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LEGAL ANTHROPOLOGY IN THE FORMULATION OF CORRECTIONAL POLICY IN THE NORTHWEST TERRITORIES, CANADA

by

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INTRODUCTION

Complementary to the author's socio-legal research in the Northwest Territories (Finkler, 1973, 1976, and 1981a) and related writings on this subject (Finkler, 1981b, 1982a, 1982b, and 1982c), this paper addresses some of the pertinent issues and considerations inherent in the formulation of a framework for the recognition and application of traditional measures for socio-legal control and socialization in future corrections institutional policy and programs.

This discussion is timely for several reasons. First, the findings of the above research have confirmed the disproportionate incarceration of native peoples along with the increasing trend in institutionalization in sentencing. Notwithstanding territorial initiatives to provide native oriented institutional policy and programming, along with its current emphasis on the development of culturally relevant non-institutional options at the community level, doubts remain as to the effectiveness of their interventions with indigenous offenders and their ability to reduce and prevent the disproportionate incidence of native criminality.

This finding, in combination with current aboriginal development toward a more culturally grounded justice system within the context of land claims and political, socio-economic, and cultural self-determination, has generated a resurgence and demand for the recognition and accommodation of traditional customs and values. Specifically, in 1980, at the 2nd Session of the Legislative Assembly of the NWT, "a motion was adopted urging the Administration and the Department of Justice and Public Services to develop a strong law reform capability within the Department which will review and update existing territorial legislation, examine ways in which aboriginal customs, values and rights can be discovered, recognized and protected by territorial laws, and develop proposals for new legislation to meet the special needs and circumstances of northerners".

Furthermore, in its discussion paper on the development of a constitution for Nunavut, the proposed creation of a provincial type government and public institutions in the NWT which reflect and provide for the special needs and circumstances of Inuit and their culture, the Nunavut Constitutional Forum (1983) recommended it "continue to study the application of Inuit customary law in Nunavut, propose specific provisions for a Nunavut constitution and, with the results of that work, plan further for the overall administration of justice

within Nunavut" (p.23). Similarly, in its discussion of a draft proposal for an arctic policy during its third annual general assembly in Frobisher Bay in July 1983, the Inuit Circumpolar Conference also affirmed that its "future self determination requires national and international recognition of our economic, political, social and cultural rights and the right to our own judicial system".

If we are to respond to this general demand for the recognition of traditional aboriginal customs and values, within the context of the subject of this paper i.e. the formulation of a framework for the recognition and application of traditional measures for socio-legal control and socialization in future correctional policy and programs, essentially we need to establish whether such policy and programming will be partially or totally traditionally grounded. In other words, we need to ascertain whether the issue rests in undertaking system modifications to reflect the traditional indigenous system of social control while continuing to operate within the existing territorial correctional framework; or whether it entails the development of an entirely new system based on the traditional normative structure and system of sanctions. It should be emphasized that consideration of either policy focus must realize that whereas the emergence of culturally based justice policies and programming in southern Canada evolved in terms of addressing native needs as a minority group, the demographic reality of the NWT, with its majority native (63.2% in 1980) yet small culturally diverse population totalling 46,069 inhabitants in 1980, necessitates that northern justice policies and programs be primarily oriented to responding to the needs of the northern indigenous offender.

In order to establish whether sufficient grounds exist for the development of justice policies and programs partially or entirely reflecting traditional measures, as a first step, we need to examine the traditional indigenous system of social control. To this end, the assessment of studies in the anthropology of law provide the requisite information for policy making in terms of its description and analysis of the traditional aboriginal normative structure and mechanisms for dispute settlement. Anthropology's contributions and relevance to the study of law is clearly demonstrated by the range of its inquiry which includes the following:

"(1) What are the types of adjudicating or mediating agents operating in society?

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(2) What is the basis of their authority to exercise these roles in dispute settlement?

(3) Which disputes are amenable under specific conditions to negotiated compromise settlements and which require adjudication?

(4) Which procedures are taken for each type of dispute under given conditions? (This question implies inquiries into such aspects as apprehension of the accused, locale, evidence, etc.)

(5) How are juridical decisions enforced?

(6) What exosystemic functions and effects attach to legal processes? (This includes inquiries into the network of social, psychological, economic and political relationships between the parties, their representatives or supporters, and the authorities.)

(7) How does law change?" (Koch, 1969, p.16).

To this end, we will now proceed to examine anthropologists' description and analysis of the traditional system of social control of Inuit society, the target group of much of our previous research, as to its implication for future socio-legal policy. This documentation provides the terms of reference for the subsequent discussion on issues and considerations entailed in the formulation of a framework for the recognition and application of traditional measures for socio-legal control and socialization in future corrections institutional policy and programs.

I. THE TRADITIONAL INUIT SYSTEM OF SOCIAL CONTROL

With reference to the author's earlier review of the anthropological literature pertaining to the traditional Inuit system of social control (Finkler, 1976), the following summarizes the normative structure of Inuit society, the sources of conflict and the mechanisms for dispute settlement.

Normative structure

Traditionally, Inuit communities, such as the Caribou Eskimos, characterized by their small size and loosely

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structured groups of families, were "voluntarily connected by a number of generally recognized laws" (Birket-Smith, 1929, p.260). However, in reference to these customary laws, Birket-Smith, as well as Goldschmidt (1956) and Vallee (1962), stressed that these norms were not codified.

Though there were no written directives to guide or check a person's behaviour, certain rules and obligations were in evidence among most Inuit groups. In essence, these rules focused on a person's obligations with respect to hunting and the sharing of food, natural resources and material goods (Balikci, 1970; Birket-Smith, 1929). Similarly, Hoebel (1954), in his evaluation of beliefs and practices inherent within the Inuit system of social behaviour, established the existence of a number of underlying jural postulates and corollaries.

Specifically, these postulates expressed a multitude of taboos as well as beliefs, such as that no one should be a burden on the community; obligations concerning the sharing of natural resources as well as material goods; the affirmation of a person's individualism; male-female roles in addition to that of the family; and the need to be able to predict a person's behaviour. In Hoebel's opinion, these postulates constitute the bases of legal or quasi-legal principles and norms, whose violation may evoke a varying pattern of reactions and sanctions.

Sources of conflict

Balikci (1970), in his study of the Netsilik, indicated that the more common causes of conflict and tension evolved out of mockery, jealousy, laziness, and minor misunderstandings. Similarly, the social equilibrium of the community was disturbed by a thief or liar. However, Balikci concurred with Birket-Smith (1929) that intragroup theft occurred quite rarely, with the offender being regarded as an unpleasant person as well as a liar. We should note that Hoebel (1954) makes the distinction that among some Inuit, chronic lying was regarded as being as grave as homicidal recidivism.

The most frequent breach of the peace centred about the competition for women (Balikci, 1970; Birket-Smith, 1959). Significantly, Balikci and several other authors

(Hoebel, 1954; Steenhoven, 1962; Vallee, 1962) have stated that the most prevalent source of violence, ranging from assaults to murder or attempted murder, was the desire to abduct or steal a woman.

Murder, usually the culmination of the aforementioned escalation in rivalry over a female, was regarded as a serious violation of community norms (Birket-Smith, 1929, 1959). In addition to conflicts over females, Balikci (1970) revealed that excessive derision, bullying, or resentment occasionally resulted in extreme acts of aggression, including murder. Birket-Smith (1929, 1959) and Hoebel (1954) noted that only sorcery or witchcraft ranked with murder as a grave offence in terms of its ability to markedly disrupt and threaten the equilibrium of the entire community.

Reaction to conflict

Prior to our examination of the varying patterns of reactions to situations of normative or interpersonal conflict, it should be noted that the traditional system of social control was devoid of any authority for the administration of its customary laws (Birket-Smith, 1929). Furthermore, Birket-Smith stressed that the system of control did not aim at justice in its individual or collective response to conflict or deviance, but rather at restoring the peace within the community.

In our subsequent presentation of the patterns of reaction to conflict, we make the distinction, as did Weyer (1932), between individual and group action, where the type of action was contingent on whether the deviant act constituted a threat to the entire community or only to a particular individual.

A. Individual action

In situations of normative or interpersonal conflict of a minor nature, such as theft or abduction, Weyer (1932) found that group reaction was rarely invoked. Furthermore, in a survey of different Inuit communities, Weyer revealed that the usual course of redress by an offended party was through individual action. The options for individual action in response to stress and conflict are varied and will be discussed in some detail. However, we would like to point out that not all of these strategies or reactions fall within the processes of conflict resolution.

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The latter point becomes clear when we consider that one of the predominant reactions to stress by an individual was his withdrawal from the situation (Balikci, 1970; Graburn, 1969; Hall, 1864; the Honigmanns, 1965; Steenhoven, 1956a, 1956b). Another avoidance reaction, cited by Graburn, particularly in response to minor irritations, was simply to ignore the existence of the problem.

The skillful use of gossip and derision served as an informal means of showing disapproval of the actions of an offender, and further functioned as some control on his behaviour (Balikci, 1970). Furthermore, Hoebel (1954) and Steenhoven (1962) stated that derision was utilized decisively in the song duel, a formalized technique for conflict resolution between two disputants. Several researchers (Balikci, 1970; Birket-Smith, 1929, 1959; Graburn, 1969; Hoebel, 1954; Weyer, 1932) have also ascertained the existence of boxing, butting and wrestling as additional structured forms for the settling of disputes. In Balikci's opinion, the function and value of these regulated techniques for peacemaking, or what Hoebel has termed as juridical forms, is that it brought the normative or interpersonal conflict between two parties before the community, with its resolution determined through a single combat.

The most extreme, though frequent reaction, with or without community approval, in response to an escalation in interpersonal or normative conflict or in obedience to the duty of blood vengeance, was the act of murder (Graburn, 1969; Weyer, 1932). Murder, with its corollary, the blood feud, will be discussed more fully in our reference to patterns of group action.

B. Group action

Whereas individual reaction was the culmination of varied responses to private conflicts, group action was operationalized when an offender's behaviour jeopardized or undermined the social equilibrium of the community as a whole.

Deviant behaviour within an Inuit community frequently resulted in the alienation of the offender from the group, manifested in the camp's social or physical withdrawal from that person (Birket-Smith, 1929; Steenhoven, 1956a, 1962; Vallee, 1962). Steenhoven (1962) revealed that

this passive withdrawal could occur in reaction to the disruption of the community by acts of theft, lying, or laziness. Interestingly, Graburn (1969) cites the use of probation, characterized by the community's informal assessment of the probable recidivism of the disruptive behaviour, with the "probationary reprieve from community sanctions... in force only as long as the probationer exhibited accepted behaviour" (p.54).

A more grave reaction to an individual, whose acts disturbed the peace within the community as a whole, was his exclusion from the camp (Birket-Smith, 1959; Chance, 1966; Goldschmidt, 1956; Hoebel, 1954; Schuurman, 1967; Vallee, 1962). According to Graburn (1969), exile from the camp, with its suspension of social and economic support, was regarded as one of the most severe sanctions an offender could incur with death a possibility for failure to comply with the wishes of the group. Such drastic reaction to situations regarded as a menace to the community was invoked for such offences as the persistent violation of taboos, bullying, or the abduction of wives (Chance, 1966; Hoebel, 1954).

Hoebel (1941, 1954), in his extensive examination of Inuit law ways, ascertained the existence of several forms of homicide approved by the community as a whole in response to a situation of intolerable stress. In addition to the approved execution of an offender whose action constituted a menace to the stability of the community, where lesser sanctions had proved ineffectual, other forms of acceptable homicide were infanticide (Balikci, 1970; Boas, 1907; Hoebel, 1941), invalidicide (Boas, 1907; Hoebel, 1941, 1954), senilicide (Boas, 1907; Hoebel, 1941, 1954), and suicide by the aged with or without assistance (Balikci, 1970; Boas, 1907; Hoebel, 1941, 1954). According to Hoebel (1941), the rationale for the acceptability of the latter forms of homicide emanated from the belief "that only those may survive who are able (or potentially able) to contribute actively to the subsistence economy of the community" (p.670).

At this juncture we would like to reiterate that individual reaction to conflict, resulting in homicide, constituted a private wrong obliging the victim's kinsmen to exact blood vengeance for the murder

(Birket-Smith, 1929, 1959, Boas, 1888; Hall, 1864; Hoebel, 1941, 1954). However, our discussion will illustrate the differences in the patterns of homicidal reaction that evolved through group consensus to rid the camp of a troublemaker as opposed to similar action by one party in a private dispute.

Whereas an individual who murdered several persons in one incident may have been regarded with a certain amount of esteem within the community, recidivist murderers(Hoebel, 1941, 1954), excessively belligerent or obnoxious individuals (Balikci, 1970; Boas, 1888, 1907; Hoebel, 1941, 1954), insane persons (Balikci, 1970 Steenhoven, 1959, 1962), evil sorcerers (Balikci, 1970; Hoebel, 1954, Steenhoven, 1959, 1962), and even chronic liars (Hoebel, 1954), whose actions severely undermined the equilibrium and peace of the community, incurred the punishment of death.

In situations where the actions of one of the aforementioned offenders pose a grave threat to the entire camp, an informal gathering of the group occurs to deliberate as to what action is deemed necessary when other sanctions have failed to deter the undesired behaviour (Balikci, 1970; Hoebel, 1941, 1954). Though the Inuit community is devoid of forensic institutions such as the court with its trial, Gluckman (1965) refers to this informal gathering, involved in the rational discussion of the situation, as an example of a proto-judicial process. Furthermore, Gluckman and others (Balikci, 1970; Hoebel, 1941 1954; Steenhoven, 1959) have determined that a crucial aspect in the camp's deliberations is the presence of, and consultation with, the offender's relatives.

The decision to execute the offender is arrived at through a group consensus, with blood vengeance being avoided as a result of the community's sanction of the act and further ensured through the selection of an executioner from the ranks of the offender's close relatives (Balikci, 1970; Boas, 1907; Hoebel, 1949, 1954). Therein lie the main differences between private and public homicide.

Reflections on the system of social control

Generally, the prevailing social climate within Inuit society, devoid of a formalized system of social control,was that of order except for the actions of those who risked deviation from the norm (Ferguson, 1971; Hoebel, 1954; Service, 1966). In Hoebel's opinion, the major factor contributing to this general state of order and peace has been the homogeneity of the Inuit community wherein the informal mechanisms of social control were highly effective in a society characterized by primary relationships.

> Furthermore in our discussion on the patterns or reaction to normative and interpersonal conflict, it was quite evident that the traditional system of social control was operationalized to restore the peace or social equilibrium within the camp rather than to administer punishment or seek justice (Birket-Smith, 1959; Hoebel, 1954; Steenhoven, 1959). In addition, Steenhoven (1956b) noted that the absence of legal concepts and notions about crime, familiar to European thought, is revealed by the fact that traditionally, no words existed in Inuktitut for law, crime, or justice.
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> Another distinguishing feature of the traditional control system was its flexibility in reaction to conflict, dependent on varying personality and situational circumstances (Balikci, 1970; Goldschmidt, 1956, 1974; Graburn, 1969; Steenhoven, 1956a). According to Goldschmidt, this flexibility emanates from Inuit belief that their reaction must be weighed against the adverse effects these measures might have upon the social solidarity of the community and social utility of the offender. (Finkler, 1976, p.10-12).

In summarizing the previous anthropological literature the system of social control in traditional Inuit society was one whose values stressed intra-group cooperation and avoidance of interpersonal conflict. The aim in dispute settlement was to resolve the peace and social equilibrium of the community as opposed to seeking justice or punishment. This process was characterized by its flexibility, tolerance and pragmatism wherein the determination of sanctions was not preoccupied with the question of guilt or responsibility, but rather in curtailing unacceptable behaviour and preventing recidivism. Furthermore, reaction to conflict, albeit without the existence of formalized institutions for socio-legal control, entailed an assessment of the offenders personality and situational circumstances, demonstrating an individualized approach to the treatment of offenders without necessarily isolating him from society and refraining from invoking sanctions more disruptive than the crime itself.

II. A FRAMEWORK FOR THE RECOGNITION/APPLICATION OF TRADITIONAL MEASURES FOR SOCIO-LEGAL CONTROL AND SOCIALIZATION IN FUTURE CORRECTIONAL POLICY AND PROGRAMS

In focussing on the recognition/application of the traditional normative structure and sanctions in future correctional policy and programming, the previous description and analysis of traditional Inuit system of social control provides the terms of reference for the following discussion on considerations in policy formulation and alternative approaches to correctional policy and programs. However, I should point out that while my discussion continues to be primarily directed at the possible recognition and application of traditional Inuit lawways in future justice policies, the methodology in our approach to this issue could be readily applied with respect to Dene society. Furthermore several of the issues and policy directions outlined would apply to the

northern indigeneous population as a whole.

A. Considerations In Policy Formulation

While past studies in the anthropology of law have provided the requisite background toward the formulation of a framework for traditionally grounded justice policies, additional field research is required to assess prevailing community views on this matter. Specifically, responses are necessary to such research questions on the extent to which traditional law ways are still practiced in northern communities, as well as distinguishing where they continue to exist by variations in community size, ethnic composition, level of homogeneity, isolation, and general traditional orientation, including where traditonal family/kinship based authority structures are still maintained. Furthermore, particularly in regards to corrections, we need to establish the degree of acceptance to retain some traditional harsh or physical punishments and whether their retention is required to support the recognition and application of customary law.

However, any proposed research in this area would have to assess the effects of accelerated social change and development in northern Canada on the traditional measures for socio-legal control For example, the impact of southern influence and presence in the north has resulted in its imposition of Anglo-Canadian law and formalized agencies for socio-legal control, along with a decline in primary group to relationships, traditional family/ kinship based authority structures, and the increasing incidence of native criminality. Furthermore, there are indications that Inuit are becoming less tolerant toward maintaining offenders in their community and more reticent to participate in socio-legal control. These and other recent developments pose several difficulties to adapting traditional lawways to a drastically altered indigeneous society.

Nevertheless, at a general level, future field investigations on these questions and related issues will enable us to ascertain the needs and advantages of a plural legal system, and more specifically, provide us with concrete guidelines for a framework for traditionally grounded values and measures in correctional policy and programming. While my socio-legal research in the NWT has not been specifically directed at measuring the prevailing indigeneous views on this question, my preliminary thoughts on this subject lead me to believe that we are essentially looking at the merits of two approaches to correctional policy and programming, varying in their level of recognition and application of traditional lawways.

B. Alternative Approaches to Correctional Policy and Programming

Briefly, the first alternative approach or model essentially entails specific modifications or refinements to reflect and accommodate aspects of traditional indigeneous social control within the existing territorial correctional framework. Briefly, considerations for such an approach may entail legislative reform of the An Ordinance Respecting Corrections Services, wherein the section pertaining to the purpose of corrections would be amended to reflect the recognition of the rights of aboriginal offenders through the provision of differential treatment based on different cultural needs. Such a recognition clearly acknowledges the demographic reality of the NWT and mandates corrections services to provide traditional culturally grounded programming primarily oriented to responding to the need of the northern offender. The implication for programming would be for a greater emphasis throughout the system for "group self determination and the fostering of cultural revitalization and positive self concept" (Newby, 1981, p.62). While the system's present thrust of native oriented institutional policy and programming continues to be primarily delivered by regional facilities, eg. the Baffin Correctional Centre, given the limited development of the range of socio-legal services in the NWT it would be advantageous to revise the Ordinance to include the designation of bush or wilderness camps or outposts as correctional institutions. This would facilitate the increasing emphasis to contract natives to provide correction services:

Directions toward the implementation of more culturally grounded institutional programming, a recogniton of the special needs and circumstances of northern indigeneous offenders, should include the following:

- increasing institutional recognition and support of immate requests to persue or discover traditional cultural and spiritual beliefs;

- provision of innovative, culturally relevant, intensive short term programs embodied in outward bound, wilderness or survival programs that facilitate the acquisition of traditional skills, and a sense of self worth, along with emphasizing an inmate's responsibility and accountability for his behaviour;

- as an alternative to conventional institutional alcohol treatment programs, the in-house utilization of culturally appropriate alcohol treatment programs, developed and delivered by indigenous persons;

- provision of vocational and educational training directly relevant to life on release, or the increasing utilization of community based educational and vocational, as well as recreational and therapeutic resources where appropriate;

- increased adoption of a more culturally relevant, holistic therapeutic approach in individual and group counselling;

- availability of an effective classification scheme for matching offenders and programs, with increased attention on pre-release planning;

- emphasis on the recruitment and training of indigenous staff balanced with ongoing initiatives in cultural sensitization for non-native staff;

- commitment by indigenous communities, groups, as well as native organizations to actively participate in the conceptualization and delivery of culturally relevant correctional policy and programming for native offenders; this entails their access into justice planning and programming through mechanisms such as citizen advisory committees (Finkler, 1982 c, p. 19-20).

The above culturally grounded policy/programming orientation constitutes a recognition, while not necessarily a total application of the traditional approach to the individualized, flexible and tolerant treatment of offenders with its focus on reducing their isolation from society through facilitating the community's access and involvement in the rehabilitative process.

In contrast to the first approach, the development of an entirely new correctional system based on the traditional normative structure and system of sanction, would be legislatively entrenched outright not only in the Corrections Ordinance but throughout the penalty provisions of other territorial legislation. Specifically as in Greenland, through codification, the Inuit's individualized, flexible, tolerant, and pragmatic approach to the treatment of offenders without necessarily isolating them from society and refraining from invoking sanctions more disruptive than the crime itself or be unnecessarily bound by reacting to the gravity of the offence, can be integrated into the sanction provisions of several ordinances. The traditional emphasis on peace maintenance as opposed to seeking punishment or justice with the desire to rehabilitate the offender and to protect society can be included. Within this legislative framework, confinement to an institution is seen as a last resort with greater emphasis placedon non-institutional measures toward maintaining an offender in community. In time, similar revisions may be undertaken to the Criminal Code which would more readily reflect traditional lawways. In regards to institutional models within this appreach, in addition to the merits of considering the aforementioned directions in culturally grounded institutional programming, they could be patterned along the lines of the Baffin Correctional Centre, whose program is primarily oriented for and delivered by Inuit.

The foregoing represents some preliminary thoughts on this subject. Whether the implementation of any of the above approaches will have the intended effect of crime prevention and reducing

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recidivism remains to be seen. However, their application will immeasurably reduce the negative or harmful effects of incarceration for indigenous offenders, and morever, focus on the community's responsibility for socio-legal control.

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