

## RESTORATIVE JUSTICE

### THE NEW ZEALAND YOUTH COURT: A MODEL FOR DEVELOPMENT IN OTHER COURTS?

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#### Introduction

I am going to start by referring to the usual theories of punishment, because I think that their inadequacy is at the heart of the present problem in criminal justice. We have all at one stage or another heard of the three commonly advanced objects of, or justifications for, sentencing - retribution, deterrence and reformation:

*Retribution*, or "just deserts" - the meting out of unpleasant consequences by the State because they are deserved by the offender<sup>1</sup>. Because society asserts this right to avenge wrong-doing, individual victims are denied the right to exact revenge.

*Deterrence* - the unpleasant nature of punishment serves to deter the offender and others from like offending in the future. This model is utilitarian in nature and presupposes rational behaviour as the norm.

*Reformation* - the protection of society by reforming the wayward individual. The sentence of supervision is most clearly aligned with this objective. It is a noble ideal, that people should be uplifted rather than degraded by the processes of the criminal law. But it is also less likely to be favoured in a society that places diminishing weight on a "welfare" model, perhaps through suspicion of its inherent "paternalism", or perhaps because of cynicism about its costs and/or its failure to deliver a reduction in crime levels.

There are other explanations of punishment but they tend to be related to one of "the big three" just described. Thus the courts sometimes talk of the *denunciatory*<sup>2</sup> role of

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<sup>1</sup> "The desire to see justice done is one of the abiding aspirations of all forms of society. ... Indeed, the pursuit of retributive justice is a theme of much of our heritage of legend, fable, saga, romantic drama, ballad, poetry and, of course, fairy-tales. Far from being an ignoble impulse, it is quintessentially human." (: EJ Mishan, *Encounter* No. 403, March 1988).

<sup>2</sup>By denouncing criminal acts through punishment the Courts uphold and reinforce the community's minimum standard of conduct. Sentencing is thus a symbolic statement of society's condemnation of certain behaviour. In a rape case our Court of Appeal said "Society is entitled to exact a severe penalty from the offender so as to mark its condemnation of his conduct". (*R v Puru* [1984] 1 NZLR 248, 254). This language is similar to that of Lord Devlin in the "Hart/Devlin debate" of the 1960s. Denunciation and retribution are closely related.

sentencing, and sometimes punishment is seen in terms of *containment*<sup>3</sup>, especially of dangerous offenders. Occasionally *compensation*<sup>4</sup> - the provision of redress or recompense to the victim for injury or loss - is also mentioned, but usually as an after-thought and only as a supplementary objective.

While there is a variety of views about the theory of punishment, the one thing about our criminal justice system today that seems to be agreed by all is that in practice it is "Not Working". Crime rates 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. The deterrent aspect of imprisonment is questioned by the failure of longer prison sentences to reduce serious crime; convictions for violent offending increased by 41% between 1985 and 1992 despite custodial sentences for violent crime increasing in length by 58% over the same period.<sup>5</sup> Whether the courts are meting out "just deserts" satisfactorily from the public's point of view seems to be always the subject of challenge. Notwithstanding the Roper report the area of rehabilitation is bedevilled by lack of resources and a dearth of publicised success stories. In my view morale in the criminal justice system is low and a siege mentality prevails.

But I am here today to proclaim the good news that a better - a *much* better - model of justice is at hand. 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 our adult courts as well. While the traditional objectives of sentencing that I have mentioned are little more than attempts at rationalising the *status quo*, the Youth Court model requires a new way of thinking about criminal justice. That new way can be described as *restorative justice*, a term which is just now starting to enter the public vocabulary. Although the concept may seem new it has its roots deep in our heritage, as we will see.

### **The Youth Court model of justice**

In summary form I have previously suggested<sup>6</sup> that the distinctive elements of the 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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<sup>3</sup> *Containment* - the prevention of further crime by locking up the criminal. A few dangerous criminals thought to be beyond reform receive the indeterminate sentence of preventive detention. Sometimes lesser criminals receive prison terms that are said to prevent reoffending but this essentially utilitarian objective is normally tempered by "just deserts", ie the length of the sentence is determined primarily by the gravity of the offence. The sentence must bear "a reasonable relationship to the penalty justified by the gravity of the offence": *R v Ward* [1976] 1 NZLR 588, 591.

<sup>4</sup> The sentence of reparation is the obvious example here.

<sup>5</sup> *Corrections Operations*, Department of Justice, p 6.

<sup>6</sup> New Zealand Law Conference, Wellington, March 1993, session on the Youth Court.

Against that simple framework let me briefly describe for those unfamiliar with its workings the **principal structural features of the Youth Court** under the Children Young Persons and Their Families Act 1989. These are as follows:

1 There is a division of function between the Family Court, which handles "care and protection" cases, the focus there being on family dysfunction, and the Youth Court which handles offending by young persons (over 14 years but not over 17 years of age).

2 A sharp separation is to be found between (a) adjudication upon liability, ie deciding whether a disputed charge is proved, and (b) the disposition of admitted or proved offences. The adversary system is maintained in full for the former, including the right to trial by jury of all indictable offences, the appointment of a Youth Advocate in all cases, and the use of traditional rules concerning the onus and standard of proof ( - beyond reasonable doubt) and the admissibility of evidence.

3 For really serious offences ("purely indictable") the young person is dealt with in the adult court unless a Youth Court judge decides to allow him to remain in the Youth Court - ss 275 and 276.

4 At the other end of the scale a diversion system operates to keep young persons away from the Youth Court. Both of the traditional means of obtaining a suspect's attendance before the court - arrest and summons - are carefully restricted. Thus no arrest can be made unless it is necessary to prevent further offending, or the absconding of the young person, or the interference with evidence or witnesses (s 214). And no summons can be issued without first referring the matter to a Youth Justice Co-ordinator who then convenes a Family Group Conference ("FGC") - s 245. 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.

5 The FGC is attended by the young person, members of his family (in the wider sense), the victim, 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: s 251. This last category could include a representative of a community organisation, eg drug addiction agency or community work sponsor potentially helpful to the young person.

6 The Youth Justice Co-ordinator (an employee of the Department of Social Welfare) arranges the meeting and of course attends as well, in most cases facilitating the meeting.

7 Where the young person *has not* been arrested, the FGC recommends whether the young person should be prosecuted and if not so recommended, how the matter should be dealt with (s 258(b)), with a presumption in favour of diversion (s 208(a)). All members of the FGC (including the young person) must agree as to the proposed diversionary program, and its implementation is essentially consensual. Where the young person *has* been arrested the court

must refer all matters not denied by the young person to a FGC which recommends to the court how the matter should be dealt with. Occasionally a 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 plan is supervised by the persons nominated in the plan, with the court usually being asked to adjourn proceedings, say for 3-4 months, to allow the plan to be implemented.

8 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 most severe being three months residence in a social welfare institution followed by six months supervision; or the court may convict and refer the young person to the District Court for sentence under the Criminal Justice Act 1985 (s 283(o)), which can include imprisonment for up to three years.

9 As with other diversion schemes, if the plan is carried out as agreed the proceedings are usually withdrawn; if the plan breaks down the court can impose its own sanctions. Thus the court acts as both a back stop (where FGC plans break down) and a filter (for patently unsatisfactory recommendations).

## Testimonials

Perhaps more enlightening than this mechanical description of the Youth Court procedures is a reference to the views and comments of those actually involved in the system. Thus to take five of them -

**Trish Stewart**, Youth Justice Co-ordinator

"The crux of the Youth Justice System is **direct** involvement of the offender and the 'offended against', eyeball-to-eyeball."<sup>7</sup>

She goes on to describe the FGC process in language very similar to that of the restorative justice writers.

**Principal Youth Court Judge MJA Brown:**

"The philosophies and principles that are being used in the youth justice field in New Zealand are, I believe, inextricably based on a communitarian concept. We are seeing a greater involvement of families and wider families - a recognition of the strength of attachments that evoke personal obligation to others within a community of concern.

All my life experience to date convinces me that there are great strengths within our community. I am positive we can draw on New Zealanders' immense reservoir of concern and sense of group obligation... When we talk of communities, we must include victims of offending. The primary objectives of a criminal justice system must include healing the breach of social harmony, of social relationships, putting right the

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<sup>7</sup> From her article in "The Youth Court in New Zealand; a New Model of Justice", Legal Research Foundation publication #34, 1993, at p 43.

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."<sup>8</sup>

(And see Judge Brown's "victim-centred" diagram attached.)

### **Judge FWM McElrea**

"The new paradigm does not easily fit within the old parameters - liberal/conservative, justice/welfare, punishment/rehabilitation, justice/mercy. It cannot be described in those terms because it requires a new way of thinking, and of doing justice.

"My conclusion therefore is that we indeed *do* have a new paradigm of justice. It is not simply an old model with modifications. A new start has been made, new threads woven together and a new spirit prevails in Youth Justice in New Zealand. It is a spirit which 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. In the process most of the power previously vested in the court is transferred to the local community which now carries this new responsibility.

"Perhaps when the real strengths of the new model have been understood we will be able to take it beyond the Youth Court, find a mechanism for defining a relevant community group for adult offenders, involve victims and the wider community in finding solutions, and in the process remove from the courts and our prisons much of the burden of unrealistic expectation under which they labour."<sup>9</sup>

### **Michael Doolan, one of the authors of the 1989 Act:**

"When I look back on the practice and the results of the last three years how much I wish we had expanded this statutory base of victim involvement. Victim rights to justice were included as a principle in the new Act, not quite as an aside, but certainly not with the planned purpose of the way that the principle is being applied today. We do have a new paradigm of justice operating in this country, some of it permitted, but not explicitly envisaged, by the Act itself. I suppose that I can at least be grateful that the Act has enabled this development to occur and has not stifled it."<sup>10</sup>

### **Raewyn Clark, Victim Support**

"The most positive aspect of the CYPF Act 1989 is that at least victims do have a far better chance of taking part in a system that addresses or imposes justice on the alleged offenders."<sup>11</sup>

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<sup>8</sup> "Listener", 25 September - 1 October 1993, p 7, "Viewpoint".

<sup>9</sup> Legal Research Foundation publication pp 13,14

<sup>10</sup> Transcript of NZ Law Conference session on the Youth Court, 4 March 1993, p 14.

<sup>11</sup> Writing in *Te Rangatahi* [Youth Justice newsletter] #1, August/September 1993, p 4.

## Restorative Justice

When you analyse what these participants are describing I believe it is the three-fold structure outlined above, ie one in which

- (i) the State is no longer centre stage;
- (ii) a response from the community most relevant to the offender is negotiated rather than imposed; and
- (iii) victims are key participants and a healing process is sought for victims and offenders.

It was only after I had drawn these conclusions some time ago that I came across the term "restorative justice". In October 1993 I was at Cambridge University where I spent a month of my sabbatical leave at the Institute of Criminology. It was a great time (and place) in which to sit quietly and reflect from a distance on the path we were following. By reading widely about the journeys of others some features of our own terrain became more meaningful to me. I was struck by the extent of common ground between what I had earlier experienced, read and written about in New Zealand and what I read about restorative justice in Cambridge.

Let me give three accounts of restorative justice from that reading.

First, Howard Zehr's seminal work *Changing Lenses: A New Focus for Crime and Justice* (1990) p 211:

"According to retributive justice, (1) crime violates the state and its laws; (2) justice focuses on establishing guilt (3) so that doses of pain can be measured out; (4) justice is sought through a conflict between adversaries (5) in which offender is pitted against state; (6) rules and intentions outweigh outcomes. One side wins and the other loses.

"According to restorative justice, (1) crime violates people and relationships; (2) justice aims to identify needs and obligations (3) so that things can be made right; (4) justice encourages dialogue and mutual agreement, (5) gives victims and offenders central roles, and (6) is judged by the extent to which responsibilities are assumed, needs are met, and healing (of individuals and relationships) is encouraged."

Zehr goes on (pp 211-214) to list 34 points of comparison of the two systems (attached).

Secondly, Tony Marshall. His 1994 paper in *Mediation Quarterly* is entitled "Restorative Justice on trial in Britain". At pp 8-9 Marshall identifies the face-to-face meeting of victims and offenders as representing "a wholly new aim of 'reconciliation', quite unrepresented in modern criminal justice practice." He goes on:

"In the concept of a victim-offender encounter lie a number of tenets that run counter to the main trends of criminal justice: that the major parties involved in a crime - especially victim and offender - should be directly involved in its resolution; that offenders should play an active role in putting things right, not just a passive one of accepting punishment; that relationships - not simply between victim and offender but also between both and the community - are important to the cause and prevention of crime; and that the emotional aspects of crime are just as important as the material ones. Reconciliation comprises a number of objectives that express these tenets:

providing victims with an opportunity to air and relieve their upset, fear, anxiety, or anger; supplying victims with an experience of apology and acceptance of apology (with or without "forgiveness", which is a psychologically complex and subjective experience) and thus to draw a line under the victimisation event; offering victims a chance to be involved and consulted, or even the opportunity to convert a negative experience into something positive by helping to try to reform the offender; providing offenders with a chance to apologise and atone, to take responsibility, and thus begin to regularise their relationship with the community; and giving both parties together an opportunity to resolve earlier relationship problems that gave rise to the crime, or subsequent dangers of retaliation that have arisen from the offence."

Thirdly, DW Van Ness and others under the title *Restorative Justice: Theory, Principles and Practice, USA* in Justice Fellowship, 1989, enunciate three fundamental principles of restorative justice:

- (1) Crime results in injuries to victims, communities, and offenders; therefore the criminal justice process must repair those injuries.
- (2) Not only the State, but also victims, offenders and communities should be actively involved in the criminal justice system at the earliest point and to the greatest possible extent.
- (3) In promoting justice, the State is responsible for preserving order, and the community is responsible for establishing peace.

By the principles provided by any of these three writers, the New Zealand system is in my view substantially a restorative model.

### **The origins of restorative justice**

Where has the idea of restorative justice come from? It did not originate in the writings of criminologists or legal philosophers, nor in the many experiments in victim-offender mediation in the United Kingdom to which I refer in my paper given to the Youth Justice Conference in Auckland on 25 February last<sup>12</sup>. Rather it is to be found deeply embedded in a variety of ancient cultures. The Jubilee Policy Group of Cambridge in an interim report<sup>13</sup> refers to legal codes promulgated in Sumeria (2050 BC), Babylonia (1700 BC), Rome (449 BC) and Kent (the laws of Ethelbert, 600 AD) as concentrating on restitution, but not as an end in itself.

"The commitment required by the criminal justice system was not only to address the wrong, but also to vindicate the victim, reconcile the parties, and re-establish community peace."

Four ancient societies are mentioned in my February paper - Hebrew, Japanese, North American Indian, and Maori. I will quote some excerpts from those citations to demonstrate their surprising degree of similarity.

**Hebrew** Howard Zehr (Chapter 8) describes one essential theme of the bible as "shalom", a Hebrew word encapsulating God's vision for humankind. It

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<sup>12</sup> *The Intent of the Children, Young Persons and their Families Act, 1989 - Restorative Justice?*

<sup>13</sup> *Relational Justice: a new approach to penal reform* December 1992, pp 9-10.

refers to a condition of "all rightness" in various dimensions. Biblical justice seeks to make things right, to restore shalom. "Offences were understood to be wrongs against people and against shalom, and the justice process involved a process of settlement", says Zehr. In a chart on pp 151-2 (attached) Zehr contrasts the modern and biblical concepts of justice in 19 different respects. In contrast to modern justice, biblical justice searches for solutions, focuses on making right, aims to bring together, is based on need rather than deserts, focuses on the harm done, has a holistic context for individual responsibility, upholds the spirit of the law, considers people, shalom rather than the state, to be the victim.

**Maori** In their paper *Maori and Youth Justice in New Zealand* (1993) Olsen, Maxwell and Morris at p 3 point out that pre-European Maori shared with other small-scale societies four features identified by Marshall in 1985:

"First, the emphasis was on reaching consensus and involving the whole community; second, the desired outcome was reconciliation and a settlement acceptable to all parties rather than the isolation and punishment of the offender; third, the concern was not to apportion blame but to examine the wider reasons for the wrong (an implicit assumption was that there was often wrong on both sides); and fourth, there was less concern with whether or not there has actually been a breach of the law and more concern with the restoration of harmony."

**Japan** Citing Haley (1988), Marshall<sup>14</sup> reports that Japan has

"a national system of justice [that] places great emphasis on apology and reparation, reinforced by a culture which values family, community and interpersonal respect, and ... is one of the few countries in the world where crime rates are falling and criminal justice costs are extremely low compared with Western nations."

**Canada** The submission of the Assembly of Manitoba Chiefs in 1989 to a Canadian inquiry included this passage<sup>15</sup>:

"the adversarial system is antithetical to the traditional approach of conflict resolution practised by aboriginal people. ... Aboriginal people believe that: a) victims' needs must be met to help them "regain a sense of harmony and respect as a member of their families and community"; b) offenders must accept responsibility for their actions not only for themselves, but for the hurt that they have brought to their families and community; c) offenders should remain in the community and take control of their own lives and that of those who have been hurt, and to assume responsibility in restoring the harmony of the community; and d) remedies for Indian offenders should include restitution and restoration with emphasis on healing and accountability, not punishment."

**How did this older and more integrative approach to justice come to be abandoned in western legal systems?**

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<sup>14</sup> Tony F Marshall, *CRIMINAL JUSTICE IN THE NEW COMMUNITY: BENDING TO THE TRENDS IN POLITICS, SOCIETY, ECONOMICS AND ECOLOGY*, a paper written for the British Criminology Conference, July 1991, p 34.

<sup>15</sup> Cited by Lajeunesse, unpublished paper, 1990.



The answer to this question is very interesting. On one level it may seem obvious that the change from small scale to large scale communities, from rural to (less personal) urban environments, has worked against the retention of a more community-based system of control. However, that change has also permitted the creation of new forms of community, eg based on voluntary association rather than neighbourhood or family, and so it cannot entirely account for the change. In any event the transformation of the face of justice occurred long before modern urban society evolved.

Most commentators point to the rise of the nation state, and this makes sense; after all, without a powerful State justice had necessarily resided with the local community. The Jubilee Policy Group report <sup>16</sup> at pp 10-11 suggests that the Norman invasion of England was the beginning of the change in Britain.

"William the Conqueror and his descendants had to struggle with the barons and other authorities for political power. They found the legal process a highly effective instrument in asserting their dominance over secular matters and, through their control of the courts, in increasing their political authority. To this end, William's son, Henry I, issued in 1116 the *Leges Henrici*, creating the idea of the 'King's Peace' and asserting royal jurisdiction over certain offences by which it was deemed to be violated. These included arson, robbery, murder, false coinage, and crimes of violence. A violation of the King's Peace was an offence against his person, and thus the King became the primary victim in such offences, taking the place of the victim before the law. The actual victim lost his position in the process, and the State and the offender were left as the sole concerned parties."

A second consequence of the King's jurisdiction in the matter of offending was a movement away from restitution (to the victim) and towards fines (payable to the State). Fines became a source of revenue<sup>17</sup>, and were consistent with the idea of paying a debt to society. This consequence reinforced the first, ie the displacement of the victim by the State as central protagonist in the dispute with the offender.<sup>18</sup>

In many areas, however, the central role of the State in modern society is being critically examined and (often) cut back. We should not assume that a restorative model is no longer possible or desirable.

### **The Youth Court as a new model of justice**

While the New Zealand system of Youth Justice has parallels elsewhere in certain respects<sup>19</sup> and is not free from criticism in its implementation<sup>20</sup> - indeed Principal Youth Court Judge MJA Brown at the Youth Justice Conference said

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<sup>16</sup> See footnote 13 above.

<sup>17</sup> Some might see a parallel with the "speed cameras" recently introduced on our roads. The criticism of their present use is that what should be a valuable means of crime control and saving of lives on dangerous roads has been compromised by their revenue-raising potential.

<sup>18</sup> Page 11 of Jubilee Policy Group interim report.

<sup>19</sup> See section 5 of my Youth Justice Conference paper.

<sup>20</sup> See section 2.3 of that paper.

that the system is only working to about 40% of its capacity- I have argued<sup>21</sup> that our system is quite distinctive in four respects:

- i. I know of no system of justice that replicates the FGC as it operates here. A unique combination of participants is the key to the new regime.
- ii. In contrast to our regime, most overseas mediation schemes involve the *voluntary* participation of both victim and offender.
- iii. The Youth Court legislation in New Zealand applies across the board - to all young persons, in all parts of the country.
- iv. It is the first time that a western legal system has legislated to introduce what is in substance a restorative model of justice.

In my paper to the Youth Justice Conference I conceded that **it is essentially the practice of youth justice**, as experienced by its practitioners, that is restorative, rather than the legislation underlying that practice. (Sections 4-6 and 208 spell out certain objectives of the Act and principles to be applied in youth justice. These are partly restorative, but mostly reflect a narrower emphasis namely the strengthening of the relationships between a young person and his family, whanau, hapu, iwi, and family group, and enabling such group whenever possible to resolve youth offending - see the short and long titles of the Act and ss 4 and 208(c).) However I went on to say that the "partly restorative" aspects of the Act should not be down-played, and I identified six of them. Here I want to mention and expand on only one, the question of **accountability**.

Section 4(f) propounds the principle 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. They are not "soft" or woolly concepts. Young people, even though they are often themselves "victims", are encouraged to take responsibility for the consequences of their actions, and not to blame others or "the system". This way they can start to take control of their own lives. We may think that the traditional court system holds offenders accountable but it has become too ritualised, too de-personalised, to succeed in many cases. As an Austrian criminologist has pointed out<sup>22</sup> in a paper written for the 11th International Criminology Congress held in Budapest, August 1993, mediation processes have an empathetic and educative effect by way of an "*inner drama*" which has a socialising value for juveniles. In 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.

### **What are the prospects of applying the Youth Court model to adults?**

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<sup>21</sup> See section 6 of that paper.

<sup>22</sup> *Who wants what kind of justice?* by Dr Christa Pelikan.

If we return to the three-part definition of the Youth Court model in p 2 above, two of those parts - the transfer of power from the State to the community, and the central role of the victim in producing a healing process - are not limited in principle to young offenders. Further the needs of individuals and societies which a restorative model seeks to address are the needs of all people, not just those relating to young offenders. The real issue to be addressed is whether and how the key mechanism, the FGC, could be adapted to adults. The starting point must be the meaning of "family" for young people and for adults.

## **Families**

As presently structured, the explicit objectives of the Children, Young Persons and their Families Act are very heavily family-oriented. About half of the Act's stated objectives and principles relate directly or indirectly to the reinforcement of family in the wider sense. (The lack of attention to the role of victims, I have argued elsewhere<sup>23</sup>, needs to be addressed by amending legislation.) But it is natural that the emphasis should be on families when dealing with children and young persons, because families are their natural community, the source of their relationships of dependence or interdependence, and the most likely basis of social control. "Families" in this context may have a narrow, nuclear connotation, or an extended sense as in Polynesian culture. In this "International Year of the Family" we are also reminded that families come in many different shapes as well as sizes. The control that is inherent within family relationships is founded in complex needs - for acceptance, for respect, for love, for food, shelter and warmth, for companionship, for role-models, for the satisfaction of being a contributor. The mutuality of rights and obligations in the family context is both an experienced fact and in turn a foundation for wider social relationships.

Such notions strongly support the involvement of families in finding solutions to young people's offending, but what happens as the young person grows up, leaves home and becomes an adult?

## **Other relationships**

My first observation is that the influence of families upon their members (and vice versa) does not cease at a given age, say the 17th birthday. Seventeen-, eighteen- and nineteen-year olds, especially those who have left home, may be "independent" in some important respects (eg financial) but are likely to continue to depend upon family in varying degrees to meet some of their emotional and social needs. Secondly, some family ties will change in character as young people mature. There may be less dependence or discipline, and more friendship and respect. Thirdly, as some family ties become less meaningful or are lost altogether, eg through death or divorce, others may take their place as the individual marries, has children, gains sisters-or brothers-in-law, and so on. Very few people can be quite without family of any sort and it would be wrong to shape a model of justice around those few. It follows that families are still likely to play an important role for most adults.

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<sup>23</sup> Section 4 of Youth Justice Conference paper.

Next we must ask whether there are other, non-family based, 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. Often there will be voluntary associations that have taken the place of family or former neighbour relationships. These might relate to a wide range of activities:

"Marshall (1991) argues that the concept [of community] can be expanded ... 'to accommodate the fact that our mobile society allows meaningful associations based on leisure pursuits, political parties, churches, ethnic groups, trade unions, extended family, etc'." <sup>24</sup>

And Marshall must surely be right. 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 are in meaningful relationships with others. Indeed some would say that "to be, is to be in relationships" (- Jonathon Burnside, of Jubilee Policy Group in conversation 20 October 1993; and see that Group's new publication *The R Factor* by Michael Schulten and David Lee concerning the overriding importance of relationships).

### **Community Group Conferences**

This being so an adult equivalent of an FGC would seek to tap the relationships of respect and influence that apply to the adult offender. Are there family members - a spouse or de facto partner, siblings, favourite cousin, even children - who are (or might yet become) concerned for his well-being? Is there a cultural unit (hapu, iwi, or Pacific Island community) which might be prepared to support one of their own? Is there an employer, ex-employer, work-mate, fellow football player, former teacher or school friend who still can provide meaning and support in a perhaps confused life? Even a non-voluntary association may be relevant. A periodic detention warden or community work supervisor who got on well with the offender in the past could be a valuable person in a time of need.

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.

All of the foregoing leads to the notion of a Community Group Conference ("CGC"). A co-ordinator would invite to that conference the victim (and supporters, if desired), a police representative, family members if appropriate (- perhaps fewer than for an FGC but cultural factors would be relevant here), and persons representing other significant relationships for the offender - say one or two such persons, or more if there is no family

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<sup>24</sup> Vivienne Morrell (Justice Department), *Social Change and Criminal Justice Issues - Report to Management Committee*, September 1993.

involvement. Imagination and perseverance would be necessary skills in assembling a community group. If despite skilled endeavour, no such persons can be found there may be a place for voluntary associations (eg a local church group, cultural association, or service organisation) to step into the gap. Finally an agency offering assistance to address a specific need (illiteracy, alcoholism, budgeting help) might appropriately be included in a CGC, just as it can be an FGC.

**If the crime has no victim**, what then? The question arises also in youth justice. An FGC there is still held, as it is where a victim is invited but declines to attend. But even with so-called "victimless" crimes, eg drug abuse, there may be others adversely affected - the families of drug addicts, in that example; so there may still be the opportunity to confront the harmful nature of the offender's conduct in a personal way, and from that confrontation to build something positive in the offender's life.

If an adult system was to follow on the Youth Justice model, it would have **diversionary mechanisms**, in particular restrictions on the arresting or summoning of offenders so that a CGC could consider alternatives to prosecution. If agreed by all members of the CGC (including the victim and the police) no prosecution would ensue and the matter would be dealt with as decided by the CGC, ie in the community.

The police would of course need the power to arrest in some form, at least (as with young people) where it is necessary to prevent further offending or ensure the offender's attendance at Court, or prevent interference with evidence. The police might argue for a right to arrest persistent offenders, or those to be charged with serious offences, say "purely indictable offences", or perhaps a combination of these two criteria, but I would argue that it would be unwise to bypass the CGC process altogether for such offenders.

i) There is some evidence that even **serious offences** may be well suited to victim-offender mediation. Thus Marshall (1994) p14 notes that amongst the various British schemes for voluntary victim-offender mediation were cases of a more serious type, in particular assaults (including sexual assaults). He continues:

"Reparation schemes in the experimental years were usually chary of accepting many such serious cases (and other agencies chary of referring them), partly because of worries that things might go wrong or get out of hand, partly because they usually need more preparation time than is available ... Nevertheless, some schemes did deal with a considerable number of assaults and some very serious crimes, including a manslaughter. Their experience with these was that, if the victim wanted to take part, they were just as likely to be successful as minor cases, and involved an even greater pay-off in terms of benefits for both victims and offenders. It was therefore recommended that each case should be considered on its merits, rather than having an arbitrary cut-off point in terms of seriousness from a legal perspective."

(ii) Then from the point of view of **repeated offending**, there may be a distinction between those who reoffend after experiencing CGCs, and those whose earlier offending was dealt with under the traditional system. There would appear to be no reason to exclude the latter from the full benefits of a new approach. Further two of the studies surveyed by Marshall's 1994 paper reported reduced offending (estimated at 10-20%) for adult, *repeat* offenders who met their victims.

For these two reasons it would be unwise to assume that serious cases or repeat offenders should be excluded from the CGC process. Even where an arrest is made of a young person the Court must refer all admitted or proved offences to an FGC in any event, and the same approach would have merit with adults. Of course serious cases are still likely to result in a term of imprisonment, either as an agreed outcome of a CGC or because it is thought necessary by the court, but there is nevertheless likely to have been value in the CGC in terms of the restoration of the victim's rights and assistance to the court in sentencing.

For the very serious offences, eg rape, the victim may not be ready to face the offender for some time, even years, after the event. This should not be a reason to avoid a CGC. A representative of the victim would be entitled to attend on behalf of the victim, and I believe there should be an obligation on the offender to meet with the victim at some later point if and when the victim would find that helpful. Any further step to be taken at that point would be purely voluntary.

### **Accountability for adults**

One of the benefits of restorative justice is that it encourages people to accept responsibility for their behaviour and its consequences for others. Is there any reason why a new Criminal Justice Act should not have as one of its guiding principles the proposition laid down by statute for the Youth Court<sup>25</sup> that those committing offences should be "held accountable, and encouraged to accept responsibility, for their behaviour" and to "develop in responsible, beneficial and socially acceptable ways"? I believe there would be a greater acceptance of responsibility (ie fewer false denials) if the offender attends a CGC. Some proponents of restorative justice criticise 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 " (Zehr p 67).

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 hung for stealing, that sort of comment was entirely understandable, but now it is perhaps time to acknowledge *each* wrong trial result as an injustice. In support of Zehr, it may be time to stop and ask: What does it do to the person who is *in fact* guilty to be found "not guilty"? And what does it do 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.

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<sup>25</sup> Section 4(f), Children, Young Persons and their Families Act 1989.

Dr Pelikan's distinction between "inner" and "outer" drama is, I submit, equally applicable in adult courts. The legal process too often fails to confront offenders with the reality of their offending. They do 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. 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. As the judge, lawyers and others in court all play their parts in a ritualised process or drama, it is hardly surprising that many defendants, their attention almost entirely on their own predicament, shuffle through their lines with little more in mind than a desire to get off the stage as quickly as they can. A restorative model is the antithesis of this process.

### **Equal treatment**

One concern expressed to me at Cambridge about the Youth Court model is that it is likely to produce different outcomes in like cases. If the essence of justice is treating like cases alike, how then can justice be done? Does too much depend on the attitude of the victim? The answer to this concern has four parts.

First we should be clear that the Youth Court model applies the same law throughout the land. It is not a system for "localised" justice, despite its emphasis on the role of the community. It is important that the courts retain their overseeing role, not least to guard against the possibility of oppressive custom or sexist or racist outcomes.

Secondly, critical attention needs to be paid to the assumption that our existing system of justice does treat like cases alike. Sentences calculated according to two or three variables (eg nature of crime, seriousness of case, and previous convictions of offender) might produce an appearance of equal treatment but only at the expense of doing justice in individual cases. As in other areas of the law, uniformity and flexibility are competing elements of justice<sup>26</sup>.

Thirdly, the court retains the power to reject the recommendation of a FGC and impose a sentence itself. In fact experience has shown that a high proportion of FGC plans are accepted by the courts - 81 % in the Maxwell/Morris sample (p 156), but even closer to 100% in my estimation of the Auckland region experience. Because the Judges have entered into the spirit of the Act, the residual power to reject a plan has not interfered with the reality of the transfer of responsibility to the community. Nevertheless the residual power to reject a plan, although little used, is a means of avoiding seriously disproportionate outcomes. The courts' intervention occurs much less frequently than might have been expected, in part because the judges recognise that sentencing even by courts is not an exact science, in part because FGC proposals are usually a very responsible and often imaginative response to the situation, in part because of the strong influence on the Court of both police and victim agreement to the plan, and in part because Youth Justice Co-ordinators can advise conferences that a particular plan is so excessively onerous or unduly lenient that it is unlikely to be accepted by the court.

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<sup>26</sup> "An overview of history throws up this constant tension and struggle between the demand for the certainty of a rule-bound system on the one hand and the demand for a flexible system that can accommodate individual justice on the other" - Judge Cadenhead, unpublished paper, 1994.

Fourthly, the effect on the victim is, even under the old system, one of the matters taken into account, and to a certain extent the offender takes the victim as he finds him. Two drivers' carelessness cause accidents. One victim dies, and the other is not injured at all. One driver goes to prison and the other is fined. If this is acceptable, why should the victim's response *not* be a permitted consideration? Proponents of restorative justice would argue that a system that de-personalises the victim's response or removes it from the equation in the name of uniformity does not produce justice for either victim or offender.

### **Prospects of acceptance by the public**

But is the concept of a CGC too novel to be accepted by a public thought to be wanting a tougher approach taken to crime?

At present the public is shown only two responses to crime - "hard" and "soft". Deterrent and retributive approaches are associated with being "hard" on criminals, while reformation/rehabilitation is regarded as "soft". Inevitably, if "soft" options do not "work" the call is for the government, the police and the courts to "get tough" on criminals. There seems to be no other course. But the Youth Court model is not "soft". Many studies report that it is harder for an offender to confront his victim than to stand in court and accept punishment. FGC plans are generally quite strict from the young person's point of view, and can be enforced more readily than impersonal court orders. If this can be understood by the public, that there is a third option which is not "soft" but which uses community resources to find alternatives to purely punitive measures like imprisonment, then its acceptance is much more likely.

Then again, is the public as vengeful as some seem to think? Those who have first-hand knowledge of victim-offender mediation report on the desire of both sides to take part in such processes - 60% of victims and nearly all offenders, in the UK experience (Marshall 1993, p9) - and also note the general absence of vindictiveness on the part of victims (Stewart p 44), a comment which is often repeated in the literature.

Nor is it new to be **involving the community** in providing solutions. Neighbourhood Watch schemes, and community policing, are but two manifestations of a clear trend in this direction. Indeed the New Zealand government has promoted a Crime Prevention Action programme, and the New Zealand Police have announced a five year strategic plan, both of which at different points are strongly community-based. In many ways a CGC system would be a practical manifestation of thinking already well developed in New Zealand.

The idea of **negotiated justice**, rather than imposed justice, is also one that has parallels readily found in the 1990's. The movement towards proportional representation in the New Zealand parliament is one such parallel. "Alternative Dispute Resolution" is another - a well developed movement in New Zealand and elsewhere (see for example Vivienne Morrell pp 10,11 in relation to commercial mediation and arbitration). Disputes Tribunals have an obligation to try and achieve a settlement between the parties. Many judges are regularly raising the question of settlement of civil disputes in pre-trial conferences. The Court of Appeal has encouraged parties to negotiate



settlements of Treaty of Waitangi disputes. Major environmental issues are often resolved by a process of detailed negotiation between all interested parties. The high rate of agreement at FGC's (90%) is testimony to the ability of the parties to resolve most cases of youth offending.

So it is a common theme, that instead of imposing a solution from the top through the power of the State, it may be better that the parties most directly affected negotiate a solution they are happy with, perhaps with the State (through the courts) retaining some degree of oversight.

## **Likely consequences of applying restorative justice to adults**

The immediate consequences of the introduction of the new Youth Court model in New Zealand were a dramatic reduction in the number of young people appearing in court<sup>27</sup>, because of the diversionary nature of the system, and the closure of most of the social welfare homes to which young people had been remanded in the past<sup>28</sup>, because of the community-based nature of most outcomes of FGCs. Would a similar system for adults mean fewer courts and fewer prisons?

Given the nature of restorative justice the answer to this question should be "Yes". Criminal courts would still be needed for dealing with arrested persons, trying defended cases, and overseeing the sentencing process of CGCs, but the number of cases in court and the proportion of those where the court would be required to impose sentence would both be likely to drop substantially. The proportion of custodial sentences is also likely to drop sharply, if the Youth Court experience is relevant. FGCs strive to find a community-based solution 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.

And what of the effect on the crime rate? Any answer would be very speculative but once again the Youth Court experience may be relevant. There is no evidence of any overall increase in offending, despite the increase in adult offending over the same period. An article by Jeremy Robertson in *Children* No. 11 p 8 on an alleged "tidal wave" of juvenile offending (to use Anita McNaught's words on FRONTLINE on 20 June 1993) showed that cleared offences attributed to young people were stable or decreasing throughout the period 1981-91 while adult offending increased, but over the period 1990-92 when police numbers were increasing there was a slight increase in the rate of youth offending as measured by "cleared offences". Since this article was published the Justice Department has released statistics showing that the number of prosecuted cases for defendants aged 17, 18 and 19 years has dropped by 27% over the five years from 1987 to 1992. This would tend to suggest that the new Youth Court is producing young adults less likely to be prosecuted in the adult courts. The Minister of Youth Affairs in his speech to the Youth Justice Conference last month certainly claimed this statistic as a success for the Youth Court model. Who knows what results might ultimately be achieved if the system were properly funded and operating at say 80% of capacity instead of Judge Brown's estimated 40%.

It would however be a mistake to seek to justify a restorative justice system solely by prosecution or "cleared offences" statistics, although one would hope to see benefits there in the long term. It cannot be a "cure" for crime, which is part of our human predicament. There are other benefits, for victims and others involved, that cannot be measured in a statistical way.

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<sup>27</sup> "Only 16 per 1,000 young people appeared in the Youth Court in 1990 compared with an average of 63 per 1,000 in the three calendar years immediately preceding the Act" - Maxwell and Morris writing in *Commonwealth Judicial Journal* Vol 9 No 4, December 1992, p 26.

<sup>28</sup> The number of children admitted to Social Welfare Department residences dropped from 2,712 in 1988 to 923 in 1992-93.

The chief danger that I see is that restorative justice will be seen as a means of saving expenditure on courts and prisons and will be adopted for "fiscal" reasons, without recognising that the community requires financial resources if it is to take on this new role. One conclusion drawn at the Youth Justice Conference was that community groups are not receiving the funding that they deserve - a point that had been earlier made by the Police Association in its submissions to parliament's Social Services select committee on 1 February 1994 when it reportedly stated that there was "woeful under-funding" of the Youth Justice section with serious implications for the future of the FGC system for young offenders. A parallel might be drawn with the area of mental health where the majority of psychiatric hospital facilities of a few years ago were closed without making equivalent provision for the cost of treatment in the community.

It would be better not to make any change at all than to do so without proper funding. Otherwise the obvious short-term savings will be taken (eg by closing prisons), the community will be left struggling and unable to cope with the extra load, and when the inevitable happens and the system is seen to be foundering it will be discarded as unworkable. Other theories of punishment have had their turn, with substantial resources invested in their prescribed remedies. Restorative justice for adults should not be introduced unless there is the political will and the financial commitment to give it a serious trial. If it is tried in a serious way it has the potential to produce a system of criminal justice which the community would be proud to own.