

INDIGENOUS APPROACHES TO JUSTICE IN THE STATE COURT SYSTEM

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The deficiencies and inequities of the Western criminal justice system are well documented. Lawyers, judges, criminologists, social scientists, civil rights groups, and others have expressed mounting frustration with the system's overreliance on incarceration and the lack of social improvement for those returning from custody. State budgets have felt the financial strain of a system whose default is all too often the prison cell. In response, many local and national jurisdictions have begun searching for alternative solutions, and some are taking their cues from Indigenous cultures.

During its International Expert Seminar held in New York in February of 2013, the United Nations Expert Mechanism on the Rights of Indigenous Peoples asked the following question: “What positive examples and lessons learned can be identified regarding instances of non-custodial, inclusive, community-focused and restorative approaches to criminal justice matters?” This paper will examine two Western jurisdictions that have recognized and experimented with Indigenous approaches to justice, from the highest court to a small neighborhood pilot project.

In Canada, the Supreme Court recognized the importance of Aboriginal approaches to justice in response to the needs of Aboriginal peoples who were—and continue to be—overrepresented in the criminal justice system.¹ Over the last twenty years, national commissions and courts alike have documented the suffering of Aboriginal peoples at the hands of the criminal justice system. In 1999, in its historic decision in *R. v. Gladue*² the Supreme Court of Canada noted that overrepresentation of Aboriginal peoples is not a singular issue, but is related to widespread institutional bias,

1 Debra Parkes, et al. Gladue Handbook: A Resource for Justice System Participants in Manitoba. (University of Manitoba: Faculty of Law, 2012) p. 2.

2 *R. v. Gladue*, 1999 (1) SCR 688.

discrimination, and racism.³ The Court recognized this as a “crisis” in the Canadian criminal justice system, and it stated the need for “recognition of the magnitude and gravity of the problem, and for responses to alleviate it.”⁴

In *Gladue*, the Supreme Court was concerned with the interpretation of section 718.2(e) of the Criminal Code, which states that when sentencing an accused person, a judge must pay “particular attention to the circumstances of aboriginal offenders.”⁵ Having found that Aboriginal peoples are grossly overrepresented in the criminal justice system, the court established that when sentencing Aboriginal offenders, a judge must take into account:

- 1) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
- 2) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.⁶

The first part of the test is arguably one of the court’s most radical declarations. A system that is predicated on the primacy of the individual’s guilty actions and state of mind (*actus reus* and *mens rea*) is generally precluded from taking into account background factors that may explain or even override an individual’s moral blameworthiness. However, it is the second part of the test that is of most relevance. In its judgment, the Supreme Court of Canada explains the importance of restorative approaches to justice and how they apply to Aboriginal communities. The court discusses the overemphasis on incarceration in Canada and validates the use of community-based and restorative sanctions as alternatives. The court concludes that community-based sanctions may be more appropriate for Aboriginal offenders than incarceration and that judges may prefer the use of restorative approaches specifically for Aboriginal offenders:

3 *Ibid*, at paras. 61 & 65.

4 *Ibid*, at para. 64.

5 Criminal Code, RSC 1985, c C-46,s.718 (2) (e).

6 *Supra* note 2, at para. 66.

Rather, the point is that one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities *are well served by incarcerating offenders*, particularly for less serious or non-violent offences.⁷

The court's decision in *Gladue* did not have the practical impact it hoped for, and the overrepresentation of Aboriginal people in the justice system has actually increased in the last decade, as the Supreme Court recognized in its recent decision in *Ipeelee*.⁸ Nonetheless, on a philosophical level, the court granted institutional legitimacy to two important notions. First, the court took judicial notice of the benefits of a restorative approach to justice, and emphasized that a restorative approach is "not necessarily a 'lighter' punishment."⁹ Secondly, the court showed that different communities have different values, which should be reflected in how they administer justice. The Supreme Court validated the use of restorative and other community-based sanctions, although in this instance they were restricted to Aboriginal communities.¹⁰

The Supreme Court of the United States has never made comparable findings about the state of Native Americans in the justice system or the need for the country to account for the historic mistreatment of its Indigenous Peoples. Nonetheless, on a much smaller scale, in a local courthouse in Red Hook, Brooklyn, the notion of restorative justice based on Indigenous principles has been taken a step further than what was proposed in Canada. In the last year, in partnership with the New York State Court System and the Kings County District Attorney,

7 *Supra* note 2, at para. 74 [emphasis added].

8 *R. v. Ipeelee*, 2012 (1) SCR 433 (CC) para. 62. In *Ipeelee*, the Supreme Court of Canada reaffirmed the *Gladue* principles and stated: "To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples." (at para. 60)

9 *Supra* note 2, at para. 72.

10 *Supra* 8.

the Center for Court Innovation launched a Peacemaking Program. Operating out of the Red Hook Community Justice Center, the court refers criminal and family matters to a group of local peacemakers.

Peacemaking is a traditional form of dispute resolution that is practiced in many Indigenous communities across the United States and Canada. The focus of peacemaking is on healing and on the restoration of the relationships underlying the crime, crisis, or dispute.¹¹ Although peacemaking varies across tribes, it generally brings together those involved in a conflict, along with family members and other members of the community who may have been affected by the problem. Peacemaking is ultimately concerned with the future of the injured relationships rather than on the disputed act or crime.¹² The paradigm underlying the Western criminal justice system is a system of laws, whereas the paradigm for peacemaking is a system of relationships.¹³

The local peacemakers in Red Hook were trained by Navajo Nation experts, who traveled to New York from New Mexico to impart their wisdom and experience with their longstanding tradition of peacemaking. Although the project is still in its infancy, the local peacemakers have resolved a number of cases using this traditional technique—cases with complicated back-stories between family members, neighbors, co-workers and friends. So far, the Red Hook peacemakers have already demonstrated the extent to which they have internalized the approach to peacemaking taught by their Navajo mentors, including listening, showing empathy, sharing personal stories, and scolding when necessary. The Red Hook peacemakers are also committed to the notion that the solution must originate with the participants—including the defendants—for it to be long lasting.

The Red Hook Peacemaking Program was not designed for disputes involving Indigenous Peoples. Neither the peacemakers nor the disputants are required to be—or even tend to be—themselves of Indigenous descent. The program is designed for anyone coming through the doors of the courthouse. In fact, in its first case, the

11 Robert V. Wolf, Center. For Court Innovation, Widening the Circle: Can Peacemaking Work Outside of Tribal Communities?. (2011) p. 8.

12 *Ibid.* at p. 4.

13 Discussion with David D. Raasch, Associate Judge, Stockbridge-Munsee Tribal Court (26 November 2013).

disputants were from Latin America, one of the peacemakers was Italian, another was Puerto Rican, and the third was African-American. By creating this program for persons of any ethnic background, the court system is going a step beyond what the courts in Canada have done. The court is not just recognizing the legitimacy of Indigenous traditions for Indigenous Peoples. Rather, the court says, this process of resolving disputes is legitimate, and for certain types of crimes, it might be more beneficial and effective than the Western system.

With their history of colonization and dispossession, Indigenous Peoples are not generally accustomed to receiving recognition from Western institutions. Nonetheless, the word is spreading about Indigenous approaches to justice that can improve communities across the United States. In Minnesota and Maryland, courts and communities are using Indigenous principles to improve relationships and resolve disputes.¹⁴ In Michigan, the State legislature recently awarded a grant to the Washtenaw County Trial Court to create a peacemaking court. This grant is “aimed at improving public service and court performance...[and will]...determine how and if tribal peacemaking principles are transferable to the state court system.”¹⁵ Similarly, the Center for Court Innovation is already planning its next peacemaking initiative. With federal funding, the Center will develop a peacemaking center in Syracuse, New York. As these initiatives continue to experiment with peacemaking, the lessons learned will inform other jurisdictions seeking alternative solutions in Indigenous and non- Indigenous communities alike.

14 See, for example, the restorative justice program in Yellow Medicine County, Minnesota, and the Community Conferencing Center in Baltimore, Maryland.

15 Lansing “Washtenaw County: Area courts receive grants for innovative projects,” *Ann Arbor Journal*. (10 November 2013), http://www.heritage.com/articles/2013/11/10/ann_arbor_journal/news/doc527d3e66c3413069181277.txt?viewmode=fullstory