CHAPTER 7

JUSTICE IN THE COMMUNITY : THE NEW ZEALAND EXPERIENCE

Judge FWM McElrea

At the heart of the usual Western concept of criminal justice is the idea of a contest between the State and the accused, conducted according to well defined rules of fair play and leading to a verdict, guilty or not guilty. One of the most important of these rules is the presumption of innocence - the accused is to be found "not guilty" unless the State can prove otherwise. Those found guilty are punished by the State, and of course the more punitive the sentencing regime the greater is the incentive for a guilty person to rely on the presumption of innocence and put the State to the proof, ie not to plead guilty.

What do these elementary propositions have to do with relational justice? They have a great deal to do with relationships, and, I suggest, a considerable influence on our system of criminal justice. Let me explain.

The concept of a fair trial has been described as the apotheosis of the adversary system - its highest ideal. It has come to be seen in procedural terms, formulated by complex rules of evidence (eg exclusion of hearsay evidence), the Judges' rules for the conduct of police interviews, and other settled principles of "due process". Important though these are in themselves, they tend to have pre-occupied our thinking in criminal justice. The over-riding issue is whether fair *procedures* are followed - not whether they produce a just result, a fair outcome for the accused, satisfaction for the victim or harmony in the community to which both victim and offender belong. We seem to be stuck in a mould, formed mostly in the nineteenth century, which measures justice by its own procedures. Indeed much of the language used is from that era. Following the taking of "depositions" the accused is "arraigned" upon an "indictment". The accused stands in "the dock", almost like an exhibit on display. "You are charged that on or about ... you did ... How do you plead?" The whole trial is conducted very publicly, with accompanying rituals that serve to dramatise and hence de-personalise the experience.

It is perhaps not surprising then that, increasingly, the news media treat crime as prime news, and criminal trials as free drama or live entertainment, sometimes not very far advanced from gladiatorial combat. They thrive on conflict, on public contests, on finding winners and losers. If the victim features at all it is usually as a "loser", even where the accused has also "lost", so the only "winner" is the prosecution, ie the impersonal State. Feelings of antagonism, fear, anger and general negativity are fuelled, amongst the trial participants and the viewing public alike. There is scarcely ever any good news from the courts. Crime rates seem to

keep climbing and prison populations keep growing, at considerable expense in human and financial terms. The needs of neither offenders nor victims are satisfied. The existing theoretical bases of punishment seem bankrupt and in the world of criminal justice morale is fairly low.

But there is another way of doing justice, one which can promote the acceptance of responsibility and by a consensual process seek to heal the wounds caused by crime. It is already at work in the Youth Court in New Zealand, so it is not just an idealistic sentiment. It has the potential to transform adult courts as well.

The Youth Court Model at work

Under the Children Young Persons and Their Families Act 1989 offending by "young persons" - ie young people of at least 14 years of age but under 17 - is the jurisdiction of a specialist Youth Court. Potentially this court can deal with all offences except murder and manslaughter, although very serious offences such as rape are usually referred on to the adult courts. In deciding whether a disputed charge is proved the adversary system is maintained in full (with one exception, concerning pleading, which I mention later), however in disposing of admitted or proved offences a radically new system is in force. The key component is the Family Group Conference ("FGC"), convened and facilitated by a Youth Justice Co-ordinator, a Department of Social Welfare employee.

The FGC is attended by the young person, members of his family (including his extended family), the victim (often accompanied by supporters), a youth advocate (if requested by the young person), a police officer (usually a member of the specialist *Youth Aid* division), a social worker (in certain cases only), and anyone else the family wish to be there. This last category could include a representative of a community organisation, drug addiction agency or community work sponsor seen as potentially helpful to the young person. There is no limit on the number of persons who can attend an FGC. The usual range is probably around 6-12 persons but occasionally one hears of 20 or more people attending. Judges do not attend FGCs. To do so would disempower others present. It is up to the Youth Justice Co-ordinator to chair the meeting in such a way as to enable feelings to be expressed and all points of view to be heard. Victims may need to be encouraged to bring supporters so that they do not feel overwhelmed by a solid turn-out of the offender's family, something that has attracted criticism in the past. Any decision of the FGC requires the agreement of all present, including the young person, the victim and the police reprentative. This should mean that a less powerful voice is not over-ridden, and it also has the result that where the conference is not unanimous the matter is decided by the court.

Matters can reach an FGC by one of two routes. The Act has a strong diversionary emphasis to it, and without invoking the jurisdiction of the Court at all the police can refer admitted offending to an FGC. If the members of the FGC all agree, including the police officer present, the matter is handled as decided by the FGC and will not go to court. Over 80% of matters are handled in this way. Secondly, all offending admitted or proved in the Youth Court must be referred to an FGC, which recommends to the Court how the matter should be dealt with. Occasionally an FGC recommends a sanction to be imposed by the Court. Usually it puts forward a

plan of action, eg apology, reparation (in money or work for victim), community work, curfew and/or undertaking to attend school or not to associate with co-offenders. The Court is usually asked to adjourn proceedings, say for 3-4 months, to allow the plan to be implemented and the proceedings to be withdrawn. The Youth Court nearly always accepts such plans, recognising that the scheme of the Act places the primary power of disposition with the FGC. However, in serious cases the Court can use a wide range of court-imposed sanctions.

The human dynamics involved in an FGC depend on (and build on) the relationships between all those present, but the importance of the presence of the victim is repeatedly stressed.

"The crux of the Youth Justice system is *direct* involvement of the offender and the 'offended against', eyeball-to-eyeball. ... When victims and families farewell each other with smiles, handshakes and embraces, I know that justice has been served."[1]

"The FGC exposes young offenders to the most devastating responsibility of seeing and hearing the consequences of their actions when a victim is present."[2]

"The primary objectives of a criminal justice system must include healing the breach of social harmony, of social relationships, putting right the wrong and making reparation rather than concentrating on punishment. The ability of the victim to have input at the family group conference is, or ought to be, one of the most significant virtues of the youth justice procedures. On the basis of our experience to date, we can expect to be amazed at the generosity of spirit of many victims and (to the surprise of many professionals participating) the absence of retributive demands and vindictiveness. Victims' responses are in direct contrast to the hysterical, media-generated responses to which we are so often exposed."[3]

In the courtroom itself the Judge's role is very different. I make a point of welcoming the family and thanking them for being there. I also encourage them to speak - by asking them to tell me how they found the FGC procedure, for example. I try to involve the young person, perhaps by asking him to explain to me the main parts of the FGC plan. So the participation of others is welcomed. In addition to legal representation there will often be a family spokesperson who will talk to the judge - often a very powerful spokesperson. Overall, the concept of a judge trying to facilitate the strengths of others and bring them to the fore is radically different to the controlling position of the traditional judge.

Responsible Reconciliation

The distinctive elements of this Youth Court model are threefold: (i) The transfer of power from the State, principally the Courts' power, to the community. (ii) The Family Group Conference as a mechanism for producing a negotiated, community response. (iii) The involvement of victims as key participants, making possible a healing process for both offender and victim.

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[1] Trish Stewart, a Youth Justice Co-ordinator who has co-ordinated several hundred conferences, from her article in *The Youth Court in New Zealand; a New Model of Justice*, Legal Research Foundation, Auckland, 1993, at pp 43 and 49.

[2] Raewyn Clark, Victim Support, Auckland, writing in *Te Rangatahi* [Youth Justice newsletter] #1, August/September 1993, p 4.

[3] Principle Youth Court Judge MJA Brown in *Listener*, 25 September - 1 October 1993, p 7, "Viewpoint".

Taken together these elements have produced an approach to justice which is centred around right relationships. The prevailing spirit I would characterise as *responsible reconciliation*. The term "reconciliation" connotes a positive, growing process where strength is derived from the interaction of victim, offender and family in a supportive environment. It is a "responsible" process in that those most directly affected take responsibility for what has happened, and for what is to happen. Indeed it is an environment in which co-responsibility can be fostered, recognising that fault does not usually lie entirely with the offender and encouraging others who share that responsibility to shoulder it. It can be a moving experience to hear from a grandmother who has been working closely with a wayward grandson and in the process has let her own son know how he has let the youngster down.

It is natural that the emphasis should be on families when dealing with young people, because families are their natural community, the source of their relationships of dependence or interdependence, and the most likely basis of social control. However the influence of families upon their members (and vice versa) does not cease at a given age, say the 17th birthday. As they grow up, young people are likely to continue to depend upon family in varying degrees to meet some of their emotional and social needs.

One common criticism of the more traditional and "antiseptic" model of justice is that it has largely removed the element of shame. In the Youth Court model shame can be experienced in a creative and constructive way. This is because the young person is dealt with in the context of his family relationships and not in isolation. For a lot of families their young people's offending is a matter of shame, and if that shame is experienced by family members with the youngster at the conference, he cannot just shrug it off. I remember reading of one young man explaining that it was easy to be 'staunch' or 'cool' in court (and indeed to take some pride in being there) but at a family group conference, he explained, '*You're just a flea, man - you're nothing!'*

Only in the context of relationships meaningful to the offender can there be effective shaming and a change of attitude. We may think that the traditional court system holds offenders accountable but it has become too de-personalised to succeed in many cases. As the Austrian criminologist Christa Pelikan has pointed out[4], mediation processes have an empathetic and educative effect by way of an "*inner drama*" which has a socialising value for juveniles. By contrast, she says, the "*outer drama*" seen in the courtroom too often produces the opposite effect - an inner withdrawal, the operation of defence mechanisms, a shunning of the deep-rooted acceptance of responsibility. Similarly the Australian criminologist John Braithwaite[5] distinguishes between "stigmatising shame" which excludes, isolates and degrades, and "re-integrative shame" which accepts the offender, offers a new beginning and can be a powerful agent for change. These distinctions are found at work in the Youth Court model.

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[4] *Who wants what kind of justice?* a paper written for the 11th International Criminology Congress, Budapest, August 1993.

[5] *Crime, Shame and Reintegration* (1989).

I have mentioned that the adversary method of pleading is not followed in the Youth Court. I now see this as an important difference in principle. On first appearing in court the young person may volunteer that the charge is denied - in which case it is adjourned for a hearing - but otherwise no plea is taken and the matter is adjourned for an FGC to be held. There the prosecution summary of the relevant facts is discussed and the young person can admit or deny its contents. This is done in the presence of the victim so there is the opportunity to try and reach agreement on the facts.

What is significant in this process is that the acceptance of responsibility is done not within the ritual of plea taking in court but at the FGC in the presence of the young offender's lawyer, family, the victim, and other community representatives. Furthermore this change of emphasis is reinforced by the principle expounded in the statute[6] that young people committing offences should be "held accountable, and encouraged to accept responsibility, for their behaviour" and should be "dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial and socially acceptable ways". These provisions emphasise accountability and membership of a wider community.

Origins and scope

It is important for outside observers to realise that on a comparative basis, and despite its "pacific" setting, New Zealand is reported to have high rates of offending, of victimisation and of incarceration[7]. Any success of the Youth Court model has not been achieved in a low-crime culture. Nevertheless the new system did not grow out of such considerations, and nor was it adopted by reading the latest criminological studies or studying the latest overseas experiments in mediation. Michael Doolan[8] outlines the concerns and the process that led to the new Children Young Persons and Their Families Act 1989. It is significant that the New Zealand Parliament's Select Committee from February to April 1988 travelled to Maori and Pacific Island meeting places throughout hearing submissions on how to recast the Bill so as to make it more culturally relevant to Polynesian people, as well as simpler and less bureaucratic in its operation. I believe the FGC mechanism which was the result of that process is the direct descendant of the "whanau conference" long employed by Maori people, although it is adapted to suit its new context, eg by inclusion of the police.

"It is not suggested that the old Maori ways should now be restored, but that ought not inhibit the search for a greater sense of family and community involvement and responsibility in the maintenance of law and order. At present there is little room for a community input into individual sentencing, no chance for an offender's family to express censure or support, no opportunity for a reconciliation between the wrongdoer and the aggrieved, no search for a community solution to a social problem. The right and responsibility of a community to care for its own is again taken away and shifted to the comparatively anonymous institutions of Western law."[9]

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6 Section 4(f) of the Children, Young Persons and their Families Act, 1989.

7 New Zealand is second only to the USA in the rate of imprisonment of its population.

8 Legal Research Foundation publication (above), pp 19-21.

9 *PUAO-TE-ATA-TU* (day break), the report of the Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare, September 1988, p 74.

When the legislators adopted and adapted the model of a whanau conference, other aspects inherent in this community-based model were bound to accompany it. I rather suspect that non-Polynesian eyes simply failed to see the significance of what was being offered. But it would be a huge mistake to see the benefits of the new model as there primarily for Polynesian peoples. Like other industrialised countries New Zealand is a multi-cultural society and the Youth Court serves equally the rich and the poor, urban and rural communities, and all races and creeds. Indeed one of its strengths has been identified as its ability to reach across such boundaries and help build better relationships within and between communities.

New Possibilities

But what of the relationships of adult offenders? Would they be amenable to the notion of a family-based conference? I suggest that families are still likely to play an important role for most adults. Naturally family ties will change in character as young people mature. There may be less dependence or discipline, and more friendship and respect. As some family ties become less meaningful or are lost entirely, for example through death, divorce or abuse, others may take their place when the individual marries, has children, and so on.

In any event we must look to the wider web of relationships and ask whether there are other relationships of respect, other communities to which the offender belongs. If so, these might be a substitute for, or a valuable supplement to, family relationships. Tony Marshall argues that in our mobile society, the concept of community can embrace meaningful associations on many bases - "work, school, voluntary associations based on leisure pursuits, political parties, churches ... ethnic groups, trades unions, extended family, etc."[10] Our needs for acceptance, self-affirmation, social involvement, friendship, fun, and spiritual sustenance do not evaporate with adulthood or "independence"; they all require that we sustain meaningful relationships with others.

This leads me to the notion of a Community Group Conference ("CGC") - an adult equivalent of an FGC which would seek to tap the relationships of respect and influence that apply to the adult offender. Are there family members who are or might become concerned for his or her well-being? Is there an employer, work-mate, fellow football player, former teacher or school friend who still can provide meaning and support? A small group of such people could be invited to the conference, along with the victim and supporters and a police representative. Very few people can be quite without any family or other meaningful relationships and it would be wrong to shape a model of justice around them. It may be a question of starting with whatever relational matrix the offender has and building a CGC around that. Where there is difficulty in assembling a community group there may be a place for voluntary associations (a local church group, cultural association, or service organisation) to step into the gap.

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[10] Marshall, T. in "Criminal Justice in the new Community", a paper written for the British Criminology Conference, York, 1991, p 13.

The importance of an FGC is that it brings together several representatives of the community to which a young person relates so as to provide a negotiated, community response. The task in respect of adults is, I suggest, exactly the same. The object is to get the relevant community to take responsibility for helping the offender to address the wrong he has done, repair the damage, and to affirm him in any remedial steps for the future. In the process the victim's needs are addressed, and the offender can be restored to a place of respect in the community.

Since first raising the possibility of a CGC process for adults I have heard of at least two such conferences successfully arranged on a voluntary basis, in each case with very positive results for both victim and offender. And such statistics as there are from the Youth Court suggest that the number of cases in court[11] and the proportion of those where the court would be required to impose sentence would both be likely to drop substantially under a system of CGCs for adults. The proportion of custodial sentences is also likely to drop sharply, if the Youth Court experience[12] is relevant. FGCs strive to find community-based solutions and often produce a more imaginative and suitable plan than the courts could achieve. Where an FGC has recommended something other than prison, the knowledge that the victim has agreed to that plan has a palpable effect on the judge. Gone is the assumption that the State represents the victim in seeking a punitive sanction.

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11 "Only 16 per 1,000 young people appeared in the Youth Court in 1990 [the first complete year] compared with an average of 63 per 1,000 in the three calendar years immediately preceding the Act" - Maxwell GM and Morris A, *Commonwealth Judicial Journal* Vol 9 No 4, December 1992, p 26.

12 The number of children admitted to Social Welfare Department residences dropped from 2,712 in 1988 to 923 in 1992-93.

New responsibilities

In the New Zealand Family Court there has long been an obligation on lawyers to promote reconciliation. In various civil jurisdictions there is starting to appear an obligation to consider alternative dispute resolution procedures.[13] Why could not a new Criminal Justice Act impose a responsibility on lawyers to encourage offenders towards reconciliation with victims, and to start that process by admitting their responsibility (if any) for the harm done? This has little appeal under the present system, but as part of a new deal for victims and offenders it would be a different proposition. When the consequences of admitting guilt are rejection and isolation, and imprisonment holds out only the prospect of degradation and destruction of self respect, there is little reason to plead guilty. But if that is changed into a positive, growing and healing experience, if the consequences are intended to promote reconciliation, there is an incentive to accept responsibility.

Howard Zehr criticises the adversary system for encouraging denials of responsibility:

"Even if he is legally guilty, his attorney will likely tell him to plead "not guilty" at some stage. In legal terms "not guilty" is the way one says "I want a trial" or "I need more time". All of this tends to obscure the experiential and moral reality of guilt and innocence".[14]

In the past the law has concentrated on the dangers of convicting one innocent person and has so arranged the laws of evidence and procedure that this risk is reduced to a minimum - even if (so it was said) 100 guilty people go free. When a person could be hanged for stealing, that was understandable, but now it is perhaps time to acknowledge *each* wrong trial result as an injustice. Is it not time to stop and ask: What does it do to the person who is *in fact* guilty to be found "not guilty"? And when that happens what does it do also to the victim, to victim-offender (and other) relationships, and to the respect for justice in the community?

I am not suggesting that the adversary model be dropped, or that the presumption of innocence be abandoned, but it should not be assumed that there are no personal or social costs incurred when the guilty are declared "not guilty". I am sure the wider society would support a system that encouraged those who are guilty to admit their guilt and focus their attention on putting right the wrong they have done. The legal process, even for defendants who plead guilty, fails to confront offenders with the reality of their offending. Unlike the young person at an FGC, the adult offender does not experience on the one hand the hurt and anger of the victim, nor on the other hand the understanding, forgiveness and even support that can follow a genuine and personal expression of contrition. And any feelings of victimisation on the offender's part are likely to be accentuated by punishment handed down in the name of a faceless State.

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[13] "The obligation of our profession is, or has long been thought to be, to serve as healers of human conflict. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants ... That is what justice is all about." - Warren Burger, former Chief Justice, US Supreme Court.

[14] *Changing Lenses - A New Focus for Crime and Justice* (1990) p 67.

Conclusion

What is the prospect of public acceptance of such a model of criminal justice?

Properly explained, I believe it is good, and this for a host of reasons. It is not a soft system. Facing a victim is commonly said to be far harder than facing a court. FGC plans are are often both tougher and more imaginative than court-imposed sentences. An acceptance of responsibility for one's own actions is an ideal that few would oppose. The strengthening of family and community-based relationships could not be politically unpopular. A much better deal for victims is what the public has long sought. A lesser role for the State and a greater role for local communities is consistent with reforms underway in many Western countries. There is also the prospect of fiscal savings from the reduced use of courts and prisons, although offset against this must be the cost of putting more resources into the community. The idea of negotiated justice is either accepted or gaining ground in other contexts, such as the use of mediation in family courts and in civil litigation. And finally, there is ample evidence that the public is not as vengeful as some politicians seem to think.

It would hardly have been thinkable under the old system for a young man to be motivated to write to his elderly victim the letter I recently saw.

> ... I wish I could turn back the hand of time and go back to that day and help you with your bag to the top of the hill instead of snatching it from your hands. I would have had the chance to know you and talk to you. I am so sorry for hurting you.

I believe we can design a system that repairs relationships and teaches respect where there was none before. When that happens we will truly have a system of justice - not a sterile, rule-bound creature but one that breathes the spirit of justice.