Crime, Aboriginality and the Decolonisation of Justice

By Harry Blagg | 2016

Aboriginal people are massively over-represented in the criminal justice system. They are among the most imprisoned people in the world. The rate of imprisonment of Aboriginal people continues to rise, increasing by 52 per cent in the last decade. Aboriginal prisoners comprised 27 per cent of the prison population last year. At the 2011 census, Indigenous people comprised just 3 per cent of the population.¹ The rate of imprisonment of Aboriginal people is up to fifteen times that of non-indigenous people.

We have been confronted by the recent revelations of the treatment of Indigenous youth in juvenile justice facilities in the Northern Territory, revelations which have resulted in the establishment of a royal commission.

Harry Blagg is a recognised authority in this field. He is professor of criminology and associate dean of research at the Law School of Western Australia. He has undertaken extensive research into the issues surrounding Indigenous people and criminal justice.

The first edition of this book was published in 2008. This second edition has been updated to discuss emerging issues such as Foetal Alcohol Spectrum Disorder and the Commonwealth Government’s 2007 intervention in remote Northern Territory communities.

The subject is approached from an academic perspective. The opening chapters carefully set the work within academic traditions in criminology, sociology and anthropology. The discussion of ontology, epistemology, teleology and liminal spaces may prove heavy going for readers unaccustomed to such scholarly discourse. It is, however, necessary to understand the theoretical framework behind Blagg’s views and recommendations.

One concept that emerges from the book is that colonisation is not a finite historical event. Rather it is an ongoing phenomenon. The ‘colonial’ processes of dispossession, genocide and assimilation are perpetuated by marginalising and denying the legitimacy of Indigenous culture and law. This ongoing colonisation gives rise to the concept of ‘decolonisation of justice’ referred to in the book’s title.

Blagg also views as fundamental a change in perspective from seeing the issue as one of an ‘Aboriginal problem’ to seeing that there are a range of deep seated problems faced by Aboriginal people. By recasting the issue in these terms, the process of addressing the issue changes. It moves away from the ‘colonising’ process in which the existing dominant power structures impose solutions, towards a process in which Aboriginal people and traditions themselves play a significant role in resolving the problems.

He suggests that from the perspective of Aboriginal people, the existing structure represents an alien law imposed without their consent and in a manner that denies recognition of their own law.

Blagg makes the obvious, but often overlooked, point that Aboriginal people are also over-represented as victims of crime, acknowledging the often endemic violence in Aboriginal communities. He sees the over-representation both as perpetrators and victims of crime as a consequence of disadvantage and marginalisation experienced by generations of Aboriginal people.

Blagg suggests that there are intrinsic differences between the Western and the Aboriginal view of the world. Acknowledging that difference is fundamental to addressing the causes of the over-representation of Aboriginal people in the criminal justice system. What he refers to as an Aboriginal domain (comprising areas such as ceremony, cosmology, kinship and law) continues to exist alongside the non-Aboriginal domain. He contends that there is a need to generate hybrid initiatives in the space between these two domains. Such hybrids represent a decolonisation of justice precisely because they operate between Aboriginal and non-Aboriginal structures and thereby avoid the risk of assimilating the Aboriginal component of the process. Blagg cites as examples of such structures:

- Circle Sentencing courts;
- Aboriginal or Koori courts;
- healing centres;
- Aboriginal self policing initiatives;
- community justice groups;
- elders groups;
- ‘on-country’ camps; and
- homelands and outstations.

Issues concerning Aboriginal youth justice are discussed. Blagg points out that in Western Australia, by the age of 18, around 80 per cent of Aboriginal youth have had contact with the justice system. On any day, upwards of 80 per cent of youth in detention in Western
Australia are Aboriginal. Youth suicide in Aboriginal Australia has been described as the highest in the world. Many Aboriginal children grow up in highly disturbed environments characterised by alcohol and drug addiction and violence.

Blagg sees child removal strategies as particularly significant in generating this situation. He says that incarceration of Aboriginal youth is another mechanism by which young Aboriginal people are removed from their families. In the case of young people from remote areas, they are frequently taken far from their communities. Incarceration carries with it a further risk that young people will be socialised within an environment that has a distorted view of Aboriginal culture. He suggests that issues of Aboriginal youth justice can be more effectively addressed by shifting the focus from mainstream institutions like courts and detention to hybrid structures (such as ‘on-country locations) based in Aboriginal custom.

He examines processes of restorative justice which he characterises as the collective resolution of how to deal with offending and the harm caused by crime. He argues that the time for this approach has passed and that it has been superseded by the re-emergence of Aboriginal customary law. He identifies a particular problem with restorative justice models arising from the manner in which implementation of the process was often controlled by the police. Because these existing power structures within the criminal justice system remain essentially non-Aboriginal, Blagg maintains that ‘Aboriginal-owned’ community justice mechanisms represent a more effective response.

He notes a problem encountered by attempts to involve Aboriginal elders in community justice mechanisms: while the involvement of elders in improving justice for indigenous people is crucial, it can be difficult to identify just who should occupy that position. He also cites instances in which elders have exploited their position.

In order to reduce levels of violence in Aboriginal communities, some form of policing is essential. Blagg recommends a partnership between Aboriginal communities and the police, so that the police will be perceived as serving the community rather than exerting force over it. He notes a perception within Aboriginal communities that police focus on minor infringements of the law. He asserts that the Northern Territory ‘Intervention’ resulted in a massive increase in Indigenous prison rates (including many prosecutions for driving-related offences) with no increase in prosecutions for intimate partner violence or notifications for child abuse.

He sees the potential for Aboriginal community patrols to address social disadvantage without involving the criminal justice system. Such patrols currently operate in urban, rural and remote areas. They act both as a link and a buffer between Aboriginal people and government agencies. In New South Wales, the Aboriginal Justice Council supports 15 community patrols operating in Sydney and in rural areas.

Blagg notes that the court system has been effective in adopting a flexible approach. Many jurisdictions have established Aboriginal courts and Circle Sentencing courts which allow Aboriginal elders to participate in the court process. They include in the sentencing phase of proceedings an examination of the issues underlying the offending and the needs of victims. One shortcoming is the fact that they are only available after a plea of guilty.

Blagg addresses the issue of family violence noting that Aboriginal people identify family violence as the main issue in their communities. He identifies a tension between the typical depiction of and response to domestic violence in the general community and the issues surrounding family violence in an Aboriginal context. Blagg questions whether the criminal law is necessarily the most effective response to the issue of family violence in Aboriginal society, advocating an approach that leans toward finding pathways to family healing.

Blagg argues that Aboriginal society is a distinctive, functioning social system, not just an ethnic subset of society. Consistent with the findings of the 1986 Australian Law Reform Commission inquiry, he says that Aboriginal customary law is practised and maintained in daily life: not only in remote areas but also in urban areas.

Blagg maintains instead that our refusal to enter into a dialogue about Aboriginal law is at the centre of the problem. In his view, the violence within Aboriginal communities is not a product of Aboriginal culture. Traditional law does not condone physical or sexual violence. Rather he sees the violence within Aboriginal communities as a result of the impact of the negative and destructive aspects of non-Aboriginal culture imposed through the process of colonisation. Blagg concludes with this observation:

We urgently require a new, decolonised version of justice, founded upon respect for, and recognition of, the Aboriginal domain and its laws and cultures, and we need to do it now.

Endnotes

1. ‘Aboriginal jail rates increase by 50 per cent, but rehab fails to reduce offending’ Bianca Hall, SMH
23 August 2016