

THINKING ABOUT ABORIGINAL JUSTICE: MYTHS AND REVOLUTION

PATRICIA MONTURE-OKANEE

**MOHAWK NATION, PROFESSOR, COMMON LAW
FACULTY, UNIVERSITY OF OTTAWA***

I am going to stand because that was the way I was taught to do things. I would like to begin by saying I am very honoured to be in this territory, the territory of the Cree. This is the territory of Treaty 6. This territory has come to be known as both Saskatoon and Saskatchewan, but that is not how I understand where I am.

I never name beforehand the talks that I am asked to give because when I was brought up I was taught you speak from your heart with your mind. You have to double understand all things. I never really know what I am going to say when I am sitting down there waiting to come up here. I cheated this time because I am a little bit nervous because issues of criminal justice are so important to me. I have written down some things that I want to cover. It will be interesting for me to see just how many of them we actually get to.

I want to make it clear that I am not going to speak about Indian or Métis women. I have no expertise in either of these two topics. I do know that many of you are going to be looking at me saying, "What is she talking about now?" I am, I suppose, in the minds of some people, an "Indian" woman. In my mind I am *Haudenausaunee*.¹ At the same time, I also recognize that I have had the great honour of marrying into the Cree Nation and into Treaty 6. I understand that my marriage creates a new set of responsibilities and relationships to another nation of people.

I am Mohawk and that is one of the ways I understand my world. I certainly have no authority to speak on behalf of Métis women. They have never asked me to speak for them. They are quite capable of speaking for themselves. What I am going to talk about today are my own Mohawk woman thoughts, not so much on self-government, but on what justice is. Self-government is a very misused term. Justice is, perhaps, easier to understand. If we look hard at the oppression of Aboriginal people in this country, we will see that all of the oppression we have faced—from residential schools to section 12(1)(b) of the *Indian Act*,² from the removal of our children through child welfare practices to the exemption of the *Indian Act*

*Currently, Professor, Native Studies Department, University of Saskatchewan

from the purview of the federal human rights legislation,³ from the prohibitions against our ceremonies⁴ to the ban against lawyers representing us⁵—all share in common one fact. All oppression of Aboriginal Peoples in Canada has operated with the assistance and the formal sanction of the law. The legal system is at the heart of what we must reject as Aboriginal nations and as Aboriginal individuals. Although I have never experienced the mainstream system of law as a just system but only as an instrument of my oppression, I still believe that there ought to exist a relationship between law and justice. As law is so central to the oppression of Aboriginal Peoples in Canada, self-government alone will not correct the problems we face in our communities. We will still have relationships with the rest of Canada, and Canadian laws will continue to touch Aboriginal lives. To speak of separate Aboriginal justice systems only simplifies the discussion without accomplishing anything.

When I was thinking about what I was going to say this morning, I looked at the conference theme. I thought, "Getting It Together," now that is kind of "kicky"—I like that. What does this mean? What does this mean in real terms to me? What does it mean to get it together or, preferably, to have it together? Well, I think that in order to get it together, the very first thing we have to deal with is truth. What is the truth about who I am? That is why I started where I started, affirming the knowledge that I am a Mohawk woman. What is the truth about who you are and what is the truth about that which brings us into this room together? All of us, independent of our tribal affiliations or status as members of the "dominant" society must learn to think about ourselves in a decolonized way.

Standing in the way of both Aboriginal and non-Aboriginal peoples, when we try to think in a decolonized way, are a number of myths about the history of both this country and of Aboriginal Peoples. The first thing that we collectively must do is to dispel the myths that surround us. These myths perpetuate the conversations that we have about Aboriginal justice in Canada. The myths distort the conversations and our relationships continue to be dysfunctional. I first want to say that there is a myth about how difficult this task is. One of my elders taught me that in its vast complexity it is profoundly simple.⁶ It is as simple as I am and I am responsible. I understand my responsibilities to myself, to the Cree man that I married, to the children that we have made and brought into this world through the gift that I have as woman. I understand my responsibilities to my new relations in the Cree territory; to Mother Earth, on whom we walk and who nurtures all life; to Father Sky; to Brother Sun; and to Grandmother Moon, who watches over the women. It is just that simple. We are not trying to do a very hard thing. When we get to truly sharing an understanding, we will see that it is in fact quite simple.

The next myth to be dispelled involves the question of government power or jurisdiction. When Aboriginal people assert jurisdiction in matters of so-called criminal justice (which is not by any means how I conceive justice), we hear in response that there is a single system of criminal laws in Canada. Non-Aboriginal people fear the results of Aboriginal Peoples' asserting jurisdiction over criminal law matters.⁷ What should be heard is the simple plea of Aboriginal Peoples to have both the resources and the control to address the many problems that our communities now face. People must stop fearing the possible creation of many Aboriginal criminal codes. What Aboriginal people seek is the acceptance that there can be more than one valid and legitimate way to address disputes and wrong doings. Aboriginal Peoples do not wish to displace anyone else's right to be governed by the legitimate and properly consented to laws of their nation. Our challenge is not a challenge to your right to be in your own unique way, but a simple desire to follow our own ways. The creation of written criminal codes that merely mimic the dominant system's solution of social order is not what I am talking about when I talk about Aboriginal justice systems.

In reality, there are already many criminal law authorities in Canada. Yes, Canada has a single federal criminal code. We also have a number of other federal statutes that create a vast number of offences. The federal criminal code also passes certain authority over to the provinces, although this authority is not always expressly stated. We had one example earlier: gaming. There are other areas of provincial jurisdiction over offences such as the control of traffic and highways. The administration of justice, that is to say the organization of the courts and the appointment of judges, is shared between federal and provincial authorities, with provinces occupying the centre of this sphere. There exists both federal and provincial authority for policing. The Canadian system of justice is a very complicated system. I do not believe that word, unitary, describes it at all. Canadians do not question the general workability of the civil and common law traditions in this country. Why is the recognition of a third tradition of law such an impossible and unworkable one? To suggest that there is a single, unitary system of criminal justice in the first place in Canada is to perpetuate a dangerous myth that only supports the status quo. At the same time, this assertion of an existing unitary system forecloses the discussion about Aboriginal justice systems in a premature way.

The next step in our journey is to consider the myth that was dispelled when the *Charter of Rights and Freedoms* became a significant part of the supreme law of this land. The Charter has revolutionized the practice of criminal law, including the manner in which people are incarcerated in Canada. It has turned the entire legal system upside down, and inside out. To provide but one example,⁸ I was reading in *The Globe and Mail* yester-

day on the plane that Gerald Gall, an esteemed professor of law at the University of Alberta, was suggesting that in his next text on law he is going to comment on the fact that the courts are no longer necessarily open courts in Canada. More and more judges are granting bans on the publication of court proceedings. This prohibits, for a time, the media's ability to disseminate information about particular criminal trials. Canadian people have had their right to know what is happening in the courts infringed. This denies the principle that individuals shall receive a full, fair and public hearing. It challenges the value attached to the notion of deterrence—which is one of the justifications for the imposition of the criminal sanction—because others cannot be deterred if they do not know of those who are charged, what the charges were and what punishments were imposed. The Charter has turned what were age-accepted truths in Canadian law around on their heads. Criminal law has been “revolutionized” since 1982. Yet, the system of justice in Canada remains intact.

From my Mohawk point of view, Canadians have now begun to respect, or perhaps it is only initial acceptance, a principle of legal revolution. In my mind then, there should be no problem with a little bit of Aboriginal revolution. It is not going to hurt things or change things or shake up anything so badly that the country is bound to come apart at its seams. In fact, the Canadian criminal justice system has clearly failed to provide justice to Aboriginal Peoples and it is hard to imagine a situation where Aboriginal justice systems would not be an overall improvement. Even if we stumble and fall on this path to self-government, including Aboriginal justice systems, then lessons will be learned and success will be one step closer.

As Aboriginal Peoples, we frequently have our motivation questioned when we assert our rights. I think it is now time that the tables were turned and that we question the motivation of those who staunchly refuse to agree to the positive changes Aboriginal Peoples seek. Vested self-interest in maintaining status quo power relations on the part of individuals, institutions and the country as a whole must be factored into the discussions of the creation of Aboriginal justice systems.

The next myth also qualifies as a major personal aggravation. There is no such thing as an Aboriginal court. Courts are, by their very nature, adversarial. This was not the historic process whereby disputes and disturbances in our communities were resolved. I am not saying there is no such thing as Aboriginal jurisdiction over matters of justice. I firmly believe this jurisdiction exists. All I am saying is that I am not willing to run only one justice conversation with you, particularly when that conversation always ends with the establishment of small pilot projects, diversion initiatives, sentencing circles and the possibility, someday, of Aboriginal courts. I am

not willing to assume that is all we need to be talking about. Although sentencing circles, diversion projects and Aboriginal justice personnel within the mainstream system are all goals worthy of support in the short term, they require nominal energy, nominal commitment and nominal resources from the existing system. These kinds of initiatives are both inadequate and insufficient if the goal of our joint efforts is to ameliorate the existing oppression and discrimination that Aboriginal people face. At least in my Mohawk woman's view that is not what we are talking about.

I want to offer one example by way of explanation. We know that in at least one instance in Canada an Aboriginal person was convicted of a crime he did not commit. We also know that the fact Donald Marshall Jr. was a "Native person" was causal in this wrongful conviction.⁹ The Marshall Inquiry report documents—albeit they do not use the word racism—that the results of the trial and subsequent appeals of Donald Marshall Jr. were shaped by the court's bias. We can choose to believe that this example is an anomaly. I know that this is not the truth. Personal acquaintance with a number of Aboriginal prisoners in Canada leads me to the conclusion that many of them are wrongfully convicted. Not all of the individuals are fully innocent of the criminal acts for which they were convicted, but the racism of the justice system has had a harsh impact both on their sentences and on the seriousness of their charges. The fact that they are not "innocent" does not mean that no legal wrong has occurred. All these individuals, in my view, are "wrongfully convicted" in a moral sense of that phrase. There exists no legal remedy for a racist trial (which, by the way, can only have one outcome—a racist one). If we are content to accept only the parameters that the mainstream system is willing to provide (such as the Charter or diversion and sentencing circles), then we desert many Aboriginal people who are in need of our support and our creative remedial ideals. There are past, present and future wrongs that need righting, as well as preventing.

Perhaps we need to change the dialogue by injecting some new language and rejecting some old ideas. It is time to firmly reject the suggestion that alternative dispute-resolution practices mirror Aboriginal reality. Alternatives are merely that, small add-ons to the existing system, which stands ready with the full force of its adversarial and punishment-oriented values if the "nice" solution does not work.¹⁰ The path that I am advocating is a path on which revolution is possible.

It is not going to be an easy path for Aboriginal people to walk. It is no secret that many of our communities are very troubled. We only need think of the youth suicide rates; the rampant alcohol, drug and substance abuse; the over-incarceration; the impact of child welfare systems and residential schools; political abuses and misappropriation, and the abuse of Aboriginal women and of our children. Existing systems of Canadian law

are both implicit and complicit in this reality. Existing law is not the solution. Tradition is the solution. Recovering our distinct ways of being is the solution. That recognition is merely a philosophical statement, and bringing it down to the daily experience of all people in our communities is a monumental task. We need the space to have the conversation about solutions at the community level rather than having to engage in a lofty discussion at the political level about our legal rights.

As we turn to tradition, we must recognize that our social systems did not historically have to deal with the grave social ills that we presently face in our communities. For example, many historical records indicate that the abuse of women in many Aboriginal societies was almost nonexistent at the time of contact.¹¹ We cannot look to the past to find the mechanisms to address concerns such as abuse, because many of the mechanisms did not exist. The mechanisms did not exist because they were not needed. What we can reclaim is the values that created a system where the abuses did not occur. We can recover our own system of law, law that has at its centre the family and our kinship relations. We must be generous with ourselves and kind as well, as we discover how to live again as healthy and disciplined individuals. We must know that the dominant system of government will also be kind and generous to us as we heal from five hundred years of oppression. We must be patient with each other as we learn to live in a decolonized way again. This means that we, as Aboriginal individuals, must stop accepting the myth of white superiority and begin advocating truly Aboriginal responses. This means looking further than the mere creation of so-called Aboriginal or tribal courts. It means rejecting the *Indian Act* regime and the foreign system of relating to each other that was imposed.

I also have problems with the words that justice systems and legal systems use, because they mask the true relationship between Aboriginal law and the Aboriginal community. One example is the fact that words such as guilt, integral to the criminal trial process, do not have exact Aboriginal translations. Whenever I am struggling to understand tradition (that is to say, who I am), I always try to reclaim the meaning of the words in my own language. In the Mohawk language when we say law, it does not really translate directly to the "Great Law of Peace" as many of us have been told. What it really means is "the way to live most nicely together."¹² That is what law means to my Mohawk mind. When I think about courts, when I think about police, when I think about people's experiences at law school, or maybe constitutional negotiation—to really bait you—are these the experiences of law that reflect living nicely together? The Mohawk standard is the standard I carry with me and compare my experiences against. Living nicely together is an onerous standard.

The whole presumption in the mainstream system is that we need law because there inevitably and invariably will be disputes among people that are not resolvable. The mainstream system is based on the presumption that there will be conflict and that we need a system of coercion to correct that conflict. That is obviously not my Mohawk woman's view of what law is. Law is about retaining, teaching and maintaining good relationships. To come to this conversation about getting Aboriginal justice together, as soon as we start talking courts and we start talking constitution, when we start talking policing, we are defeated. The most important part of the dialogue that needs to take place is lost. We must start by recovering our Aboriginal notions of justice. As I understand this concept, it embraces a knowledge of who I am, an understanding of my responsibilities, which are both individual and collective, and only then a sense of what is fitting, right or fair.

The more reading and the more listening I do, the more I notice how much this conversation about Aboriginal justice is becoming solely a conversation about the mainstream system accommodating us. I do not want to be accommodated. It is truly an offensive suggestion. Offensive because in the long run I expect it will not make even a little bit of difference for the experiences my children will have. I want to be able to live my life, to have the faith that my children will live their lives, in the way of our law. That is the way to live most nicely together. What we need to look at is whose decision it has been to have a conversation about accommodation of individuals and about accommodating the existing justice system. Those people who have jumped into the conversation in the middle need to stop and have the honesty, the integrity and the kindness to walk back and understand what Aboriginal people mean when we say justice.¹³

Noel Lyon suggests that to persist in looking for ways to adopt the dominant society's criminal laws and processes to Aboriginal people perpetuates a very destructive breach of the fiduciary duty that is owed to Aboriginal Peoples by the Canadian governments.¹⁴ The idea of a fiduciary relationship will not be familiar to everyone. It is not a complicated idea, but at the same time its legal meaning is not precise.¹⁵ The duty owed to Aboriginal Peoples is a unique one. It is like no other duty owed in law. It is the duty that is owed by a person to another over whom they have power. Common examples of the relationship would be doctor/patient or teacher/student. In the case of Aboriginal Peoples, the duty owed by government arises out of our historic occupation of the land and the notion that the Crown must always act honourably.¹⁶ It seems to me that the concept of fiduciary duty or relationship is the key to moving the justice dialogue forward in a good way. Judging government action against the notion of a unique fiduciary relationship seems progressive in that it forces

the disempowerment of Aboriginal Peoples to the front and centre of the conversation. If the standard remains to be mere accommodation, not only is it potentially dangerous, it fails to focus the conversation on the power that certain people have to define; power that is based on the untrue belief in European (white) superiority.

The fact that mere accommodation has become the standard that Canada is willing to embrace in the face of overwhelming documentation of the wrongful treatment of Aboriginal people at the hands of the criminal justice system is a disturbing one. The accommodations made to date have had little impact on the rates of incarceration of Aboriginal people over the last decade. It is also my suspicion that the standard of mere accommodation is illegal and unconstitutional. It fails to give meaning to the "solemn promises" made in section 35(1) of the *Constitution Act, 1982*.¹⁷

I have two messages to share now that the myths that disturb me the most have been exposed as untruths. I have a message for Aboriginal people and I think this message was also delivered earlier. I am going to do it in a slightly different way. We are here as the original peoples; there is no doubt in my mind that we will continue to be here as the original peoples. There is no doubt in my mind that we have every right, every jurisdiction—moral, legal or otherwise—to assert and be who we are. Do not wait for anybody to pat you on the head and say "do it" before you pick up your responsibilities. When we have it together, we will do it. Go home, pick up your responsibilities and do it now. In particular, when you know of abuses—from political corruption to the abuse of women and children—occurring within your community or within your own family, do not turn the other away. Remember our law is family law. Exercise your responsibilities. Do not trust in a foreign justice system to solve those problems.

I also have a message to deliver to Canada and Canadians. As far as I am concerned the question is not Aboriginal justice systems or not. It is merely a question of when. Aboriginal justice systems are already happening. They will occur and there will have to be some form of reconciliation of the jurisdiction questions. We, the original people, will continue to make Aboriginal justice occur. It is merely a question of how long is it going to take. How long will the Aboriginal people of this country wait and how much will we be forced to suffer to be able to go back to that place where we live most nicely together? How much more pain and oppression will there be? Canada and Canadians have a unique role to play in the question of when Aboriginal justice systems will be fully recognized. Canada and Canadians only have the power to delay or facilitate. No matter how long it takes, Aboriginal people will reclaim and recover.

For non-Aboriginal people, I also want you to have the opportunity

to understand what self-government means to me. It is very simple. When we say it in my language it means I or we (depending on the context) are responsible. It boggles my mind to think that all of this constitutional debate, the number of conferences, the amount of federal money and federal energy spent trying to figure out what Aboriginal people want is merely the struggle to accept that we want to be responsible as Peoples. At the centre of our demands is one simple thing. I want and I need and I have the right to live as a responsible person in the way that the Creator made me, as a Mohawk woman. That is the only right I need. When I have the right to live in my territory as a Mohawk woman then I will have justice. I am disturbed by what we see in self-government, the kind of self-government where we are merely granted the authority of administering our own misery. This is not self-government as I understand it. Self-government requires the significant letting go of Canadian government power over the lives of Aboriginal citizens. I do not doubt that the release of power is a difficult thing.

So what does all of this mean? Well, I told you I was not going to talk about women. I fibbed, because we come right back to women. Women are at the heart of it. Women are at the centre of it. The way that women are treated, not only within Aboriginal Nations but within this country and any other one you want to choose, for me is the ultimate test of whether a country is democratic, is free, is just. Well, within these territories that have come to be known as Canada, I think we are failing miserably. We know about the abuses that are going on. And let's not just look at Aboriginal territories. The truth is that the abuse is not worse in Aboriginal communities. It may be focused on more and more easily documented, but it is not worse than in the rest of the country. That assertion is also a myth. The truth is that if rape occurs, if battering occurs, if any form of violence is present, if so-called women's work is devalued, all women are harmed and live with the knowledge that each of us is a potential victim. The abuse of women is not an activity that is quantifiable as better or worse.¹⁸

Women's involvement in justice work is not just a measure or standard of the success of justice initiatives, the Aboriginal women's role is much more central and essential. There is one message I have heard so many times in trying to figure out what justice is. I have heard the old people say, "It was grandmother who made the laws; it was grandfather who enforced them." So when talks occur among political leaders about the administration of justice or constitutional rights for self-government, you are not talking to the right people because you are not talking to the women. It was the women who had a fundamental role in making laws in our communities. I cannot stress enough that the answer lies with the women of the communities. I do not have much long-term use for national organizations,

be they organizations of chiefs or of women. We need to organize ourselves within our communities and worry less about national political venues. Involving women in a full, complete and respectful way in this process, be they Aboriginal or not, will again revolutionize what we think of law and justice. I do not believe that justice can even exist without women's central participation in all aspects of that system. Women are the doorway through which all life passes.

What I have come to understand is that justice is not a legal problem. It is a human problem. It is a women's problem and a men's problem. Every challenge and criticism that the legal system now faces—and there are many—is rooted in this reality. We have to carry that with us both in our minds and in our hearts because if we do not, we do not have it together.

NOTES

- 1 This is the word in my language that expresses my membership in the Six Nations Confederacy (as the English expressed it) or the Iroquois (in the French expression). We are the Oneida, Onondaga, Tuscorora, Seneca, Mohawk and Cayuga nations.
- 2 R.S.C., 1970, c. I-6.
- 3 *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 67.
- 4 *Indian Act*, R.S.C. 1886, c. 43, s. 114. In 1951, this prohibition (in revised form) was repealed. *Indian Act*, S.C. 1951, c. 29.
- 5 *Indian Act*, R.S.C. 1927, s. 141.
- 6 I pay my respects to Dr. Art Solomon for his vision and the gift he made to me when he shared this teaching.
- 7 I do not mean to create simple dichotomies of Aboriginal and not. In fact, the phrase Aboriginal is a legal fiction. We are, in truth, many nations with many ways of being. I struggle in a language that is not my own.
- 8 This by no means suggests that I have any particular opinion on this matter.
- 9 *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Province Nova Scotia, 1989).
- 10 For a detailed discussion, please refer to Patricia Monture-OKanee, "Alternative Dispute Resolution: A Bridge to Aboriginal Experience?" (Victoria: University of Victoria, Centre for Dispute Resolution, forthcoming).
- 11 For a fuller discussion please see, Patricia A. Monture-OKanee, "Reclaiming Justice: Aboriginal Women and Justice Initiatives in the 1990's." Discussion Paper prepared for the Royal Commission on Aboriginal Peoples, Fall 1992, 47 pages; revised as "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice," *Saskatchewan Law Review* 56(2) (1992): 237-66.
- 12 I am again grateful to my Mohawk friend, Tom Porter, of the territory of Akwesasne, for sharing this information with me.

- 13 A lot of this difficulty arise out of the fact that the conversation takes place in English or French only. It is not carried on in the language of Aboriginal people but in one of the two languages of our colonization. Part of the process of colonization is inherent in both of these languages. Those with the privilege of having either of those languages reflect their cultural reality do not see the contradictions that arise for those of us who are continually forced to negotiate, converse and discuss in a second and foreign language.
- 14 Noel Lyon, "A Perspective on the Application of the Criminal Code to Aboriginal Peoples in Light of the Judgment of the Supreme Court of Canada in *R. v. Sparrow*," *University of British Columbia Law Review* (Special Edition) (1992): 306-32 at 311.
- 15 See for example, Richard H. Bartlett, "The Fiduciary Obligation of The Crown to the Indians," *Saskatchewan Law Review* 53 (1989): 301-25; Michael J. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law," *University of British Columbia Law Review* 27:1 (1993): 19-49; W. R. McMurty and Alan Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective," (1986) 3 *Canadian Native Law Reporter* 19; Alan Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?" *National Journal of Constitutional Law* 2 (1991): 163-95.
- 16 *R. v. Sparrow*, [1990] 3 C.N.L.R. 160-88, 178 and 181.
- 17 *Ibid.*, 163 and 170.
- 18 In a previous article, I discuss the way racism is also an experience of violence. Please refer to Patricia Monture-Okanee, "The Violence We Women Do: A First Nations View." In *Contemporary Challenges: Conference Proceedings of Contemporary Women's Movement in Canada and the United States* (Montreal: Queen's-McGill Press, 1992), 191-200.