

# The Constitutional Context of Aboriginal Justice Systems

---

John D. WHYTE, Q.C.\*

<b>I. LEGAL PLURALISM</b> .....	407
<b>II. THE CONTEXT OF ABORIGINAL LEGAL SYSTEMS</b> .....	410
<b>III. A NON-CONSTITUTIONAL JUSTICE STRATEGY</b> .....	415
<b>IV. THE CONSTITUTIONAL CONTEXT</b> .....	416
<b>A. The Case for Aboriginal Justice Systems</b> .....	416
<b>B. Constitutional Limitations on Aboriginal Justice Systems</b> .....	416

---

\* Deputy Minister of Justice and Deputy Attorney General, Justice Saskatchewan, Regina, Saskatchewan.



## I. LEGAL PLURALISM

The paradox that lies at the heart of this conference arises from conflicting needs — on the one hand, the need to respond to the constant social demand for differentiation and specialization in social functions and, on the other hand, the need to generate broad social order through generating a common legal regime based on a common set of governing principles. In short, this conference, and the particular topic of Aboriginal justice systems, engage the complexities of legal pluralism. The great historical strength of legal systems, and their claim for political respect, has been their role in national development. The English legal system, for instance, both ran the length of the King's authority and was a valued social instrument that helped strengthen and extend the King's authority. It supplanted local courts and shire courts and, hence, baronial power. Not only did this system represent a significant role for centralized authority in creating common, nation-wide norms and a wide-reaching capacity for its judicial power, it enabled personal and market mobility. Hence, the case for a single national legal system is tied up with the great project of the modern age — the development of nation states and national economies. We could no more lightly erode that instrument of national development than we would abandon our sense of the value of maintaining national integrity.

Yet, the world is not so simple. Everywhere, including Canada, nations comprise historical communities and the preservation of the integrity of those nations is a powerful moral imperative. In Canada, of course, the sustaining of historical communities is more than a moral imperative. It is a constitutional guarantee. Historical religious communities, historical language communities and Aboriginal communities are all given explicit constitutional protection and, in a more general way, the Constitution directs respect for the unspecified cultural communities that have formed throughout all of Canada's post-settlement development.

One of the lessons that one might derive from the Supreme Court of Canada's decision last August in the *Secession Reference*<sup>1</sup> is that, national integrity should not be given the highest possible importance, even in an organic state like Canada. The political compulsion to keep the nation intact must be ameliorated by other constitutional principles, including democracy. For the Supreme Court of Canada, the constitutional principle of democracy cashes out to mean that when one of Canada's constitutionally recognized historical communities chooses democratically to leave the nation, there is an obligation to conduct a national discourse on possible terms of dissolution. This is recognition of strong imperatives stemming from the historical pluralism of Canada. The Supreme Court has weakened — perhaps, appropriately weakened — the traditional view that maintaining a state as a single inviolable regime of public ordering enjoys the strongest constitutional support.

---

1. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217.

In this context, it is difficult to sustain the doctrinaire view that a single universal system of law throughout the nation is an unadulterated constitutional mandate.

However, notwithstanding the Supreme Court's apparent comfort with talk of dissolution, the human need for efficiency and order generates significant discomfort over any radical version of legal pluralism — that is, the presence of an entirely separate legal system whose separation from the dominant system is so profound that it derives its legitimacy solely from the fact of the presence in the national territory of a historic community. This sort of legal pluralism recognizes the rightness of a separate justice system because it recognizes an unmediated right of self-determination. The conundrum of radical legal pluralism is that every community can generate its own authority, including its own legal authority, and there is no external authority that validates the claim for that separate system. If there is no external validation, there is no external invalidation, since the occasional failure to take steps to suppress the exercise of political autonomy would be seen as tantamount to validation by an external regime — the one expression that radical legal pluralism would not allow.

In this sense, it is probably not consistent with any degree of national order to subscribe to radical legal pluralism. Non-radical legal pluralism probably does, however, lie within the range of possible (and comfortable) institutional design. This form of legal pluralism would be constitutionally based and would derive from an explicit constitutional recognition of the historic community and the implicit recognition of the instruments of community ordering necessary to maintain the cultural integrity of the historic community. In the context of language communities, for instance, a separate legal system — certainly a full legal system — may not be required. In the context of religious communities, a separate legal order is very much tied up with cultural integrity. In this case, however, recognition of a distinct legal authority is highly conditioned by the recognizing regime so as to require the satisfaction of any number of basic regime conditions. The most notable of these would be procedural fairness. Other conditions are free speech and religious liberty, security of the person and many of the fairness elements of basic contract law and association law.

Beyond these two types of constitutionally identified communities, liberal democratic legal systems necessarily possess a jurisgenerative capacity. The underlying rationale of the legal system, at least within liberalism, is to facilitate private arrangements through providing a form for their construction and security for those that participate in them. This sort of legal system is designed not so much to create a comprehensive social order as to create a process for constructing any number of regimes of private ordering. In this way, legal pluralism is not only tolerable, it is inevitable. It should be noted, however, that even under this jurisgenerative ideal of liberal legalism, the state assumes a monopoly over establishing overarching conditions, general norms and limits on remedial authority. For instance, one would normally expect the state to impose limits on the forms of punishment that can be imposed for harm to the association or, more generally, for social harm. Private associations can, of course, create regimes for imposing punishing consequences, including fines, but not often are the parties to private arrangements allowed to impose restrictions of physical liberty.

However, even the jurisgenerative idea is curtailed in two significant ways. First, there is no constitutional entitlement to establish a private ordering regime apart from

rights that arise under freedom of association, or in the United States, the constitutionally implied freedom of contract. Second, the state's broad power to impose conditions and terms on all private arrangements, can be exercised without being required to demonstrate, in the context of judicial review, that the limitations on ordering are necessary in order to check unwelcome externalities, or maintain values that the state wishes to prevail across society. In other words, outside a constitutional entitlement to develop a community legal system, the range of private law-making authority is a matter of policy.

As for Aboriginal communities, our task is precisely to discover the case for a separate legal system — even a limited or partial separate legal system — that can be drawn from the recognition in section 35(a) of the *Constitution Act, 1982*,<sup>2</sup> of the rights of Aboriginal communities. Although the recognition of Aboriginal rights is abstractly worded in section 35(1), it contains a specific promise that is attached to any constitutional recognition and that is the promise of continued existence of the recognized communities with a form and a function that makes meaningful their continued existence. The question is, what part does a separate legal system play in meeting this constitutional promise?

Although Aboriginal justice systems might be seen as a manifestation of a constitutional guarantee we are, of course, thinking and acting within a single national regime. The regime is obliged, by its basic law, to consider the case for an Aboriginal justice system. However, the regime must also consider the extent to which it is obliged to reflect other constitutional values in its recognition of a separate justice system. Just as Canadian courts have constrained the exercise of religious legal authorities in working out, for instance, the consequences of dissolution of religious communities, so Canadian courts may well feel impelled to impose constraints on Aboriginal justice systems — constraints that derive from general law about age of responsibility, or age of majority, or the general law about contracts against public policy, or implicit law about the state's authority to meet emergencies, or the legal authority to provide peace, order and good government.

---

2. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

In other words, legal pluralism in the form of Aboriginal justice systems requires two sets of questions. The first is what authorities with respect to law-making and legal administration are part of the basic constitutional right of Aboriginal peoples to preserve the integrity of their communities. The second is what is the range of constitutional and legal standards from the general system of law that must be held up as checks against Aboriginal administration of justice.

Before getting to these basic questions, however, we need to place our enquiries into an actual context.

## II. THE CONTEXT OF ABORIGINAL LEGAL SYSTEMS

The first context is the actual state of cultural and political separateness of Aboriginal peoples and, on the other hand, the actual prospect of assimilation. This question, as fraught with political peril as it is, is necessary because there is no reason to recognize such "hard" authorities as a justice system if the community which has been given constitutional recognition neither seeks to exercise separate legal authority nor connects such authority to its cultural survival — or well-being. Arguably, it is this concern not to grant constitutional protection to purely historic practices that are without current-day manifestation, or without relevance to current conditions, that led the framers of the *Constitution Act, 1982*, to recognize "existing" aboriginal and treaty rights.

It is necessary to determine the current condition of Aboriginal separateness. In their R.C.A.P. article, "Implementing Aboriginal Self-Government : Constitutional and Jurisdictional Issues,"<sup>3</sup> Professors Peter Hogg and Mary Ellen Turpel state that an Aboriginal justice system is required and make this case for their claim :

An Aboriginal government will require the power to enforce its own laws and may also wish to enforce those federal and provincial (or territorial) laws that continue to apply on Aboriginal land. The Aboriginal people will want policing, prosecutions, courts and corrections to operate so as to ensure a peaceful and law-abiding Aboriginal community. The people will also want all aspects of the justice system to be administered with sensitivity to Aboriginal ways and Aboriginal problems.

This claim rests on the assumption that if Aboriginal peoples enjoy a constitutional right to self-government, the consequent Aboriginal state instrumentalities only become workable — at least workable with a requisite degree of sensitivity to, and respect for, Aboriginal government — if legal administration of Aboriginal laws is controlled by Aboriginal governing regimes.

Brian Goehring offers a broader perspective. He writes in *Indigenous Peoples of the World : An Introduction to Their Past, Present and Future* :

---

3. P.W. Hogg & M.E. Turpel, "Implementing Aboriginal Self-Government : Constitutional and Jurisdictional Issues" (1995) 74 Can. Bar. Rev. 187.

*All Indigenous societies today have been irrevocably altered by contact with a dominant world economy based upon capitalist industrial exploitation and its associated metaphysical underpinnings [...] New, altered, and hybridized cultures are emerging from this process.*<sup>4</sup>

These emergent lifeworlds are neither "traditional" cultures in the true sense of the concept, nor are they truly part of the new world order, and most will never be. First and foremost, all Indigenous Peoples desire the opportunity to survive. At the very basic level, all Indigenous Peoples value those things they share as a culture, those commonalities that set them apart from all other peoples. All Indigenous societies want, at a minimum, a chance to hand down those core identifying values they hold dear to succeeding generations, in their own ways and without interference.

All over the world Indigenous Peoples are saying loudly : "We are here, we cannot be destroyed, and we will be here forever."

This stark view of Aboriginal communities as non-assimilable is, I believe, key to understanding the claim for Aboriginal government in general and Aboriginal justice systems in particular. The state of cultural separateness might simply be the short or long-term consequence of state policies of exclusion and marginalization, including, I'm afraid, the policies of our criminal justice system. But, if that were the sole cause, we might not need the constitutional policy that we have as much as we would need a much more aggressive policy of inclusion and adaptation. However, behind our constitutional policy — both the policy of section 35(1) of the *Constitution Act, 1982*, and section 91(24) of the *Constitution Act, 1867*,<sup>5</sup> which assigns responsibility for Indians to the federal order of government — is the clearly expressed wish of constitution makers to respect the preference of Aboriginal peoples to continue as peoples — as distinct cultural communities. Aboriginal preference is less a matter of rejection of adaptation and cultural change and more certainly a rejection of cultural eradication. In my view, the core element of this sense of cultural survival is the rejection of mobility or, at least, the idea of labour market mobility that dominates Western communities.

This rejection of physical (and social) mobility is not just a device for maintaining existing cultural communities but also a way by which Aboriginal people can sustain their personality and identity. Many Aboriginal people do not accept mobility — detachment from a traditional place — because they know, and fear, the consequences of dislocation for people with their particular view of the proper fit of human society with creation. For this reason, they have persisted as largely separate communities with a distinctive relationship with both markets and nature. There is no easy assimilation into European-based societies of people who seek neither to conquer nature nor participate in market adjustment.

---

4. B. Goehring, *Indigenous Peoples of the World : An Introduction to Their Past, Present and Future* (Saskatoon : Purich Publishing, 1993).

5. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [hereinafter *Constitution Act, 1867*].

This is a profound form of separation, and the distinctive epistemology behind it presents a strong case for special instruments for self-regulation.

A third context to be examined is suggested by Professors Hogg and Turpel. They write :

*[T]he administration of justice is a critical area given the numerous recent studies indicating that discrimination against Aboriginal peopl[es] in the Canadian criminal justice system requires the development of new approaches to the field and greater autonomy for Aboriginal peoples to design and implement criminal justice measures in their communities.<sup>6</sup>*

Their claim is that the general administration of justice harms the Aboriginal population and this fact gives rise to claim for a separate justice system. It is, of course, the expectation of criminal justice that it will serve as a constructive social instrument — that it will promote beneficial social norms and social solidarity, that the practices of respect for the person and property of others will benefit communities. If none of these commonly aspired to consequences of criminal justice is realized we need to look seriously at the claim of Professors Hogg and Turpel.

It is, therefore, necessary to look at the broader social context of criminal justice and, for the purposes of this paper I shall do that through examining the Saskatchewan situation.

Arguably one of the most arresting social trends in evidence both in Saskatchewan and globally is the uncoupling of economic and social development. Conventional economic indicators such as growth in the GDP, low inflation, budget surpluses and low unemployment rates are positive, but most indicators of social development are not. Despite a relatively robust provincial economy, one in seven Saskatchewan residents is poor, as is one in five children. Further, the poverty rate among Aboriginal people is roughly four times higher than among the general population.

According to the 1996 census, Aboriginal people, Indian and Metis, account for 11.4% of the Saskatchewan population, and 14% of the Aboriginal population of Canada. By group, there were 75,205 self-identifying First Nations people, 36,535 Metis, and 190 Inuit resident in the province.

Almost half of the Saskatchewan Aboriginal population resides either in the north or on-reserve in the south. The cities of Saskatoon, Regina and Prince Albert in turn account for a third (34%) of the provincial Aboriginal population. The remaining 19% live in close proximity to reserves or in the corridor between Saskatoon and Prince Albert.

---

6. "Implementing Aboriginal Self-Government : Constitutional and Jurisdictional Issues," *supra* note 3 at 205.



The Saskatchewan Aboriginal population has a much lower average age than the general population. More than 54% of the Indian population, and 46% of the Metis population of the province, is under the age of 20. In comparison, 29% of the non-Aboriginal population is under the age of 20. These age distributions will have a significant impact on the educational system and the labour market in the years ahead. In 1996, one in six persons of school age and one in seven new labour force entrants was Aboriginal. Over the next 5 to 10 years, these proportions will approach one in five.

More generally, notwithstanding some important gains in recent years, whatever indicator one might choose to examine, Saskatchewan Aboriginal people are to be found at or near the bottom of the socioeconomic heap. To illustrate, as of 1996 :

- 80% of the Saskatchewan Aboriginal population had an annual income below \$20,000 as compared to 53% of the non-Aboriginal population. Further, average per capita income among Aboriginal people was \$12,738, just over half the non-Aboriginal average of \$23,446.
- 51% of the Aboriginal population of working age participated in the provincial labour force as compared to 69% of the non-Aboriginal population. The Aboriginal unemployment rate was 26%, more than 4 times higher than the non-Aboriginal rate of 5.9% .
- 23% of the Aboriginal population 15 years and older had less than a grade 9 education as compared to 12% of the non-Aboriginal population. This said, the gap in post-secondary education is narrowing : 21% of the Aboriginal population had attended at least some college or trade school, and a further 14% had at least some university studies; comparable non-Aboriginal attendance rates are 25% for college/trades and 22% for university studies respectively.
- nation-wide, almost one third of Aboriginal children under the age of 15 lived in lone parent families in 1996, double the rate in the general population. In Regina and Saskatoon, almost half of Aboriginal children lived with a single parent.
- life expectancy at birth for Metis and First Nations people remains 5 to 7 years below the average for the general population. First Nations people can expect to be hospitalized nearly twice as frequently for infections or parasites, endocrine, nutritional or metabolic disorders, or respiratory causes. Although declining, infant mortality rates for First Nations people remain twice the provincial average. Similarly, the incidence of tuberculosis and diabetes is 5 times higher, and accidental deaths and suicides 2 to 6 times higher than among the general population.

Just as there is a stark over-representation of Aboriginal people among those living at the margins, so too is there a troubling over-representation among those in conflict with the law — as offenders, as victims of interpersonal violence, as inmates in provincial correctional centres, and as youth in custody.

In 1996, Saskatchewan recorded the second highest provincial crime rate (after British Columbia). In this, it had the third highest violent crime rate (after Manitoba and British Columbia), and the second highest property crime rate (after British Columbia). Regina and Saskatoon in turn ranked first and fifth respectively on reported crime among Canadian census metropolitan areas with a population greater than 100,000.

All of this is part of a troubling regional trend. Whereas much of Canada has registered modest single digit reductions in their crime rates in recent years, Saskatchewan has consistently recorded year-over-year increases of 3 to 5%.

Aboriginal people presently account for 74% of people in Saskatchewan provincial jails, 61% of those incarcerated in federal prisons, and 72% of youth in custody. Research conducted by the Canadian Centre for Justice Statistics suggests that the violent crime rate on reserve in Saskatchewan is about 5 times higher than the provincial rate; that the reported crime rate for Aboriginal people in Regina and Saskatoon is as much as 10 to 12 times greater than among the general population; and that Aboriginal people, women in particular, are at much greater risk of being victims of violent crime.

Factors frequently cited to account for this over-representation include :

- differential criminal justice processing as a result of culture conflict and racism;
- higher Aboriginal offending and victimization rates;
- commission by Aboriginal people of the type of offences that are more likely to result in criminal justice detection and carceral sentences; and
- criminal justice policies and practices that have a differential impact on Aboriginal offenders due to their pervasive socio-economic disadvantage.

The wider literature suggests that an accumulation of risk factors is a powerful contributor to over-representation of visible minorities among those in conflict with the law throughout the Western world. As Tonry succinctly puts it :

*[p]overty, disadvantaged childhood, welfare dependence, educational deficiency and lack of marketable skills are powerfully associated with a number of social pathologies, including criminality.*

Whatever the causal weight accorded to the factors outlined above in accounting for the over-representation of Aboriginal people among those in conflict with the law in this country, there can be little disputing that they are closely tied to the historical and contemporary experience of colonialism. This process, in the words of the Royal Commission on Aboriginal Peoples, "has systematically undermined the social, cultural and economic foundations of Aboriginal peoples, including their distinctive forms of justice."



Responding to and redressing the historical and contemporary roots of Aboriginal crime and disorder is one of the challenges of our time. Although enduring solutions obviously lie beyond the boundaries of the criminal justice system as traditionally conceived, there is a powerful case, as Professors Hogg and Turpel have suggested, for the development of changes so that the general structures of inter-societal alienation are not replicated in the legal system.

### III. A NON-CONSTITUTIONAL JUSTICE STRATEGY

Although one might conclude that Canada's constitutional arrangement does not mandate broad Aboriginal self-government powers or separate Aboriginal justice systems, it would not follow from this that the criminal justice system should not be adapted to respond to the problem of social harm within Aboriginal communities in more constructive ways. Again, Saskatchewan serves as an example of this policy development.

In Saskatchewan the Department of Justice is pursuing a long-term reform agenda based on crime prevention/crime reduction, through building bridges to Aboriginal communities through community-based justice programming.

The goals of this agenda are these :

- to confront the root causes of Aboriginal crime and victimization;
- to balance the needs of offenders, victims and communities;
- to respond to the unique needs of each community, keeping in mind the parameters set by the Constitution and Charter of Rights,<sup>7</sup> the *Criminal Code*<sup>8</sup> and *Saskatchewan Government Aboriginal Policy*;
- to respond to the need and potential for Aboriginal people to have greater control over justice services and decisions;
- to increase the credibility and cultural resonance of decisions and outcomes arising out of justice processes involving and affecting Aboriginal peoples and communities;
- to focus on justice objectives that resonate with the values and cultures of Aboriginal people; and
- to develop justice services that are more responsive to, and representative of, the Saskatchewan population.

---

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

8. R.S.C. 1985, c. C-46.



#### IV. THE CONSTITUTIONAL CONTEXT

##### A. The Case for Aboriginal Justice Systems

- the argument for self-government : Factum of the Federation of Saskatchewan Indian Nations and White Bear First Nations in *R. v. Pamajewon*;<sup>9</sup>
- the argument in the Queen's University Faculty of Law response to the arrest of persons at Kanesatake, dated September 24, 1990;
- the meaning of the Supreme Court of Canada's decision in *R. v. Pamajewon*;
- application of criminal law to Aboriginal peoples;
- surrender and extinguishment of Aboriginal rights by treaties;
- the effect of sections 91(24) and 92(14) of the *Constitution Act, 1867* on the recognition of Aboriginal justice systems.

##### B. Constitutional Limitations on Aboriginal Justice Systems

- the requirement for judicial independence under Part VII of the *Constitution Act, 1867*, and section 11(d) of the *Canadian Charter of Rights and Freedoms*;
- the argument of Professor Patrick Macklem in favour of a provincial capacity to create Aboriginal courts and in favour of Aboriginal courts that do not meet the strict requirements of Part VII of the *Constitution Act, 1867*;
- the impact of section 15 of the *Canadian Charter of Rights and Freedoms* on separate Aboriginal justice system;
- the case for overriding application of the *Canadian Charter of Rights and Freedoms* and of the *Criminal Code*.

---

9. [1996] 2 S.C.R. 821.