# The Promise and the Paradox:

## Diversity and Legalism in Canada's Justice System

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ABSTRACT

Canada's legal system is premised on a standard of justice based on universal equality. However, it has little scope for incorporating the diversity of cultural and social experience that characterizes offenders. In many ways, Canada's judicial system, with its rather unbending juridical orientation, stands in opposition to the diversity of Canadian society.

The rule of law encompasses two broad claims: that everyone is subject to the law and that the law treats everyone the same. The standard of justice in Canada is premised on the principle of legality, that the law is an impartial and objective system for resolving social conflict amongst people or groups who are, by definition, equal in the eyes of the law. The traditional dispute mechanism for resolving conflict is the adversarial system in which two parties represent their versions of an event to the courts and judges must determine the "facts" of the case in order to pronounce the "truth." The legal mechanism for judging truth is the principle of *stare decisis;* judges are bound to follow precedent, making judgments on the basis of previous cases. One of the contradictions of the system of precedent, however, is that societies like Canada are in a constant state of demographic and social flux and the system of precedent cannot account for social change.

Legal scholars have criticized the premise of legality as an inherently conservative doctrine developed in another time.[1] The fundamental problem is that in a diverse socio-economic world, the law is, in practice, unable to treat everyone equally. As Anatole France stated at an earlier time: "The law in all its majestic impartiality forbids both rich and poor alike to sleep under bridges, to beg in the streets and steal bread."[2] Although this aphorism sounds "tongue in cheek," the message is profound and important. The legal system is expensive to access, the arbitrators of law are drawn from the ranks of the powerful (mostly male, mostly white, and exclusively well-educated), and the discourse of law assumes an intimate knowledge of the language. Further, the legal process (especially in criminal cases) starts at the policing level, and the impartiality of the law assumes that the police will be objective upon detection and arrest. In the end, the two fundamental questions remain: a) in a liberal democratic society, do the rights of the individual encoded in law and in the charter supersede, without question, the rights of collectivities based on community, ethnicity, culture, geographic area, among others? and, (b) in a society that prides itself on diversity, is a juridical, individualized rights-based justice system anathema to such diversity?

To answer these questions we need to interrogate the nature of Canadian society with a view to understanding if and when occasions occur when the rights of the collective are as important as (and whether they coincide with) the rights of the individual. And, although it is difficult to identify concrete collectivities, the conventional wisdom is that communities that face legal disadvantage are marked by intersections of race/ethnicity, geographic area, gender, sexuality, and age. Importantly, we need to understand that the markers of diversity often intersect to produce disadvantage both when law is formed and when it is applied.[3] The race and class skew that is so evident in Canada's prison testifies to how diversity intersects to produce disadvantage. In the province of Saskatchewan, for example, the majority of prisoners in jails are of Aboriginal ancestry. They mostly come from the ranks of the poor and their engagement with the justice system starts at a very young age. One could make a human rights argument that the racial and class-based nature of prisons in Canada is a fundamental violation of the collective rights of identifiable socio-economic and cultural communities.

The legal places in which diverse populations come into contact with rigid justice occur at several levels: policing; access to alternative measures; access to adequate and dedicated counsel; decisions in courts; and, imprisonment. The problems that individuals encounter in the justice system are exacerbated when elements of diversity intersect; biases or insensitivities at all levels of justice are directed primarily against disadvantaged people who are characterized by combinations of race, class, gender and age, and geography.

**The Police**

A rather substantial body of work questions both the fairness and objectivity of police decisions to arrest. The thrust of this work is that the police, either deliberately or inadvertently, engage in racial, age, gender and community profiling as they make on-the-scene decisions firstly to stop a suspect and then to arrest. Both empirical and anecdotal evidence to date suggests that profiling does occur, especially with respect to race/ethnicity, age, and place.[4] The police respond by arguing that they are engaged in policing on the basis of best evidence, both empirical and intuitive: if they stop and detain proportionately more young men from minority communities, they do so because such young men are proportionately more engaged in criminal activity. The validity of this claim notwithstanding, the police are faced with a dilemma. In a society in which certain communities are more prone to street crime and in which the citizenry demand protection, the police do confront some social categories of offenders more so than others. The problem, however, rests in part with culturally insensitive policing and in part with a rigid, often inappropriate mandate for policing. The police are, for the most part, crime control officers and their quasi-military training dictates that their primary duties are the maintenance of law, order and public safety. The notion that police officers should be, in part, front line social workers (peace officers) is highly disregarded by rank and file officers. And, here is the dilemma in policing a diverse society: it is relatively easy for the police to make forensic decisions without accounting for the context in which behaviour occurs. To keep the peace, on the other hand, officers would need to have the mandate to manage conflict in an informal way without first recourse to arrest. Managing conflict involves being a member of the community, being visible on a daily basis, and being ready and able to manage conflict that arises from intersections of race, class, gender, sexuality, place and age.

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One of the solutions offered for diversity-sensitive policing is to make certain that the police force represents the gender, race and class diversity of the community. Although there certainly is a defensible argument regarding equity in police recruitment, the solution to discriminatory policing must go well beyond equity policies and into the realm of community policing. Community policing, by definition, involves changing the nature of policing so that the role of the police officer who walks into inner-city schools everyday to become a part of the community is as important as arresting the drug user who stands on the corner. As police officers manage the peace of a community, they learn as much as they teach, and in fact, diversity between the police and the community is not such a bad thing. That the police officer and the community are not phenotypically similar may result in mutual learning and accommodation. And, of course, this ideal context is based on good will at the community and the policing level. Both players must decide that the good of the community, with respect to long term peace and order, is as important as the legislated mandate to control crime. If that agreement involves using healing instead of imprisonment for an incorrigible offender, then that is as it should be.

**The Courts and Access to "Justice"**

If we assume that the system of legality that we use and defend is the best system possible, then we must make certain that in the day-to-day workings of the courts, those who live on the socio-economic, cultural, or linguistic margins of the society are not at a disadvantage. In fact, in a responsible society, arguably the disadvantaged should have the greatest advantage in court. There is, however, a corpus of very fine work that shows the courts' inability to deal with diversity. Rupert Ross's work on the operations of the courts illustrates that when cultures collide in court, justice is not served well at all.[5] He shows that when Aboriginal offenders, especially from isolated communities, come into court, they have different cultural and linguistic mannerisms that are often misinterpreted by the courts as indifference or disdain. Further, the law court is based on a hierarchical system of deference, and when the accused violates the norms of authority and deference, s/he is at a substantial legal disadvantage. As well, the language of the courtroom is a closed linguistic system that is rarely challenged. Therefore, most offenders must rely on lawyers as language intermediaries. The presumption is that lawyers are predisposed to help translate the language of the law into a vernacular that can be understood by the recent immigrant to Canada, by a Cree-speaking First Nations person from Northern Canada, or by a young offender who has minimal education and who has not yet developed adult verbal skills. The tragedy in all of this is that courts are overbooked, that legal aide and other court-appointed counsel are overworked, and that most courts are ill-equipped to conduct the legal process in a multi-lingual context. Given the bureaucratic demands on the courts, diversity-sensitive justice is almost impossible.

Ironically, one of the reasons that alternative forms of justice arise is not because they are any more objective or judicious than the courtroom, but because, paradoxically, they remove the court from its rigid legalistic moorings. As alternative methods (including alternative dispute resolutions, healing circles, etc) find their way into legal work, they bring community members in as part of the legal process. Also, the procedures are less formal than typical court procedures and they allow more room for dialogue (in community-based language), collective input, evidence in a cultural/diversity context, and accommodation. It is not even so much that alternative measures are more

lenient—in many cases the judgments are more harsh than those in regular court—but justice occurs in a context in which the courts are demythologized and in which the diversity of the community and the socio-economic and cultural background of the offender are crucial considerations.

### Prison, Rehabilitation and Healing

With the advent of alternative measures, Canada's justice system is undergoing a gradual but fundamental change in its working philosophy. The change from a system that sees incarceration as the answer to the problem of crime, to a system that views prison as a last resort has occurred as a result of a general awareness amongst policy officials that to incarcerate more and more offenders is not only morally questionable, but also antagonistic to rehabilitation. What has resulted is a new justice philosophy broadly based on principles of healing. The healing concept is drawn from traditional Aboriginal cultures in North America that see people who break the rules of society in need of care rather than punishment, in need of inclusion into the community rather than exclusion.

When we observe the tremendous social skew in prison populations—with respect primarily to race, class and age—it is clear that prison as an agent of healing or justice at any level is inappropriate. Without question, the majority of people in prison are those who live on the margins of society. Given that prisons do a poor job of helping offenders but, in fact, become places of apprenticeship for crime, it is clear that the system of incarceration encourages social disadvantage.[6] For example, those who are incarcerated in youth justice facilities at a young age are highly disposed to go on to become adult offenders. What this means for social justice in a diverse society is that if a recent immigrant to Canada or an Aboriginal person from an isolated rural community faces the prospect of spending time in jail, their prospects for the future in Canada as happy and productive citizens are limited. This is precisely why the Youth Criminal Justice Act contains provisions for alternatives to incarceration for young offenders, and also why sentencing circles and healing lodges dot the current landscape of justice. The principle of a sentencing circle is that the community takes an active part in determining what happens to an offender and that the sentence reflects the long-term welfare of both the offender and the community.

The healing lodge, exemplified by the Pe'Sakastew Centre in Hobbema, Alberta, is based on the belief that, for a convicted offender, physical and emotional safety and security are fundamental to healing, and encompassed in the gestalt of healing is the attachment to culture and spirituality. In the Pe'Sakastew Centre, offenders come from maximum-security prisons and enter the lodge as members of an ethno-spiritual community. Their success and their healing is a result not only of the provision of a livable world but also a world in which they are connected to their race and culture. Connie Braun[7] has shown us the wonderful results that accrue from post-conviction programs that account for the cultural, linguistic and spiritual backgrounds of the offenders. In her research, Braun shows how quickly inmates, even the most hardened offenders, heal when their time in prison is circumscribed by their culture, how recidivism decreases and, more importantly, how their emotional and physical lives improve.

To extrapolate the principles of healing used in Aboriginal healing lodges to a diverse society is simple and important. It is reasonable to assume that if an immigrant Canadian runs afoul of the law, the moral and instrumental response by the state should be to incorporate the offender's ethno-cultural community into decisions about sentencing as healing. Although such extra-legal considerations contradict the principles of legality that are embedded in our justice system, they do, in the end, provide the context in which real justice can occur in a diverse, complex world.

### Justice Policy and Diversity

The implications for incorporating diversity into the judicial world are profound. If linguistic or cultural barriers impede access to the legal system for new Canadians who are struggling in competitive economic world or for First Nations Canadians who are distinct by their culture, religion, and language and who live on the economic margins of the society, then the law must be amenable to alternatives to the judicial model for people from diverse and intersecting backgrounds. Quite clearly, it is not sufficient to address policies that look at social-economic and cultural identities in isolation.

Canada prides itself on a history of multiculturalism and has encouraged and developed diversity. But, the systems of policing, justice and punishment have been anything but multicultural, ignoring the need to incorporate diversity into justice. The substantive inequality that exists in the justice system is anathema to diversity, and exacerbates rather, social and cultural inequality. When intersecting identities are ignored in judicial decisions, the individual suffers along with the society In a healthy, diverse society, a monolithic, unyielding legal system should not be the only basis upon which a unique individual is judged.

### Notes

1 Naffine, Ngaire. *The Law and the Sexes: Explorations in Feminist Jurisprudence.* Sydney: Allen and Unwin, 1990.

2 France quoted in Comack, Elizabeth. *Locating Law: Race/Class/Gender Connections.* Halifax: Fernwood Publishing, 1999. 42.

3 For a theoretical and empirical understanding of discriminatory law formulation and application in Canada, see Elizabeth Comack's *Locating Law: Race/Class/Gender Connections.* Halifax: Fernwood Publishing.

4 See Julian Tanner & Scott Wortley. *The Toronto Youth Crime and Victimization Survey: Overview Report*. U of Toronto: Centre of Criminology, 2002. See also Carl James. "Armed and Dangerous: Racializing Suspects, Suspecting Race." *Marginality and Condemnation: An Introduction to Critical Criminology.* Eds. Bernard Schissel & Carolyn Brooks. Halifax: Fernwood Publishing, 2003.

5 Ross, Rupert. *Dancing with a Ghost: Exploring Indian Reality*. Markham: Reed Books Canada, 1992.

6 For a compelling first-hand account of the prison experience as an apprenticeship for crime, see Donald Morin's work entitled "Doing Time." *Marginality and Condemnation: An Introduction to Critical Criminology.* Eds. Bernard Schissel & Carolyn Brooks. Halifax: Fernwood Publishing, 2003.

7 Braun, Connie. *Destruction, and Renewal: Stories from Aboriginal Men at the Pe'Sakastew Centre.* Saskatoon: University of Saskatchewan, 1998. Masters Thesis.