



Restorative Justice Note # 3

Access to Justice and the Protection of Indigenous Peoples

In its study on “access to justice in the promotion and protection of the rights of Indigenous peoples”, the Expert Mechanism on the Rights of Indigenous Peoples, emphasized that the cultural rights of Indigenous peoples include recognition and practice of their justice systems, as well as recognition of their traditional customs, values and languages by courts and legal procedures.¹ Indigenous justice systems closely reflect the cultures and mores of the peoples concerned, contributing to their legitimacy. Customary norms and laws that govern relationships are accepted as necessary for generating harmonious relationships and communities. In many instances, customary justice mechanisms are often more accessible than the State system because of their cultural relevance, availability and proximity.

There are profound issues with the way criminal justice systems usually interacts with Indigenous peoples. When Indigenous persons are victims of crime, they are less likely to report the incident to the authorities, and the response of the justice system is often quite problematic. Indigenous persons are usually also over-represented in the justice system They are more likely to have contacts with the police, be charged with offences, convicted, and incarcerated. The ability of Indigenous persons to effectively participate in domestic criminal proceedings, either as victims or defendants, is often limited due to cultural and socioeconomic factors, discrimination, and various systemic factors. There are also issues with the way customary Indigenous justice is practised; among those, the potential for conflict with international human rights norms.

The relationship between restorative justice processes and those originating from Indigenous and customary justice systems is sometimes misunderstood. Despite their similarities, the two are distinct processes. Nevertheless, the participatory nature of restorative justice, along with its frequent similarities to customary law, suggests that it may provide a vehicle to support the use of Indigenous justice systems and hence facilitate Indigenous self-determination.²

The preamble to the United Nations *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* recognizes that restorative justice initiatives “often draw

¹ Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples (2013). *Access to justice in the promotion and protection of the rights of Indigenous peoples*. A/HRC/24/50, para 28.

² Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples (2014). *Access to justice in the promotion and protection of the rights of Indigenous people: Restorative justice, Indigenous juridical systems and access to justice for Indigenous women, children and youth, and persons with disabilities*, A/HRC/27/65.

upon traditional and Indigenous forms of justice which view crime as fundamentally harmful to people”. Restorative justice has benefited from the incorporation of Indigenous wisdom into the practice of restorative justice in criminal matters. However, Cunneen warns against accepting the selective and ahistorical claims made by practitioners about Indigenous social control conforming with the principles of restorative justice.³ As noted by Hamilton and Yarrow, in the context of traditional conflict resolution practices, research has not revealed the perfect model of social cooperation and mutual respect that restorative justice proponents advocate for.⁴ In many instances, the goal being pursued through these traditional mechanisms is not so much the pursuit of justice for those who have been harmed and a consideration of their needs, but a rapid settlement to maintain public order and avoid an escalation of the conflict.

Nevertheless, in the context of decolonization, Indigenous communities are formulating and activating processes that derive from their own traditions and conditions and are adapted to a new context.⁵

The Use of Restorative Justice in Indigenous Communities

Specific practices that characterize Native American Indigenous restorative practices seek to include native language (when possible), oral customary law, spirituality, resolution and healing, examination of the contributing factors of crime, no time limits, value toward long periods of silence and patience, trust building, resolution and healing, inclusion of all affected by the problem behaviour, family participation, victim and community rights, sanctions and corrective measures, verbalization of accountability, and reparation.⁶

Indigenous Youth Justice

The Committee on the Rights of the Child encouraged States to support Indigenous peoples to design and implement traditional restorative justice systems, but only as long as the latter are in accordance with the rights set out in the Convention, notably with the principle of the best interests of the child.⁷ In her report on harmful practices in plural legal systems, the Special Representative of the Secretary General on Violence against Children noted that in countries where national legislation interplays with customary and religious law, the potential for rising tensions can be problematic. Traditional conflict resolution mechanisms may present themselves as viable alternatives to the formal justice process in dealing with children.

³ Cunneen, C. (2011). Restorative justice and the politics of decolonization. In Weitekamp, E.G.M. & Kerner, H.-J. (Eds.) *Restorative justice: Theoretical foundations*, London: Routledge, 32-49.

⁴ Hamilton, C. & Yarrow, E. (2016). Preventing and addressing youth offending: Restorative justice and family focused programming. In Kury, H., Redo, S. & E. Shea (Eds.), *Women and children as victims and offenders: Background, prevention, reintegration*. Zurich: Springer, 301-339, p. 309.

⁵ Cunneen, C. (2011). Restorative justice and the politics of decolonization. In Weitekamp, E.G.M. & Kerner, H.-J. (Eds.) *Restorative justice: Theoretical foundations*, London: Routledge, 32-49. Also: Cunneen, C. & Rowe, S. (2014) Changing narratives: Colonised peoples, criminology and social work. *International Journal for Crime, Justice and Social Democracy*, 3(1), 49–67.

⁶ Hand, C. A., Hankes, J. & House, T. (2012). Restorative justice: The Indigenous justice system. *Contemporary Justice Review*, 15 (4): 449-467, p. 454.

⁷ Committee on the Rights of the Child (2009), *General comment No 11 on Indigenous children and their rights under the Convention, the Committee on the Rights of the Child* .

However, as explained by the Special Representative, they may allow for the justification of harmful practices on grounds of culture, religion or tradition based on sources of law that may compromise the realization of human rights. It is important to keep in mind that customary law and practices have sometimes placed vulnerable groups, especially women and children, at risk for harmful practices.⁸

It is also important to note that some research findings seem to indicate that restorative justice responses may not be as effective in preventing recidivism among Aboriginal children, as they are not from the dominant racial groups.⁹ This may be a reflection of the fact that these responses tend to neglect to address other individual, social and historical factors (including various forms of systemic discrimination) involved in the youth's situation.

Challenges Related to Indigenous Justice and Restorative Justice

Issues have been identified with a tendency to conflate Indigenous justice and restorative justice. Yet, it is not always clear how to differentiate between the two. Claims that restorative justice is derived from Indigenous modes of dispute resolution are overgeneralized and fail to recognize the important differences between Indigenous peoples. For example, claims that sentencing circles empower Indigenous peoples may have been overstated.¹⁰

There is a need, as many have suggested, for exploring new pathways and meeting places between Indigenous people and the institutions of the colonizers – a point where dialogue can take place and cultural differences be accepted and honoured.¹¹

Some researchers have highlighted the inability of restorative justice processes, in particular sentencing circles, to deliver safety and justice to Indigenous women and concluded that such an approach has failed to meet the needs of Indigenous women.¹² Some note that Indigenous women recognize obstacles to safe and just outcomes in their communities, particularly when the impact of colonization and intergenerational violence are not taken into account.¹³ Indigenous women's experiences of domestic violence and their justice needs and expectations

⁸ Special Representative of the Secretary General on Violence against Children (2012). *Protecting children from harmful practices in plural legal systems*. New York: United Nations & Plan International.

⁹ Kim, H. J. & Gerber, J. (2012). The effectiveness of reintegrative shaming and restorative justice conferences: Focusing on juvenile offenders' perceptions in Australian reintegrative shaming experiments. *International Journal of Offender Therapy and Comparative Criminology*, 56 (7), 1063-1079.

¹⁰ Dickson-Gilmore, J., & La Prairie, C. (2005). *Will the circle be unbroken? Aboriginal communities, restorative justice, and the challenges of conflict and change*. Toronto: University of Toronto Press.

¹¹ Blagg, H. (1998) Restorative visions and restorative justice practices: Conferencing, ceremony and reconciliation in Australia. *Current Issues in Criminal Justice*, 10 (1): 5-14

¹² Goel, R. (2010). Aboriginal women and political pursuit in Canadian sentencing circles: At cross roads or cross purposes? In Ptacek, J. (Ed.), *Restorative justice and violence against women*. New York: Oxford University Press, 60-78.

¹³ Stubbs, J. (2010). Restorative justice, gendered violence, and Indigenous women. In Ptacek, J. (Ed.), *Restorative justice and violence against women*. New York: Oxford University Press, 104-123, p. 115.

are different in certain ways from non-Indigenous women.¹⁴ Some observers have concluded that significant justice challenges can arise from issues related to community, culture, and context that must be seriously considered before restorative justice can offer viable, safe, and sustainable alternatives to Aboriginal communities struggling with violence.¹⁵

Tauri maintains that the application of restorative justice within mainstream justice has been unjustly commodified through globalization resulting in the ‘packaging’ of ineffective processes such as Family Group Conferencing. He argues that such approaches not only facilitate a superficial method that lacks depth and remains disconnected to the Indigenous experience or origins of Indigenous justice, they also hinder Indigenous people from creating and practicing meaningful responses to harm. This author suggests that more engagement with local Indigenous people needs to occur to develop a more informed way forward given that Indigenous people continue to reside in a settler colonial context.¹⁶

How Challenges Might be Addressed

There is much to be learned about how restorative justice may advance access to justice for Indigenous peoples. Some of that learning comes from the experience of Indigenous sentencing courts in various countries. Some of these courts have dealings with serious offenders. In Australia, for example, there are Indigenous sentencing courts that sentence Indigenous perpetrators of family and intimate partner violence.¹⁷

Indigenous sentencing court practices are sometimes associated with restorative justice and therapeutic jurisprudence. Though they share similar qualities, Indigenous sentencing courts are better viewed through a category of their own. They are more offender-centred than restorative justice practices and more concerned with the offender’s impact on a victim or community than problem solving courts adopting a therapeutic jurisprudence approach. In addition, they are attempting to imbue a mainstream court process with Indigenous cultural norms and values, which further differentiates their practices from processes adopting a restorative justice or therapeutic jurisprudence approach. It is therefore more appropriate to conclude that Indigenous sentencing courts are operating according to a transformative, culturally appropriate and politically charged participatory jurisprudence, which goes beyond the principles found in restorative justice and therapeutic jurisprudence.¹⁸ For Marchetti and Daly, the program theory underpinning Indigenous sentencing courts may be partially

¹⁴ Nancarrow, H. (2010). Restorative justice for domestic and family violence – Hopes and fears of Indigenous and non-Indigenous Australian women. In Ptacek, J. (Ed.), *Restorative justice and violence against women*. New York: Oxford University Press, 123-149, p. 143.

¹⁵ Dickson-Gilmore, J. (2014). Whither restorativeness? Restorative justice and the challenge of intimate violence in Aboriginal communities. *Canadian Journal of Criminology*, 56 (4), 417-445.

¹⁶ Tauri, J. M. (2016). Indigenous peoples and the globalization of restorative justice. *Social Justice*, 43 (3), 46-67. See also: Berlin, M. (2016). Restorative justice practices for Aboriginal offenders: Developing an expectation-led definition for reform, *Appeal*, 3 (1), 19-20.

¹⁷ Marchetti, E. (2015). An Australian Indigenous-focused justice response to intimate partner violence: Offenders’ perceptions of the sentencing process. *British Journal of Criminology*, 55 (1), 86–106. See also: Marchetti, E. & Daly, K. (2016). Indigenous partner violence, Indigenous sentencing courts, and pathways to desistance. *Violence against Women*, 23 (12), 1513-1535.

¹⁸ Marchetti, E. (2015). An Australian Indigenous-focused justice response to intimate partner violence: Offenders’ perceptions of the sentencing process. *British Journal of Criminology*, 55(1), 86–106.

reflective of therapeutic jurisprudence and restorative justice principles, but it is “more concerned with transforming racialized relationships and communities”.¹⁹

Research on Indigenous sentencing courts suggests that community-building aims are typically achieved. Specifically, the courts provide more culturally appropriate processes, increased communication, and community participation—all of which make the sentencing process more meaningful to defendants and victims.²⁰ The evidence relating to offenders' desistance from crime is far less convincing, with many studies finding no perceptible or statistically significant differences found in re-offending for defendants sentenced in Indigenous or conventional courts. Some observers have argued that this is because these evaluations often take a short-term view of desistance as an event rather than as a process.²¹

Evaluations of even the most well-considered Indigenous-focused criminal justice processes continue to find that such programs have little or no impact on outcomes such as recidivism rates.²² However, it is not clear whether these findings are an accurate reflection of program ineffectiveness or the result of the way the research was carried out. A single focus on measuring rates of recidivism, for example, detracts from considering other important outcomes. The latter may be achieving outcomes that are not measured by policy-driven evaluations, ignoring how Indigenous-focused criminal justice programs might assist in addressing Indigenous incarceration and over-representation in the criminal justice system.²³ For example, one of the ways in which imprisonment may be reduced by such programs is to focus on rehabilitation and assistance to promote offender compliance with court orders so that they may avoid incarceration as a consequence of noncompliance.²⁴

The issue of compliance with court orders and how Indigenous courts respond to non-compliance is important. The reasons for the relatively high rate of administration of justice offences among offenders (failure to appear in court, breaches of bail or probation conditions) are complex and, to some extent, related to culture and the clients' unique circumstances, marginalization, and alienation from the justice system. In British Columbia, for example, First Nations Courts attempt to distinguish themselves from other courts by the way they respond,

¹⁹ Marchetti, E. & Daly, K. (2007). Indigenous sentencing courts: Towards a theoretical and jurisprudential model. *Sydney Law Review*, 29, 415–43.

²⁰ Borowski, A. (2010). Indigenous participation in sentencing young offenders: Findings from an evaluation of the children's Koori Court of Victoria. *Australian and New Zealand Journal of Criminology*, 43, 465-484. See also: Morgan, A. & Louis, E. (2010). *Evaluation of the Queensland Murri Court: Final report*. Canberra: Australian Institute of Criminology.

²¹ Marchetti, E. & Daly, K. (2017). Indigenous partner violence, Indigenous sentencing courts, and pathways to desistance. *Violence Against Women*, 23 (12), 1513-1535.

²² Beranger, B., Weatherburn, D. & Moffatt, S. (2010). *Reducing Indigenous contact with the court system*. NSW Bureau of Crime Statistics and Research: Crime and Justice Statistics Bureau Brief 54, 1–4.

²³ Marchetti, E. (2017). Nothing works? A meta-review of Indigenous sentencing court evaluations. *Current Issues in Criminal Justice*, 28 (3), 257-276. See also: Marchetti, E. & Daly, K. (2017). Indigenous partner violence, Indigenous sentencing courts, and pathways to desistance. *Violence Against Women*, 23 (12), 1513-1535.

²⁴ Beranger, B., Weatherburn, D., & Moffatt, S. (2010). *Reducing Indigenous contact with the court system*. NSW Bureau of Crime Statistics and Research: Crime and Justice Statistics Bureau Brief 54, 1–4.

often with the assistance of Elders, to situations where offenders fail to appear in court or breach conditions of their bail supervision or probation order. Even if that distinction is sometimes hard to apply, it may be important for the courts to distinguish between offender behaviour that results from non-responsivity to the intervention or simply from wilful noncompliance with supervision requirements.²⁵ The distinction between noncompliance and non-responsivity suggests that some behaviours are better responded to by treatment rather than sanctions because they do not represent wilful noncompliance.²⁶ Like many other problem-solving courts, First Nations Courts may use an informal system of graduated rewards and sanctions to motivate compliance.²⁷

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²⁵ Matejkowski, J., Festinger, D. S., Benishek, L. A., & Dugosh, K. (2011). Matching Consequences to Behavior: Implications of failing to distinguish between noncompliance and nonresponsivity, *International Journal of Law and Psychiatry*, 34: 269-274. Also: Marlowe, D.B. (2011). The Verdict on Drug Courts and Other Problem-solving Courts, *Chapman Journal of Criminal Justice*, 2 (1).

²⁶ Matejkowski, J., Festinger, D. S., Benishek, L. A., & Dugosh, K. (2011). Matching Consequences to Behavior.

²⁷ Porter, R., Rempel, M., & Mansky, A. (2010). *What Makes a Court Problem-solving?* New York: Centre for Court Innovation.