

INTRODUCTION

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In his essay in this volume Robert Depew writes that the communitarian tradition of justice, known more commonly as popular justice,

embraces an ideology and assumption set which promise a quality of justice and a range of related practical benefits that cannot be achieved or are difficult to achieve through the more conventional, formal justice apparatus of the State.

The desire to explore this ideology and these assumptions further, and to examine the practical consequences of popular justice from an international perspective provided the impetus for this special issue of the *Journal of Legal Pluralism*. We make reference to the concept of 'popular' rather than 'community' justice as the former incorporates an ideology and set of assumptions which the term 'community' does not explicitly include.

The volume is framed by the following questions: What is the meaning of popular justice? What is the genesis of the popular justice movement? What is the future of popular justice? In this introduction we expand upon these questions to provide a framework for reading the diverse range of papers which follow. Because the term 'popular justice' wears many hats and has become a catch-all phrase to denote anything not of the formal, adversarial criminal justice system, we feel it important to provide a context for the papers. These questions are integral to each of them, although each also deals with a specific subject of popular justice. Each of the questions which frame the volume is considered in turn below.

What is the meaning of Popular Justice?

In a recent article Stanley Cohen sets out some ways of thinking about social control. He maintains that there are three different traditions of thought or

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discourses about the subject. The first is political, and deals with order, legitimacy and authority and confronts the central problem of how to achieve a degree of order, regulation and stability not inconsistent with the maintenance of individual liberty; the second is anthropological, and involves the search for the variation in content of the universal process of socialization, conformity, internalization of norms, value-consensus; and the third is concerned with deviance and crime, and deals with the organized, patterned responses to the normative violations which become categorized as crime. Cohen argues that we are now at the fascinating stage where these three discourses are becoming less separate and the interfaces between them more apparent.

Within each discourse are various modes of social control, namely the punitive, compensatory, conciliatory and therapeutic. It is within the compensatory and the conciliatory modes that popular justice is located. In the political discourse, terms such as community justice, popular justice or people's courts are used; in the anthropological, references to the universal, natural, organic forms of control, are to be found; in the crime/deviance mode, informal social control, community control, and abolitionism are terms which abound. It is less frequently noted that popular justice can use punishment as easily as reconciliation, and that conversely modes such as compensation and reconciliation can be found in many state or bureaucratic institutions (Cohen 1994: 64-65).

In the compensatory and conciliatory modes of social control the emphasis is on social rather than legal justice; the objective is to place justice in a context where damage and not guilt is seen as important. Braithwaite (1994) argues that a challenge for a communitarian approach to justice is to determine how community power can replace or co-opt state power. These modes of social control rely heavily on the empowerment of individuals and communities where the goal is to work together to negotiate mutually acceptable outcomes and where blame is shared (Cohen 1994: 68). Depew's paper is particularly helpful in describing the psychological and organizational objectives of popular justice and its vast appeal in terms of its more 'human' elements. Its emphasis on social rather than legal factors (Justice Fellowship 1989) lends support to the view that popular justice gives more attention to real problems and has the potential to achieve more useful, longer term solutions to these problems.

What is the genesis of popular justice?

A desire to exercise greater local control over disputes is part of a broader movement toward minimal intervention of the State, and toward informality. It is also part of the victims' rights movement where the State is seen as indifferent to victims and local systems as more inclusive and more capable of resolving

problems of communication and individual conflict. Popular justice has emerged within what might be termed the 'participation paradigm', where in some respects justice has become 'everybody's business' (Shearing 1993) and where community is paramount. Inherent in this new definition and understanding of justice is a new legal pluralism. This involves the recognition of different legal orders where local orders co-exist with the state, while maintaining a degree of autonomy and ensuring that the state monopoly of law is not absolute at the community level, as Nina and Schwikkard note.

Popular justice has also become more 'popular' under the influence of post-modernism with its emphasis on individual expressions of identity and culture. Here popular justice becomes a vehicle for 'moments of resistance' and features "as part of a larger movement, most often about transformative politics" (Merry 1995). This is particularly evident in Canada, where individual expression has defined the aboriginal criminal justice discourse and where today empirical research is sometimes replaced by 'worldview' (LaPrairie 1996). This, as Depew notes, may in fact be an ideology, but when it is presented as a worldview any challenge to its validity is inhibited. It is important, therefore, to keep in mind that expressions of popular justice may become a vehicle for necessary political change and for expressions of 'empowerment', but may also be used as a vehicle for hegemonic domination of a discourse.

At the more specific level of criminal justice, there is a widespread belief that the present system does not rehabilitate people, that victims are unjustly excluded, and that a reliance on prisons makes people worse and not better. In attempting to redress these defects there is a move toward sharing responsibility for crime more widely, towards the demystification of the state system through the use of informal community mechanisms, and towards giving more power to victims and communities (Justice Fellowship 1989). Empowerment and the belief in the need to 'restore' relationships between offenders, victims and communities, are central. The popular justice discourse, especially where it interacts with customary or traditional, indigenous forms of justice, suggests a return to the roles and relationships between groups and individuals which characterize less complex and more communal societies. Regardless of the merit of this belief, there is an ideology attached to popular justice which it is virtually impossible for the state system to satisfy.

The papers by Depew, Crnkovich and Clairmont in this volume all speak of aboriginal criminal justice against the background of demands by aboriginal groups in Canada to move from the adversarial system of dispute resolution and adjudication in criminal cases to a system in which victims, families and communities will play a greater role. This is also the case in Australia and New Zealand where a variety of community forms of criminal justice is emerging.

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Some of these are aboriginal-inspired, such as Family Group Conferencing for dealing with young offenders in New Zealand. There is a variety of local initiatives, often involving aspects of customary law, in Australia. There is a distinct move towards the adoption of popular justice (often defined as 'restorative justice'), in which the restoration of bonds between people is the goal. In this context popular justice has emerged as a demand by aboriginal people as part of a larger First Nation political agenda.

What is the future of popular justice?

In many respects this is the question which is the most relevant to the articles in this volume, because they provide examples of the 'practice of popular justice'. Some of the papers, such as those by Anne Griffiths, George Westermarck and Mary Crnkovich, are case studies; others, such as that by Donald Clairmont, provide information and analysis of certain approaches undertaken within an accommodating and supportive political climate; yet others, such as that by Nina and Schwikkard, describe the machinery of popular justice.

Perhaps the most important conclusion we can reach from a study of the articles in this volume and elsewhere (see Merry 1990; Gordon and Meggitt 1985; Nader 1993) is that informal justice is not a panacea for all our justice problems any more than is formal, state justice. As Depew notes, the type of case and characteristics of disputants strongly influence the use and effectiveness of popular justice interventions. In assessing the value of informal justice approaches it is also necessary to note its relation to the degree of mutual dependence among community members. An overly idealized vision of 'community' and its ability to understand the nature of its problems and readily to find solutions, given the power and opportunity, may lead to disappointment and frustration with popular justice. It is interesting that, as we become increasingly sophisticated in some areas such as technology and genetics, we become increasingly simplistic in others such as justice.

At the same time, however, it is important to remain open to the other merits of alternative approaches to dealing with disputes between people, crime and disorder. Some of these, while not providing solutions to social problems, still do less harm than the state's traditional reliance on police, courts and prisons. Perhaps the real value of popular justice lies in its potential for doing less harm both between and to people. It is with regard to this possibility, as well as with a view simply to providing current information and analyses of popular justice from an international perspective, that we have compiled this collection. Let us turn now to the content of this issue.

The Papers

Robert Depew's paper "Popular justice and aboriginal communities: some preliminary considerations", is particularly useful in setting out the range of popular justice issues, and providing a broader framework for understanding the meaning, genesis and future of popular justice. Hence we are presenting it as the lead article. The author travels from a broad description of popular justice using the general literature, to the relevant aboriginal issues and context. He raises some of the critical but often ignored issues about the state of aboriginal communities, looking beyond the common description and perception of popular justice as the panacea to all their problems.

This is followed by "The 'soft vengeance' of the people: popular justice, community justice and legal pluralism in South Africa", in which Daniel Nina and Pamela Jane Schwikkard describe the value of popular justice in moving communities to define their own legal needs. The authors provide a particularly insightful account of the various forms of accommodation between community and state justice in their discussion of popular justice and legal pluralism in South Africa. They describe the communities which they sought to assist in the process of 'self-regulation', i.e., in the development of their own structures of conflict resolution and legal ordering. This type of move to self-regulation does not deny the authority of state law but contributes to the maintenance of local order. After presenting examples of self-regulation, Nina and Schwikkard conclude that popular justice will not disappear. It is perceived not only as an effective tool of empowerment, but as a significant contribution to the process of consolidating a democratic and fair society.

In his paper on approaches to development and the construction of identities, "The multiple faces of the ideology of intervention: a story of administrators' fantasies and implementors' anxieties", Pieter de Vries provides an important insight: that community justice needs to reflect the realities of those who are most affected by activities that purport to serve that community. He describes a rural development project in Costa Rica and demonstrates how the realities of the community of people most affected by development, i.e., local farmers, are marginalized in the definitions of development and in the categorisation of them as clients, formulated by frontline workers and bureaucrats. The ideology of intervention derives its power from its usefulness for accomplishing bureaucratic tasks through the conversion of rural people into bureaucratic subjects. The author's account provides an example of the necessity for popular justice to reflect the needs and realities of the client group if it is to remain viable for those it purports to serve, and to meet the 'empowerment' objectives of popular justice.

In the next paper, "The Rise of the *Rondas Campesinas* in Peru", German Nuñez

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Palomino provides an engaging account of the emergence of the *rondas campesinas* (peasant rounds), organs of popular justice originating in the Inca empire. He describes how these re-emerged in more recent times in response to a problem with cattle rustling and how they have expanded from local groups with a specific purpose to country-wide instruments of social control and dispute resolution, while at the same time maintaining their most characteristic features as authentic peasant organizations. In their contemporary form the rounds deal with all types of criminal and civil claims. They also sanction those who commit criminal acts. A particularly interesting function in the light of the experience reported by de Vries in Costa Rica, is that the *rondas campesinas* in Peru also are involved in the regulation of communal development. A loss of legitimacy of the rounds in the peasant communities resulted, in part, from attempts by state government to undermine them in the 1970s. Subsequently there have been changes and improvements in the relationship between rounds and official authorities. The road to official recognition has been long and difficult, but in 1986 they received official recognition in state legislation.

We move next to another two Canadian papers. The high representation in the volume of Canadian papers is not by accident. We felt that the advanced state of aboriginal self-government and aboriginal justice activities in that country, in comparison to others with similar indigenous populations, justified the devotion of more space to the Canadian example. The papers by Robert Depew, Donald Clairmont and Mary Crnkovich provide a good overview of the state of popular justice in aboriginal communities in Canada. It is essential to consider the issues these papers raise if we are to develop an understanding of the future of popular justice, not only in Canada, but in other countries with similar interests in popular justice.

In contrast to Depew's theoretical analysis of the implications of popular justice for aboriginal people and communities in Canada, Donald Clairmont, in "Alternative Justice Issues for Aboriginal Justice", provides more of a micro-level analysis of specific community justice projects. The projects are presently functioning in communities that vary in geography and size.

Clairmont's paper situates the community justice activities within the broader political and aboriginal criminal justice contexts. He provides four examples of community projects and locates their source in aboriginal political demands for greater control over justice in communities, but ties them as well to the need for institution-building in communities. He gives us information about the projects from the perspective of a number of community players, including community members, officials, offenders and victims. He concludes that, while these projects have many attractions from a community and self-government perspective and well may "constitute a flagship for change in the justice field", they require more

time and analysis before any firm conclusions about their immediate and long-term value to communities can be reached.

In contrast to the broader approach of Depew and the overview of community projects by Clairmont, Mary Crnkovich in her "A Sentencing Circle" takes us on a different journey in her fascinating account of one family violence case in a northern Quebec Inuit community where a community circle was used to determine the sentence. The most compelling part of her description is her account of the views of the various players, contrasting the judge and the community, the offender and the victim. Perhaps her account of this case provides the most vivid demonstration of some of the contradictions between, on the one hand, the discourse and the rhetoric, and, on the other, the reality of popular justice. Her article is particularly useful in demonstrating how popular justice may be adopted by mainstream justice officials in the belief that it is more appropriate for the community, even though the needs of the individual most affected - the victim - are compromised.

The assumption that a return to a more customary local system of justice will be permanent and transcend any social and economic change is challenged in the paper by George Westermarck, "When the alternative fails". In his careful analysis of the genesis and functioning of the village courts in Papua New Guinea in the '70s and '80s, Westermarck documents the effects of a desire for a popular justice system with a status comparable with that of the state system, in combination with a lack of government support, and the alteration of local life through global economic and religious changes. He shows how these factors modified the sources of and responses to conflict in the communities and reduced the general reliance on the village court system.

The Westermarck paper is complemented by the contribution of Anne Griffiths who, from extensive field work in Botswana, details the functioning of a state Magistrate's court and the local Chief's *kgotla* as two apparently opposite forms of justice in "Between paradigms: differing perspectives on justice in Molepolole Botswana". She concludes that many of the assumptions about the differences between popular and state justice cannot be upheld. Popular justice forums may be just as inflexible as those of the state, and it is difficult if not impossible to prevent the intrusion of state power into local systems. Perhaps her most compelling conclusion is that popular justice should be explored beyond the confines of legal institutions. We need to move into the realm of other bodies and agencies which construct social relations, particularly in cases involving gender and power.

We hope that the collection of papers in this volume will tell the reader something about the concepts and contradictions of popular justice. Our aim has been also,

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by presenting an international perspective, to make apparent the richness and diversity of popular justice projects. We hope that the reader finds our selection of articles as interesting and stimulating as the editors found them when receiving and reviewing them. To all the authors we extend our sincerest appreciation for their contributions.

References

BRAITHWAITE, John

1994 "Thinking harder about democratising social control." Pp. 199-216 in Christine Adler and Joy Wundersitz (eds.), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?*, Australian Studies in Law, Crime and Justice.

COHEN, Stanley

1994 "Social control and the politics of reconstruction." Pp. 63-88 in David Nelken (ed.), *The Futures of Criminology*, London: Sage Publications.

GORDON, Robert J. and Mervyn J. MEGGITT

1985 *Law and order in New Guinea Highlands: Encounters with Enaa*. University Press of New England.

JUSTICE FELLOWSHIP

1989 *Restorative Justice: Theory. Principles. Practice*. Washington, D.C.: Fellowship Communications.

LAPRAIRIE, Carol with Phil MUN

1996 *The State of Aboriginal Corrections*. Ottawa: Ministry of the Solicitor General (forthcoming).

MERRY, Sally Engle

1990 *Getting Justice and Getting Even: Legal Consciousness among Working Class Americans*. Chicago: University of Chicago Press.

1995 "Resistance and the cultural power of law." *Law and Society Review* 29: 11-26.

MERRY, Sally Engle and Neal MILNER (eds.)

1993 *The Possibility of Popular Justice: A Case Study of Communities Mediation in the United States*. Ann Arbor: University of Michigan Press.

NADER, Laura

1993 "When is popular justice popular?" Pp. 435-452 in Merry and Milner.

SHEARING, Clifford

1993 "Participatory policing: modalities for lay participation." Community Law Centre, University of the Western Cape, South Africa (unpublished paper).