

# *Review Essay: Towards a Comparative, 'Post-colonial' Criminology*

Kayleen Hazlehurst (ed) *Perceptions of Justice*  
Avebury, Aldershot (1995) ISBN 1 85972 079

Margaret Wilson & Anna Yeatman (eds) *Justice and Identity*  
Allen & Unwin, Wellington (1995) ISBN 1 86373 889 4

Mervyn Bennun & Malyn Newitt (eds) *Negotiating Justice*  
University of Exeter Press, Exeter (1995) ISBN 0 85989 459 2

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Smandych, Lincoln and Wilson suggest in their contribution to Hazlehurst's edited collection, *Perceptions of Justice* (hereafter *POJ*) that 'research and theorizing around aboriginal criminality in Canada and Australia have remained quite insular' (p246) and comparative criminology more generally remains in an 'under-developed state' (p256). These books make a useful contribution to remedying these deficiencies. It is of added and particular interest that these collections mostly address conditions and developments on what were the antipodean and colonial fringes of the British empire, in Canada, New Zealand, South Africa and Australia. In confronting the legacies of colonialism and contemporary struggles and strategies to recast the politics and legal cultures of these 'post-colonial' states, they also begin to remedy the neglect of such questions within a criminological community whose theoretical and socio-political universe remains pretty firmly entrenched within the borders of Western Europe and the USA. The growing body of scholarship of which these books form a part reflects an emerging recognition that the questions being posed in these societies are of global import and demand original and innovative strategies of inquiry and reform.

*POJ* is a diverse collection of essays dealing with the indigenous experience of criminal justice in Canada, New Zealand and Australia. Despite important local differences there are similarities in both the broader political developments and the specific criminal justice issues apparent within these colonial settler societies at the present time. These are noted in many of the contributions and include:

- the seemingly intractable realities of massive indigenous over-representation in the criminal justice system;
- the growing politicisation of indigenous criminalisation rates and the proliferation of official inquiries seeking in various ways to address the issue;
- the linking of these issues to indigenous movements and aspirations for autonomy, self-determination and sovereignty, including with respect to law and justice; and
- the coincidence of these challenges with an emerging 'crisis' of effectiveness, efficiency and accountability from within the established criminal justice system, fostering in turn an interest in alternative criminal justice measures and strategies.

In her introduction to *POJ* Hazlehurst identifies a common thread running through many of the responses to these conditions: 'the beginning of wisdom lies less in government initiatives than in the regeneration of communities ...' (p ix).

McNamara's contribution to *POJ* surveys the most recent of numerous inquiries and reports into indigenous contact with the criminal justice system in Canada over the last 20 years. He is centrally concerned with the manner in which indigenous demands and proposals for autonomy in relation to law and justice have been responded to by national and provincial governments. In his analysis the prospects for effective reform are tied to the larger constitutional and political questions of sovereignty and self-government whose contemporary status and prospects in Canada he examines. Judged against this benchmark most of the reform programs of the past are depicted as at best 'tinkering' and as at worst an extension of social control over Aboriginal peoples masked by a policy of 'indigenization'. Although proposals for constitutional reform to entrench a general right to aboriginal self-government in the *Constitution Act* were rejected in a national referendum in 1992, McNamara describes some of the more limited achievements of these struggles. One of these is the statutory recognition of regional self-government agreements in some provinces. Such agreements delegate local government powers to Indian bands and in some cases limited criminal jurisdiction. Relying and building on the recommendations of the *Report of the Aboriginal Justice Inquiry of Manitoba*, McNamara argues that the jurisdiction of autonomous indigenous justice systems need not be confined to territorially defined communities, although the details of the argument remain sketchy.

Sadik also addresses the issue of autonomy although with a particular focus on policing in one native community in Canada. He notes the coincidence of the reemergence of movements for native autonomy and the crisis of confidence in conventional criminal justice arrangements, a propitious one for launching experiments and genuine alternatives to conventional policing arrangements. Saville and Rossmos' examination of problem oriented policing in British Columbia provides a very useful account of one of the responses to the 'crisis' in western styles of policing that has emerged from inside the criminal justice system. Problem oriented policing certainly carries the potential for more cooperative approaches to policing although the vital political question remains of who gets to define 'the problems' which require policing. For those who argue that responsibility for policing should be shared with the institutions of civil society — including indigenous institutions, private policing and so on — it might seem like a sounder democratic idea to limit the role of state police, in line with their distinctive capacity to use force, to those situations when it is called for by the members — individuals, associations, and so on — of civil society to supplement their own policing efforts (see Brogden & Shearing 1993).

One area where a crisis of confidence within the criminal justice system and the influence of indigenous ideas and practices with regard to dispute resolution have produced practical experimentation is in relation to the emergence of what is often called family group conferencing for juvenile offenders. Moore and McDonald provide a detailed analysis of one such scheme in New South Wales, adapted from developments in New Zealand. Relying on John Braithwaite's normative theory of reintegrative shaming and the experience of family group conferencing they distil the principles which might afford a foundation for a new approach to criminal justice and a new vision of its place within a democratic community and polity. Such an approach will promote 'citizen involvement in the task of achieving and maintaining good order'. Family group conferencing gives practical institutional expression to the ideas of participation, responsibility and reintegration by involving all those affected by offending behaviour (including victims) in a 'collective process of achieving restitution, reparation and reconciliation'.

However, Havemann and Havemann argue in their examination of law and order politics in New Zealand between 1984 and 1993 that the wider political climate in which such apparently progressive developments and movements are appearing is not at all hospitable to the broader political aspirations and claims referred to by Moore and McDonald. Hil's analysis of juvenile justice policies in Queensland in the early '90s reaches similar conclusions. The dominant tendency the Havemanns identify is one of an increasingly repressive state directed at managing the social fall-out from the radical experiment in free market policy pursued by both Labour and National governments in New Zealand since the '80s. They acknowledge the many innovative and progressive reforms and proposals within public policy — such as family group conferencing, the introduction of a bill of rights in 1990, the proposals of the Royal Commission on Social Policy for participatory forms of citizenship, the development of biculturalism and devolved forms of power to tribal regions and so on — but their ultimately reductive and negative thesis requires that they interpret these developments as either of minor importance or as disguised aspects of the more or less uniformly repressive trend they regard as dominant.

Some of the same questions are taken up in *Justice and Identity* (hereafter *Jl*) which combines contributions which consider some of the specific effects of the post-colonial claims of Maori on the constitutional, legal and public institutional life of New Zealand with other papers devoted to the theoretical questions raised by the conceptualisation and operationalisation of the idea of justice in the context of multi- or bi-cultural societies. These questions resonate with themes central to many of the essays in *POJ*. Many of the essays in *Jl* are concerned with the legal, constitutional and institutional recognition of Maori as an independent sovereign people with control over their own land, resources, laws and culture. As Durie puts it, 'one culture cannot be judged by the norms of another, and each must be seen in its own terms' (p35), echoing McNamara's argument (in *POJ*) with regard to the Canadian setting that — 'Meaningful autonomy must include the right to "define" justice, and to adopt and apply laws and processes consistent with this definition' (p16).

On the other hand, many of the contributors to *Jl* (notably Sharp, Turner, Young and Yeatman) are concerned to avoid the 'binary politics' and 'entrenched separatism' that may be suggested by such claims, the risk as the editors put it 'of overlooking both New Zealanders who fall outside this binary and the complexities within those two identities'. (p. viii). The emphasis in these papers shifts from the assertion of sovereignty to what Turner refers to as notions of 'relational citizenship', 'a relational politics of difference' and diverse and inclusive 'partnerships' and Young 'communicative democracy'. Sharp provides an incisive, practical, philosophically informed argument against the predisposition to see cultures as 'separate, incommensurable and self-justifying ensembles' (p118) at the same time as he argues for the value of adopting biculturalism (and multiculturalism) as a 'mode of inter-cultural contact' in the public life of a nation. The central concern of these writers is to avoid the forms of closure that are implied by sovereignty-based arguments in favour of the virtues and prospects of ongoing processes of translation, reconciliation and mutual transformation between peoples and identities.

No nation currently confronts a more awesome challenge in giving institutional expression to such values than South Africa. The collection *Negotiating Justice* (hereafter *NJ*) takes as its most immediate focus the legal, constitutional and communal politics of South Africa in the period from Nelson Mandela's release in 1990 to the first democratic elections in April 1994 which saw the election of an ANC dominated government of national unity with Mandela as President. Mervyn Bennun provides a detailed and revealing examination of the communal and political violence in this period and of its roots in the Apartheid state and its successive attempts prior to 1990 and to the very eve of the 1994 elections to adapt and renew itself in the face of changed circumstances. The scale of the

violence in this period was massive, but Bennun rejects the commonplace assumption that 'Apartheid came to an end in 1990 and that communal violence is in some way linked to its demise.' Rather his core argument is that much of this violence was more or less directly sponsored by the Apartheid regime, the National Government under de Klerk and the security forces and that it represented a continuation in an intensified form of the paradigmatic Apartheid strategy of promoting ethnic and 'tribal' divisions and the forms of communal violence that in some degree or another always accompanied them. If anything this thesis has been greatly strengthened by the evidence disclosed since 1994 in the Truth and Reconciliation Commission and other inquiries. The interpretation widely propagated within the white community and in the west that 'tribal' conflicts and culture lay at the root of the violence is not so much an explanation therefore as a dimension of a strategy of rule that increasingly came to rely on fomenting political terror. The ANC from its inception represented the greatest threat to the Apartheid politics of division and separatism (as practised by the National Party and its erstwhile political allies in the black community such as the Inkatha Freedom Party) because the ANC was and is a multi-ethnic and pluralistic organisation embodying widely shared aspirations to build a unified democratic state. Its triumph over the threats and risks of civil war is a remarkable one in the circumstances.

Bennun's political analysis of the violence does not deny the horrific scale or realities of violence within the 'townships'. Again however this must be placed in the context, provided by Bennun, of the struggles over the basic resources of subsistence (space, land, housing, work, transport, etc.) fostered by the apartheid system which placed 87 per cent of the land in the hands of 14 per cent of the population, which denied blacks the right to own land, which permitted forced resettlement and enforced a pass system against the black majority, which substantially failed to provide any system of legal protection within black communities at the same time as it eroded (especially in latter years) traditional, community-based mechanisms of regulation. That this fostered endemic violence and conflict, despair, anomie, and a pervasive 'culture of evasion' in which illegal and informal economies and means of regulation, whose more pathological forms included gangsterism, extortion and vigilantism, stepped into the vacuum is hardly surprising.

The new South African government is faced with truly monumental tasks of social, economic and political reconstruction. The remaining chapters in *NJ* deal with critical legal and constitutional aspects of this process. The creation of a democratic, law-based society rooted in a respect for human rights is central to the ANC program of reform. Malyn Newitt summarises the long history and legacy of constitution making in southern Africa with which the new government must contend. Consistent with the account provided elsewhere this constitutional history has entailed successive attempts to entrench separatism and ethnic divisions, most notably through the various versions of the 'homelands' policy. This history is rich in lessons for those inclined to unthinkingly invoke ideas of sovereignty and separatism in other national settings. The ANC has resolutely resisted the fragmentation of the nation and the strong forms of federalism variously favoured by the far right Freedom Front, Inkatha and the other Homeland regimes and the National Party. It set itself the task of reconciling ethnic, regional and other deep-seated divisions with the idea of a unified, democratic state.

As Nico Steytler demonstrates this was the fundamental challenge posed by the struggle to vest responsibility for the making of the new constitution in a democratically elected constituent assembly, achieved by the ANC against the opposition of the other major political forces. Of central importance in the creation of the new constitution is the question of a bill of rights and in particular of what formulation will be given in the bill of rights and what balance struck between the protection of 'fundamental' (or 'first generation') civil and political rights on the one hand and socio-economic rights on the other. The former will

tend often to entrench the existing rights of privileged minority communities acquired and maintained (typically by violent means) under Apartheid whilst the latter embody the aspirations of the majority for social justice and a radical redistribution of resources.

As a source of guidance on these questions de Vos examines the constitutional jurisprudence generated by the Bill of Rights in the Indian Constitution and the varied efforts to reconcile first generation rights limiting governmental interference with negative rights of individuals with the 'directive principles' mandating governmental action to remedy social and economic problems and inequities. No issue raises this dilemma more acutely than that of property (and land in particular), which is the subject of Andrew Caiger's contribution to *NJ*. Here the constitution makers must reconcile the demand for equitable redistribution of property not only with the protection of property rights, mostly acquired through expropriation of black land-holders, but also the stresses inflicted on a fragile economy by the threatened flight of white capital and skills. Eurocentric notions of absolute dominion over land must also be reconciled with the rather different status of land in African culture. One area of potential reconciliation of these tensions canvassed by Caiger may lie in the recognition of forms of 'shared access to land' in line with African customary notions of 'use' and custodianship rather than ownership of land. There are some definite parallels with the issues raised by the *Wik* case in Australia with respect to Aboriginal native title rights on land held under pastoral lease.

The essays in *NJ* forcefully and practically remind us that nation building never occurs on a tabula rasa. As Steytler puts it — 'For a democratic state to emerge in South Africa fundamental issues have to be resolved. What is the South African state? What are the limitations on state sovereignty? How can legitimate state authorities be created?' (p78). Moreover, these questions are in vital respects resolved not as the *outcome* of formal democratic processes but as the prior and critical condition of their existence. The making of a democratic state necessarily proceeds through many steps which are not themselves democratic. In the South African case these included, amongst other things, protracted private negotiations between leaders of the ANC and leaders of the National Party, as Allister Sparks recounts in his superb book, *Tomorrow is Another Country*. Steytler refers to more immediate issues, such as the establishment of impartial and effective election administration machinery and regulation of the security forces to ensure free and open campaigning. Holding the nation together in the face of powerful centrifugal forces to enable the making of a democratic state was the formative project of nation building achieved by the ANC.

The peace process was thus of central importance from the outset. It is easy to assume that communal peace is not possible until the goals of reconstruction are achieved, but South Africa's new leadership are acutely aware that, on the contrary, the whole process of reconstruction is jeopardised unless a measure of peace and reconciliation can be brought to the country. J R Midgley provides a critical overview of the framework of the peace process and the peacekeeping structures — the National Peace Accord — introduced in 1991 following multilateral negotiations. Despite the deficiencies noted by him, the core values and aims embodied in this framework — of engaging community participation and promoting cooperation across existing divisions through regional and local peace committees, of emphasising negotiation and mediation over adversarialism and retribution, and of deploying mechanisms for monitoring the activities of the authorities — reflect a commitment to changing the civic fabric and political culture. There is a vital recognition here that the strength, effectiveness and durability of formal democratic constitutional, political and legal institutions depend upon the processes of reconciliation and the building of inclusive relationships of trust and cooperation within the body of civil society rather than vice versa. Such processes are currently being pursued through the continuation of the peace process, most notably perhaps in the Truth and Reconciliation Commission. The

challenge is nevertheless enormous given the legacies of hatred, violence, lawlessness and suspicion left by apartheid.

Reading Bennun's analysis in *NJ* of life and violence in the townships, there are unmistakable parallels with the dispossession, forced resettlement, segregation, social dislocation and current living conditions of many Aboriginal communities in Australia. The denial of basic entitlements of citizenship and community infrastructures (including in some areas a clean water supply and municipal services like garbage collection), high levels of overcrowding, poverty and preventable disease, and associated community and domestic tensions and violence are characteristic of many Aboriginal communities today. Many Australians, including the current Prime Minister John Howard, would ridicule such comparisons just as they do use of terms like 'genocide' to describe Australia's past policies towards Aboriginal Australians. Unfortunately for John Howard, in an increasingly globalised world of ideas as well as well as markets, it will not be left solely to him and his ilk to judge the veracity of such comparisons and their moral and political implications. Building on the sort of comparative work represented in the three books under review will help ensure that criminology does not fail to play its small part in making this so.

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## REFERENCES

Brogden & Shearing (1993) *Policing for a New South Africa*, Routledge.