We are happy to share this information with you and encourage you to use this document for your research purposes. Please ensure that all credits are acknowledged when using all or any information within this document. Commercial reproduction is strictly prohibited.

PLACING INDIGENOUS JUSTICE DEVELOPMENTS IN CONTEXT: SOME DIMENSIONS FOR ANALYSIS OF THE EXPERIENCE

A BACKGROUND PAPER PREPARED FOR THE INDIGENOUS JUSTICE WORKSHOP (SESSION 2.3) OF THE 11TH COMMONWEALTH LAW CONFERENCE, VANCOUVER, CANADA, AUGUST 27, 1996

The International Centre for Criminal Law Reform and Criminal Justice Policy
1822 East Mall, Vancouver, B.C., Canada
Tel: (604) 822-9875 Fax: (604) 822-9317
WWW: http://www.law.ubc.ca/centres/crimjust.html

**PLACING INDIGENOUS JUSTICE DEVELOPMENTS IN CONTEXT:
SOME DIMENSIONS FOR ANALYSIS OF THE EXPERIENCE**

A BACKGROUND PAPER PREPARED FOR THE INDIGENOUS JUSTICE WORKSHOP (SESSION 2.3) OF THE 11TH COMMONWEALTH LAW CONFERENCE, VANCOUVER, CANADA, AUGUST 27, 1996

**by Joan Nuffield, Ph.D.
Senior Associate**

**The International Centre for Criminal Law Reform and Criminal Justice Policy
1822 East Mall, Vancouver, B.C., Canada
Tel: (604) 822-9875 Fax: (604) 822-9317
WWW: http://www.law.ubc.ca/centres/crimjust.html**

**PLACING INDIGENOUS JUSTICE DEVELOPMENTS IN CONTEXT:
SOME DIMENSIONS FOR ANALYSIS OF THE EXPERIENCE**

**by Joan Nuffield, Ph.D.
Senior Associate, The International Centre for Criminal Law Reform and Criminal Justice Policy,**

Vancouver, Canada

INTRODUCTION

The "mainstream" judicial system of many Commonwealth countries evolved from Anglo-Saxon common law roots to produce a criminal justice system based on historical Victorian values of punishment. In contrast, Indigenous justice systems were, and still are, rooted in the cultural philosophy that "offenders" against society's norms cannot be reformed by punishment, but by seeking atonement and restitution with the victim so as to restore harmony within the community.

Given the cultural conflict which is evident in the disproportionate representation of Aboriginal peoples in the penal systems of many Commonwealth countries, plus the fact that many Indigenous leaders are anxious to resume control over the administration of justice in their communities, it seemed fitting for the 11th Commonwealth Law Conference to sponsor an update on successful and promising Indigenous justice initiatives that have evolved within Commonwealth jurisdictions.

Indigenous people in many Commonwealth countries are searching for the appropriate components of a justice system that will provide their communities with law and order for the safety of their citizens and the public at large.

The presentations in this section are some examples of where this search has led. They include a wide range of possible approaches, including but not limited to legal modifications allowing for alternative, blended approaches, and practices which take advantage of the discretion which exists at the various stages of the justice system. In the end, the quest must lead to the question of jurisdiction, and the ability of a people to exercise their free will within a rule of law.

PURPOSE OF THIS PAPER

The purpose of this context paper was to provide an initial focus for the presentations and ensuing discussion taking place at the Indigenous Justice Workshop.

While it is always useful for Commonwealth Law Association members to have the opportunity to be brought up-to-date on new developments in Indigenous Justice, knowledge of new developments is more useful if it can be placed within a framework for analysis which allows for relevant comparisons, distinctions, extrapolations, and limitations on applicability. Such a framework helps us to understand why a given approach may work in one set of circumstances, but not in another. This may also be of assistance in allowing justice officials in non-Indigenous environments to see how developments in Indigenous justice may be of interest in non-Indigenous settings and justice systems. This paper will therefore attempt to create a framework for analysis by suggesting some dimensions for the discussion.

DIMENSIONS FOR ANALYSIS

The initiatives under discussion, including the use of tribal courts and new procedures such as circle sentencing, have certain aspects in common.

*** Purposes.** All of the initiatives share certain broad purposes in common. One dimension for analysis will therefore be whether the initiatives have been successful in achieving these purposes. These purposes include:

* to increase the input and involvement of Indigenous people and communities in justice processes and decisions;

* to increase the credibility of justice processes and decisions among Indigenous people, and vice versa;

* to return a certain measure of control over these processes to Indigenous people and their representatives;

* to increase the quality of the decisions and outcomes arising out of criminal justice processes involving Indigenous people; and

* more particularly, to focus on objectives which resonate with Indigenous people, including restoring the balance upset by the offence (restoration/restitution), solving the problems which gave rise to the offence (prevention), and healing the people and the communities (recovery).

In addition, while the Indigenous justice initiatives under discussion may not have had, as one of their primary purposes, the intention of motivating the "mainstream" justice system to take a more critical look at itself, that may in fact be a result of some of these initiatives. As suggested earlier, some Indigenous justice approaches may be as instructive for non-Indigenous systems and communities as they are for Indigenous ones.

In turn, the ability of an Indigenous justice initiative to achieve these and other objectives will be affected by a number of other dimensions. These include the following, which will be analysed as part of the Workshop presentations and ensuing discussion.

* **Legal Authority**. What is the source of the initiative's legal authority:? Is it vested in law (like family group conferencing for youthful offenders in New Zealand), created in written policy or memoranda of understanding with the mainstream justice system, or an ad hoc arrangement existing within the framework of the common law and the discretion of the parties involved?

Initiatives which are created more or less informally within the discretion of the mainstream justice system may be less stable and less attractive from the standpoint of recognizing

Indigenous peoples' right to self-determination. On the other hand, initiatives which are created within existing discretion may be more flexible, easier and quicker to get off the ground, and may be characterised by a strong personal commitment among the individual officials involved to make things "work".

* **Jurisdiction/Mandate.** Does the initiative have exclusive jurisdiction to deal with matters within its purview (such as in Botswana's statutorily-recognized system of *kgotla*, or courts for handling customary tribal law), or is it one among two or more options available for handling the matter (such as among the Maroon people of Jamaica)? If the latter, does the other (usually "mainstream") system act as an appeal from the Indigenous process (an approach suggested by Canada's recent Royal Commission on Aboriginal Peoples), can either process be waived by the consent of all or some parties, or is the mainstream process invoked only when and if the Indigenous process has been tried and has failed (as with family group conferencing for youthful offenders in New Zealand)?

Beyond the formal legal question of access to two or more systems, in practice how easy or difficult is it for Indigenous community members to access either system? For example, is legal representation required (or highly desirable) in the mainstream system, and can people without many resources obtain representation?

The mandate and jurisdiction of the initiative can significantly affect the way in which the Indigenous system is perceived. If it must be tried first before any of the parties can invoke the mainstream system, that can lend it weight and credibility. In some cases, the expected outcome of the mainstream process, if available later, can create a very strong incentive to settle the matter in the Indigenous stream. For example, in Nigeria, offenders from among the minority Hausa people have a strong incentive to cooperate with the orders imposed through the internal Hausa adjudication process, since they can expect harsh treatment if they do not cooperate and are referred to the mainstream Yoruba authorities (Salamone, 1995).

* **Governance Issues.** A related dimension is: how is the Indigenous justice initiative governed? Is there a mechanism for broad representation from various segments of the Indigenous community? What does the existing mechanism look like?

Justice is one of the most sensitive functions of a society - especially in the sense that in most societies, it cannot operate effectively without the support of its citizens. To obtain this support, it must be credible, meaning it must be perceived as representing the interests of all, and making decisions which are generally considered to be fair and appropriate. There are some members in every community who are doubly disadvantaged in that they may be excluded from many of the important decision-making processes of the society, and also tend to be more vulnerable than others to being victims of crime and other social ills. Women and youth have often been mentioned, in this regard, as requiring special consideration in the design and running of processes which will affect them.

A related issue lies in the relationship between the governance mechanisms for the justice system components, and the community's overall leadership or political authority. While the independence of the justice system from political interference is considered a cornerstone of Western justice, in some communities this ideal is difficulty to achieve, and in some Indigenous communities, entirely different models for governance exist.

Numerous examples can be found of the importance of governance mechanisms which are, and are seen to be, fair, open and representative. In Canada, several jurisdictions are currently facing issues around the perceived fairness of the police public complaint process (e.g., Oppal, 1994): even if the decisions of an internal police review process are fair, they are increasingly not being perceived as fair if they are not open to the public and capped by an independent review level with the power to conduct its own investigation.

* **Integration with Mainstream Justice Principles and Processes**. To what extent is the Indigenous justice initiative constrained by the rules or activities of the justice system of the larger society? On the other hand, to what extent does concordance with and recognition by the mainstream society afford protection and stability to Indigenous justice and other aspirations?

In highly integrated, mobile or urban environments, it will be more difficult for Indigenous systems to coexist with mainstream systems unless there is a strong concordance between them in terms of norms and principles. However, there may be a high cost to this concordance, in that some Indigenous persons may not identify with their own justice initiatives if they do not reflect Indigenous values and ways of doing things. In other communities, more leeway may be available and acceptable - to both Indigenous and mainstream societies - as long as public protection and other key objectives are served.

The United Nations *Draft Declaration on the Rights of Indigenous Peoples* is perhaps the most obvious example of an international effort to obtain recognition by mainstream governments of Indigenous political, social, economic and other aspirations. It will be interesting to watch the development of the debate between those who support the Draft Declaration and the use of UN enforcement mechanisms to give life to its provisions, and those who oppose the Draft Declaration on various grounds, including that it creates "special" rights for certain groups.

The other side of this coin - the extent to which the mainstream legal system will be permitted to constrain the operations of Indigenous initiatives - is a key issue in some countries. In Canada, for example, this debate has, in recent years, centred around the question of whether Aboriginal justice systems should be subject to the Constitutional provisions of the *Canadian Charter of Rights and Freedoms*. Some have argued, inter alia, that this document's emphasis on the rights of

the individual may come into conflict with the legitimate rights of Aboriginal collectives. In this regard, it is important to bear in mind that there are various ways to deal, in a flexible fashion, with finding the appropriate balance between such constraints from the mainstream system and the needs of Indigenous communities - to the extent that they do in fact conflict.

*** Meaningfulness within Community Context.** To what extent does the Indigenous justice initiative draw upon and fit into the reality of the community? Probably the greatest strength and the greatest potential weakness of Indigenous justice initiatives lies in the bonds and allegiances among the people within the community. Strength, because when these allegiances can be mobilized to achieve a worthwhile aim, they are incredibly powerful; and potential weakness, because in many communities, especially small, isolated ones, allegiances can turn into factions and warring interests.

LaPrairie (1995), in her comparison of the bases behind family group conferencing as practiced in Australia and circle sentencing as practiced in Canada, suggests that a strength of family group conferencing, which is more difficult to achieve in circle sentencing, is that the former is more easily able to draw on the "significant others" - the meaningful bonds among people directly affected by the offence - to achieve a solution.

* **Cultural/Community Context.** No two communities are entirely alike, and it is clear that no one "solution" will work in all communities. Therefore it is important to be cognisant of the cultural, social, economic, political and other conditions in the community where the initiative is occurring which may affect its operation and transferability to other settings. Among the key factors which the Workshop's discussion will note are:

* **the degree of social cohesion which exists or social breakdown which has occurred in the community**. Is this a community with a strong consensus around community values, or are there significant schisms, for example around traditional vs. modern/"mainstream" values and lifestyles? Are large numbers of people in the community dysfunctional as a result of experiences with substance abuse, or physical or sexual abuse? Are the roles of community members stable and clear?

A community which has experienced a relatively low degree of social breakdown will likely experience fewer difficulties in realising some of its justice aspirations than will a community which has more issues to contend with. For example, a community whose traditional spiritual beliefs and practices have been preserved and are "alive" for a majority of the community members will probably have less difficulty enforcing its justice "orders" simply by virtue of their accepted moral authority. A community where theft is the main criminal problem will have fewer justice challenges than one plagued by widespread substance abuse, sexual abuse, and suicide.

* **the distribution of influence among community members**. What is the distribution of influence, resources,

authority and power among community members vis-a-vis one another?

Communities with some members who are seriously "disempowered" relative to the rest will face formidable challenges in ensuring that justice initiatives and components yield fair and equitable outcomes, whatever that may mean within the community's reality. Community members who are disempowered may be unlikely to participate fully in the justice system, either as victims, as witnesses, or as treatable offenders. This in turn weakens the entire justice process.

The disadvantage which women and youth face in some Indigenous communities has received considerable attention in recent years (e.g., Crnkovich, 1993), and they deserve particular mention in this context, both in terms of their exclusion from certain key processes and their risk of criminal victimization. The origins of this reality are less clear; a number of authors have suggested that some of the allegedly "indigenous" aspects of Aboriginal societies may have been an artefact of Colonial authorities.

* **the community's degree of integration with or isolation from the rest of society**. Is this a remote community within a larger, separate society, or is it more connected to other parts of the society, in terms of geography, as well as community members' social and economic opportunities, and access to justice?

A community's degree of integration into the larger society can affect the degree to which the community will be able to mobilize or unite behind an initiative of its own, as well as the degree to which individual community members will be able to seek alternatives or turn to outside avenues of redress. In addition, an isolated community will face greater challenges in terms of ongoing training opportunities for its justice workers, access to specialized recovery services, and synergy with other Indigenous communities.

* **the resources available within and to the community**. Related to all of the above factors is the question of the resources which the community is able to draw on from within itself and from the larger society. Are there significant numbers of respected Elders, spiritual leaders and medicine people who are still active in the community? Do these or other members of the community have the skills and the willingness to take on key roles such as deciding on appropriate restitution, keeping track of the behaviour of offenders, and healing child sexual abuse victims? Can the community easily and quickly draw on outside resources, including training resources, specialized legal, investigative or healing resources?

A community which has few internal or external resources on which to draw may be willing to take on the justice challenges, but facing a lengthy implementation period before it can effectively handle a wide range of activities. For example, it was discovered during some of the earliest experimentation with circle sentencing in Canada that ordering the offender into the "care and custody" of the community did not necessarily ensure

that anyone in the community was concerning him/herself with the required activity. Even where traditional practices and resources are still strong, some problems facing modern Indigenous communities may be beyond the capacity of traditional practitioners to solve them.

DISCUSSION OF FACTORS IMPINGING ON SUCCESS

What are the elements and factors which foster the success of Indigenous justice initiatives in some cases, and mitigate success in others? The discussion on Indigenous Justice at the 11th Commonwealth Law Conference will examine the above dimensions, as well as others, in an attempt to distil ideas as to why certain Indigenous justice initiatives succeed in certain circumstances, but may not in others.

REFERENCES

Crnkovich, Mary (1993). "Report on the Sentencing Circle in C," in Pauktuutit Inuit Women's Association: *Brief to the Royal Commission on Aboriginal Peoples in Canada*

LaPrairie, Carol (1995). "Altering Course: New Directions in Criminal Justice. Sentencing Circles and Family Group Conferences," in *Australian and New Zealand Journal of Criminology*, December, 1995.

Oppal, Mr. Justice Wallace T. (1994). *Closing the Gap: Policing and the Community. Report of the Commission of Inquiry on Policing in British Columbia*. Victoria: Province of British Columbia, Canada.

Salamone, Frank. (1995). "Law and Ritual: A Nigerian Case", in *Papers of the 10th International Congress of the Commission. on Folk Law and Legal Pluralism*. Legon, Ghana: University of Ghana, 1995.