

# Thinking about Justice through a Māori Lens<sup>1</sup>

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## Introduction

The history of transitional justice has been marked by a variety of efforts to promote peace, reconciliation and achieve justice in the aftermath of mass violations of human rights. It appears that the majority of mechanisms used since the Second World War primarily seek redress through retribution and punishment via the use of tribunals and courts. The Nuremberg Tribunal and the Tokyo tribunal, as well as the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC) are examples of this approach to justice. More recently, attempts to bring about justice have been complemented by less retributive mechanisms, such as truth commissions, and revamped customary mechanisms of justice. These mechanisms of justice are often described as promoting a combination of retributive, reparative, and restorative justice. This paper contends that the current scholarship is ill-suited to account for the type of justice that is embodied in customary mechanisms of justice. Here, I explore how indigenous approaches to doing and thinking about justice often differ from the existing framework used in transitional justice. Using evidence gathered through three months of ethnographic research in New Zealand, I contend and explain how the māori approach to justice, like many other indigenous approaches, adopts a relational lens. I conclude that the type of “justice” embodied in customary mechanisms, has often been taken out of context, and rendered universal and ahistorical in the transitional justice literature through their representation as restorative justice mechanisms.

## I Justice in Transitional Justice

Of particular interest in this paper is the way “justice” is conceptualized in the field of transitional justice. The literature on transitional justice tends to think about how to *do* “justice” in different terms, by using the retributive, reparative, and the restorative approaches. Each approach, in essence, seeks the same thing, which is to make things right after violations of rights, but tries to do so using different means. The retributive approach, for instance, favors the use of tribunals and courts, while the reparative

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approach encourages the enactment of material and symbolic reparations. Restorative justice sees truth-telling as an essential element in its pursuit of “justice.” So, while the end goal of “justice” remains the same, views of how to do “justice,” in the field of transitional justice, vary.<sup>3</sup>

Each of these approaches conceives of the individual as a holder of rights, regardless of any other factor.<sup>4</sup> Cultural differences and backgrounds are irrelevant considerations. Conceptions of justice can be “justified independently of particular conceptions” of what is good or bad.<sup>5</sup> This understanding of how justice ought to be carried out, and also of individuals, has clear roots in the Western, Judeo-Christian tradition, which views human beings as imperfect reflections of God.<sup>6</sup> The approach to justice embodied in the restorative, reparative and retributive modes of justice is “the creation of a specific legal tradition,”<sup>7</sup> that of the West, and can be considered “a cultural artefact... masquerading as universal, immutable values.”<sup>8</sup>

Such approaches to carrying out justice traditionally had much credence in the minds of liberal thinkers, including Kant and Nozick.<sup>9</sup> According to the liberal approach, individuals are conceived as morally autonomous, and fully rational beings. As such, individuals are the bearers of rights,<sup>10</sup> and function under the same framework and conception of justice. Justice is seen as a “foundational priority” that precedes any other considerations, preferences, and cultural particularities.<sup>11</sup> The majority of the literature in transitional justice is embedded within these deontological approaches.<sup>12</sup> Regardless of whether justice is to be categorized as retributive, reparative or restorative each approach sees the individual as the primary source of concern, and justifies the need for justice either in the restoration, reparation, or retribution for individuals, whose rights have been violated. They are fundamentally grounded in a Western liberal framework, which “rests on an overly individualistic conception of the self.”<sup>13</sup> For this reason, I argue that they are ill-suited to discuss the type of justice that is embodied in customary mechanisms of justice.

## I Tikanga Māori

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<sup>3</sup> Brandon Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health* (New York : Pringer, 2009), 117.

<sup>4</sup> Michael Sandel, *Liberalism and The Limits of Justice* (Cambridge: Cambridge University Press, 1998), 15.

<sup>5</sup> Seyla Benhabib, *Situating the Self: gender, community, and postmodernism in contemporary ethics* (London: Routledge, 1992), 76.

<sup>6</sup> Patrick Glenn, *Legal Traditions of the World* (New York : Oxford University Press, 2000), 133.

<sup>7</sup> Anthony Padgen, “Human rights, natural rights and Europe’s imperial legacy” *Political Theory* 31.2 (April 2003), 173.

<sup>8</sup> Padgen, *Human rights, natural rights*, 173.

<sup>9</sup> Benhabib, *Situating the Self*, 78.

<sup>10</sup> Sandel, *Liberalism and The Limits of Justice*, 2.

<sup>11</sup> Benhabib, *Situating the Self*, 176.

<sup>12</sup> When using the term ‘deontology,’ I refer to Kant’s approach, which considers that individuals are the bearers of rights, reason, rationality, and good will, which are contributing factors in the ethical decision-making process. A deontological theory of justice is one that views justice as “fairness” and which holds dear the principle of equal rights for all citizens.

<sup>13</sup> Daniel Bell, *Communitarianism and Its Critics* (USA : Oxford University Press, 1993), 4.

When asked, a majority of Māori individuals I 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”<sup>14</sup> or simply that *tikanga* was justice.<sup>15</sup> Judge Durie adds that *Tikanga māori* can be defined a body of “Māori principles for determining justice.”<sup>16</sup> Not abiding by *tikanga* would have severe consequences in communal life and would result in oneself, and one’s community “being hurt.”<sup>17</sup>

In fact, *tikanga māori* is a normative system, which prescribes correct ways of behaving and processes to use for correcting problematic behavior.<sup>18</sup> It can be seen as a set of principles determining right from wrong and prescribing actions on how to deal with it.<sup>19</sup> *Tikanga* also includes “measures to deal firmly with actions causing a serious disequilibrium within the community.”<sup>20</sup> Burrows explains that indigenous people, 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.”<sup>21</sup> *Tikanga māori* can be seen as a set of principles to determine justice and is, therefore, generally referred to as Māori customary law.<sup>22</sup>

It appears that, “the traditional system of *tikanga* for resolving dispute still exists”<sup>23</sup> and used in some areas of the country. Māori generally prefer to deal with offenses and crimes amongst themselves, without any external state intervention.<sup>24</sup> Only a few decades ago, the police rarely got involved or intervened in Māori communities.<sup>25</sup> Nowadays, while the police are sometimes called, they still do not always come to the help of Māori living in rural communities.<sup>26</sup> As noted by Stafford, “historical legacies of indigenous peoples and police interaction have resulted in...feelings of mutual suspicions held by both parties.”<sup>27</sup> Māori often feel disempowered and disadvantaged by the judicial system.

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<sup>14</sup> Interview with member of Auckland Maori Regional Tourism Organization, 14<sup>th</sup> May 2010, Auckland.

<sup>15</sup> Interview with social worker, 22<sup>nd</sup> July 2010, Auckland.

<sup>16</sup> Eddie Durie, "Custom Law: Address to the New Zealand Society for Legal and Social Philosophy" *Victoria University of Wellington Law Journal* 24 (1994), 331.

<sup>17</sup> Interview with a member of the New Zealand Parliament and Maori Party, 31<sup>st</sup> May 2010, Wellington.

<sup>18</sup> Mead, *Tikanga Maori*, 6.

<sup>19</sup> Government of New Zealand, *He Hinatore Ki Te Ao Maori*, 10.

<sup>20</sup> The New Zealand Law Commission, "Maori Custom and Values in New Zealand Law" Wellington, 2001, 16.

<sup>21</sup> John Burrows, *Recovering Canada: The Resurgence of Indigenous Law*. Toronto: University of Toronto Press, 2002, 46.

<sup>22</sup> Mason Durie, *Te Mana, Te Kawanatanga: The Politics of Maori Self Determination* (Auckland: Oxford University Press, 1993), 23; and Metge, *Custom Law Guideline Project*, 3.

<sup>23</sup> Khylee Quince, "Maori Disputes and Their Resolutions." In *Dispute Resolution in New Zealand*, edited by Peter Spiller. Auckland: Oxford University Press, 2007, 16. *Italic added.*

<sup>24</sup> Interview with a community member, 13<sup>th</sup> June 2010, Rotorua; and Moana Papa, South Auckland community member, 28<sup>th</sup> June 2010, interview with author, Auckland.

<sup>25</sup> Interview with a community member, 13<sup>th</sup> June 2010, Rotorua.

<sup>26</sup> Lisa Chant, Professor of Maori Studies, the University of Auckland, interview with author, 10<sup>th</sup> May 2010, Auckland.

<sup>27</sup> Christine Stafford, "Colonialism, Indigenous Peoples and the Criminal Justice Systems of Australia and Canada: Some Comparisons." In *Legal Pluralism and the Colonial Legacy*, edited by Kayleen Hazlehurst. Aldershot: Avebury, 1995, 233.

They are also often distrustful of the police forces, which they see as “amplifiers of crimes.”<sup>28</sup> That is the police is often perceived as being more severe towards the indigenous population than against the white population.<sup>29</sup> Moreover, there exists a shared belief, amongst the Māori, that New Zealand laws and judicial procedures are foreign and imposed 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.”<sup>30</sup> 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.<sup>31</sup>

## II Relational Justice

Customary law and customary mechanisms, and more particularly, the type of justice they embody, are difficult to appreciate and make sense of within a Western, individualistic and legally based framework. This may be due to the fact, that justice, in a number of cases, “represent[s] a grammar for living and an intricate set of religious principles that make the world intelligible.”<sup>32</sup> It is not just legal institutions that differ, but entire social structures and beliefs, which, in turn, get lost and sanitized in the restorative justice texts.

Central to these Māori norms and ideals is the primacy of kinship. Relationships are of paramount importance to Māori.<sup>33</sup> 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 kinships.<sup>34</sup>

The importance of relationships is visible through a number of principles that Māori abide by, including *whakapapa* (genealogical connection) and *whanaungatanga* (human connection).<sup>35</sup> Both point to the strength and importance of connections between

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<sup>28</sup> Stafford, *Colonialism, Indigenous Peoples and the Criminal Justice Systems*, 233.

<sup>29</sup> Stafford, *Colonialism, Indigenous Peoples and the Criminal Justice Systems*, 233.

<sup>30</sup> Moana Jackson, "Justice and Political Power: Reasserting Maori Legal Processes." In *Legal Pluralism and the Colonial Legacy*, edited by Kayleen Hazlehurst. Aldershot: Avebury, 1995, 253.

<sup>31</sup> Interview with former lawyer and law professor, 20<sup>th</sup> May 2010, Auckland; Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, 1<sup>st</sup> July 2010, Auckland; and Interview with schoolteacher, 17<sup>th</sup> June 2010, Otara; Moana Papa, South Auckland community member, 28<sup>th</sup> June 2010, interview with author, Auckland; Interview with a member of staff at Auckland University of Technology (AUT), 30<sup>th</sup> June 2010, Auckland.

<sup>32</sup> Harry Blagg, *Crime, Aboriginality, and the Decolonization of Justice*. Sydney: Hawkins Press, 2008., 154.

<sup>33</sup> The New Zealand Law Commission, *Maori Custom and Values*, 30.

<sup>34</sup> Patricia Monture Okanee, "Thinking About Aboriginal Justice: Myths and Revolution." In *Continuing Poundmaker's & Riel's Quest*, edited by Richard Gosse, James Youngblood Henderson and Roger Carter. Saskatoon: Purich, 1994, 227.

<sup>35</sup> For a more detailed discussion of these principles, refer to the glossary.

people and their communities.<sup>36</sup> While *whakapapa* is concerned with the spiritual, *whanaungatanga* deals with present relationships and is not restricted to the genealogical order.<sup>37</sup> 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.”<sup>38</sup> They provide the understanding that all Māori are related to one another and their environment.<sup>39</sup> 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.<sup>40</sup> The *whanau*,<sup>41</sup> to Māori, is “a pivotal social and cultural force,” that gives its members a sense of identity and safety.<sup>42</sup> To many, the *whanau* is everything.<sup>43</sup> It is “what we are made of”<sup>44</sup> and “makes us the way we are.”<sup>45</sup> To Māori “you are nobody unless you belong to a community, to some land and some people.”<sup>46</sup> Māori identity is defined by community membership and the relationships that comprise it.

According to Huffer and So’o, “Pacific values must be seen in the context of a network of social relationships.”<sup>47</sup> 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.”<sup>48</sup> As a result, “connections... must be respected and fostered.”<sup>49</sup> Mane notes that the creation and maintenance of relationships, for Māori, “is a matter of considerable significance highlighting the required sense of reciprocity, accountability and mutual respect.”<sup>50</sup> This has important consequences on the Māori practice and approach to justice and requires re-thinking our approach to criminal behavior. Crime must be seen, no longer as breach of contract and law, but rather as a “breakdown in

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<sup>36</sup> Joe Williams, "The Maori Land Court: A Separate Legal System?" Paper presented at the Faculty of Law and the New Zealand Centre for Public Law, University of Wellington, July 2001.

<sup>37</sup> Interview with a representative from the Ngati Whatua Trust, 27<sup>th</sup> June 2010, Auckland.

<sup>38</sup> The New Zealand Law Commission. "Converging Currents: Custom and Human Rights in the Pacific." Wellington, 2006, 51.

<sup>39</sup> Interview with former offender, 09<sup>th</sup> June 2010, Auckland.

<sup>40</sup> Moana Papa, South Auckland community member, 28<sup>th</sup> June 2010, interview with author, Auckland.

<sup>41</sup> The Whanau is the family, but in a wider sense than its western counterpart. For a more detailed discussion of these principles, refer to the glossary.

<sup>42</sup> Ministry of Health. "Whaia Te Whanaungatanga: Oranga Whanau the Well-being of Whānau: The Public Health Issues." Wellington, 1998, 1.

<sup>43</sup> Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, 1<sup>st</sup> July 2010, Auckland; Interview with a community member, 13<sup>th</sup> June 2010, Rotorua; Interview with a Kaumatua, 13<sup>th</sup> June 2010, Rotorua; Interview with community member 26<sup>th</sup> June 2010, Auckland; Moana Papa, South Auckland community member, 28<sup>th</sup> June 2010, interview with author, Auckland; Interview with a Marae Trustee, 29<sup>th</sup> June 2010.

<sup>44</sup> Interview with a Kaumatua, 13<sup>th</sup> June 2010, Rotorua.

<sup>45</sup> Interview with community member 26<sup>th</sup> June 2010, Auckland.

<sup>46</sup> Interview with former lawyer and law professor, 20<sup>th</sup> May 2010, Auckland.

<sup>47</sup> Elise, Huffer and Asofou So'o. "Beyond Governance in Samoa: Understanding Samoa Political Thought." *The Contemporary Pacific* 17 (2005): 311.

<sup>48</sup> Government of New Zealand, *He Hinatore Ki Te Ao Maori*, 128.

<sup>49</sup> John Patterson, *Exploring Maori Values* (Palmerston: Dunmore Press, 1992), 88.

<sup>50</sup> Jo Mane, "Kaupapa Maori: A community approach" MAI Review, 2009 Vol 3.

relationships.”<sup>51</sup> It must, therefore, be treated as such.<sup>52</sup> Implicit in the centrality of the *whanau* and relationships to Māori is the sense of collective social responsibility.<sup>53</sup> In turn, this sense of a) interconnectedness and collective responsibility, begets b) active involvement and participation of all community members for the c) well-being of the collective.

a) Interconnectedness and collective responsibility

Māori approach to justice is built around “fundamental values such as collectivism and interconnectedness.”<sup>54</sup> Māori “collective identity lends itself to collective responsibility.”<sup>55</sup> This has important consequences on justice and how it is viewed and carried out in Māori communities. Relationships being the most valued element of Māori social life and worldview, they are the focus of justice.<sup>56</sup> Justice becomes a way to nurture and sustain relationships. This is strongly reminiscent of Ross’ “relational lens” which was discussed in chapter 3 when dealing with *Ubuntu* and Aboriginal *healing Justice*. This emphasis on relationships, interdependence and collective responsibility encourages us to think of wrongdoing as a “relational event.”<sup>57</sup> A crime becomes the symptom of “disharmonies within the offender's relational life.”<sup>58</sup> It is therefore the relational life of the offender that must be explored and restored.

Accordingly, one of the first steps in dealing with offences, for Māori, is to uncover the relational ties, each of the parties to the dispute, sustains with other community members.<sup>59</sup> Many indigenous traditions, such as that of the Navajo, view a person who harms another as a person who “has no relatives.”<sup>60</sup> Accordingly, justice is very much about reinstating these relationships. It is concerned with “retaining, teaching and maintaining relationships.”<sup>61</sup> Only once the relationships between the parties to the dispute have been explored, can discussions about why a dispute took place and how it

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<sup>51</sup> Jonathan Burnside and Nicola Baker. *Relational Justice: Repairing the Breach*. Winchester: Waterside, 2004, 24.

<sup>52</sup> Michael Schuler, “What is Relational Justice” in *Relational Justice: Repairing the breach* (Waterside, Winchester: 1994), 24.

<sup>53</sup> The New Zealand Law Commission, *Maori Custom and Values*, 32; Interview with a representative from the Ngati Whatua Trust, 27<sup>th</sup> June 2010, Auckland.

<sup>54</sup> Joseph, *Māori Customary Laws and Institutions*, 3.

<sup>55</sup> Interview with former lawyer and law professor, 20<sup>th</sup> May 2010, Auckland

<sup>56</sup> Mead, *Tikanga Maori*, 28.

<sup>57</sup> Rupert Ross, *Exploring Criminal Justice*, 8.

[http://www.lsuc.on.ca/media/third\\_colloquium\\_rupert\\_ross.pdf](http://www.lsuc.on.ca/media/third_colloquium_rupert_ross.pdf).

<sup>58</sup> Ross, *Exploring Criminal Justice*, 8.

<sup>59</sup> Moana Jackson, “The Māori and the Criminal Justice System a New Perspective: He Whaipaanga Hou Part 2.” Wellington: Department of Justice, 1988, 34.

<sup>60</sup> Jarem Sawatsky, *The Ethic of Traditional Communities and the Spirit of Healing Justice*. London: Kingsley, 2009, 69.

<sup>61</sup> Patricia Monture Okanee, “Thinking About Aboriginal Justice: Myths and Revolution.” In *Continuing Poundmaker's & Riel's Quest*, edited by Richard Gosse, James Youngblood Henderson and Roger Carter. Saskatoon: Purich, 1994, 227.

can be solved, begin.<sup>62</sup> 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.”<sup>63</sup> By the same token, highlighting the connections and kinship between all community members serves to demonstrate how the wrong and the pain caused “reverberates through the individual and the community.”<sup>64</sup>

This, 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.”<sup>65</sup> After a crime or dispute, people come together, whether in the *marae* or 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.”<sup>66</sup> 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.<sup>67</sup> 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,”<sup>68</sup> thereby giving a kind of derivative responsibility to the individuals’ *whanau* and the wider community. Traditionally, the system of *tikanga* simply attributed “responsibility for wrongdoing on the family of the offender.”<sup>69</sup> Because Māori society is largely based on collective responsibility, if an individual member is wronged or hurt, the entire *whanau* is equally liable to redress the harm caused.<sup>70</sup> “When you hurt one member, you hurt the rest of the *whanau*.”<sup>71</sup> Each member of a community will “either feel some sense of having being wronged or some sense of responsibility for the wrong.”<sup>72</sup> It is, therefore, in the interest of all to contribute to the process of justice.<sup>73</sup>

This sense of collective responsibility “does not resonate quite so strongly in non-Māori communities.”<sup>74</sup> It requires providing support to those who have been wronged as well as to those who have wronged.<sup>75</sup> One is never alone in the Māori world and that

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<sup>62</sup> Interview with social worker, 22<sup>nd</sup> July 2010, Auckland.

<sup>63</sup> Interview with a representative from the Ngati Whatua Trust, 27<sup>th</sup> June 2010, Auckland.

<sup>64</sup> Susan Drummond, *Incorporating the Familiar: An Investigation into Legal Sensibilities in Nununavuk*. Kingston: Queens University Press, 1997, 107.

<sup>65</sup> Interview with a probations officer, 28<sup>th</sup> June 2010, Auckland.

<sup>66</sup> Interview with member of the UN forum on Indigenous Issues, 18<sup>th</sup> May 2010, Auckland.

<sup>67</sup> James Guest, "Aboriginal Legal Theory and Restorative Justice." Native Law Centre of Canada, 1999, 2.

<sup>68</sup> Penal Reform International. "Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems." 2001, 23.

<sup>69</sup> Jackson *The Māori and the Criminal Justice System*, 43.

<sup>70</sup> Government of New Zealand, *He Hinatore Ki Te Ao Maori*, 40.

<sup>71</sup> Interview with a Kaumatua, 13<sup>th</sup> June 1010, Rotorua. Emphasis added.

<sup>72</sup> Penal Reform International, 22.

<sup>73</sup> Interview with member of the UN forum on Indigenous Issues, 18<sup>th</sup> May 2010, Auckland; Agnes Naera, Programme Director Equity, Kaiwhakahaere Kaupapa Maori, Auckland University of Technology (AUT), interview with author, 30<sup>th</sup> June 2010, Auckland.

<sup>74</sup> Lisa Chant, Professor of Maori Studies, the University of Auckland, interview with author, 10<sup>th</sup> May 2010, Auckland.

<sup>75</sup> Marilyn Brewin, Research Programming Leader, The National Institute of Research Excellence for Maori Development and Advancement, interview with author, 04<sup>th</sup> June 2010, Auckland.

means everyone has to look after one another to sustain the community.<sup>76</sup> 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.”<sup>77</sup> 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.<sup>78</sup> Some individuals admitted to having taken into their homes and raised another family’s child,<sup>79</sup> periodically chairing or attending marae meetings,<sup>80</sup> or working on the construction of a marae for their *iwi*.<sup>81</sup> 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.”<sup>82</sup>

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, and according to *tikanga*. This stems from the “very real sense that a conflict belongs to the community itself,”<sup>83</sup> and constitutes a violation of the community’s interwoven relationships and harmony.<sup>84</sup>

## B) Active community participation

Māori processes to carry out justice are not “formal court sitting that a lawyer would recognize.”<sup>85</sup> When a *hui* is organized, it is open to all who wish to contribute.<sup>86</sup> “Whoever may feel that they have an interest” is included.<sup>87</sup> There is no audience, *per se*, since everyone is encouraged to participate and share their views.<sup>88</sup> Hearings usually take

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<sup>76</sup> Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, 1<sup>st</sup> July 2010, Auckland.

<sup>77</sup> Agnes Naera, Programme Director Equity, Kaiwhakahaere Kaupapa Maori, Auckland University of Technology (AUT), interview with author, 30<sup>th</sup> June 2010, Auckland.

<sup>78</sup> For instance, Kim-sara Hohaia, Auckland youth and Resource Management student, the University of Auckland, interview with author, 10<sup>th</sup> May 2010, Auckland; Lisa Chant, Professor of Maori Studies, the University of Auckland, interview with author, 10<sup>th</sup> May 2010, Auckland; Arena Williams, Auckland youth and Law student at the University of Auckland, interview with author, 10<sup>th</sup> May 2010, Auckland.

<sup>79</sup> Lisa Chant, Professor of Maori Studies, the University of Auckland, interview with author, 10<sup>th</sup> May 2010, Auckland; Interview with social worker, 22<sup>nd</sup> July 2010, Auckland.

<sup>80</sup> Interview with member of the UN forum on Indigenous Issues, 18<sup>th</sup> May 2010, Auckland, Kim-sara Hohaia, Auckland youth and Resource Management student, the University of Auckland.

<sup>81</sup> Interview with schoolteacher, 17<sup>th</sup> June 2010, Otara; Interview with a Marae Trustee, 29<sup>th</sup> June 2010.

<sup>82</sup> Interview with schoolteacher, 17<sup>th</sup> June 2010, Otara.

<sup>83</sup> John Holleman, "An Anthropological Approach to Bantu Law: With Special Reference Toshona Law" *Rhodes-Livingstone Journal* 10 (1949): 53.

<sup>84</sup> Schuler, *What Is Relational Justice*, 24.

<sup>85</sup> Interview with a member of the New Zealand Parliament and Maori Party, 31<sup>st</sup> May 2010, Wellington.

<sup>86</sup> Interview with former lawyer and law professor, 20<sup>th</sup> May 2010, Auckland; Arena Williams, Auckland youth and Law student at the University of Auckland, interview with author, 10<sup>th</sup> May 2010, Auckland; Kim-sara Hohaia, Auckland youth and Resource Management student, the University of Auckland, interview with author, 10<sup>th</sup> May 2010.

<sup>87</sup> Interview with member of the UN forum on Indigenous Issues, 18<sup>th</sup> May 2010, Auckland.

<sup>88</sup> Drummond, *Incorporating the Familiar*, 108.

place in the *marae*, because it is inclusive of all and represent a neutral “place to reconcile difference.”<sup>89</sup> During a *hui*, community members talk through things in an attempt explain what happened, why it happened, and solve the issues at hand.<sup>90</sup> Indigenous mechanisms of justice use a “talking-out process among relatives (by blood and clan)” to reach a practical solution to the problem.<sup>91</sup> Justice is the result of “what the society...considers to be fair and just.”<sup>92</sup> Both parties to the dispute must be present to exchange their views and opinions.<sup>93</sup> Their participation and the expression of their interests are central to a process that relies on voluntariness.<sup>94</sup>

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.”<sup>95</sup> 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.”<sup>96</sup> Holding offenders verbally accountable for their wrongdoing is “essential to expressing remorse to the victims,” and facilitate the communication of suffering, and possibly apologies.<sup>97</sup> 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.<sup>98</sup> Justice, then, becomes a “communal asset” to be safeguarded by all.<sup>99</sup> On top of regenerating communal values of respect and care, the presence of community members in the process contributes to what Braithwaite calls “reintegrative shaming.”<sup>100</sup> The purpose of reintegrative shaming is not to exclude, but, rather, to reintroduce offenders within a supportive network of relationships, and

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<sup>89</sup> Haare Williams, Kaumatua and Manukau city councilor, interview with author, 18<sup>th</sup> June 2010, Auckland.

<sup>90</sup> Interview with a member of the New Zealand Parliament and Maori Party, 31<sup>st</sup> May 2010, Wellington; Interview with a Kaumatua, 13<sup>th</sup> June 2010, Rotorua; Joseph, *Māori Customary Laws and Institutions*, 3-4.

<sup>91</sup> James Zion, "Punishment Versus Healing: How Does Traditional Indian Law Work?" In *Justice as Healing: Indigenous Ways*, edited by Amanda McCaslin. Minnesota: Living Justice Press, 2005, 70.

<sup>92</sup> Ulrike Wanitzek, "Legally Unrepresented Women Petitioners in the Lower Courts of Tanzania." *Journal of Legal Pluralism* 30 (1990), 258.

<sup>93</sup> Interview with schoolteacher, 17<sup>th</sup> June 2010, Otago; Haare Williams, Kaumatua and Manukau city councilor, interview with author, 18<sup>th</sup> June 2010, Auckland; Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, 1<sup>st</sup> July 2010, Auckland; Kim-sara Hohaia, Auckland youth and Resource Management student, the University of Auckland, interview with author, 10<sup>th</sup> May 2010, Auckland; Interview with executive member of Nga Taurua Maori Auckland Maori Student Association, 12<sup>th</sup> May 2010, Auckland; Lisa Chant, Professor of Maori Studies, the University of Auckland, interview with author, 10<sup>th</sup> May 2010, Auckland.

<sup>94</sup> Joseph Robert, "Māori Customary Laws and Institutions." Hamilton: Te Matahauariki Institute at the University of Waikato, 1999, 5.

<sup>95</sup> Interview with a community member, 13<sup>th</sup> June 2010, Rotorua.

<sup>96</sup> Drummond, *Incorporating the Familiar*, 108.

<sup>97</sup> Ada Pecos Melton, "Indigenous Justice Systems and Tribal Society." In *Justice as Healing: Indigenous Ways*, edited by Amanda McCaslin. Minnesota: Living Justice Press, 2005, 115.

<sup>98</sup> Kayleen Hazlehurst, *Popular Justice and Community Regeneration: Pathways of Indigenous Reform*. London: Praeger, 1995, xxii.

<sup>99</sup> Nin Thomas, "Maori Justice: the Marae as a Forum for Justice." In *Justice as Healing: Indigenous Ways*, edited by Amanda McCaslin. Minnesota: Living Justice Press, 2005, 135.

<sup>100</sup> John Braithwaite, *Crime, Shame and Reintegration*. New York: Cambridge University Press, 1989, 84-104.

discourage further misbehaving.<sup>101</sup> Shaming helps produce compliance to the values upheld by the community and limits potential deviance.<sup>102</sup>

The process engendered by *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.”<sup>103</sup> Offenders get to experience justice, as it is not handed down to them but requires their participation, their commitment and agreement. Participation is also entirely voluntary.<sup>104</sup> The strength of relational justice lies in the fact that community participation lends authority to the process and the decision reached.<sup>105</sup> In horizontal and acephalous societies, communities tend to take a very active role in the process.<sup>106</sup> “Consensus development for the resolution of disputes or grievances between or within communities” is an important element of these processes.<sup>107</sup> And because all are held accountable by their *whanau*, which engages in the process, parties to the dispute “have to own up to the decision and carry out what has been decided collectively.”<sup>108</sup>

Moreover, relational justice is about showing *aroha*, support and care to both offenders and victims, regardless of their actions.<sup>109</sup> Indeed, the “methods of justice reflect the virtues of justice: respect, love, engaging family and community, land, elders and the Creator.”<sup>110</sup> These values “bind the individual to the group and the group to supporting the individual.”<sup>111</sup> 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.<sup>112</sup> The support and presence of the community also serves to alleviate the pain and contributes to the collective healing.<sup>113</sup> The sense of interconnectedness and collective responsibility discussed previously requires all to engage in the restoration and rehabilitation of those affected by injustice.

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<sup>101</sup> Braithwaite, *Crime, Shame and Reintegration*.

<sup>102</sup> Elmar Weitekamp, "The History of Restorative Justice." In *A Restorative Justice Reader*, edited by Gerry Johnstone. Devon: Willan Publishing, 2003, 111.

<sup>103</sup> Interview with a representative from the Ngati Whatua Trust, 27<sup>th</sup> June 2010, Auckland.

<sup>104</sup> Penal Reform International, 16.

<sup>105</sup> Wayne Rumbles, "Seeing Law in Pre-European Society." Hamilton: Waikato University, 14.

<sup>106</sup> James Guest, "Aboriginal Legal Theory and Restorative Justice." Native Law Centre of Canada, 1999, 338.

<sup>107</sup> The New Zealand Law Commission, *Converging Currents*, 54.

<sup>108</sup> Agnes Naera, Programme Director Equity, Kaiwhakahaere Kaupapa Maori, Auckland University of Technology (AUT), interview with author, 30<sup>th</sup> June 2010, Auckland; Arena Williams, Auckland youth and Law student at the University of Auckland, interview with author, 10<sup>th</sup> May 2010, Auckland; Interview with schoolteacher, 17<sup>th</sup> June 2010, Otago.

<sup>109</sup> Maori word meaning love and care.

<sup>110</sup> Sawatsky, *The Ethic of Traditional Communities*, 70.

<sup>111</sup> James Zion, "Punishment Versus Healing: How Does Traditional Indian Law Work?" In *Justice as Healing: Indigenous Ways*, edited by Amanda McCaslin. Minnesota: Living Justice Press, 2005, 70.

<sup>112</sup> Tristan Anne Borer, *Telling the Truths: Telling Truth and Building Peace in Post-Conflict Societies*. Indiana: University of Notre Dame, 2006, 23.

<sup>113</sup> Patricia Lundy and McGovern Mark. "Community Based Approaches to Post-Conflict Truth Telling: Strength and Limitations." *Shared Space: A research journal on peace, conflict and community relations in Northern Ireland* 1 (2005), 42.

### C) Well-being and rehabilitation

To Māori, justice is a way of life, not just a response to crime. It is *houhou rongō*, literally sewing the seeds for peace.<sup>114</sup> Justice is “a conversation around living.”<sup>115</sup> It is an “everyday thing, so you don’t have a special courtroom, special lawyers or special language.”<sup>116</sup> 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.”<sup>117</sup> 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 wellbeing. Justice, therefore, serves as a means of maintaining or redressing that harmony and balance within the community.<sup>118</sup>

The Māori approach to justice is essentially holistic and oriented towards the maintenance of mutually supportive relationships.<sup>119</sup> 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, recognizing the centrality of emotions.<sup>120</sup> The emphasis on healing is the “necessary manifestation of a [indigenous] world-view.”<sup>121</sup> Zion notes that indigenous justice “attempts to reach into the mind.”<sup>122</sup> It cannot succeed and heal without dealing with the person in its entirety, meaning spiritually, emotionally, physically and mentally.<sup>123</sup> Justice is about healing the spiritual, emotional, physical or mental imbalance in the person, and goes beyond the legal sphere. It allows one to “fix one’s spirit.”<sup>124</sup> This means that justice is not simply about redressing a wrong and restoring a balance, but it is also about healing those involved.<sup>125</sup> It can only be successfully achieved if it restores the “spiritual, emotional and physical balance within the social, environmental, and cosmic sphere.”<sup>126</sup>

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<sup>114</sup> Haare Williams, Kaumatua and Manukau city councilor, interview with author, 18<sup>th</sup> June 2010, Auckland.

<sup>115</sup> Lisa Chant, Professor of Maori Studies, the University of Auckland, interview with author, 10<sup>th</sup> May 2010, Auckland.

<sup>116</sup> Interview with former lawyer and law professor, 20<sup>th</sup> May 2010, Auckland.

<sup>117</sup> Hazlehurst, *Popular Justice and Community Regeneration*, xii.

<sup>118</sup> Thomas, *Maori Justice*, 135.

<sup>119</sup> Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, 1<sup>st</sup> July 2010, Auckland; Interview with schoolteacher, 17<sup>th</sup> June 2010, Otara.

<sup>120</sup> Sawatsky, *The Ethic of Traditional Communities*, 69.

<sup>121</sup> Ross, *Exploring Criminal Justice*, 13.

<sup>122</sup> Zion, *Punishment Versus Healing*, 69.

<sup>123</sup> Gloria Lee, "Defining Traditional Healing." In *Justice as Healing: Indigenous Ways*, edited by Amanda McCaslin. Minnesota: Living Justice Press, 2005, 68.

<sup>124</sup> Interview with a probations officer, 28<sup>th</sup> June 2010, Auckland.

<sup>125</sup> Interview with a member of the New Zealand Parliament and Maori Party, 31<sup>st</sup> May 2010, Wellington.

<sup>126</sup> Nena Benton, "Te Pu Wananga: Some Notes from the Seminars and Consultations with Maori Experts." Paper presented at the 20th Annual Conference of the Australian and New Zealand Law and History Society, Hamilton, 2001, 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*.”<sup>127</sup> In turn, healing those directly affected by wrongdoing contributes to the well-being of the entire community.<sup>128</sup> 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.”<sup>129</sup> 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.<sup>130</sup> This “derives from long held indigenous customs in which kin...seek to meet the need if all involved in a harm situation.”<sup>131</sup>

At a *hui*, “the basic question asked is what happened and how can we fix it?”<sup>132</sup> It seeks to identify the reasons that led a community member to wrong another member,<sup>133</sup> provides a space for exploring and “understanding what made offenders do what they did, who they are, where they come from.”<sup>134</sup> Justice, therefore, is sought when the community tries “to restore that balance within them and between the individuals involved in what happened.”<sup>135</sup> This is done in accordance with the principle of *utu*, which emphasizes reciprocity and the maintenance of harmonious relationships between members of society.<sup>136</sup> Whatever harm has been caused by an item being stolen or damaged, for instance, must be returned or repaired.<sup>137</sup> The kind of reparations must fit the circumstances and needs of all parties, keeping in mind the collective concern for harmony and balance.<sup>138</sup>

Because all community members are considered integral and essential parts of a collective, “it is not as simple as just removing [offenders.]”<sup>139</sup> The emphasis remains on restorative penalties, such as community service.<sup>140</sup> This approach is based on the

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<sup>127</sup> Moana Papa, South Auckland community member, 28<sup>th</sup> June 2010, interview with author, Auckland.

<sup>128</sup> Interview with former lawyer and law professor, 20<sup>th</sup> May 2010, Auckland; Benton, *Te Pu Wananga*, 8.

<sup>129</sup> Sawatsky, *The Ethic of Traditional Communities*, 39.

<sup>130</sup> John Pratt, *Punishment in a Perfect Society. The New Zealand Penal System 1840 - 1939*. Wellington: Victoria University Press, 1992, 35.

<sup>131</sup> Dennis Sullivan, and Larry Tiftt. *Handbook of Restorative Justice: A Global Perspective*. London: Routledge, 2006, 1.

<sup>132</sup> Interview with former lawyer and law professor, 20<sup>th</sup> May 2010, Auckland.

<sup>133</sup> Interview with member of the UN forum on Indigenous Issues, 18<sup>th</sup> May 2010, Auckland.

<sup>134</sup> Moana Papa, South Auckland community member, 28<sup>th</sup> June 2010, interview with author, Auckland.

<sup>135</sup> Interview with member of the UN forum on Indigenous Issues, 18<sup>th</sup> May 2010, Auckland.

<sup>136</sup> Government of New Zealand, *He Hinatore Ki Te Ao Maori*, 7; Interview with a representative from the Ngati Whatua Trust, 27<sup>th</sup> June 2010, Auckland.

<sup>137</sup> Interview with executive member of Nga Tauira Maori Auckland Maori Student Association, 12<sup>th</sup> May 2010, Auckland; Interview with social worker, 22<sup>nd</sup> July 2010, Auckland; Interview with member of the UN forum on Indigenous Issues, 18<sup>th</sup> May 2010, Auckland.

<sup>138</sup> Government of New Zealand, *He Hinatore Ki Te Ao Maori*, 67; and Custom Law, Robert, *Māori Customary Laws and Institutions*, 4.

<sup>139</sup> Agnes Naera, Programme Director Equity, Kaiwhakahaere Kaupapa Maori, Auckland University of Technology (AUT), interview with author, 30<sup>th</sup> June 2010, Auckland.

<sup>140</sup> Penal Reform International, 22.

understanding that removing someone from the community, such as sending him through the penitentiary system, 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.<sup>141</sup> 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.

### III Implications for Transitional Justice

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 argues that “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.”<sup>142</sup> Over the years, Māori have remained critical towards New Zealand’s legal apparatus, which many viewed as a “system imposed upon them by an aggressive colonizer,”<sup>143</sup> and which incessantly worked against indigenous communities and their rights.<sup>144</sup> The existing legal system never fully empowered Māori communities to take care of their own, according to their own traditions and beliefs.<sup>145</sup> Despite the increasing number of Māori going through the criminal justice system, the latter continued to uphold the values and to adjust to the needs of the settler society.<sup>146</sup> Following 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,” Family Group Conferencing (FGCs) were set up.<sup>147</sup> The FGC model put in place by the New Zealand government is often said to epitomize the restorative justice approach.<sup>148</sup> It is also frequently presented as a Māori process.<sup>149</sup>

In fact, part of the debate surrounding restorative practices and traditions concerns “claims that restorative justice draws on traditional processes for resolving disputes among indigenous peoples.”<sup>150</sup> Daly has coined this the “myth of origin,” according to

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<sup>141</sup> Interview with social worker, 22<sup>nd</sup> July 2010, Auckland.

<sup>142</sup> Marie, Dyhrberg, "Maori Based Justice: An Alternative Dispute Resolution in the Criminal Justice System." Paper presented at the The Fifth International Criminal Law Congress, Sydney, 25-30th September 1994, 6.

<sup>143</sup> Jane Kesley, "Legal Imperialism and the Colonization of Aotearoa." In *Tauīwi: Racism and Ethnicity in New Zealand*, edited by Paul Spoonley, Cluny MacPherson, Davis Pearson and Charles Sedwick, Wellington: Dunmore, 1984, 21.

<sup>144</sup> Larissa Behrendt, *Aboriginal Dispute Resolution*. Mayborough: The Federation Press, 1995, 71.

<sup>145</sup> Jim Consedine, *Restorative Justice: Healing the Effect of Crime*. Christchurch: Ploughshares, 1995, 81.

<sup>146</sup> Moana Jackson, "The Māori and the Criminal Justice System a New Perspective: He Whaipaanga Hou Part 2." Wellington: Department of Justice, 1988, 262.

<sup>147</sup> Erik Luna, "Reason and Emotion in Restorative Justice."

<http://www.scoop.co.nz/stories/GE0007/S00014.htm>.

<sup>148</sup> Maxwell, Gabrielle, and Allison Morris. "Youth Justice in New Zealand: Restorative Justice in Practice?" *Journal of Social Issues* 62, no. 2 (2006), 239.

<sup>149</sup> Interview with former lawyer and law professor, 20<sup>th</sup> May 2010, Auckland.

<sup>150</sup> Chris Cunneen, "Reviving Restorative Justice Traditions?": University of New South Wales Faculty of Law Research Series, 2008, 1.

which restorative justice “uses indigenous justice practices and was the dominant form of pre-modern justice.”<sup>151</sup> 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.<sup>152</sup> 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. Hakiaha expresses concerns at the New Zealand government’s use of Māori principles, which may result, in his view, in “the dilution, bastardization and disenfranchisement of these revered and sacred principles.”<sup>153</sup>

This amalgamation between restorative justice practices and indigenous approaches illustrates the worrisome propensity to romanticize and homogenize indigenous philosophies and practices.<sup>154</sup> It is also symptomatic of the transitional justice literature. More often than not, customary mechanisms of justice are described using our own conceptual tools, without any critical evaluation of the implications this has for the quality and relevance of the transitional justice research. Indeed, customary mechanisms of justice are generally described as embodying a mix of restorative and retributive values.<sup>155</sup> Seldom, are they ever considered and examined outside of the existing conceptual framework used to think about justice mechanisms in transitional justice, namely using the retributive, reparative and restorative approaches.

Indeed, the Māori along with a number of other indigenous communities adopt a relational understanding of the self. The strength of Māori communities and approach to justice comes from a deep-seated sense of collective identity, which informs every aspect of living and knowing.<sup>156</sup> Such an understanding fundamentally differs from that of a society, which views the self as a fully independent and autonomous entity.<sup>157</sup> Clark explains that the Western legal tradition is anchored in an “understanding of events as interactions between independent objects.” With deep roots in individualism, the Western, Eurocentric justice tradition, embodied in the retributive, reparative restorative approaches, is unable to detach itself from the idea of justice used as a means of social control and punishment of individuals who violate the rule of law. It also generally

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<sup>151</sup> Kathleen Daly, "Restorative Justice: The Real Story." In *Restorative Justice: Critical Issues*, edited by Eugene McLaughlin, Ross Fergusson, Gordon Hughes and Louise Westmarland, 195-214. London: Sage Publication, 2003, 195.

<sup>152</sup> Jim Consedine, *Restorative Justice: Healing the Effect of Crime*. Christchurch: Ploughshares, 1995.

<sup>153</sup> Hakiaha, Matt. "What Is the State’s Role in Indigenous Justice Process." In *Critical Issues in Restorative Justice*, edited by Howard Zehr and Barbara Towes, Devon: Willan Publication, 2004, 358.

<sup>154</sup> See for instance, Maureen Cain, "Orientalism, Occidentalism and the Sociology of Crime." *British Journal of Criminology* 40 (2000): 239-60.

<sup>155</sup> Joanna Quinn, "The Thing Behind the Thing : The Role and Influence of Religious Leaders in the Use of Traditional Practices of Justice in Uganda." Paper presented at the Canadian Political Science Association, Ottawa, 2009, 8.

<sup>156</sup> Tuhiwai Smith, *The Native and Neoliberal Down Under*, 343.

<sup>157</sup> Val Napoleon, "By Whom and by What Processes Is Restorative Justice Defined and What Bias Might This Introduce?" In *Critical Issues in Restorative Justice*, edited by Howard Zehr and Barbara Towes, New York: Criminal Justice Press, 2004, 40; And see Michael Asch, "Indigenous Self-Determinism and Applied Anthropology in Canada: Finding a Place to Stand." *Anthropological* XLIII, no. 2 (2001): 204-205.

“assumes that the voice of the community is the same as the voice and values of the state.”<sup>158</sup>

Moreover, this liberal principle of individuation, although culturally and historically specific, serves to shape much of existing conceptions of how to carry out justice in transitional societies.<sup>159</sup> Nagy, who is highly critical of what she refers to as the “global project,” accuses transitional justice of seeking to “produce subjects and truths that align with market democracy and are blind to gender and social justice.”<sup>160</sup> Lundy and McGovern, who denounce international efforts for promoting “a pattern of development determined by the dominant ideology of neo-liberalism,” echo Nagy’s concern.<sup>161</sup> Transitional justice, just like peacebuilding, with which it is often associated, is informed by a given “epistemic knowledge base and ontological view of the world” which influences the strategies employed and promoted in order to carry out justice.<sup>162</sup>

Assuming that the restorative justice approach to justice is identical to indigenous (and in this case, Māori) approaches to justice is hugely problematic. Failing to look at justice from an indigenous perspective runs the risk of misrepresenting and re-appropriating indigenous mechanisms to fit the western individualistic brief. The Māori conception and processes of justice are “based on a different cultural orientation than the Western model.”<sup>163</sup> Part of the difficulty lies in the fact that the underlying philosophy of Māori practices and approach to justice are not well understood.<sup>164</sup>

Customary mechanisms and philosophies of justice have long been overlooked and under-researched in the literature on transitional justice. Mostly out of pragmatism, and in response to their growing use in post-conflict societies, transitional justice scholars have started to pay more attention to traditional justice practices and customary law. Yet, there is still very little knowledge about what they can and cannot achieve. I content that the lack of conceptual imagination of transitional justice scholars has limited their approach to these mechanisms and their ability to engage with the beliefs and conception of justice they generally embody. In my view this tendency to simply equate restorative justice and other legal and overly individualistic conceptions of justice with indigenous approaches is harmful and dangerous for it risks rendering the transitional justice scholarship homogenizing and universalizing, at the detriment of local preferences and practices.

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<sup>158</sup> Jenkins, *How Do Culture, Class and Gender Affect the Practice of Restorative Justice*, 322.

<sup>159</sup> Bhikhu Parekh, “The Cultural Particularity of Liberal Democracy.” In *The Prospects for Democracy*, edited by David Held, California: Stanford University Press, 1993, 157.

<sup>160</sup> Rosemary Nagy, “Transitional Justice as Global Project: Critical Reflections” *Third World Quarterly* 29, no. 2 (2008), 275.

<sup>161</sup> Patricia Lundy and Mark McGovern. “The Role of Community in Participatory Transitional Justice.” In *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, edited by Kieran McEvoy and Lorna McGregor, Oxford: Hart Publishing, 2008, 104.

<sup>162</sup> Oliver Richmond, “Beyond Liberal Peace? Responses to Backsliding.” In *New Perspectives on Liberal Peacemaking*, edited by Edward Newman, Roland Paris and Oliver Richmond, New York: UN University Press, 2009, 69.

<sup>163</sup> Dyhrberg, *Māori Based Justice*, 7.

<sup>164</sup> Jackson *The Māori and the Criminal Justice System*, 38; And Interview with a Kaumatua, 13<sup>th</sup> June 1010, Rotorua.

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