Native Law Centre • Spring 1995

Justice as Healing

A Newsletter on Aboriginal Concepts of Justice

Evaluating the Quality of Justice

Russel Lawrence Barsh, Associate Professor, Native American Studies, University of Lethbridge. Professor Barsh is U.N. representative for the Mikmaq Grand Council of Nova Scotia in association with the Four Directions Council, a non-governmental organization in consultative status with the Economic and Social Council of the United Nations.

Justice like beauty, is largely in the eye of the beholder. The medieval European trial-by-combat may seem loathsome and absurd in the eyes of contemporary Canadians, but their ancestors demanded the right to defend themselves by that means. Swearing oaths on Bibles or other Christian relics was once considered deeply meaningful, by now merely quaint. What people deem just in a particular era plumbs the deepest levels of their culture. It is an expression of the basic principles attached to human relations.

When I asked by students to define "justice," most non-Aboriginal students referred to *equality before the law* or the application of the same rules to everyone. Most Aboriginal students used "harmony," or a synonym. To my mainstream Canadian students, the reality of life in a bureaucratic state, which manifests its "justice" by treating everyone at arm's-length, indistinguishably. My Aboriginal students experience a reality of all-pervading kinship, not only in the home, but economic life and politics. For them, "justice" is minimizing the frictions of living among kinfolk, and maximizing its potential synergies.

There have been few empirical studies hazarding a measurement of the extent to which modern Western legal systems apply rules equally. There are even greater challenges to meet before attempting to measure "justice" in the Aboriginal sense.

A threshold issue is the widespread contemporary confusion of the term "justice" with the concept of "order". We routinely refer to the police, criminal courts and prisons as institutions of "justice", when they were clearly devised for the purpose of maintaining "order" among certain social classes (first non-Normans, later commoners, eventually the poor). *Justice* was an afterthought, historically, as the governments tried to reconcile the measures they had traditionally taken to impose order on society, with the developing sense of "rights" and resistance among the people to whom it was applied.

Order can be maintained without any "justice" at all, for example by a ruthless but efficient dictatorship. Studies of the Nazi, Soviet and South African legal systems amply shoe that a high degree of legal formality and consistency in applying rules can be observed by highly repressive regimes. *Deterrence*, the principal tool of Western notions of order, can be achieved to some degree and in certain circumstances by extreme, bureaucratically consistent cruelty – albeit societies that choose this path may not last for more than a generation or two.

Purportedly "objective" measures such as changes in the frequency of reported offences or recidivism, are related to the deterrence goal of legal systems, rather than justice. Most existing subjective tests are also deterrence-oriented, such as measures of individual feelings of physical security, or their belief that "crime is being dealt with" effectively. The challenge posed by Aboriginal peoples is a different one, and requires distinguishing between the *just-ness* of responses to violence and disorder, and the *effectiveness* of responses in reducing, short-term, the quality of violence and disorder.

Part of the justification for this alternative approach may be an implicit hypothesis that, in the *long-term*, just systems lead to lower rates of violence. More important, however, is the hypothesis that a just system of responding to individual disruptions results in greater long-term community harmony and cooperation. In other words, the goal or pay-off will not be found in lower crime rates or recidivism but in a more self-respecting, self-confident, and productive society made up of individuals who feel valued and rejected. This is clearly not the kind of result that can be tested (if at all) within a few years after the

implementation of an alternative legal system. At best, the long-term goals may be evident a generation or two hence.

What measures might be devised, in the shorter-term that address justness rather than deterrence? Individual communities' values and expectations can only be captured by subjective measure that test the perceived just-ness of institutions in the minds of all participants, *than the alternatives*. Hence:

- Victims should feel that their pain and anger are acknowledged, and more effectively addressed.
- Decision-makers must feel that they are able to understand the needs of the parties, and respond more appropriately than would be possible in mainstream adjudication.
- Accused persons must feel that they are treated fairly and with respect, and must be more willing to comply with decisions.

We should also expect to find a positive evaluation of the legal order by community members who are, for the present, merely observers rather than participants.

- People in the community as a whole should feel that, as victims, or accused persons, they would be treated more fairly and more respectfully – a broad *expectation* of just treatment among those who are presently only potential participants.

If the direct participants feel well-served, it is reasonable for us to predict that decisions will last, beyond the time-horizon of our research measurements. If this community at large senses that there is greater justice, this observation is *consistent* with greater long-term community harmony and cooperation.

The most important step in evaluating alternative justice models, then, is working with communities to clarify their objectives. If the community equates "justice" with improved deterrence, notwithstanding what has been said here, then its program must be evaluated using more conventional, "objective" measures such as offence rates. However, if community members agree that their ultimate objective is just-ness and the hypothesized long-term social advantages of just-ness, its program must be evaluated through subjective measures.