

9.0 An Aboriginal Perspective on Justice

Preamble

Every society has a way of life which sets forth patterns of belief and actions based on premises and categories that are linked and make for an interdependent, coherent whole. This wholeness we call culture. Clyde Kluckhohn states it as follows:

Each different way of life makes its own assumptions about the ends and purposes of human existence, about ways by which knowledge may be obtained, about the organization of the pigeon-holes in which each sense datum is filed, about what human beings have a right to expect from each other and the gods, about constitutes fulfilment and frustration. Some of these assumptions are made explicit in the lore of the folk; others are tacit premises which the observer must infer by finding consistent trends in word and deed.¹

In other words, a culture is much more than a set of skills for making a living or a set of rules for relating to others.

Every society has many distinctive ways and assumptions which are traceable to very deep and implicit convictions about what human life and existence is all about.

These implicit convictions are so taken for granted that it is difficult for an insider to know how all other human beings can possibly see the world in any other way. The problems that Aboriginal people have with the criminal justice system are, to a large extent, a result of the implicit convictions of white society embodied in Canadian law. The end result is a clash of two cultures. For the Aboriginal people of Alberta, this results in non-fulfilment and frustration of expectations because the criminal justice system does not embody their implicit convictions about life and existence.

In this section of the report, an attempt will be made to describe the premises on which the cultures of Indians and Metis and of White society are based. It is not our intention to present a complete thesis on the subject. Rather, only the essential substance of the underlying premises of each culture are presented. Furthermore, the subject is, of necessity, addressed through generalizations. Clearly, Indian, Metis and White societies are diverse.

However, there is sufficient commonality within a society to give credence to the generalizations and to interpret variations as idiosyncratic colourings of the general themes.

Discussion

The underlying premises of any culture are the result of a combination of several factors, including the worldview and values of that culture. The nature of the underlying premises of White society can be characterized as "linear and singular", and "specialist and product oriented." Linear thinking is very well illustrated by Western European concepts of time. Time is conceptualized as a straight line. It is like a river flowing toward the self and flowing on past. What is immediately around the self is the present. What is behind the self is the past. The future is upstream. But one cannot see very far upstream because of a waterfall which serves as notice that one cannot predict the future. This straight line is objectified by White society as quantity, as lengths made of units. A length of time is envisioned as a row of similar units. For instance, a day is a unit, and therefore, separate and different from other units. The consequence is that each day is a different day; each day is a new day. Another ramification of thinking about time in this manner is that time flows in one way only. Once a day-unit goes by, it will never return. Wasting and making up time combined with values that speak to productivity result in ideas about the efficient use of time.

Linear thinking lends itself to a singularity of view. Implicit is the idea that a line leads only to one thing. Ramifications of this idea are beliefs that there can be only one god, only one true answer, one and

only one way. Horizontal and hierarchial chronologies are still other outgrowths of the linear and singular worldview.

Every society has positive and negative sanctions; rewards for living according to the prescriptions of the culture and ostracisms for deviations from the prescriptions. Positive cultural prescriptions that result in rewards, recognition and prestige are called social values. Values are usually part of the implicit and unstated part of the culture. The values that arise out of a linear/singular worldview will differ markedly from a wholistic/cyclical worldview. A linear view implies a number of things. A line can be divided into units; a line has two opposing ends; a line is singular in direction; a line can be horizontal or vertical. Using these characteristics of a line, a number of social values implicit in linear thinking can be illustrated. Categorizing, dichotomizing, and reduction to smaller units are examples of the divisibility of a line. The opposing ends of a line leads to either/or modes of thought: good/bad, saint/sinner, big/small, fast/slow, new/old, day/night.

In terms of value judgements, good is preferred over bad, saint over sinner, faster over slower, bigger over smaller, and newer over older. The singular nature of a line leads to values that imply "only one answer, one true way, one golden rule, one god, and so on." Hierarchial orders are the result of a line in a vertical position. The consequences are values that prefer higher over lower, the leader over a commoner.

A linear/singular worldview leads toward specialist and product orientation. The singular nature of a line results in a singular identity and being a something.

Personal identification is drawn from a specialty such as lawyer, teacher, doctor, mechanic, and so on. If people cannot apply a label of some kind to themselves, they are "a nobody" in terms of social status. The movement from A to B to C on a line orients one toward achievement of a goal or the achievement of a product.

Language is one of the systems an observer can use to find consistent trends and patterns. In other words, language, to a large extent embodies, implicitly, the worldview and values of a culture. For instance, English reflects the linear worldview. It is a language that has a bias for nouns or identification. Identification complements categorizing and dichotomizing, and the notion of "thing" or product. One can conclude that English is noun-rich, but action-poor.

In contrast to White society's linear/singular worldview, the Indian and Metis worldviews can be characterized as cyclical/wholistic, generalist, and process oriented. The cyclical/wholistic view looks at time in terms of cosmological cycles and patterns and not in terms of an artificial creation of "time units." Cosmological cycles are generally imperceivable in terms of change. Consequently, time at the functional, operative, day-to-day level is not considered dynamic, and therefore, is not an important referent. The wholistic view leads to an implicit assumption that everything is inter-related. Inter-relatedness leads to an implicit idea of equality among all creation. Equality is brought about by the implicit belief that everything - humans, animals, plants, and inorganic matter - has a spirit. Anthropomorphic factors are not important because metamorphosis readily occurs. The common denominator is the spirit.

The cyclical/wholistic view can be described as "looking at the forest as opposed to the trees." Implicit in the cyclical/wholistic view is "generalism" and constant motion. In other words, there is a bias toward generalist knowledge and process. This arises out of the slow and imperceivable but continuously changing patterns in the cosmos and the interrelationship of all creation.

Similar to the reflection of Western European values in the culture of White society, the cyclical/wholistic view embodies values that are implicit reflections of the worldview. The cyclical aspect leads to respect for cycles, phases, and repetition. A circle can be viewed as a whole. It has no beginning or no end, but it can be viewed as going round and round, not unlike the cyclical patterns of the cosmos. Repetitive patterns do not lead to goal orientation as they would in a linear view. Rather, they focus on the process. Implicit is the belief that if the process is followed, a product will happen.

When a circle is viewed as a whole, implicit convictions arise that, in the case of a society, the whole or the group is more important than a part or the individual. Being part of the group is better than being alone. The whole, combined with interrelatedness, results in values suggesting harmony and balance. Implicit in cycles and wholeness is generosity and sharing; everyone shares and shares alike. No one should be more important, wealthier, or different from everybody else.

Aboriginal languages, like other languages, are repositories for many implicit convictions. Benjamin Whorf states:

Every language contains terms that have come to attain a cosmic scope of reference, that crystallize in themselves the basic postulates of an unformulated philosophy, in which is couched the thought of a people, a culture, a civilization, even an era. Most metaphysical words in hopi are verbs, not nouns as in European languages.²

Here, Whorff points out the process orientation of the Hopi language in comparison with the noun or product-oriented English language. Blackfoot and Cree are not unlike Hopi. The categorizing process in most Aboriginal languages classifies almost all things as animate. Inanimate categories are nearly non-existent. If most things are animate and if all things have a spirit, then humans can relate to not just other humans, but also to animals, plants, and even inorganic matter.

The basic foundations - those rules of a culture that are dominant in the control of the behaviour of the members of a society - are worldview and value constituted. The underlying premises of White society can be articulated as follows:

God created the universe, the earth, and everything in it and on it.

God created humans in His own image and gave them dominion over everything.

God had a chosen people that He blessed to show the true way for all others.

Creation is divisible.

Individuals are more important than the group. Nations exist to protect and provide for individuals.

Property is individually ownable, including land.

Knowledge is the learning of skills for a comfortable living.

Accumulation of wealth is a sign of success.

Social order is hierarchical.

The earth and everything in and on it is for the benefit of man.³

The underlying foundations of Indian/Metis culture can be stated as follows:

The Creator made everybody, as equals, including humans, animals, plants, and inorganic life.

Everybody is inter-related with everybody.

Existence consists of energy and is expendable.

The energy quotient of creation is rechargeable through ritual.

Man is subordinate to, and a mere part of creation.

Other-than-human beings have knowledge that humans do not have.

Attainment of the knowledge of other-than-human beings is power.

Harmony and balance brings about happiness, order, beauty and health.

The group is more important than the individual.

Aggressive tendencies bring about disorder and imbalance.

All land and resources belong to the group.

Individual property is private but should be generously shared.

Individuals are important and should be given a lot of freedom.

Disorder is corrected through rehabilitative and restorative action.

Everything in the universe and on earth is alive and has a spirit.

Anthropomorphic aspects are not important.

Metamorphosis occurs readily.⁴

The above premises, even though they are not exhaustive, are sufficient to point to differences between Aboriginal and White culture.

But what is the significance of these underlying premises as regards the criminal justice system? The significance lies in the fact that the law may embody these premises with respect to dispute resolution, and the system that comes into being will have certain assumptions and expectations. Adamson Hoebel observes about the Cheyenne:

As an operating system, Cheyenne law is remarkable for the degree of juristic skill that is manifest in it. By juristic skill we mean the creation and utilization of legal forms and processes that effectively and efficiently solve the problems posed to the law and in such a way that the basic values and purposes of the society are realized and not frustrated by rigid legalism. Juristic skill implies the ability to define relations between persons (trouble cases) in ways that effectively reduce internal social tensions and promote individual well-being and the maintenance of the group as a group. For them the law is corrective; it is never employed as a vindictively punitive measure. Punishment, in their view, need not go further than is necessary to make the individual see the right. Once they are convinced the knave is reformed, they move smoothly to reincorporate him into the community.⁵

John Henry Provinsse makes the following observation about Plains Indian justice:

Another characteristic of Plains justice, as shown in the hunt proceedings, must be remarked upon here. That is the order-preserving

nature of the punishments inflicted as opposed to the idea of punishment for the sake of social vengeance. Uppermost in the minds of the Police and their superiors was the need for conformity to tribal regulations evoked to preserve the social order. This is clearly brought about by the attitude of the society to the offender after punishment had been inflicted upon him. Conformity, and not revenge was sought, and immediately after a promise to conform was secured from the delinquent, steps were taken to reincorporate him into the society.

Law may or may not be a matter of government, although it is always a matter of political organization - the system of regulation of relations between groups or members of different groups within the society at large.⁶

Law may be public or it may be private. Public law is the body of rules that are held to be of importance to the society as a whole. Public officials are appointed or elected to administer these rules. Violations of public law are held to be offences against the society at large. Private law is the body of law that governs the relationships between individuals. It may not be of immediate or direct concern to the society at large, but it is still an important aspect of political organization. In White society, law and justice are largely matters of public law while among the traditional Aboriginal societies, law and justice were largely private.

Justice and dispute resolution in White society can best be illustrated by a retributive model of justice which includes the following:

Crime is a violation of the state.

The focus is on establishing blame or guilt.

Truth is best found through an adversarial relationship between the offender and the state.

Punishment deters and prevents.

Report of the Task Force on the Criminal Justice System and its Impact
on the Indian and Metis People of Alberta, March 1991

Justice is defined by intent and process (right rules).

Community does not play a leading role.

Action revolves around the offender.

Accountability of the offender is put in terms of punishment.

Offences are strictly legal and devoid of moral, social, political and economic considerations.

Past behaviour is an important factor.

Social stigma of criminal behaviour is almost unremovable.

Remorse, restitution, and forgiveness are not important factors.

Offenders play a passive role depending on proxy professionals.

Justice and dispute resolution in traditional Aboriginal societies can be illustrated by a restorative model of justice which includes the following:

Crime is a violation of one person by another.

The focus is on problem-solving and restoration of harmony.

Dialogue and negotiation are normative.

Restitution and reconciliation are used as a means of restoration.

Justice is right relationship and harmony.

The community acts as a facilitator in the restorative process.

The offender is impressed with the impact of his action on the total order.

The wholistic context of an offence is taken into consideration including moral, social economic, political and religious and cosmic considerations.

Stigma of offences is removable through conformity.

Remorse, repentance and forgiveness are important factors.

Offenders take an active role in the restorative process.

The above models of justice and dispute resolution result in different relationships and expectations. For instance, Rupert Ross points out differences between expectations in the different systems. He states that the aim of the Indian dispute resolution system is real resolution, restoration of co-operative co-existence and the elimination of bad feelings. Indians expect the criminal justice system to do the same. Having realized that the White system does not aspire to the same goals as the traditional system, they now want to dismiss it from their communities so that they can revert back to their own system.

John Loftin sees the problem that Native Americans have with the law as one of a cultural clash. He sees as the cause of the problem the embodiment in law of modern capitalistic economic theory as expounded by Adam Smith in "Wealth of Nations." According to Smith, humanity has a natural propensity toward progress, evolving from subsistence modes of hunting, herding, and farming to a capitalist industrial economy. His theory holds that civilization is the fulfilment of the natural human propensity for the exchanging of surplus goods, and the consequent intrinsic desire to accumulate wealth. According to Smith, humans who do not have an exchange economy are not civilized and are, therefore, not fully human. Loftin argues that the embodiment of Smith's economic theory and definition of civilization is implicit in

American law - which is not unlike Canadian law - at an unarticulated level. One of the results is that Native Americans, because of their different culture, were not accepted as fully human by Western Europeans. This explains, in part, the great efforts to civilize and convert Indians to Christianity. According to this view Loftin argues is the justification by White society for the trials and tribulations of Native Americans including cultural genocide as the price paid for a greater good, namely civilization and Christianity.⁷

The embodiment of economics, efficiency, Christian values, and Smith's concept of progress and civilization are as evident in Canadian law as they are in American law. The implicit convictions that arise out of this embodiment will not change in the foreseeable future because the legal profession is blind to this kind of cultural phenomenon. In other words, the legal profession's implicit convictions are so deep and so taken for granted that it is hard for people in this profession to see how it could possibly be different in the minds of another people. Until the implicit convictions of Indian and Metis people are included in the underlying premises of Canadian law, Aboriginal people will continue to have "run-ins" with the law. High incarceration rates will continue to be the norm. Louise Mandell puts this view in terms of "Native Culture on Trial."⁸ Rupert Ross observes that:

It is now the judgment of many Bands that the price inherent in adopting our process is too great in light of (its) failure. Many want us to leave, taking our unproductive, perhaps destructive judicial system with us. More voices join the call for "self-government."⁹

One can add, more voices are calling for their own justice systems.

References

¹Clyde Kluckhohn, "The Philosophy of the Navajo," *The Navajo*, 1946.

²Benjamin Whorff, "An American Indian Model of the Universe," *Language, Thought and Reality*, Cambridge: Cambridge Technology Press, 1956.

³Drawn from several sources including: Elders on the Blood Reserve; *The Cheyenne* by Adamson Hoebel; and Chief Judge Lilles in "Some Problems in the Administration of Justice in Remote and Isolated Communities," *Queen's Law Journal* (Fall 1990).

⁴Adamson Hoebel, "The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence." University of Oklahoma P, 1941.

⁵John Henry Provinse, "The Underlying Sanctions of Plains Indian Cultures and Approach to the Study of Primitive Law." Chicago: U of Chicago P, 1954.

⁶*Ibid.*

⁷John D. Loftin. "Anglo-American Jurisprudence and the Native American Tribal Quest for Religious Freedom," *American Indian Culture and Research Journal* (1989).

⁸Louise Mandell, "Native Culture on Trial," *Canadian Bar Review*.

⁹Rupert Ross, "Dancing with a Ghost: Exploring Indian Reality" 1987 (draft).