Contemporary Comments

Decolonising Restoration and Justice

In her paper presented to the Institute of Criminology seminar 'Restorative Justice, Conferencing and the Possibilities of Reform', Kathleen Daly (1998) advocated the exploration of 'spliced justice forms'. By this, Daly recognised the potential of a collaboration 'where an informal restorative justice process was piggybacked on a formal traditional method of prosecuting and sanctioning serious offences' (Daly 1998:10). In advancing this position, Daly recognised the merits of an interrelationship between formal and informal justice. She referred to Roger Matthews view (1998) that formal and informal justice are neither dichotomous nor a matter of choosing one or the other, but of examining how they worked together (Findlay & Zevkic 1988).[1]

Experience in traditional cultures, such as those in the South Pacific (Findlay 1998a) suggests caution when considering the grafting of a more formal institutionalised mechanism of justice onto pre-existing, and customary restorative practices.[2] Harry Blagg, in his presentation to the Institute of Criminology seminar challenged 'orientalist' appropriations of culturally specific reintegration endeavours (Blagg 1997, 1998). Blagg argues that the colonisation of customary ceremonies and resolutions may be more about the securing of the hegemony of introduced systems of justice, rather than the reassertion and recognition of custom-based alternatives. Scholarly support for a synthesis of custom and introduced systems may, as Blagg criticises, endorse and confirm Eurocentric 'devices of destructuring the totality and context' of customary resolutions.

While endorsing Daly's interest in a synthesis between formal and informal criminal justice, my recent work on the transitional relationships of crime in a global context (Findlay 1998b) confirms the significance of Blagg's injunction. Recent attempts to 'splice' justice forms in certain South Pacific jurisdictions reveal the danger of cultural abstraction, and the potential to compromise the essential contextual elements of criminal justice resolution mechanisms.

A blatant example of the colonising potential of 'spliced' justice forms is demonstrated through reconciliation in the criminal courts of Fiji. Section 163 of the *Criminal Procedure Code* 1978, of Fiji, provides that where charges for criminal trespass, common assault, assault occasioning actual bodily harm or malicious damage to property are brought under the *Penal Code* 'the Court may in such cases which are substantially of a personal or private nature and which are not aggravated in degree, promote reconciliation and encourage and facilitate the settlement in an amicable way on terms of payment of compensation or other

1 This book advances the proposal that consideration of formalisation in justice should focus on a continuum rather than the representation of formal and informal as polar opposites.

2 In this respect 'restorative' is not so much the description of an 'alternative process for resolving disputes' but one in which it is both customary and traditional for victims, offenders and communities to accept responsibility for the resolution of crime-based problems.

terms approved by the Court and may thereupon order the proceedings to be staid or terminated'.

While having regard to the court's role as a 'facilitator' in the reconciliation process, this section operates on the understanding that the sanction is in the hands of the accused. To that extent, the Court disposes itself of 'ownership' of the penalty beyond its role in promoting settlements of this form.

The state constrains the use of such penalty, or at least limits the situations in which reconciliation may be recognised by the court by designating the offences to which it may relate. This is important in terms of a purpose for reconciliation; that being the staying or terminating of other penalty options.

Reconciliation has long existed as a feature of the restitution and compensation dimensions of customary punishments in the Pacific. Even so, its punitive potential is recognised in Section 163, through the reference to 'payment of compensation or any other terms approved by the court'. Further, by providing for an avoidance of any further State-based penalty by achieving reconciliation, the institutions of legal formalism have incorporated this penalty within their own sentencing options.

The operation of reconciliation under the sponsorship of the State courts differs from 'self help', customary resolutions. The consequences of modem reconciliation as a penalty option within the formal courts are interesting. In its custom-based context, reconciliation is governed by three factors,

- the public nature of the settlement
- the collective nature of its terms and
- the relative expectations of parties involved.

In its contemporary context within the formal legal framework of the Fijian courts it would appear that reconciliation has been removed from an open, accountable, and relative penalty where the community has an investment into a far more private and localised settlement. In Fiji today it is common, when domestic violence comes before the court, to see reconciliation promoted as an appropriate penalty. However, between the unequal power positions of persons negotiating domestic reconciliations, the private nature of their terms, and the application of expectations which may go well beyond an immediate issue of the assault or future threats of violence, reconciliation may become more of an avoidance of penalty rather than a penalty. For instance, where a complainant withdraws her allegation of assault as a result of reconciliation, this may be the consequence of threats from the husband to throw the wife out into the street if she does not 'reconcile' rather than any genuine rapprochement. The court would not become aware of this by simply seeking an assurance on reconciliation from the accused, and the complainant may not be examined by the court in this regard. The community, the traditional witness and enforcer of reconciliation also has no voice in the court hearing.

A key problem with the 're-culturising' of such resolutions or penalties is the realisation that the State is not the community and vice versa. While the State may need to take responsibility (and hence sponsor criminal justice initiatives) for those crimes which the community should not own, there exists a significant array of crime situations and crime choices where community ownership and involvement is appropriate. However, these situations may not regularly overlap. Therefore, legal formalism as a feature of the State may not be supportive of customary penalty. Those features of custom penalty which seem appealing when compared with the formalised justice structures of introduced law, (such as openness and accountability) are often compromised or corrupted within State-centred en-

vironments. Further, the essential sanction impact of custom penalties may be lost as they are required to address new aspirations from within the formal justice process.

By identifying the difficulties facing the integration of formalised and custom-based resolution it should not be assumed that attempts at such integration are either fruitless or flawed. In fact, some of the problems associated with the intersection of formal and informal justice mechanisms may have been overcome with the assistance of a more detailed and considered analysis of the consequences of such integration.

I would suggest two things which are worthy of further investigation and which would anticipate the successful integration of justice mechanisms at various levels of formalisation.

First, a re-thinking of the notion of 'restorative justice' may facilitate efforts at harmony. In recent justice parliance restorative justice refers to 'an alternative process for resolving disputes in organisations, to alternative sanctioning options, or to distinctly different new modes of criminal/juvenile justice organised around principles of restoration to victims, offenders, and the communities in which they live (Daly 1998:5). Another way of looking at restoration here is to focus on the process rather than on the participants and the outcome. By this I would suggest an exploration of traditional or custom-based mechanism for resolution, mechanisms which have a particular cultural resonance worthy of recognition and protection. In any such consideration, we would be answering Harry Blagg's question; what is being restored in restorative justice? (1998:16). Blagg's argument away from restoring to the status quo, where this is both 'incomplete and one-dimensional', has some significance for any reflection on the restoration process of custom-based resolution. Only when the full cultural context of such resolutions operating within a contemporary world is considered, will restoration of a 'status quo' be dynamic and transformational.

The second important theme, arising from this new interpretation of restorative justice, (ie restoring culturally sensitive custom-based resolutions), is the issue of collaboration. More than simply an expectation that alternative strategies will more likely be restorative, collaborative justice [3] recognises that the effective delivery of criminal justice must be both culturally relative and reliant on community co-operation. Even so, certain common themes will tend to invigorate the relevance and impact of particular criminal justice initiatives. In this respect the 'collaboration' injustice is not simply an expectation for local communities, but between proponents of custom-based resolution, and those with investments in more formalised criminal justice regimes. Collaborative justice relies on an integrative model for criminal justice delivery in transitional cultures, where the State values customary resolutions and the community accepts the State's responsibilities in the area (Findlay Zvekie 1988:chap7). Essential to such recognition and acceptance is a program of education and training in which principal participants would be involved. These participants may include victims and their immediate community, perpetrators, police, community agencies, sentencers, and elders. They need initially to be made aware of their mutual interests and potential contributions prior to being invited to explore and apply interactive models for justice delivery.

In societies where state sponsored justice is weak and customary resolution is wide spread or recognised, (such as those in the South Pacific) then the most efficient way in

---

3 The concept of collaborative justice was devised by the author as part of a project on collaborative justice developed in conjunction with Simon Fraser University: See 'Pacific-Canada Collaborative Justice Project', Project proposal document, Centre for Distance Education Simon Fraser University (1997)

which the legitimate goals of criminal justice are to be achieved is through collaborative modes and initiatives. However, in order that collaboration is to emerge and be sustained in a climate of cooperation and ownership, the principal participants in criminal justice must be brought together to identify their needs and determine the most effective response to these needs. To facilitate this process of communication, participants should be provided with collaborative justice models which have been successfully tested in other settings and which exhibit elements compatible with the characteristics of the communities in which collaboration is offered. The crude transplantation of culturally specific models into alien settings is neither collaborative nor potentially successful. Rather, collaborative justice models in context where custom and introduced law intersect, allow for the critical adaptation of effective models of resolution, encouraging local participants to own, implement and sustain collaborative justice initiatives which emerge in such an exercise.

Collaborative justice ensures custom-based initiatives, presently endangered by the colonisation of introduced law and systems, enhance their sustainability through appropriate integration within competing systems. The process of this integration, being essentially collaborative and community based offers a responsive and relevant alternative to the dissection and cooption of some restorative justice agendas.

Mark Findlay
Head of Department of Law, University of Syndey

REFERENCES

Blagg, H (1997) 'A Just Measure of Shame: Aboriginal Youth and Conferencing in Australia', *The British Journal of Criminology,* vol 37, no 4, pp 481-501.

Blagg, H (1998) 'Restorative Visions: Conferencing, Ceremony and Reconciliation'. Paper presented to Restorative Justice, Conferencing and the Possibilities of Reform, Institute of Criminology seminar, University of Sydney, 8 April (on file with the Institute of Criminology).

Daly, K (1998) 'Restorative justice; Moving past the caricatures'. Paper presented to Restorative Justice, Conferencing and the Possibilities of Reform, Institute of Criminology seminar, University of Sydney, 8 April (on file with the Institute of Criminology).

Findlay, M (1998a) *The Globalisation of Crime,* Cambridge University Press, Cambridge.

Findlay, M (1998b) 'Crime, Community Penalty and Intergration with Legal Formalism in We South Pacific', *Journal of Pacific Studies* (forthcoming).

Findlay, M & Zvekic, U (1988) *Informal Mechanisms of Crime Control: A Cross-Cultural Perspective, UNSDRI,* Rome.

Matthews, R (1988) 'Reassessing Informal Justice' in R. Matthews (ed) *Informal Justice?,* Sage, Newbury Park, CA, pp 1-24.