

Aboriginal Choices : Suffering Under a Failed Criminal Justice System or Creating an Aboriginal Attorney General Office

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After more than two decades of Commissions, inquiries, reports, special initiatives, conferences and books on the subject of Aboriginal peoples and the Criminal Justice in Canada, in March of 1994, at the federal/provincial Justice Ministers Conference in Ottawa, Canada's Justice Ministers collectively addressed Aboriginal justice reform. Ministers agreed that the justice system has failed and is failing Aboriginal peoples and agreed that a holistic approach, including the healing process, is essential in Aboriginal justice reform. The Ministers agreed that the necessary justice reforms be made to the general system to make it equitable in every sense for Aboriginal peoples, that the existing justice system must work with Aboriginal communities on community-based crime prevention and crime reduction initiatives, and the included reforms must reflect the values of Aboriginal peoples in the general justice system. Also they agree that they must build bridges between the general justice system and Aboriginal practices, traditions and approaches. Finally they pledged to work together for these priorities with Aboriginal community leaders, and in future meetings analyse the implication for Aboriginal people on all issues on the agenda.

Canada's Justice Ministers looked forward to the recommendations of the *Royal Commission on Aboriginal Justice*. In 1996, the *Royal Commission on Aboriginal Peoples* issued a report on Aboriginal People and the Criminal Justice in Canada, called *Bridging the Cultural Divide*. The report summarized a large number of other Commissions, inquiries, reports and conferences on the Aboriginal justice system, and affirmed the failure of the criminal justice system. It drew two conclusions. The first is a remarkable consensus on how the justice system has failed Aboriginal peoples, the first Nations, Inuit and Metis. Secondly, despite the hundreds of recommendations from commissions, task forces and inquiries, the justice system is still failing them. They link the integral structural problem to the historical and contemporary experience of Canadian colonialism.

Colonization, in Canada, has systematically undermined the Aboriginal world view and justice system and created racism as the fundamental lens for viewing Aboriginal peoples. The disorderly symptoms of the colonial mentality in the justice system have created an over-representation of Aboriginal peoples in the criminal justice system. Thus, the principle reasons for this crushing failure is the fundamentally different world view of

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Aboriginal and non-Aboriginal with respect to such elementary issues as the substantive content of justice and the process of achieving justice.

These conclusions are not a Canadian anomaly. They are global conclusions. The failure of imposed criminal jurisdiction over indigenous nations has haunted all of the British colonies' legal systems. It is a failure of the relationship of force rather than of justice.¹ In the last decades, each member of the British Commonwealth who has studied the problem has reached a similar conclusion about the effect of the criminal justice system on Aboriginal people. None of the studies has concluded that its criminal justice system is succeeding with Aboriginal peoples. All have recommended various criminal justice reforms and community-driven projects. All are facing the rise of Indigenous gangs and organized crime.

The Royal Commission's solution was to create constitutional space for an Aboriginal Justice system, while reforming the existing justice system. Canadian colonization and its various theories of neutrality or generalities of the law have hidden the Aboriginal system of order and justice. These colonial discourses failed to protect the constitutional rights of Aboriginal peoples, and sought to create a national criminal code administered by each province. In developing the criminal code, the Federal Parliament neglected to include the Aboriginal legal system and treaty rights provisions that provide a jurisdictional basis for the Aboriginal justice systems. Constitutional reforms in 1982, however, have affirmed these rights as part of the Constitution of Canada.

Under Aboriginal title, rights and treaty rights in section 35 of the *Constitution Act, 1982*, Aboriginal nations have the constitutional right to establish criminal justice systems that reflect and respect their world view and heritages. These rights have always existed in the Aboriginal order. Most treaties accommodated a continuation of the Aboriginal order and established new jurisdiction clause concerning controversies or differences between English and Indians in the shared territorial jurisdiction. The consent of the imperial Crown and the Aboriginal nations created the dual system of law and government. The Crown did not impose it on Aboriginal peoples.

In the context of Canada, many treaties establish the right to make laws and to administer a justice system. These treaty rights are related to, but should not be confused with, the inherent Aboriginal rights. These prerogative treaties are the source of related constitutional delegations of responsibilities for justice over the immigrants. The 1664 treaty between the Crown and the Haudenosaunee provided for the punishment of transnational crimes and recognized the mutual jurisdiction of each party over such crimes committed by its subjects or peoples under its protection.²

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1. See, J. Webber, "Relations of Force and Relations of Justice : The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623.
 2. "Articles of Agreement Between the Five Nations Indians and Colonial George Cartwright, 1664" in *Early American Indian Documents, Treaties and Law, 1607-1789*, A. Vaughan, ed., (Washington : University Publication of America, Washington, D.C.) vol. 7 at 294.

The *Georgian Treaties* of "peace, friendship and protection" authorized English laws to apply to the existing settlements and civil law to apply to all controversies between the two distinct peoples. A few treaties established English criminal jurisdiction within the settlements,³ but none established that English laws would apply within Aboriginal lands. The *Georgian Treaties* with the Mikmaq and their Friends affirmed the existence of the Mikmaq legal order and recognized the need to place limits on the British coercive legal system. These *Treaties* created dual legal orders. For example, the *Wabanaki Compact, 1725* provided that "no private Revenge shall be taken" by either the Wabanaki or the English. Instead, both agreed to submit any controversies, wrongs or injuries between their people to His Majesty's Government for "Remedy or induse[sic] thereof in a due course of Justice."⁴ These terms illustrated the need for a vision of order that both validated each legal systems and integrated consensual norms for harmony in the future.

These terms affirmed the autonomy of the diverse Aboriginal legal orders. They created a system of personal jurisdiction, rather than territorial. The terms prevented a Wabanaki or its allies from asserting their law if an English man offended their people as well as in the opposite case. The Wabanaki agreed that, as a birthright, English law governed the English settlers in all their conduct. This prevented the application of Algonquian law, the law of private revenge that applied to the worst conduct, if an English man had killed or wronged a Wabanaki or its allies — a Wabanaki family had the duty of retaliation by killing another Englishman or the actual killer. Under the treaty, Aboriginal nations suspended their laws in these cases and transferred them to English law and justice and in controversies between "Indians," they applied the Aboriginal law. Under the terms of the treaty, the Wabanaki agreed to maintain peace by allowing controversies between English settlers and the Wabanaki to be settled by His Majesty's law and tribunals.

In the 1726 *Accession to the Wabanaki Compact*, the Mikmaq district chiefs extended and clarified their personal jurisdiction over their people in the English settlements. They took responsibility for "any robbery or outrage" in the English reserves. They expressly promised to make satisfaction and restitution to the "parties injured." This extended the customary law of the Mikmaq to the relations with the new English settlements. Thus when they alleged that a Mikmaq robbed or committed an outrage against any Englishman, even if it happened in the settlements, English law could not be applied. In all other cases between the peoples, they followed the *Wabanaki Compact* and the chiefs agreed to apply for redress according to English law.

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3. J.Y. Henderson, "The Marshall Inquiry : A View of the Legal Consciousness" in J. Mannette, ed., *Elusive Justice : Beyond the Marshall Inquiry* (Halifax : Fernwood, 1991) 35 at 49-56; M. Battiste paper for the "Grand Council of the Mikmaq Nation to the Royal Commission on the Donald Marshall, Jr. Prosecution" vol. 3, App. 2 at 81.
 4. Article 6 affirmed by Mikmaq in 1726 and 1749, article 7 in Cumming and Mickenberg, ed., *Native Rights in Canada* 2nd ed., (Toronto : Indian-Eskimo Association of Canada in Association with General Pub. Co., 1992) [hereinafter cited *CM*]. App. 3 at 295-309. Similar provisions suspending indigenous law and providing British justice in colonial courts were common with other British treaties with the First Nations.

The *Mikmaq Compact, 1725* continued these promises.⁵ The Grand Chief and Delegates, however, explicitly clarified the processes of law. They specifically limited the scope of the English law in any controversy between English and Mikmaq to His "Majesty's Courts of Civil Judicature."⁶ The terms of the treaty established the retraction of the Mikmaq's consent to English criminal legal remedies and political solutions. This reflects their abhorrence of state-imposed violence that is British policy and criminal law. They rejected the idea of law as power, for an ideal of shared civil meanings and private wrong. In this manner they attempted to harmonize English law with their traditions.

Civil jurisdiction was the only practical solution to the transcultural issues. The English authorities could not request that the *Mawiomi* or *Sakamow* or *Saya* punish the alleged Mikmaq offender. It was an impossible request because of the gulf separating the Mikmaq and British legal minds. The British concepts of guilt and a positive attitude toward punishment and execution of offenders were different standards. There were different standards of responsibilities. In Mikmaq society only the families could remedy controversies. If the Mikmaq assumed jurisdiction over the dispute, the English immigrants had no families to mediate the issues. Thus it was not a practical solution.

Facing these clashing values, the best alternative in a controversy between a Mikmaq and a British person was for the Mikmaq to withdraw and disassociate themselves from the conflict, thereby maintaining harmony, and to allow a limited civil remedy in a British court or give satisfaction to injured parties. Mikmaq, however, rejected any British criminal solution — they had no tolerance for the disruptive British remedies of execution, incarceration, and whipping.

The terms of these compacts and treaties affirmed the First Nations' capacity to tolerate legal autonomy and dual jurisdictions. Within their dedicated territory and the British coastal settlements there was accommodation between two distinct and self-preferential legal orders. Neither community could pretend that a unitary legal system existed. Each community had the liberty and capacity to create and interpret laws within their space, and to create harmony between the two cultures. The terms of the treaties established the consensual rules and validated and legitimized boundaries and bridges between the people and their conventions. These principles resonated in the prerogative treaties, and they made it explicit that more than one system of law applied.

The Victorian treaties of "peace and goodwill" included jurisdictional promises by Aboriginal Nations to maintain "peace and good order" in the ceded land among all peoples, and affirmed their Chiefs' authority to strictly observe the treaty, to respect, obey and abide by the law,⁷ and that "they will aid and assist the officers of Her Majesty in

5. *Mikmaq Compact, 1725, Accession Treaties of 1726, 1749* are incorporated in article 1.

6. Art. 8. See B. Witkin, "26 August, 1726 : A Case Study in Mikmaq-New England Relations," *Acadiensis*. XXIII (Autumn 1991).

7. This bore a special meaning for Aboriginal leaders who undertook to make the treaties part of their own constitutional teachings. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1 (Winnipeg : Queen's Printer, 1991) at 17-46.

bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country."⁸

This treaty article affirms and continues the inherent right of jurisdiction over Indians in the Chiefs and Headmen.⁹ The Crown had affirmed in the Chief an authority similar to Attorneys General and other officers of Her Majesty in issues of justice and punishment in the ceded territory. This article is of no less constitutional authority in North America than the original grants of the King's prerogative authority to the courts, the House of Lords and the House of Commons in England.¹⁰ Both the treaty article and the Crown delegations to Englishmen are exercised in different contexts and territories but have the same constitutional significance. The treaty article is similar to the "Peace, Order

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8. *Treaty 6* (Ottawa : Queen's Printer); reprints of the treaties in R.A. Reiter, *The Law of Canadian Indian Treaties* (Edmonton : Juris Analytica, 1995) at Part III. The central and common article of the Victorian treaties concerning legal jurisdiction provided that :

[...] the undersigned Chiefs on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will in all respects obey and abide by the law, that they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indian or Whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts and that they will not molest the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tracts, or any part thereof, and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

See J.Y. Henderson. "Implementing the Treaty Order," in R. Gosse, J.H. Henderson and R. Carter, eds., *Continuing Poundmaker & Riel's Quest : Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon : Purich Publishing, 1994) 52. In treaties 8 and 10, *supra* note 23, the Chiefs promised they would maintain peace.

9. From an English legal point of view, government may be described as the exercise of certain powers and the performance of certain duties by public authorities or officers. *The structure of the machinery of government, and the regulation of the powers and duties which belong to different parts of this structure are defined by law, which also prescribes, to some extent, the mode in which these powers are to be exercised or these duties are to be performed.* (*Halsbury's Laws of England*, 4th ed., vol. 8 (London : Butterworths, 1974) at para. 804). The treaties forged the constitutional law of Canada and established a framework of duty and obligations defining the government of the country through the Chief and Headmen and distributed power between the Chiefs and imperial Crown. This is analogous to the *Magna Carta* (25 Edw. 1) (1297) and other constitutional documents of the same kind that created Parliament.
10. *Halsbury's*, *supra* note 9, vol. 8 at para. 808-817. Originally, the whole of English government was the prerogative authority. This authority was delegated to the courts and then to Parliament and became a limitation on prerogative authority in England. In the course of centuries, Parliamentary power strictly limited the prerogative powers and introduced a distinction between the Sovereign's power when acting in association with Parliament and when not acting in association with Parliament.

and good Government clause" in section 91 of the *Constitution Act*, 1867,¹¹ which gives residual authority to the federal government. The authority that Chiefs and Headmen had initially exercised by Aboriginal right over the protected territory is now exercised by the treaties throughout the ceded land at the request of the Crown.¹² Aboriginal authority to govern the ceded land under the treaties is an inviolable and a vested prerogative right.¹³ However, under the treaties, the Chief and Headmen's exercise of the treaty right to provide justice and punishment of Indians in the ceded territory does not require any association with the imperial Crown. Rather, the actions of other officers of the Crown requires consent and cooperation of the Chief and Headmen.

The prerogative treaty order was a separate constitutional realm from imperial Parliament. These foreign jurisdictions of the Crown treaties were also a separate realm from the colonial assemblies over the immigrants created by the Crown-in-Parliament,¹⁴ which ended prerogative authority over the British subjects.¹⁵ These derivative governmental bodies had no constitutional capacity to extinguish or modify vested prerogative rights in treaty order since these rights continued as a distinct part of the constitutional or public law of Great Britain.¹⁶

Along with the inherent Aboriginal rights to justice,¹⁷ all of these treaty rights are constitutional rights. However, law makers or law appliers have not respected them. These avoidances of Aboriginal constitutional rights have created the failure of the criminal justice system. The Court noted in *Sparrow* that "there can be no doubt that over the years, the rights of the Indians were often honoured in the breach."¹⁸ The Court refused to constitutionalize existing federal or provincial law or regulations that breached the aboriginal and treaty rights of Aboriginal people. The federal and provincial ministers or department of justice or law commissions have not reformed these historical breaches of the rights, they have not modified the discriminatory laws or regulations, they have not reformed failed criminal justice system. They have not even made these issues a priority. They have placed the entire burden on the judiciary.

11. See P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto : Carswell, 1992) at 435-439.

12. By the principle of legality in English constitutional law, the existence of a power or duty is a matter of law and not fact and so must be determined by reference to some prerogative or statutory enactment or reported case. See *Halsbury's*, *supra* note 9, vol. 8 at para. 828.

13. See *Campbell v. Hall* (1774), 1 Cowper's Rep. 204 (K.B.) at 281; *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 C.N.L.R. 86 (U.K. C.A.). See also J.A. Chitty, *Treaties of the Law of the Prerogatives of the Crown, and the Relative Duties and Rights of the Subject* (London : Joseph Butterworths & Son, 1820) at 29.

14. See *Foreign Jurisdiction Act 1890* (U.K.), 53 & 54 Vict., c. 37; and Hogg, *supra* note 11 at 13-17.

15. Hogg, *supra* note 11 at 27-36. Also, from the middle of the nineteenth century, there was a convention against Parliament legislating for self-governing colonies without consent (*Halsbury's Laws of England*, 4th ed., vol. 6 (London : Butterworths, 1991) at para. 988).

16. *Halsbury's*, *supra* note 9, vol. 8 at para. 807-817 and 889-1082.

17. *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 at para. 40.

18. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 3 C.N.L.R. 160 at 177.

In this situation Aboriginal peoples must begin the process of protecting their people from the failed system of justice. As a first step the federal government should create and fund an independent office of the Aboriginal Attorney General under section 35 of the *Constitution Act*, 1982. This would require federal legislation, not constitutional change. The existing federal legislation concerning the Department of Justice¹⁹ and the Solicitor General²⁰ is inconsistent with the constitutional rights of Aboriginal people and infringes our aboriginal and treaty rights. A constitutional conflict of interest clearly exists in the federal Crown and its Department of Justice in Aboriginal and treaty rights cases. No reorganization of federal Justice can resolve the constitutional rights and fiduciary obligations of the Crown to Aboriginal peoples and its conflict with the interest of the government of the day.

The function of the Aboriginal Attorney General and its office is to safeguard aboriginal and treaty rights from the other governments, from the failed provincial criminal justice systems, and to coordinate law reform. The Aboriginal peoples need an Attorney General to personify their constitutional interests in the prosecution system under the federal and provincial legislations, for the exercise of powers conferred by aboriginal and treaty rights. The Aboriginal Attorney General would also be responsible for the police and correctional facilities for Aboriginal peoples. A second step of an Aboriginal Attorney General would be to carry out these existing constitutional rights and create constitutional space for the renewal and administration of an Aboriginal *sui generis* system of justice and to create an holistic approach to Aboriginal justice reform. Based on the finding that the justice system has failed and is failing Aboriginal people, an Aboriginal Attorney General should be vigilant in pursuing the functions.

The Supreme Court has made it clear that federal government has always had exclusive ability to prosecute criminal offenses under the *Criminal Code*.²¹ This competency combined with the federal government authority on Aboriginal and treaty rights,²² Indians and Lands reserved for Indians,²³ and the Aboriginal Attorney General would create the ability to renew the *sui generis* administration of an Aboriginal justice system. This system solution would create systemic reform among Aboriginal peoples. This would either reform or end the predatory jurisdiction of the failed provincial criminal justice systems over Aboriginal peoples. It would be a partial solution to forcing Aboriginal peoples to suffer under the pervasive injustice of the failed system.

19. *Acte concernant le Département de la Justice*, S.C. 1868, c. 39.

20. *Acte pourvoyant à la nomination d'un Solliciteur général*, S.C. 1887, c. 14.

21. *A.G. Canada v. CN Transportation*, [1983] 2 S.C.R. 206.

22. *Delamuukw v. B.C.* [1997] S.C.J. No. 108 (Quicklaw) at para. 181.

23. Section 91 (24) of *Constitution Act*, 1867. Indians are the only peoples and lands mentioned as being under federal jurisdiction, the rest of the peoples are under provincial jurisdiction.