A LAWLESS LIFE, UNREST AND STRIFE?

THE EXISTENCE OF ABORIGINAL CUSTOMARY LAW IN MANITOBA FIRST NATIONS COMMUNITIES: AN EXPLORATORY STUDY

BY

E. FRANK CORMIER

A Thesis
Submitted to the Faculty of Graduate Studies
in Partial Fulfillment of the Requirements
for the Degree of

MASTER OF ARTS

Department of Sociology
University of Manitoba
Winnipeg, Manitoba

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ABSTRACT

The literature dealing with traditional methods of dispute resolution indicate that increasing support is found for the contention that the application of customary law in First Nations communities is the most promising route to improving upon the current dismal relationship between First Nations peoples and the Canadian criminal justice system. There is, however, a lack of information regarding the current state of knowledge of - and belief in - customary law. This is compounded by a lack of clear descriptions of its content.

This research is intended to address these questions through an examination of current attitudes of First Nations peoples in Manitoba toward customary law. Data were collected through interviews conducted in the member-communities of the West Region Tribal Council. Respondents were asked to describe what they believed to be the most appropriate response to several detailed hypothetical instances of deviance. Respondents were drawn from three age groups: "older" (56 years and over), "middle aged" (36-55 years), and "young" (18-35 years).

Analysis of the data showed that the three age groups applied three differing methodologies for responding to deviant acts. The "older" group displayed a "community focus", the middle aged group a "family focus" or "mixed focus", and the young group a "state focused" approach to deviance-response. Analysis of the content of customary law shows that context, restoration, prevention, publicity, group decision-making, and apology/forgiveness are its central elements. Belief in customary methods of dispute resolution remains strong among the older respondents. It is concluded that while the application of customary law is a viable and desirable option for justice initiatives in the future, caution must be exercised in the design of any such programs to ensure recognition of the complexity of this issue.

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For Mom and Dad

You showed me how to build a fire.

TABLE OF CONTENTS

In days of old our fathers, bold
In arts of war must chase
To bend a bow, or scalp a foe,
Gave *strength* the highest place.

Chorus
Then let us praise the peaceful days
Of that Queen Mother's rule,
Whose kindly laws must give us cause
To love our Indian school.

A lawless life, unrest and strife,
Lone graves among the trees;
But heart and brain find higher gain
In nobler crafts than these.

'Tis ours to learn the thoughts that burn
In Christian hearts, to train
Both head and hands in heathen lands
From *work* true strength to gain.

(From the 1894 Anglican bulletin *Aurora*; to be sung by Indian students in residential schools.)

INTRODUCTION

> ...in the spirit of recognition of aboriginal rights to self-determination and the need to take innovative steps to deal with the abysmal social conditions facing aboriginal people, it is time to accept the claim by aboriginal leaders that there is a way to proceed based on indigenous processes of social control. In some cases those processes have been stifled by outside pressures but they remain largely intact and ready to be applied when recognized and supported. (Clark, 1989)

In recent years the discussions surrounding Aboriginal self-government have been increasingly characterized by the calls for a return to the traditional or customary ways of Aboriginal peoples. The citation above reflects what is becoming the overwhelmingly accepted model for Aboriginally controlled institutions, especially in the realm of criminal justice.

Specifically, customary methods of social control are featured prominently in the current literature that deals with Aboriginal peoples and criminal justice. Rarely, however, are these methods clearly described, nor is there any specific analysis of how they might be applied to the existing justice system. In the Report of the Royal Commission on the Donald Marshall, Jr., Prosecution, it is stated that such description and analysis is vital for several reasons, among them the following:

> First, if effective, community-based justice processes could be given their due recognition and instituted as a legitimate and complementary component of the wider system. Second, if encouraged and supported, effective indigenous justice mechanisms such as mediation and reconciliation could be adapted and instituted in other community settings, Native and non-Native (Clark, 1989).

Many examples of this attention toward the uses of customary ways can be found across the country in the reports of several recent Aboriginal justice inquiries, task forces, and commissions. Specifically, much attention has been paid to the vastly different conceptions of "justice" found in aboriginal customary law and so-called "white" law. This difference is used throughout these reports as the basis for many of the recommendations for improvements to the existing criminal justice system, as well as for new programs designed to facilitate the delivery of justice to Aboriginal peoples.

It may be argued, however, that there is some question regarding the extent to which knowledge of customary law continues to exist in First Nations communities. The purpose of the research to be described herein is to discover who holds knowledge of customary methods of dispute resolution, and whether the people in First Nations communities believe that these methods can and should be applied to specific instances of deviance.

A brief review of the literature dealing with customary law is first presented, followed by an overview of some of the recent recommendations made by government agencies and task forces calling for the application of customary methods to present-day problems. The specific research questions that were developed from an analysis of these recommendations are then described, followed by a description of the research methods employed. Briefly, selected reserve residents in Manitoba were presented with several detailed deviance "vignettes" and were asked what they thought the appropriate response to them should be. The assumption is that the responses will indicate first whether or not the respondent has knowledge of customary methods of dispute resolution. More

importantly, they will also indicate whether or not the respondent believes that customary methods are a viable response to real instances of deviance, as opposed to a set of norms that are no longer relevant in their communities today.

The research findings and analysis are then presented, followed by a brief description of their implications for future customary law initiatives, as well as for future research.

CHAPTER ONE

Literature Review

Since the time of first contact, much has been written about the customs and traditions of Canada's Aboriginal peoples. Perhaps the earliest such work came from the missionaries - mostly Catholic and Anglican - who first lived among the Natives. The Catholic missionaries produced thousands of pages describing the aboriginal people and their customs; one example of this documentation is the *Jesuit Relations and Allied Documents* (Kenton, 1954). While providing a great deal of information about customary methods of dispute resolution, the records are permeated with ethnocentric assumptions, and thus must be used with care.

Describing the apparent virtues of the Indians with respect to sharing and generosity, one writer appears surprised when he states that:

> These little things...show nevertheless that these Peoples are not quite so rude and unpolished as one might suppose (Volume 10: 215).

This writer goes on to assert that the Indians are also not as lawless as they might at first appear:

> ..it seems to me that, in view of the perfect understanding that reigns among them, I am right in maintaining that they are not without laws (Volume 10: 215).

The missionaries go on to describe some of the specific instances of response to deviance that they have observed. A detailed description of the response to a murder provides an early indication of the importance of restitution and apology in the successful resolution of

a problem. The response to the act involved the giving of nine gifts to the family of the victim, which were:

> put into the hands of the relatives to make peace, and to take away from their hearts all bitterness and desire for vengeance that they might have against the person of the murderer (Volume 10: 217).

The restorative aspects of customary law are emphasized in these descriptions, placing them in stark relief in comparison to the punitive aspects of the European law to which these missionaries were accustomed:

> By these..presents he signifies his regret for having killed him, and that he would be quite ready to restore him to life, if it were possible (Volume 10: 217).

It is notable that there is no mention of the proper penalty to be served for killing a person, nor of the need to punish the offender; only a concern for what has been lost.

The Jesuit documents, like many of the accounts written in this era, are an interesting mix of ethnocentric judgment of the 'savages' and respectful commentary on their seemingly effective methods of dispute resolution. A description of the system of laws used by the Huron are one example of this dichotomy. In describing their response to a murder, one of the missionaries noted that:

> It would be attempting the impossible, and ruining everything, rather that affording a remedy, to proceed with the Barbarians according to the judicial usage of nearly all nations, by condemning the murderer to death: it is the public that gives satisfaction for the crimes of the individual, whether the culprit be known or not. In fine, the crime alone is punished, and not the criminal; and this, which elsewhere would appear an injustice, is among them a most efficacious means for preventing the spread of similar disorders (Volume 38: 275).

While referring to the Indians as 'savages' and 'Barbarians', there is at the same time this rather admiring description of a system of laws "quite as effective as our own, and even more so, since there appear, among conditions of extreme liberty, very few disorders" (Volume 238; 265).

Other accounts and descriptions of customary law from this early period follow a similar pattern of derogatory labels and assumptions mixed with qualified praise for these 'noble savages' (see, for e.g. Colden, 1775; Catlin, 1844; Harrison, 1887; James, 1894).

By the early twentieth century, the literature surrounding aboriginal customs and laws had moved from the colourful accounts of missionaries and adventurers to the more scientific approach of academics, primarily anthropologists and sociologists. These writers noted that while a great deal had been written about the Indians and their customs by various organs of the state and the churches, little of it was carried out in a systematic manner. Parker (1916) points out that:

> Notwithstanding the immense effort that is put forth by missionary bodies and by the federal government to remedy the unhappy situation of the Indian, neither of these forces acts as if it surely knew the elements with which it was dealing (1916: 253).

William MacLeod echoed these sentiments when he stated that "the study of the law...of the peoples popularly called primitive has received little or no attention" (1932: 169). Another sociologist writing in the early twentieth century period further points out that the existing research relied too heavily upon superficial observations:

> It takes years of patience before you can begin to know an Indian and therefore before you can begin to get first-hand knowledge of the human unit of your problem (McKenzie, 1914:762).

These researchers began to not only recount observations, but to attempt to develop a deeper understanding of the values and norms that underlie the traditional responses to deviance. Bernard (1928) listed three major methods of social control in use in aboriginal communities. He notes that the most extensively employed was 'suggestion-imitation'. That is, young members of the community were to observe the others around them and thus indirectly learn the accepted modes of behaviour. This method of controlling behaviour was effective because "the behaviour patterns were already well established, [so] the technique used by the leaders was usually suggestion" (Bernard, 1928: 308).

The second method of control was a kind of public shaming that employed "the use of epithets, ridicule, sarcasm, etc." (Ibid: 308). This public ridicule method is noted in much of the literature surrounding traditional law. The third method noted by Bernard is force, which he notes is not often required.

Another aspect of customary law found in much of the early literature is the need for community participation in response to deviance. For example, MacLeod notes that among the Omaha the response to a murder involved the assembly of gifts for the family of the victim contributed "not by the relatives of the murderer, but by the tribesmen in general" (1934: 195-6). He also notes that there were no specific officials holding the power to make or enforce laws. Rather, he states that aboriginal society might be described as a "gerontocracy":

> they are also characterized by a usually elaborate development of advisory councils of the upper age classes of the males of the community (MacLeod, 1932: 170-1).

Thus, the elders provide guidance through their councils, but the power to enforce laws is drawn from the community as a whole. Similarly, the police systems of the Plains Indians must be supported in their actions by the "whole camp", and it is understood that their authority is derived from the collectivity (MacLeod, 1937).

Another of the most common aspects of customary law described by the early twentieth century researchers was the need for public confession of deviant acts:

> one of the distinctive features of the Saulteaux belief system is this: if one who is ill because of 'bad conduct' confesses his transgression, the medicine will then do its work and the patient will recover (Hallowell, 1941: 876).

Hallowell also points out that following the commission of a deviant act, the offender must "suffer the shame of self-exposure involved in confession. This is part of the punishment" (Ibid: 877).

There is another aspect of public confession that appears to be equally important to the healing of the victim and the offender, and that is public education:

> Punishment aims at social prevention, and it is such prevention which is primarily the object of the elaborate public ceremonialization of the punishment (MacLeod, 1934: 227).

This author also speaks of "an elaborate public ceremonial of punishment apparently designed publicly to impress the people with the need to avoid crime" (MacLeod, 1932: 189); Hoebel notes that "ridicule and disapproval in 'public opinion' are effective goads to conformity" (1941: 665); and Hallowell sums this idea up most succinctly when he states that:

> Confession..by making public the transgression committed permits the individual to recover. This is its ostensible purpose. But confession has a wider social function. It

> makes others aware of disapproved types of conduct which act as a warning to them (1941: 880).

Thus, the need to lay out specific rules or laws to members of the community simply did not exist. By publicly discussing and responding to deviant acts, the rules were implicitly presented to young members of the community:

> This public aspect of confession is one of the channels through which individuals growing up in Saulteaux society and overhearing the gossip of their elders *sense*, even though they may fail to understand fully, the general typology of disapproved patterns of behaviour. Children do not have to be taught a concrete panel of transgressions in Saulteaux society (Hallowell, 1941:878).

By the 1940's, the notion of restoration rather than punishment being one of the hallmarks of customary law was becoming more evident. The anthropologist E. A. Hoebel wrote a number of articles dealing with customary law, noting within them the focus on restoration. Hoebel here describes the use of song duels by the 'Eskimos':

> they are judicial instruments insofar as they do serve to settle disputes and restore normal relations between estranged members of the community..however, the judgement bears no relation to the rightness or wrongness of the original actions which give rise to the dispute. There is no attempt to mete justice according to rights and privileges defined by a substantive law (1941: 681-2).

Thus, while a judgement is rendered in that a 'winner' is declared, the outcome is disassociated from the deviant act. The process used to settle a dispute or respond to deviance is not concerned so much with punishing a past sin, but with assuring a harmonious present and future for both the offender and the victim. 'Punishment', therefore, is "widely conceived of as expiation, not as retaliation" (MacLeod, 1934: 227).

Another of the central aspects of customary law noted by the researchers was the fact that it used an ad hoc approach to deviance and dispute resolution. That is, rather

than adhering to abstract rules in all cases, each incident was viewed in its context. All of the facts and circumstances surrounding the incident were considered in order to arrive at the response most likely to produce the desired outcome:

> each organization, game, dance, feast, or custom filled some social need. They understood what they wanted and strove to meet that want (Parker, 1916: 258).

Another example of this contextualizing is found in the approach to property. In our society, if a person takes an item belonging to someone else, no matter how rich the owner, they are guilty of theft. In aboriginal society, the situation of both the victim and the offender would be taken into account. Nelson (1899) noted that:

> if a man borrows from another and fails to return the article, he is not held to account for it. This is because if a person has enough property to enable him to lend it, he has more than he needs (1899: 304).

One final aspect of the literature from this period is that, while often praising customary and traditional methods, it also includes recommendations for the accelerated assimilation of Aboriginal peoples as the answer to their 'problems':

> As rapidly as possible...the tribal organizations should be broken up and individual ownership of land and property encouraged and promoted (Blackmar, 1929: 655).

Similarly, McKenzie argues that to truly achieve freedom, the Native peoples must accept and internalize the ways of the white man, since it is the white way of life that is seen as being inevitable. As this writer puts it, "no one is free until he shares in the thought which controls his social life" (1914: 768).

This statement provides a natural transition point to the consideration of more recent research on customary law, for the statement above might characterize the tone of much of the current literature, albeit with a very different interpretation. While McKenzie

meant it as an argument to abandon custom and tradition, contemporary authors might see such a statement as a very strong argument for promoting First Nations customs and encouraging a return to traditional methods of social control and dispute resolution.

Recent customary law literature identifies the same principles and beliefs that were described in the earlier literature considered in the preceding pages. The main difference is that the inherently racist and assimilationist core that characterized the earlier literature is no longer evident; it has been replaced with active promotion of customary law as a means to improve the situation of First Nations peoples with respect to the criminal justice system.

The current literature regarding Aboriginal customary law differs little in substance from the earlier research discussed in the preceding section. The major tenets of community involvement, confession and apology, restitution and restoration of harmony, and the lack of a specific, codified body of common law are all prominently featured (see, for e.g. Coyle, 1986; McDonnell, 1992; AJI, 1991; Clark, 1991).

What is now being recognized is that while customary law is most often described with respect to its original context, recommendations are made for its application in a modern context. Hoyle notes that dissatisfaction with the current legal system has led many First Nations community members to assert that social control could be better maintained through the use of "traditional law" (1995: 150). At the same time, he points out that:

> it can neither be assumed that 'tradition' is a satisfactory base for modelling a justice system or that every aboriginal community would want such a focus. Native communities vary tremendously in the degree to which customary practices have been retained, changed or forgotten. Many

> aboriginal communities are characterized by fractious disputes over the role of 'traditional' values and practices in the ordering of daily life (1995: 152).

Similarly, McDonnell notes that there is little agreement among Cree people regarding customary law and its suitability for use in the contemporary context:

> customary practices have a quite different place and importance in the minds of different people in contemporary Cree society...There are very few [Cree] who could give clear substance to these values and customs, and fewer still who, in doing so, would find broad agreement in the population as a whole (1992: i - ii).

It is this emerging issue that has prompted the research described here. While there appears to be general agreement regarding the general nature of customary law, there is little information regarding who continues to hold traditional knowledge. In addition, there is a lack of knowledge regarding what these laws might look like when considered in the contemporary context. In the following sections, some of the issues currently being explored internationally and in Canada with respect to customary law will be examined.

CHAPTER TWO

Current Issues in Aboriginal Customary Law

2.1 - Aboriginal Customary Law in Other Countries

The idea of applying customary law to the criminal justice system is being explored in several areas of the world to a much greater extent than in Canada. Australian Aborigines and New Zealand Maoris have much in common with Canada's Aboriginal peoples; as stated in the Report of Manitoba's Aboriginal Justice Inquiry:

> All three nations suffer from a tragic over-representation of indigenous peoples in the adult and youth criminal justice system, including detention facilities. All three have few members of the indigenous population who work within the system as judges, lawyers, police or correctional officers. Aboriginal people in each country are making ever stronger demands upon the justice system to reform itself and to involve the indigenous community in its plans and operations (1991:299).

While the Australia Law Reform Commission (1991) has produced extensive reports describing Aboriginal customary law and examining the issue of establishing Aboriginal justice systems, recognition has not become implementation to any great extent.

The situation in New Zealand is not significantly different, although a special Aboriginal court system does exist. This system holds exclusive jurisdiction over property law such as the administration of Maori land holdings and estates, but has no criminal or civil authority. Maori communities are allowed to deal with some very minor offences such as public drunkenness and disorderly conduct, but the role of the communities in handling criminal justice continues to be very limited.

It is apparent that Australia, Canada, and New Zealand share a similar experience with respect to the situation of their Aboriginal populations in the existing justice systems. In all three countries there is increasing recognition of Aboriginal customary law, but little in the way of application to the administration of justice. There are, however, numerous examples of indigenous customary law existing side by side with Western legal systems; many of them may be found in African countries that once experienced colonization similar to that in the countries discussed above.

Perhaps one of the best examples of this mix of legal forms can be found in Botswana. The law of modern Botswana has many sources, including their current statutory law, Dutch and common law received in colonial times, and traditional or customary law. This country has been selected as an example due mainly to the fact that traditional law is still important in the day-to-day lives of many citizens and as a source of law actually applied in the country's courts (Barton, 1983:40). Modern Botswana has a rapidly growing industrial component, is becoming ever more urbanized, and an increasing segment of the population derive income from urban-industrial employment.

Botswana's government is a multi-party democracy modelled after the British parliamentary system. An interesting feature of the system is the House of Chiefs, made up of thirteen tribal leaders from across the country. The role of the House of Chiefs is very much like the Canadian Senate, giving comments on all proposed and amended legislation. The government is not, however, bound to follow their decisions.

The justice system consists of the Botswana Court of Appeal, the High Court (similar to Canada's Supreme Court), and Subordinate Courts (similar to provincial or