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Canadian natives want their own system of justice

OTTAWA — When the Mohawks of Akwesasne devised their own proposed judicial code, the ultimate punishment was the turning over of natives to the "white" system.

That explains a lot about how natives view the justice system and why they want their own.

They don't trust the British-based adversarial approach — with its European values and focus on incarceration — to provide justice to Canada's 1.2 million aboriginal people.

There are only a handful of native judges in Canada and about 100 of Canada's 42,685 practising lawyers are aboriginal people.

The traditional native justice system, which existed long before the French and the English battled it out on the Plains of Abraham, didn't even acknowledge imprisonment as a method of dealing with conflict.

But today across Canada, natives are behind bars in numbers often startlingly disproportionate to their percentage of the total population.

"The notions of crime and punishment (among aboriginal people) were and continue to be profoundly different than those of Euro-Canadian society," says Alan Grant, an Osgoode Hall law professor, who recently chaired a justice review concerning reserves in northern Ontario. "Imprisonment was never used as a form of punishment."

Crimes were seen as a hurt against the community. A justice system existed to foster social harmony because of the interdependence among people in a relatively small hunting and gathering society.

"It (the native justice system) placed much more emphasis on modifying future behavior than on penalizing wrong-doers for past misdeeds," the New Saugeen Nation of northern Ontario said last year in a submission to Grant's committee. "Counselling, therefore, was far more important than punishment. Punishment, in fact, was often only a last resort."

Everyone — aboriginal leaders, native lawyers, federal and provincial government officials, legal experts — recognizes that something must be done to reduce the over-representation of natives in prison.

Greater flexibility

But the road toward solutions has interminable forks. At one turn, aboriginal leaders, native lawyers, even the Canadian Bar Association, talk of a separate justice system. However, the federal government's preferred route is to create greater flexibility within the conventional legal system.

Natives feel that conventional legal system too often fails them. And recent inquiries into the treatment of natives within the justice systems of Nova Scotia and Manitoba have raised serious questions for them.

"Indian nations should have the freedom to codify their own laws and to apply those laws to their people in their own courts," says lawyer Ovide Mercredi, a Manitoba regional chief. "It's up to them what kind of system they want to develop."

Native leaders often speak of following the example of the United States, where tribal courts are common.

About 170 of 300 tribes in the United States now have such courts. Modelled on the American legal system, the courts are sometimes criticized as reflecting white American values, but it's an improvement on what exists here, say Canadian native lawyers.

American tribal courts apply law on reserves, but natives who commit crimes off the reserve are generally subject to state and federal law. Many tribes have civil and criminal codes, children's codes, hunting and fishing codes, domestic codes, with many incorporating traditional customs and beliefs.

Major crimes such as rape, robbery and murder are considered capital crimes, dealt with in the federal system.

Mercredi and many other aboriginal leaders here believe even these kinds of crimes should be handled in the native justice system.

Sentences handed down by tribal courts "aren't necessarily going to be leaner, but they may be different," says Shin Imai, a lawyer with the Ontario attorney-general, who spent 10 years working for Indian bands in Ontario.

The federal government's position on the concept of a separate justice system seems mired in semantics. On the one hand, Prime Minister Brian Mulroney and his justice minister, Kim Campbell, reject categorically the development of an entirely separate justice system for aboriginal people. On the other hand, their senior bureaucrats don't rule out the establishment of tribal courts on reserves, similar to the U.S. model.

The federal government appears open to something "separate" as long as it links into the broader Canadian legal system.

Campbell has suggested the conventional system be reformed to make room for the values of consensus and community healing that characterize the traditional ways in which aboriginal communities have dealt with conflict.

And federal and provincial institutions have already begun doing that.

Ceremonies permitted

They now permit native inmates to engage regularly in spiritual and religious ceremonies, such as sweatlodges. And Ontario now has pilot projects in two remote native communities, where elders play advisory roles in sentencing matters in the provincial courts.

But the federal government is trying to assuage, in part, the concerns of non-native Canadians who often ask why aboriginal people need their own justice system.

What if aboriginal people receive more lenient sentences for crimes such as rape or murder? Wouldn't that be contrary to the equality provisions all Canadians are guaranteed under the Charter of Rights and Freedoms?

Native people argue they are not just another ethnic group. They have never relinquished their right to govern themselves, they argue.

The Canadian Bar Association, in a 1988 report called Locking Up Natives in Canada, argued separate native justice systems would not be open to challenge. A section of the Charter protects any law which has, as its object, the amelioration of conditions of disadvantaged individuals or groups, including those disadvantaged because of race.

"One of the principal reasons for considering aboriginal justice systems is that the existing criminal justice system has created a condition of disadvantage, particularly in terms of the number of native people in Canada's prisons," the report says.

No uniformity

Lawyers, native and non-native, argue there is no uniformity of sentencing in Canada anyway. Individuals often receive different sentences — sometimes radically different sentences — for the same crime.

Yet aboriginal leaders and government officials see flaws with the American tribal courts.

For example, native lawyers in Canada favor a different approach toward crimes committed off the reserve. According to Roger Jones, past president of the Indigenous Bar Association of Canada, native offenders in cities should be given the choice of being transferred to a tribal court for trial.

"In Canadian law, an accused can apply for a change of venue if there's reason to believe he or she won't get a fair trial in the region where the offence was committed," says Jones. "Well, allowing an aboriginal person to be tried in a tribal court is based on the same principle."

Mark Krasnick, secretary of the Ontario Native Affairs Secretariat, says, logistically, that may be a problem.

"When there's a victim involved, that victim has a right to watch the proceedings, that victim is often a witness. It's a question of accessibility to the system. That's why we have local courts, to address community disputes."

No barrier

The prospect of problems is no reason not to act, says Imai. "Once the political will is there, the technical stuff is no barrier. It's merely work for a lawyer behind a desk."

Ronald Worme, president of the Indigenous Bar Association of Canada, says it's likely Indian bands will develop different kinds of justice systems.

"There isn't going to be one worked out a proposed code. It includes three major categories of offences: crimes against one another, crimes against the community and crimes against nature.

The offence would be heard by a tribunal of justices. The sentence must be reached by consensus. During the process, both the accused and the victim would have an opportunity to say what they would consider a just resolution.

Punishment for the most serious offences, such as murder, carries the most serious sentence. Banishment is the ultimate punishment.

"If you are banished, you can never go home again. You are no longer considered a Mohawk," says Joyce King-Mitchell, justice of the peace for the Mohawk court.

And banishment can include being turned over to the authorities of New York State, Quebec or Ontario, or to the federal authorities in the United States or Canada.

For many aboriginal people, nothing could be worse than that.