Changing Punishment for Aboriginal Peoples of Canada

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Draft

As the colonial era of parliamentary sovereignty transforms into the postcolonial era constitutional supremacy,[1] the Supreme Court of Canada has become aware of the problematic legal legacy of colonization law. In seeking to end discrimination against Aboriginal peoples, the Court has disclosed and empowered the original constitutional order for Aboriginal peoples located in s. 35(1) of the *Constitution Act, 1982*.[2] Its recent decisions have affirmed Aboriginal law as part of Aboriginal rights and are the context for understanding treaty rights. The principles have been derived from cases that have come before the Court under s. 35(1) for prosecutions for regulatory offences that, by their very nature, proscribe discrete types of activity. These decisions provide for a necessary and urgent framework for *sui generis* administration of justice and changing punishment for Aboriginal offenders and their communities.

The criminal justice system has failed Aboriginal peoples and is in crisis over these issues. In *Gladue* v. *The Queen*,[3] the Court affirmed this conclusion:

> In *Bridging the Cultural Divide*, supra […] at p.309, the Royal Commission on Aboriginal Peoples listed as its first "Major

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1 *Re Reference by the Governor General in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada*, [1998] 2 S.C.R. 217, at para. 85.

2 April 17, 1982, Part II, Schedule B, *Canada Act, 1982*, c. 11 (U.K.)

3 *Gladue* v. *The Queen [1999] 1 S.C.C. 688* at para. 62. There was no constitutional challenge to s. 718.2(e) in these proceedings, and accordingly the Court did not address the constitutional issues.

Findings and Conclusions" the following striking yet representative statement:

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada—First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural—in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

Bridging the Cultural Divide reported that colonisation has systematically undermined the traditional Aboriginal worldview and justice system and created racism as the fundamental lens that immigrants viewed Aboriginal peoples. The result of the "disorderly symptoms" of the colonial mentality has been an over-representation of Aboriginal peoples in the criminal justice system and systemic racism. More than two decades of commissions, inquiries, reports, special initiatives, conferences, and books have established the totalizing effects of colonisation on Aboriginal peoples in Canada.[4] The common conclusion is that decolonization is a necessary and urgent reform needed to create an impartial legal system.

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[4] Canada, Indian and Northern Affairs, *Indians and the Law* (Ottawa: Canadian Corrections Association and the Department of Indian and Northern Affairs, 1967); Law Reform Commission of Canada, *Report No. 34, Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: The Law Reform Commission of Canada, 1991*)*; Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: The Commission,1989); Ontario, *Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee* (Ontario: The Committee, 1990*);* Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991); Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impacts on the Indian And Métis People of Alberta* (Edmonton: the Task Force, 1991); Saskatchewan, *Report of the Saskatchewan Indian Justice Review Committee* (Saskatoon: The Committee,1992*);* British Columbia, *Report on the Cariboo-Chilcotin Aboriginal Justice Inquiry* (Victoria: The Inquiry 1993); Québec, *Justice for and by the Aboriginals: Report and Recommendations of the Advisory Committee on the Administration of Justice in Aboriginal Communities, submitted to the Minister of Justice and the Minister of Public Security* (Québec: Advisory Committee on the Administration of Justice in Aboriginal Communities, 1995); Canada, *Bridging the Cultural Divide: A Report on*

In 1994, at the federal and provincial justice ministers' conference, Canada's justice ministers collectively reached the same conclusions. Ministers agreed that the Canadian justice system has failed and is failing Aboriginal peoples and that a holistic approach including the "healing process" is essential in Aboriginal justice reform. They agreed that the reforms must make the general system "equitable in every sense" for Aboriginal peoples; that reforms must make the system "work" with Aboriginal communities; and must reflect the "values" of Aboriginal peoples. They also agreed they must build "bridges" between the general system and Aboriginal practices, traditions, and approaches.[5] These conclusions by the Supreme Court of Canada, the various reports, and the justice ministers are a definitive statement of issues facing Aboriginal peoples in the Canadian legal system—a systemic statement beyond individual case analysis.

Far from being a Canadian anomaly, these conclusions are global. The failure of imposed foreign criminal jurisdiction system over Indigenous nations has haunted each British colony's legal system. In recent decades, every commonwealth country that has studied the problem has reached a similar conclusion: the British legal system is not succeeding with Aboriginal peoples. The failure is a function of relationships of force rather than justice.[6]

Aboriginal peoples are overrepresented in virtually all aspects of the criminal justice system.[7] The excessive imprisonment of Aboriginal

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Aboriginal People and Criminal Justice in Canada (Ottawa: Minister of Supply and Services Canada, 1996).

5 "Final Statement of the Canadian Ministers of Justice" (Justice Ministers' Conference, Ottawa, March 24, 1994) [unpublished].

6 See Jeremy 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; M. Jackson, "Locking Up Natives in Canada" (1988-89), 23 U.B.C. L. Rev. 215 (article originally prepared as a report of the Canadian Bar Association Committee on Imprisonment and Release in June 1988), at pp. 215-16.

7 Solicitor General of Canada, Consolidated Report, *Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act—Five Years Later* (1998), at pp. 142-55.

people is well documented[8] and prison has become for many young treaty people the contemporary equivalent of what the Indian residential school represented for their parents.[9] The Court in *Gladue* viewed that excessive imprisonment is "only the tip of the iceberg insofar as the estrangement of the Aboriginal peoples from the Canadian criminal justice system is concerned."[10] As the Court noted in *R.* v. *Williams*, widespread bias against Aboriginal people exist within Canada and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system".[11]

The Court's decision in *Gladue* requires all actors in the criminal justice system to adopt a unique analysis of the situation of Aboriginal peoples in sentencing:

> These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.[12]

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8 Jackson, Locking Up Natives, *supra* note 6, Solicitor General of Canada, Consolidated Report, *Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act -- Five Years Later* (Ottawa: Solicitor General, 1998), at pp. 142-55; Canadian Centre for Justice Statistics, Adult Correctional Services in Canada, 1995-96 (1997), at p. 30.

9 *Gladue*, *supra* note 3 at 60.

10 *Ibid.* at para. 61. The Court stated "It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons," *ibid*. at para. 65

11 *R.* v. *Williams*, [1998] 1 S.C.R. 1128 at para. 58.

12 *Gladue*, *supra* note 3 at para. 64.

In light of the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system,[13] the Court held that the remedial section s. 718.2(e) of the *Criminal Code*,[14] creates a judicial duty to consider all background factors which bring Aboriginal peoples, and the individual before the courts, in conflict with the justice system, and to consider alternatives to incarcerations:

> It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process. [...] What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.[15]

The fundamental purpose of s. 718.2(e) is to treat Aboriginal offenders fairly by taking into account their difference.[16] It applies to all aboriginal offenders wherever they reside, whether on-reserve or off-reserve, in a large city or a rural area.17 It applies to all Aboriginal peoples of Canada, who are protected by s. 25 of the Charter and s. 35 of the Constitution Act, 1982.[18] It creates a judicial duty and provides a method of analysis that each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender.[19] The different

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13 *Ibid.* at paras. 33 and 34.
14 *Criminal Code*, R.S.C., 1985, c. C-46, s. 718 [am. 1997, c. 23, s. 17]
15 *Gladue*, *supra* note 3 at para. 64-65.
16 *Ibid.* at para. 87
17 *Ibid.* at para. 91
18 *Ibid.* at para. 90.
19 *Ibid*. at para. 33

background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances. The Court is to consider the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; as well as the types of sentencing procedures and sanctions which may be appropriate in the circumstances because of the offenders particular aboriginal heritage or connection.[20]

The Court noted the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination.[21] This conclusion has been emphasised repeatedly in studies and commission reports. Aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated". The Court reasoned that this is because systemic discrimination towards them is often rampant in penal institutions and the internment milieu is often culturally inappropriate.[22]

Faced with such overwhelming evidence, reviewing judges must be prepared to analyse the totalizing discourse of colonisation theory and consider how it has been assimilated to a systemic discrimination and unjust legal regime. Judicial decisions was (and continues to be) a central process in legitimating colonisation, with its institutional and social arrangement. The political empire and legal framework of colonisation are bound at the level of simple utility (as propaganda, for instance). They are also bound together at a purposive and unconscious level, where they lead to the naturalising of artificially constructed values based on the dualism of Aboriginal "savagery" and British or French "civilization". This rational dualism empowered the privileged norms of British cultural values to become deeply embedded in Canadian political and legal consciousness whereby they are a source of deep discrimination and bias in the criminal 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 have created a failure of the criminal

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20 *Ibid.* at para. 66.
21 *Ibid.* at para. 68.
22 *Ibid.* at para. 68.

justice system to protect the constitutional rights of Aboriginal peoples, while at the same time sought to create a national criminal code administered by each province. In developing the criminal code, the federal Parliament neglected to respect aboriginal rights and treaty rights that provide a jurisdictional basis for Aboriginal justice systems.

Constitutional reforms in 1982 have affirmed these rights as integral parts of the Constitution of Canada. The Supreme Court has noted that before the constitutional reforms of 1982, the courts ignored Aboriginal and treaty rights.[23] The constitutional reforms change this legal context:

> the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35, as it was termed in *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.[24]

In the process of implementing the constitutional reform in Canadian law, the Canadian courts have increasingly confronted and displaced the totalizing discourse of colonisation. Courts are faced with the particular manifestations of its interpretative monopoly and its oppression of Aboriginal peoples. It has faced its operation in legal theory and history, and now the Court has required criminal law and sentencing judges to confront its tragic results and seek judicial innovation. In its typical manner of denial and delay, the criminal justice system has been tragically slow to respond to the Court decision, and has failed to understand the constitutional rights of Aboriginal peoples and their legal order that instructs a unique search of a fit sentence in the *Criminal Code*.

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[23] *R*. v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1103-5, [hereinafter *Sparrow*].

[24] *Quebec Secession Reference, supra* note 1 at para. 82.

No constitutional challenge to s. 718.2(e) was involved in *Gladue*; accordingly the Court did not address the constitutional issues.[25] My paper will address the constitutional framework that directly support innovations in sentence and punishment before a fair and impartial tribunal that respects Aboriginal law and difference. Understanding and utilising the constitutional framework with the criminal justice system will facilitate a reconciliation and reintegrative approach to reframing sentencing.

Sui Generis Aboriginal orders

In *Delgamuukw* v. *British Columbia*,[26] the Supreme Court of Canada affirmed and acknowledged a new constitutional meaning and role for aboriginal and treaty rights. In Canadian constitutional law aboriginal and treaty rights must be read together with other constitutional principles and texts. The constitutional rights of Aboriginal peoples constitute a distinct legal system with its own implicate architecture, sources, traditions, and texts that require constitutional equality with the other parts. The Court rejected the colonial concept that Aboriginal peoples did not have any law. The Court held that when the British sovereign asserted jurisdiction over Aboriginal territory, the act vested the preexisting responsibilities and rights of an independent Aboriginal legal order in British imperial constitutional law. Imperial constitutional law protected the totality of Aboriginal legal order from intrusion by either colonial governments or colonialists. It created legally binding fiduciary obligations to regulate and supervise governments' and subjects' relation to these *sui generis* orders. These protected Aboriginal legal orders of aboriginal and treaty rights were transferred from the imperial law to the Aboriginal peoples of Canada by s. 35(1) of the *Constitution Act, 1982*. [27]

The existence of Aboriginal order and law in the constitution of Canada, like the *Charter*, established the constitutional framework of Canadian criminal law and the administration of justice. Criminal law

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25 *Gladue*, *supra* note 3 at para. 87.

26 *Delgamuukw v. British Columbia* [1997] 2 S.C.R. 1010 .

27 *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, Ex rel. Indian Association of Alberta*, [1981] 4 C.N.L.R. 86, [1982] 1 Q.B. 892, 2 All E.R. 118, at 128-129 Lord Denning, M.R., May L.J. and Kerr L.; see also P.W. Hogg, *Constitutional Law of Canada,* 2nd ed. (Toronto: Carswell, 1985) at 215-17.

must accommodate the constitutional rights of Aboriginal peoples. Under aboriginal 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 worldview and heritages, including a right to *sui generis* punishments. These neglected or abused rights have always existed in the aboriginal and treaty order, and need to be respected and empowered.

The Supreme Court has affirmed Aboriginal order. Justice Heureux-Dubé in Van der Peet said directly: "it is fair to say that prior to the first contact with the Europeans, the Native people of North America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs."[28] Also in Van der Peet, Justice McLachlin argued that the "golden thread" of British legal history was "the recognition by the common law of the ancestral laws and customs the Aboriginal peoples who occupied the land prior to European settlement."[29] Justice Macfarlane for the British Columbia Court of Appeals confirmed that the rights and privileges conferred by Aboriginal law and factual occupation were unaffected by the Crown's acquisition of sovereignty.[30] The Lamer Court held that if Aboriginal people were "present in some form" on the land when the Crown asserted sovereignty, their pre-existing right to the land in Aboriginal law "crystallized" as a *sui generis* Aboriginal title in British law.[31]

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[28] *Ibid.* at paras. 106; *Calder* v. *Attorney-General of British Columbia*, [1973] S.C.R. 313 at 328, Hall J.; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1053, 3 C.N.L.R. 127, Lamer J. as he then was.

[29] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at para. 263.

[30] *Ibid.* para. 46, citing Brennon J., *Mabo, supra* note 23 at 51. McFarlane erroneously declared that the Aboriginal peoples had an "unextinguished non-exclusive aboriginal rights which have received the protection of common law, and which now receive protection as existing aboriginal rights under s. 35(1) of the *Constitution Act, 1982*." He characterized these rights as "other than a right of ownership or property rights...[and] may be described as sui generis rights in land. [...] Their characteristics may vary depending upon the particular context in which the rights are said to exist, and having regard to specific fact situations,." *ibid.* at para. 263. See also Justice Wallace states "an enforceable [Aboriginal] right, as against European settlers, came only with the protection which was extended to aboriginal rights by the adjusted common law", *ibid.* at paras. 381-84, 400.

[31] *Delgamuukw*, *supra* note 26 at para. 145.

British law created constitutional fiduciary duties in the sovereign to protection and safeguard existing Aboriginal legal order.[32] To modify or limit these aboriginal rights the Court has required clear and plain intent and wording of the sovereign,[33] such as either a prerogative treaty or constitutional act.

The *sui generis* Aboriginal legal orders are contain in Aboriginal perspectives and traditions. Aboriginal perspectives are derived from Aboriginal knowledge and heritage. These perspectives define the nature of an Aboriginal peoples' their practices, customs, and legal traditions. They define how an Aboriginal peoples deliberately and communally resolved certain recurring problems, to other peoples, and their own livelihood. Their legal order is comprised of Aboriginal judgements, tacit and explicit, and reflective assent about how to live with the land and other people that defines their picture of humanity—who they are and who they ought to be—and their experiences. They are grounded on practical issues of recurring problems that were constantly refined, transformed and vindicated which created a complimentary order that revealed their humanity, shared kinship, sympathies, and altruism.

Aboriginal knowledge refers to the integrated body of knowledge that covers all aspects of life. It is dynamic and cumulative, and stored in heritage by Aboriginal language, memories and ceremonies; learned and expressed in the oral and symbolic traditions of the peoples that informs Aboriginal law. These multi-layered relationships are the basis for maintaining legal, social, economic, and diplomatic relationships—through sharing—with other peoples.

Aboriginal heritage is so intimately based on Aboriginal knowledge that often the terms are interchangeable. Many national and international definitions of Aboriginal or Indigenous knowledge or heritage stress the principle of its totality or holism and diverse modes. *The Report of the Royal Commission on Aboriginal Peoples* views Aboriginal knowledge:

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[32] *Ibid.* at paras. 174, 176, 178; *Sparrow*, *supra* note 23 at 1108, 1114; *Guerin* v. *The Queen,* [1984] 2 S.C.R. 335.

[33] *Ibid.* at para. 180; *Sparrow*, *supra* note 23 at 1099; *Delgamuukw*, *ibid.* (Court of Appeal) at 470, 523 per Macfarlane JA at 480 per Taggart JA, 595 per Wallace JA, 753 per Hutcheon JA, 633, 670 per Lambert, JA.

> as a cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and their environment.[34]

The UN Special Rapporteur, Dr.-Mrs. Daes, has presented the best operational definition of Indigenous knowledge and heritage with the assistance of many Indigenous organisations and peoples. In her report on the protection of the heritage of Indigenous people, she pointed out that Indigenous knowledge and heritage is "a complete knowledge system with its own concepts of epistemology, philosophy, and scientific and logical validity."[35] The Rapporteur further concluded that diverse elements of any Indigenous knowledge system "can only be fully learned or understood by means of the pedagogy traditionally employed by these peoples themselves, including apprenticeship, ceremonies and practices."[36] These insights were codified in the *Principles And Guidelines For The Protection Of The Heritage Of Indigenous Peoples* (1995) that merged the concepts of Indigenous knowledge and heritage into a definition of heritage.[37]

Similar to other cultural visions about law, an Aboriginal perspective or tradition contains a vision about the nature, role, and organization of

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[34] Canada, *Final Report of the Royal Commission on Aboriginal Peoples*, vol. 4 (Ottawa: Minister of Supply and Services, 1995) at 454 [hereinafter RCAP]. See also, Inuit Circumpolar Conference, *A Report of Findings: The Participation of Indigenous Peoples and the Application of their Environmental and Ecological Knowledge in the Arctic Environmental Protection Strategy,* vol. 1 (Ottawa: Indian and North Affairs, Canada, 1993) at 27-37.

[35] Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, United Nations Economic and Social Council, *Preliminary Report of the Special Rapporteur, Protection of the Heritage of Indigenous People,* UN ESC, UN Doc. E/CN.4/Sub.2/1994/31 (1994) at para. 8.

[36] *Ibid.*

[37] *United Nations Guidelines for the Protection of the Heritage of Indigenous Peoples,* G.A.Res.95-12808 (E), UN GAOR, 40th Sess., UN Doc. E/CN.4/Sub. 2/1995/3, (1995) at paras. 12-13 at 6.

law; as well as where values are and should be found, taught, applied, and perfected.[38] As Professor Robert Cover wrote in "Nomos and Narrative":

> A legal tradition […] includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves—a lexicon of normative action—that may be combined into meaningful patterns culled from meaningful patterns of the past.[39]

Aboriginal perspective places cultural values into Aboriginal legal order; in some cultures these legal traditions and ceremonies are indistinguishable from a legal system. Legal systems are viewed through its customs and rules. To understand them a judge has to know the sources of legal tradition, their relationship to vision or purposes.[40] A comprehensive vision of a legal system is concerned with its legal tradition that creates its internal logic and interrelated concepts surrounding the rules—such as legal extension and penetration that define the boundaries of the system, the structures, actors, and processes that describe how it functions.[41]

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[38] J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal System of Western Europe and Latin America* (Stanford, Calif.: Stanford University Press, 969); Harold Berman*, Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983); J.C. Smith and D.N. Wiesstub, *The Western Idea of Law* (Scarborough, Ont.: Butterworths, 1983); M.A. Glendon, M.W. Gordon, C. Osakwe, *Comparative legal traditions : text, materials, and cases on the civil law, common law, and socialist law traditions with special reference to French, West German, British, and Soviet law* (St. Paul, Minn. : West Pub. Co., 1985). Most Eurocentric writing take a anthropological context and approach to studying Aboriginal ('primitive" or traditional) law, A Hoebel and K, Llewellyn, *The Cheyenne Way, Conflict and Case Law in Primitive Jurisprudence* (Norman, University of Oklahoma Press, 1941); J.H. Barton, J.L. Gibbs, V.H. Li, J.H. Merryman, *Law in Radically Different Cultures* (St. Paul, Minn. : West Pub. Co., 1983).

[39] R. M. Cover, "*Nomos* and Narrative" (1983) 97 Harv. L. Rev. 4 at 9.

[40] J.H. Merryman, "Letter to Editor" (1987) 35 *Am. J. Comp. L* . 438-441.

[41] J.H. Merryman and D. Clark, *Comparative Law: Western European and Latin American Legal Systems Cases and Materials* (Indianapolis: Bobbs-Merrill, 1978).

These Aboriginal perspectives and their visions of law, order, and diplomacy created an international order in America before the assertion of British sovereignty. Aboriginal law incorporates customary standards and rules, canons of behaviour, and understandings of the world. Non-Aboriginal scholars have examined the Aboriginal worldview and its legal order in terms of an ideational order of reality,[42] or cognitive orientation, or ethno-metaphysic, and primitive law.[43]

The Lamer Court explicitly emphasized the Aboriginal perspective includes, but is not limited to, their systems of law:[44]

> the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples […]. As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.[45]

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42 W.H. Goodenough, *Cooperation in Change* (New York: Russell Sage Foundation, 1963) at 7.

43 A. I. Hallowell, *Culture and Experience* (Philadelphia: University of Pennsylvania Press, 1955) and "Ojibwa Ontology, Behavior and World View" in S. Diamond, ed., *Primitive Views of the World* (New York: Columbia University Press, 1960), reissued as *Culture in History: Essays in Honour of Paul Radin* (New York: Columbia University Press, 1969) at 49-82.

44 *Ibid.* at para. 147.

45 *Ibid.* at para. 148. The reliance on Aboriginal perspective is consistent with s. 27 of the *Charter, supra* note 29, which provides: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." In *Van der Pee*t, *supra* note 39, the Lamer Court held that the Aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of Aboriginal peoples, at para. 41. Justice La Forest may have had doubts about this test, *Delgamuukw*, *supra* note 1 at para. 191.

Under this test, Aboriginal perspective and law create many versions of occupation and use, and their uses are not depend upon foreign state law, proclamation or sovereign recognition.

In the past, one of the most difficult judicial tasks was ascertaining and understanding Aboriginal perspectives or "traditional evidence". Although Aboriginal perspectives may share many tendencies with the classic European theory of human nature, Aboriginal perspectives are distinct representation of human nature that are not separated from the ecology and do not have to face the terror of separation by constructing artificial organization or human "culture"—the antitheses of nature.

Both the Aboriginal orders and treaty orders are intimately related to Aboriginal worldviews and languages. Each Aboriginal legal order and worldview is expressed in the semantic structure of its language. Aboriginal peoples are experts with respect to their own perspectives, languages, and laws. The best evidence of the legal order will come from Aboriginal peoples' hearts and minds as contained in their language.[46] Aboriginal languages provide judges with an introduction into these distinct relationships and recurring problems they have struggled with in creating their lives. Languages are the architectural source of intelligible order, law and freedom for those who inhabit them. Only in the context of Aboriginal language and ideas can Aboriginal law or "history" be studied, since vocabularies, metaphors, communication methods, styles, and discourses that encode values and frame understanding.

The Court recognized this interrelatedness and held if, at the time of sovereignty, an Aboriginal nation or society had a legal regime, tradition or laws in relation to land, those laws would be relevant to establishing constitutional rights of the Aboriginal peoples.[47] In determining the Aboriginal perspectives and law, a comparative law and transcultural analysis is appropriate since "one culture cannot be judged by the norms of another and each must be seen in its own terms".[48] The Dickson Court

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[46] See, *Ejai* v. *Commonwealth* (unreported, Supreme Court of Western Australia, Owen J., No. 1744 of 1993. 18 March 1994).

[47] *Delgamuukw*, *supra* note 26 at para. 148

[48] Chief Judge E.T. Durie of the Maori Land Court of New Zealand and Chairman of the Waitangi Tribunal, address, "Justice, Biculturalism and the Politics of Law" address to University of Waikato, 2 April 1993, quoted by Judge A.G. McHugh in

stated that in analysing aboriginal rights in s. 35(1) "It is [...] crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake".[49]

Canadian judges must recognize that when the British sovereign asserted authority over Aboriginal lands, British imperial constitutional law and common laws recognized and affirmed Aboriginal perspectives, practices and law as part of the rule of law. If Aboriginal perspectives are a valid source of aboriginal rights to the land itself, they must also be the source of jurisdiction over all activities on the land and a *sui generis* body of practices or rules that regulated these activities.[50] The courts must recognize and affirm these *sui generis* constitutional rights, they cannot pretend that Aboriginal society had no law.

These *sui generis* legal order of aboriginal rights are compatible with the common law traditions where customs and practices create the rules and with the legal positive convention that rules govern practices.[51]

Treaty orders

In British North America many treaties establish the right of Aboriginal nations and tribe to continue their legal order and to administer justice system. These treaty rights are related to, but should not be confused with, the inherent aboriginal rights. Treaty rights are imperial laws with written reconciliation of Aboriginal law and British law, similar to positive laws, which establish the constitutional jurisdiction between the British sovereign and Aboriginal nations and tribes.

"The New Zealand Experience in Determination of Native or Customary Title, Effect of Title Grants and Need for a New Title System" address to Supreme Court and Federal Court Judges of Australia at their 1995 Conference, Adelaide.

49 *Sparrow*, *supra* note 23 at 1112.

50 *Delgamuukw*, *supra* note * at 176 ("although the submissions of the parties and my analysis have focussed on the question of jurisdiction over aboriginal title, in my opinion, the same reasoning applies to jurisdiction over any aboriginal right which relates to land.")

51 F. Shauer, "Rules and the Rule of Law" (1991) 14 Harvard J. of Law and Public Policy at 645-694.

These prerogative treaties created the cooperative constitutional system of law and government in the Aboriginal territories. Most treaties established shared territorial jurisdiction between the application of Aboriginal law and British law in controversies or differences between British and Indians. For example, the written text of a 1664 treaty between the sovereign and the Haudenosaunee, for instance, 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. [52]

In Atlantic Canada, the Georgian treaties with the Míkmaw nation and their allies, the British sovereign affirmed the existence of the Aboriginal legal order and recognized the need to place limits on the British legal system. [53] These treaties created dual legal orders based on system of personal jurisdiction, rather than territorial jurisdiction. For example, the *Wabanaki Compact, 1725* provided that "no private Revenge shall be taken" by either the Wabanaki or the British. Instead, both agreed to submit any controversies, wrongs or injuries between their peoples to His Majesty's Government for "Remedy or induse[sic] there of in a due course of Justice".[54] These terms illustrated the need for a vision of order that both validated each legal system and integrated consensual norms for harmony in the future.

The terms of the treaties prevented a treaty Wabanaki or its allies from asserting Aboriginal law over a British subject that offended their people. British law governed the British settlers in all their conduct.

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[52] Articles of Agreement Between the Five Nations Indians and Colonial George Cartwrith, 1664, in Early American Indian Documents, Treaties and Law, 1607-1789, ed. A. Vaughan (Washington, D.C.: University Publication of American) vol. 7, at 294.

[53] J.Y. Henderson, "The Marshall Inquiry: A View of the Legal Consciousness" in J. Mannette, ed., *Elusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood, 1992) 35 at 49-56: M. Battiste paper for the Grand Council of Mikmaw Nation to Royal Commission on the Donald Marshall, Jr. Prosecution in vol. 3, appendix 2 at 81.

[54] Article 6 affirmed by Míkmaq in 1726 and 1749, article 7 in Cumming and Mickenberg , ed. *Native Rights in Canada.* (1972) [hereinafter cited CM] Appendix 3: 295-309. Similar provisions suspending indigenous law and providing British justice in colonial courts were common with in other British treaties with the First Nations.

Aboriginal law applied to controversies between "Indians". The treaty terms allowed controversies between British settlers and the Wabanaki to be settled by His Majesty's law and tribunals.

In the 1726 ratification to the Wabanaki Compact, the Míkmaq district chiefs extended and clarified their personal jurisdiction over their people in the British settlement. They took responsibility for "any robbery or outrage" in the British reserves. They expressly promised to make satisfaction and restitution to the "parties injured." This extended the Aboriginal law of the Míkmaq to Mikmaw behavior within the new British settlements. When British peoples alleged that a Míkmaw robbed or committed an outrage against any British person or property even if it happened in the settlements, Mikmaw law applied rather than British law. In all other cases between the peoples, the Mikmaw chiefs agreed to apply for redress according to British law.

The *Míkmaw Compact, 1752* continued these promises.[55] The Grand Chief and Delegates, however, explicitly clarified the processes of law. They specifically limited the scope of the British law in any controversy between British and Míkmaq to His "Majesty's Courts of Civil Judicature".[56] The terms of the treaty established the retraction of the Míkmaq's consent to British criminal legal remedies and political solutions. This reflects the Míkmaq abhorrence of state-imposed violence as proper punishment that is British policy and criminal law. They rejected the British idea of law as power for an ideal of shared civil meanings and private wrong. In this manner they attempted to harmonize British law with their traditions.

The terms of these compacts and treaties affirmed the First Nations' capacity to tolerate legal autonomy and dual jurisdictions. Within their reserved territory and the British coastal settlements there was accommodation between two distinct and self-preferential legal orders. Neither community could pretend a unitary legal system existed. Each community had the liberty and capacity to create and interpret law within their space, and to create harmony between the two cultures. The terms of

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55. *Wabanaki Compact, 1725*, Accession Treaties of 1726, 1749 are incorporated in article 1.

56. Article 8. *See*, B. Witkin, "26 August, 1726: A Case Study in Mi'kmaq-New England Relations", *Acadiensis*, XXIII (Autumn 1993).

the treaties established the consensual rules that validated and legitimized boundaries and bridges between the people and their conventions. These principles resonated in the prerogative treaties and they made explicit that more than one system of law applies.

Similarly, the Victorian treaties included jurisdictional promises by Aboriginal nations and tribes to maintain "peace and good order" in the ceded land among all peoples. These provisions continued the vested pre-existing Aboriginal laws regarding land and people (which arose from the British sovereign asserting jurisdiction over their land) as imperial constitutional law. They affirm and continue the inherent aboriginal right of jurisdiction over Indians to the Chiefs and Headmen[57] throughout the ceded land at the request of the Crown.[58] Aboriginal authority to govern the ceded land is an inviolable and a vested prerogative right.[59]

The Victorian treaties affirmed their chiefs' authority to strictly observe the treaty, to respect, obey and abide by the law.[60] The treaty

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[57] From an British 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.

[58] By the principle of legality in British 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 Laws of England*, supra note 58, vol. 8 at para. 828.

[59] *Campbell* v. *Hall*, *supra* note 37 at 281; *The Queen* v. *The Secretary of State*, supra note 27. 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.

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

chiefs specially promised to "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".[61] These written provisions did not require any association with the imperial Crown. The British sovereign affirmed the Chief would exercise authority (that is similar to British law concept of Attorney Generals and other officers of Her Majesty) in issues of justice and punishment in the ceded territory.

These treaty articles are 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.[62] Both the treaty article and the sovereign's delegations to responsible government are exercised in different contexts and territories but have the same imperial constitutional significance. The treaty article is similar to

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[61] 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. See J.Y. Henderson, "Implementing the Treaty Order," in R. Gosse, J.Y. 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, *ibid.,* the Chiefs promised they would maintain peace. 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 Indians 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*."

[62] *Halsbury's*, vol. 8, *supra* note 59 at para. 808-17. Originally, the whole of British 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.

the "Peace, Order, and good Government clause" in section 91 of the *Constitution Act, 1867*,[63] which gives residual authority to the federal government.

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,[64] which ended prerogative authority over the British subjects.[65] 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.[66]

Affirm and Recognizing *Sui Generis* Punishments

The constitution of Canada entrenches the most sacred principles upon which a country is founded, and upon which its elected representatives dare not trespass. The constitution of Canada creates the singular law based on a respect for diversity. Its core of shared rights and values was intended to bind Canadians together and inoculate them against the centrifugal forces of language and against the divisive legacy of colonialism.

In 1982, Canadian leaders negotiated a *Charter of Rights and Freedoms* for the express purpose of clarifying what it means to be Canadian, and s. 35 of the *Constitution Act, 1982* to clarify the rights and meaning of Aboriginal peoples of Canada.

The *Constitution Act, 1982* has reconciled Aboriginal peoples with constitutional supremacy, the structural division of the imperial

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63 P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 435-39.

64 See *Foreign Jurisdiction Act, 1890* (U.K.), 53 & 54 Vict., c. 37 and accompanying text; and Hogg, *supra* note 62 at 13-17.

65 Hogg, *supra* note 62 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* 1991 vol. 6, *supra* note 59 at para. 988.

66 *Halsbury's*, vol. 8, *supra* note 59 at para. 807-17 and 889-1082.

sovereignty. Aboriginal and treaty rights are now vested in the Aboriginal peoples of Canada. Within the constitutional interpretative principles, in Justice McLachlin's words, no part can be "abrogated or diminished"[67] relative to any other parts. Chief Justice Lamer explained that the "symbiosis" constitutional analysis: "[n]o single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."[68] Under section 52(1) of the *Constitution Act, 1982*, Aboriginal and treaty rights are integral parts of constitutional supremacy and federal and provincial law must be consistent with them, including federal criminal law.[69] The protection of these rights reflects an important "underlying constitutional value".[70]

Section 35(1) of the *Constitution Act, 1982* prevents legislative powers from unjustifiably infringing on aboriginal and treaty rights. Section 25 of the *Charter* mandates that courts may not interpret the individual Charter rights as derogating or abrogating any constitutional rights or "other rights" of Aboriginal peoples. Section 27 of the *Charter* acknowledges that judges must interpret the right to a fair trial and individual rights in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians.[71] In the colonial legal legacy, law makers or law appliers in the colonial era have not respected them; they simply ignored them or made them inferior to the statute laws or interpreted them in a self-serving way. These avoidances of the constitutional rights of Aboriginal peoples of Canada have created the failure of the criminal justice system and its jurispathic legal tradition and consequences. 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".[72] The federal and provincial legislative have not reformed the existing criminal justice system in accordance with the constitutional rights of Aboriginal people or even made this issue a priority.

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67 *New Brunswick Broadcasting Co*. v. *Nova Scotia (Speaker of the House of Assembly*, [1993] 1 S.C.R. 319 at 373 (S.C.C.) [hereinafter New Brunswick Broadcasting].

68 *Québec Secession Reference*, supra note 1 at para. 49. See also para. 91

69 Section 51(1), *supra* note 2.

70 *Québec Secession Reference*, supra note 1 at para. 82. See also para.32.

71 *R.D.S.* v. *Queen*, [1997] 3 S.C.R. 484 at para. 95.

72 *Sparrow* supra note 23 at 177.

Under constitutional supremacy and the rule of law, judges are held to the highest standards of impartiality. In *R.D.S.* v. *Queen* [1997] Justice Cory states:

> A system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and they appear to be fair to the informed and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.[73]

Sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* have expressly anchored in the constitution of Canada the right to trial by an impartial tribunal.[74] All adjudicators owe a duty of fairness to the Aboriginal parties who must appear before them.[75] To fulfil this duty, they must simultaneously be and appear to be unbiased.[76] Fairness and impartiality must be both subjectively present and objectively displayed to the informed and reasonable observer. If the words or actions of a presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair.[77]

Judicial impartiality is "a state of mind or attitude of the tribunal in relation to the issue and the parties in a particular case."[78] The state of mind of a fair and impartial adjudicator is defined as disinterest in the outcome, meaning that she or he is open to persuasion by the evidence and submission.[79] Bias has an attitudinal and behavioural component.[80] A biased or partial adjudicator is one who is in some way predisposed to a particular result, or who is closed with regard to a particular issue.[81] This state of mind has been considered a "leaning inclination, bent or

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73 *R.D.S., supra* note 66 at para. 91.
74 *Ibid.* at para. 93.
75 *Ibid.* at para. 92.
76 *Ibid.*
77 *Ibid.*
78 *Ibid.*
79 *Ibid.* at para. 104, citing *Valente* v. *The Queen*, [1985] 2 S.C.R. 673 at 685.
80 *R.D.S., ibid.* at para. 107.
81 *Ibid. at* para. 105, citing *Liteky* v. *U.S.*, 114 S.Ct. 1147 at 1155 (U.S. 1994). L'Heureux-Dubé and McLachlin, JJ. endorsed Cory J.'s comments on judging in a multicultural society, the importance of perspective and social context in judicial decision-making, and the presumption of judicial integrity.

predisposition toward one side or another or a particular result" or "preconceived biases" that affect the decision, or a closed judicial mind.[82]

The Court decision in *R.D.S.* holds that judges must be particularly sensitive to the need to be fair to all heritages, races, religions, nationality, and ethnic origins.[83] Justice McLachlin stressed in Williams that these racial assumptions:

> shape the daily behaviour of individuals, often without any conscious reference to them. In my opinion, attitudes which are engrained in an individual's subconscious, and reflected in both individual and institutional conduct within the community, will prove more resistant to judicial cleansing than will opinions based on yesterday's news and referable to a specific person or event.[84]

In 1984 in *Simon* v. *The Queen* Chief Justice Dickson rejected existing precedents that reflected the "biases and prejudices" of the colonial era in legal history.[85] In *Sparrow*, the Supreme Court rejected the existing precedents as controlling the context of constitutional rights of the Aboriginal peoples, and renounced "the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."[86] Also, in Sparrow the Court rejected the Crown's arguments that aboriginal rights can be extinguished by federal Acts or regulations; instead it stated that historical statutory or regulatory control of an aboriginal right does not mean that the right is extinguished, even if the control is exercised in "great detail".[87] It interpreted "existing" aboriginal rights as unextinguished by clear and plain intent and wording of the sovereign, and interpreted them

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82 *R.D.S., ibid.* at para. 106.

83 *Ibid*. at para. 95.

84 *Ibid.* at para. 21.

85 *R.* v. *Simon*, [1985] 2 S.C.R. 387 at 399.

86 *Sparrow*, *supra* note 23 at 1106.

87 *Ibid.* at 1095-1101, 1111-1119. *Denny* v. *The Queen* (1990), 94 N.S.R. (2d) 253at 263, 2 C.N.L.R. 115 (N.S.S.C.A.D.), affirmed the Aboriginal right to fish for food strictly on a constitutional interpretation of section 35(1) of the *Constitution Act, 1982*, and independent of the force and effect of the terms of the Míkmaq treaties; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35(1).

with flexibility to permit their evolution over time.[88] This should apply to the relations between the Aboriginal order of aboriginal and treaty rights to the federal Criminal Code and the provincial administration of justice. The British sovereign did not impose British law on Aboriginal peoples; the colonizers and their legislative assemblies overextended criminal law to Aboriginal peoples, ignored their aboriginal and treaty rights, and create systemic discrimination in the criminal justice system.

Within the existing aboriginal and treaty rights in the constitution of Canada are *sui generis* concepts of punishment and sentencing that must be respected by fair and impartial courts. Aboriginal concepts of punishments are a legitimate part of the complex postcolonial structure of Canada and should not be ignored or minimized. Aboriginal peoples and communities have used the law as an instrument for obtaining and protecting their rights both as individuals and as peoples. Aboriginal peoples have succeeded in becoming Canadian judges and lawyers and are comfortable with Canadian law. However, we also recognize the continuing tragedy of imposing colonial laws on Aboriginal peoples, the affects of systemic discrimination, a need to displace these colonial laws with constitutional principles, and to use justice as a form of healing and restoration for Aboriginal peoples.

Remedies for such systemic discrimination in the criminal justice system against Aboriginal offenders as illustrated in section 718.2(e) have a solid constitutional foundation. The preservation and enhancement of Aboriginal heritage, with the judicial duty to create fit sentences for Aboriginal offenders, require the courts and its actors to interrogate the existing theory of punishment and to grasp the issue of punishment in Aboriginal law. Aboriginal concept of punishment and sentencing cannot be presumed to be incommensurable with Canadian legal pluralism—that is an old colonial myth.

Sentencing innovations are beginning to be explored by the judges. These innovations have a constitutional right to exist and be implemented. In the process, the criminal justice system will need the cooperation of

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[88] *Ibid.* at 1091-93. The Court refused to equate "existing" with the concept of being in actuality or exercisable. See *R.* v. *Eninew* (1984), 10 D.L.R. (4th) 137, 32 Sask. R. 237 (C.A.). This approach answers the problems of how law can persist as order in a world of pervasive change and progression.

Aboriginal Elders, judges, lawyers and in combinations with Aboriginal leaders for informing the courts of *sui generis* sentencing and punishment. The judiciary must begin a dialogue with Aboriginal Elders to grasp Aboriginal law and its view of sentencing wrongdoers. They may not provide ready-made answers to difficult questions but they hold a large part of the answers to the required innovations on restorative justice and rehabilitation of Aboriginal offenders.

Additionally, the creation of an Aboriginal Attorney General would create the ability to renew the *sui generis* administration of Aboriginal justice system, research ways of eliminating all form of discrimination in the system, and changing punishment for Aboriginal peoples and creating a reintegrative and restorative approaches. These innovations would create systemic reform and healing among Aboriginal peoples. This would soften the existing Aboriginal perception of the predatory jurisdiction of the failed provincial criminal justice systems over Aboriginal peoples.