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Māori Customary Law: A Relational Approach to Justice

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Abstract

This research paper examines the philosophy of justice embodied in *tikanga Māori*, the Māori traditional mechanism and approach to doing justice. Based on several months of fieldwork in New Zealand, this study contends that the Māori approach to justice adopts a holistic and relational lens, which requires that justice be seen in the context of relationships and crimes dealt with in terms of the relationships they have affected. As a result, justice must be carried out within the community and the process owned by community members. Further discussion draws attention to the response of Māori communities to the New Zealand government's attempt to accommodate their traditions and warns against the global tendency to render traditional Indigenous approaches to justice ahistorical through their representation as restorative justice mechanisms.

Keywords

Indigenous knowledge, Māori, restorative justice, relationships

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Māori Customary Law: A Relational Approach to Justice

Early European explorers of New Zealand ignored the existence of Māori customary law and often viewed the Māori as a violent people (Thompson, 1997). In Captain Cook's words, war was considered to be the Māori's "principal profession" (cited in Reed & Reed, 1969, p. 252). Eldon Best (1934), one of the first European explorers and observers, described the Māori as "uncultured," "savage," "Neolithic folk" with a "barbaric society" (pp. 86-89). His work was reflective of the ethnocentric bias of early explorers and anthropologists. The idea that there were no or few social norms and laws in Indigenous and pre-contact societies was a common and persistent one in European jurisprudence (Frame & Meredith, 2004). Quince (2007a) explains that Europeans brought with them a different system of laws "centered around strongly defined notions of individuality" and visible legal institutions (p. 13). What they failed to see, and later to recognize, was the existence of a complete system of beliefs and values regulating social interaction. *Tikanga Māori*, or the Māori way of doing things, (K. Hohaia¹, personal communication, May 10, 2010) became marginalized as the state's judicial system strengthened its hold and Māori principles and practices were considered "quaint custom, belittled, or ignored" (Quince, 2007a, p. 15). The tumultuous relationship between the Māori and European explorers, and *tikanga Māori*, are explored below.

This article is important for two reasons. First, there have been very few recent and systematic examinations of the Māori conception of justice and the state of *tikanga Māori* today. Second, this article uses field research findings to substantiate the argument that *tikanga Māori*, like a number of Indigenous traditions (see Bopp, 1989; Ross, 2006), adopts a view of justice that is often at odds with existing adversarial criminal justice systems.

Note on Method

Kaupapa Māori, a Māori methodology committed to the promotion of Māori knowledge from a Māori point of view, guided the author's approach to this research. This research project received ethical approval from the University of Western Ontario's Research Ethics Board. During several months of fieldwork and ethnographic research conducted in New Zealand, 33 Māori were interviewed. The questions asked were open-ended to accommodate a diversity of responses. The author wanted to know about the respondents' level of activity within their community, knowledge of the Māori language, cultural beliefs, and practices, as well as their experience and knowledge of customary mechanisms of justice. In some cases, participants asked that their identity remain confidential. In accordance with the values of *Kaupapa Māori*, the author purposefully chose to only interview Māori individuals in order to get a glimpse of the Māori culture and conception of 'justice' from a Māori perspective. All participants expressed great pride in being Māori. In total, nine participants were under the age of 30, and four were older than 60 (two of whom were community elders). The majority of participants were between the ages of 30 and 60 and were active in a number of sectors, such as academia, judiciary, parliament, and tourism. The author talked to individuals belonging to 20 different *imū*, with a majority from Nga Puhī, Ngati Porou, Ngati Whatua, Te Arawa, and Tuhoe. These *imū* are located in the northern and north-eastern region of the North Island. Direct quotations from these personal communications (for complete interview list see Appendix) are used throughout this article.

Māori History and Customary Law

While early explorers to New Zealand did not recognize the existence of a value-based system of social control, the Treaty of Waitangi, New Zealand's founding document, did guarantee the protection of Māori culture and customs. Māori customary law was also, to a certain extent, tolerated under the Native Exemption Ordinance of 1844, which stipulated that the Crown was not required to intervene in Māori affairs and in crimes committed against Māori by Māori (Government of New Zealand, 2001). In an poor adaptation of

¹ Resource management student at the University of Auckland.

² *Iwi* is the largest Māori community.

the principle of *utu*³, and exclusively for cases of crimes committed against *Pakeha*⁴, the Crown allowed any Māori convicted of theft to pay four times the value of the stolen good in lieu of punishment (Robert & Bennion, 2002). The 1852 New Zealand Constitution further specified that Māori laws and customs were to be preserved so long as these were not “repugnant to the principles of humanity” (Government of New Zealand, 2001). Latent to all these legislative acts was the belief that “English law and culture were innately superior” and customary practices were to be subsumed to the dominant culture (Government of New Zealand, 2001, p. 22). As a result, a mixed measure of “denial, suppression, assimilation and co-option put Māori customs, values, and practices under great stress” (Government of New Zealand, 2001, p. 22). This was particularly visible through land tenure disputes between the Māori and the Crown, which ignored customary land titles in favor of its own statutory claims.

Despite years of oppression and policies aimed at cultural assimilation, *tikanga Māori* did not die out. Adherence to this system helped preserve a social system based on mutual expectations and collective responsibility with the goal of avoiding dispute (Rumbles, n.d.). The strength of *tikanga Māori* comes from the fact that it is not a separate set of laws, but rather a worldview and set of beliefs sustained through “the interaction and arrangement of the people that are to be the subjects of the law” (Frame, 2002, p. 5). It survived “outside of formalized structures” (Tauri & Morris, 2003, p. 23) and in “Māori controlled environments such as *marae*⁵ and *bui*⁶, in a significant number of Māori homes” where the state could not meddle (Tauri & Morris, 2003, p. 45). In the words of Quince (2007b), New Zealand ended up with a “kind of accidental pluralism,” whereby the traditional Māori legal system continued to operate in non-urban areas without the knowledge and sanction of the state (p. 10). Throughout the years, the relationship between Māori customary law and the New Zealand legal system has remained ambiguous with the possibility of giving full and formal recognition to *tikanga Māori* only ever half-heartedly considered (Belgrave, 2001).

The most significant recognition of the value of *tikanga* and its principles in terms of justice, came in 1989 with the creation of Family Group Conferencing (FGC) under the Children, Young Persons, and Their Families Act and, later on, with the Sentencing Act in 2002 (McElrea, 1998). The purpose of setting up FGCs and the Sentencing Act was twofold: First, the New Zealand government sought to address the high number of young, usually Māori, offenders in the legal system and limit recidivism (Henwood, 1997). Second, the government saw the restorative conferencing model as a way to reform the existing judicial system into “a modern system of justice, which is culturally appropriate,” and thereby incorporate some of the values of New Zealand’s Indigenous population in the legal system (Youth Court of New Zealand, n.d., Integration of Indigenous and Western approaches, ¶ 2). A report published by the New Zealand Law Commission (2001) stated that, in accordance with the spirit and terms of the Waitangi Treaty, “the law and legal and political institutions should reflect the values underlying *tikanga*” (p. 88). In many ways, the creation of FGCs and the derived restorative initiatives proved to be “a test case of the ability of the present justice system to adapt to the needs of Indigenous peoples” (Tauri & Morris, 2003, p. 48).

Tikanga Māori

While *tikanga* corresponds to a widely shared set of beliefs as to what is right and wrong, its application or *kawa* may differ from *imi* to *imi* (Frame, 2002; Tauri & Morris, 2003). One must abide by the *kawa* or protocol of the *imi* whose land on which one is standing (L. Chant⁷, personal communication, May 10, 2010). The protocol may affect practical aspects of community life (Metge, 1996); including, for instance, when it is proper to call for a *bui* (K. Hohaia, personal communication, May 10, 2010) or when and whether women can

³ *Utu* can be translated as the principle of reciprocity.

⁴ *Pakeha* is a Māori word used to designate the white, non-Māori population of New Zealand.

⁵ A *marae* is a communal gathering house.

⁶ A *bui* is a community gathering.

⁷ Professor of Māori Studies at the University of Auckland.

talk during *hui* (A. Williams⁸, personal communication, May 10, 2010). As a result, while the ideals and values that make up *tikanga* are vastly similar from *ivi to ivi*, Mead (2003) notes that “what we see happening when *tikanga* is put into practice is not necessarily the ideal manifestation of that *tikanga*” (p. 18). This variety in protocols between *ivis*, however, does not preclude the existence of common, fundamental values that underpin *tikanga Māori* (New Zealand Commission, 2001).

When asked, 25 out of the 33 Māori interviewed agreed that *tikanga* is important in thinking about justice in a Māori way. I was told that *tikanga* was “absolutely essential in thinking about Māori justice” (Anonymous⁹, personal communication, May 14, 2010) or simply that *tikanga* was justice (Anonymous¹⁰, personal communication, July 22, 2010). Judge E. Durie (1994) adds that *tikanga Māori* can be defined a body of “Māori principles for determining justice” (p. 331). Not abiding by *tikanga* would have severe consequences in communal life and would result in oneself, and one’s community, “being hurt” (R. Kātene¹¹, personal communication, May 31, 2010).

In fact, *tikanga Māori* is a normative system that prescribes ways of behaving and processes to use for correcting problematic behaviour (Mead, 2003). It can be seen as a set of principles determining right from wrong and prescribing actions on how to deal with it (Government of New Zealand, 2001). *Tikanga* also includes “measures to deal firmly with actions causing a serious disequilibrium within the community” (New Zealand Law Commission, 2001, p. 16). Burrows (2002) explains that Indigenous peoples around the world have developed various sets of spiritual, economic, political, and social principles in order to foster their relationships with one another and the environment. These principles and conventions, he adds, “became the foundation for many complex systems of governance and laws” (p. 46). *Tikanga Māori* can be seen as a set of principles to determine justice, and is, therefore, generally referred to as Māori customary law (M. Durie, 1993; Metge, 1996).

Metge (1996) explains that the failure of Europeans to recognize the existence of a system of law in Māori society was the result of a “defect in the way of observation rather than any actual absence of law” (p. 3). They could not see *tikanga Māori*, an orally transmitted code of conduct and set of beliefs, because they were looking for written records of law, duties, and rights sustained through formal institutions such as courts of law (Rumbles, n.d.). The system of social control implied in *tikanga* “was interwoven with the deep spiritual and religious underpinnings of Māori society so that the Māori people did not so much live under the law, as with it” (Jackson, 1988, p. 36). Hibbitts’ (1992) research on what he calls “performance law” is useful in understanding the difficulty encountered by Western legal observers when studying Māori society and customary law. He writes:

As a culture that can physically separate contracts, judgments, and statutes from their proponents, we consider law to exist apart from, and indeed above, human individuals. This attitude is perhaps best captured in the aspirational phrase “a government of laws and not of men.” In performance cultures, however, laws and men are virtually coincident. Finding the law generally means finding someone who can perform or remember it. (p. 873)

In other words, the law and its practice are inseparable from those who practice it. It does not, and cannot, exist separate from everyday life and is not captured in any one institution or document. The Law Reform Commission of Western Australia (2006), for instance, found that Aboriginal customary law could not be dissociated from Aboriginal culture and way of life. It governed “all aspects of Aboriginal life, establishing a person’s rights and responsibilities to others, as well as to the land and natural resources” (p. 62). In the context of the Māori, *tikanga* guides interpersonal relationships but cannot be located in one place. Indeed, when it comes to Indigenous beliefs and laws, there are no tangible written resources to which we can refer for study; and “there is sharp caution from the people within the communities against the collection and

⁸ Law student at University of Auckland.

⁹ Member of Auckland’s Māori Regional Tourism Organization.

¹⁰ Social worker.

¹¹ Member of New Zealand Parliament and Māori Party.

codification” of these beliefs (Burrows, 2002, p. 15). The strength of these conventions and norms, as well as their survival, is largely due to their fluidity and adaptability. *Tikanga Māori* “has been receptive to change while maintaining its basic beliefs” (Government of New Zealand, 2001, p. 5). This value-based, ancestral set of beliefs guide everyday action and life in the community. As such, it is extremely flexible and, while relying on ancestral beliefs, always adapts and reinvents itself to suit the circumstances. It is the adherence to principles rather than rules, which allowed *tikanga* to maintain its cultural integrity and survive (Metge, 1995). In the words of one of my respondents, the values that make up *tikanga* “give us our identity” (A. Naera¹², personal communication, June 30, 2010).

In part, what renders *tikanga Māori* difficult to observe and translate into Western legal thinking is precisely its flexibility and the fact that it is not a “technical, standalone system: rather it is part of culture” (Frame, 2002, p. 25). In other words, it is a “way of life that makes law a living concept that one comes to know and understand through experience” (Melton, 2005, p. 109). In this respect, it is strongly reminiscent of Bourdieu’s (2009) *habitus*, which can be described as a system of cognitive dispositions acquired through social interaction and guiding individual action. The precepts of customary law, and in this case *tikanga*, “have nothing in common with the transcendental rules of a judicial code: everyone is able, not so much to cite and recite them from memory, as to reproduce them (fairly accurately)” (Bourdieu, 2009, p. 17). *Tikanga Māori* is an integral part of the culture, way of life, and identity of Māori.

“The traditional system of *tikanga* for resolving dispute still exists” and is routinely used in some areas of the country (Quince, 2007a, p. 16). Māori generally prefer to deal with offenses and crimes amongst themselves, without any external state intervention (Anonymous¹³, personal communication, June 13, 2010a; M. Papa¹⁴, personal communication, June 28, 2010). Only a few decades ago, the police rarely got involved or intervened in Māori communities (Anonymous, personal communication, June 13, 2010a). Today, while the police are sometimes called, they still do not always come to the aid of Māori living in rural communities (L. Chant, personal communication, May 10, 2010). As noted by Stafford (1995), “historical legacies of Indigenous peoples and police interaction have resulted in... feelings of mutual suspicions held by both parties” (p. 233). Māori often feel disempowered and disadvantaged by the judicial system. They are also often distrustful of the police forces, which they see as “amplifiers of crimes” (Stafford, 1995, p. 233); that is the police are often perceived as being more severe towards the Indigenous population than the white population (Stafford, 1995). Moreover, there exists a shared belief amongst Māori that New Zealand laws and judicial procedures are foreign and impose legal norms. These imposed *Pakeha* laws and mechanisms are considered “part of the mechanism of colonization” that has “shaped and helped create the circumstances which lead to much contemporary Māori offending” (Jackson, 1995, p. 253). And so, as a result of a combination of factors, including the police’s attitude towards Māori communities, the remoteness of some communities, as well as their “know-how,” non-urban Māori communities will generally deal with disputes and offenses themselves (Anonymous¹⁵, personal communication, May 17, 2010; Anonymous¹⁶, personal communication, May 20, 2010; Anonymous¹⁷, personal communication, June 30, 2010; K. Jones¹⁸, personal communication, July 1, 2010; M. Papa, personal communication, June 28, 2010).

Traditional Māori dispute resolution “is still happening but it is not entrenched in the New Zealand legal system. It’s like a parallel thing that we do not want to say too much about because it is outside of the legal system and could attract the wrong kind of attention” (K. Jones, personal communication, July 1, 2010). It

¹² Programme Director, Department of Equity, Kaiwhakahaere Kaupapa Māori, Auckland University of Technology (AUT).

¹³ Community member.

¹⁴ South Auckland community member.

¹⁵ School teacher.

¹⁶ Former lawyer and law professor.

¹⁷ Member of staff, Auckland University of Technology.

¹⁸ Professor in management, Auckland University of Technology.

would be inaccurate, however, to say that all Māori communities and all crimes are dealt with the traditional ways of *tikanga*. Each *ini* may deal with crimes differently. The type and severity of offences committed often determine whether Māori community members choose to use the traditional Māori ways or resort to police intervention. For the “everyday type of offending, people do not even consider calling the police” (Anonymous, personal communication, May 20, 2010). Māori community members often deal with offences, such as theft, youth misbehaviour, and domestic violence, through the *marae* and *tikanga* (Anonymous¹⁹, personal communication, May 16, 2010; Anonymous, personal communication, June 13, 2010a; Anonymous, personal communication, July 22, 2010; K. Jones, personal communication, July 1, 2010; M. Papa, personal communication, June 28, 2010; A. Williams, personal communication, May 10, 2010). In some cases, sexual offences are also dealt with at the community level without external judicial or police involvement (Anonymous, personal communication, May 17, 2010; Anonymous, personal communication, May 20, 2010; Anonymous, personal communication, June 30, 2010). Māori community members, however, do tend to reach toward more formal legal authorities to deal with severe offences, including murder, that they do not feel appropriately equipped to deal (L. Chant, personal communication, May 10, 2010). The *kawa* of the community, as well as the number of people involved in a dispute or crime, will also affect the location and participation of community members in the dispute resolution process (H. Williams²⁰, personal communication, June 18, 2010). For instance, dispute resolution may take place in the *marae* when more than one family is involved in the dispute. Holding a *hui* in the *marae* allows all community members to attend. When a crime or dispute is confined to a family, the *hui* may take place in a home, where the process remains more private.

Belgrave (2001) explains that “an understanding of the nature of customary law has become a matter of growing urgency” because the Māori have continued to demand their sovereignty under the Treaty of Waitangi (p. 1). Moreover, the rights of Indigenous peoples have been recognized under a number of international documents, including the International Covenant on Economic, Social, and Political Rights and, more recently, the UN Declaration on the Rights of Indigenous Peoples. Under Article 34 it specifies:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standard. (United Nations, 2007, p. 12)

Understanding the principles that underpin Indigenous customary law and, in this particular case, *tikanga Māori* is therefore of paramount importance.

To understand *tikanga Māori*, we must approach the body of thought, sets of beliefs, and principles that define it (E. Durie, 2006). The existing scholarship surrounding the existence of Māori customary law and the traditional system of *tikanga* for dealing with offences and dispute, however, is sparse. The work of anthropologists, legal philosophers, lawyers, and judges, such as Joan Metge, Justice Eddie Durie, Hirini Moko Mead, Khylee Quince, and Moana Jackson provide the few discussions of the concepts and values that make up *tikanga*. The following section identifies some of the core principles of *tikanga Māori* in order to gain an understanding of the Māori approach to justice.

Relational Justice

Customary and Indigenous law is said to originate in social values “expressed through the teachings and behavior of knowledgeable and respected individuals and elders” (Burrows, 2002, p. 13). The principles and beliefs that underpin *tikanga Māori* are themselves transmitted from generation to generation through *korero tawhito*, which are a collection of myths and stories that “reflect the philosophies, ideals, and norms” of the Māori world (Government of New Zealand, 2001, p. 9). Central to these Māori norms and ideals is the primacy of kinship. Relationships are of paramount importance to the Māori (New Zealand Law

¹⁹ Member of the United Nations Forum on Indigenous Issues

²⁰ *Kaumātua* and Manukau city councillor.

Commission, 2001). No discussion of the principles that underpin *tikanga Māori* can bypass the primacy of relationships, which in turn influence and affect the Māori practice and approach to justice. In fact, *tikanga Māori* is fundamentally relational and, just like other Indigenous traditions, is centered on the primacy of kinship (Monture Okanee, 1994).

The importance of relationships is visible through a number of principles by which Māori abide, including *whakapapa* (genealogical connection) and *whanaungatanga* (human connection). Both point to the strength and importance of connections between people and their communities (Williams, 2001). While *whakapapa* is concerned with the spiritual, *whanaungatanga* deals with present relationships and is not restricted to the genealogical order (Anonymous²¹, personal communication, June 27, 2010). In other words, both *whanaungatanga* and *whakapapa* remind each person of the centrality of relationships, both past and present, and his or her responsibility towards these. These values, which resonate in a number of other traditions found throughout the South Pacific, remind individuals of “the importance of group unity and of maintaining relationships” (New Zealand Law Commission, 2006, p. 51). They provide the understanding that all Māori are related to one another and their environment (Anonymous²², personal communication, June 9, 2010). As a result, it is in the interest of all to act in ways that strengthen and sustain relationships, whether they be with other human beings or with the natural world (M. Papa, personal communication, June 28, 2010). The *whanau*,²³ to Māori, is “a pivotal social and cultural force” that gives its members a sense of identity and safety (Ministry of Health, 1998, p. 1). To many, the *whanau* is everything (Anonymous, personal communication, June 13, 2010a; Anonymous²⁴, personal communication, June 13, 2010b; Anonymous²⁵, personal communication, June 28, 2010a; Anonymous²⁶, personal communication, June 29, 2010; K. Jones, personal communication, July 1, 2010; M. Papa, personal communication, June 28, 2010). It is “what we are made of” (Anonymous, personal communication, June 13, 2010b) and “makes us the way we are” (Anonymous, personal communication, June 28, 2010a). To a Māori “you are nobody unless you belong to a community, to some land, and some people” (Anonymous, personal communication, May 20, 2010). Māori identity is defined by community membership and the relationships that comprise it.

According to Huffer and So’o (2005), “Pacific values must be seen in the context of a network of social relationships” (p. 311). Indeed, to Māori and other Pacific Islanders, society is seen as a “collective unit meaning everyone within that unit has the responsibility of working together” (Government of New Zealand, 2001, p. 128). As a result, “connections...must be respected and fostered” (Patterson, 1992, p. 88). Mane (2009) notes that for Māori the creation and maintenance of relationships “is a matter of considerable significance highlighting the required sense of reciprocity, accountability, and mutual respect” (p. 3). This emphasis on relationships has important consequences on the Māori practice and approach to justice and requires rethinking our approach to criminal behavior. Crime is no longer seen as breach of contract and law, but rather as a “breakdown in relationships” (Burnside & Baker, 2004, p. 24). It must, therefore, be treated as such (Schuler, 2004). Implicit in the centrality of the *whanau* and relationships to Māori is the sense of collective social responsibility (Anonymous, personal communication, June 27, 2010; New Zealand Law Commission, 2001). In turn, this sense of interconnectedness and collective responsibility begets active involvement and participation of all community members for the well-being of the collective.

²¹ Representative from the Ngati Whatua Trust.

²² Former offender.

²³ The *whanau* is the family, but in a wider sense than its Western counterpart.

²⁴ A *Kaumatu* is an elder who plays a leading role in the organization of the community. They usually belong to the oldest generation of the community.

²⁵ Community member.

²⁶ Marae Trustee.

Interconnectedness and Collective Responsibility

The Māori approach to justice is built around “fundamental values such as collectivism and interconnectedness” (Robert, 1999, p. 3). Māori “collective identity lends itself to collective responsibility” (Anonymous, personal communication, May 20, 2010), which has important consequences for justice and how it is viewed and carried out in Māori communities. Relationships, the most valued element of Māori social life and worldview, are the focus of justice (Mead, 2003). Justice becomes a way to nurture and sustain relationships, which is strongly reminiscent of Ross’ (2010) “relational lens” that exemplifies *Ubuntu*²⁷ and Aboriginal healing justice. An emphasis on relationships, interdependence, and collective responsibility encourages us to think of wrongdoing as a “relational event” (Ross, 2010, p. 8). A crime becomes the symptom of “disharmonies within the offender’s relational life” (Ross, 2010, p. 8). It is, therefore, the relational life of the offender that must be explored and restored.

Accordingly, for Māori, one of the first steps in dealing with offences is to uncover the relational ties each of the parties in the dispute has with other community members (Jackson, 1988). Many Indigenous traditions, such as those of the Navajo, view a person who harms another as a person who “has no relatives” (Sawatsky, 2009, p. 69). Accordingly, justice is very much about reinstating these relationships. It is concerned with “retaining, teaching, and maintaining relationships” (Monture Okanee, 1994, p. 227). Once the relationships between the parties in the dispute have been explored, discussions about why a dispute took place and how it can be solved begin (Anonymous, personal communication, July 22, 2010). Exposing the relational ties between the *whanau*, the offender, and the victim lifts the veil of anonymity and contributes to accountability. “You know your victims and they know you. That puts more of an onus on you for your actions” (Anonymous, personal communication, June 27, 2010). By the same token, highlighting the connections and kinship between all community members serves to demonstrate how the wrong and the pain it caused “reverberates through the individual and the community” (Drummond, 1997, p. 107). The outcome of this exploration, in turn, directly influences how justice is carried out and who is involved in the process. “Offenders and victims must be seen in the context of extended family” (Anonymous²⁸, personal communication, June 28, 2010b). After a crime or dispute, people come together in the *marae* or in a home, depending on the severity of the crime, to discuss what has been done and what needs to be done. According to the Māori way, “it is all about the collective, rather than the individual” (Anonymous, personal communication, May 18, 2010). Individuals and their communities share a co-dependent and almost symbiotic relationship. This means that when a crime takes place, everyone in the community is affected to some degree because the harmony of the community is threatened (Guest, 1999). The focus of the process of justice is more than just the offender and the individual wronged. Both are “inextricably linked to family, clan and culture,” thereby giving a kind of derivative responsibility to the individuals’ *whanau* and the wider community (Penal Reform International, 2000, p. 23). Traditionally, the system of *tikanga* simply attributed “responsibility for wrongdoing on the family of the offender” (Jackson, 1988, p. 43). The entire *whanau* is equally liable to redress the harm caused if an individual member is wronged or hurt because Māori society is largely based on collective responsibility (Government of New Zealand, 2001). “When you hurt one member, you hurt the rest of the whanau” (Anonymous, personal communication, June 13, 2010b). Each member of a community will “either feel some sense of having being wronged or some sense of responsibility for the wrong” (Penal Reform International, 2000, p. 22). It is, therefore, in the interest of all to contribute to the process of justice (Anonymous, personal communication, May 18, 2010; A. Naera, personal communication, June 30, 2010).

This sense of collective responsibility “does not resonate quite so strongly in non-Māori communities” (L. Chant, personal communication, May 10, 2010). It requires providing support to those who have been

²⁷ *Ubuntu*, generally speaking, is a form of African humanism that relates to a way of being, a human trait or quality, or a view of the self in relationship to others. It has been popularized by Archbishop Desmond Tutu who used the concept within the context of the South African Truth and Reconciliation Commission.

²⁸ Probations officer.

wronged as well as to those who have wronged (M. Brewin²⁹, personal communication, June 4, 2010). One is never alone in the Māori world, which means everyone has to look after one another to sustain the community (K. Jones, personal communication, July 1, 2010). This principle of collective responsibility also influences everyday life in contemporary New Zealand. “As children, we grow to learn the importance of the community and involvement and responsibility” (A. Naera, personal communication, June 30, 2010). A significant number of my respondents appeared to be socially aware and responsible, in that many actively contributed, and in some ways supported, community life (For instance, L. Chant, personal communication, May 10, 2010; K. Hohaia, personal communication, May 10, 2010; A. Williams, personal communication, May 10, 2010). Some individuals admitted to having taken into their homes and raised another family’s child (Anonymous, personal communication, July 22, 2010; L. Chant, personal communication, May 10, 2010), periodically chairing or attending *marae* meetings (Anonymous, personal communication, May 18, 2010; K. Hohaia, personal communication, May 10, 2010), or working on the construction of a *marae* for their *imi* (Anonymous, personal communication, May 17, 2010; Anonymous, personal communication, June 29, 2010). A schoolteacher explained, “These are our kids. They’re not that family’s or that family’s; they’re all our kids. And all, whoever they are, belong to our *whanau* and we have a social responsibility as a community to help them” (Anonymous, personal communication, May 17, 2010).

This sense of collective identity and responsibility urges community members to take part in communal matters and decision-making. As a result, the participation by and consultation of community members becomes a central element in doing justice within Māori communities according to *tikanga*. This stems from the “very real sense that a conflict belongs to the community itself” (Holleman, 1949, p. 43) and constitutes a violation of the community’s interwoven relationships and harmony (Schuler, 2004).

Community Participation and Engagement

Māori processes to carry out justice are not a “formal court sitting that a lawyer would recognize” (R. Kātene, personal communication, May 31, 2010). When a *hui* is organized, it is open to all who wish to contribute (Anonymous, personal communication, May 20, 2010; K. Hohaia, personal communication, May 10, 2010; A. Williams, personal communication, May 10, 2010). “Whoever may feel that they have an interest” is included (Anonymous, personal communication, May 18, 2010). There is no audience *per se* since everyone is encouraged to participate and share their views (Drummond, 1997). Hearings usually take place in the *marae* because it is inclusive of all and represents a neutral “place to reconcile difference” (H. Williams, personal communication, June 18, 2010). During a *hui*, community members talk through things in an attempt explain what happened, why it happened, and to solve the issues at hand (Anonymous, personal communication, June 13, 2010b; R. Kātene, personal communication, May 31, 2010; Robert, 1999). Customary mechanisms of justice use a “talking-out process among relatives (by blood and clan)” to reach a practical solution to the problem (Zion, 2005, p. 70). Justice is the result of “what the society...considers to be fair and just” (Wanitzek, 1990, p. 258). Both parties to the dispute must be present to exchange their views and opinions (Anonymous³⁰, personal communication, May 12, 2010; Anonymous, personal communication, May 17, 2010; L. Chant, personal communication, May 10, 2010; K. Hohaia, personal communication, May 10 2010; K. Jones, personal communication, July 1, 2010; H. Williams, personal communication, June 18, 2010). Their participation and the expression of their interests are central to a process that relies on voluntariness (Robert, 1999).

The active participation and contribution of community members to the process is an inherent element of a worldview based on the centrality of relationships. “Justice has to be done with the families” (Anonymous, personal communication, June 13 2010a). The inclusion of community members in the process, however, also serves to reinforce the community’s values and “generates a more compelling sense of justice” (Drummond,

²⁹ Research Programming Leader, The National Institute of Research Excellence for Māori Development and Advancement.

³⁰ Executive member of Nga Tauira Māori Auckland Māori Student Association.

1997, p. 108). Holding offenders verbally accountable for their wrongdoing is “essential to expressing remorse to the victims,” and facilitate the communication of suffering and possibly apologies (Melton, 2005, p. 115). By participating, the community shows its commitment to social stability and harmony. It emphasizes the “solidarity of the collective” towards upholding communal well-being and empowers community members to make decisions (Hazlehurst, 1995, p. xxii). Justice, then, becomes a “communal asset” to be safeguarded by all (Thomas, 2005, p. 135). On top of regenerating communal values of respect and care, the presence of community members in the process contributes to what Braithwaite (1989) calls “reintegrative shaming” (p. 84). The purpose of reintegrative shaming is not to exclude, but rather to reintroduce offenders within a supportive network of relationships and discourage further misbehaving (Braithwaite, 1989). Shaming helps produce compliance with the values upheld by the community and limits potential deviance (Weitekamp, 2003).

The process of *tikanga*, a form of relational justice, creates a venue where “offenders, the victims, and their support system get to see how the crime has affected each of them” (Anonymous, personal communication, June 27, 2010). Offenders get to experience justice that it is not handed down to them, but requires their participation, commitment, and agreement. Participation is also entirely voluntary (Penal Reform International, 2000). The strength of relational justice lies in the fact that community participation lends authority to the process and decision reached (Rumbles, n.d.). In horizontal and acephalous societies, communities tend to take a very active role in the process (Guest, 1999). “Consensus development for the resolution of disputes or grievances between or within communities” is an important element of these processes (New Zealand Law Commission, 2006, p. 54). Parties to the dispute have to own up to the decision and carry out what has been decided collectively because all are held accountable by their *whanau* (Anonymous, personal communication, May 17, 2010; A. Naera, personal communication, June 30, 2010; A. Williams, personal communication, May 10, 2010).

Moreover, relational justice is about showing *aroha*, which is love, support, and care, to both offenders and victims regardless of their actions. Indeed, the “methods of justice reflect the virtues of justice: respect, love, engaging family and community, land, elders, and the Creator” (Sawatsky, 2009, p. 70). These values “bind the individual to the group and the group to supporting the individual” (Zion, 2005, p. 70). The exploration of the crime, truth-telling, and confrontation between offenders and victims can be emotionally trying, but also contributes to the acknowledgment of their experiences (Borer, 2006). The support and presence of the community also serves to alleviate pain and contributes to collective healing (Lundy & McGovern, 2005). The sense of interconnectedness and collective responsibility discussed previously requires all to engage in the restoration and rehabilitation of those affected by injustice.

Well-being and Rehabilitation

To Māori, justice is a way of life not simply a response to crime. It is *bouhou rongu*, literally sewing the seeds for peace (H. Williams, personal communication, June 18, 2010). Justice is “a conversation around living” (L. Chant, personal communication, May 10, 2010). It is an “everyday thing, so you don’t have a special courtroom, special lawyers or special language” (Anonymous, personal communication, May 20, 2010). The way justice is carried out, as a public space for all to participate, very much reflects that. In fact, it is argued that justice in Indigenous communities is “inseparable from issues of social well-being” (Hazlehurst, 1995, p. xii). The occurrence of a crime causes a serious imbalance in the community and reflects the community’s failure to set favorable living conditions for all. Implicit in the sense of collective responsibility that underpins relational justice is the belief that all community members are responsible for sustaining community well-being. Justice, therefore, serves as a means of maintaining or redressing that harmony and balance within the community (Thomas, 2005).

The Māori approach to justice is essentially holistic and oriented towards the maintenance of mutually supportive relationships (Anonymous, personal communication, May 17, 2010; K. Jones, personal

communication, July 1, 2010). It is based on the belief that justice is about healing the person who has wronged, the person who has been wronged, and the entire network of relationships affected by the harm caused. As such, it seeks to deal with harm in its entirety, while recognizing the centrality of emotions (Sawatsky, 2009). The emphasis on healing is the “necessary manifestation of a [Indigenous] world-view” (Ross, 2010, p. 13). Zion (2005) notes that Indigenous justice “attempts to reach into the mind” (p. 69). Justice cannot succeed and heal without dealing with the person in his or her entirety (Lee, 2005). Justice is about healing the spiritual, emotional, physical, or mental imbalance in the person. It goes beyond the legal sphere by striving to “fix one’s spirit” (Anonymous, personal communication, June 28, 2010b). This means that justice is not simply about redressing a wrong and restoring a balance, but it is also about healing those involved (R. Kātene, personal communication, May 31, 2010). It can only be successfully achieved if it restores the “spiritual, emotional, and physical balance within the social, environmental, and cosmic sphere” (Benton, 2001, p. 6).

Relational justice requires working “collectively in a manner to help rebuild the person that has done wrong. It is a daily process of doing things together and surrounding that person with normality. To show them caring and *aroha*” (M. Papa, personal communication, June 28, 2010). In turn, healing those directly affected by wrongdoing contributes to the well-being of the entire community (Anonymous, personal communication, May 20, 2010; Benton, 2001). Healing the harm provides the opportunity to “transform suffering and root causes of harm... to cultivate conditions of respectful living within the interrelated aspects of the self, other, communities, social structures, environment, and spirit” (Sawatsky, 2009, p. 39). Viewing justice through a Māori lens leads us to focus on relationships as the source of restoration and rehabilitation for individuals affected by a dispute or crime. Māori justice is not about retribution, but about restoration and rehabilitation (Pratt, 1992). This “derives from long held Indigenous customs in which kin...seek to meet the need if all involved in a harm situation” (Sullivan & Tiff, 2006, p. 1).

At a *hui*, “the basic question asked is what happened and how can we fix it” (Anonymous, personal communication, May 20, 2010)? The discussion at a *hui* helps to identify the reasons that led a community member to wrong another member (Anonymous, personal communication, May 18, 2010). It provides a space for exploring and “understanding what made offenders do what they did, who they are, where they come from” (M. Papa, personal communication, June 28, 2010). Justice, therefore, is sought when the community tries “to restore that balance within them and between the individuals involved in what happened” (Anonymous, personal communication, May 18, 2010). This is done in accordance with the principle of *utu*, which emphasizes reciprocity and the maintenance of harmonious relationships between members of society (Anonymous, personal communication, June 27, 2010; Government of New Zealand, 2001). Whatever harm has been caused by an item being stolen or damaged, for instance, must be returned or repaired (Anonymous, personal communication, May 12, 2010; Anonymous, personal communication, May 18, 2010; Anonymous, personal communication, July 22, 2010). The kind of reparations must fit the circumstances and needs of all parties; keeping in mind the collective concern for harmony and balance (Government of New Zealand, 2001; Robert, 1999).

Because all community members are considered integral and essential parts of a collective, “it is not as simple as just removing [offenders]” (A. Naera, personal communication, June 30, 2010). The emphasis remains on restorative penalties, such as community service (Penal Reform International, 2000). This approach is based on the understanding that removing someone from the community, by sending him or her through the penitentiary system for example, does not mend relationships or contribute to healing the harm. It is, on the contrary, more likely to cause further suffering and victimization for all involved (Anonymous, personal communication, July 22, 2010). Removing someone from the community would also signal a break in communal relationships and result in additional imbalance. It would absolve the Māori notion of collective responsibility, which bestows responsibility on all community members for the wrong committed by one.

Concluding Thoughts and Caution

The Māori approach to justice is clearly embedded within a kinship-based tradition that highly values principles of collective responsibility, social harmony, and well-being. Dyhrberg (1994) argues, “central to Māoridom is the right and the responsibility of a community to care for its own, and to seek... solutions to its social problem” (p. 6). Over the years, Māori have remained critical of New Zealand’s formal legal apparatus, which many viewed as a “system imposed upon them by an aggressive colonizer” (Kesley, 1984, p. 21), and which incessantly worked against Indigenous communities and their rights (Behrendt, 1995). The existing legal system never fully empowered Māori communities to take care of their own according to their own traditions and beliefs (Consedine, 1995). Despite the increasing number of Māori going through the criminal justice system, New Zealand’s formal legal system continued to uphold Western judicial values and to adjust to the needs of the *Pakeha* society (Jackson, 1988). Upon mounting criticism from Māori communities that the existing legal system “was wholly foreign to its traditional values and destructive of the kinship networks essential to Māori society,” FGC was set up (Luna, 2000, ¶ 52). The FGC model put in place by the New Zealand government is often said to epitomize the restorative justice approach (Maxwell & Morris, 2006). It is also frequently presented as a Māori process (Anonymous, personal communication, May 20, 2010). Judge McElrea (2004) goes as far as to claim that the restorative model employed by FGCs is the “direct descendant of the *whanau* conference long employed by Māori people” (p. 98).

In fact, part of the debate surrounding restorative practices and traditions concerns the “claims that restorative justice draws on traditional processes for resolving disputes among Indigenous peoples” (Cunneen, 2008, p. 1). Daly (2003) has coined this the “myth of origin” according to which restorative justice “uses Indigenous justice practices and was the dominant form of pre-modern justice” (p. 195). Restorative justice practices and Indigenous approaches to justice are often seen as one and the same. As mentioned earlier, a common assumption in the case of the New Zealand restorative conferencing model is that the practice is rooted in Māori culture. (Consedine, 1995). This belief is particularly striking in that it reveals a lack of understanding of the cultural, social, and spiritual principles that underpin Māori society and its approach to justice. Hakiha (2004) expresses concern at the New Zealand government’s use of Māori principles, which in his view may result in “the dilution, bastardization and disenfranchisement of these revered and sacred principles” (p. 358). This amalgamation of restorative justice practices and Indigenous approaches illustrates the worrisome propensity to romanticize and homogenize Indigenous philosophies and practices (see for instance Cain, 2000). The ongoing attempt to include and represent Māori values in the legal system, according to Jackson (1995), only serves to “capture, redefine and use Māori concepts to freeze Māori cultural and political expression within parameters acceptable to the state” (p. 254). The tendency to equate the FGC restorative model with the Māori approach to justice is simply part of the continuing history of colonization and co-option of Māoridom (Jackson, 1995).

Indigenous and customary mechanisms of justice around the world have faced similar challenges and attempts at conforming traditional approaches to justice to the legalist paradigm. The UN Secretary General’s Report on the Rule of Law and Transitional Justice, for instance, talks about *conforming* Indigenous and traditional processes with international standards (United Nations Security Council, 2004). This means that customary mechanisms are to be tolerated so long as they can be judicialized to correspond to international legal norms and expectations. According to MacGinty (2008), the relationship between the law and local traditional justice practices is more often one of “co-option rather than a co-existence of equals” (p. 158). Rwanda’s *gacaca*³¹ courts are a prime example of how the international interest and support of customary mechanisms led to their co-option. Drumbl (2000), for instance, argues that the call for *gacaca* courts to become “as legal as possible” is intended to force them to emulate the trial model and thereby conform to the international law paradigm (p. 16). The overall coordination and organization of *gacaca* courts was in the hands of the Rwandan state and its Department of Gacaca Jurisdiction within the Ministry of Justice (Amnesty International, 2002). The intervention of the state and the international community has, in fact,

³¹ *Gacaca* is a customary mechanism of justice used in Rwanda.

radically altered the traditional Rwandan process of doing justice by removing the voluntary and grassroots aspects of the process (Kerrigan, 2002). This has resulted in *gacaca* courts having little authenticity in the eyes of those who knew how these processes were traditionally conducted pre-genocide (Oomen, 2005). A similar conclusion can be drawn in the case of New Zealand; the government's ongoing attempt to include Māori practices within its judicial framework has produced, at best, mixed results. To a large extent, many Māori remain suspicious of the government's attempts, which they view as mere tokenism.

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Appendix:
List of Fieldwork Interviews

Name	Date of Interview	Title or Description	Institutional Affiliation or Location
Anonymous	May 7, 2010	Student	University of Auckland
Anonymous	May 12, 2010	Executive member of Nga Taurira Māori, Māori Students Association	University of Auckland
Anonymous	May 13, 2010	Member of Māori Students Association	University of Auckland
Anonymous	May 13, 2010	Student	University of Auckland
Anonymous	May 13, 2010	Student and member of the Māori Students Association	University of Auckland
Anonymous	May 14, 2010	Member	Auckland Māori Regional Tourism Association
Anonymous	May 14, 2010	Professor of Māori studies	University of Auckland
Anonymous	May 17, 2010	Schoolteacher	Otara
Anonymous	May 17, 2010	Schoolteacher and head of Māori department	Otara
Anonymous	May 18, 2010	Member	United Nations (UN) Forum on Indigenous Issues, Auckland
Anonymous	May 20, 2010	Former lawyer and professor of law	Auckland
Anonymous	May 26, 2010	Student	University of Auckland
Anonymous	May 28, 2010	Court worker	Auckland
Anonymous	June 9, 2010	Former offender	Auckland
Anonymous	June 13, 2010	Community member	Rotorua
Anonymous	June 13, 2010	<i>Kaumātua</i>	Rotorua
Anonymous	June 27, 2010	Representative	Ngati Whatua Trust, Auckland
Anonymous	June 28, 2010	Community member	Auckland
Anonymous	June 28, 2010	Probations officer	Auckland
Anonymous	June 28, 2010	Student	University of Auckland
Anonymous	June 29, 2010	Marae Trustee	Auckland

Name	Date of Interview	Title or Description	Institutional Affiliation or Location
Anonymous	June 30, 2010	Staff member	Auckland University of Technology
Anonymous	July 22, 2010	Social worker	Auckland
Brewin, Marilyn	June 4, 2010	Research programming leader	National Institute of Research Excellence for Māori Development and Advancement, Auckland
Chant, Lisa	May 10, 2010	Professor of Māori studies	University of Auckland
Hohaia, Kim-sara	May 10, 2010	Resource management student	University of Auckland
Jones, Katherine	July 1, 2010	Professor in management	Auckland University of Technology
Kātene, Rāhui	May 31, 2010	Member of the New Zealand Parliament and Māori Party	Wellington
Naera, Agnes	June 30, 2010	Programme Director, Department of Equity, Kaiwhakahaere Kaupapa Māori	Auckland University of Technology
Papa, Moana	June 28, 2010	South Auckland community member	Auckland
Royal, Charles	May 11, 2010	Director	National Institute of Research Excellence for Māori and Advancement, Auckland
Williams, Arena	May 10, 2010	Law student	University of Auckland
Williams, Haare	June 18, 2010	<i>Kaumatua</i> and Manukau City Councillor	Auckland