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Reviving Restorative Justice Traditions?

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Abstract

I entitled this chapter with a question because of the complexity of the issues involved and the unresolved matters that continue to be debated among restorative justice advocates. Much of the debate over restorative justice 'traditions' centres around claims that restorative justice draws on traditional processes for resolving disputes among indigenous peoples and on processes in the western world which were eroded from the twelfth century onwards and were gradually supplanted with the modern state. Yet there are serious historical and factual questions that need to be addressed before we can assume an Arcadian past where restorative justice ruled supreme. Are there restorative justice traditions to be revived? And should they be revived? Like most complex matters, a simple answer to these questions is neither possible nor desirable.

Reviving Restorative Justice Traditions?

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Introduction

I entitled this chapter with a question because of the complexity of the issues involved and the unresolved matters that continue to be debated among restorative justice advocates. Much of the debate over restorative justice 'traditions' centres around claims that restorative justice draws on traditional processes for resolving disputes among indigenous peoples and on processes in the western world which were eroded from the twelfth century onwards and were gradually supplanted with the modern state. Yet there are serious historical and factual questions that need to be addressed before we can assume an Arcadian past where restorative justice ruled supreme. Are there restorative justice traditions to be revived? And should they be revived? Like most complex matters, a simple answer to these questions is neither possible nor desirable.

The particular development of restorative justice in the later decades of the twentieth century in North America, Australia and New Zealand help to explain the links made between restorative justice and indigenous societies. Early developments in restorative justice in Australia, New Zealand and Canada based their approaches on connections to indigenous cultures. Family Group Conferencing in Australia and New Zealand was said to have been inspired by Maori traditions. Sentencing circles began in Canada in the 1990s in response to indigenous demands for more effective sentencing, while American 'peace-making' criminology also drew inspiration from native American traditions.

The search for origins of restorative justice in indigenous traditions provided an important rhetorical tool to distinguish restorative justice traditions from modern state-centred systems of punishment. Similarly, in relation to the development of punishment in the West, it has been argued that the processes for ensuring that offenders made-up for wrong doings through restitution to the victim were eroded as the state assumed a central role in prosecuting and punishing offenders.

The broad argument is that over the longer period of human history the state assumed the function of punishment only relatively recently and that, previously, societies functioned well with restorative forms of sanctioning. Restorative methods of dispute resolution were dominant in non-state, pre-state and early state societies: individuals were bound closely to the social group and mediation and restitution were primary ways of dealing with conflict. Further, these pre-modern, pre-state restorative forms of sanctioning can still be found practiced in indigenous communities today.

There are a number of assumptions underpinning this story of restorative justice. Most important for the current discussion are the simple dichotomies: non-state sanctioning is restorative (and, conversely, state imposed punishment is not) and indigenous societies and pre-modern societies do not use utilise retributive forms of punishment as their primary mode of dispute resolution. Adding to the difficulties of separating

fact from fiction have been some grandiose claims made by advocates. For example, John Braithwaite claimed that restorative justice was grounded in traditions of justice from the ancient Arab, Greek, and Roman civilisations through to the public assemblies of the Germanic peoples, Indian Hindu, ancient Buddhist, Taoist, and Confucian traditions. He concluded that 'restorative justice has been the dominant model of criminal justice throughout most of human history for all the world's peoples' (Braithwaite 1999:1).

As Daly (2002:62) has noted, these extraordinary claims need to be seen in a particular context. They are not 'authoritative histories' of justice, but attempts to construct origin myths about restorative justice. If it can be established that the first form of human justice was restorative justice, then advocates can claim legitimacy for contemporary restorative justice alternatives to state-sponsored retributive justice.

Of course, not all claims about the historical origins of restorative justice are so all-encompassing. Johnstone (2002) has noted that proponents do acknowledge some problems with ancient forms of restitution, but emphasise their advantages over systems of state punishment. 'Most importantly, they argue, pre-modern people saw clearly what has become obscured to us: that crime is at its core a violation of a person by another person' (Johnstone 2002:40). Thus, the primary purpose should be to persuade offenders to acknowledge their responsibility for harm and to make restitution. Although the development of a state-based system of punishment has led to some better outcomes, such as greater equality before the law, it also resulted in the loss of community-based mechanisms of crime control, the neglect of victims and the loss of communally educative, constructive and reintegrative responses to crime and punishment.

The search for restorative justice in indigenous traditions of dispute resolution has also lead to claims which grossly over-simplify indigenous cultures. As Daly notes, the 'reverence for and romanticisation of an indigenous past slide over practices that the modern "civilised" Western mind would object to, such as a variety of harsh physical (bodily) punishments and banishment' (Daly 2002:62). Part of the interest in indigenous forms of justice derives from the renewed political assertion of rights by indigenous groups in the former British 'settler' colonies of North America, Australia and New Zealand from the 1970s onwards. Indigenous demands for recognition of customary law and rights brought attention to indigenous modes of social control, and indigenous leaders themselves would often articulate their claims for indigenous law within the language of restorative justice.

The Navajo Nation in the USA provide an example of the rejuvenation of indigenous law. A revival of Navajo justice principles and processes began in the 1980s. The Navajo customs, usages and traditions came to form what has been called the Navajo common law (Yazzie and Zion 1996:159). The Navajo system is based on peacemaking, described as a healing process aimed at restoring good relationships among people. Navajo methods seek to educate offenders about the nature of their behaviours, how they impact on others, and to help people identify their place in the community and re-integrate into community roles. 'Peace-making is based on relationships. It uses the deep emotions of respect, solidarity, self examination, problem-solving and ties to the community' (Yazzie and Zion 1996:170).

However, indigenous processes for maintaining social order and resolving disputes are diverse and complex. The United Nations estimates there are 300 million indigenous peoples globally, living in 70 nations spread over all continents. One might think that this basic fact should caution claims made about indigenous restorative justice practices. The Yolgnu people of Arhnemland in Australia and the Inuit of the Arctic Circle may have quite similar historical experiences of colonisation and subsequent social and political marginalisation, but their traditional social processes of resolving disputes are not necessarily 'restorative' simply because they are indigenous peoples.

Given the diversity of indigenous cultures it is not surprising that there are a variety of sanctions used by indigenous peoples within their specific cultural frameworks. Certainly in most cases these sanctions are by definition 'non-state'. However, are they restorative? Not surprisingly, some sanctions are 'restorative', in the sense that a modern proponent of restorative justice would accept, and some, clearly, are not. Indigenous sanctions might include temporary or permanent exile, withdrawal and separation within the community, public shaming of the individual, and restitution by the offender and/or their kin. Some sanctions may involve physical punishment such as beating or spearing.

There are a number of lessons to draw from this. Firstly, indigenous societies deploy a range of sanctions depending on the seriousness of the offending behaviour. The definition of 'seriousness' will arise from specific cultural frameworks. In terms of traditional sentencing goals we could legitimately characterise these as retribution, deterrence, public denunciation, restitution and reparation. Certainly, restitution to the victim is an important goal but it would be incorrect to see it as the only the goal. Physical punishments seem to display a strong element of retribution.

Secondly, many of the sanctions are based on avoidance rather than confrontation between offender and victim. Temporary or permanent exile of the offender, or enforced avoidance between the offender and the victim, may certainly restore harmony to the community but it is not a process which would normally find favour with restorative justice advocates. It is certainly not a process that is based on a principle of reintegration.

Restorative justice has had a tendency to romanticise indigenous dispute resolution. Blagg (1997, 2001) has argued that this romanticisation is a type of Orientalism – a phrase referring to the way the West develops a complex set of representations for constructing and understanding the 'Other'. In this case restorative justice discourses have come to construct indigenous justice mechanisms which are devoid of political and historical contexts.

Through the Orientalist lens, distinctive and historically embedded cultural practices are essentialised, reduced to a series of discrete elements, then reassembled and repackaged to meet the requirements of the dominant culture (Blagg 2001:230).

¹ The exception might be in post colonial societies where the dominant indigenous group ensures state control through exclusion of other minorities (for example, Fiji), but even here it is likely that international pressure will ensure that the state legal system is one at least resembling something workable to the interests of the West (Findlay 1999).

Ironically, the reconstruction and appropriation of idealised indigenous modes of social control and governance by restorative justice advocates may serve to further disempower indigenous political claims for self-determination.

As indigenous people struggle with modern nation states over fundamental rights to self governance, restorative justice advocates may see their own agenda for justice reform as more important. From this perspective even the very notion of 'reviving' indigenous traditions may seem patronising to indigenous groups engaged in long historical struggles to have their rights to land, law and culture respected.

Restorative Justice Mechanisms and Indigenous Participation

There are many forms of restorative justice currently being practiced in a variety of countries. This section of the chapter will discuss some problems in the interaction between restorative justice practices and indigenous people. It seems clear from the experience in Australia that family group conferencing and youth justice conferencing, as examples of a restorative justice approach, have not always had a beneficial outcome for indigenous people (Cunneen 1997). As Blagg has noted,

While references to pre-modern forms of dispute resolution liberally embellish the texts of many restorative justice advocates, the actual practices of conferences tend to be highly modernistic in content, privileging established forms of justice discourse, official modes of communicative reasoning, and reflecting non-Indigenous patterns of community association (Blagg 2001:231).

Identifying the reasons for lack of indigenous participation in conferencing allows us to explore broader questions about what we might expect from the 'promise' of restorative justice and its capacity to deliver on that promise for indigenous people.

First, there is a need to understand the relationship between indigenous peoples and the state. Although restorative justice advocates argue against state-centred retributivist punishment, in practice, restorative justice is often firmly embedded within the formal justice apparatus. The problem for indigenous people is that the state may be seen to lack legitimacy. A restorative program initiated and controlled by the state may be viewed with suspicion by indigenous peoples, who see the state in terms of its colonial functions. The state is synonymous with government agencies that forced people onto reservations, denied basic citizenship rights, forcibly removed children, enforced education in residential schools, banned cultural and spiritual practices, and imposed an alien criminal justice system (Zellerer and Cunneen 2001:246-247).

While the creation of restorative programs within a legal framework and through centralised government agencies may be seen as an achievement by some restorative justice advocates, it may create specific problems for marginalised indigenous communities who seek to maintain and develop their own justice initiatives. In short, although both indigenous groups and restorative justice advocates may seek to alter traditional state practices of punishment, the political outcomes they are seeking to achieve cannot be assumed to be identical.

Secondly, we need to consider the relationship between culture, subjectivity and identity. There is a tendency in the restorative justice literature to see 'victim' and 'offender' statuses as uncomplicated and homogenous categories. The assumption is that we all subjectively experience these categories in identical or, at least, similar ways without any inherent complexity. Yet indigenous people, like all people, will subjectively experience the restorative justice process through the lens of their culture. How they conceptualise being a victim or offender will be determined by a range of experiences and cultural understandings.

The fact that some indigenous cultures use separation/banishment between offender and victim suggests that subjective experiences of a restorative justice model will be quite different to non-indigenous participants. Patterns of kinship authority will also play a fundamental role in the way individuals will react and interact within a process like a conference. There is ample evidence of the cultural difficulties and disadvantages indigenous people face in the formal legal process and the same problems may be reproduced in restorative justice programs (Cunneen 1997). These difficulties partly derive from a range of cultural and communicative (verbal and nonverbal) differences which govern who can speak and when. The failure to understand and respect indigenous structures and processes for inter-personal communication can lead to further 'silencing' of an indigenous voice in the process.

Punishment and Postmodern Hybridity

The simple dichotomy posed is between a pre-modern, pre-state restorative justice, and a modern state's model of retributive (and rehabilitative) punishment. Perhaps a more useful conceptualisation is to see the current developments in restorative justice within a framework of hybridity that is neither pre-modern nor modern. By 'hybridity', I am referring to transformations in punishment, similar to a form of 'fragmented' justice or 'spliced' justice, where traditional legal bureaucratic forms of justice are combined with elements of informal justice and indigenous justice (Blagg 1997, Daly 2002).

Thinking about restorative justice within the context of hybridity provides us with the opportunity to ascertain some of the more complex answers to questions regarding the possibility of 'reviving' restorative justice traditions, particularly as they relate to indigenous peoples, and the forms such revival might take. There are both pessimistic and optimistic accounts of where hybrid forms of restorative justice might lead. I present both arguments below.

A Pessimistic View of Hybridity

A pessimistic reading of current developments is that in many cases restorative justice programs have been introduced within frameworks emphasising individual responsibility, deterrence and incapacitation. Thus, there may be elements of restorative justice, retribution, just deserts, rehabilitation and incapacitation all

² It is tempting to argue that the hybridity is *postmodern*. However, there has been an ongoing debate over whether contemporary punishment in western societies should be conceptualised as late modern or postmodern (Garland 1995, Hallsworth 2002). How the concept of hybridity fits within this debate is an issue in itself.

operating within a particular jurisdiction at any one time. For example, it has been argued that this is a fair characterisation of what occurred in the introduction of youth justice conferencing in Australia during the 1990s (Cunneen 1997).

Some form of conferencing operates in all Australian jurisdictions and, along with New Zealand, Australia is regularly upheld as an example of restorative justice programs in action. Yet, as I have noted elsewhere, (Cunneen 2002), during the late 1990s and early 2000 the Australian Government was criticised by four United Nations human rights monitoring bodies for possible breaches of international human rights conventions because of the operation of 'three strikes' mandatory sentencing legislation for juveniles, particularly indigenous young people, in a number of Australian jurisdictions. Other research has consistently shown that indigenous young people do not receive the same restorative justice options as non-indigenous young people and are more likely to be processed through interventions of arrest and court appearance (Cunneen 1997, Blagg 2001). A paradoxical outcome, then, is that restorative justice is available to non-indigenous young people while indigenous youth are subject to the formal mechanisms of non-indigenous state punishment.

Some discussions on postmodern penality are useful for contextualising the relationship of restorative justice to traditional modes of punishment. Pratt (2000), for example, has discussed the return of public shaming and the resurfacing of a premodern penal quality. He also notes the development of other phenomena that would seem out of place within a modern penal framework, including boot camps, curfews and the abandonment of proportionality (2000:131-133). O'Malley (1999) has also discussed the 'bewildering array' of developments in penal policy, including policies based on discipline, punishment, enterprise, incapacitation, restitution and reintegration – policies which are mutually incoherent and contradictory. In this context, state-run restorative justice programs need to be seen within the totality of policing and criminal justice strategies. These strategies increasingly involve a range of inconsistencies in punishment, from programs which hark back to a nostalgic past (emphasising either discipline or 'shaming') while others emphasise individual responsibility (just deserts and incapacitation).

According to O'Malley (1996), state justice programs which allow 'government at a distance' have been attractive and include a re-emphasis on 'community-based' processes. These have involved apparently indigenous forms of control where they are seen as complementary to the broader aims of government. The attempt is usually made to appropriate certain aspects of indigenous forms of governance and to ignore others seen as irrelevant or inappropriate.

We can understand these processes operating in the context of a greater *bifurcation* of existing justice systems. For example, conferencing models have been introduced in contexts where juvenile justice systems are increasingly responding to two categories of offenders: those defined as 'minor' and those seen as serious and/or repeat offenders. Minor offenders benefit from various diversionary programs involving restorative justice methods. Serious and repeat offenders are ineligible for diversionary programs and are dealt with more punitively through sentencing regimes akin to adult models. The paradox for indigenous people is that they are more likely to find themselves on a non-restorative pathway into the justice system.

Pathways into the justice system are increasingly determined by the prediction of risk. Risk analysis and risk prediction becomes critical for determining how individuals are identified, classified and managed, and whether they are diverted to restorative justice processes like conferencing. Thus, strategies of actuarialism, the prediction of risk, and incapacitation (like mandatory imprisonment) can be seen as complementary to restorative justice, and co-existing within a single system of criminal justice. Risk assessment becomes a tool for dividing populations, between those who are seen to benefit from restorative justice practices and those who are channelled into more punitive processes of incapacitation.

Issues of bifurcation and risk assessment are fundamental to understanding indigenous peoples experience of restorative justice within state criminal justice systems. The risk assessment tools used in countries like Canada and Australia (such as the Youth Service Level Case Management Inventory) disadvantage indigenous people. There is a strong focus on individual factors to predict risk. Factors such as age of first court order, prior offending history, failure to comply with court orders, and current offences are all used to predict risk of future offending. A range of socio-economic factors are also connected to risk, including education (such as 'problematic' schooling and truancy) and unemployment. The individual 'risk' factors are decontextualised from broader social and economic constraints within which young people live. This is particularly problematic for indigenous people who are among the poorest and most marginalised groups within society.

Not surprisingly, studies of recidivism, using a risk analysis framework, draw the following conclusions:

Over time, the probability of those juveniles on supervised orders in 1994-95 who are subject to multiple risk factors (eg, male, indigenous, care and protection order) progressing to the adult corrections system will closely approach 100 per cent (Lynch et al 2003).

Like many such studies, the above research identifies the most 'robust' characteristics for predicting repeat offending – and political minority status (in this case being indigenous) at the forefront. For governmental regimes that attempt to balance imperatives of 'evidence-based' programs and more punitive law and order policies for recidivists, it means that indigenous young people are seen as the 'problem cases' who are unlikely to respond to the opportunities offered by restorative justice.

An Optimistic View of Hybridity

An optimistic account of the interaction between indigenous demands for the development of their own justice systems, the work of restorative justice advocates and the changing face of state-controlled punishment is that new positive forms of hybrid justice can be created which are consistent with the principles of restorative justice. In this context, new spaces are created wherein indigenous communities can formulate and activate processes derivative of their own particular traditions and where scepticism about state-imposed forms of restorative justice can be replaced with organically connected restorative justice processes that resonate with indigenous cultures.

What we have is the opening up of 'liminal spaces' (Blagg 1998) where dialogue can be generated, where hybridity and cultural difference can be accepted. This vision of restorative justice is emancipatory in a broader political sense, whereby restorative justice is not only a tool of criminal justice, it is a tool of social justice. As I have stated elsewhere, hybridity can involve a re-imagining of new pathways and meeting places between indigenous people and the institutions of the coloniser – a place where the institutions of the coloniser are no longer taken for granted as normal and unproblematic, where the cultural artefacts of the colonisers (ie the criminal justice system) lose their pretension to universality. In this context, restorative justice provides an opportunity for decolonisation of our institutions and our imaginations and a rethinking of possibilities (Cunneen 2002).

A significant body of research indicates that where Aboriginal community justice initiatives have flourished there have been successes in reducing levels of arrests and detention, as well as improvements in the maintenance of social harmony (for an overview see Cunneen 2001). The success of these programs has been acknowledged as deriving from active Aboriginal community involvement in identifying problems and developing solutions. These solutions can be seen within the context of restorative justice. They cover the range of criminal justice practice:

- offender programs such as indigenous men's programs which target family violence
- indigenous healing lodges and other culturally-specific residential alternatives to prison
- alternative court and sentencing processes such as circle sentencing and indigenous courts
- alternative policing processes such as night patrols, and
- alternative victim-offender mediation and dispute resolution processes such as community justice groups and elders groups.

The examples provided below will show more fully the hybrid nature of the interaction between indigenous restorative justice processes and the demand of non-indigenous state law. A major area of recent change has been the growth in circle sentencing and indigenous courts, allowing the community to become more actively involved in the sentencing process and, as a result, introduce new ideas about what might constitute an appropriate sentence for an offender. In this sense, community involvement opens the sentencing process up to influences beyond the ideas of criminal justice professionals. This is particularly important for Aboriginal communities who have generally been excluded from legal and judicial decision-making.

Indigenous courts³ have been established for indigenous adult and juvenile offenders in many jurisdictions in Australia over recent years. The courts typically involve Aboriginal elders or community group members sitting on the bench with a magistrate. They speak directly to the offender, expressing their views and concerns about offending behaviour and provide advice to the magistrate on the offender to be

³ The courts are titled after local indigenous names such as Koori Courts (Victoria), Murri Courts (Queensland) and Nunga Courts (South Australia). New South Wales has adopted the Canadian circle sentencing model for indigenous people in that state.

sentenced and about cultural and community issues. Offenders might receive customary punishments or community service orders as an alternative to prison. As one example, consider the Murri Court in Queensland. The elders and community justice group members express their concerns and views directly to the offender. The conditions placed on court orders may involve meeting with elders or a community justice group on a regular basis and undertaking courses, programs or counselling relevant to their particular needs. A non-indigenous Murri Court magistrate noted the following:

Orders, particularly probation orders and intensive correction orders, often include conditions requiring attendance on the Justice Group and/or Elders, attendance at counselling and/or programs to address specific issues (for example domestic violence and family violence, alcohol or drug abuse), attendance at Indigenous Men's Groups or other support groups... The extent of compliance required represents what might be considered to be significant punishment and deterrence whilst offering rehabilitation opportunities (Hennessy 2005:5).

While the non-indigenous court see traditional sentencing objectives are met, other factors are clearly at play. The magistrate at the Brisbane Childrens Court, stated:

The [Youth] Murri Court sessions are intense, emotional occasions with a greater involvement of all parties. I can say that since the Youth Murri Court has been held that there has been a reduction in the number of serious offences committed by young Indigenous persons. There may be a number of reasons for this but I like to think that the Youth Murri Court, by involving the wider community in the concern for the futures of young Aboriginal and Torres Strait Islander people, has in some way contributed to this result (Pascoe 2005:7).

The courts are seen to validate a basic tenet of indigenous law and values – the authority and respect for elders of the community.

The acknowledgment in a public forum of the Elder's authority and wisdom and their role as moral guardians of the community by the Court honours traditional respect for the role of the Elders. The Elders mean business and they make it quite clear to the offenders that they must honour their responsibilities after Court for the community support to be available. Often when addressing offenders, the Elders speak of the 'old people' (ancestors) and what they would have done or seen done to an offender in the 'old days'. This always strikes a chord with offenders – even the toughest (Hennessy 2005:6).

Other customary actions include banishment from various areas, apologies and reparation. However, it is the role of the community in sanctioning the offender and providing conditional re-acceptance that appears most powerful.

Feedback indicates that the most significant impact on offenders in the Murri Court process is the possibility of reconnection with their local community and the support this offers them. Those who choose to take advantage of the support offered by the elders and the justice group tend to successfully complete their orders and make valuable changes to their lives (Queensland Magistrates Courts 2004:43).

It is clear that the Murri Court has a powerful effect on participants.

What cannot easily be explained is the power of the Murri Court process on a spiritual or emotional level. The power of the natural authority and wisdom of the Elders is striking in the courtroom. There is a distinct feeling of condemnation of the offending but support for the offender's potential emanating from the Elders and the Justice group members.

Often similar emotions are expressed by the offender's family members. Declaring private concerns and fears for and about the offender in front of those assembled in court, in a public way, can be very cathartic for the family members (who are often victims of the offending themselves). Orders often need to take intimate family considerations into account in order to tailor orders which are designed not only to punish but also assist the offender address his/her problems with appropriate supports (Hennessy 2005:5).

Indigenous community justice groups and elders groups have developed in many jurisdictions. In the examples above their work is directly connected to a modified court process. However, the work of these groups extends beyond the role of the courts in passing sentence. They are essentially involved in responding to community problems and restoring community harmony. For example, community justice groups might be involved in developing measures in relation to alcohol and substance abuse and domestic violence in indigenous communities. These strategies might include:

- Elders publicly shaming adults who gave alcohol to children.
- Educative and counselling programs to address domestic violence and alcohol abuse
- Banning individuals from purchasing alcohol in response to alcohol abuse problems.
- Sending juveniles to outstations⁴ to address petrol and glue sniffing addictions (DATSIPD 1999:8).

Community justice groups typically employ mediation between individuals and between family groups, which assists in reducing community tensions and provides the opportunity to reduce court matters for minor disputes. Community justice groups may work with and encourage police to use their discretion in referring individuals to the community justice group to be dealt with through customary law. They may assist in the granting of bail, supervising bail conditions to ensure compliance, and organising accommodation. Regarding sentencing, the community justice groups help courts maximise the use of community-based orders as an alternative to prison by providing local programs and working to ensure that offenders do not breach orders. This work may involve developing programs and initiatives on outstations for use as diversionary options.

An assessment of community justice groups found that 'a strong theme in the activities of community justice groups is a desire to strengthen language, culture and customary law in their communities in order to restore a sense of cultural identity and

⁴ Remote camps on indigenous land which may be used for a range of activities including cultural ceremonies and initiation, and training in traditional skills and work skills.

high self-esteem' (DATSIPD 1999:9). Indigenous people support notions of restorative justice to the extent that it promises an element of self-determination. For example, Nancarrow's interviews with indigenous women found that they supported restorative justice for dealing with family violence as an alternative to the criminal justice system, which they saw 'as a tool of oppression against indigenous people and a facilitator of increased violence against them and their communities' (forthcoming:8). Indigenous women identified restorative justice strategies as including:

mediation involving extended family members; outstations where elders guide people to achieve a sense of belonging and self worth; families supporting people to stop the violence; and community or family meetings (Nancarrow forthcoming:8).

Importantly, restorative justice provides an avenue for opening up the justice system to greater indigenous control. It is an opportunity to reconfigure the justice system with different values, different processes and different sets of accountability.

Some Broader Issues in 'Reviving' Indigenous Restorative Justice

The question of 'reviving' indigenous restorative justice is complex and there are a number of issues that need to be understood and addressed. These include the state's legal framework within which restorative justice operates, conflicting punishments, conflicting laws and the balancing of rights.

The State's Legal Framework

The broad legal and political framework within which justice operates critically affects the way indigenous justice develops. For example, the Navajo have been largely able to retain and develop indigenous law because they have the recognised inherent right to exercise jurisdiction over tribal matters. The recognition of the right of tribal sovereignty (limited though it may be) is part of the legal framework of Federal-Indian relations in the US and derives from important US Supreme Court decisions in the early part of the 19th century recognising Indian tribes as domestic dependant nations. The US Supreme Court affirmed in 1832 that Indian nations retained their inherent right of self-government. Since then they have been entitled to exercise legislative, executive and judicial powers, subject to the powers of the US Federal Government.

This situation can be contrasted to Australia where indigenous peoples were not seen to possess laws or customs recognisable by the British. As a result there is no inherent right recognised today whereby indigenous people can develop and exercise their own jurisdiction over legal matters, except in situations where the state permits them to do so as a matter of policy or practice.

Processes like circle sentencing and indigenous courts in Australia and Canada fit within the broader criminal justice framework. If we take the development of circle sentencing in Canada we can see how the sentencing circles are placed within the existing parameters of Canadian law. Circle sentencing arose in Canada in 1992 out of a decision from the Supreme Court of the Yukon in the case of *R v Moses*. The circle

is said to be premised on three principles that are part of the culture of the Aboriginal people of the Yukon.

Firstly, a criminal offence represents a breach of the relationship between the offender and the victim as well as the offender and the community; secondly, the stability of the community is dependant on healing these breaches; and thirdly, the community is well positioned to address the causes of crime (Lilles 2001:162).

Circle sentencing is part of the court process and it results in convictions and criminal records for offenders (Lilles 2001:163). Discretion as to whether a sentencing circle is appropriate remains with the judge, as does the ultimate sentencing decision. The judge is still obliged to impose a 'fit' sentence and is free to ignore the recommendations of the sentencing circle. Sentences imposed with the assistance of a sentencing circle are still subject to appellate court sentencing guidelines (Green 1998). Not surprisingly, there may be tensions between community involvement in the circle and the power which the judge retains. While at one level there is an appeal to 'equality' within the circle, it is clear that the circle itself is significantly constrained by the wider power of the non-indigenous criminal justice system.

Canadian case law sets out the criteria for involvement in a sentencing circle. *R v Joseyounen* (1996) set out the following criteria:

- 1. The accused must agree to be referred to the sentencing circle.
- 2. The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.
- 3. There are elders or respected non-political community leaders willing to participate.
- 4. The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.
- 5. The court should try to determine beforehand, as best it can, if the victim is subject to battered woman's syndrome. If she is, then she should have counselling and be accompanied by a support team in the circle.
- 6. Disputed facts have been resolved in advance.
- 7. The case is one which a court would be willing to take a calculated risk and depart from the usual range of sentencing (see Green 1998:76).

Although not 'etched in stone' by the Court, the criteria have been widely quoted and applied across Canada (albeit with variations such as whether the victim must attend).

Section 718.2(e) of the Canadian *Criminal Code* is also relevant to understanding the sentencing of Aboriginal offenders in Canada (McNamara 2000). The legislation provides that a court that imposes a sentence shall take into consideration (among a range of other factors) the following principles:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

The Canadian Supreme Court in *R v Gladue* (1999) confirmed that the unique circumstances of Aboriginal people that judges needed to consider included both the *processes* and *outcomes* of sentencing:

The background consideration regarding the distinct situation of Aboriginal people in Canada encompass a wide range of unique circumstances, including most particularly:

- (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
- (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (cited in McNamara 2000).

Thus, the Supreme Court of Canada emphasised the importance of restorative justice and circle sentencing as an appropriate sentencing procedure for Aboriginal offenders.

Circle sentencing has been operating for indigenous offenders in a number of areas in New South Wales. Circle sentencing guidelines, procedures and criteria are established through criminal procedure regulations. The objectives of the circle sentencing court are to:

- (a) include members of Aboriginal communities in the sentencing process;
- (b) increase the confidence of Aboriginal communities in the sentencing process;
- (c) reduce barriers between Aboriginal communities and the courts;
- (d) provide more appropriate sentencing options for Aboriginal offenders;
- (e) provide effective support to victims of offences by Aboriginal offenders;
- (f) provide for the greater participation of Aboriginal offenders and their victims in the sentencing process;
- (g) increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong;
- (h) reduce recidivism in Aboriginal communities (Potas et al 2003:4).

The fundamental premise underlying circle sentencing is that the community holds the key to changing attitudes and providing solutions. The court's deliberations have been typified as power-sharing arrangements. 'It is recognised that if the community does not have confidence that the power-sharing arrangements will be honoured, the prospect that circle sentencing will be successfully implemented is likely to be diminished' (Potas et al 2003:4).

An evaluation by the New South Wales Judicial Commission found that circle sentencing helped break the cycle of recidivism and introduced more relevant and meaningful sentencing options for Aboriginal offenders. The courts improved the level of support for Aboriginal offenders and victims and promoted healing and reconciliation. The courts also increased the confidence and promoted the empowerment of Aboriginal persons in the community (Potas et al 2003:iv).

Conflicting Punishments and Conflicting Laws

A final area of contention in discussions of reviving or recognising indigenous law is how to handle conflict when it arises between state and indigenous laws and punishments. It was noted at the beginning of this chapter that indigenous systems of sanctioning and punishment may involve inflicting serious physical injury. For example, in Australia, ceremonial spearing of offenders, though not frequent, does occur as a legitimate tribal punishment.

Aboriginal law could give rise to conflict, for example, with rights and protections established by the United Nations in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention for the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

It is generally accepted that international human rights standards should apply. Article 33 of the draft *Declaration on the Rights of Indigenous Peoples* notes that indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Thus, it is an established requirement that indigenous customs, traditions, procedures and practices comply with internationally recognised human rights standards. In Australia, the Aboriginal and Torres Strait Islander Social Justice Commissioner noted that, 'all proposals for the recognition of Aboriginal customary law have taken as their starting point that any such recognition must be consistent with human rights standards' (Jonas 2003:3).

The issues that arise not only refer to punishment but also to basic definitions of what constitutes crime. A recent case in the Northern Territory of Australia shows this complexity. *GJ* was a 55 year old traditional Aboriginal man convicted of assaulting and having unlawful sexual intercourse with a 14 year old Aboriginal girl. When the child was about 4 years of age, in the traditional way of the Aboriginal law of the community, the Ngarinaman Law, the child was promised as a wife to the older man. The 14 year old was to be his second wife, and his first wife and their children were to remain as part of the household. In sentencing, Judge Martin noted the following:

This is an extremely difficult case... You believed that traditional law permitted you to strike the child and to have intercourse with her. On the other hand, the law of the Northern Territory says that you cannot hit a child. The law of the Northern Territory also says that you cannot have intercourse with a child...

You and the child's grandmother decided that you would take the child to your outstation. The grandmother told you to take the child and the grandmother told the child that she had to go with you. The child did not want to go with you and told you she did not want to go. The child also asked her grandmother if she could stay. Rather than help the child, the grandmother packed personal belongings for her ...

The child later told the police that she was 'at that old man's place for four days', and that she was crying 'from Saturday to Tuesday'. She knew that she was promised to you in the Aboriginal traditional way, but she did not like you. In the words of the child, 'I told that old man I'm too young for sex, but he didn't listen.' (Martin CJ, *Queen v GJ*, Supreme Court of Northern Territory, SCC 20418849, 11 August 2005, at 1-2).

GJ admitted hitting the child with a boomerang and having sexual intercourse with the child. He told police that in Aboriginal culture the child was promised as a wife from the time she was 4 years old and said that it was acceptable to start having sexual intercourse with a girl when she was 14 years old.

I appreciate that it is a very difficult thing for men who have been brought up in traditional ways which permit physical violence and sexual intercourse with promised wives, even if they are not consenting, to adjust their ways. But it must be done. I hope that by sitting in your community today and saying these words, and I hope that by the sentence that I am going to impose upon you, that the message will get out not just to your community, but to communities across the Territory...

You have had a strong ceremonial life across widespread communities. You are regarded by the Yarralin Community as an important person in the ceremonial life of the community. You are responsible for teaching young men the traditional ways. I accept that these offences occurred because the young child had been promised to you...

I have spoken quite a lot about what you believed and how you felt. I must also remind you about how the child felt. She was upset and distressed and I have no doubt that your act of intercourse with her has had a significant effect upon her. The child has provided only a very brief Victim Impact Statement in which she does not speak of any emotional and psychological impact upon her. That is not surprising. This is a child who has been shamed within a community that obviously has very strong male members and strong traditional beliefs. It is not surprising that she would not be prepared to publicly state how she was feeling. I do not know, therefore, the extent of the effects or how long they will last, but I have no doubt that the effects have been significant (Martin CJ, *Queen v GJ*, Supreme Court of Northern Territory, SCC 20418849, 11 August 2005, at 3-4).

The GJ case shows that generally accepted international human rights for women and children are in conflict with some indigenous laws and that there is significant conflict between state and indigenous law. It shows that the blending of indigenous law and state law will not always be an easy task. Further, in specific cases it will be indigenous law that needs to change if basic human rights are to be respected. Finally, the case shows that we cannot assume consensus on what constitutes lawful and unlawful behaviour. There is clearly significant support among GK's community for traditional law to be upheld.

Conclusion epress Legal Repository

This chapter has shown that simple dichotomies contrasting pre-modern indigenous restorative justice with modern state-centred systems of justice are not necessarily helpful. Indigenous societies were, and are, complex and their processes for dealing with crime and social disorder cover a range of possible responses from the restorative to the retributive.

It has been argued that a context of hybridity is a more useful representation to consider contemporary developments, where new forms of doing justice are developed which merge the restorative in new practices. The flexibility of new justice practices may accommodate indigenous justice demands, but are not necessarily the same as indigenous practices. For example, we can see the movement of circle sentencing from indigenous communities in Canada to indigenous communities in Australia, and from dealing with exclusively indigenous offenders to also including non-indigenous offenders. We can see this as 'reviving' indigenous dispute resolution, but it is also much more transformative than this as it moves across a range of jurisdictional, national and cultural boundaries.

Yet as indicated in this chapter there is also a 'dark' side to a developing hybridity. Restorative justice has found itself a partner to a greater emphasis on individual responsibility, deterrence and incapacitation. Criminal justice systems that bifurcate by dividing offender populations between the minor offenders and serious repeat offenders have only a limited vision of restorative justice, and indigenous and other minorities are likely to be fast-tracked towards the hard end of the system.

There are positive examples of indigenous/state processes merging in a hybrid way and which do respect indigenous claims for greater self-determination and control. In the examples of the indigenous courts and community justice groups we see the justice system reconfigured with different and more restorative values. However, it is also necessary to understand that processes like circle sentencing and indigenous courts exist within a broader state-based legal framework that still prioritise a range of considerations within sentencing. Further, we need to be clear that some indigenous laws and practices do not comply with generally recognised human rights standards. This is not an argument against restorative justice or indigenous justice. It is an argument for considering how we might deal with these conflicts.

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