

# Restorative Justice, Indigenous Custom and Justice Reform in New Zealand

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## Abstract

Over the past four decades, a new approach to crime and conflict resolution, known as 'restorative justice', has been gaining ground around the world and various restorative justice practices are in place or are being developed in many countries. It can be described as a process whereby all the parties affected by a crime – victims, offenders and communities – come together to determine collectively how to deal with the harm caused by the offence and its implications for the future. Restorative justice is not a new concept. It was the dominant justice model in ancient civilizations in Europe and Asia and remains so among many indigenous communities around the world. The Pacific region is of particular interest. It has been the cradle of contemporary restorative justice models within the common law systems of New Zealand and Australia, where restorative justice theory has effectively been translated into practice within the structure of statutory and judicial frameworks. Furthermore, in many Polynesian and Melanesian islands diverse examples of older indigenous forms of restorative practice are still operating. Following an overview of the philosophy, guiding principles and aims of restorative justice, the present paper will examine the roots of restorative justice in the indigenous Maori culture of New Zealand and discuss the role of restorative justice practices within the formal justice system today, with particular reference to family group conferencing as it operates in the domain of juvenile justice. The paper will also comment on the current and potential influence of Maori customary law on New Zealand's legal and judicial system.

**Key words:** criminal justice, family group conferencing, Maori customary law, New Zealand, restorative justice, youth justice

## Introduction Restorative Justice: Philosophy, Guiding Principles and Goals

Restorative justice may be described as a victim-centered response to crime that provides opportunities for those most directly affected by the crime – the victim, the offender, their families and the community – to be directly involved in responding to the

harm caused by the offence.<sup>1</sup> According to a well-known definition by Marshall, “restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”<sup>2</sup> The UN also recently adopted its own and rather all-encompassing definition of restorative justice as “any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.”<sup>3</sup> Restorative justice is generally viewed as a way of humanizing justice, of bringing victims and offenders together in ways that provide opportunity for victims to receive explanation and reparation and for offenders to be accountable to the victim and the community. It draws on a philosophy that gives priority to reconciliation over punishment, to healing for victims over vengeance against offenders, to community and wholeness over alienation, to forgiveness and mercy over negativity and harshness. This shift in thinking away from retributive or punitive justice is also referred to as community justice.<sup>4</sup>

Restorative justice is both a new and an old concept. While the modern articulation has emerged in the past forty years,<sup>5</sup> the underlying philosophy and ethos played a central role in ancient Greek, Roman and Asian civilizations, which all recognized the importance of compensation for the victims of wrongdoing.<sup>6</sup> Furthermore, restorative justice was

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- 1 Kent, R., “Changing Punishment at the Turn of the Century: Restorative Justice on the Rise”, (2002) *Canadian Journal of Criminology* 2(3), 249.
  - 2 Marshall, T., “The Evolution of Restorative Justice in Britain”, (1996) *European Journal on Criminal Policy and Research* 4(4), 37. A similar approach to restorative justice is adopted by Zehr. According to this author, restorative justice is “a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.” Zehr, H., *The Little Book of Restorative Justice* (Scottsdale, PA, Good Books, 2002), 37.
  - 3 *Handbook on Restorative Justice Programmes, Criminal Justice Handbook Series*, United Nations Office on Drugs and Crime, (2006), p. 7.
  - 4 According to Braithwaite, the aims and core values of restorative justice are about healing, moral learning, community participation and caring, dialogue, forgiveness, responsibility and making amends. Braithwaite, J., “Restorative Justice: Assessing Optimistic and Pessimistic Accounts”, (1998) *Crime and Justice* 25, 1 at 5. In a later work, this author cites the following emerging standards for restorative justice: (a) remorse over injustice; (b) apology; (c) censure of the act; (d) forgiveness of the person; and (e) mercy. “Setting Standards for Restorative Justice”, (2002) *British Journal of Criminology* 42(3), 563 at 570.
  - 5 The term ‘restorative justice’ was coined by Albert Eglash in a 1977 article. See Eglash, A., “Beyond Restitution: Creative Restitution”, in Hudson, J. and Galaway, B. (eds), *Restitution in Criminal Justice* (Lexington, Mass., Lexington Books, 1977), 91-92.
  - 6 Braithwaite, J., “Restorative Justice: Assessing Optimistic and Pessimistic Accounts”, (1998) *Crime and Justice* 25, 1 ff. As Zehr has remarked, “it is difficult to realize that the paradigm which we consider so natural, so logical (i.e. the one pertaining to the traditional Western criminal justice system), has in fact governed our understanding of crime and justice for only a few centuries. We have not always done it like this. ...Instead, community justice has governed understandings throughout most of our history. ...For most of our history in the West, non-judicial, non-legal dispute resolution techniques have dominated. People traditionally have been very reluctant to call in the state, even when the state claimed a role. In fact, a great deal of stigma was attached to going to the state and asking it to prosecute. For centuries the state’s role in prosecution was quite minimal. Instead it was considered the business of the community to solve its own disputes.” Zehr, H., “Retributive Justice, Restorative Justice”, *New Perspectives on Crime and Justice – Occasional Papers Series* (Kitchener, Mennonite Central Committee, Canada Victim Offender Ministries, 1985), 6-7. And see Weitekamp, G.M., “The History of Restorative Justice” in Bazemore, G. and Walgrave, L. (eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Monsey, New York, Criminal Justice Press, 1999); Johnstone, G., *Restorative Justice: Ideas, Values, Debates* (Devon, Willan Publishing, 2002) 36 ff.

prominent among various indigenous cultures across the world, such as Native American, Canadian Aboriginal/First Nation, Australian Aborigine, New Zealand/Aotearoa Maori and African indigenous people. Indigenous justice systems gave special attention to the needs of the victims of crime, and reconciliation and restitution were considered crucial to right the wrong caused by the offending behavior. Such systems allowed the victim, the offender, the families concerned and members of the community to actively participate in the reconciliation process.<sup>7</sup> The recent rediscovery of such practices in different parts of the world has stimulated and informed the development of restorative programmes and enriched criminal justice philosophy. Western countries re-discovered restorative justice in the 1974 with the establishment of an experimental victim-offender reconciliation programme in Kitchener, Ontario, Canada,<sup>8</sup> and by the end of the 1990s most Western countries had embraced restorative justice programmes.<sup>9</sup>

Restorative justice revolves around the recognition that crime is a violation of the relationships that bind community members together and aims to restore the wellbeing of the victim, the offender and the community through a consensus approach based on dialogue and mutual respect.<sup>10</sup> It aspires to achieve the following outcomes: (a) to attend fully to the material, emotional and social needs of the victim and those individuals personally related to him or her who may have been affected; (b) to provide the victim the opportunity to view the offender as a person rather than as a faceless criminal; (c) to allow all parties affected by an offence the opportunity to contribute to the decision-making about what needs to be done; (d) to enable offenders to fully appreciate the nature and consequences of their actions and to give them the opportunity to make amends for the harm caused; (e) to denounce the

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7 It should be noted, however, that reconciliation was not always sought in cases where disputes involved comparative strangers.

8 See Peachey, D., "The Kitchener Experiment", in Wright, M. and Galaway, B. (eds), *Mediation and Criminal Justice: Victims, Offenders and Community* (London, Newbury Park, Sage Publications, 1989). The first victim-offender mediation program in the United States was introduced in Elkart, Indiana, in 1978, and was modeled on the program developed in Kitchener.

9 In 1999 a resolution was adopted by the United Nation's Economic and Social Council encouraging member states to make use of the restorative justice approach in appropriate cases. The same resolution invited the Commission on Crime Prevention and Criminal Justice to consider formulating a set of guidelines on the development and implementation of restorative justice programs. At the Tenth UN Congress on the Prevention of Crime and Treatment of Offenders, held at Vienna in May 2000, restorative justice and the issue of fairness to both victims and offenders were discussed at great length. The Congress endorsed a declaration encouraging governments to develop and expand restorative justice programs. Following the conclusion of the Congress proceedings, the UN's Commission on Crime Prevention and Criminal Justice adopted a resolution inviting Member States to comment on "Preliminary Draft Elements of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters". The relevant proposal was subsequently approved by the UN Economic and Social Council.

10 Zehr, H., *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, Pa., Herald Press, 1990) 181. And see Roach, K., "Changing Punishment at the Turn of the Century: Restorative Justice on the Rise", (2000) *Canadian Journal of Criminology* 42(3), 249 at 256. According to Kay Pranis, "restorative justice has at its core the concept of mutual responsibility and interdependence. Individuals are responsible for their impact on others and on the larger whole of which they are a part... The importance of relationships is at the centre of restorative approaches – not just the relationship between a victim and an offender, but all the relationships connected to the victim and offender in the web of life." "Restorative Values and Confronting Family Violence", in Strang, H., and Braithwaite, J. (eds) *Restorative Justice and Family Violence* (Cambridge, Cambridge University Press, 2002), 23-41 at 25.

offending behavior and prevent re-offending by integrating the offender into the community; (f) to create communities that would support the rehabilitation of offenders and victims and would actively contribute to the prevention of anti-social behavior through positive interventions; and, (g) to provide a means of avoiding the escalation of legal justice and the associated costs.

As the above discussion suggests, restorative justice focuses on the harms suffered rather than the laws broken; shows a balanced concern for the victim and the offender; works towards assisting victims through empowerment and making amends; supports the offender and simultaneously encourages him or her to understand, accept and carry out his or her commitments to repair the harm. The victim's involvement is essential in defining the harm and how it might be repaired,<sup>11</sup> while offenders must be held accountable for their actions by accepting responsibility for their behavior and making reparation. Reparation can be made in a variety of ways, such as a verbal or written apology,<sup>12</sup> financial compensation or work carried out for the victim or the community (e.g. work at a school, old age home or hospital).

Whilst according to the traditional criminal justice theory responsibility for crime control lies with the state and state-run institutions, restorative justice seeks to transfer such responsibility to the particular community concerned. Restorative justice proponents assert that the community is in a better position to effectively deal with the problems caused by the offending behavior, having regard to the needs of the individuals involved as well as cultural and circumstantial requirements. Restorative justice entails a relocation of authority in responses to crime away from the state since from this viewpoint the state no longer has a monopoly over decision-making, the principal decision makers being the parties themselves. The state's role is restricted to providing information, delivering services and supplying resources.<sup>13</sup>

An important feature of restorative justice is a shift away from the retributive paradigm pervading the traditional criminal justice system. Rather than merely ensuring that the offender pays his debt to society through punishment, the chief priority of restorative justice is to ensure that the offender is held accountable for his or her actions and repairs the harm,

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11 One of the main criticisms that proponents of restorative justice level against the conventional criminal justice system is that it ignores the needs of the victims of crime. As Cayley puts it, "modern criminal justice has stressed the aggrandizement and edification of the state, rather than the satisfaction of victims". Cayley, D., *The Expanding Prison: The Crisis in Crime and Punishment and the Search for Alternatives* (Cleveland, OH, Pilgrim Press, 1998) 217. On this issue consider also van Dijk, J., "Ideological Trends within the Victims Movement: an International Perspective", in Maguire, M. and Pointing, J. (eds) *Victims of Crime: A New Deal?* (Milton Keynes, Open University Press, 1988) 124.

12 According to Retzinger and Scheff, apology and forgiveness pertain to "symbolic reparation", a vital element of the restorative process. As they point out "Without [apology and forgiveness] the path towards settlement is strewn with impediments, whatever settlement is reached does not decrease the tension level... and leaves the participants with a feeling of arbitrariness and dissatisfaction. Thus, it is crucially important to give symbolic reparation at least parity with material settlement... Symbolic reparation is the vital element that differentiates [restorative justice] conferences from all other forms of crime control." Retzinger, S. and Scheff, T., "Strategy for Community Conferences: Emotions and the Social Bonds", in Galaway, B. and Hudson, J. (eds), *Restorative Justice: International Perspectives* (Monsey NY, Criminal Justice Press, 1996), 317.

13 See on this Morris, A., "Critiquing the Critics: A Brief Response to Critics of Restorative Justice", (2002) *British Journal of Criminology* 42, 596, at 597.

both material and symbolic, he or she has caused. In this context, accountability means understanding what one did and then taking responsibility for it.<sup>14</sup> According to Johnstone, “instead of isolating offenders and seeking to deter them through threats of punishment, [we should aim to] hold the offender accountable, subject them to the disapproval of those who care about them, establish circles of support and accountability around them and attempt to restore repentant offenders to full membership of the community.”<sup>15</sup> The above statement highlights a further feature of restorative justice, namely the desire to rehabilitate the offender with a view to preventing recidivism and returning the offender to the community. The reintegration of the offender is facilitated by the participation of the community in the restorative justice process and the removal of barriers to active involvement of offenders in the community life.

In this connection some reference should be made to the notion of ‘reintegrative shaming’, an idea that has played an important part in the restorative justice movement. According to John Braithwaite, the type of social shaming that is generated and perpetuated by the traditional criminal justice system through its formal processes and punitive measures entails the stigmatisation of the offender. Such stigmatization tends to create outcasts who reject community values and consequently makes recidivism and crimes rates worse. As the offender’s role in society is undermined by stigmatisation, deviance for him or her then becomes a way of life that is difficult to change and is rationalized as a defensive lifestyle within the deviant subculture.<sup>16</sup> The challenge for the restorative justice approach is to develop ways of responding to offenders that would counter the naturally occurring stigmatizing processes and provide mechanisms for the reintegration of offenders into community life. As Braithwaite has remarked, communities characterized by high levels

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14 As John Braithwaite has remarked, “retributivists are obsessed with passive responsibility because their priority is to be just in the way they hurt wrongdoers. The shift in the balance towards active responsibility occurs because the priority of the restorativist is to be just in the way they heal.” *Restorative Justice and Responsive Regulation* (Oxford, Oxford University Press, 2002) 129.

15 Johnstone, G., *Restorative Justice: Ideas, Values, Debates* (Oregon, Willan Publishing, 2002) 161.

16 In the words of Gerry Johnstone, “by segregating and ostracising offenders we render them more rather than less of a threat to us. We drive them into criminal subcultures where they become more and more like alien enemies of the community. We lose whatever chance we have of influencing them to behave better and to subject themselves to various forms of supervision and control.” *Restorative Justice: Ideas, Values Debates* (Devon, Willan Publishing, 2002) 13. This approach draws support from the so-called ‘labeling theories’ in criminology. Labeling theories focus on the way other people react to offending behaviour and the subsequent effects of those reactions that create or contribute to deviance. It is submitted that when it becomes known that a person has engaged in deviant acts, he or she is then segregated from society and thus labeled, for example, ‘thief’, ‘abuser’, ‘fraudster’ and the like. Once a person has been singled out as a deviant, the label attached can become the dominant label or ‘master status’, which is seen as more important than all the other aspects of the person. This process of segregation creates ‘outsiders’, who are outcast from society, and then begin to associate with other individuals who have also been cast out. When more and more people begin to think of these individuals as deviants, they respond to them as such; thus the deviant reacts to such a response by continuing to engage in the behaviour society now expects from them. The labeling theories draw on on the general sociological perspective known as ‘symbolic interaction theory.’ According to the latter theory, reality is to a large extent defined by shared social symbols: when enough people agree that a certain idea is true then it ‘becomes’ true and is understood as real. On the labeling perspective see e.g.: Becker, H., *Outsiders: Studies in the Sociology of Deviance* (New York, Free Press, 1963); Lemert, E., *Human Deviance, Social Problems and Social Control* (Englewood Cliffs, NJ, Prentice Hall, 1967); Gove, W.R., *The Labelling of Deviance: Evaluating a Perspective* (Beverly Hills, CA, Sage Publications, 1980).

of cohesion and low delinquency rates make substantial use of practices in which young people who violate social norms are 'shamed' and then 'reintegrated' into the community. A reintegrative process grounded on restorative justice would normally begin with a confrontation that empathetically involves the offender, affirms norms and engages family and community input and support. Then, community forgiveness of the offender occurs through a process of earned redemption as the offender makes amends to those he or she has harmed. Successful reintegration presupposes that the disapproval of the offending behavior is accompanied by the re-affirmation of the offender's status in the community as a good and respected person. Of particular importance is whether the procedure adopted succeeds in invoking feelings of genuine remorse in the offender. In this respect, choosing the right participants to be present in supporting roles is of paramount importance. If the process is to have a reintegrative effect the offender must be made powerfully aware of the disapproval of his or her wrongful conduct by persons for whom he or she maintains maximum respect. In the words of Braithwaite, "the discussion of the consequences of the crime for victims (or consequences for the offender's family) structures shame into the [restorative justice] conference; the support of those who enjoy the strongest relationships of love or respect with the offender structures reintegration into the ritual. It is not the shame of police or judges or newspapers that is most able to get through to us; it is shame in the eyes of those we respect and trust."<sup>17</sup>

Restorative justice processes can be applied in a variety of contexts at a formal or informal level. Formal restorative justice processes are usually initiated by criminal justice organs, while informal restorative justice processes are initiated by community groups and organizations.<sup>18</sup> At a formal level, the criminal justice system can employ restorative justice during the pre-trial phase, during the pre-sentencing process as a condition of the sentence, or in pre-release programmes. At an informal level, restorative justice can be utilized to resolve a variety of conflicts and disputes such as, for example, neighbourhood conflicts, family conflicts and conflicts arising from bullying in schools. Although guided by common underlying principles, restorative justice programmes vary considerably from country to country and region to region, depending on local cultural norms, needs and customs. Examples include victim-offender mediation; family group conferencing; sentencing circles; peace-making circles; healing circles; victim intervention programmes; victim panels;

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17 Braithwaite, J., *Restorative Justice and Responsive Regulation* (Oxford, Oxford University Press, 2002) 74. For a closer look on the issue of reintegrative shaming see Braithwaite, J., *Crime, Shaming and Reintegration* (Cambridge, Cambridge University Press, 1989); "Juvenile Offending: New Theory and Practice", in *National Conference on Juvenile Justice, Conference Proceedings No. 22*, edited by Atkinson L. and Gerull, S., (Canberra, Australia, Australian Institute of Criminology, 1993) 35-42; Masters, G., and Roberts, A., "Family Group Conferencing for Victims, Offenders and Communities" in Liebmann, M., (ed), *Mediation in Context* (London, Jessica Kingsley Publishers, 2000) 145.

18 Restorative justice may be described as embracing a spectrum of practices ranging from serving as a complement to the traditional criminal justice system to being an alternative, community-based, dispute resolution system.

and community reparative boards.<sup>19</sup> Most countries have developed standards and ethical guidelines for restorative justice practitioners, which address aspects such as the education and training of practitioners; the conduct of the restorative justice process; the victims' and offenders' safety and freedom of thought and choice; the impartiality and neutrality of practitioners; confidentiality and the disclosure and exchange of information; expert advice and assistance; how to detect and avoid manipulative or intimidating negotiating techniques; costs and fees; media policy; informed negotiations and dialogue, especially when different cultural and racial groups are involved; the screening of cases; and follow-up procedures and quality control through programme assessment and evaluation.

As previously noted, in many societies restorative justice practices for resolving conflict had existed prior to the development of formal Western-style legal and judicial systems. The Pacific region is of particular interest in this respect. It has been the cradle of contemporary restorative justice models within the common law-based systems of New Zealand and Australia, where restorative justice theory has effectively been translated into practice within the structure of statutory and judicial frameworks. In the following paragraphs we will examine the role of restorative justice in Maori customary law and discuss the development and operation of restorative family group conferencing in the domain of juvenile justice in New Zealand. The paper will also comment on the current and potential influence on Maori customary law on New Zealand's legal system, with particular reference to criminal law and sentencing policy.

## **The Traditional Maori Approach to Justice and Conflict Resolution**

New Zealand academic commentators have frequently looked to Maori customary law as a source of modern restorative justice theory and practice. It is therefore important in any discussion of restorative justice in New Zealand to canvas the fundamental concepts and principles of the traditional Maori justice system.

Prior to European contact, the Maori had a well-developed system of customary law

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19 McCold distinguishes between mediation models (including community mediation, victim offender reconciliation and victim offender mediation programmes), child welfare conferencing models (including social welfare family group conferences and family group decision-making programmes), community justice conferencing models (including youth justice and police conferences) and circle models (including peace, sentencing and healing circles). See McCold, P., *Restorative Justice Practice – the State of the Field* (Pipersville, PA, Community Service Foundation, 1999), 1. Umbreit has expressed the view that, notwithstanding the wide diversity of restorative justice programs, these programmes share many common elements. According to this author, the term 'restorative justice conferencing' may be used as an umbrella term to cover all forms of direct restorative communication between victims of crime and offenders that are facilitated by one or more impartial third parties. He has observed, further, that all the diverse models have strengths and weaknesses and that a multi-method approach to the matter will allow one to build on the strengths of the various models while minimizing the limitations. See Umbreit, M.S., *Restorative Justice Conferencing: Guidelines for Victim Sensitive Practice* (Florida Atlantic University, Community Justice Institute, 2001), 33. It is important to note here that restorative justice is also relevant to programmes that do not involve direct contact between victims and offenders but employ shuttle conferencing as the preferred method. The latter method is considered very useful in some cases involving sexual offences where a face-to-face encounter may put the victim at the risk of further emotional harm.

and practice that ensured the stability of their communities. However, in contrast with the Western view of law, Maori customary law (*tikanga*) required neither a strict set of formal rules nor a distinctive hierarchy of judges or a legal profession to uphold it. Such law was inextricably woven into the cultural and ethical fabric of Maori life and was inclusive of and accessible to all community members, whose collective interests it served.<sup>20</sup> It was constructed over centuries of practice and was informed by core values and principles that governed Maori political, social and spiritual life.<sup>21</sup> Furthermore, *tikanga* was pragmatic, open-ended, flexible and adaptable to fit new circumstances or the needs of the community at a particular time or situation.<sup>22</sup>

After consultation with the Maori community, the New Zealand Law Commission expressed the central values underpinning Maori customary law.<sup>23</sup>

*Whanaungatanga* – the relationships between people bonded by blood, and the rights and obligations deriving from an individual’s place in the collective group.<sup>24</sup> The relevant rights and obligations extended to the closely-knit nuclear family group (*whanau*)<sup>25</sup> and the

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20 Law in Western thought is regarded as being an autonomous discipline. This means that it is conceptually distinct from custom, morality, religion or politics. It is important to note here that law is not autonomous in the sense that it is free from the influences of politics, religion, economics and those cultural factors, upbringing and world view which influence the beliefs and attitudes of lawmakers and judges. The content of law is shaped by the social forces that furnish the context of law’s operation. But the values of these social forces are not simply reproduced in the Western legal tradition as legal norms. They have to be reconstructed within law and to be accepted as law. In other words, the language of other disciplines and belief systems is not merely translated into law, but rewritten as law, converted into legal norms of rights and obligations, and of lawful and unlawful acts. The vindication of those rights occurs through legal procedures, and the law takes on a life of its own as it develops the content and scope of those rights through its processes of legal reasoning and the establishment of legal precedents. In contrast with Western law, Maori customary law is inseparable from the ethical and spiritual dimensions of community life and thus not autonomous. As a commentator has remarked, “the Maori lived not under the law but with it.” Jackson, M., *Maori in the Criminal Justice System: A New Perspective: He Whaipanga Hou* (Wellington, Department of Justice, Policy and Research Division, 1988), 97-98.

21 *Tikanga* has been defined in more than one way. According to Judge Durie, it embraces the “values, standards, principles or norms to which the Maori community generally subscribed for the determination of appropriate conduct.” Durie E., “Will the Settlers Settle? Cultural Conciliation and the Law”, *Otago Law Review* 3(8), (1996), 449. Chief Judge Williams describes *tikanga* as “the Maori way of doing things – from the very mundane to the most sacred or important fields of human endeavor.” Williams J., ‘He Aha Te Tikanga Māori’, paper presented at Mai i te Ata Hapara Conference, Te Wananga o Raukawa, Otaki 11-13 August 2000, 2. The word *tikanga* originates from the words *tika* and *nga*. *Tika* can be defined as correct, right, just or fair. *Nga* is the plural for the English word ‘the’. Therefore, *tikanga* may be defined as ‘way(s) of doing and thinking held to be just and correct.’ *Tikanga* was believed to have had its origins in the spiritual realms of the Atua (the gods) and was handed down from *tupuna* (ancestors) to the present.

22 The ability of *tikanga* to change over time and place explains its variations among different tribal groups (*iwi*). However, flexibility could not be so great as to allow a practice to be advanced as *tikanga* where it conflicted with core values handed down from the ancestors. This allowed for common *tikanga* not only within individual groupings but also at a broader regional level.

23 New Zealand Law Commission, *Treaty of Waitangi Claims: Addressing the Post Settlement Phase* (NZLC SP 13, 2002) at 9, para 42. It should be noted here that, in addition to forming the body of Maori customary law, *tikanga* includes the cardinal ethical norms and values of Maori society.

24 And see New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (NZLC SP9, 2001), paras 130-136.

25 The *whanau*, usually embracing three generations of immediate relatives, constitutes the most basic and important social grouping in Maori social, political and economic relations.



broader *hapu*<sup>26</sup> and *iwi*<sup>27</sup> groupings.<sup>28</sup> *Whanaungatanga* demanded loyalty, generosity, caring and sharing amongst those in reciprocal relationships. Fulfilling one's obligations to the group was understood to serve group welfare or the 'extended self'.<sup>29</sup>

*Mana* – political power, authority, control, prestige and influence.<sup>30</sup> There are three facets of *mana*: god given power (*mana atua*); power inherited from one's ancestors (*mana tupuna*); and authority derived from one's personal attributes (*mana tangata*). This triadic nature of *mana* is important because it accounts for the dynamic of status and personal leadership in Maori society and the lines of accountability between leaders and common people.

*Tapu* – interpreted as part of a code for social conduct based upon avoiding risk and keeping safe, as well as protecting the sanctity and inviolability of revered persons, objects or places.<sup>31</sup> A person, object or place that was designated *tapu* could be touched or even in some cases approached only by suitably qualified priests. *Tapu* was believed to have originated from the gods and therefore its breach was considered to expose the offender to spiritual interference and misfortune.<sup>32</sup>

*Utu* – relating to reciprocity as a requirement for maintaining relationships between people.<sup>33</sup> *Utu* usually involved a form of punishment or compensation paid to the victim of an offence with a view to restoring the balance between the respective *mana* of the victim and the offender.<sup>34</sup>

*Kaitiakitanga* – pertaining to the notion of guardianship and protection, especially in relation to natural resources.<sup>35</sup>

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26 This term denotes a grouping of several *whanau* within a tribe.

27 This term signifies a tribe, the largest social and political grouping in Maori society.

28 The term *whakapapa* is used to describe Maori genealogy. The *whakapapa* (family tree) is often retold in intricate carvings on the *whare* (the meeting house on the *marae* or meeting place) paying tribute to the ancestors. The *whare* is embellished with symbolic artwork depicting the story of creation, the world of the Maori gods (*atua*) and the holistic system connecting humans to the physical and spiritual worlds through links of *whakapapa*. This environment encourages respect for *tikanga* and the fundamental principles governing Maori social relationships.

29 In traditional Maori society an individual was never regarded as an individual in isolation; rather an individual's identity was defined through his or her relationship with others and the group to which he or she belonged. See on this Mead, H.M., *Tikanga Maori: Living by Maori Values* (Wellington, Huia Publishers, 2003).

30 New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (NZLC SP9, 2001), paras 137-149.

31 New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (NZLC SP9, 2001), paras 150-155.

32 *Noa* is the opposite of *tapu* and includes the concept of common. *Noa* also has the meaning of a blessing in the sense that it can lift the rules and prohibitions of *tapu*. *Tapu* and *noa* remain part of Maori culture today, although it should be noted that people are not subject to the same *tapu* constraints as in previous times.

33 New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (NZLC SP9, 2001), paras 156-162.

34 *Utu* is sometimes understood as denoting revenge for wrongdoing, but this is only partly correct. The concept had positive and negative connotations. It pertained to cases involving the giving of goods, such as gifts and services, in return for other goods of a similar nature, as well as to cases in which some form of punishment was inflicted in return for an injury or offence.

35 New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (NZLC SP9, 2001), paras 163-166.

The Law Commission noted that each tribe (*iwi*) applied variations of the above-mentioned values to inform their particular *tikanga*. Moreover, any attempt at defining *tikanga* must acknowledge the importance of notions such as *tikanga tangata* (social organization), *tikanga rangatira* (leadership) and *tikanga whenua* (relationship with the land).<sup>36</sup>

In the context of a dispute resolution process, the ultimate aim of *tikanga* was the maintenance or restoration of balance, understood in a broad and qualitative manner. The Maori believed that society could only function if all things, physical and spiritual, were held in balance.<sup>37</sup> A dispute between individuals was held to upset the balance of the world at large on a macro level, as well as the balance within an individual's own private world. When a person was unbalanced for whatever reason, their *mauri* or life force was weakened.<sup>38</sup> One of the aims of the Maori justice system was therefore to make the *mauri* strong again so that the person concerned could act as a normal member of society.

In the Maori justice system it was the group rather than the individual that played the central role. In this system, a crime was regarded as an offence against an individual as a member of a collective group and, as such, was dealt with by the collective. In other words, the Maori justice system was built up from the flax roots up, in contrast with the Western liberal model that stresses the role of the State as a disinterested arbiter lying above and outside of society as a whole. In Maori society, the concept of communal responsibility was realized through the belief that the individual was responsible to the group for all his actions and the group was responsible to the wider community for the actions of its individual members.<sup>39</sup> For this reason, the dispensation of justice was both inter and intra-generational: redress for an individual's injuries could be sought from one or a number of the offender's relations, including future generations. The objective was to restore the *mana* of the victim, his/her family and the family of the offender, and to ensure that measures were taken to restore the social order of the wider community.

The emphasis of the Maori justice system was on reaching consensus (*kotahitanga*) and involving the whole community through *whanau*, *hapu* and, on occasion, *iwi* participation. Public debate as a means of resolving disputes or addressing wrongdoing is a central feature of this system, and customs concerning the *marae* process (especially *whaikorero*: formal speech making) are designed to assist decision-making. In general, the Maori justice process aligns more closely with an inquisitorial model of dispute resolution, where every party seeks to achieve a common and mutually beneficial outcome. Allowing every affected party

36 New Zealand Law Commission, *Treaty of Waitangi Claims: Addressing the Post Settlement Phase* (NZLC SP13, 2002) at 9, paras 42 & 43.

37 See on this Consedine, J., *Restorative Justice: Healing the Effects of Crime* (Lyttelton, NZ, Ploughshares Publications, 1995), 90; Pratt, J., "Colonisation, Power and Silence: A History of Indigenous Justice in New Zealand", in Galaway, B. and Hudson, J. (eds), *Restorative Justice: International Perspectives* (Amsterdam, Kugler Publications, 1996), 137-138.

38 As a commentator explains, "the *mauri* is the force inside you which makes you function. It is the combining of your physical, chemical, spiritual everything. ... when a person's *mauri* is sick [they] cannot behave in society as a normal human being." Sharples, P., "Cultural Justice", in McElrea F., *Rethinking Criminal Justice, vol. 1: Justice in the Community* (Auckland, Legal Research Foundation, 1995), 39.

39 As Consedine notes, "definitions of unacceptability were based not so much on the act that people had individual rights, but rather that they had collective responsibilities." Consedine, J., *Restorative Justice: Healing the Effects of Crime* (Lyttelton, NZ, Ploughshares Publications, 1995), 90.

a voice in the proceedings was almost as important as the outcome itself, whilst the concept of confidentiality played no part. The Maori approach to dispute resolution is fundamentally at odds with the adversarial system that prevails in common law judicial systems.<sup>40</sup> As Consedine has remarked, “the purpose of marae justice was a healing for all; [the marae] is not a battleground. The process was primarily about healing and helping the victim, healing the whanau, and helping the perpetrator.”<sup>41</sup> However, although the emphasis was on healing for all the parties involved, the needs of the victim and their *whanau* were given priority.<sup>42</sup> Furthermore, the relevant outcome might also contain a punitive element in the form of a penalty or recompense paid to the victim as a means of restoring the balance between the latter and the offender in terms of *mana* or prestige.

According to Maori custom, a conflict resolution or justice process would commence with *karakia* (prayers) and *mihimihi* (greetings) acknowledging the presence and dignity of all in attendance, reminding participants of their *whanaungatanga* obligations and links with their ancestors (*atua*) and drawing attention to the need to adhere to the principles of hospitality, natural justice and *aroha* or love.<sup>43</sup> Introductory speeches would then take place, followed by *waiata* or singing and further speeches emphasizing relational links between the participants and seeking to dispel their separate *tapu* (spiritual restrictions).<sup>44</sup> The recognition of relational connections (*whakapapa*) strengthened community bonds and consequently respect for the interdependent web of obligations binding the parties. A discussion of the matter at hand would follow, through which the problems requiring resolution would be aired. The order of speaking was determined by the *tikanga* or practices of the local *iwi*. Following this, the leaders of the various groups would commence a process of mediation with a view to weaving the perspectives of the parties concerned into a single narrative and work toward a fair solution. A proposal and eventually agreement between the parties would be formed, followed by concluding speeches in support of the agreed outcome by the leaders of the groups involved. The relevant outcome would often involve reparatory action by the offender’s *whanau* in aid of the community and/or the victim’s own *whanau*. For instance, the offender’s family might be charged with supplying the necessaries for any upcoming *tangi* (funeral) or other ceremony. Alternatively, the parties might agree upon an appropriate penalty for the wrongdoer or his family group, such as the amount or value of the resources considered a fair bounty for a *murū* or raiding party to take from the offender’s village. The participants would end the proceedings with further *waiata* and prayers

40 The adversarial system of legal procedure is a system where the facts emerge through a formal context between the parties, while the judge acts as an impartial umpire. In the inquisitorial system, on the other hand, the truth is revealed by an inquiry into the facts conducted by the judge.

41 Consedine, J., *Restorative Justice: Healing the Effects of Crime* (Lyttelton, NZ, Ploughshares Publications, 1995), 81.

42 Consider on this Hakiha, M., “Resolving Conflict from a Maori Perspective”, in Bowen, H. & Consedine, J. (eds) *Restorative Justice: Contemporary Themes and Practice* (Lyttelton, NZ, Ploughshares Publications, 1999), 90 ff.

43 In traditional Maori lore the magical principle of *aroha* is the most powerful force in the universe. *Aroha* has several layers of meaning and carries a profound message to all people. It is the energy that binds and unites everything together throughout the universe.

44 Visitors were often referred to as being *waewae tapu*, meaning literally that they stood on feet that had different *tapu* to those of the *marae* inhabitants.

recognizing and blessing the agreed outcome as well as the new or restored relationships created through the dispute resolution process. The final act was the *haakari* or feast. The act of feasting together served as a symbol of the binding effects of the process and the restoration of a state of togetherness among all the parties involved.<sup>45</sup>

While to some observers the Maori approach to justice may appear to be too lenient for or even forgiving of offenders, it is not so from a Maori perspective. Within the broader context of the collective life and identity of the Maori people, one of the harshest tools that could be employed against wrongdoers was the shaming of the individual in the eyes of his or her community. This is expressed in the well-known proverb *Ma te whakama e patu*: let shame be their punishment.<sup>46</sup> The essence of this proverb is that it is a greater punishment for a Maori to have to live with shame under the eyes of his peers than it is for him to live in isolation (e.g. in prison) away from his people. It is important to note, however, that such shaming was not aimed at destroying the individual's self-esteem; rather, the aim was to restore the *mana* of the aggrieved individual or group by holding the offender accountable for his behavior and requiring him to make things right.

### **Indigenous Policies and Restorative Justice Conferencing in New Zealand**

The early period of colonization in New Zealand, particularly the years following the end of the Maori wars (1845-1872), was characterized by a policy aimed at the assimilation of the Maori people into a Western dominated society. The various governments of this era sought to achieve this objective largely by means of education, religion and law. In line with this policy, state institutions, including those charged with the administration of justice, obstructed the dissemination of Maori cultural practices and knowledge in favour of Western values. At the same time, the state failed to provide the Maori with the skills that would enable them to effectively compete for resources and access to political office. Like other nations with a colonial past, such as Australia and Canada, New Zealand followed an assimilationist agenda underpinned by a mono-cultural ideology.

From the early 1970s, several events converged to prompt the New Zealand government to alter the ideological basis of its policies towards the Maori people. Of particular importance was the rise of a young, radical and politically active Maori leadership, which contributed a great deal to bringing about the politicization of Maori ethnic identity. This development was closely connected with the Maori labour migration to the country's principal urban centres from the mid-1950s to the late 1960s. This phenomenon brought with it new pressures on Maori society as a result of social dislocation. These pressures were subsequently intensified with the onset of the economic crisis of the early 1970s. These events had the effect of clarifying the divergence with respect to socio-economic position

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45 In Maori society, food and its consumption were considered *tapu*, or sacred things.

46 The concept of *whakama* is a socio-psychological construct that does not have an exact equivalent in Western societies. It embraces notions such as shame, self-abasement, feeling inferior or inadequate, excessive shyness and withdrawal.

between the majority European and minority Maori populations. In this way the conditions were laid for the onset of Maori radical politics and the subsequent ideological and structural changes to the state's response to the Maori people.<sup>47</sup>

At the beginning, the New Zealand government had two options in responding to the radicalization of the Maori political discourse and action: to treat Maori expressions of discontent as a law and order issue and resort to force; or to recognize the validity of certain Maori demands and seek reconciliation. Initially the government opted for the former approach, but from the mid-1980s it decided to follow the latter path.<sup>48</sup> The New Zealand state met the challenge posed by Maori radicalism with a programme of policy reforms that incorporated many elements of Maori ideology and culture. Successful 'pro-Maori' policy and practice changes included increased public-service responsiveness to Maori values, needs and aspirations; a growing emphasis on a bicultural allocation of power and resources within the country; and a growing acceptance of the Treaty of Waitangi as the foundation of the New Zealand state. The state's programme was also designed to encourage the belief among the Maori people that justice could be attained through their acceptance of and participation in the country's formal justice system and institutions such as the Waitangi Tribunal, a quasi-judicial body established in 1975.<sup>49</sup>

The new attitude of the New Zealand state toward the Maori is also reflected in the changes that have been introduced to the country's justice system since the 1980s. These changes included the active recruitment of Maori as justice employees (i.e. in the police force, the probation service and the Department of Corrections); the establishment of links between criminal justice agencies and Maori tribal and family groups; and the involvement of Maori communities in the administration of community-based sentences and the treatment of Maori offenders following their release.

Of particular importance has been the introduction of family group conferencing as part of New Zealand's youth justice system under the Children, Young Persons and Their Families Act 1989 (CYPFA).<sup>50</sup> This law was influenced in part by criticisms of New Zealand's criminal justice system by Maori leaders and by submissions from various Maori scholars and organizations to the Committee of the New Zealand Parliament that was responsible for drafting the relevant bill. The introduction of the 1989 juvenile justice

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47 These developments were not unique to New Zealand but mirrored events that were taking place in other Western countries, such as Canada and the United States, where the process of 'ethnic reorganization' among indigenous peoples had begun about a decade earlier.

48 This change is associated with the transfer of power from the National Party government of Prime Minister Robert Muldoon to a Labour Party government under David Lange in 1984.

49 The Treaty of Waitangi Act 1975 established the Waitangi Tribunal as a permanent commission of inquiry to consider claims by Maori that the state had breached the principles of the Treaty of Waitangi (signed between Maori chiefs and the British Crown in 1840) and make recommendations to the government. The jurisdiction of the tribunal was initially restricted to hearing claims dating from 1975 and thus its social and political influence was limited. However, in 1985 the tribunal's jurisdiction was extended to cover state acts and omissions since the signing of the treaty in 1840. This opened up the nation's historical record of state-Maori relations to intense scrutiny. Further amendments to the Treaty of Waitangi Act expanded the tribunal's membership and extended its capacity for research, hearings and report writing.

50 A child is defined in the CYPFA as a boy or girl under the age of 14 years; a young person is a boy or girl over the age of 14 but under the age of 17.

legislation was triggered by, among other things, a concern about the damage that conflict with the mainstream culture and justice system was doing to youth in Maori communities. Under the new legislative regime, primary responsibility for decisions concerning child abuse and neglect and youth offending is placed with extended families, which are given support in their role through services and other appropriate aid to respond to needs. The key element in the decision-making process is the family group conference, which includes all those directly concerned together with representatives of the responsible state agencies, i.e. child welfare for care and protection cases and the police in the case of offending.

Although modern restorative justice theory was at an early stage of development when the 1989 legislation was enacted, it is obvious that the core restorative values of participation, negotiation, repair, healing and the reintegration of those affected have supplied the foundations of the new youth justice regime. In this context, family group conferencing is recognized as a mechanism that is used within the broader justice system to provide restorative justice solutions to youth offending within a traditional Western system where the prescribed sanctions of the court could also be available when needed. Since the late 1990s the use of restorative justice practices in New Zealand has expanded, with the widespread employment by the police of diversionary processes to deal with relatively minor offending and with the development of legislation for the delivery of restorative justice outcomes in the adult criminal justice system.<sup>51</sup> The following paragraphs offer an overview of the operation of family group conferencing in New Zealand's youth justice system and comment on the relationship that exists between this system and the traditional Maori approach to justice and conflict resolution.

A family group conference may be convened by a youth justice coordinator following a referral by the police or the Youth Court in three situations: (a) where a young person has allegedly committed an offence and has not been arrested, but the police are contemplating criminal proceedings (this is the most common trigger for a conference); (b) where a young person has been arrested and charged in the Youth Court, and he or she has not denied guilt; and (c) where the Court has issued an initial finding of guilt.<sup>52</sup> When convening a conference, the youth justice coordinator is expected to consult with the families and individuals concerned as to the time, place and date of the conference, as well as the procedure to be followed. The coordinator is expected to implement the wishes of the

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51 There are independent community groups that provide restorative justice services following referrals from the courts, community-managed restorative justice programmes funded by the Crime Prevention Unit, as well as a number of marae-based programmes. Although courts in New Zealand have considered restorative justice on an ad-hoc basis since the early 1990s, it was not until the introduction of the Sentencing Act 2002, the Parole Act 2002 and the Victims' Rights Act 2002 that there was any clear statutory recognition of restorative justice in relation to the formal criminal justice system. Together these three Acts accord greater recognition and legitimacy to restorative justice processes, encourage the use of restorative justice processes wherever appropriate, and allow or require restorative justice processes to be considered in the sentencing and parole of offenders where such processes have occurred.

52 It should be noted, that a court might direct that a conference be convened at any stage of hearing a proceeding if it appears that such a conference is necessary or desirable.

parties, so far as this is practicable and consistent with the principles of the CYPFA.<sup>53</sup> If a mutual agreement cannot be reached, the coordinator must make the decision.<sup>54</sup>

Section 251 of the CYPFA sets out the categories of persons who are entitled to attend a youth justice family group conference. These include: (a) the child or young person in respect of whom the conference is held; (b) every parent, guardian or other person who has care of that child or young person, or a member of the family, *whanau* or family group of that child or young person; (c) the youth justice coordinator;<sup>55</sup> (d) the informant in the proceedings for the offence or alleged offence to which the conference relates (usually a representative of the Police Youth Aid Section or some other law enforcement agency); (e) any victim of the offence or alleged offence to which the conference relates, or a representative of that victim; (f) the victim's support group (members of his or her family, *whanau* or family group, or any other persons); (g) any legal counsel, barrister or solicitor

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53 The CYPFA does not contain any guidance as to the venue for a family group conference, but police stations and court offices are generally not regarded as suitable venues for a conference. During the 1990s, conferences were often held at the home of the young offender's parents or a family member, at a *marae* or at a Pacific Island church hall. Such venues encourage free and open discussion in an environment familiar to the young person and his or her family, are culturally appropriate and reduce the sense of officialdom. Although these venues are still used today, the current tendency is to hold conferences at less personal venues, such as offices or meeting rooms of the Children, Youth and Family Services (CYFS) Agency. Such venues have certain advantages: they may be less threatening for victims and their families, more accessible by public transport, and have available technology (such as overhead projectors and computer facilities) that may be utilized during the conference.

54 The CYPFA sets strict time frames for the convening of family group conferences. A conference called in relation to a juvenile's alleged offence that did not involve an arrest must be convened no later than 21 days after the coordinator receives notification from an enforcement officer that charges are contemplated. Where the Youth Court orders that a young person be held in custody pending a hearing, the conference must be convened no later than 7 days after the date of the Court order. This shorter time limit reflects the position expressed in the UN Convention on the Rights of the Child that children should only be deprived of their liberty as a last resort and for the shortest time possible. Where a charge against a young person has been proven in the Youth Court, a conference must be convened within 14 days after the date on which the Court found the charge proved. Although the CYPFA does not clearly indicate whether the above time frames are mandatory or discretionary, the courts have adopted a firm view that the relevant time limits are mandatory on the ground that these limits are fundamental to the philosophy and purposes of the Act. Moreover, there are separate statutory time limits that stipulate the period for completing a family group conference. There is a time limit of 7 days where the young person has been charged with an offence and the Court has ordered that he or she be detained in custody pending the determination of the charge, and where the young person has been arrested and appeared before the Youth Court. Any other conference must be completed within one month after it is convened.

55 After the enactment of the CYPFA, there was awareness that innovative new approaches to youth justice could be stifled by bureaucratic disinterest or inertia. Thus, youth justice coordinators were recruited from outside the Department of Social Welfare, the government agency then responsible for administering juvenile justice. Subsequently, there developed a tendency for new appointments to be sourced from within the relevant department. Although they are now employees of the Department of Child, Youth and Family Services, coordinators are responsible only to the manager of the local office from which they work. This grants them a degree of independence and autonomy that is unusual within the public service. The CYPFA requires that youth justice coordinators be appointed on the basis that they have the appropriate personality, training and experience to perform their statutory responsibilities. They are expected to have organizational skills and the personal qualities necessary to interact with people from different cultural and socio-economic backgrounds. See T. Stewart, "The Youth Justice Co-ordinator's Role – A Personal Perspective of the New Legislation in Action" in Brown B. and McElrea F. (eds) *The Youth Court in New Zealand: A New Model of Justice* (Auckland, Legal Research Foundation, 1993), 47.

representing the child or young person;<sup>56</sup> (h) a social worker; and (i) a probation officer, if the young person is subject to a community-based sentence.<sup>57</sup> While there is no compulsion on any person entitled to attend a conference to actually appear, it would be unusual (and certainly unwise) for a juvenile offender to shun attendance as this absence might be viewed as an act of defiance or failure to face up to the consequences of misconduct.<sup>58</sup> It must be remembered, however, that attendance at a conference is voluntary; it is sufficient compliance under the CYPFA that the individuals concerned had the opportunity to attend the conference through a proper invitation. If people entitled to appear at the meeting are unable to do so and wish to have their views considered, they must notify the youth justice coordinator of their unavailability. Thereupon, the coordinator has a legal duty to ascertain their views and ensure that these are communicated to the conference.

Occasionally, if it is appropriate, the family group conference proceedings are opened by a community elder or pastor with a greeting or prayer. The youth justice coordinator will then introduce those present or ask them to introduce themselves. Next, the youth justice coordinator will inform the participants of the matters that have brought the young person to the attention of the law enforcement authorities, explain the purpose of the conference and advise the participants on the decisions and recommendations that can be devised and the methods for their implementation. The law enforcement officer will then supply the conference with detailed information about the alleged offending. The conference must ascertain whether the young person admits the offence, unless the conference has been convened after the charge was proved at court. No decisions, plans or recommendations can be formulated if the young person does not admit the offence or if the conference cannot ascertain an admission of guilt; should this be the case, the matter must be transferred back to the referring agency. No pressure should be exerted on the young person to admit the offence. If the young person admits the charge, it is open to the police to advise the conference of previous offending that has been proved against the young person.<sup>59</sup>

After the young person has admitted responsibility for the offence, the victim or his or her representative will be invited to speak about the personal impact of the offender's misconduct. Next, all the participants will discuss the causes, circumstances and effects

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56 Although the counsel's principal responsibility is to protect the young person's legal rights, it is recognized that the restorative focus of the family group conference process and the clear statutory objectives that direct its operation should guide the counsel away from zealous adversarial representation. The counsel can play an important role in enhancing the well-being of his or her client by supplying information about the conference process and the emotional challenges that the latter may confront. Consider on this Braithwaite, J. and Mugford, S. "Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders" (1994) 32 (2) *Brit J Criminology* 139.

57 For the family group conference to accomplish its restorative aims, it is essential that the professionals participating in it take a 'back-seat' role. When families lack the knowledge or confidence to deal with the issues at hand, there is actually a danger that the professionals may assume control over the decision-making process. The intervention by professionals (whether direct or indirect, conscious or inadvertent) may prevent the attainment of empowerment by the young person, the victim and their respective families.

58 If a young person has a genuine reason for failing to attend, the conference may be adjourned until a later date.

59 The CYPFA gives no clear indication whether the police at the conference can disclose other alleged offending by the young person. It would appear contrary to the principles of justice if the police officer could bring unproven and unadmitted offences to the attention of the conference.



of the young person's wrongdoing and share their views about how to set matters right. At this stage, the coordinator will clarify the procedures that will apply if the young person's family makes a recommendation that the conference as a whole is prepared to accept and the consequences that will ensue if an agreed decision proves impossible. The young offender, his or her family and other support persons will then deliberate privately with a view to formulating a plan. When the family has finished its deliberations, the young person and his or her support group will rejoin the conference and put forward their recommendations. These recommendations will then be presented to the victim, his or her support group and the law enforcement agent. The consensus of opinion is that any decisions made at a family group conference are binding only if they are unanimous and supported by all those participants entitled to attend and who actually participated in the conference.

After an agreement has been reached, the youth justice coordinator will compile a written record of the decisions, recommendations and plans formulated by the family group conference. A copy of the record is then distributed to: (a) the young person; (b) every parent, guardian or other person who has care of the young person; (c) any advocate representing the young person; (d) the informant (police officer or other law enforcement agent) for the offence that prompted the conference; (e) the victim of the offence; (f) any other person who is or will be directly affected by the decision, recommendation or plan detailed in the record; and (g) any appropriate social service agency. Where the court has ordered the conference or found an offence proven against the young person, the youth justice coordinator must report the outcome of the conference to the court. The proceedings of family group conferences are absolutely privileged and are accorded the same protection from publication as that granted to the proceedings of the Family Court and the Youth Court. Thus, it is illegal to report the proceedings of a conference and the copied records of conference outcomes can be distributed only to the above-mentioned persons.

The conference has the flexibility to make any decision or recommendation it chooses but, in particular, it can recommend that: (a) any proceedings commenced against the young person should progress or be discontinued; (b) a formal police caution should be issued; (c) an application for a declaration that the young person requires care or protection should be initiated; (d) appropriate penalties should be imposed on the young person; and (e) the young person should make reparation to any victim. Although the CYPFA explicitly refers to the above five recommendations, they are not intended to limit the discretion of the conference. For instance, the conference could recommend that the young offender should write a letter of apology to the victim;<sup>60</sup> perform community service; or be placed under

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<sup>60</sup> It is important that any apology is personal and sincere, and expresses the true feelings of the person making the apology. A guide to the preparation of an apology letter is helpful but it is important that apology letters do not become formalized. The aim is to elicit a sincere expression of regret for the young person's behaviour and to demonstrate an understanding of the effect of the offending on the victim or victims. The Youth Court Judge may ask a young person to read out the apology letter and, if the letter is inadequate, the Judge may direct that it be rewritten.

appropriate supervision.<sup>61</sup> Where the young person has been detained in custody pending the determination of the charge, the conference can make a recommendation regarding custody; where proceedings in relation to a charge have commenced, it can recommend to the court whether the court or an alternative body should deal with the young person. Where the court has issued an initial finding of guilt, the conference can recommend how the young person should be treated.<sup>62</sup>

Where the family group conference has been held at the direction of the Youth Court or the Court has found an offence proven against the young person, the plan formulated at the conference must be reported to the Youth Court Judge so that he or she can decide whether to approve it. Judges usually accept such plans. If the young person complies with the plan, the charge against him or her may be withdrawn or the young person may be discharged. If the young person fails to comply, then depending on the nature of the offence the Youth Court Judge might make an order. This will elaborate what tasks the young person has to perform to make up for his or her offending. Orders can include restitution, forfeiture, reparation, fine, supervision, community work, supervision with activity, and supervision with residence. For a traffic offence, the Youth Court Judge may also order a young person to be disqualified from driving. In some cases, the Judge may order the transfer of a young person's case to the District Court for sentencing. The case can only proceed at the District Court after a social worker has written a report on the young offender and the Judge is assured that proper procedures have been observed.

The CYPFA makes no provision for an appeal against the decision, recommendation or plan formulated by a family group conference. Any participant who is dissatisfied with a proposed decision, recommendation or plan can refuse to agree and this will prevent the achievement of a binding decision. A coordinator may reconvene a conference on his or her own initiative or at the request of two members of the conference for the purpose of reviewing the solutions devised by the conference. If a conference is reconvened because a young person is not complying with the original plan, the conference must agree on a new plan. If no agreement is possible, the enforcement officer may take such action that he or she deems appropriate (for example, he or she may refer the matter to the relevant enforcement

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61 Young offenders in the United Kingdom are sometimes asked to enter into a 'behaviour contract' as a means of strengthening their commitment to behaviour change, and setting clear expectations and goals (Youth Justice - The Next Steps, Home Office UK, 2003, at para 19). Such behaviour management schemes and behaviour contracts are not apparently used as part of family group conference plans in New Zealand.

62 Many of the restorative elements of family group conferencing will be lost if the agreed upon dispositions or sanctions are not followed through. If the young person fails to issue the promised apology, conduct the agreed reparation, attend training or drug rehabilitation courses or perform community work in accordance with the conference decision, the requirement that young people should be held accountable for their behaviour will be defeated. Moreover, in such a case the victim is likely to feel betrayed and the message sent to the young offender is that offending will be treated lightly. The CYPFA provides that enforcement agencies must comply with any agreement, decision, recommendation or plan of a family group conference relating to any offence by a young person that involves action on the part of an enforcement agency. The Act also provides that the Chief Executive of the Department of Child, Youth and Family Services should effectuate every solution devised at a family group conference that involves any action on the part of this executive. This requires the provision of such services and resources, and instigating such action and steps as are necessary and appropriate in the circumstances.

agency or the Youth Court).

The family group conferencing system lies between the justice and welfare models, yet also endorses a radically new approach to youth justice that has significant consequences for young offenders, victims and their respective families.<sup>63</sup>

The intended effect of family group conferencing on a young offender is guided by the statutory principles enacted by the CYPFA. These principles support both accountability and welfare goals within the youth justice context.<sup>64</sup> An emphasis on accountability enhances a young person's development by encouraging him or her to critically evaluate their behaviour, assume responsibility for his or her life and achieve cognitive self-change.<sup>65</sup> Identifying and addressing the needs of juveniles is a key objective of the restorative justice approach, and this is achieved in the family group conferencing process largely through the participation of the young offender and his or her family in the formulation of the conference plan.<sup>66</sup> Furthermore, the participation and empowerment of young offenders are important elements for the success of a reintegrative shaming ceremony – a process recognized as capable of engendering positive and rehabilitative results.<sup>67</sup> The dynamics of the family group conference are extremely relevant from a reintegrative shaming perspective: as Braithwaite points out, the family unit is the ideal forum to realize the potential of reintegrative shaming.<sup>68</sup> The centrality of the family is linked to the fact that families often exhibit the essential features of communitarianism and interdependency. These features invoke personal obligations that provide the essential foundations for cognitive self-change. The role of the family is also related to the observation that the family is most likely to exist as the key social unit that takes responsibility for reintegrating the young offender. Reintegration is achieved in the family group conference process through the formulation of a plan aimed at healing the injury caused by the offending behaviour as well as dealing with the underlying

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63 The welfare model is guided by the assumption that juvenile delinquency has treatable causes and that intervention for rehabilitative purposes is in the best interests of the offender. By contrast, the justice model is concerned with determining guilt and providing a proportionate punishment consistent with due process protections. See M.P. Doolan, "Youth Justice - Legislation and Practice" in Brown B. and McElrea F. (eds) *The Youth Court in New Zealand: A New Model of Justice*, (Auckland, Legal Research Foundation 1993), 18-19.

64 Section 4 (f) of the CYPFA stipulates that: "The object of this Act is to promote the well-being of children, young persons, and their families and family groups by ... (f) ensuring that where children or young persons commit offences, (i) they are held accountable, and encouraged to accept responsibility, for their behaviour; and (ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways."

65 See on this Zehr, H., *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, PA, Herald Press, 1990), 204.

66 It should be noted, however, that a number of studies have found that the level of participation by young persons in the conference decision-making process remains relatively low (even though it substantially exceeds the juveniles' level of participation in the traditional court-oriented justice system). See, e.g., Maxwell, G. and Morris, A., *Family Victims and Culture: Youth Justice in New Zealand* (Wellington, GP Print for Social Policy Agency Ropu Here Kaupapa and Institute of Criminology, Victoria University of Wellington, 1993) 128, 182-184.

67 A number of studies appear to support the interrelationship between restorative justice and reintegrative shaming. See e.g. Maxwell, G. and Morris, A., "Family Group Conferences and Re-offending" in Morris A. and Maxwell, G., (eds), *Restorative Justice for Juveniles* (Oxford & Portland, OR, Hart Publishing, 2001), 252. See also Morris, A., "Revisiting Reintegrative Shaming" (2001) 16 (10) *Criminology Aotearoa/New Zealand: A Newsletter from the Institute of Criminology*, Victoria University of Wellington.

68 Braithwaite, J., *Crime, Shame and Reintegration* (NY, Cambridge University Press, 1989), 55-56.

causes of that behaviour. By agreeing to the plan, the young person is thought to disassociate himself or herself from the shamed behaviour.

The position of victims of offending in the new regime highlights the CYPFA's restorative features.<sup>69</sup> While the role of victims in the mainstream criminal justice system extends no further than that of a witness for the prosecution in the court proceedings (a role that can often be traumatic and disempowering), the role of the victim in restorative justice conferencing is pivotal.<sup>70</sup> The victim's involvement in the process is said to empower the victim in his or her search for healing. Healing is thought to have three aspects. The first is finding answers to questions such as: why did this happen to me? The second is obtaining the opportunity to express and validate emotions. And the third is receiving restitution for material losses. According to Zehr, healing is best achieved when victims are involved in the process with a view to satisfying their need for 'an experience of justice'.<sup>71</sup> The commonly cited benefits of victim participation include having one's views heard; meeting with the offender to express one's anger and emotions directly; assessing the offender's attitude; and understanding why the offence occurred. Researchers have also identified some of the factors related to victim dissatisfaction: the failure to keep victims informed; a lack of or inadequate preparation; and insufficient monitoring of conference outcomes. In particular, research suggests that the provision of information to victims about both the procedure and the range of emotions they may experience can enhance their well-being.<sup>72</sup>

The inclusion and empowerment of the family in the current youth justice regime is in stark contrast to the previous system. The paternalism of the old system was guided by the idea that the deficiencies of the family lie at the root of juvenile crime. The family was viewed as dysfunctional and incapable of taking responsibility for its younger members.<sup>73</sup> The system was also dividing families through the widespread removal of children from their families into residential placements. This had a particularly negative impact on Maori and Pacific Island families and communities whose young people were over-represented in the population of juvenile offenders. This constant undermining of the family through

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69 Section 208 (g) of the Act stipulates the principle that "any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of that offending".

70 Zehr, H., *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, PA, Herald Press, 1990), 181 ff.

71 As Zehr remarks: "Victims need someone to listen to them. They must have opportunities to tell their story and to vent their feelings, perhaps over and over. They must tell the truth. And they need others to suffer with them, to lament with them the evil that has been done ... Somewhere in the process, victims need to feel vindicated. They need to know that what happened to them was wrong and undeserved and that others recognize this as wrong. They need to know that something has been done to correct the wrong and to reduce the chances of its recurrence. They want to hear others acknowledge their pain and validate their experience". Zehr, H., *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, PA, Herald Press, 1990), 191.

72 Consider, e.g., Morris, A. and Maxwell, G., "Implementing Restorative Justice: What Works?" in Morris, A. and Maxwell, G. (eds) *Restorative Justice for Juveniles* (Oxford & Portland, OR, Hart Publishing, 2001), 278. And see Umbreit, M.S., Coates, R.B. and Vos, B. "Victim Impact of Meeting with Young Offenders: Two Decades of Victim Offender Mediation Practice and Research", *idem* at p. 129.

73 As Trish Steward has remarked, families were often "described frequently in negative and judgmental ways in social work reports, were often not fully informed, and as they received little recognition were powerless to contribute to outcomes for their offending children". "The Youth Justice Co-ordinator's Role - A Personal Perspective of the New Legislation in Action" in Brown, B., and McElrea, F. (eds) *The Youth Court in New Zealand: A New Model of Justice* (Auckland, Legal Research Foundation, 1993), 45.

increasing state intervention led to prevalent dissatisfaction. The CYPFA is explicit in its intent to empower and strengthen the family by vesting with the family the responsibility to respond to their young members' offending. The restorative potential of the family's increased role lies not only in its responsibility to deal with the offending, but most importantly in the legislature's objective to strengthen the family as a valuable institution in its own right.<sup>74</sup> The family group conference process presents an opportunity for the family to understand the nature and causes of the offending behaviour and to seek ways to help the young person. The wider family may learn about problems within the nuclear family that are related to the offending and possibly assist in tackling those weaknesses.<sup>75</sup> The process may also initiate better family functioning through communication, co-operation, supervision and proper exercise of authority.<sup>76</sup> Moreover, when people from outside the family, such as teachers and community elders, are invited to the conference, the process may contribute to the empowerment and well-being of the wider community by enhancing understanding of social realities, reducing stereotypes and fostering bonds of solidarity and cooperation.<sup>77</sup>

A series of research studies have been carried out to assess the family group conferencing system, describe its effects on participants and determine the extent to which the system achieves its restorative objectives.<sup>78</sup> The results of these studies confirm that, in general, the outcomes of conferences are largely restorative: the majority of the individuals involved participate in the process and subscribe to the decisions reached, which are for the most part concerned with the reparation of the harm and the reintegration of offenders.<sup>79</sup> These studies have also identified several key factors that are associated with crime prevention and positive life outcomes. These include the equitable and respectful treatment

74 One of the core principles in youth justice is elaborated in s 208 (c) of the Act: "The principle that any measures for dealing with offending by children or young persons should be designed - (i) To strengthen the family, whanau, hapu, iwi and family group of the child or young person concerned; and (ii) To foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons."

75 It should be noted here that despite the high participation levels of parents, research shows that the wider family was often not involved in the conference process. See, e.g., Maxwell, G. and Morris, A., *Family Victims and Culture: Youth Justice in New Zealand* (Wellington, GP Print for Social Policy Agency Ropu Here Kaupapa and Institute of Criminology, Victoria University of Wellington, 1993), 109 ff.

76 See on this issue Hassall, I., "Origin and Development of Family Group Conferences" in Hudson, J., Morris, A., Maxwell, G and Galaway, B. (eds) *Family Group Conferences: Perspectives on Policy and Practice* (Monsey, NY, Willow Tree Press, 1996), 27, 31-32.

77 Consider on this matter Cunha, J., "Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States" (1999) 13 *Emory Int'l L Rev* 283 at 339.

78 See, e.g., Maxwell, G., and Morris, A., *Family Victims and Culture: Youth Justice in New Zealand* (Wellington, GP Print for Social Policy Agency Ropu Here Kaupapa and Institute of Criminology, Victoria University of Wellington, 1993); *Understanding Re-Offending: Full Report* (Wellington, Institute of Criminology, Victoria University of Wellington, 1999); Maxwell, G., Kingi, V., Robertson, J., Morris, A., and Cunningham, C., *Achieving Effective Outcomes in Youth Justice; an Overview* (Wellington, New Zealand Ministry of Social Development, 2004); *Achieving Effective Outcomes in Youth Justice; Final Report* (Wellington, New Zealand Ministry of Social Development, 2004). And see Umbreit, M.S., Coates, R.B. and Vos, B., *The Impact of Restorative Justice Conferencing: a Review of 63 Empirical Studies in 5 Countries* (University of Minnesota, Center for Restorative Justice and Peacemaking, 2002).

79 It should be noted, however, that some departures from best practice were also observed: only about half the victims and young offenders felt truly involved in the decision-making process; about half the conferences resulted in restrictive or punitive outcomes; and the provision of rehabilitative and reintegrative service did not fully address the needs that were reported by young people.

of all; the absence of stigmatic or disintegrative shaming; the understanding of the nature and aims of the process by the participants; and the young offender feeling remorseful, forgiven and supported. The studies also found that the costs of restorative justice conferencing are significantly lower than those of the formal sentencing process.

### **Restorative Justice, Maori Custom and the Limits of Judicial Reform in New Zealand**

Family group conferencing, as practiced in New Zealand, can be described as a hybrid social control mechanism, because it involves the mixing of formal Western with informal Maori justice processes. The system provides evidence for the ability of indigenous Maori culture and justice notions to adapt to contemporary conditions and successfully modify Western justice models. Furthermore, having a justice process based on Maori customary law gives the Maori people ownership of a system with which they are more likely to identify;<sup>80</sup> accords with Treaty principles of participation and partnership;<sup>81</sup> and contributes to a genuine sense of cultural identity.<sup>82</sup> Given the regrettable fact that the Maori represent a significant proportion of those involved in the criminal justice system, the case of greater Maori input into the justice process is compelling.

The traditional Maori approach to justice and conflict resolution shares many common elements with contemporary restorative justice philosophy, as reflected in the family group conference system. As the New Zealand Maori Council has remarked, both the Maori system and restorative justice “emphasize a reaffirmation of community values, endorse the authority of the community, ensure participation and agreement of all involved and plan for outcomes which take responsibility of all for the healing of the breach.”<sup>83</sup> Further similarities include the desire to restore the balance between the parties concerned;<sup>84</sup> the priority given to healing and restoration over retributive punishment; the requirement that the offender accepts responsibility for their harmful behaviour; and the requirement that the community assumes responsibility for the actions of its members and takes steps to address the harm caused by the offence and prevent further offending in the future.<sup>85</sup> A key

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80 See New Zealand Maori Council, “Restorative Justice: A Maori Perspective”, in Bowen H. & Consedine J. (eds) *Restorative Justice: Contemporary Themes and Practice* (Lyttelton NZ, Ploughshares Publications, 1999) 25 at 28.

81 New Zealand Law Commission, *Justice: the Experiences of Maori Women* (NZLC R53, 1999), 6.

82 New Zealand Law Commission, *Justice: the Experiences of Maori Women* (NZLC R53, 1999), 8.

83 New Zealand Maori Council, “Restorative Justice: A Maori Perspective”, in Bowen H. & Consedine J. (eds) *Restorative Justice: Contemporary Themes and Practice* (Lyttelton NZ, Ploughshares Publications, 1999), 31. And see Consedine, J., *Restorative Justice: Healing the Effects of Crime* (Lyttelton, NZ, Ploughshares Publications, 1995), 10.

84 It should be noted here, however, that the balance restored in the restorative justice process as it currently operates in Western legal systems is not premised on the same holistic spiritual worldview adopted by the Maori.

85 As the New Zealand Maori Council notes, “restorative justice compels individuals to address their own behavior... the offender is required to own their offending, and the responsibility for the conduct of its members reverts to the community to which they belong. New Zealand Maori Council, “Restorative Justice: A Maori Perspective”, in Bowen H. & Consedine J. (eds) *Restorative Justice: Contemporary Themes and Practice* (Lyttelton NZ, Ploughshares Publications, 1999), 29.

similarity between the two systems is the inclusion of family, *whanau* and communities of care as supporters of both the victim and the offender throughout the process. Moreover, both the Maori and the restorative justice systems have a largely informal character with respect to the nature and order of the process, the physical environment, the required attire and language used.<sup>86</sup> According to a commentator, Maori justice and restorative justice conferencing, as forms of community justice, are located at different stages along a continuum of ‘popular justice’ that is “characterized by a process of decision making and conflict resolution that is relatively informal in ritual and ceremony, dress and language; and is highlighted by an absence of professionals and professional language. It also applies local standards and rules and commonsense forms of reasoning rather than state laws. [It is] local in origin ... decentralized, focused within geographical areas such as schools, neighbourhoods and the workplace. ... Rather than being imposed, decision making is conciliatory and consensual. ... [The] popular justice system is highly accessible to all community members.”<sup>87</sup> This overarching concept of popular justice may be used as a basis for approaching both the similarities and differences between Maori justice and the current system of restorative justice conferencing.

Probably the most significant difference between the Western, legally entrenched, approach to restorative justice and the Maori approach is the value and meaning attached to the community. To the Maori and other indigenous peoples, the community corresponds to a perception of connectedness to other human beings and to a group. This sense of community and relatedness is inseparable from the practice of justice as a means of restoring and maintaining relationships. Individuals are never viewed in isolation of fellow community members. On the other hand, with its deep roots in individualism, the Western approach to justice is unable to detach itself from the notion that justice is carried out, in part, through the punishment of individuals who violate the law. It also generally tends to assume that the voice of the community is the same as the voice and values of the state. It is thus unsurprising that many Maori tend to view state led and controlled initiatives, such as family group conferencing, with some suspicion. For them, such initiatives are driven by norms and assumptions about the nature of justice that are at odds with indigenous Maori perspectives, which view law and justice as a lived experience, always reflecting the needs and preferences of the persons and communities involved, as opposed to a rigid body of rules disconnected from local realities.

Moana Jackson, a well-known Maori lawyer and Maori rights activist, has put forward a strong argument in favour of Maori customary law playing a greater part in the

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86 However, the Maori system is somewhat more formal with respect to the protocol required; the speaking order of the participants; the dispelling of the separate *tapu* between the parties through prescribed speeches, songs and other acts designed to bridge the rift between the groups involved; and the holding of the proceedings in the *whare*, the meeting house on the *marae*, which serves as a symbol of a word in balance.

87 Tauri, J., “Indigenous Justice or Popular Justice? Issues in the Development of A Maori Criminal Justice System”, in Spoonley, P., Pearson, D. and Macpherson, C. (eds), *Nga Patai: Racism and Ethnic Relations in New Zealand* (Palmerston North, Dunmore Press, 1996), 208.

legal process.<sup>88</sup> Among Jackson's many recommendations is a call for a parallel criminal justice system for Maori. According to him, "the aim of a Maori system would not be to simply transplant the Pakeha (Western or non-Maori) organization into a Maori context, but to develop a structural framework which reflects the imperatives of Maori law and the processes it developed for maintaining order. ....Under Pakeha notions of criminal jurisprudence, the objectives are to establish fault or guilt and then to punish. The sentencing goals of retribution, revenge, deterrence and isolation of the offender are extremely important, although the system often plays lip service to the idea of rehabilitation as well. A Maori system would endeavor to seek a realignment of those goals to ensure restitution and compensation rather than retribution; to mediate the case to everyone's satisfaction rather than simply punish. Of course, sanction to express community disapproval would necessarily be a part of the process, but the method and type of sanction would be shaped by traditions other than the need to further alienate an offender from his community. Implicit in the process of mediation is concern for the victim and the victim's whanau. While the redress and restitution available would be defined according to each offence, the [aggrieved] whanau would have the right to contribute to its determination in any particular case. The end result would be a settlement and sanction that would not necessarily be any more harsh or lenient than those imposed by the Pakeha system, although the method of its imposition and fulfillment by the defendant would clearly be different."<sup>89</sup>

A question that arises is whether the proposed system would be parallel to and completely separate from the state-run system, or it would be set up in conjunction with the latter system, with appropriate cases being diverted by the courts. To many non-Maori, the latter seems to be most sensible option. Many Maori, on the other hand, argue that the lack of autonomy of their own system would render it useless. Indeed, some have asserted that restricted or state-controlled Maori justice programmes can be construed as hegemonic tools by the state for, by allowing Maori limited judicial authority under its overall control, the state would in fact be strengthening its hold over this section of the population. Since Maori would be unable to fund their own justice system and would therefore be reliant on the state, they would forever be wedded to the philosophies and political preferences of the latter. Jackson recognizes this paradox and uses it in his argument for a completely separate Maori criminal justice system.<sup>90</sup>

However, the recognition by the government of a separate justice system for Maori seems, under current circumstances, to be unrealistic. As commentators have observed,

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88 See Jackson, M., *The Maori and the Criminal Justice System, A New Perspective: He Whaipaanga Hou Part II* (Wellington, Department of Justice, 1988).

89 *Ibid.*, at 277-278.

90 Jackson, M., "Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality?", in McElrea, F., (ed), *Rethinking Criminal Justice: Justice in the Community* (Vol. 1) (Auckland, Legal Research Foundation, 1995); and see Tauri, *supra* note 87, p. 207. It should be noted here that the debate on the introduction of a Maori criminal justice system is inextricably linked to the discussion concerning Maori sovereignty (*tino rangatiratanga*). Some Maori assert that a parallel Maori justice system will never flourish or earn the same credibility as the country's mainstream justice system without a recognition by the government of Maori sovereignty over their own affairs. They argue, moreover, that the Treaty of Waitangi both explicitly and implicitly provides for a parallel system.



whatever the role of restorative justice today, the solutions of traditional, pre-contact Maori justice would be very difficult to apply today because, apart from anything else, Maori culture has undergone profound changes.<sup>91</sup> As a result of a vastly changed social life, away from traditional Marae communities, the Maori people today are less versed in the philosophies underpinning their customary justice system. The apparent lack of cohesiveness among various Maori groups<sup>92</sup> represents a further obstacle to the introduction of a parallel justice system, for such a system would require a united effort from all Maori people. A question frequently raised in contemporary debates over Maori issues pertains to the definition of ‘Maoriness’ and the qualifications an individual must meet to have access to such a system. Thus, one may ask whether only individuals born with a minimum percent of Maori blood should become subject to the system, or whether the system could be utilized also by individuals who are not Maori by birth but who claim to adhere to the Maori worldview and daily practices. A further problem emerges when one considers that, due to the integrated nature of New Zealand’s largely urban society, criminal offences often involve both Maori and non-Maori parties, and that the latter may not feel comfortable if they were subject to a specialized and foreign (to them) system of justice. In view of the above problems and in light of the currently prevailing notion of ‘Treaty partnership’,<sup>93</sup> an integrated system existing alongside the mainstream court system seems far more realistic than the introduction of a completely separate Maori justice system.

As Jackson recognizes, there would be little obstacle to a parallel justice system where: (a) the offender is Maori; (b) the victim is Maori; and (c) there is no dispute as to the question of guilt. In such circumstances, the underlying need for a formal adversarial process is removed. The availability of Maori-focused restorative justice programmes<sup>94</sup> demonstrates the digestibility of Maori customary law in the field of criminal justice and an initial recognition that the trade-off to the Western system in these circumstances is not too great. Furthermore, Section 10 of the Sentencing Act 2002 provides a clear legislative pathway for *murū* (the taking of personal property as compensation for an offence against an individual or group)<sup>95</sup> or *ifoga* (a ceremony in which an apology in the Samoan way is offered) to be accorded judicial recognition by allowing a court to take offers of amends into

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91 See, e.g. Pratt, J., “Colonisation, Power and Silence: A History of Indigenous Justice in New Zealand Society”, in Galaway, B. & Hudson, J. (eds), *Restorative Justice: International Perspectives* (Amsterdam, Kugler Publications, 1996), 150.

92 Reference may be made here to the divisions between urban and rural residents, different tribal entities and different political groupings.

93 In connection with the ongoing debate about the literal meaning of the Treaty of Waitangi, the New Zealand Court of Appeal has articulated a number of guiding principles on the partnership between the Maori and the Crown, such as the principles of good faith and consultation. Consider on this matter *New Zealand Maori Council v AG* [1994] 1 NZLR 513.

94 Consider, for example, Te Whanau Awhina described in Maxwell, G., and Hayes, H., “Restorative Justice Developments in the Pacific Region: A Comprehensive Survey”, (2006) 9(2) *Contemporary Justice Review* 127 at 131-133; and Te Oritenga referred to in Quinn, T.J., and Bowen, H., “Restorative Justice in New Zealand”, in (1997) 486 *Lawtalk* 34 at 35-36.

95 For a closer look see Ministry of Justice, *He Hinatore kit e Ao Maori – A Glimpse into the Maori World: Maori Perspectives on Justice* (Wellington, Ministry of Justice, 2001), 75-79. See also Mead, H.M., *Tikanga Maori: Living by Maori Values* (Wellington, Huia Publishers, 2003), 151-164.

account at sentencing. Moreover, the Maori Community Development Act 1962 permits Maori committees to impose penalties on Maori for certain minor offences or nuisances.

Today, restorative justice mechanisms that embody Maori customary norms and practices are generally restricted to either youth offenders or relatively minor offences. With respect to serious offending, there is less room for the recognition of a parallel sentencing regime lacking institutional safeguards and applying only to one sector of the community. This is consistent with the notion that when grave crimes (such as murder, manslaughter, wounding with intent to cause grievous bodily harm and sexual violation) are committed, the public interest in subjecting offenders to the generic sentencing process should be given priority. This approach is reflected in the general attitude of the High Court and the Court of Appeal towards Maori restorative justice measures and practices. Whilst the courts have been willing to treat a concluded *hui* (Maori assembly) at which a full apology was offered and accepted as a mitigating factor in sentencing, they have rejected it as a form of punishment.<sup>96</sup> Furthermore, judges in New Zealand have often shown a reluctance to allow Maori customary law to intrude into the regular criminal trial process.<sup>97</sup>

In New Zealand, as in other western countries, a lawfully recognizable customary norm must possess four basic attributes: "It must be immemorial; it must be reasonable; it must be certain in respect of its nature general, as well as in respect of the locality where it is alleged to obtain, and the persons to whom it is alleged to affect; and it must have continued without interruption since its immemorial origin. The custom must be clearly proved to exist, and the burden of proof is on the proponent."<sup>98</sup> The tendency to subject custom to legal and constitutional scrutiny manifests an institutional reluctance to forgo any substantive control over customary law. As stated in a recent case: "There has to be some ability to limit rights based on aboriginal custom, as occurs in other rights-based areas of the law, where necessary, otherwise some features of Maori custom which would today be considered untenable might be enabled to continue unabated."<sup>99</sup>

It is submitted that Maori customary law is not readily reconcilable with the existing legal framework because unlike the latter system, which focuses on single rules of general application, it comprises a plethora of norms, which enable the parties concerned to call

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96 As stated in *R v Talataina* (1991) 7 CRNZ 33 (CA), "the law of New Zealand must be administered in the interests of our society as a whole. The Court must therefore give weight to the difference in the emphasis that this society places on certain types of conduct, perhaps on sexual crimes in particular." (at p. 36)

97 E.g., in *Pairama* (1995) 13 CRNZ 496 (HC) the court rejected an application for a father to defend his son in accordance with Maori custom; in *Rameka* [2000] DCR 166 (DC) the court rejected an application for a trial to take place on the accused's marae; and in *Knowles* (CA 146/98 12 Oct. 1998) the court did not permit the applicant to be tried by her own people in accordance with *tikanga*. It should be noted here that, by contrast to criminal law, the civil law allows more room to accommodate cultural needs where the parties share a cultural identity. Thus, it is open to parties to a civil dispute to seek to resolve their conflict outside of the state-controlled court system, for example by means of arbitration or mediation.

98 *Knowles v Police* (1998) 15 CRNZ 423 (HC) at 426. And see *R v Iti* (CA267/06, 4 April 2007) at [47].

99 *R v Iti* (CA267/06, 4 April 2007) at [46]. This attitude is clearly reflected in decisions of the High Court and Court of Appeal addressing matters such as customary adoption (see *B v Director-General of Social Welfare* (1997) 15 FRNZ 501 (HC)); the ability of non-Maori to inherit Maori land (*Grace v Grace* (1994) 12 FRNZ 614 (CA)); and the ability of a person adopted in accordance with *tikanga Maori (whangai)* to inherit from a deceased's estate (*Re Walker* (2002) 22 FRNZ 11 (HC)).

upon those that best fit the needs of the case at hand. Further difficulties are revealed when the values supporting a particular customary norm run contrary to the values that inform the Western equivalent. Another critical difficulty facing the judiciary in applying Maori customary law lies in their lack of understanding of Maori culture.<sup>100</sup> One facet of this difficulty is associated with the fact that most of the New Zealand judiciary are not familiar with Maori language. But even a fully bilingual judge must be aware of the broader philosophy, experiences and intricate patchwork of relationships from which *tikanga* Maori derives. An understanding of a particular concept would be incomplete without an awareness of this additional dimension. Cultural inexperience can have two unwanted effects: it can result in judges being improperly swayed to an erroneous decision on the back of a party's misuse or manipulation of a customary norm; and it can foster a judicial mistrust of custom and an unwillingness to be receptive to traditional practice. Finally, the fact that Maori customary law, being transmitted orally, is seldom written down represents a further challenge to the existing system. The above represent only some of the practical difficulties surrounding the application of Maori customary law.

### Concluding Remarks

The introduction of restorative justice family group conferencing has been a welcome change in New Zealand's criminal justice system. Restorative justice is a flexible, transportable model, which can be used for first and repeat offenders, especially young offenders, and for a large range of crimes, be it property crimes or crimes against the person. However, there is some doubt about the effectiveness of restorative justice conferencing with respect to grave crimes, such as crimes of violence and serious sexual offences. Proper screening and risk assessment should be able to detect cases that are not suitable for restorative justice conferencing, regardless of the character of the crime involved. It is furthermore important that law enforcement agents and restorative justice coordinators be properly educated about the objectives and appropriateness of conferencing and the proper screening and evaluation of victims and offenders in terms of recognized standards and ethical norms of conduct. Restorative justice conferencing, with its emphasis on relationships, healing and integration, shares many common elements with Maori customary justice practice, although, as a hybrid system, it does not fully reflect the cultural norms and mores underpinning the latter. However, under present-day conditions, Maori justice is not likely to be implemented as a full-scale separate justice system for Maori citizens. Rather, it appears that in the spirit of the Treaty of Waitangi, the Maori approach to justice can offer valuable lessons to the mainstream justice system, so that a more effective, acceptable and accessible justice system may be developed from a combination of Western and indigenous perspectives. With proper education, understanding and intellectual flexibility on the

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<sup>100</sup>As the New Zealand Law Commission remarked, "Part of the problem today is that judges, through no fault of their own, are being called upon to assess the mores of a society still largely foreign to them." *Maori Custom and Values in New Zealand Law* (NZLC SP9 2001) at 4.

part of all participants, it may be possible to find a significant place for Maori within the New Zealand justice system and to provide supportive networks for all members of the community. This remains a significant challenge that is worth pursuing.

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