Native Law Centre • Vol. 2, No. 3 (Fall 1997)

Justice as Healing

A Newsletter on Aboriginal Concepts of Justice

Punishment vs Healing:
How Does Traditional Indian Law Work?

ÓJames W. Zion. Mr. Zion is the Solicitor to the Courts of the Navajo Nation, a recovering lawyer, and an old-fashioned humanist. He thanks many wise teachers of the Cree, Chippewa, Navajo, Pima, Maori Ndebele, Swana, Xhosa, Zulu, Saami and other nations for their counsel and guidance. He hopes he gets things right.

Many people are skeptical of justice methods which do not have punishment as their driving force. There is a great deal of disbelief about traditional Indian law for that reason, and there are many who are leery of the growing restorative justice movement. One of the difficulties with "law" as it is viewed in Canada and the United States (two English common law jurisdictions) is that it is dominated by legal positivism and its definition that "law" is "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[1] Western law is built on the relationship of "superiors" to "inferiors." That is relevant to Indians and their nations within the modern states of the western hemisphere, because conquest itself may create law as we know it. Franz Oppenheimer holds "that law in the strict sense is found only where one group has conquered another and remains in the territory of the conquered as a dominant caste or class. The resulting social stratification is then rationalized, the infe- e: rior group is subjected to punishment i for any infringement of the interests of their superiors, and thus formal law comes into being."[2] That sort of relationship nourishes political oppression, which "… is easier when there is a racial or cultural distinction between the masters and the oppressed. Tyranny will be harsher in a state established through conquest of one people by another than in a state where all share the same language, culture, and history."[3]

There is a contradiction in the ways Canadian and American law view Indians and their nations: Given these definitions of law and their consequences in states created by conquest, states try to treat Indians as "equals" in democratic societies without honoring their rights as Indians. We see attempts to maintain societies where "all share the same language, culture, and history" through civil rights legislation or court rulings which deny Indian values because they do not fit an equal protection model, the rejection of Indian nation jurisdiction over non-Indians, English-only legislation, and voiding affirmative action programs. Of course we all know that history is written by the oppressor and not by the oppressed. Legal positivism is a dangerous and racist doctrine.[4] We must remember that contemporary Canadian and U.S. "Indian law" is the product of social Darwinists who strongly influenced 19th century thought at a time when the foundations of present day Indian law were established. Canada attempts to create a multicultural society while the U.S. is dominated by a white male Protestant authoritarian power structure.

In contrast, most Indian societies are genuinely egalitarian in nature. They do not rely on artificial and imposed "equality." For example, a great deal of traditional Indian law is distributive justice: the notion that people should share limited resources.[5] We see that in Potlatch and Giveaway ceremonies and in the way Indians look to their relatives for help when they have problems. Most traditional justice methods are based on talking things out to reach consensus. A great deal of the early (Anglo) literature on Indian justice methods stresses retribution, punishment, revenge and strong institutions such as "chiefs,"[6] powerful councils and soldier societies. The reality is that such may have been caused by pushing groups of Indians away from their original homes into a new environment.[7] The horse was introduced to the Americas by the Spanish, creating the Plains Culture, which did have authoritarian elements. More recent research (especially by Indian writers), shows that most traditional Indian justice methods were consensus and equality-based.

Another distinction between Western and Indian justice is the role of religion or spirituality. Modern constitutional provisions on the separation of church and state make it difficult for Western justice bodies to utilize religion or spirituality in dispute resolution. Traditional Indian justice depends upon it. There is insufficient space here to detail the importance of Indian spirituality in traditional dispute resolution, but belief systems which integrate spiritual beings into everyday life can address conflict using them.

Western law does not attempt to reach into the mind or deal with psychological injuries. Traditional Indian law does, and that is why it heals. Most disputes are the product of bad attitudes, feelings, or thinking. We use "head thinking" about others, and traditional Indian process moves people to "heart thinking" and empathy with others.[8] When there is an injury which creates a dispute, there is anger and hurt. Often, there is cognitive dissonance, which is the mind creating excuses and justifications to avoid shame.[9]

Most traditional Indian justice methods address cognitive dissonance and shame. They involve relatives. They do not make a sharp distinction between "victim" and ''offender."[10] They use a talking out process among relatives (by both blood and clan) to reach practical consensus about what to do about a problem. They use ceremony and prayer to bond people to the process and to involve the Spirits in both the path to a solution and a binding decision. It is a process which gets to the bottom of things.

Most indigenous peoples have a word to describe group and person solidarity, or as Justice Raymond D. Austin of the Navajo Nation Supreme Court puts it, "freedom with responsibility." The Navajo word for it is *k'e,* the Lakota term is *ti ospaye,* and the Zulu word is *ubuntu*. Indigenous peoples believe in individual freedom, but it is exercised in the context of the group. Indigenous justice uses respect, consensus, solidarity, mutuality, interdependent relationships, reciprocity, and even love as the means to heal in traditional justice methods. Those are values which bind the individual to the group and the group to support the individual. We do not see those values at play in Canadian or American courts or legislatures.

In sum, Indian thought is sophisticated thought. It is humanist, and humanism is a value which has been lost in the current social Darwinist climate. Indian law uses emotions and feelings but rationalist thought rejects it. While Thomas Aquinas said that law is a "rule of reason," he also reminded us that humans possess both reason and emotion. Emotion was thrown out the window in the structure of modern Western law as it-is found in the U.S. and Canada.

Western law is based on punishment, and Indian law[11] is based on healing. The problem with many contemporary justice initiatives directed at Indians is that they are integrationist and ultimately assimilationist. Assimilation is a genocidal and ethnocidal force which is not yet prohibited by human rights law, but it should be. Indian justice works because it heals. It should not be taken captive by a legal system based on force, as with circle sentencing dominated by a judge or family group conferencing directed by a non-Indian police officer. Indian justice should stand on its own, and if the Western systems of power, force, and authority wish to utilize Indian methods in their own way, they should do so. We must take a close look at the institutions and rules which dominate in North America and see that there is an alternative - methods which heal.

We must recognize the forces of authoritarianism, social Darwinism and racism in today's political and legal discourse and reject them in favor of multiculturalism and humanism. Canada seems to be headed in that direction while the United States is still affected by its sad history of slavery, criminal exile, race conflict, and the fact that a small white elite holds most of the power and the money and struggles to maintain its dominance through repressive law. Both Canada and the U.S. have a lot to learn from traditional Indian law and its foundations in genuine equality, respect, humanity and spirituality.

---

1 Edwin W. Patterson, *Jurisprudence: Men and Ideas of the Law* at 85 (1953) (quoting John Austin, an English academic and legal philosopher who lived from 1790 through 1859)

2 Howard Becker & Harry Elmer Barnes, *Social Thoughtfrom Lorc to Scicnec* at 30 (3rd ed. 1961).

3 Eli Sagan, *At the Dawn of Tyranny: Thc Origins of Individualism, Political Opprcssion and the State* at 278 (1985).

4 *See, e.g*. Cuttis A. Bradley & Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique ofthe Modern Position" 110 *Harvard Law Review* 816 (1997). Bradley and Goldsmith warn Americans that the United Nations is creating new customary Inw human rights norms which may be applied by U.S. courts and thus override the prerogative of the Congress to deny human rights. Accordingly, they say, we should change our reading of the Supremacy and Treaty clauses of the U.S. Constitution to reaffirm the power of Congress to do so. This is legal positivism at its worst. The theories of parliamentary supremacy and the devolution of authority from a parliament or legislature are a species of the genus.

5 I think that the Black culture(s) of North America retain a great deal of their Indigenous thought. For example, a few years ago I had the pleasure of hearing Lani Guinier, the "Quota Queen" whose nomination as the head of the Civil Rights Division of the U.S. Department of Justice was shot down by right wing Republicans and a cowardly president. She explained her theory of proportional representation in legislatures in a simple way. She said they are based on the simple concept of "sharing." *See,* Lani Guinier, *The Tyranny of the Majority: Fundamental Foirness in Representativc Democracy* (1994).

6 The office of "chief" as a domineering and authoritarian figure was of course invented by the Europeans.

7 The essays in *War in the Tribol Zone: Expanding States and Indigenous Warfarc* (R. Brian Ferguson & Neil L. Whitehead, 1992) clearly point that out. Indians suffer from five centuries of warfare, and they suffer from mass post-traumatic stress disorder as a result. That makes the healing component of traditional Indian law even more important.

8 This is the thesis of Laurie Melchin Gtohowski, "Cognitive-Affective Model of Reconciliation (CAMR)" (M.A. thesis based on a study of Navajo peacemaking) (cited with permission).

9 For a definition of cognitive dissonance, *see* Elliot Aronson, *Thc Social Animal* at 178 (7th ed. 1995). Psychiatrist James Gilligan maintains that: "The emotion of shame is the primary or ultimate cause of all violence, whether toward others or toward serf." Violence, he says. is designed to replace shame with pride to prevent "the individual from being overwhelmed by the feeling of shame." James Gilligan, *Violence: Our Deadly Epidemic and Its Causes* at 110 (1996).

10 For example, in one Navajo peacemaking case: "… as a reticent teenager explained why she was causing such disharmony in a troubled home. she broke down. saying she desperately wanted to stop drinking. Then she dropped a bombshell – another family member had been molesting her. The court room silenced. The peacemaker declared the need for a follow-up with the accused. A look of relief, even a few smiles, crossed family members' feces. One by one, they effusively thanked [peacemaker Ruthie] Alexius." Vince Bielski, "The Navajo Model" *California Lawyer* at 39 (November 1995). Peacemaker liaison Betty Donald of the Tuba City (Navajo Nation) Distnct Coun says that such situations are common.

11 That is, "Indian law" in the sense of the laws of Indians. The "Indian law" texts we see in law schools teach the law of the oppressor and not that of the oppressed subjects of that corpus of law.