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Restorative justice in the Pacific Islands

Meshing traditional approaches and Western methods: potential and problems

Joanne Mackey

The instability of Papua New Guinea/Bougainville, Solomon Islands and Fiji is characterised by ethnic clashes, a growing crime rate and political struggles that have seen the loss of state control in some areas. The outbreaks of violence, and in some cases the total collapse of the rule of law, have ignited discussion over appropriate alternatives that could be useful in rebuilding societies torn apart by ethnic conflict and violence generated by political, social and economic change.

While current policy debates focus on strengthening state agencies and processes of law enforcement, academics, community leaders and some representatives from the law and justice sector believe that the role of informal justice traditions could prove to be influential, indeed crucial to restoring communities fractured by years of violence and conflict.

While concerns surrounding Western adversarial justice working in opposition to traditional restorative measures abound, as do concerns about the potential lack of ownership of Western ways, many believe that there is something to be gained from blending imported, Western methods with traditional restorative justice practices.¹ These findings are tentative rather than conclusive, yet current literature resounds with the warning, given the colonial history of the Pacific Islands, that blending of Western and traditional legal approaches in the effort to create genuine legal pluralism must display a deep sensitivity to local culture and a commitment to empowering the indigenous population.

In post-conflict zones, working with traditional conflict resolution practices enables a greater chance of success than approaches that oppose them. There

should not be a singular reliance on 'kastom' or Western justice, but a creative integration of the best of both.

This paper seeks to uncover both the potential for and the challenges to creating genuine legal pluralism.

Potential for using traditional restorative justice practices

Ideological foundation

A fundamental reason for advocating the use of restorative justice in Pacific Island communities is the ideological basis that views concepts of self, identity and personhood in relation to community. Ideologies are, according to Folger and Bush, 'organising frameworks that people use to view, interpret and judge their surrounding world'.²

The individualist ideology that dominates Western culture and permeates approaches to law and governance promotes that satisfaction of individual needs and desires. Windslade and Monk identify 'the primacy of the individual' in Western approaches to conflict resolution as where the individual is on a path to self-interest alone.³

In contrast, Melanesian cultures understand personhood and identity only in terms of their relation to 'the group'. In such a society, actions are weighed against how they will affect a web of relations. The orientation towards resolving conflict then places restoring and maintaining harmony within the community as the benchmark for justice.

Restorative justice fosters community empowerment and social cohesion

Informal justice systems, with their focus on restoration within community

life, can play an influential role in post-conflict reform strategies because they:

- often enjoy a higher degree of legitimacy
- offer greater access to justice for the local population
- often survive far more intact than the introduced formal system because they are the product of locally enforced practices.⁴

The research to come from The Juvenile Justice Project, a project designed to gauge how 'kastom' law works in relationship to 'Western law' in Vanuatu, indicates that young people prefer to have customary laws deal with them when they commit offences, citing as one of their reasons the view that 'chiefs know them'.

While acknowledging that the right kind of structures must be put in place in communities to address issues of inequality and discrimination, Ralph Regenvanue, co-author of the *Report on Juvenile Justice*, advocates the value of empowering communities that already have a rich system of dealing with disputes rather than constantly trying to build state institutions. He says:

You want to give the community the power to be able to look after itself and regulate itself and the more power you give to the State, the more it weakens the power of that community. If the State was to give more power to the community then it could deal with its own people in a much more meaningful way because they know each other.⁵

Restorative justice harnesses cultural knowledge

According to Lederach, a specialist in the field of conflict transformation and culture,

Understanding conflict and developing appropriate models of handling it will



necessarily be rooted in, and must be drawn from, the cultural knowledge of a people.⁶

Lederach argues this is important through the lens of social constructivism. Essentially, a constructivist view suggests that people are the products of social processes and they act on the meaning that things have for them. Meaning is created through shared, accumulated knowledge and knowledge is derived from culture.⁷ These principles of 'anti-realism' state that knowledge is relative to time and place and the social landscape from which it has been produced, therefore it can never be final or absolute. Further, the perspective or position from which one views something is important, as perspective shapes and constructs a particular reality.⁸

Post-modern theory also proposes that problems or conflict do not lie in a personal deficit of the people involved, rather they are constructed within a pattern of relationships.⁹ These relationships are constituted by the social context and the myths, traditions, beliefs, customs, assumptions and values of the particular culture. Social constructionist and post-modern theories offer a complex understanding of people's lives and values diversity and complexity, thereby embracing cultural influences more readily.

Restorative justice invites an 'elicitive' approach drawn from the cultural knowledge and resources of the parties involved, thereby allowing the influence of participant's values, customs and beliefs.

Fundamentally, the non-prescriptive nature of restorative justice means that there is no right or best model. Braithwaite says that restorative justice is culturally plural and contextual about what might prove to be the best process to deal with an injustice.¹⁰ Under the umbrella, then, of minimalist requirements a rich diversity of practices can flourish and be adapted and moulded in ways that fit the culture.

Restorative justice and the benefits of informality

The practical benefits that come from such approaches are not lost among the discussion on theories and frameworks. A practical benefit of customary

restorative justice practices is the ease and speed by which the customary systems can convene in local cases.

Christian Ranheim, in his research for the United States Institute of Peace on legal pluralism in East Timor, identifies one of the strongest reasons for recognising customary approaches as being that the process is far more flexible and less resource demanding than formal judicial procedures.¹¹

Once a complaint is received, meetings with village elders occur within one or two days because it is crucial to restore community order and relationships as fast as possible. Moreover, the hearings are held in settings that are familiar to all parties. In contrast, the formality of modern processes were found to be expensive, time consuming, unable to accommodate the cultural diversity of the groups involved and were void of the restorative aspect of traditional justice.¹²

Problematic nature of traditional restorative justice

While some would argue that the unregulated and informal nature of traditional justice opposes the rule of law, some of the loudest criticisms and concerns relate to a decreasing importance of tradition, essentially 'kastom' and the issue of human rights abuses, particularly in relation to gender.

Compensation concerns itself with restoration or recognition of injured dignity or status. According to Arkwright, a parish priest who has served in the Solomon Islands since the 1960s, the recent conflict between the people of Guadalcanal and Malatia has 'strained to the utmost' the restorative aspect of compensation payments, and this problem is intensified in a society that has only recently become conscious of material goods and possessions.¹³ Arkwright explains it is not unusual for compensation claims to escalate into the millions of dollars and traditional concepts and symbols such as shell money or pigs prove to be quite inadequate when faced with exorbitantly high levels of monetary compensation. He contends that the term 'compensation' is invested with a new and non-traditional numerical value.

There is also a grave danger of simplistic appeals to customary

practices. They can be oppressive and discriminatory. Rita Naviti, a former registrar of the Supreme Court of Vanuatu, voices concern over the use of traditional restorative justice.

In a male dominated society such as ours women are easily intimidated. It would be unwise to use the concept of restorative justice in a conflict between individuals where there is a power imbalance between the parties. Its practical implementation would also be difficult. Sometimes justice might be restored at the cost of a dissatisfied woman. Is that justice truly restored?¹⁴

The deficit in customary practice is not so much in procedure but rather with who is vested with decision-making capacities in disputes. Paterson cites the male dominant role of village chiefs in Vanuatu as the source of bias and therefore a structural reinforcer of gender inequality.

Women tend to feel that any decisions made relating to women are likely to be biased against them. Not biased in procedure because they are allowed to talk and quite often the women that are involved are more vocal than men. But the outcome looks biased because it is made by males and elderly males and the general feeling is that the women are not treated as fairly as they should be.¹⁵

The concern of power imbalances between men and women and the influence of customary practices on that imbalance is of vital concern, particularly with regard to human rights abuses. The unregulated nature of customary approaches means that they can 'fly under the radar' of the international standards. East Timor is a case in point. Groups including United Nation's Human Rights Unit and the International Rescue Committee (IRC) raise concerns over customary approaches violating the rights of women and children.

According to the IRC report on traditional justice and gender-based violence in August 2003, violence against women in East Timor is both common and accepted, citing cases where female victims of physical violence need to be seriously injured before they are heard before a local customary hearing. Often women are forced by male family members to accept solutions to which they would

otherwise object. For example, in cases of rape the female victim is often made to marry the male offender in order to restore harmony.

The report concluded:

... it is evident that women's rights are not given adequate consideration in their search for justice, especially in local justice proceedings.¹⁶

Restorative justice cannot resolve deep structural injustices that cause problems, such as gender inequality. If restorative justice is about restoring troubled relations, then in an unequal society it may reaffirm inequality and pave the way for grotesque human rights abuses.

Potential for Western justice in the Pacific Islands

The justifications for using traditional restorative practices are clearly tempered with the warnings just raised. It is here that Western justice models can be helpful.

Western justice and empowerment

The restoration of an unjust political status quo is not restorative justice. Rather, restorative justice is about empowerment; that is, allowing people to be involved with conflict and its resolution. While Western justice has its focus on retributive solutions and 'stealing conflict' from people, as Nils Christie would say, curiously it does have a place in encouraging empowerment.

Braithwaite purports then that if a person affected by an injustice wants to respond in a retributive way, then taking empowerment seriously they should be '...allowed to opt for a retributive resolution to the injustice rather than a restorative outcome'.¹⁷ He further argues that all societies, including those that still operate under traditional customary law, must set limits on the 'domination community justice can impose'.¹⁸

This establishes a legitimate platform from which Western models of justice can operate. For victims of gender inequalities, where traditional justice has placed community harmony over and above obtaining a form of justice that heals, having recourse to a formalised, adversarial system of law quite possibly can deliver the promised goods of restoration; that is, the restoration of one's dignity and self-worth.

A further benefit can be seen in the

ability of a formalised system to limit the types of punishments meted out by customary law. By virtue of the fact that formalised systems are recognised by the international community, regulations intended to protect individual basic human rights apply. Customary approaches may still operate and be officially recognised in as much as they observe human rights norms.

Western justice and restoring law and order

Perhaps one of the most readily recognised benefits of Western intervention into post-conflict societies of the Pacific is in the ability to establish law and order where it has totally broken down, or come close to it.

The Australian-led Regional Assistance Mission to Solomon Islands (RAMSI) is a case in point. Designed to restore law and order and to support economic recovery, RAMSI was a turning point in Australian foreign policy. The security risk of a state in serious decline on Australia's doorstep in an age of terrorism forced the hand of the Australian Government and a regional peacekeeping mission was deployed to the Solomon Islands after four years of conflict between ethnic groups. The strong law and order mandate was deemed necessary given the collapse of the formalised government and corruption in the police force.

Bringing protracted conflict to a halt can actually allow the traditional restorative practices at least the *opportunity* to operate once again where they may have actually been abandoned in the years of violent fighting.

Problems for Western justice in the Pacific Islands

One of the most influential challenges any form of Western law faces in the Pacific Islands context is the lack of legitimacy mainly because such styles of governance and law and order do not meet the Pacific understanding of decision making and ruling. Government corruption and mismanagement of resources has led many citizens to have little faith in the 'fairness' of the formal justice system. According to Dinnen, there is a widening gap between 'law' and 'justice' in many places and a view that those in power can manipulate the

formal system to their own advantage.¹⁹

This can have far-reaching effects on 'cooperative' interventions such as RAMSI. Even when the Solomon Islands Parliament endorsed the intervention concerns abounded over whether the wider society would support it since politicians lacked credibility and the government was fragmented.²⁰

Yet political reform is not only about having competent, honest and committed bureaucrats and politicians – it also requires an understanding of the traditional structures, specifically in rural areas. Reports indicate that RAMSI needs to be more aware of the local people's role and capacity and its efforts at capacity building need to respect the culture of the people.²¹

Other obvious sources of tension include the adversarial nature of dispute resolution, the orientations to conflict and the narrow focus on individual responsibility. These present very real issues to the application of Western approaches to law and justice.

Conclusion

Western justice with its focus on law and order can establish some degree of order and regularity that is necessary to sustain social life in any community. Restorative justice, with its focus on restoring relationships, is a paradigm for community building.

While it is beyond the scope of this article to explore mechanisms and strategies that can facilitate the meshing of somewhat polarised approaches to law and governance, some concluding observations can be made.

First, there is a distinct need to formalise the relationship between the introduced and traditional justice models. This will allow for safeguards that address human rights issues.²² However, the challenge here is formalising traditional customary models that are typically 'fluid processes'.

Second, the grass-roots level capacity to prevent and resolve conflicts needs to be strengthened, especially in rural areas.

Finally, ADR appears to be well positioned to provide the bridge between formalised state law and traditional restorative justice approaches. Here, mediation could be used as a possible process to negotiate appropriate dispute



resolution processes that all stakeholders could buy into. The Peace and Democracy Foundation in East Timor has developed a mediation model that blends Western mediation with local customary practice as a possible alternative to the state courts for civil matters. While it is still in trial stage, this is an example of a community dealing with the possibility of blending approaches and therefore warrants further observation and investigation. ❖

Joanne Mackey has recently completed her *Masters of International Studies (Peace and Conflict)* at the University of Queensland and plans to begin a PhD on the topic explored in this article in 2006. Joanne may be contacted at joannemackey@bigpond.com.

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