This type of open forum discussion seems to be directly contrary to this Inuit belief of non-interference, especially with the number of people that can be involved in the circle and the extent to which they are not directly related with the family or issue at hand.

Today the collectivity of individuals within Inuit communities is very different. No longer are individuals a "close-knit group" or dependent upon each other for their survival. Accordingly, some of the traditional values and practices might not be readily accepted by members of contemporary Inuit community. For example, some might question any consideration given to whether an accused is one of the better hunters in the community when determining the appropriate sentence for abusing his wife.[18]

The extent to which certain traditional values and practices are accepted in contemporary Inuit communities is also another issue which must be addressed. Within contemporary Inuit communities, it cannot be assumed that all Inuit welcome a return to traditional values and practices. We have not heard any Inuit women calling upon such traditional practices of social control such as a shaming song, individuals fighting one another, and challenges of strength to replace the existing justice system when dealing with sexual offenders. The decision of what traditional values and practices are adopted and reflected in a contemporary justice alternatives is a matter for all Inuit within the community to determine.[19]

IV. A "COMMUNITY-BASED" ALTERNATIVE?

There is a need for a better understanding of contemporary community-based initiatives and traditional practices and their respective differences. As noted earlier, these are seen to be one and the same by many observers. Mere involvement by local

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18. It is interesting to note there have been strong objections and criticisms raised by Inuit women in response to judges in the Northwest Territories who take into consideration, as a mitigating factor when determining sentence, whether the accused convicted of a sexual assault is a "good hunter" and relied upon as a "provider for the family". This traditional value of determining the community's response on the basis of who the person causing the problem is, rather than the nature of the problem itself, appears to have lost its significance among many Inuit women in the communities today.

19. For example, the concept of "shame" as Qallunaat knows it, is very different from shame and the shaming practice used in the past by Inuit. To suggest that sentencing circles or the latest initiative, family group conferencing, is more appropriate than the existing system because it incorporates a "shaming practice" again is only true insofar as people are using the same words. To an Inuk, the inappropriateness of this model would seem evident, but to outsiders it is not so clear. After all how different can "shame" in one culture be from another?

people in an alternative crafted by outsiders is not the same thing as an alternative truly originating from Inuit within the community.

There are persons who suggest that the failures of the existing justice system could be addressed, in part, if more Inuit were included in the system beyond the role of accused or victim.[20] A culturally appropriate justice system cannot simply be achieved by ensuring more community members are involved. There certainly is merit in this argument of increasing Inuit presence if you truly believe that the system itself is not flawed or that the role being afforded to Inuit will provide them with decision-making power within the system. Community-based alternatives, such as sentencing circles appear to work from the same premise. However, this is not an initiative designed by Inuit within the community affording all segments of the Inuit community with full participation.

To a certain extent, we cannot ignore or minimize the possibilities of an alternative that has a significant involvement of community people. If it is operated by community people, this will lessen the role of professionals within the justice system and increase the role of members of the community. However, the issue then becomes what role is the community playing?

There is a tendency to ignore where these alternatives come from and focus on how they involve the community when determining whether or not they are community-based. If there is significant community participation, it is somehow considered to be "community-based".

Those advocating sentencing circles regularly identify this approach as a means to ensure that the community has a meaningful role, takes greater responsibility for problems and has more control over sentencing. Yet, the circle sentencing process in Nunavik was something initiated by the judge, and it in no way altered the ultimate authority of the judge to determine the appropriate sentence.

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20. It would appear that those who support this solution see the problems confronted by Aboriginal Peoples within the existing justice system arising from how the system is being applied and more particularly, by whom. Accordingly, the solutions would focus on increasing the number of Inuit defense and Crown counsels, judges, probation officers and police officers. There is no question, the existing system would look very different if the majority of persons administering the criminal justice system were Inuit. That such a change would ameliorate the root causes attributed to the failure of the system is not so easy to answer. Would Inuit judges, lawyers and police officers be sufficient enough to address the structural inequalities and barriers confronting Inuit accused and victims in the existing system? Certainly, the movement to establish the Nunavut Government, is based very much on the premise that the majority of Inuit in control will make their government more meaningful and reflective of their dynamic culture and society. In the case of the new Nunavut Territory and government, ideally Inuit would be the decision-makers, legislators, and bureaucrats who do have the power to address the root causes of the problems of the system.

Real change reflective of the goals and aspirations of Inuit will come only when the community members define what the change will be and control that change. In the context of the criminal justice system, it means allowing all segments of the Inuit community, including those most marginalized, to fully participate in the redesign and implementation of an appropriate, responsible and respectful system. Sentencing circles stop far short of this possibility.

Beyond the judge's ultimate decision on sentence, the sentencing circle affords the person or persons participating in the circle considerable power and control over the outcome and its impact on the specific individuals involved. The more these decisions are left in the hands of the community, the more this alternative is presented as a "community-based" alternative and an "aboriginal" alternative.

A note of caution about power and its abuse within the community must be raised at some point in this discussion. If sentencing circles and other so called "community-based" initiatives simply result in a transfer of power and control from outsiders to specific individuals within the community, this is going to cause even greater problems.

Community members being left to determine such matters as which case, if any, goes to the circle and the factors to be considered when making this determination are examples of decisions that are of considerable importance and significance, not only to the accused, but to other members of the community, namely the victim. The decision of who participates in the circle, the role of the accused, the role and level of participation of the victim, and how the circle will be conducted, are other examples of critical decisions. The issue now becomes who within the "community" has the responsibility and right to be making such decisions. The issue of accountability of these community members has yet to be discussed. In the Yukon, we are told, these decisions are primarily made by the community justice committees, or the circle support groups.[21]

In Nunavik, those decisions were made by the judge and the probation officer, in consultation with the mayor of the community and, to a lesser extent, the Chair of the Inuit Justice Task Force. This raises concerns whether it is appropriate to leave these decisions in the hands of outsiders or local people with political power, in the absence of any agreed to procedures or standards recognized by all segments of the community.

It is fair to say that while the judge in the Nunavik case proposed the use of the sentencing circle to help him determine the sentence, those involved knew very little about why he was doing this. There was no explanation provided to the members of the community attending about what this circle was supposed to do, or where the

21. See unpublished draft manuscript of Judge B. Stuart entitled "Circles into Square Systems : Can Community Processes be Partnered with the Formal Justice System".

idea of a sentencing circle originated. Nothing was said about how it relates to Inuit customs and traditions.[22]

The judge briefly mentioned that sentencing circles had been used in the Yukon and it was being tried here because of the recommendations from the *Inuit Justice Task Force Final Report*. He then quoted a specific recommendation of the report :

> *That the present court system provide for community participation and involvement in the sentencing process* [...] *by effecting modifications to the Criminal Code and Rules of Practice of the Cour du Québec and any other necessary reglementation changes in order to compel the court to provide full community participation and involvement in the sentencing process.*[23]

The judge continued with the story of how the circle came about through a request by the accused for help from his community.[24] From these remarks, and remarks made earlier by the judge during the regular court session,[25] participants could only assume that this sentencing circle was something new that was supposed to include Inuit in the sentence decision-making process. The judge stressed a need to provide the community with some role in the sentencing process, but did not explain what the participants could do or what they were expected to do "to help" the accused.

It would appear that the group was being asked to help construct a sentence that would prevent the accused from repeating his crime, but this was not explicitly stated. Was the sentencing circle also being asked to develop a sentence that would reconcile the accused with the community or protect the victim? This is not clear, as

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22. In his opening statement to the sentencing circle in Nunavik, the judge noted this sentencing circle approach had been used in the Yukon and, in his view, resulted in a lower crime rate. The passing reference to the *Moses* case, *supra* note 1, in the Yukon and general lack of information provided, in the author's view, left many bewildered about what they could do and what they were supposed to do in this circle. The judge did not explain in detail how the circle was intended to operate, how it was different than the regular sentencing procedure, or what the role of the participants in the circle would be.

23. Inuit Justice Task Force, *supra* note 17 at 121.

24. The judge informed the group that when the accused appeared before him earlier, he requested help from his community because he was not liked in his community. This was the result of an incident which took place some ten years previous which resulted in his being charged with sexual assault. Since that time, he felt his community did not like him. He took out his problems on his wife. He admitted to the judge that while he was convicted of assaulting his wife maybe three or four times, he said that he actually assaulted his wife 50 to 100 times. He told the judge he wanted help from his people.

25. In the regular court session, the judge ordered another sentencing circle to be held for one young offender and a young man who burned down a community building. Again the Judge cited the same recommendation from the *Inuit Justice Task Force Final Report, supra* note 17. He appeared to want to use the sentencing circle in this specific case because of the offence's direct impact on the community.

the direction given to the group by the judge was put in the form of a question — "What are we going to do with this man?"

> *In the matter at hand, a person broke the law, that is the court's ground. After guilt is proven or found, there is sentencing. In this forum, it is up to each and everyone of us* [...] *what can we do to help* [the accused] *get a fresh start.* [...]

In the absence of clear direction from the judge about the objective of this process, the participants may have limited their discussion and options to focusing only on what could be done to help the accused get "a fresh start" when other issues could also have been addressed. For example, I think it is also significant that the crime he pleaded guilty to was physical assault and the person he beat was his wife. From the information provided by the judge, the accused committed this offence while on probation for the same offence on the same victim and openly confessed in court while he had been convicted three times already for beating his wife, he had beat his wife at least 50 times without being charged.

Most of the community members involved in the circle had very little knowledge of the judicial process and were no doubt unfamiliar with principles upon which sentencing practices are based. Without some explanation regarding this sentencing alternative, active and meaningful contribution on the part of all of the circle members was severely limited. Questions were never answered about why this special circle was being used instead of the regular court hearing, what power the circle had to create new sentencing options, what a sentence is supposed to do, or what the law says a judge's sentence could be for someone convicted of wife assault.[26]

The judge attempted to clarify what his role and the roles of the other participants would be. He explained that everyone in the circle was "on the same level" and "equal".

There was no doubt some confusion caused when, after stressing this equality, he explained that he was "not obliged to follow advice" given by the circle members. The idea of the circle is to "break down the dominance that traditional courtrooms accord lawyers and judges."[27] Referring to the group's work as "advice" while stressing the equality of everyone in the circle presents a mixed message and raises questions about how "equal" the members really were and to what extent the community had any control in this process. In his subsequent written decision on this case, the judge referred to the circle as a "consultation" circle and likewise referred to the sentencing circles in the Yukon in the same manner. As well he reiterated that this type of

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26. In the *Moses* case, *supra* note 1, at the commencement of the circle Judge Stuart invited both defence and Crown Counsel to make their sentencing submissions, as they would have done in a regular court sentencing hearing. However, in explaining his reasons for beginning this way, the Judge stated he felt it was necessary for the participants to know what the upper limits were should they fail to reach a decision.

27. *Ibid.* at 366.

consultation "will always remain a tool at the judge's disposal to help him pass sentence."[28]

The contribution of the community did not end with the completion of the circle. In fact, the sentence crafted by the circle relied upon members of the community volunteering their time to provide counselling on a weekly basis for the accused and his partner. The judge indicated it would be good if both could attend counselling. Of the three persons identified by the group to form this counselling support group for the couple, none had special training to counsel either abusers or victims of domestic violence. The lingering responsibility of the community in ensuring the accused does not repeat his crime was discussed by the judge in his written decision :

> *The circle members will definitely keep an eye on the accused, and, to a certain extent, feel accountable for his behaviour. It will seem quite natural for them to lavish advice and encouragement on him or even vigorously express disapproval of some of his acts, even after their assignment has expired.*[29]

In the eyes of this judge, this process is, in fact, less of an alternative to the existing system than a "tool of integration" for Inuit, especially the Inuk offender.

> *The only way for the Inuk to participate in the carrying out of justice is to become associated with the people who administer it at present. This way, the Inuk will understand that the sentence passed on him by a judge who came from the South is the one that his fellow citizens desired to impose on him.* [...] *If the Inuk understands that the sentence passed on him is that of the his people, he will no doubt be better disposed to mend his ways.* [...] *If he is sentenced to a prison term, following the recommendation of the members of the "consultation circle", he will see those same people when he comes out of prison. It can only be hoped that they will give him help and assistance so the he does not go back to prison.*[30]

V. THE COMMUNITY : THE SUM OF ITS PARTS

One assumption that appeared to be held by the judge in this case was that the "community" is one relatively homogenous unit. There was no special attention paid to who should participate in the circle, other than to ensure the inclusion of an elder and the accused. Community members were approached by the mayor, at the request of the probations officer, and "invited" to participate. There did not appear to be any criteria in place for determining eligibility of persons who could participate in the circle. In the

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28. *R.* v. *Nappaaluk* (1993), 25 C.R. (4th) 220.

29. *Ibid.* at 232.

30. *Ibid.* at 234.

end, it appeared to be open to anyone interested who came to watch the circle or was asked to participate by the Mayor.

There were a few individuals who did participate who were not from the community. In addition to the judge, they were the defense and crown counsel, Chairperson of the Inuit Justice Task Force, the regional family violence counsellor and the probation officer.

The Judge in his written decision on this case commented that :

> *I wanted the circle to be made up mostly of Inuit from the same community, who knew the accused; elders, women and any person playing an important role in the community were to be invited to be members of the circle* [...] *I had suggested to* [the probation officer] *who was responsible for recruiting the participants, that the "consultation circle" include the mayor of the community, at least one elder (according to tradition), relatives of the accused, and friends or relatives of the victim.* [...] *"Consultation circles" must always be made up of people who take a great deal of interest in the welfare of the community. These people must also be representative of the community itself, to whose opinion they give voice. Traditionally, elders made important decisions. There should always be a place for them at those sittings. The victims should also be heard.*[31]

There were no efforts made prior to the circle by the judge, probation officer or mayor to inform the victim of this process and of what would be happening, or to ensure that she was willing to participate and had the necessary support to do so. The victim was informed by the family violence counsellor from another community that this circle would be taking place and she was asked to participate.

When discussing the role of the participants, like his colleague Judge Stuart, the judge appears to believe that all participants of the circle are "equal". The circle is intended to promote equal access and equal exposure with everyone facing each other.[32] Proponents suggest that this alternative places the accused and the victim on equal playing fields. In fact, within this context, the victim becomes one member of the larger community and, in many ways, loses her or his individual identity and becomes part of the collective.

This assumption about the community and its members being one homogenous unit with shared values, traditions and beliefs overlooks the fundamental power imbalances, differences and conflicts within the system and the community and helps promote a myth that all participating have equal access and opportunity within

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31. *Ibid* at 227, 228 and 237.

32. *Supra* note 2 at 365-66.

the circle.[33] Ironically, those who see this approach as an improvement because it allows the participants to look at the particular crime in a broader social context do not reflect on the possible impacts this larger community context has in silencing certain participants within the circle and promoting the interests of others. The extent to which the interests and anticipated outcomes of community members are the same, in particular those of the victim vis-a-vis the rest of her community, is questionable.

From the very beginning of this alternative process this notion of equality could be questioned. The right to choose between the existing system and any alternatives, if provided, is usually open to the accused. Ultimately the "rights" of the accused are perceived as paramount to the "needs" or "interests" of victims. Affording the parties involved a right to choose ultimately means the choice of the accused will prevail because of the substantive rights afforded to the accused through the *Charter*.

The suggestion that this alternative is initiated by way of choice is ill-conceived. It is quite likely that, given the choice between a regular sentencing hearing and a circle, an accused would opt for the hearing. Proponents of the sentencing circle often suggest that the circles are more feared by the accused because they face and are among their community members and not some judge they don't know or care about. However, experience with jury trials for sexual assaults in some Inuit communities would suggest that members of the community do not want the responsibility of sanctioning another community member and look for the most lenient response.[34]

Without question, where there is a choice left to the accused, the victim and/or the community to the use of such alternatives in cases involving violence against women, it is feared that not only will the accused be left to make the choice, but also that the choice will be made in favour of the alternative because it will be seen as and will become an alternative to incarceration. This is not necessarily a bad thing, if the alternative to incarceration is a meaningful and progressive response to re-educate the accused about using violence against women and more generally, addressing the violence faced by women who are the victims.

This begs the question of how to ensure that interests and needs of the victim are not totally overlooked in this determination or choice of what route to follow, and what measures will be provided to ensure that the victim is able to fully participate without coercion, harm or fear of reprisals. These questions must be asked and their response should help determine what standards and guidelines will apply regarding the use of these alternatives and the election or choice of specific alternatives.

Advocates of circle sentencing suggest that community justice committees should play a role in determining which matters are dealt with by circles. In some

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33. For a further discussion about perceptions of "community" and assumptions about contemporary aboriginal communities please refer to C. La Prairie's "Altering Course" *supra* note 5 at Chapter V : Discussion.

34. Pauktuutit Justice Project is preparing a report on the use of jury trials in sexual assault cases in Inuit communities in the NWT. This report should be completed by April 1996.

instances in the Yukon, these committees have set certain application procedures requiring the offender to perform certain tasks before gaining entry into the sentencing circle process. These were outlined in a draft manuscript by Judge Barry Stuart. In his draft manuscript, Judge Stuart states :

> *[s]ome communities have established application procedures which impose significant tasks upon the offender to gain entry into the circle sentencing process. Pre-requisites, common to all* [Yukon] *communities, include an acceptance of responsibility by the offender, a plea of guilty, a connection to the community, a desire for rehabilitation, concrete steps toward rehabilitation, support within the community and the input of the victim.*

Those who are proponents of the circle suggest that each circle will be different depending upon the community and that there is a need for flexibility in structure and process. This informality, on one hand, is welcome for many who are alienated by the formality and rigours of courtroom procedures. On the other hand, without any guidelines or standards, the extent to which this process is fully understood by the community members is doubtful and leaves one to question how meaningful the participation of the victim can be. Having said this, the predictability and professed universalism of the existing system, regardless of its deficiencies and inequities, may be more appealing to victims because it is well known and experienced by many.

Again, there appears to be an underlying assumption being made that, with respect to these alternatives, the interests of the victim are understood, acknowledged and considered as equally important as those of the accused by the participating community members.

Advocates of the circle sentencing approach often suggest that victims can be afforded more of an opportunity to be heard and have a role in rehabilitating the accused through this alternative approach. This ignores the reality of many women who are victims of violence. Found within this assumption that all participants within the community are equal and share the same interests, is this view that the victim, like any other person within the circle, is free and able to speak out. Yet at the same time, it is well understood that there are very few, if any, support services available to women who are victims of violence to provide the necessary support and advocacy to participate.

To many judges, such as the judge in this case, such services or supports for victims would not have been seen as essential prerequisites to this approach, as they have assumed that the community and the victim share the same views and beliefs. Accordingly, by having community members around the victim, this would be perceived as sufficient in providing her with the necessary support. Furthermore, it would appear that it is not really necessary for the victim to fully participate by speaking. Her presence, in the view of the judge, is sufficient in demonstrating some

form of reconciliation and possibly forgiveness, which is an important message for other members of the community.[35]

In the Nunavik case, this circuit court judge was relatively unfamiliar with the community members, the power dynamics within the community, including family ties and political links within the community and he was definitely not privy to community gossip. This unfamiliarity, coupled with this assumption of a homogenous community, prevented the judge from even considering examining more deeply who the accused is within the community, how this relationship with the community may impact on the ability of other community members to participate freely, what status the victim has within the community. Failing to explore these issues, and at the same time making decisions on whether or not the case will go to circle, serves to perpetuate further barriers to women who are victims of domestic violence.

So much depends on who a particular community member is. If the community member is a relative of the accused, himself an abuser, or simply not interested in this matter, he may find it very hard to understand the impact of this crime on the victim and, more generally, on the community. This assumption further silences many victims. The assumption that all members of the community share the same values and views on justice precludes the need to really hear from the victim, especially if she is uncertain about participating. In other words, this assumption may (and in the Nunavik case did) render the need for the victim to speak about the impact on the crime upon her inconsequential.

In the Nunavik sentencing circle discussions, the focus was primarily on the accused and what could be done to "help" him and what he would have to do himself to overcome the problem. The tone of the discussions was never adversarial or emotional. Everyone who spoke did so in a very straightforward manner. No Inuit observing the circle were asked to speak during the process, only the people sitting in the circle spoke.

Very little was said about the victim during the session, other than that she suffered a burden when her husband was not in the community to help her raise her children. Only the family violence worker raised the need for the victim to have her own outlet of support should her husband begin assaulting her again. The activities and lifestyle of the accused were discussed initially as "his problem", but as the proceedings progressed some members of the circle started talking about "their problem". This shift in focus implies that some degree of blame or responsibility for the abuse was being placed on the victim.

At no time during the circle discussion did the offender or others hear from the victim, in her own words, what the impact of the accused's actions had been on her or her family. The victim appeared to be very nervous in the circle and would only briefly speak when asked a question by the judge. The victim's participation is

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35. See *R.* v. *Tivii*, October 19, 1993, unreported decision of Jean-L Dutil, J.C.Q. In this decision, the judge elaborates on the factors regarding the community when determining whether to hold a sentencing circle in Nunavik.

essential, according to advocates of circles, because her comments are significant and necessary to developing a sentence that will rehabilitate the accused.[36] Yet in this case, it was evident the victim was not able to fully participate.[37] A further assumption by the judge was that the whole community shared an interest, responsibility and willingness to address this particular issue of domestic assault. The judge appears to believe there is a widespread acceptance, within the community, to take on the responsibility to address violence against women in their community. In his written decision on this case, he stated that "[a]ll participants in a 'consultation circle' share a common purpose : to settle a problem that distresses a family and, consequently an entire community."[38] Beyond this statement, there is no evidence available from any community members or political leaders that this in fact is the case.

Not unlike communities in the South, Inuit communities are struggling with the issue of domestic violence and are no further ahead in having all members, especially male community members, accept responsibility for male violence against women. To expect this of this community, especially when the judge himself recognizes violence in "the form of assault and battery or [...] committed by a man against his wife, consort, friend, casual companion"[39] is the ‹most common crime', is simply unrealistic.

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36. In *Moses, supra* note 1 at 371, Stuart Terr. Crt. J. stresses the need to find an appropriate means of including the victim or, at the very least, the impact of the crime on the victim in order to motivate the offender to successfully pursue rehabilitation :

    Many offenders perceive only the state of the aggrieved party. They fail to appreciate the very human pain and suffering they cause [...]. *Only when offender's pain caused by the oppression of the criminal justice system is confronted by the pain that victims experience from crime, can most offenders gain a proper perspective of their behaviour. Without this perspective, the motivation to successfully pursue rehabilitation lacks an important and often essential ingredient.*

37. Before the circle started, I spoke with the victim. She seemed nervous and unwilling to participate. Prior to the circle commencing and for the previous twenty-four hours, her husband, the accused, had returned to the community for the sentencing and stayed with her at their house. During this time the order prohibiting any contact with his wife was still in effect. She explained she had spoken with her husband and that she wanted to sit beside him. She said he had come up with a solution. When I asked her what she thought should happen to him, she again said that her husband felt that they should get counselling together by people in the community. She appeared to feel that this was sufficient. The family violence worker asked what she would want to happen if after, he did abuse her again. She explained that he had promised not to beat her. When I asked her if she would want to get separate counselling from her husband she indicated that she did not know and would have to speak to him about this. It is unclear to what extent she was responsive to her husband's wishes because she truly believed in them or simply because she was afraid to speak against him. During our conversation, the accused walked by several times and stood nearby, within hearing distance. The victim looked visibly nervous. The conversation ended when he finally called her to join him.

38. *Supra* note 28 at 231.

39. *Ibid* at 224.

Inuit communities can be small and everyone may know everyone else. There are complex networks of kinship and relationships through marriage. With such complex and well known relations within a community, it is not surprising few in the community want to take on the responsibility of sending another community member, a possible blood relative or in-law, to jail. As stated earlier, the experience with jury trials in some Inuit communities in the Nunavut demonstrates people within the communities do not like to send people to jail. In fact, it is understood by many in these particular communities that if you are charged with a crime of violence against women, especially sexual assault, you should always elect to be tried by judge and jury. The underlying message in this story is that juries seldom convict Inuit men of sexually assaulting Inuit women. Many reasons are given : some defense counsel blame it upon a bad Crown counsel, others in the community say that people on the juries do not want to be responsible for sending the person down South to jail. With this as the background information, one must seriously question whether or not alternatives such as community-based sentencing circles can protect the interests of victims while respecting the rights of the accused. It is not surprising Inuit women fear the use of these circles in cases involving violence against them.

It became evident in the manner the circle was conducted that there was an assumption made by the judge that the "community" and "victim" are one and the same, sharing the same values, interests and outcomes. The judge did not seem at all concerned with the very limited engagement the victim had with the group during the circle. The focus remained on the accused; the victim was just part of the larger public identified as the community.

There is an assumption that is perpetuated in the existing system to the extent that the Crown, while representing the "state" and "public interest", is often perceived and referred to as the victim's lawyer. The conflicts surrounding this perceived dual role of the Crown have begun to be addressed in one community with the establishment of an independent Inuit women victims' advocacy and support service.

With such underlying assumptions, it is not a surprise that the issue of what happens to those women who are victims of violence and cannot speak out in their community is ignored. In the case of Inuit women, it was only through Pauktuutit's Justice Project that community women have been able to voice their concerns about reforms such as these in ways that make them less vulnerable to "community" pressure. For women, Pauktuutit is seen as the organization that can represent their interests without their feeling threatened.

This is important to acknowledge because if "community" is understood to be the local geographic unit and the "collectivity" empowered by judges to participate in and, eventually, decide on the design and procedures of such sentencing alternatives, the end result will mean that women may be further discriminated against and unable to speak out. Pauktuutit clearly does not fit within this definition of "community" if defined by geography, yet many women recognize this organization to be their "community" voice.

VI. CIRCLE SENTENCING : AN ALTERNATIVE TO OR TOOL OF THE EXISTING JUSTICE SYSTEM

While the intention of sentencing circles is clearly to provide a "restorative justice" alternative to the existing retributive sentence hearing procedure and incarceration, this alternative is not truly independent of the existing justice system. The discussion of whether sentencing circles are part and parcel of the existing system or an alternative to it does ultimately impact on the success and effectiveness of this initiative in meeting its goals. Several issues arise from this assumption that the sentencing circles are alternatives to the system.

A. A Traditional Alternative beyond Scrutiny?

Sentencing circles have not been severely scrutinized and critiqued in part because anything would be considered an improvement of the existing justice system. Furthermore, while these alternatives are not necessarily reflective of traditional values, by labelling them in some way as belonging within Inuit culture, there appears to be reluctance on the part of non-Inuit working within the justice system or within government to scrutinize them. This results in a "hands-off" approach. Ironically, these alternatives are identified and perceived to be mechanisms of self government and therefore beyond the scrutiny of other levels of government or the judiciary.

Regardless of how such alternatives are identified, they should not be allowed to sanction or result in greater inequalities against women or, worse yet, put women and other victims at greater risk than they would confront as a result of the existing system. A practice that is identified as part of an "aboriginal" system and part of "self government" may allow for certain flexibility that is not allowed within procedures found in the existing criminal justice system. Yet this flexibility must still protect the rights afforded Inuit women through the *Canadian Charter of Rights and Freedoms*.

This need for scrutiny and rigorous review to ensure rights of Inuit women are not being eroded has developed from the experiences of constitutional negotiations and aboriginal justice reform inquiries. For example, aboriginal justice inquiries on one hand discuss how such alternatives must respect and protect the "rights" of the accused as provided for and guaranteed in the Charter. On the other hand, it is these same law makers, politicians and others that become very "hands off" about the "details" of many alternative justice systems and practices in so far as they impact upon and deal with matters of the victims of violence. Self government rights do not collectively sanction internal inequalities based on gender or any other of the enumerated or non-enumerated grounds of the Charter.

There are certain safeguards in place in the existing system along with infrastructural supports where victims have some protection. So, if these are not equally available within the alternatives, then it would seem likely that women will ultimately choose what offers them the most protection while the accused will choose the alternative that best serves his needs. In the "community-based" alternative where

the accused and victims are both given the choice between the outside system and their "own", the pressure to choose their own system will be great even if it does not provide the needed support services. Those choosing the existing system will be seen as not supporting "their own" system. This further alienates the women and places unbearable, yet intangible, pressure on them, making it difficult for them to choose the existing system even though it may afford them more protection.

It would be useful to examine the system or practice being advocated in the community, regardless of whether it is a traditional practice or a contemporary "community-based" initiative, to identify the extent to which these alternatives create further obstacles and barriers to victims.

B. An Alternative to What?

The second issue is that this initiative is not really an alternative to the entire system, just one very small component. Sentencing circles are an alternative to the sentencing hearing. As such, all the procedures and practices of the existing justice system leading up to the sentencing hearing apply. The difference lies in the outcome of the circle.

Yet, this type of change masks over the larger issues and makes it more difficult to address any substantial changes to the system. Until these jurisdictional and constitutional issues are resolved through self-government negotiations, the alternatives being advocated are not mutually exclusive of the existing system but rather remain as instruments of the system.[40] It is understandable that, in face of the shortcomings of the existing system and ever-increasing level of crime in the communities, those with the ability to make alterations that require neither legislative sanction nor constitutional change are doing so. However the consequences of these changes, in the absence of or without connection to larger social system alterations, limit not only the appropriateness of the changes but their effectiveness in dealing with root causes of the problems.

C. The Alternative and its Impact on Community

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40. If there is a serious commitment to address these issues regarding justice reforms within the self-government forum, Inuit women have stated that there must be a serious commitment to ensure that the "real" representatives of women's voices are provided the opportunity to fully participate in these negotiations, including the provision of appropriate funding to the representatives of women's issues and concerns such as Pauktuutit. Pauktuutit has communicated to the Government of Canada that the self government negotiations model, as proposed by the Minister of Indian Affairs and Northern Development, Ron Irwin, could very easily, like many justice alternatives, exclude Inuit women at community and regional levels. The process as advocated by the Minister does not provide any safeguards or opportunities for the inclusion of women's groups such as Pauktuutit.

The third issue relates to the second. The type of change and its implementation is confined to those within the system and possibly a small group within the community that those involved within the existing system know. For example, in the Nunavik circle, the judge called upon the probation officer and mayor to organize the circle and locate people to participate. The idea of the circle was canvassed by the judge with a political leader involved in justice reform in the region.

This small group of architects of change do not allow for a very open, public discussion about the type of change people in the community feel is necessary. This informal process of change may unknowingly and quite easily facilitate the perpetuation of community power imbalances and structural inequities that are only well known to community members. In the context of sentencing circles, the power to sentence is transferred from the judge to particular members of the community participating in the circle. Even though the judge ultimately has the authority to make the decision, the pressure to accept the recommendations of the circle members is great. Failing to accept the community's advice would directly impact on the legitimacy and credibility of this initiative. Judges know this and therefore are very sensitive to not moving contrary to the circle members' advice. With this as a crucial factor, the participants in the circle become a very important element.

On one level, the debate of whether sentencing circles reflect "real change" and are true "alternatives" to the existing system becomes a debate about who really has the power to make this change. It focuses on the extent to which those working within the system are designing and ultimately controlling these alternatives. Does it matter if it is not independent of the existing system? In my view, it does if you believe that Inuit should define their own system and practices and that there are fundamental differences between the way Inuit and Qallunaat respond to issues of social disorder.

Also, if you support the goals of self-determination, the redesign of this fundamental element of society must remain with Inuit. Having said this, I also believe that leaving this matter to be resolved through self-government negotiations, without question, has its risks for Inuit women. To date, the self-government process has been male-dominated and focused on economic and resource issues at the expense of social issues. With assurances of full and equal participation of women within this negotiation process, the possibilities of making progressive and real change to the existing justice system may be more within reach. Within this forum, there is the possibility, if the negotiators are willing, to have these issues joined and not addressed as isolated issues. Change to the justice system is directly connected to other issues such as finance, budget priorities of governments, housing, health, economic development, and other social programs and policies. Without a comprehensive and coordinated response to issues such as poverty, violence, and inadequate social and health services, the justice system and its alternatives will be incapable of addressing the root causes of the problems it confronts daily.

The alternatives such as sentencing circles are molded by perceptions and experiences of those within the justice system who have worked with aboriginal communities and have the authority and ability to make these changes. If this is the only way change is going to be made, the risk clearly is that they will never really know the culture, the values and traditions. Therefore, if it remains only within their

jurisdiction to make change, this change will always be limited by this lack of knowledge and experience. It becomes even more difficult to explore the contradictions and tensions between Inuit and Qallunaat values associated with social order, social control and justice in contemporary Inuit society.

I recognize, however, that there is still considerable need for caution in advocating greater independence of these alternatives whether designed and implemented by the justice system or the community. Many of the concerns raised earlier regarding the assumptions made about the "community", its willingness to take responsibility for issues such as violence against women, and the role of the victim within the larger community become even more significant where the community determines which cases are eligible for circles and what procedures will be followed. Certainly, the implications of holding a sentencing circle for a young offender charged with theft or vandalism are very different from one held for a man charged with wife assault.

If, in fact, such alternatives become further removed from and less dependent upon the existing criminal justice system and individual accused are left to choose between the existing system or the community alternative, these assumptions must be closely examined to ensure that women are not further victimized.

D. The Alternative versus Existing Resources and Services.

This brings me to the final issue I wish to address on this topic. In the sentencing circles undertaken to date, there certainly is no assurance of adequate financial resources and trained individuals within the community to provide the meaningful and progressive response to crimes involving violence, including services to the offenders as well as the victims.

The use of sentencing circles for cases involving violence against Inuit women and children may in fact be sending the wrong message to the community and most importantly to victims of violence. For those women and children who are victims of male violence, the Nunavik case may send the message that men who abuse women and children and who go through this process will not really have to be responsible or accountable for their actions and will not likely get the help they need to change their behaviour and attitudes. With this result, many women may weigh the value in reporting such crimes against very real and possible harms they may suffer as a result of sentencing circle decisions.

For example, in the case in Nunavik, a third time repeat offender for domestic assault is not incarcerated or required to seek specialized counselling as a result of the circle. Rather, he and his wife are required to attend weekly sessions with community volunteers who have no training in dealing with these issues, but will agree to be available to talk to the "couple" together about "their problem". The outcome in this circle ignored the real threats and harms that exist for women who are victims of abuse in remote Inuit communities. It also ignored the real needs of the offender. These

needs of the offender and the threats and harms to the victim cannot be discounted when discussing alternatives to the existing system.

There is an even greater need to fully explore what is meant by "community", who makes up the community, what safeguards have been used to ensure the safety and ongoing support of victims who participate in this process, and any follow-up which is recommended when looking at alternatives to the justice system.

As stated early in my presentation, the existing justice system Inuit within the communities are questioning and criticizing is not the same existing justice system operating in Vancouver, Winnipeg or Ottawa. The reference to the "existing system" implies there is a universal justice system in Canada with the same level of resources and services that everyone, regardless of their location, ethnicity, gender, economic status, to name only a few factors, has access to.

Seldom in a discussion about the virtues and shortcomings between the existing system and its alternatives, is there a suitable opportunity to raise the issue of the absence of services and programs similar to those provided or available to other victims and offenders elsewhere in Canada.

It is evident that sentencing circles shall not be provided with the same resources, support services and skilled expertise that is available in the existing system. Rather this alternative clearly is an attempt to fill the gaps caused by the deficiencies of the existing system within Inuit communities.

Pauktuutit has been very clear in stating that alternatives are not welcome in communities if the necessary infrastructure, support services and resources needed for these alternatives to operate are not also provided.[41] It has stated that due to the lack of adequate resources and services within the existing system and their overutilization, alternatives will suffer greatly alongside the communities attempting to introduce these changes.

The question of whether the community has the necessary financial and human resources to provide the necessary support and counselling to both the accused and victims of the offence should be considered a fundamental factor in determining a community's willingness to pursue an alternative. If the community lacks these resource and services, one must seriously question the community's ability to implement these alternatives effectively.

The adequate resources and services I am referring to (as necessary to support these alternatives and provide the necessary infrastructure) include the development and operation of adequate public legal education on the alternatives, paid administration to operate the alternative approach, support and advocacy workers for women and children who are victims of violence, male batterer counselling programs, in addition to the social workers and addiction's counsellors that may already be

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41. See Pauktuutit's Bill C-41 Presentation to the Standing Committee on Justice and Legal Affairs, February 1995.

located in the communities. Without such infrastructure in place, the credibility and accessibility of alternatives is immediately called into question.

It is well recognized that the response to violence against women and children is multi-faceted, involving not only the criminal justice system but a number of government agencies and groups within the community. It is acknowledged that a coordinated response is required. So, in theory, the reworking of the criminal justice system to develop models that look to broader social goals is welcome. However, in practice, the criminal justice system, including any of its alternative measures, can only go so far in adequately responding to crime and disorder within the communities if it does not have the necessary support services and infrastructure in the communities.

This raises a general point. Any alternative must have the necessary infrastructure in place to sustain itself, including trained and skilled community service providers who are paid for their services. If an alternative is reliant upon a significant volunteer component, it will be unreliable and will vary considerably in the level of services. It also means that existing, over-utilized community resources will be further taxed. In the new federal legislation on early release and parole of offenders, there is an express provision dealing with the need to establish half way houses within aboriginal communities (s. 81). This provision is followed by a very explicit provision expressing the federal government's obligation to fund these initiatives. This type of statutory funding commitment is also needed for alternative measures such as circle sentencing.

Alternatives such as sentencing circles are referred to as "alternatives" but rely upon the existing system to operate. The terminology of "alternatives" makes it somewhat confusing and suggests that they will be financed in the same manner as the existing system. It is not unreasonable for some community members to believe that the resources, put into the existing system, will simply be transferred to the communities to deliver the alternatives. We know this is not the case. In fact, based on experience, it would appear that no new resources or services will be provided to assist in the design, establishment and operation of such alternatives. As such, they will remain within the domain of the judiciary and others within the existing system who have access to a limited amount of resources to "experiment".[42]

42. This is the term used by the judge in the Nunavik case to describe both the circles he held and the circles conducted under the authority of Judge Barry Stuart.

This requirement for funding of infrastructure and resources associated with alternatives is directly connected to a requirement of these alternatives to provide certain safeguards and protection for victims of violence, if these initiatives are going to be used in cases involving violence against women and children.

CONCLUSION

Despite the concerns and appeals raised by Inuit women, it is likely that these alternatives will continue to be used in cases involving violence against women.

More discussion is needed about what cases will be allowed to go through the circle and how this decision will be made. This decision should not be left to the judge; this is an important issue that the judge, along with the community, should make after considerable public discussion.

Having said this, I strongly feel that cases involving violence against women, young girls and boys, and children, should not be dealt with in community sentencing circles, until such time as the community has accepted and is able to take full responsibility for addressing the issues of violence against specific members and segments of their community. Greater awareness about wife abuse and violence against women is needed in the community, if the community is to take responsibility for these types of sentences. With this awareness and acknowledgment, the community may be better prepared to ensure that the victim or the victim's impacts are adequately represented and addressed in these alternatives.

Efforts should be made to ensure the victim has the necessary support or advocacy group within the circle itself. It has been recognized that this is an issue requiring further work.[43]

In addition, a fairly good understanding has to be reached about the objectives of alternatives such as the sentencing circle. Consideration must be given to broadening the accepted general principles of sentencing. For example, if sexual assault and wife assault cases are eligible for this process, the sentencing alternative must be designed to deal with rehabilitation of the accused, but it must also deal with rehabilitation and protection of the victim and family, independently of what is decided for the accused.

In the Yukon case, *R.* v. *P. (J.A.)*, Lilles, C.J.T.C., stated that the focus of the sentence for the sexual assaults that took place should not be on the removal of the offender from the community but on healing both the victims and wrongdoer in the

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43. Stuart, J. in *Moses, supra* note 1 at 371 states : "Much work remains to find an appropriate means of including the victim or, in the very least, including the impact of the victim in the sentencing process."

community.[44] What is missing from this focus of "healing" is the assurance that the community is able to provide this service. Does it have the necessary human and financial resources to assist both the victim and the offender in healing, where they are willing to do so? Does the community have the necessary services, if the wrongdoer stays in the community, to ensure that the victim is protected from further assaults? Without such protection, it is unlikely the victims will ever "heal".

As in the Nunavik case, the crime of violence against women is often seen by the Court and others as a problem shared by the accused and the victim.[45] As such, it should be worked out by them together. To suggest that the only way in which to resolve the problem is to bring the victim and accused together is problematic. The syndrome of abuse that the victim in this case suffered may require that she be allowed the necessary support and counselling apart from the man who is abusing her. To require that they work this out together imposes even greater abuse upon the victim. This type of situation, in my view, would not have arisen if the victim had adequate advocacy and support services. Had these services been available, questions, well in advance of the circle, could have been asked to the judge and others responsible for organizing and conducting the circle to determine whether this was something that should be taking place at all and if so, whether the victim was able to participate in it and under what conditions.

Another issue of importance is the responsibility for the selection of circle members. In the Nunavik case, the judge asked the probations officer to deal with this. This responsibility was passed on to the mayor. The decision of who participates in the circle should not be made unilaterally by the judge or by his or her delegate. Representatives, identified by the community in consultation with the judge, can decide how many people should participate and identify people for the circles.

The selection process for members of sentencing circles should be broadened. Perhaps guidelines or criteria should be developed regarding who in the community is eligible to participate in the circle. There is a need for more discussion of what is really meant by "community". Perhaps there are other ways Inuit within the community would want to deal with issues before the circle. In particular, maybe there are specific segments of the community that want to participate in a way other than through a representative of the community. This needs further exploration by members within the community and those outside working with different groups within the community. The bottom line is that the term "community" should not be used to exclude groups not physically located within the community that provide support to more marginalized individuals within the community.

Further, in relation to the selection of participants, a thorough discussion is needed regarding the involvement of relatives and special segments of the community

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44. *R.* v. *P. (J.A.)* (1991), 6 C.R. (4th) 126 at 129.

45. In the sentencing circle in the *R.* v. *P. (J.A.), ibid.* case as well as the Nunavik case, the members of the circles and the judges appeared to focus on keeping the family together and presenting this as a problem that "the couple" shared and should resolve together.

such as elders, youth, or women. Issues of family relations and power imbalances within the group must be addressed, if this notion of "equality" among participants is to be adhered to. Traditionally, the family was responsible for dealing with conflict within it, so from this perspective, Inuit may see the involvement of relatives as a necessity, where the court may see it as a conflict of interest. Many women who are victims of violence do not quickly embrace such traditions because they are often geared towards reconciling the family, disregarding the victim's wishes. These issues have to be discussed in the community and with the Court.

There appears to be some confusion about Inuit-based justice initiatives and community-based justice initiatives. As stated earlier, the fact that Inuit are the majority within the community does not necessarily make a community-based initiative an Inuit-based initiative. In fact, very few of the community-based initiatives are rooted in Inuit tradition and the strengths of Inuit culture. In order for alternatives to be Inuit-based, Inuit must be allowed to design and implement them. Those within the justice system endorsing alternatives must be willing to allow their models to be reconstructed to reflect the goals and objectives as determined by Inuit in the community.

Within the Inuit community, this reconstruction must be done in a way that is appropriate for and includes all segments of the community. If alternatives simply allow for the transfer of the power of the judge to a select and powerful few in the community, little has been accomplished. Women have expressed concern about the introduction of Inuit traditions into the justice system without further examination and discussion because of their discriminatory nature against women.[46] Much time and talk is required about these alternatives in light of the concerns being raised. Frank discussion is needed where traditional ways are relied on in community-based initiatives and those ways have the effect, even though not intended, of discriminating against women.

Should we look beyond the existing criminal justice system and undertake to reconstruct it in a manner that builds upon Inuit values and strengths, I believe the result would truly be unlike any alternatives we have ever seen.

In such a reconstruction, the strength of Inuit women as survivors of violence as well as those of the men who abuse could be the basis from which to build the system. Until this is done, sentencing circles like other components of the criminal justice system will mirror the existing criminal justice system they have grown out of. The names may change but the roles of the accused and complainant/victim will still

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46. An example of the concerns raised is the view of some elders regarding wife abuse. The view that wife abuse is not a serious crime or is the result of a woman's lack of obedience to her husband or non-acceptance of her traditional role is not one shared by many contemporary Inuit women. Yet this is a view that is heard expressed by elders. If elders are given responsibility for sentencing circles, which might better reflect Inuit tradition, there could be problems. This is a very sensitive issue that must be resolved by the Inuit before Inuit-based justice initiatives are incorporated into the justice system or community-based justice initiatives are redesigned to reflect Inuit traditions.

remain virtually intact. For Inuit women who are victims of violence, and for their advocates, their energy will focus upon ensuring their protection and safety within such alternatives because they have been and will always remain the victims within this context. Even though the accused is meant to be seen in a broader perspective within the sentencing circle, including his strengths and contributions to the community, this is not the case for women who are the victims of the violence.

While there have been no in-depth evaluations undertaken to assess the impact of this sentencing circle alternative within Inuit communities, the popularity and support for this approach have grown considerably within the media, among aboriginal political leaders, other political leaders and the judiciary. Sentencing circles are looked to by many as the panacea to cure the ills of the existing justice system. I would like to end my presentation by simply suggesting that before we so readily embrace these alternatives, we carefully examine the assumptions we bring to the discussion and the concerns being raised by women who have experienced these alternatives as the victims of violent crimes. After having done this, we must then ask ourselves, as Inuit tradition suggests for victims of violence : is this response creating "more problems than the initial infraction"?