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Decolonising Restoration and Justice: Restoration in Transitional Cultures

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Abstract: This article is a strategy for the comparative analysis of justice in various contesting forms. To identify useful levels of the comparative project, the colonising potential of restorative justice is examined. In this context the influence of formalised justice mechanisms over the less formal is explored, with examples in transitional cultures in the South Pacific discussed. Local and global potentials (and dilemmas) are identified for analysis. The integration of justice forms, both in terms of structure and ideology, is argued for. Notions of collaborative rather than restorative justice are advanced, in order that the intersection between state-sponsored and customary justice forms is best appreciated.

Restorative Justice and Colonisation

Restorative justice may be understood as a new wave of colonialism in the current domain of social control. When examined against the cultural roots of certain restorative justice strategies[1] this potential to colonise is especially poignant. Bearing in mind the decimation last century of custom-based justice in the face of formal, introduced systems, the potential for restorative justice to overtake modern bureaucratised counterparts particularly in criminal justice, is more than ironic. This article suggests some reasons behind this trend, and the consequences it poses for interpreting restorative justice.

Constitutional legality and legal formalism were crucial to political and economic colonialism of the 'new worlds' (when introduced law and legal institutions repressed the impact of custom) (see Findlay 1997a). More recently, claims for 'informal justice'[2] and its potential to remedy the failings of bureaucratised crime control have tended to legitimate the capture by communitarians of juvenile justice in particular. As with the colonisation of social control through legal and constitutional formalism, restorative justice has, in some instances, failed to respect the limitations of the models it promotes, as well as the tensions with the systems it replaces (see Cunneen 1997). The discussion to follow highlights this dislocation.

Colonisation through restorative justice is more complex than the triumph of the informal over the formal. Claims for restorative justice, and its mechanisms have led to change in both custom-based and bureaucratised criminal justice, as the case studies to come suggest. A consequence of these changes has been that bureaucratised justice is buffered from challenge by the incorporation and co-option of alternative modes of resolution. Also,

custom-based control is drawn closer to the command of the state through recognition and integration.

Advocates of restorative justice argue that less formal justice resolutions must replace moribund and dysfunctional bureaucratised strategies for control. Beyond the justification of failure theory (see Cohen 1995) restorative justice is commended as a means for modifying and augmenting pre-existing control mechanisms. Kathleen Daly (1998) advocates the exploration of 'spliced justice forms'. By this, Daly recognises the potential of collaboration, 'where an informal, restorative justice process was piggybacked on a formal, traditional method of prosecuting and sanctioning serious offences' (p.10). In advancing this position, Daly identifies the merits of an interrelationship between formal and informal justice. She notes Roger Matthews's (1988) view that formal and informal justice are neither dichotomous nor a matter of choosing one or the other, but of examining how they worked together (see Findlay and Zvekic 1988). While this is true, it does not invite anything but the most sensitive and contextually aware intersection between justice models with differing features of formalisation.

Experience in transitional cultures, such as those in the South Pacific (see Findlay 1999, pp.203–17) suggests caution when considering the grafting of a more formal institutionalised mechanism of justice onto pre-existing, and customary restorative practices. 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. Harry Blagg challenges 'orientalist' appropriations of culturally specific reintegration endeavours (see 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 justifying Daly's interest in a synthesis between formal and informal criminal justice, recent work on the transitional relationships of crime in a global context (see Findlay 1999, chs. 1, 4) confirms the significance of Blagg's injunction. Attempts to 'splice' justice forms in certain South Pacific jurisdictions reveal the danger of cultural abstraction, and the potential to compromise the essential and potential contextual elements of customary justice resolution mechanisms.

In order to appreciate the dangers involved in any mindless merging of justice resolution mechanisms, it is useful to examine these both from local and more global perspectives. The imperatives and interests behind the move to integrate may reflect a crisis in local control strategies, as well as wider claims for legitimacy across control agendas, beyond local, jurisdictional or immediate demands.

A blatant example of the colonising potential of 'spliced' justice forms is demonstrated through reconciliation in the criminal courts of Fiji. This also provides a local level of analysis for restoration as a justice paradigm.

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 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 modern 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 court may not examine the complainant 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* (see Abel 1995). 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 customary 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 environments. Further, the essential sanctioning impact of customary 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.

The Indigenisation of Justice

The influence of customary penalty over the control process of formalised legality means more than the recognition of custom through mitigation, or acceptance through judicial notice. Across the Pacific the penalties which now emerge from the state-centred judicial system often incorporate features of customary penalty. Considering the penalty of banishment, speculation on the development of 'hybrid' and culturally sensitive penalties in terms of their ownership, object and purpose is possible. In so doing, Garland's (1990) emphasis on the cultural essence of penalty is confirmed.

Banishment, an extreme custom sanction in Western Samoa, might provide an instance where a less formalised control mechanism may be extrapolated from a uniquely local and relative cultural context into an application where the level of analysis is potentially global. In this regard, the more universal potential of the sanction is available for comparative analysis and cultural transportation only after the original custom context (and its relationship with the sanction) is appreciated.

Potentially Global Level of Analysis

With banishment, the state in Western Samoa recognises the resilience, popularity and utility, of community-centred control. It also appreciates the dangers inherent in a challenge from constitutional legality which will

expose its peripheral and symbolic presence. Finally, through the tolerance and even celebration of banishment, the state, and its constitutional legality, share the legitimacy of indigenised justice forms and outcomes.

In Western Samoa, where today structures of custom-based social order remain intact, banishment is a powerful penalty available to village communities. Beyond this both the formalised state-sponsored processes of dispute resolution, and introduced law have borrowed and endorsed banishment.

The history of banishment as a penalty in Western Samoa was interestingly reviewed in the recent decision of *Italia Taamale and Taamale Toelau* v. *Attorney General of Western Samoa* (Court of Appeal – CA. 2/95B). This was an appeal from a decision of the Land and Titles Court, a court in the state judicial hierarchy, ordering the appellants and their children to leave their village by a nominated date. The appellants argued on appeal that they could not be in contempt of the original court order through non-compliance because the penalty itself contravened Article 13 (1)(d) and (4), the freedom of movement and association provisions of the Constitution. They further argued that it was clear from earlier decisions of the Supreme Court, the penalty of banishment was not to be recognised by the courts of Western Samoa. It is worthy of note here, that in attempting to defeat the jurisdiction of the custom penalty the appellants not only had recourse to the courts of introduced law, they also relied on constitutional legality, and colonial law doctrines of precedent.

The tenure of the earlier courts' argument against banishment as 'law' was that 'ownership' of the penalty remained within customary tribunals, directed against traditional relationships and for the purpose of enforcing customary obligations. None of these therefore should be legitimised at the level of the state through its legal formalism or constitutional legality.

The appeal court in *Taamale* rejected such submissions. Banishment was historically rooted, as the court saw it:

> there is no doubt that banishment from the village has long been an established custom in Western Samoa.

Further, the court went on to review the place of banishment within the law of the colony, and following on from independence. In 1822 the German Administration of Western Samoa passed an Ordinance *to Control Certain Samoan Customs*. The Ordinance prevented Samoans of any station from 'expelling any person from his village or district, under penalty of imprisonment…'. The penalty of banishment was then reserved to the Administrator.

With the introduction of independent constitutional legality in Western Samoa, the status of banishment as a penalty became ambiguous in terms of ownership and objective. The appeal court drew from earlier decisions of the Supreme Court the view that:

> undoubtedly the customs and usages of Samoa in the past acknowledged the rights of village councils and the court to make banishment orders, but that custom ceased on 28 October 1960 when the Constitution was adopted.

Several judgments of the Supreme Court in the 1970s and 1980s endorsed

appeal points that such banishment orders were in violation of the Constitutional rights of freedom of movement and residence.

In *Taamale* the appeal court acknowledged that currently, for many village councils in Western Samoa, banishment was the 'most important sanction vested by custom in the village council'. Banishment is usually employed when other forms of customary penalty such as fines and ostracism from village affairs had failed.

A further argument in favour of the continued significance of banishment was that as an effective general deterrent at a village level, it was rarely necessary to employ state-centred crime control resources such as the police to back up the enforcement of customary orders.

The appeal decision recognised the Land and Titles Court as the only judicial 'site' from where banishment as a penalty may emerge:

> While upholding the jurisdiction of the Land and Titles Court to order banishment we do so on the express basis that the jurisdiction can only lawfully be exercised in accordance with the principles and safeguards identified in the present judgement.

The purpose of the penalty was said to be 'limited to the interests of public order – meaning to prevent disturbances, violence or the commission of offences against the law'. The Land and Titles Court has taken from the village council the responsibility for the banishment penalty, making it a formal court order. The councils are left with their ultimate penalty of ostracising a person within the village.

The appeal court in *Taamale* endorsed the Court's assumption of banishment, and the monopoly over this sanction as within its jurisdiction. A justification as to why banishment moved from the 'ownership' of the village council, to that of a Court is:

> that the imposition of a banishment order is made fair and reasonable and according to law … An individual who is dissatisfied with a decision given at the first instance level of the Land and Titles Court also has further (formal) avenues for seeking redress … as the Land and Titles Court can make a banishment order, so that court can cancel it.

The process of 'ownership' is 'that a village council minded towards banishment from the village would be well advised to petition that (the Land and Titles) Court for an order rather than take an extreme course on their own responsibility'. Further, because serious offences such as murder and rape are grounds for banishment 'it is necessary to say that the punishment of (such) offences is a matter for the criminal courts. Serious crime is properly dealt with in the Supreme Court'. This appears to be both a further constraint on the object and purpose of banishment and a limitation over its ownership.

The court concluded:

> Banishment from a village is, at the present time, a reasonable restriction imposed by existing law, in the interests of public order, on the exercise of the rights of freedom of movement and residence affirmed (in the Constitution).

Interestingly the court recognised the dynamic and culture-bound nature of this penalty:

as Western Samoan society continues to develop the time may come when banishment will no longer be justifiable.

With banishment we have a pre-existing and prevailing custom-based resolution which is 'indigenised' by the state and its bureaucratised justice system. In New Zealand, on the other hand with family group conferencing, we are witnessing the state claiming cultural sensitivity by adopting the structures and discourse of Maori justice practice and philosophies. As Tauri (1998) suggests:

> Indigenisation of the justice system … must also refer to the ideological and practical (re)legitimation of the state's own system. This is attempted through the implementation of legislation and justice initiatives that, while appearing on the surface to empower First Nations, merely incorporates their justice philosophies and practices within hybridised judicial forms. (pp.177–8)

This is not integrated criminal justice (see Findlay 1999, ch. 6). Nor is it the victory of one form of control over another. It is a process of colonisation, where bureaucratised justice claims legitimacy through assimilation. The integration of justice resolutions requires more than the transaction of benefits and interests, one context to another. The integrity of the original context needs to be retained along with the credibility of any new application (and its context) for integration rather than colonisation to take place.

Integration of Justice Forms

The discussion of criminal justice relocated from the context of custom into formalised criminal justice institutions highlights several problems for integration:

- the structures of sanction on which crime control traditionally lies may be culturally specific
- the structures of community out of which such sanctions emerge may not be compatible with the 'communities' of modernisation
- the delineations between control, tolerance and reintegration in modernised communities may be hard and fast – in custom settings these may more naturally merge, as the behaviours and situations they regulate are not so rigidly labelled
- the interests regulated for in modernised societies are more individual and therefore require more formalised legal protection
- the bureaucracies which construct modernised criminal justice have a large investment in crime control – as such they are reluctant to divest their areas of responsibility in favour of other socialisers
- the state represents the interests of those affected by crime in modernised criminal justice – therefore, the community consensus and co-option so essential for tolerance and reintegration (and evident in the custom contexts) are removed from more formalised crime control

Within modernised communities these difficulties necessitate either artificial or imposed integration in place of a natural and evolutionary integrative context for control. One reason for this is the manner in which

modernisation, and its institutions, has tended to colonise (and often compromise) pre-existing ways of doing things. Custom-based justice resolutions are just one casualty of this process. What is interesting recently, however, has been the manner in which derivations of custom have made claim for levels of justice resolution where bureaucratised alternatives are either ineffective or losing credibility. In this regard moves towards integration are not simply from the informal to the formal, custom to modern.

The forces favouring integration will encounter resistance from localised control regimes, where sophisticated bureaucracies monopolise the institutions and processes of crime control. As much as crime is differentiated from other behaviours and situations needing regulation, crime control in these localised contexts is institutionally separate from the broader themes of socialisation.

Despite certain representations of globalised crime which suggest a return to the modes of denunciation common in simpler societies, the preference for adapting and advancing modernised crime control strategies is a feature of global politics. This paradox cannot be explained in terms of a common language of criminal liability, local to global. Globalised crime offends morality, polity and perpetuity rather than the interests of individuals. Victimisation is collectivised. Harm is global. Threats are common. As such, the context of globalised crime seems to be communal, and control arguably should be integrated in order to address a collectivised problem.

To test this suggestion, the transportation of a custom-based control technique into a globalised context may indicate the applicability of integrated control for regulating global crime. Banishment is a control strategy with roots deep in customary socialisation. It depends on consensus, approbation, comprehensive ascription, and total enforcement. Banishment is reliant on community and not state sanction. It grows out of stages of tolerance, and failed situations of reintegration.

A global crime context where banishment would be relevant is corporate crime. For the individual, bankruptcy is a banishment from the marketplace. For the corporation 'winding up' proceedings may have some regulatory impact but this is limited to where the company against which these are directed is simply an expendable part of a wider corporate entity.

Commentators on corporate regulation favour control initiatives which recognise the significance of compliance (Fisse and Braithwaite 1988). But what happens when compliance evaporates or breaks down?

Banishment means exclusion from the community. Essential for its punitive and regulatory significance is separation from those features of community life valued by the banished. The community is more than a referent in that it must maintain the boundaries of exclusion. For instance, international trade sanctions imposed by one nation on another will not have the same impact without multinational endorsement.

Some might see banishment as anything but an integrated control strategy. It appears to depend on segregation and difference. What makes banishment integrative, however, is the manner in which it involves the whole community and a range of socialisation beyond crime control. In addition, banishment is a transitional state, usually imposed for a determinate period,

with the exception that it will create a radical context for reintegration when its time has run.

Banishment's influence within a corporate commercial community would depend on the authority prescribing this penalty. Once the banishment order was determined, the community would be required to achieve the banishment from a series of nominated and valued relationships. These might involve market position, consumer confidence, capital access, and share trading. A schedule for reintegration might be set as part of the banishment strategy.

This mechanism will be far better suited to the corporate entity than individualised penalties such as the fine, or imprisonment. Banishment requires and incorporates responsibilities advocated by the corporate community in its arguments for self-regulation. It has a reintegrative goal, while adopting clearly retributive and deterrent measures in its early stages.

The feature on which the effectiveness of an integrated (local to global) control strategy relies is the scope of community collaboration for its achievement. Collaboration in simple, local communities is obvious and essential to the context of the sanction in question. The restorative consequence of its application is ensured through the commitment of the community and the collaboration between the perpetrator, victim and their immediate community. On a global level collaboration is equally essential but more difficult to realise and retain. This is not just a product of a more complex community context. It is a consequence of confusion over responsibility to collaborate, and the state to which the offender and the victim must be restored.

Conclusion: Collaboration Rather than Restoration?

It is necessary to examine in more detail the issue of collaboration and its crucial connection with restoration prior to anticipating the successful integration of justice mechanisms at various levels of formalisation. By focusing on harmonisation and collaboration as features of the essential context within which certain less-formalised justice resolutions tend to prevail might be more productive than tending to focus on their restorative outcomes. An outcome-driven analysis has the danger of overlooking the possibility of disharmony and domination inherent in the preference for restorative justice.

A re-thinking of the notion of 'restorative justice' may facilitate efforts at harmony. In recent justice parlance 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, p.5)

Another way of looking at restoration here is to focus on the process rather than on the participants and the outcome. This will necessarily then require an exploration of traditional or custom-based mechanisms for resolution, mechanisms which have a particular cultural resonance worthy of recogni-

tion and protection. In any such consideration, we would be answering Harry Blagg's (1998) question: what is being restored in restorative justice? (p.8). 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. Further, the recognition of context, both initial and transformed, when examining restorative justice mechanisms will automatically highlight the situations and stages where community collaboration is possible or denied.

A new interpretation of restorative justice, (that is, restoring culturally sensitive custom-based resolutions within and beyond their original context), is possible though recognising the essential significance of collaboration, in any context of its application. More than simply an expectation that alternative, less formalised strategies will likely be restorative, collaborative justice claims 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' in justice is not simply an expectation for local communities, but between proponents of custom-based resolution, and those with investments in the rejuvenation of 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 1999, ch. 7). Essential to such recognition and acceptance is a programme 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 widespread or recognised, (such as those in our examples from the South Pacific) the most efficient way in which the legitimate goals of criminal justice are to be achieved is through collaborative models and initiatives. However, in order that collaboration is to emerge and be sustained in a climate of co-operation and ownership, the principal participants in criminal justice must be brought together to identify their expectations for justice resolutions and determine the most effective response to these expectations.

To facilitate collaboration beyond the initial customary context (such as at a global level), participants and stakeholders in the justice process should be provided with collaborative justice models which have been successfully tested in other settings. These must exhibit elements compatible with the characteristics of the 'new communities' in which collaboration is offered (that is, the mutual obligations which bind multi-national corporate enterprise, as compared with homogeneous village organisation, in the case of banishment). The crude transplantation of culturally specific models into

alien settings is neither collaborative nor potentially successful. Rather, collaborative justice models in a context where custom and introduced law intersect, allow for the critical adaptation of effective models of resolution, encouraging original or new participants to own, implement and sustain collaborative justice initiatives which emerge in such an exercise.

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

The essence of collaboration for the success of restorative justice initiatives also explains the recent predominance of restorative over bureaucratised justice forms. Further, effective community collaboration distinguishes those justice resolutions which 'work', along with those that survive transplantation from one cultural context or level, to another.

Returning to the crucial determinant of any comparative policy agenda for justice resolutions, before one can declare a preference for any justice paradigm, or critique the cultural reality of restorative justice, comparative contextual analysis must be engaged in. This is particularly imperative when the local/global dichotomy is addressed as crucial for any understanding of contemporary justice paradigms. Therefore, the comparative project and its pitfalls underlie all that has been discussed so far.

The Comparative Project: A Research *Aside*

Recently, when examining the relationship between crime and globalisation (Findlay 1999), we argued the virtues of comparative contextual analysis. This means an interactive project where context is employed over *community* or *culture*, to enable comparative analysis without sacrificing specificity. Comparative contextual analysis provides the potential to reconcile 'an acute sensitivity to the peculiarities of the local', with 'the universalising imperative'. The novelty in this approach to comparative analysis is not the rediscovery of context. Rather it is in the multi-levelled applications which context invites:

> To achieve its fullest potential … comparative research should, therefore, concentrate within a nominated cultural context; across two or more contexts within the same culture; across time and space within a culture in transition; culture to culture; and (or not) simultaneously at the local and global levels. (Findlay 1999, p.vii)

Nelken (1997) identifies the need to ensure, when analysing any feature of criminal justice, that it 'resonates' with the rest of the culture in context before a comparison is advanced:

> Cultural ideals and values of criminal justice do not necessarily reflect their wider diffusion in the culture. In many societies there is a wide gulf between legal and general culture, as where the criminal law purports to maintain principles of impersonal equality before the law in societies where clientilistic and other particular practices are widespread. (p.563; also Findlay 1997b)

The recognition of difference is crucial to the success of comparative contextual analysis. So too is there potential through comparison, to understand the complexity of culture and not only seek explanations for features of culture, such as crime:

> Comparative investigation turns into the hermeneutic exercise of trying to use evidence about crime and its control to resolve puzzles about culture. (Nelken 1994, p.225)

Comparative contextual analysis should not be bound by dichotomous methodologies, (see Sztompka 1990) or divergent outcomes (see Beirne 1983). Its focus on interaction within contexts, opens up to understanding dynamic relationships such as crime and control, and trends in these. The perennial problem of comparing like with like or a common concept within different contexts is surpassed when the analysis is of interaction and transition. Further, the concerns for comparison in terms of motivation or expectation are less likely to be discussed as stark dichotomies if the analysis unfolds through various levels and dimensions.

Comparative contextual analysis does not focus on the boundaries of crime and control in order to seek their explanation. It is more likely to explore the relationships within these boundaries, and the manner in which new or transitional contexts impact on and transform these relationships.

An enlivening, if underdeveloped capacity of comparative analysis is to move away from 'cause and effect' as a narrow frame of analytical reference. When examining institutions and strategies of crime control, a causal focus tends both to distort the place and purpose of criminal justice, as well as the motivations for the analytical project. Comparative contextual analysis recognises the possibility of simultaneously viewing crime and control from several dimensions, as 'multiple, overlapping and interconnecting socio-spatial connections of power' (Mann 1986, p.1). This emphasis on interaction and transition avoids simplistic assumptions about criminal justice, and the unfounded construction of policy. It should also prevent the abstraction of effective social control mechanisms from their essential contextual supports, to the extent where an appreciation of the impact of context over control is lost.

An example of this is the examination of restorative justice mechanisms from the culture out of which they emerge, then the introduced culture into which they are adapted, and finally in the context of their representation. As instanced above, however, it is necessary to dispel the impediments to this analysis by exposing some of the interests which advance more limited approaches to comparative analysis (for example, where one form of justice seeks its legitimacy from the other, or its validation from the other's failure).

Restorative justice as a focus for comparative cultural analysis has regularly suffered from what David Nelken (1997) refers to as 'comparison by juxtaposition'. This may be explained through answers to Nelken's question about what the comparison is supposed to be achieving. Particularly in the literature supporting the policy of conferencing, the relentless reference back to methods and experiments in a specific cultural context so as to justify their adoption and promotion in others, exposes comparative analysis to crit-

icisms for which it should not be held responsible. Rather than the style of analysis, it might be 'the disguised hegemonic project and the avowed research for global legal concepts' (Zedner 1995, p.519), which is laid open to criticism.

The inclusion of comparative analysis amongst the characteristics of intellectual and administrative imperialism is only to be expected when contextual actuality is overlooked or under-played. Where the comparative project breaks down into an exercise in justification rather than analysis is when context is marginalised. Therefore, the insights into restorative justice, for instance, offered by comparative analysis are no longer sufficiently critical or analytical, unless they recognise levels of cultural context and transition.

Whether one wishes to:

- analyse the impact of restorative justice
- evaluate the transition of restorative mechanism from their original to their transplanted cultural contexts
- review the influence of restorative over bureaucratised justice resolutions, or
- speculate on why restorative justice is successfully colonising domains once held by bureaucratised justice processes and institutions,

the comparative challenge is clear. If, as this article invites, collaboration is conceded as a crucial characteristic of the restorative justice context, the nature of that collaboration within and between the original and transplanted community requires critical review. Such a review, to avoid contributing to little more than dogma or policy imperialism, can only proceed if immersed in the context of its origins and its cultural translation.

Notes

1 Such as conferencing and Maori culture, reconciliation and Fijian custom, and sentencing circles and First Nation peoples in Canada.

2 We are not comfortable with the suggestion of simple dichotomies between the mechanisms of justice based on degrees of formalism. It is better to see formalism as a continuum when analysing justice mechanisms (see Findlay and Zvekic 1988).

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