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Catriona Anne Ferguson

Culture, Tradition and Alternative Justice: An Evaluation of Restorative Justice  
Developments in New Zealand and Northern Ireland

Abstract:

*This thesis is a piece of comparative research assessing the extent to which restorative justice may be said to resonate particularly with certain cultures. It focuses on two jurisdictions within which restorative justice features strongly, particularly in the youth justice context: New Zealand and Northern Ireland. The thesis will discuss the ways in which restorative justice has evolved over the years, from its earliest roots of community-based dispute resolution through to current practices of youth conferencing. It examines how effectively contemporary restorative justice practices have been integrated into the respective justice systems of these nations, and the factors which may have influenced this level of success. The cultural heritage of New Zealand and the unique social and political features within Northern Ireland are suggested as possible dynamics affecting the successful integration of restorative justice.*

Culture, Tradition and Alternative Justice: An Evaluation of  
Restorative Justice Developments in New Zealand and  
Northern Ireland

Catriona Anne Ferguson, LL.B.

Durham Law School

Durham University

Master of Jurisprudence

2015

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## Statement of Copyright

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## **Introduction**

With its emphasis on reparation and rehabilitation over retribution and punishment, restorative justice represents something of a change of direction within the field of contemporary criminal justice. In other ways however, it merely signifies a return to more ancient and traditional archetypes of justice. Several indigenous cultures once utilised a restorative outlook within the dispensation of day-to-day justice, and indeed certain of these still do to some extent. Still others have adopted restorative justice practices as a bottom-up response to political, economic or social conflicts. The focus of this work will be on two jurisdictions that have encapsulated the above factors during the implementation of restorative justice mechanisms as an answer to offending.

For many hundreds of years, the indigenous peoples of New Zealand – the Maori – favoured a system wherein victims were compensated for harms suffered and offenders were encouraged in societal reintegration. Communities were actively involved in the resolution of offending. These values and practices were curbed upon European colonisation of New Zealand but have seen a recent resurgence in the form of family group conferences, legislated for by the Children, Young People and Their Families Act 1989 in accordance with Maori consultation. This development made New Zealand the first country to institutionalise a form of restorative justice. Northern Ireland, on the other hand, largely owes its current restorative justice framework to the conflicts of the ‘Troubles’ - although it does have a more archaic connection through the early Brehon laws, characterised by a reparative attitude to dispute resolution. Communities in Northern Ireland developed these methods of alternative, restorative justice as recourse from punishment violence and out of a desire to avoid taking disputes through the route of deeply mistrusted state mechanisms. Since reforms made in the wake of the Belfast Agreement, these community-led initiatives have worked alongside, though not always in cooperation with, the state-based Youth Conferencing Service. Restorative conferencing emerged as a result of the Belfast Agreement and, like New Zealand, was thereby placed on a statutory footing. As such, these are two nations whose restorative justice scenes have been very much framed by cultural and political conflicts and developments, making them ideal subjects for comparative analysis.

The objective here is to provide in-depth analysis as to the successful integration of contemporary restorative justice practices in two nations at the forefront of the restorative justice movement. The thesis will examine the evolution of restorative justice processes from

their earliest beginnings as tribal mechanisms of dispute resolution, to modern methods of restorative youth conferencing. These contemporary practices will then be evaluated in order to establish how successfully they have been implemented in the respective youth justice systems of New Zealand and Northern Ireland. The focus of this work ultimately intends to ask whether restorative justice resonates particularly with certain cultures and, if this is the case, which features of these cultures enable its effective integration into a criminal justice system. This will involve a precise examination of specific social, political and cultural factors in unearthing the possible dynamics behind successful restorative justice practices.

The essence of this discussion is predominantly theory-based, thus no fieldwork was undertaken. Rather, the evaluative aspect of the work was carried out through desk-based research synthesising the relevant literature. The nature of the research is comparative, analysing the varying restorative justice initiatives developed within the jurisdictions of New Zealand and Northern Ireland. As with most research methods however, comparative research does have its drawbacks. It is generally the case that studies comparing the laws of different justice systems are carried out with the purpose of assessing their suitability for use in other jurisdictions. The difficulties in predicting this suitability is a major challenge to the user of comparative research. No two countries and no two justice systems are exactly alike, and the myriad economic, political, social and cultural factors at play create a highly complex situation wherein success in one jurisdiction does not equate to universal success. To put it simply: what works for one country will not necessarily work for another. Kahn-Freund likens this issue to that of organ transplantation in humans, stressing the importance of asking whether a foreign body will 'accept' or 'reject' the organ before attempting the transplant.<sup>1</sup> It must therefore be kept in mind that any research demonstrating the success of restorative justice does not necessarily mean it is appropriate in all jurisdictions or scenarios, and vice versa. Notwithstanding the above, comparative research remains a very useful tool in assessing alternative legal developments with a view to implementing change. An additional obstacle when conducting research of a comparative nature is that of researcher subjectivity. For example, it is conceivable that in evaluating other cultures, there is the risk that researchers may view alternative practices from their own, differing cultural viewpoint.<sup>2</sup> Awareness of this issue on the part of researchers is vital in maintaining an attitude of neutrality.

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<sup>1</sup> Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' [1974] 37(1) MLR 1, 6.

<sup>2</sup> Linda Hantrais, 'Contextualisation in Cross-National Comparative Research' [1999] 2(2) *International Journal of Social Research Methodology* 93, 103.

The first chapter of this work will act as a general introduction to the concept of restorative justice. It will provide an overview of the core principles and processes underpinning this model of justice. There are many viewpoints as to what precisely constitutes a restorative justice practice, and of foremost concern in this chapter will be to attribute a working definition to the term. This will draw on the work of key commentators in the field to acknowledge the strengths and weaknesses of the chosen definition. The central themes of restorative justice will also be considered, and such issues as perceptions of offending, the role of the victim in criminal justice, and treatment of offenders will be discussed. Additionally, the chapter will reflect upon the role of punishment in justice, and question whether restorative justice and imprisonment are irreconcilable concepts. Finally, the predominant methods of restorative justice will be explored. The most prevalent form in this work will be restorative conferencing; however it is also important to recognise that there are a wide range of practices included under the restorative justice umbrella, from victim-offender mediation to sentencing circles. Combined, these elements should provide a firm understanding of the fundamental values of restorative justice, creating a foundation of knowledge on which to build in the subsequent evaluative chapters.

The second chapter of this work will provide a detailed insight into the history of restorative justice in New Zealand. This will devote particular attention to Maori responses to offending, as well as the factors which led to New Zealand implementing the first institutionalised form of restorative justice. In considering Maori attitudes this chapter will explore not only the underlying philosophies of their justice mechanisms, but also the tangible elements of dispute resolution including principles of redress. Of key importance will be the disruption to Maori society caused by European colonisation and the signing of the Treaty of Waitangi in 1840. The extensive variety of ways in which the settlers attempted to undermine and weaken traditional Maori structures will be illustrated, in addition to the consequent catastrophic rise in Maori offending, particularly among young people. This increased rate of offending led to recognition of a need for change at a legislative level, and following unprecedented consultation with Maori elders the Children, Young People and Their Families Act 1989 was implemented. The key features of this Act will thus be examined, with particular focus on the introduction of family group conferencing for young offenders. This chapter should provide an in-depth understanding of both the history and current standing of restorative justice in New Zealand. This knowledge will be used in subsequent chapters in evaluating the link between the success of restorative justice practices and cultural dynamics.

Chapter III will perform the same essential function as Chapter II, only this time from a Northern Ireland perspective. The focus of this chapter will rest on both the earliest roots of restorative justice and contemporary initiatives implemented in the aftermath of the ‘Troubles’. It will detail firstly the system of Brehon laws, discussing the literature on these ancient customs. The ways in which restorative justice values are reflected in these laws will be considered, however it will also be shown that there are difficulties in regarding certain aspects of the Brehon system as fully restorative in nature. Following this, the chapter will trace the timeline of colonisation eventually leading to English rule over Ireland and the subsequent conflict in Northern Ireland - commonly known as the ‘Troubles’. Tentative steps towards peace in the form of the Belfast Agreement will be an important feature of this chapter, as consequent reviews and reforms led to greater recognition of the values of restorative justice. In addition to this, the rift between community and state caused by conflict in Northern Ireland will be explored, with reference to the resulting culture of self-policing and punishment violence. Of great importance will be discussion of the principal community-based restorative justice programmes in Northern Ireland as an alternative form of justice, enabling the avoidance of mistrusted state institutions. Finally, Chapter III will detail the course of state reforms in introducing the Youth Conferencing Service as well as illustrate the process of these restorative conferences.

Chapter IV will build upon the knowledge gained in Chapters II and III by examining the success of contemporary restorative justice initiatives in New Zealand and Northern Ireland. It will compile empirical evidence from a variety of sources in an attempt to measure the extent to which restorative justice programmes have affected the youth justice systems of the two nations in question. This research will be used in the final chapter of this work in order to assess whether restorative justice does indeed resonate particularly with certain cultures. Of primary importance in Chapter IV will be to specify precisely what is meant when the term ‘success’ is used. The measures used in this evaluation will be identified as victim satisfaction and recidivism. Reasons for limiting the research to these measures will be provided, however the potential weaknesses of these factors will also be acknowledged. Following this, the greater part of the chapter will be devoted to outlining the substantive evidence available within the field. A range of sources will be used, from meta-analyses of restorative justice to individual case studies of restorative youth conferencing. Where available in consideration of reoffending levels, official statistics will be used. The chapter will conclude with a brief discussion comparing and contrasting the evidence gathered from

New Zealand and Northern Ireland, assessing whether either system is producing more positive outcomes or long-lasting results.

Pursuant to the research compiled in Chapter IV, Chapter V will comprise an in-depth analysis of the relationship between the relative success of restorative justice and pre-existing cultural ideals within both New Zealand and Northern Ireland. Reflecting on the results uncovered in the previous chapter, this chapter will endeavour to evaluate the connection between the level of success restorative justice has had in each jurisdiction and the cultural factors – be they historical, political, economic or social – which have influenced this. This will additionally involve drawing on the knowledge expounded in Chapters II and III in order to examine how, for example, Maori protocols or the ‘Troubles’ have laid the foundations for, and shaped the success of, contemporary restorative justice initiatives. The roles of state and community will be considered in detail, with evaluation of the extent to which these entities may be responsible for successful integration of restorative justice. This will involve discussion on both community-led and state-based practices. Impairment to cultural identities and ideologies will be discussed, as restorative justice may be attributed to the healing of such harms. In addition to this, procedural aspects of restorative justice programmes must not be discounted, as certain features of the youth conferencing processes in question may well have affected outcomes equally as much as cultural factors. Through consideration of these elements, it is hoped that this chapter will assist in drawing conclusions as to what facets contribute towards the successful implementation of restorative justice into a given criminal justice system.

## **Chapter I**

### **An Introduction to Restorative Justice**

This chapter provides a concise overview of the key tenets of restorative justice. The aim is to develop a firm understanding of the core themes of this field of justice, as well as to recognise some of the challenges facing proponents of restorative justice at this time. It seeks to cultivate a well-rounded basis of knowledge with which to approach an evaluation of restorative justice developments in New Zealand and Northern Ireland throughout the remainder of this work. The difficulties in establishing a single, universally accepted definition must be acknowledged, whilst a working definition for the purposes of this work will be provided. The chapter will then consider the central elements of restorative justice, exploring in particular the roles of the key stakeholders, including the involvement of communities, as well as the differing perspectives on crime according to both restorative and retributive viewpoints. The evolution of restorative justice practices will also be explored, tracing the birth of state punishment and its impact on traditional methods of justice. Finally, the chapter will outline the predominant forms restorative justice may take, integrated to various degrees within their respective justice systems. This will place particular emphasis on conferencing techniques, as restorative youth conferencing will form the basis of discussion for restorative justice practices in New Zealand and Northern Ireland in subsequent chapters.

### **Defining Restorative Justice**

In recent years, restorative justice has developed rapidly in the field of criminal justice at an international level. Despite this however, there remains uncertainty, discord and a significant level of “conceptual confusion”<sup>3</sup> over precisely what qualifies as a ‘restorative justice’ practice. As Gavrielides observes, “[a]rguably, the only agreement that exists in the literature regarding [restorative justice’s] concept is that there is no consensus as to its exact meaning.”<sup>4</sup> Problems arise in considering the wide range of processes that restorative justice has the potential to encompass. From one-on-one victim-offender mediation sessions to restorative police cautioning techniques, the breadth of restorative justice has resulted in

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<sup>3</sup> James Dignan, *Understanding Victims and Restorative Justice* (Open University Press 2005) 2.

<sup>4</sup> Theo Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy* (Helsinki, European Institute for Crime Prevention and Control 2007) 37.

dispute over which features must be present for the process to be truly classified as 'restorative'.

An example of the above issue is raised by McCold, who claims that there exists - to some extent - a spectrum of restorative justice, whereby some practices are essentially more restorative than others.<sup>5</sup> It has been claimed that "[t]he degree to which all three [of the victim, offender and their communities of care] are involved in meaningful emotional exchange and decision-making is the degree to which any form of social discipline can be termed fully 'restorative'."<sup>6</sup> McCold suggests that only where all three stakeholders are present in a face-to-face scenario is a process fully restorative, dubbing these processes as "primary restorative justice practices".<sup>7</sup> The difficulties in attributing a universal definition to restorative justice are therefore evident. Nonetheless, certain advocates of restorative justice have attempted to afford a firm definition to the concept, with perhaps the most well-renowned provided by Marshall. This states that, "[r]estorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of that offence and its implications for the future."<sup>8</sup>

Whilst the above formulation will be adopted in this work, and arguably delivers a succinct and helpful characterisation of restorative justice, it is not without its limitations. It has been criticised from multiple commentators for being "highly restrictive"<sup>9</sup> and limiting in its scope. One of the foremost issues with Marshall's definition is the requirement for direct contact between victim and offender. This excludes methods of restorative justice whereby a victim supporter is used, for example, or circumstances in which indirect or shuttle mediation is necessary. As Zernova and Wright state, "it limits restorative justice to instances where 'coming together' can take place and excludes from the restorative justice 'tent' situations where a face-to-face meeting between victims, offenders and their communities is either

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<sup>5</sup> Paul McCold, 'The Recent History of Restorative Justice: Mediation, Circles and Conferencing' in Dennis Sullivan and Larry Tiftt (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge 2007) 23.

<sup>6</sup> Paul McCold and Benjamin Wachtel, 'In Pursuit of Paradigm: A Theory of Restorative Justice' (Rio de Janeiro: Brazil, paper presented at the XIII World Congress of Criminology 10-15 August 2003) 3. Available online at <[http://www.iirp.edu/iirpWebsites/web/uploads/article\\_pdfs/paradigm.pdf](http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/paradigm.pdf)> accessed 16 March 2015.

<sup>7</sup> Paul McCold, 'Primary Restorative Justice Practices' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing Ltd. 2001) 41.

<sup>8</sup> Tony Marshall, *Restorative Justice: An Overview* (Home Office: Research Development and Statistics Directorate 1999) 5.

<sup>9</sup> Jim Dignan, 'Restorative Justice and the Law: The Case for an Integrated Systemic Approach' in Lode Walgrave (ed), *Restorative Justice and the Law* (Willan Publishing 2002) 172.



impossible or undesirable.”<sup>10</sup> Shapland et al. support this position, claiming that Marshall’s wording “does not include indirect reparative punishments such as community service, where victim and offender have no contact with each other.”<sup>11</sup> At the same time, the definition has been criticised for being too broad in scope, in that it makes no direct reference to the reparative qualities of restorative justice in repairing the harm done to victims.<sup>12</sup> In spite of these factors, Marshall’s definition remains one of the more widely accepted depictions of what restorative justice entails. In order to understand more fully the concept of restorative justice however, further examination of its underlying principles is necessary.

### **Core Themes of Restorative Justice**

#### ***Crime as conflict***

A key tenet of restorative justice is its perception of crime as conflict in comparison to a state-based, conventionally punitive reaction to offending, which takes the traditional retributive stance on justice claiming that sufficiently severe punishment will result in deterrence from future offending. Dispute was once viewed as conflict between individuals<sup>13</sup> and restorative justice aims for a return to this mindset. Daly and Immarigeon expand upon this, noting that restorative justice “emphasises the repair of harms and of ruptured social bands resulting from crime; it focuses on the relationships between crime victims, offenders and society.”<sup>14</sup> It allows for the process to heal the parties involved and creates a sounding board for meaningful reparation, rather than meting out abstract punishments that are entirely unrelated to the offence committed. It should be noted that the process itself is intended to be restorative, not only the end result; the reparative effect of the voluntary nature of the process and opportunity for participants to actively partake in the distribution of justice should not be underestimated. Examples of restorative outcomes, aside from the potential of an apology from the offender, may include monetary compensation, some form of community service, agreement to undergo rehabilitation or, on occasion, a period in custody.

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<sup>10</sup> Margarita Zernova and Martin Wright, ‘Alternative Visions of Restorative Justice’ in Gerry Johnstone and Daniel W Van Ness (eds), *Handbook of Restorative Justice* (Routledge 2011) 92.

<sup>11</sup> Joanna Shapland et al., ‘Situating Restorative Justice Within Criminal Justice’ [2006] 10(4) *Theoretical Criminology* 505, 507.

<sup>12</sup> Supra [10].

<sup>13</sup> Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Willan Publishing 2002) 12.

<sup>14</sup> Kathleen Daly and Russ Immarigeon, ‘The Past, Present, and Future of Restorative Justice: Some Critical Reflections’ [1998] 1(1) *The Contemporary Justice Review* 21, 21.

Restorative justice focuses primarily on the damage done to the relationship between victim and offender, placing the conflict between these two parties at the forefront, and emphasising the need for redress in order to restore balance to the relationship. As Zehr explains, “[c]rime then is at its core a violation of a person by another person, a person who himself or herself may be wounded. It is a violation of the just relationship that should exist between individuals.”<sup>15</sup> It is because of this that advocates of restorative justice believe conflict should be returned to the individual, as crime is perpetrated first and foremost against people, not against the entity of the state. Thus proponents of restorative justice regard offending “primarily as a breakdown in relationships between individuals, and only secondly as a violation of the law”.<sup>16</sup>

### ***Voluntariness***

Key pre-requisites for all forms of restorative justice are voluntary consent by all parties and the offender’s admission of guilt as to the offence. The importance of this is noted by Stuart, who states that, “[v]oluntary participation is not a weakness, but strength of the process. The parties are involved because they choose the [restorative justice] process over other alternatives.”<sup>17</sup> This ensures a higher degree of cooperation from participants and a willingness to create an outcome appropriate for all involved. As Gavrielides observes, it is necessary for all those involved to participate “out of their own free will and desire to reconcile and restore their relationship in a sincere and humane way.”<sup>18</sup> As such, parties must not be coerced or forced into taking part in a conference, as this would be to risk doing more harm than good. If the offender is not willing to make right the damage caused by the offence, victims may be left feeling even more deprived of a just result than they would through the formal legal process.

### ***The importance of a victim-oriented system***

The vast majority of westernised societies are the subject of criminal justice systems that prioritise the punishment of wrongdoers in an attempt to deter from future offending, rather than helping and compensating the victim. As a result, it must regrettably be acknowledged

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<sup>15</sup> Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (3<sup>rd</sup> edn, Herald Press 2005) 182.

<sup>16</sup> Kevin Haines and David O’Mahony, ‘Restorative Approaches, Young People and Youth Justice’ in Barry Goldson and John Muncie (eds), *Youth Crime and Justice* (London, Sage Publications 2006) 110.

<sup>17</sup> Barry Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles* (Ontario, Department of Justice of Canada 1997) 10.

<sup>18</sup> *Supra* [4], 33.

that the victim is very much the “forgotten player”<sup>19</sup> in the criminal justice process nowadays, and this must necessarily be the case in a society where the interests of victims are considered secondary to those represented by the state.

The role of the victim in the criminal justice system is almost solely limited to that of witness which, as Doak et al. describe, is “primarily instrumental”.<sup>20</sup> The victim is sidelined by the process and receives no true reparation for the harm suffered; they are instead meted out a form of ‘justice’ which is very much distanced from the nature of the offence. Pollard observes this in terms of crime having been “de-personalised”<sup>21</sup> for offenders, who are no longer held accountable for the harms they have caused to another but are instead brought before the anonymous face of the state. As such, victims are treated very much as subjects of the criminal justice system, rather than viable participants with needs to be met.<sup>22</sup> Not only this, but victims are often treated with little respect in the courtroom, often subjected to cross-examination close to harassment, and frequently are not kept abreast of procedural developments in their case.<sup>23</sup> It is therefore the case that the victim’s role in the criminal justice system has been severely curtailed, and the outcome of the process is a result scarcely deserving of the name ‘justice’.

In the realms of the conventional justice system, victims are offered very little opportunity to go beyond the simple facts of the incident, forced to stay within the confines of questions put to them by legal professionals, where often what they desire most is the provision of a cathartic outlet for telling their account of events. This is where the victim-centred approach offered by restorative justice provides real potential for helping the victims of crime. As Zehr observes, “[v]ictims need opportunities and arenas to express their feelings and their suffering, but also to tell their stories. They need to have their ‘truth’ heard and validated by others.”<sup>24</sup> Moreover, when an individual has suffered the effects of an offence it seems reasonable that they should be central to the resolution of the incident. True reparation through the use of restorative justice may aid in the process of emotional recovery. This is

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<sup>19</sup> Ian Edwards, ‘An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making’ [2004] 44(6) *Brit J Criminol* 967, 967.

<sup>20</sup> Jonathan Doak, Ralph Henham and Barry Mitchell, ‘Victims and the Sentencing Process: Developing Participatory Rights?’ [2009] 29(4) *LS* 651, 654.

<sup>21</sup> Charles Pollard, ‘Victims and the Criminal Justice System: A New Vision’ [2000] *Crim L R* 5, 8.

<sup>22</sup> See Jo-Anne Wemmers, ‘Where Do They Belong? Giving Victims a Place in the Criminal Justice Process’ [2009] 20 *Crim L F* 395.

<sup>23</sup> Antonia Cretney and Gwynn Davis, ‘Prosecuting Domestic Assault: Victims Failing Courts, or Courts Failing Victims?’ [1997] 36(2) *The Howard Journal of Criminal Justice* 146, 150.

<sup>24</sup> *Supra* [15], 27.

supported by Gal, who states that “[t]o be treated as an individual subject of rights, with legitimate interests in the particular case and with valid expectations from the process and its outcomes, can be no less than a healing experience for victims.”<sup>25</sup>

### *Attitudes towards offenders*

Restorative justice differs from the conventional criminal justice system substantially in its treatment of offenders. Where traditional justice favours an approach involving the stigmatisation and degradation of offenders, restorative justice encourages the wrongdoer to assume responsibility for their actions and make good the harm done, the aim being to reduce the chance of further offending whilst restoring the victim. This is not to say however, that the seriousness of the offender’s actions is in any way mitigated. As Zehr observes, “there is usually a moral imbalance that must be explicitly acknowledged. Someone has caused harm and someone has been harmed, and that fact is placed at the centre of the encounter.”<sup>26</sup> Moreover, an important component of restorative justice is to help offenders in facing the victim they have harmed, a dynamic missing in the conventional justice system. Christie explains this further, stating that the “offender has lost the opportunity to explain himself to a person whose evaluation of him might have mattered. He has thereby also lost one of the most important possibilities for being forgiven.”<sup>27</sup> This is an element lacking within all areas of the conventional criminal justice system, from cautioning through to sentencing there is little opportunity for offenders to open a dialogue with those they have harmed. As such, offenders are largely robbed of the opportunity to redress the balance thrown off kilter through their wrongdoing.

Critics of restorative justice often target its attitudes towards offenders as a major deficiency of the field, claiming it to be a ‘soft’ approach or, as Coker terms it, “cheap-justice”.<sup>28</sup> It is submitted here that this is not the case at all, and in fact the assumption of responsibility required of offenders arguably makes it a far more meaningful process. This is in contrast to the conventional criminal justice approach which, as Morris observes, “is trivialised by processes in which victims have no role ... and in which offenders are not much more than

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<sup>25</sup> Tali Gal, *Child Victims and Restorative Justice: A Needs-Rights Model* (Oxford University Press 2011) 123.

<sup>26</sup> Howard Zehr, ‘Restorative Justice, Mediation and ADR’ (Restorative Justice Blog, 13 August 2010). Available online at <<http://emu.edu/now/restorative-justice/2010/08/13/restorative-justice-mediation-and-adr/>> accessed 12 January 2014.

<sup>27</sup> Nils Christie, ‘Conflicts as Property’ [1977] 17(1) *Brit J Criminol* 1, 9.

<sup>28</sup> Donna Coker, ‘Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking’ [1999] 47 *UCLA L Rev* 1, 85.

passive observers.”<sup>29</sup> In the criminal courts, lawyers speak on behalf of the key stakeholders and defendants may only speak to confirm their name or enter a plea. Conversely, restorative justice creates an environment whereby offenders are obliged to actively participate in the justice process. Sentences are not simply handed down by authority figures, but rather offenders must listen to their victim, respond to the harm they have caused, and face up to the reality of making right this harm. They are also presented with the opportunity to explain their actions and apologise to the victim, a feature often stated to be the most profound aspect of the restorative justice process. It forces offenders to face both their victims and the reality of the offence, making them confront the impact crime can have on almost every aspect of the victim’s life. As Doolin et al. note, “[t]he presence of victims means that it is harder for offenders to insulate themselves from the victim, and rationalisations for their offending can be challenged more directly”.<sup>30</sup> In addition, the outcome of a restorative justice process should induce the offender to compensate the victim in a way that is intrinsically linked to the offence itself. This will render them not only *accountable* for the crime as the conventional justice system would see it, but encourage them to be actually *responsible* for it.<sup>31</sup> As such, the process of restorative justice is a difficult one for offenders and in no way simply the ‘easy option’ in comparison to the conventional criminal justice system.

### ***Involvement of communities***

A major feature of restorative justice is that it draws on the ‘communities of care’ surrounding the victim and offender. There is much dispute over this concept: just what constitutes a ‘community’ in today’s society, where in many parts of the world traditional conceptions of community arguably no longer exist? This often is not a matter of any specific geographical area<sup>32</sup> but rather the support network of each individual, which may involve family, friends and teachers. As McCold and Wachtel explain, “[c]ommunity is a feeling, a perception of connectedness”<sup>33</sup> either to individuals or a group. Having this form of community focus can provide a strong foundation for the two principle stakeholders in the offence, both in helping them through the process and upholding the outcomes. The victim

<sup>29</sup> Allison Morris, ‘Critiquing the Critics: A Brief Response to Critics of Restorative Justice’ [2002] 42(3) Brit J Criminol 596, 604.

<sup>30</sup> Katherine Doolin et al., *Whose Criminal Justice? State or Community?* (Waterside Press 2011) 149.

<sup>31</sup> *Supra* [15], 40.

<sup>32</sup> *Supra* [8], 29.

<sup>33</sup> Paul McCold and Benjamin Wachtel, ‘Community Is Not a Place: A New Look at Community Justice Initiatives’ (Albany: New York, paper presented to the International Conference on Justice Without Violence 5-7 June 1997). Available online at <[http://www.iirp.edu/article\\_detail.php?article\\_id=NDc1](http://www.iirp.edu/article_detail.php?article_id=NDc1)> accessed 17 March 2015.

may be aided in their emotional, physical or psychological recovery, and the offender is provided with support in societal reintegration and the prevention of recidivism. The importance of reintegration into society for offenders should not be under-estimated as the effects of stigmatisation following offending are likely to be substantial, and social inclusion by communities may be vital for individuals to feel accepted.<sup>34</sup> This is recognised by Stuart, who notes that it is down to these communities of care to “recognise people return from jail less connected to their communities and more inclined to dysfunctional behaviour.”<sup>35</sup> It has been suggested that it is not merely beneficial for the offenders when communities play a part in their reintegration, but that it is actually a social obligation of sorts in order to maintain community relationships. Zehr and Mika explain this further, stating that communities have “responsibilities to support efforts to integrate offenders into the community, to be actively involved in the definitions of offender obligations and to ensure opportunities for offenders to make amends.”<sup>36</sup>

Further to this, including communities in the resolution of offending may help to generate increased feelings of a unified society, leading to a more collective attitude towards crime. This will be explored in greater detail in later chapters, examining how the indigenous and transitional societies of New Zealand and Northern Ireland contain stronger community bonds and are more inclined to make use of restorative justice processes. A strong community foundation and feeling of collective responsibility towards offending may bolster the effectiveness of restorative justice through the use of a cohesive response in upholding outcomes. If people feel that they can in some way reclaim disputes and contribute towards their outcome, it may encourage them to take steps to prevent further offending in their neighbourhoods. As O’Mahony and Doak observe, “[i]n setting down norms of acceptable and unacceptable conduct, community participation can help foster a sense a civic ownership of disputes.”<sup>37</sup> This is supported by Drewery, who notes that restorative processes are more conducive to building a peaceful, community-driven society than retributive, punitive

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<sup>34</sup> Daniel W Van Ness, ‘The Shape of Things to Come: A Framework for Thinking About a Restorative Justice System’ in Elmar G M Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan Publishing 2002).

<sup>35</sup> Supra [17], 13.

<sup>36</sup> Howard Zehr and Harry Mika, ‘Fundamental Concepts of Restorative Justice’ in Dennis Sullivan and Larry Tift (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge 2006) 42.

<sup>37</sup> David O’Mahony and Jonathan Doak, *Restorative Justice and Criminal Justice: International Developments in Theory and Practice* (Ireland, Department for Justice, Equality and Law Reform 2008) 20.

stances.<sup>38</sup> It is submitted therefore that community involvement in dispute resolution is a valuable tool and may be utilised to great effect in the justice process. Having considered the key philosophies underpinning restorative justice, the chapter will now explore the development of restorative customs in relation to conventional justice norms. This exercise will further the understanding of the ways in which restorative justice differs from the conventional justice system and has evolved as an alternative form of dispute resolution.

### **The Evolution of Restorative Justice**

It has been suggested that the conceptual origins of restorative justice are far-reaching, evident in “the customs and religions of most traditional societies.”<sup>39</sup> Thus although modern restorative justice practices are a relatively recent development, the philosophy underlying them is not a new phenomenon and has in fact survived for several centuries, far preceding the contemporary criminal justice systems and state punishment seen in most westernised societies. Understanding the development of restorative justice requires recognition of the ways in which conceptions of crime and punishment have influenced societal attitudes towards justice today.

#### ***The birth of state punishment***

Historically speaking, it is only recently that offending has begun to be viewed primarily as a crime against the state rather than as private dispute between individuals. This phenomenon has had a tendency to arise at times where a hierarchical structure within society has emerged, for example with the advent of a monarchy or elected government.

Such progression has meant that gradually the interests of the victim have been dissolved and replaced by the interests of society as a whole. As such it can be said that “industrialised nations [have] ‘stolen’ conflicts away from individuals and communities as part of a broader process of state legitimation.”<sup>40</sup> This is perhaps expressed best by Christie in his seminal work ‘Conflicts as Property’, who describes the ways in which the state and its authorities steal conflicts away from individuals, going so far as to refer to lawyers as “Professional

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<sup>38</sup> Wendy Drewery, ‘Conferencing in Schools: Punishment, Restorative Justice, and the Productive Importance of the Process of Conversation’ [2004] 14 *Journal of Community and Applied Social Psychology* 332, 337.

<sup>39</sup> *Supra* [4], 20.

<sup>40</sup> Kieran McEvoy and Harry Mika, ‘Restorative Justice and the Critique of Informalism in Northern Ireland’ [2002] 42 *Brit J Criminol* 534, 534.

Thieves”,<sup>41</sup> in explaining how the system can be seen to take possession of disputes as if they were property.

The arrival of this system of state ownership over disputes occurred in the western world following the Norman Conquest of England in 1066. From this emerged the concept of *infangthief*, essentially eroding the notion of offences as being primarily done to the individual. It introduced a system of fines, payable both to the injured party and, significantly, to the king. As such, the state was able to exert its control over the execution of justice, gradually increasing its hold until it had complete rule. This occurred to an even greater extent as the British Empire developed over the centuries and further countries were brought under its control. At different times, this came to include both Northern Ireland and New Zealand, as will be seen in later chapters. This state-centric trend has continued over time and remains the prevailing value within current adversarial justice systems. Morris and Maxwell reinforce this, opining that every detail of the modern justice system is designed to convey the authority of the state: “Even the structural and spatial arrangements of the courtroom, and the positioning of the parties involved in the proceedings, indicate who has the real power and who the real participants are.”<sup>42</sup> As such, the state is able to reassert its dominance at every turn.

### ***Conventional conceptions of punishment***

The conventional criminal justice system revolves around the concept that wrongdoers must be punished; its aim in this is to protect the public, and to denounce the offender in an effort to deter both them and others from future offending. Perhaps the most closely associated form of punishment in western societies is imprisonment through custodial sentencing. Most proponents of restorative justice hold the belief that spells in prison are ineffective in achieving the above goals. As Walgrave et al. state, “[r]estorative justice, both in theory and in practice, shows that a public justice system must not necessarily give priority to punishment to deal appropriately with crimes.”<sup>43</sup>

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<sup>41</sup> Supra [27], 3.

<sup>42</sup> Allison Morris and Gabrielle Maxwell, ‘Reforming Criminal Justice: The Potential of Restorative Justice’ (Brazil, Paper prepared for seminar March 2004) 3. Available online at <<http://igps.victoria.ac.nz/events/completed-activities/RJ%20Mexico/RJ%20Reform%202004.pdf>> accessed 14 March 2014.

<sup>43</sup> Lode Walgrave et al., ‘Why Restorative Justice Matters for Criminology’ [2013] 1(2) *Restorative Justice: An International Journal* 159, 160.



It is important to distinguish here between the concepts of punishment and imprisonment. Restorative justice *can* be punishment; this is a separate notion from that of imprisonment, although there may be overlap between the two. There is, however, debate between commentators as to whether restorative justice and imprisonment can comfortably co-exist or whether their philosophies are anathema. Morris theorises that restorative justice agreements can reasonably include a custodial sentence, arguing that “[r]estorative outcomes are sometimes viewed as focusing on apologies, reparation or community work, as ways of restoring property stolen or of compensating the victim for injuries endured. But, in fact, *any* outcome – including a prison sentence – can be restorative if it is an outcome agreed to and considered appropriate by the key parties.”<sup>44</sup> Brooks, conversely, claims that “restorative justice offers an alternative approach to the use of prisons. While no theory endorses the use of prisons for every crime, restorative justice never endorses imprisonment for any crime.”<sup>45</sup> It is submitted here that custodial sentences can be appropriate and consented to within a system of restorative justice, particularly in cases where the crime committed is serious and public safety must be protected.

Despite the above, there are a variety of reasons as to why imprisonment may be an unsuitable response for many types of offending. First and foremost it is a form of punishment entirely distanced from the offence itself. It is therefore unsurprising that few offenders seem to identify that prison is a way of paying their debt to society. It does not in any way encourage offenders to take responsibility for their wrongdoing or make amends for the harm they have done. As Bresnihan states, “[c]learly this type of punishment doesn’t work. One of the reasons may be that prisoners, by definition, are isolated from the consequences of their actions.”<sup>46</sup>

Further to this, the prison environment itself is not one that is conducive to reforming criminals. For example, taking a young, first-time offender and confining his interactions to those with a selection of hardened, possibly violent criminals is highly unlikely to teach him non-violent behaviours. Rather, it may reinforce the concept that violence is a normal way of dealing with conflict, making it even more difficult for an offender to reintegrate back into society upon release. Moreover, the entire structural make-up of prisons is intended to

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<sup>44</sup> Supra [29], 599.

<sup>45</sup> Thom Brooks, ‘Restorative Justice’ in *Punishment* (London, Routledge 2012) 65.

<sup>46</sup> Valerie Bresnihan, ‘Restorative Justice in Ireland’ in Monica Barry et al. (eds), *Children, Young People and Crime in Britain and Ireland – From Exclusion to Inclusion – 1998* (The Scottish Executive Central Research Unit 1999) 39.

remove an offender's sense of humanity, largely restricting their individual autonomy, powers of decision-making and personal space. As Zehr observes, prisoners must "learn to obey, to be submissive. This is the response that the prison system encourages, yet it is the response least likely to encourage a successful transition to free society."<sup>47</sup>

It is therefore submitted that traditional punitive justice is unsuited to its intended dual purpose of protecting the public and deterring prisoners from future offending. It may in fact have the exact opposite effect and actually nourish criminal attitudes towards society, particularly in young and vulnerable offenders. In addition to this, although one might reasonably assume that victims would place a high priority upon retribution, it has been shown that this is not the case. Victims have often been shown to be remarkably open to reparative processes, sometimes more so than the general population.<sup>48</sup> As a result, a restorative option should be provided for both victims and offenders. It would not only offer the opportunity truly to make amends and generate emotional healing, but also help to reduce the currently cost-ineffective, overcrowded and fruitless reliance on prisons. Having considered both the evolution of restorative justice and its standing in relation to conventional, punitive mechanisms of justice, the chapter will now explore certain of the predominant forms restorative justice may take. This will develop understanding of the processes and outcomes one might expect from a restorative justice initiative.

### **Types of Restorative Justice**

A wide range of practices exist that embrace the fundamental principles of restorative justice, albeit they may vary greatly in the extent to which processes are either formally or legally supported, with some being integrated into legal systems and some being largely volunteered. It has been suggested that "[v]ariations in these programs arise from their diverse national origins";<sup>49</sup> this will emerge as a recurring theme throughout this piece of work. As the focus here is on restorative justice practices in New Zealand and Northern Ireland, the predominant processes referred to will be variants on restorative conferencing techniques. These will be explored in greater detail in later chapters however. It is equally important to have an overview of the most prevalent forms of restorative justice, thus we will now

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<sup>47</sup> Supra [15], 37.

<sup>48</sup> Supra [15], 193.

<sup>49</sup> Caroline Angel, 'Crime Victims Meet Their Offenders: Testing the Impact of Restorative Justice Conferences on Victims' Post-Traumatic Stress Symptoms' (Unpublished doctoral dissertation, University of Pennsylvania 2005) 21.

consider victim-offender mediation, restorative conferencing, restorative policing, Youth Offender Panels and sentencing circles.

### ***Victim-offender mediation***

Victim-offender mediation is possibly the practice most closely affiliated with restorative justice. Most contemporary mediation programmes have their roots in North America, and can be traced back to the Native American Navajo peacemaking practices. These peacemaking concepts direct that in cases of wrongdoing, a *naat'aanii* (peacemaker) will assist the offender in making amends. The purpose of the process is to open a dialogue between victim and offender, with victims offered the opportunity to explain their complaint and express their emotions, before the offender is able to respond; actions for reparation will then be proposed.<sup>50</sup> This endeavours to “restore victims and, most important, the rule breakers themselves to harmony.”<sup>51</sup>

Similarly, contemporary victim-offender mediation schemes bring together the victim and the offender along with a trained mediator or facilitator. Their roots lie in the Victim-Offender Reconciliation Programs founded in Kitchener, Ontario in 1974 by the Mennonite Central Committee.<sup>52</sup> These focused on direct face-to-face encounters between victim and offender, and placed great emphasis on reconciliation and restitution. The scheme was later replicated in Elkhart, Indiana and gradually the movement spread throughout North America.<sup>53</sup>

Victim-offender mediation offers a structured setting whereby victims are able to confront their offender and bring them to accountability. The facilitators are trained to provide structure and open dialogue between the parties throughout the meeting, but do not impose their own opinions or solutions to influence outcomes. They will also typically meet with the victim and offender individually before the actual mediation takes place, in order to assess participants' expectations of the process. Mediation aims to “give victims and offenders a safe environment in which they are able to discuss the crime, its impact and the harm it may have caused, and to put right the harm caused.”<sup>54</sup> Along with the therapeutic potential for emotional healing, some form of compensation or reparation for the victim is usually agreed

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<sup>50</sup> Donna Coker, ‘Restorative Justice, Navajo Peacemaking and Domestic Violence’ [2006] 10 *Theoretical Criminology* 67.

<sup>51</sup> Jon’a F Meyer, ‘History Repeats Itself: Restorative Justice in Native American Communities’ [1998] 14(1) *Journal of Contemporary Criminal Justice* 42, 49.

<sup>52</sup> Howard Zehr, *The Little Book of Restorative Justice* (Good Books 2002) 42.

<sup>53</sup> *Supra* [15], 158.

<sup>54</sup> *Supra* [37], 28.

upon. Umbreit et al. describe the process of mediation as being ‘dialogue driven’ rather than ‘settlement driven’ as with other types of restorative justice, “with the emphasis upon victim healing, offender accountability, and restoration of losses.”<sup>55</sup>

In considering contemporary examples of victim-offender mediation there have been interesting developments in certain areas of Europe, such as Austria and Norway. In Austria, victim-offender mediation, or *Aussergerichtlicher Tatausgleich*,<sup>56</sup> was placed in statute for young people through the Juvenile Justice Act 1988 and subsequent to successful pilot schemes later resulted in amendments to the Penal Code in 1999.<sup>57</sup> Mediation is recommended at discretion of the public prosecutor in cases where there is: sufficient clarification of facts; no loss of life; no severe guilt; a maximum range of punishment for the offence not exceeding five years; no punishment necessary to prevent the offender from committing further crimes.<sup>58</sup> Additionally, the offender must accept responsibility both for the offence itself and for the need to make amends, and the victim’s interests must be considered “to the greatest extent possible”.<sup>59</sup>

Meanwhile, the Norwegian system of victim-offender mediation was greatly influenced by Christie’s work in 1977, triggering discussions on alternative justice. Mediation was placed on a statutory footing by the Municipal Mediation Service Act 1991 and is now governed by the Norwegian Mediation Service, or *konfliktrådet*.<sup>60</sup> Referrals for mediation can come from either the police or prosecutor, or since the Execution of Sentences Act 2001 can be court-ordered as a part of a community sentence.<sup>61</sup> The case must be considered ‘suitable’ by the prosecutor, and both parties must agree on the facts of the case and consent to the process.<sup>62</sup> Since 2004, victim-offender mediation has been run by 22 regional mediation services,<sup>63</sup> and

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<sup>55</sup> Mark S Umbreit, Robert B Coates and Betty Vos, *Impact of Restorative Justice Conferencing with Juvenile Offenders: What We Have Learned From Two Decades of Victim Offender Dialogue Through Mediation and Conferencing* (University of Minnesota, Centre for Restorative Justice and Peacemaking 2000) 3.

<sup>56</sup> The literal translation of which is ‘out-of-court offence compensation’.

<sup>57</sup> *Supra* [37], 53.

<sup>58</sup> Veronika Hofinger and Christa Pelikan, ‘Victim-Offender Mediation with Juveniles in Austria’ in Anna Mestitz and Simona Ghetti (eds), *Victim-Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries* (Springer 2005) 163.

<sup>59</sup> *Ibid.*

<sup>60</sup> Ida Hydle, ‘The Development of Restorative Practices in a Human Security Perspective in Northern Europe’ (Halifax: Nova Scotia, paper to the International Conference in Restorative Practices 15-17 June 2011) 2. Available online at <[http://www.nova.no/asset/4954/1/4954\\_1.pdf](http://www.nova.no/asset/4954/1/4954_1.pdf)> accessed 20 March 2015.

<sup>61</sup> Siri Kemény, ‘Victim-Offender Mediation with Juveniles in Norway’ in Anna Mestitz and Simona Ghetti (eds), *Victim-Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries* (Springer 2005) 104.

<sup>62</sup> *Supra* [37], 70.

<sup>63</sup> *Supra* [61], 103.

it is stated that a central philosophy of the services is “[e]mpowerment of communities and of the conflicting parties.”<sup>64</sup>

### ***Restorative conferencing***

Broadly speaking, restorative conferencing practices may fall into one of two categories: the family group conferencing techniques most widely associated with New Zealand, or the youth conferencing system based in Northern Ireland. These individual processes will be examined in much greater detail in later chapters as they will be a central component of this work, but this brief overview provides a concise picture of conferencing schemes for the purpose of drawing a comparison between conferencing and other forms of restorative justice.

Restorative conferences are used almost exclusively for youth offenders, and may be recommended either by a court or by the Public Prosecution Service in the case of Northern Ireland. One of the key aims of restorative conferencing is to divert young offenders away from the conventional criminal justice system. It emphasises the need to bring together not only the young offender and their victim, but also their families and relevant community members or support network, with the aim of obtaining redress for victims through a collective decision-making process. Drewery defines the purpose of conferences as being to “discuss what the problem might be and to pool ideas about what might be most helpful from here, for all concerned. From this pool of ideas should emerge a plan for restoration of the situation, especially the relationships that have been impoverished by the offence.”<sup>65</sup>

Restorative conferencing is in some ways an extension of victim-offender mediation. The focus is largely on encouraging the offender to make reparations for the offence, although practice is not always uniform – Northern Ireland, for example, is more victim-oriented than New Zealand. It differs however, through branching out to include further parties affected by the incident. This enables the process to include a wider circle of support for victim and offender, and thus brings more voices and perspectives in creating appropriate outcomes for all involved. In this way, the offender’s support network is able “to share the blame and directly witness the harm caused”.<sup>66</sup> It may also help to provide a stronger foundation for the

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<sup>64</sup> Supra [60], 3.

<sup>65</sup> Supra [38], 335.

<sup>66</sup> Supra [8], 14.

offender in both carrying out restoration and compensation for the current offence, and preventing further offending in the future.

### ***Restorative policing***

Restorative policing is essentially based around cautioning schemes that present an alternative to formal police cautions. McCold and Wachtel propose that there is a six-part philosophy behind restorative policing, maintaining that it seeks to:

- “1) Encourage accountability, reparation, reintegration and healing.
- 2) Reduce recidivism.
- 3) Resolve conflict and eliminate ongoing problems.
- 4) Provide communities with a satisfying experience of justice.
- 5) Reduce reliance on the criminal justice system and formal processes.
- 6) Transform police attitudes, organisational culture and role perceptions.”<sup>67</sup>

It can therefore be seen to embrace many of the core restorative principles, and in fact shows a large degree of overlap with general restorative justice theory. It is also however, grounded in Braithwaite’s theory of ‘reintegrative shaming’. This theory claims that traditional police cautioning is based upon degrading and denouncing the offender himself, which will only result in further criminal behaviours as the wrongdoer seeks to conform to the label he has been branded with. On the other hand, the reintegrative shaming model is one that “shames while maintaining bonds of respect or love, that sharply terminates disapproval with forgiveness”.<sup>68</sup> In other words, it condemns the act of committing the offence itself rather than stigmatising the offender.

The focus of restorative policing is to cause the offender to be ashamed of the offence he or she has committed, but in such a way as to enable him or her to be reintegrated back into society. For example, the agreements reached at the conclusion of the process may include verbal or written apologies, and promises to pay compensation for damage caused by the offence.<sup>69</sup> The cautioning process is facilitated by a trained police officer and the meeting is

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<sup>67</sup> Paul McCold and Benjamin Wachtel, *Restorative Policing Experiment: The Bethlehem Pennsylvania Police Family Group Conferencing Project* (Pipersville: Pennsylvania, Community Service Foundation 1998) 10.

<sup>68</sup> John Braithwaite, *Crime, Shame and Reintegration* (Cambridge, Cambridge University Press 1989) 12.

<sup>69</sup> David O’Mahony and Jonathan Doak, ‘Restorative Justice – Is More Better? The Experience of Police-Led Restorative Cautioning Pilots in Northern Ireland’ [2004] 43(5) *The Howard Journal of Criminal Justice* 484, 490.

likely to be scripted to a greater extent than the above forms of restorative justice. The victim is generally encouraged to participate, but this is not a necessity and policing schemes thus far, as has been noted by O'Mahony and Doak, have prioritised reintegration of the offender over meeting the needs of the victim.<sup>70</sup>

Based on the Wagga Wagga model of police-led conferencing, arguably the foremost example of contemporary restorative policing comes from the Thames Valley police force in England, which it is said has been “at the vanguard of developing restorative justice interventions”.<sup>71</sup> The Wagga Wagga scheme was introduced in the New South Wales state of Australia in 1991 and utilises the concept of reintegrative shaming within youth justice conferences run by a police sergeant. This model was then essentially ‘imported’ to England and Wales, as well as some areas of North America. Commitment to a Thames Valley restorative policing scheme was initiated by Chief Constable Charles Pollard in 1994, with the aim of integrating restorative justice processes into all aspects of policing.<sup>72</sup> This scheme was put into action in 1998 and underwent comprehensive evaluation for three years. Conferences were conducted according to a script, with all those affected by the offence invited to take part. The Thames Valley scheme was enacted according to a “philosophy oriented primarily towards the repair of harm rather than deterrence, rehabilitation or punishment.”<sup>73</sup> Ramifications from this programme are still felt, as evidenced by s.66ZA/s.66ZB Crime and Disorder Act 1998,<sup>74</sup> which allows constables to employ restorative youth cautions. Police constables/officers are additionally authorised to dispense conditional cautions to admitted offenders over the age of 18 where the purpose of the caution is to rehabilitate the offender or to ensure the offender provides reparation, according to the Criminal Justice Act 2003.<sup>75</sup> Moreover, restorative policing interventions were further expanded following the introduction of Youth Restorative Disposals, piloted in 2008. The purpose of this was to provide police with a more efficient response to low-level offending, in the form of a summary disposal or final reprimand.<sup>76</sup> The evaluation of this scheme proved

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<sup>70</sup> Supra [37], 30.

<sup>71</sup> Ian Waters, ‘The Policing of Young Offenders’ [2007] 47 Brit J Criminol 635, 648.

<sup>72</sup> Supra [37], 46.

<sup>73</sup> Carolyn Hoyle, Richard Young and Roderick Hill, *Proceed with Caution: An Evaluation of the Thames Valley Police Initiative in Restorative Cautioning* (York, Joseph Rowntree Foundation 2002) 1.

<sup>74</sup> Inserted by s.135 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>75</sup> Criminal Justice Act 2003, ss 22 and 23.

<sup>76</sup> David O'Mahony, ‘Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Back’ [2012] 21 Nott L J 86, 91.

popular with the police, due both to the time-saving nature of the process and because it allowed greater discretion and proportionate responses to minor offending.<sup>77</sup>

### ***Youth Offender Panels***

The introduction of Referral Orders in England and Wales represents “arguably [the] most significant attempt to draw on restorative justice principles in the youth justice arena.”<sup>78</sup> They are the result of various legislative measures attempting to bring a more restorative outlook to youth justice. The developments originated with the Crime and Disorder Act 1998, which established both the Youth Justice Board and Youth Offending Teams (YOTs).<sup>79</sup> This was then expanded upon by the Youth Justice and Criminal Evidence Act 1999 (Part 1), which heralded the introduction of Youth Offender Panels (YOPs).<sup>80</sup> Referral Orders are currently legislated for under the amended Powers of the Criminal Courts (Sentencing) Act 2000 (s.16-32). YOTs are now present across all regions of England and Wales.

Referral orders are aimed at juvenile offenders aged 10-17 who plead guilty to the offence at the first court appearance. The order by youth or magistrates’ court will refer the young person to a YOP, consisting of two trained volunteers from the local community together with a member of the YOT. The victim, their supporters, members from the local community as well as anyone deemed capable of having a ‘good influence’ on the offender are permitted to attend the YOP.<sup>81</sup> It should be noted however, that victim participation levels at panel meetings have been strikingly low, particularly in comparison to other restorative disposals.<sup>82</sup> The aim of YOPs is to reach agreement on a ‘contract’ with the young person, which ideally “should always include reparation to the victim or wider community, as well as a programme of activity designed primarily to prevent further offending.”<sup>83</sup>

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<sup>77</sup> Andrew Rix et al., *Youth Restorative Disposal Process Evaluation* (Youth Justice Board 2011) 33.

<sup>78</sup> Rod Earle, Tim Newburn and Adam Crawford, ‘Referral Orders: Some Reflections on Policy Transfer and ‘What Works’ [2002] 2(3) *Youth Justice* 141, 142.

<sup>79</sup> Adam Crawford and Tim Newburn, ‘Recent Developments in Restorative Justice for Young People in England and Wales: Community Participation and Representation’ [2002] 42 *Brit J Criminol* 476, 476.

<sup>80</sup> Patricia Gray, ‘The Politics of Risk and Young Offenders’ Experiences of Social Exclusion and Restorative Justice’ [2005] 45 *Brit J Criminol* 938, 941.

<sup>81</sup> *Supra* [79], 479.

<sup>82</sup> Adam Crawford and Tim Newburn, *Restorative Justice and Youth Justice: Implementing Reform in Youth Justice* (Routledge 2013) 186-187.

<sup>83</sup> *Supra* [79], 478.



## *Sentencing circles*

It has been argued that due to the statistically significant over-representation of Aboriginals in the Canadian criminal justice system, there should be a separate and distinct Aboriginal system incorporating the traditional indigenous process of sentencing circles.<sup>84</sup> This practice was resurrected as recently as 1991 in the Yukon Territory, Canada by local community justice initiatives and Judge Barry Stuart, in response to the court case of a local repeat offender.<sup>85</sup>

Sentencing circles themselves involve the two principle parties of victim and offender as with most restorative practices, but additionally they include a judge, counsel for both parties, and affected members of the local community. They incorporate both traditional, indigenous processes and those that would be recognisable from a conventional justice standpoint. As such the affected parties and community may speak meaningfully about the offence and express preferences as to the outcome, however the judge retains ultimate decision-making authority.<sup>86</sup>

The overarching theme of sentencing circles lies in the concept that, in order to eliminate the harm caused by the offence, the root issues must be addressed as a way of restoring harmony and balance. Victims are encouraged to participate in the process and express their anger and hurt, whereby they are offered empathy and support from their family and the local community. Offenders are told that their behaviour has been unacceptable and are urged to apologise, become accountable for the offence, and make the commitment to change. By witnessing the sentencing circle, the local community are accepting the responsibility of helping the offender to reintegrate into society.<sup>87</sup>

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<sup>84</sup> Emily Anderson, 'The Feather, The Gavel, The Sentencing Circle and The Smudge – And Where They All Have Their Place: Seeking Aboriginal Justice in Canada' (University of Alberta 2007). Available online at <[www.chumirethicsfoundation.ca/files/pdf/EmilyAndersonSEEKINGABORIGINALJUSTICE.pdf](http://www.chumirethicsfoundation.ca/files/pdf/EmilyAndersonSEEKINGABORIGINALJUSTICE.pdf)> accessed 20 January 2015.

<sup>85</sup> Pamela Boisvert, 'Aboriginal Peoples and Restorative Justice: The Promise of Sentencing Circles' (30 April 2003). Available online at <<http://cfcj-fcjc.org/clearinghouse/drpapers/2003-dra/boisvert.pdf>> accessed 15 January 2014.

<sup>86</sup> Jo-Anne Wemmers and Marisa Canuto, *Victims' Experiences with, Expectations and Perceptions of Restorative Justice: A Critical Review of the Literature* (Department of Justice Canada: Research and Statistics Division 2002) 23.

<sup>87</sup> Gordon Bazemore and Curt Taylor Griffiths, 'Conferences, Circles, Boards and Mediations: The "New Wave" of Community Justice Decision-Making' [1997] 61(2) Fed Probation 25, 26.

## **Conclusion**

The intention of this chapter has been to provide a general introduction to restorative justice, examining the underlying beliefs behind the concept and exploring some of the key forms restorative justice can take. It has explored the difficulties inherent in establishing an uncontested definition of restorative justice, and attempted to attribute meaning to the concept. It is seen how this task is further complicated by the wide variety of practices which may be encapsulated by the term 'restorative justice', from victim-offender mediation to sentencing circles. These processes are united however, by their underlying philosophies. These include such principles as voluntariness, restoring the victim, holding offenders accountable, and drawing support from communities. The diverse range of restorative justice practices may choose to weigh the priority of these attributes differently, yet they are present in each.

Having established an understanding of restorative principles and the types of practices typically associated with them, the next chapter proceeds to discuss a more extensive history of restorative justice in New Zealand. The aim of this will be to examine the long-standing roots of restorative justice utilised by the indigenous Maori of the country, and to explore what effect European colonisation has had on these processes. It will additionally consider the extent to which restorative justice principles have been incorporated into the contemporary youth justice system of New Zealand. This knowledge will assist in evaluating the link between successful restorative justice practices and pre-existing cultural ideals, as will be considered in subsequent chapters.

## **Chapter II**

### **The Evolution of Restorative Justice in New Zealand**

New Zealand's justice system is unique, with a heritage like no other. In order to fully understand the impact that this country has had in the international development of restorative justice, this chapter intends to offer a detailed insight into its history. Central to this history is the influential Maori approach to dispute resolution. Here the philosophy on justice employed by this indigenous people will be examined, including their attitude towards offending and course of action when dealing with the aftermath of a crime. It will then go on to consider the tremendous impact that European colonisation of New Zealand has had on the Maori way of life. The changes implemented will be shown to have had long-lasting and far-reaching effects upon Maori systems of justice and community. The consequent rise in Maori offending and their substantial over-representation in crime statistics will also be analysed, looking at possible explanations for these disproportionate figures. It will explore how this level of indigenous over-representation led to government recognition of a need for change. The process of implementing a more culturally appropriate justice system in New Zealand, which included an unprecedented level of Maori involvement in the process, will be examined. Finally, the chapter will outline the subsequent legislation resulting from this process, and detail how New Zealand became the first country actually to institutionalise a form of restorative justice. The aim of this exercise is to develop an in-depth understanding of how the cultural roots of restorative justice in New Zealand have helped to frame contemporary youth justice processes. This understanding will aid in subsequent evaluation on the connection between successful restorative justice practices and culture.

#### **Maori Philosophy on Justice**

Prior to European colonisation, the Maori did not consider themselves to be a national people. Rather, every day and legal matters were dealt with on a three-tier system: *whanau* (extended family), *hapu* (subtribe) or *iwi* (tribe).<sup>88</sup> It was a society anchored strongly in relationships of differing levels within the tribal structure. Vieille describes Maori communities as having a

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<sup>88</sup> Khylee Quince, 'Maori and the Criminal Justice System in New Zealand' in Julia Tolmie and Warren Brookbanks (eds), *Criminal Justice in New Zealand* (Wellington, LexisNexis 2007) 4. Available online at <<https://cdn.auckland.ac.nz/assets/law/about/centres%20and%20associations/te-tai-haruru/documents/Maori%20chapter.pdf>> accessed 30 March 2015.

“co-dependent and almost symbiotic relationship”,<sup>89</sup> and as such maintaining the harmony in these connections was essential as to do otherwise would be to threaten the cohesive nature of entire tribes. As Quince notes, in tribal-based societies such as the Maori any imbalance in harmonious relations within the *whanau*, *hapu* or *iwi* “could potentially lead to increased conflict or threaten the economic survival of the group.”<sup>90</sup>

Maori justice is governed by a system known as *tikanga maori*. Essentially this is a collection of guiding principles and beliefs; it prescribes both right and wrong behaviours, as well as measures for dealing with misdemeanours.<sup>91</sup> It is not law as would be recognised by westernised societies, but rather “a way of life, not just a response to crime. It is *houhou rongu*, literally sowing the seeds for peace.”<sup>92</sup> *Tikanga maori* emphasises the vital importance of maintaining tribal relations and balance within the community through this code of conduct transmitted orally through the generations. The strength in this system lies in the fact that it can be very flexible; although it provides general principles it can be adjusted to suit individual circumstances and as such is able to adapt to contemporary conventions.

In essence, *tikanga maori* is a “kinship-based tradition that highly values principles of collective responsibility, social harmony and well-being.”<sup>93</sup> This strong emphasis on the community is a central feature of the Maori way of life, but also to the administration of justice. Maori academic Nin Tomas states that, “[j]ustice is the means by which we, as humans, keep our world balanced”.<sup>94</sup> This can be seen throughout the guiding beliefs of *tikanga maori*. Relationships are perceived as the key to restoring the damage done to individuals as a result of crime. This is because, as noted by Tauri and Morris, the motivation behind offending is “felt to lie not in the individual but in a lack of balance in the offender’s social and family environment. The causes of this imbalance, therefore, [have] to be addressed in a collective way.”<sup>95</sup> Thus it is evident that justice is considered to be a matter of

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<sup>89</sup> Stephanie Vieille, ‘Maori Customary Law: A Relational Approach to Justice’ [2012] 3(1) *The International Indigenous Policy Journal* Article 4, 7.

<sup>90</sup> Supra [88], 8.

<sup>91</sup> Supra [89], 2.

<sup>92</sup> Stephanie Vieille, ‘Thinking about Justice through a Maori Lens’ (Ontario, paper prepared for presentation at the Canadian Political Science Association 16-18 July 2011) 11. Available online at < [www.cpsa-acsp.ca/papers-2011/Vieille.pdf](http://www.cpsa-acsp.ca/papers-2011/Vieille.pdf) > accessed 23 January 2015.

<sup>93</sup> Stephanie Vieille, ‘Rethinking Justice in Transitional Justice: An Examination of the Maori Conception and Customary Mechanism of Justice’ (The University of Western Ontario, Doctoral thesis 2011) 212. Available online at < [ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1464&context=etd](http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1464&context=etd) > accessed 20 January 2015.

<sup>94</sup> Nin Tomas, ‘Maori Justice – The Marae as a Forum for Justice’ in Wanda D McCaslin (eds), *Justice as Healing: Indigenous Ways* (Living Justice Press 2011) 135.

<sup>95</sup> Juan Tauri and Allison Morris, ‘Re-forming Justice: The Potential of Maori Processes’ in Eugene McLaughlin et al. (eds), *Restorative Justice: Critical Issues* (SAGE Publications UK 2003) 45.

community responsibility, and as such “if an individual member is wronged or hurt, the entire *whanau* is equally liable to redress the harm caused.”<sup>96</sup>

It was a common conceit for the European settlers in New Zealand to believe that there were few laws or social customs among the indigenous peoples, as the ancestral belief system of the Maori bore little resemblance to the recorded and codified statutes of western society.<sup>97</sup> Correspondingly, the Maori saw little of merit within the European system of jurisprudence which had been imposed upon them. The custodial sentences most frequently favoured by European penal systems as a form of justice made little sense to a society in which maintaining social ties and redressing the harm done, both to individuals and the community, was of paramount importance. From a Maori perspective, to inflict a prison sentence upon an individual would in fact indicate failure on the part of the community to sustain a collective well-being. As Vieille observes, “[r]emoving someone from the community would ... signal a break in communal relations and result in additional imbalance.”<sup>98</sup> Tomas supports this, arguing that to withdraw the offender from the community would “do little to remove the disease afflicting the abuser and even less to heal the spiritual havoc that the victim and relations have suffered.”<sup>99</sup> As such, Maori justice instead focuses upon restoring balance to all parties, including the community as a whole.

One of the most important features of the Maori philosophy on justice is the concept of *mana*. Wearmouth et al. define this as, “an individual’s autonomy, integrity, self-esteem and standing within the group”.<sup>100</sup> All positive behaviours and misdemeanours have an effect on *mana*, at both an individual and tribal level. It is one of the desires of Maori society therefore, to “increase individual and collective *mana* by ensuring that principles of *tikanga* are abided by”.<sup>101</sup> *Mana* is a way of life for Maori, a principle that guides all actions and has the potential to affect the reputation of communities and their citizens. It also however, takes on a specific role in terms of offending. For example, the perpetration of an offence has a negative impact upon *mana* due to a breach of *tapu*. The principle of *tapu* in essence takes the place of a legal system, operating “as a system of prohibitory controls, effectively acting

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<sup>96</sup> Supra [92], 7.

<sup>97</sup> Supra [89], 1.

<sup>98</sup> Supra [89], 10.

<sup>99</sup> Supra [94], 138.

<sup>100</sup> Janice Wearmouth, Rawiri McKinney and Ted Glynn, ‘Restorative Justice in Schools: A New Zealand Example’ [2007] 49(1) *Educational Research* 37, 43.

<sup>101</sup> Supra [88], 6.

as a protective device.”<sup>102</sup> To breach *tapu* is to compromise the standing of an individual, and consequently their *whanau*, *hapu* or *iwi*. Accordingly, compensation (*utu*) is required in order to restore the *mana* of the parties.<sup>103</sup> Rectification of the offence through *utu* has the potential to restore *mana* of not only the victim, but also of the offender and his community. This is due to the acknowledgement of wrongdoing and the steps taken to make amends – actions seen in an entirely positive light when viewed from a Maori perspective. *Utu* is considered to hold the offender completely accountable for the misconduct and they are accepted fully back into society as a result. This stands in sharp contrast to the western notion that offenders must be punished and stigmatised in order for justice to be accomplished. This is supported by Drewery, who explains that this acceptance of redress for an offence “is quite a different psychology from the individualised idea that an offender must be diminished or shamed before they can be built back up.”<sup>104</sup>

This was intended to illustrate the key Maori philosophies with regard to justice and wrongdoing. It is now pertinent to consider the structures which Maori have adopted to resolve disputes and respond to offending.

### **The Maori Forum for Justice**

#### ***Discussing the offence – the role of the marae***

One of the principal features of Maori justice is the setting in which it may be administered. For Maori this place is the *marae*, the meeting ground. The most important aspect of the *marae* is a sacred building known as the *wharenui*, which serves as the focal point for the local community. It is significant not only as the location for dispute resolution, but as a symbolic representation of Maori ancestors. Examination of a *wharenui* will show that it is structurally designed to represent the body of ancestors, intended to welcome newcomers. For example, there will usually be a carved figure on the rooftop of the building symbolising the head, long sloping boards over the entrance representing arms held in a welcoming embrace, and a beam running along the length of the roof which acts as the spine of the *wharenui*. As Quince notes, using the *marae* as a setting for dispute resolution holds great

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<sup>102</sup> New Zealand Ministry of Justice, *He Hinātore ki te Ao Māori: A Glimpse into the Māori World: Māori Perspectives on Justice* (Wellington: New Zealand, Ministry of Justice 2001) 59.

<sup>103</sup> *Supra* [88], 5.

<sup>104</sup> *Supra* [38], 341.

meaning for Maori, as it is “a forum that represents both the body of an ancestor, and the world in balance.”<sup>105</sup>

As was discussed above, maintenance of tribal relationships is the most vital aspect of Maori way of life. It is unsurprising therefore, that this is of foremost consideration during conflict resolution processes on the *marae*. Subsequent to a dispute or the perpetration of an offence, the community will gather on the *marae* and discuss what action must be taken in consequence of the conflict. One of the primary concerns in this discussion is to establish the relationships between the key parties, as a way of engaging all those involved in the process of restoration and rehabilitation. Vieille explains the importance of this, observing that “[e]xposing the relational ties between the *whanau*, the offender, and the victim lifts the veil of anonymity and contributes to accountability.”<sup>106</sup> Not only this, but the inclusion of the extended community allows for a more visible administration of justice, and enables them to offer their support to both the victim and offender. It “serves to alleviate the pain and contributes to the collective healing.”<sup>107</sup>

Conducting meetings to consider disputes on the *marae* also requires that certain traditional protocols be abided by. This includes such customs as: being respectful of elders; not interrupting those speaking; and committing to upholding the outcome of the *hui* (meeting).<sup>108</sup> These again emphasise the Maori values of community responsibility and the importance of reparation in the aftermath of offending. Conducting justice on the *marae* reiterates the need to respect traditional indigenous values whilst looking to the future, seeking to regain balance and restore *mana* to the individuals harmed by dispute.

### ***Principles of redress – utu and muru***

As a product of using the *marae* as a forum for justice, the meeting only terminates when a means for restoration has been agreed upon by all parties. Such restoration must be sufficient to repair the damage done to relationships within the *whanau*, *hapu* or *iwi*, and to regain harmony and balance within the community. As discussed above, this usually involves the application of *utu*, as the offender is required to compensate the victim in order to redress the

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<sup>105</sup> Supra [88], 7.

<sup>106</sup> Supra [89], 7.

<sup>107</sup> Supra [92], 10.

<sup>108</sup> Supra [100], 40.

harm caused by the dispute. This demand for compensation must be “commensurate to the quality of harm done”<sup>109</sup> in order to fully restore the *mana* of the parties.

*Utū* may take many forms, and is applied to a greater degree in proportion to the severity of the crime and according to the circumstances surrounding the dispute. A variety of factors may be taken into account, including the societal status of the parties involved, and the acts or omissions of said parties. In terms of actual tangible restitution, *utu* may “require revenge, other times it would be a reward, a transfer of goods or services, or an insulting song.”<sup>110</sup> This is clearly a diverse range of actions, and it must be noted that it is important not to romanticise Maori justice through believing it to be an entirely compassionate system. There are in fact an abundance of accounts of intruders being killed for violating the *tapu* of Maori tribes<sup>111</sup> (although of course this is not the norm in modern Maori culture). Thus it would be naïve to idealise Maori society, as it could be very vengeful indeed – so much so that it was in fact possible to pass along an offence to one’s offspring.<sup>112</sup> The reason for this is that if sufficient *utu* is not felt to have been offered, the social equilibrium continues to be disturbed regardless of the death of one of the parties; therefore justice may be sought by their descendants in order to restore balance.

A further method of seeking redress for wrongdoing lies in the concept of *murū*, which “consists of ritualised plunder or confiscation”.<sup>113</sup> Once *murū* has been carried out the dispute is considered closed; the taking of personal property from the offender signals that the harm has been redressed. It should be noted that *murū* may be applied even where the wrongdoer’s transgression was entirely unintentional. In terms of the process of *murū*, it is first required that the offender and their *whanau*, *hapu* or *iwi* (which of these is relevant depends on the severity of the offence) must take responsibility for the wrongdoing and accept that *murū* may be performed. Following this there will be a formal process wherein it is discussed in great detail exactly what will be taken.<sup>114</sup> Thus although *murū* may sound indistinguishable from straightforward theft from a westernised perspective of justice, it was in fact performed according to strict protocols and customs. This approach is not often used

<sup>109</sup> John Pratt, ‘Colonization, Power and Silence: A History of Indigenous Justice in New Zealand Society’ in Burt Galaway and Joe Hudson (eds), *Restorative Justice: International Perspectives* (Criminal Justice Press 1996) 144.

<sup>110</sup> Supra [102], 67.

<sup>111</sup> Supra [102], 61.

<sup>112</sup> Supra [109], 138.

<sup>113</sup> Simone Bull, “‘The Land of Murder, Cannibalism, and All Kinds of Atrocious Crimes?’: Maori and Crime in New Zealand, 1853-1919’ [2004] 44(4) *Brit J Criminol* 496, 513.

<sup>114</sup> Supra [102], 77.



in modern times, however it provides essential insight into the way in which Maori society – and the values it upholds - is maintained and offenders are made to be accountable for their wrongdoing.

Thus far the intention has been to provide an in-depth understanding of both the Maori philosophy on justice and their community-based approach towards dealing with offending. It is now important to consider the matter of colonisation, examining the changes implemented by the European settlers and the far-reaching impact that this had on the Maori way of life and, in particular, their indigenous systems of justice.

### **Colonisation**

The original settlers of New Zealand originated from Polynesia around seven hundred years ago, and these compose the earliest ancestors of the Maori. Settlers from further afield did not appear until much later however. The first European sighting of New Zealand is thought to have occurred in 1642 by a Dutch explorer by the name of Abel Tasman, although he did not set foot upon the land. Instead, it was the British Captain James Cook who was the first European to reach New Zealand in 1769. He made a further two expeditions to the country, and is credited with both circumnavigating and mapping New Zealand.<sup>115</sup> There followed a small trickle of traders and missionaries who composed the first visitors and early European settlers of the country. It was in 1840 however, that New Zealand was declared to be a British colony with the signing of the Treaty of Waitangi. This “allowed for the permanent settlement of *pakeha*<sup>116</sup> in New Zealand, while guaranteeing the Maori undisturbed control over various resources and treasures.”<sup>117</sup> It was the firm belief of the settlers however, that the colonial settlement should be modelled upon British society, and therefore government policy “was founded on the objective of assimilating Maori into the developing settler-society.”<sup>118</sup>

There was great dissension between the two societies from the offset, as there was such discrepancy between *pakeha* and Maori cultures and justice systems. The European settlers were accustomed to being governed at a national level, whereas the indigenous people were

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<sup>115</sup> John Wilson, ‘European Discovery of New Zealand’ (Te Ara – The Encyclopedia of New Zealand, 18 February 2014). Available online at <<http://www.teara.govt.nz/en/european-discovery-of-new-zealand/page-5>> accessed 19 March 2014.

<sup>116</sup> *Pakeha* is simply the Maori term for European settlers.

<sup>117</sup> Supra [88], 9.

<sup>118</sup> Juan Tauri, ‘Explaining Recent Innovations in New Zealand’s Criminal Justice System: Empowering Maori or Biculturalising the State?’ [1999] 32 ANZJ Crim 153, 154.

primarily concerned with tribal affairs and had no form of overarching, supreme power to impose laws upon their entire race. Their codes of conduct and traditional values had instead been passed down orally from generation to generation, adapting to circumstances and implemented within the tribal *marae*. There was even discord between the very type of offence penalised by the two systems: breaches of *tapu* such as wearing another man's clothes or disregarding a family obligation carried severe penalty in Maori culture, yet were not actionable under *pakeha* law.<sup>119</sup> Similarly, Maori people could not understand how certain misdemeanours such as adultery or swearing could go unpunished by the settlers. This was acknowledged by certain disparaging and derogatory comments in the Report of the Waitako Committee of 1860, which stated that “[f]or these offences at present there is practically no redress, which is of course incomprehensible to a savage.”<sup>120</sup> Conflict also arose in relation to the treatment of offenders as Maori had no comprehension of, or respect for, imprisonment as a means of punishment. Further to this, the concept of individual accountability for crime jarred with the philosophy of collective responsibility embedded in the Maori justice belief system.

As a result of the above, the *pakeha* refused to acknowledge the beliefs of *tikanga maori*, and in fact simply could not understand it. The uncodified nature of the indigenous laws meant that they were discounted by a nation accustomed to written records and formal courtrooms.<sup>121</sup> Anything that did not conform to this was considered primitive, ineffective and uncivilised, and required a remedy. As Pratt explains, “[o]ne of the justifications for colonisation in the mid- to late-nineteenth century was to civilise the noble savages found in distant lands. Assimilation into the British way of life was to be the gift of civilisation.”<sup>122</sup> The European settlers therefore implemented a vast array of changes, subjecting Maori to a multitude of judicial customs that, even to this day, are considered to be “foreign and imposed legal norms”.<sup>123</sup>

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<sup>119</sup> Khylee Quince, ‘Maori Disputes and their Resolution’ in Peter Spiller (ed), *Dispute Resolution in New Zealand* (2<sup>nd</sup> edn, Oxford University Press Australia and New Zealand 2007) 15. Available online at <<https://cdn.auckland.ac.nz/assets/law/about/centres%20and%20associations/te-tai-haruru/documents/mdr2006.pdf>> accessed 30 March 2015.

<sup>120</sup> *Report of the Waitako Committee* (1860) 112. Available online at <<http://atojs.natlib.govt.nz/cgi-bin/atojs?a=d&d=AJHR1860-I.2.1.7.3&e=-----10--1-----0-->> accessed 7 March 2014.

<sup>121</sup> *Supra* [93], 192. See also New Zealand Ministry of Justice, *He Hinātore ki te Ao Māori: A Glimpse into the Māori World: Māori Perspectives on Justice* (Wellington: New Zealand, Ministry of Justice 2001) 5.

<sup>122</sup> *Supra* [109], 140.

<sup>123</sup> *Supra* [92], 4.

*Pakeha* settlers put many new systems into effect that weakened the traditional Maori mechanisms for justice. In 1893 for example, the Magistrates' Court Act was implemented. This instituted a unified criminal justice system in New Zealand, meaning that only one set of laws had any influence. Rather inevitably, this was the collection of laws that bore close resemblance to those found in British society. Tauri and Morris argue that "silencing Maori law was a powerful mechanism for destabilising the foundations of Maori society".<sup>124</sup> The Magistrates' Court Act was a classic example of this, as it permitted British colonisers to make a wide variety of decisions with very little consultation with the Maori.

Pursuant to the Treaty of Waitangi, a series of laws and restrictions were introduced by the British government displaying a clear bias against Maori people. Examples of these included the Suppression of Rebellion Act 1863, which deemed that any indigenous person found defending their land against settlers was held to be rebelling against the Crown. To compound the issue, the Crown was granted permission to confiscate land from any landowner accused of rebellion under the New Zealand Settlement Act 1863.<sup>125</sup> This provided the settlers with a relatively straightforward, yet corrupt, way of obtaining land rights from the Maori. Further to this, the *pakeha* imposed a Dog Tax in the 1890s. This was taken by the Maori as a direct stamp of oppression and dominance, as they were known to own significantly more dogs than the European settlers. Perhaps the most outrageous restrictions imposed upon the Maori however, were in relation to alcohol consumption. The latter half of the nineteenth century saw particular anti-liquor restrictions inflicted on the Maori, and by 1910 the Licensing Amendment Act allowed complete criminalisation of Maori drinking. Bull takes the view that these restrictions were originally implemented simply because the settlers "were accustomed to having their drinking habits policed",<sup>126</sup> and therefore to be without restrictions would be to undermine European confidence in their own legal system. It is submitted however, that such legislation was simply an additional way for the settlers to assert social control over the indigenous people and, as will soon be revealed, arrests based on Maori drunkenness were all too frequent. It was thus the case that Maori were in a very precarious position under the new imposed legal system.

It can be seen therefore that the settlers took every opportunity to institute legislative changes that were very much in their own interests upon colonisation. Having examined the

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<sup>124</sup> Supra [95], 45.

<sup>125</sup> Supra [113], 507.

<sup>126</sup> Supra [113], 505.

alterations and forms of social control that the *pakeha* implemented on their arrival in New Zealand in the nineteenth century, it is now important to study precisely *how* these changes affected the Maori. From the time of colonisation, there has been a significant over-representation of Maori in the New Zealand criminal justice system. What follows is an examination of the trend of these statistics, and discussion on the reasons behind such over-representation. This should assist in understanding the breadth of the challenge facing restorative justice in New Zealand, as well as emphasising just why an alternative approach to youth justice was so necessary for this indigenous culture.

### **The Rise in Maori Crime**

#### *The statistics*

New Zealand suffers from chronically high imprisonment rates and currently ranks second amongst comparable countries (behind the United States of America) in prison population statistics, with a rate of 179 prisoners per 100,000.<sup>127</sup> Lynch opines that this is due to the presence of several indicators denoting a strongly punitive justice system. She identifies these as including: “incarceration rate, volatile and reactive law making, the use of ‘tough on crime’ as an electoral strategy, and the imposition of longer and more punitive sentences and orders.”<sup>128</sup> It is certainly the case that in recent years New Zealand has demonstrated staggeringly high rates of imprisonment compared to its western counterparts. This is even mirrored at a school level, with an increase in suspensions and exclusions from around 4 per 1,000 in the early 1990s to more than 12 per 1,000 in 1999.<sup>129</sup>

What is more startling however, is the disparity between Maori and non-Maori statistics on incarceration rates. These demonstrate an underlying “ethnic toxicity”,<sup>130</sup> firmly prejudiced against the indigenous people of New Zealand. Pratt and Clark highlight this fact through the prison statistics of 2004, during which the overall imprisonment rate was 179 per 100,000 of the population.<sup>131</sup> They note that although Maori only constitute around fifteen percent of the

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<sup>127</sup> International Centre for Prison Studies, *World Prison Brief* (International Centre for Prison Studies 2013). Available online at <<http://www.prisonstudies.org/highest-to-lowest>> accessed 7 March 2014.

<sup>128</sup> Nessa Lynch, “‘Contrasts in Tolerance’ in a Single Jurisdiction: The Case of New Zealand’ [2013] 23 *International Criminal Justice Review* 217, 220.

<sup>129</sup> *Supra* [38], 333. See also, Ministry of Education, *New Zealand Schools Nga Kura o Aotearoa: A Report on the Compulsory Schools Sector in New Zealand 1999* (New Zealand, Ministry of Education 2000).

<sup>130</sup> John Pratt, ‘The Dark Side of Paradise: Explaining New Zealand’s History of High Imprisonment’ [2006] 46(4) *Brit J Criminol* 541, 542.

<sup>131</sup> John Pratt and Marie Clark, ‘Penal Populism in New Zealand’ [2005] 7(3) *Punishment and Society* 303, 304.

population, the rate of Maori male imprisonment in 2004 reached 350 per 100,000 of the population.<sup>132</sup> These already disproportionate figures increase even more dramatically when the age group is narrowed to Maori men aged 18-30. The rate of imprisonment is then estimated to be between 600 and 700 per 100,000 of the population.<sup>133</sup> This is supported by Marie in her examination of Maori offending during the decade from 1997-2006. She notes that on average in this period, Maori represented thirteen percent of the general population in New Zealand and yet made up fifty-one percent of the prison population.<sup>134</sup> Further to this, although total police apprehensions rose in this time frame by four percent generally, the Maori rate was at ten percent.<sup>135</sup> This clearly demonstrates irregularities in police treatment of Maori in comparison to non-Maori offenders. Quince also notes this significant inequality in the relationship between Maori and non-Maori with the New Zealand criminal justice system. She reports that “Maori are 3.3 times more likely to be apprehended for a criminal offence than non-Maori”,<sup>136</sup> and that “seven times as many Maori as non-Maori are given a custodial sentence upon conviction.”<sup>137</sup>

These figures show a consistent and extreme over-representation of Maori in the New Zealand criminal justice system, and as such it is now important to examine the reason behind this over-representation. Are Maori really offending at such an exorbitant rate compared to their non-Maori counterparts, or is the criminal justice system of New Zealand displaying an innate prejudice against its indigenous people? This is the question that we will now attempt to answer.

### ***Why is there such Maori over-representation in New Zealand’s criminal justice system?***

It is submitted that many of the Maori difficulties with the legal system in New Zealand stem from changes to their culture instigated as a result of colonisation. This is supported by Marie, who argues that “the contemporary over-representation of Maori in offending, incarceration, and recidivism rates is best understood as the outcome of Maori experiencing impairments to cultural identity resulting from colonisation.”<sup>138</sup> To illustrate, a clear example of this can be seen through examining the consequences of criminalising Maori alcohol

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<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Dannette Marie, ‘Maori and Criminal Offending: A Critical Appraisal’ [2010] 43 ANZJ Crim 282, 284.

<sup>135</sup> Ibid. Violent offending by Maori also showed a marked increase at a rate of forty percent.

<sup>136</sup> Supra [88], 2.

<sup>137</sup> Ibid.

<sup>138</sup> Supra [134], 283.

consumption, as was discussed above. Maori drinking habits were restricted in 1910, and accordingly in the period between 1910 and 1911 there was a ninety-nine percent increase in alcohol-related charges.<sup>139</sup> This rise in convictions occurred not because Maori were drinking any more than they had been previously, but because the *pakeha* had seen fit to prohibit alcohol consumption by Maori. As a result, levels of Maori offending appear inordinately high in this time frame, whilst in reality these figures may be explained by certain discriminatory legislation imposed by the European settlers.

In addition to this, it is possible that certain Maori cultural rites caused misunderstanding and were recorded as offences inadvertently. For example, the concept of *murū* – the ritual of obtaining redress for an offence by confiscating the personal property of the offender – which if not carried out according to a prior formal agreement may have been reported as a theft to the police.<sup>140</sup> As discussed previously, the British-style legal system implemented by the settlers had little respect for, or understanding of, the indigenous tribal process of justice. The raids demanded by *murū* could therefore easily be mistaken for thievery. This, then, may also have contributed to high levels of Maori reported crime, particularly in the period of cultural transition around the time of colonisation in New Zealand.

One of the many changes enacted by the Europeans upon settlement in New Zealand involved the introduction of segregated Native Schools. These were established in 1867, after British colonisation had been guaranteed as permanent by the Treaty of Waitangi, and were not abolished until a whole century later in 1967. The Native Schooling system “aimed to assist Maori to assimilate into the *pakeha* world, by providing boys with training for the rural agriculture sector, and training girls as domestic workers and housewives.”<sup>141</sup> As such, the indigenous youth of New Zealand were entirely restricted to manual labour rather than any form of advanced academic achievement or the type of higher level skilled work that comes from further education. The fact that the Native Schools were in existence for a hundred years means that this restrictive education system produced multiple generations of Maori who were unable to aspire to high-achieving professions. Unsurprisingly, this has had a lasting effect on Maori success in the workplace. The majority of Maori are in lower-earning

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<sup>139</sup> Supra [113], 512.

<sup>140</sup> Supra [113], 513.

<sup>141</sup> Supra [88], 11.

professions,<sup>142</sup> putting them at an economic disadvantage and, in many cases, below the poverty line to a disproportionate extent.<sup>143</sup> It has been demonstrated repeatedly that there is a positive correlation between less affluent communities and high crime rates,<sup>144</sup> and as such the economically disadvantaged Maori may well offend to a greater degree as a result of their socio-economic circumstances. There is also the possibility that Maori are apprehended more due to higher levels of police surveillance of the less prosperous areas that Maori tend to populate, thus resulting in a heightened awareness of Maori offending by law enforcement agencies.

Further to the above, the lack of Maori participation in higher levels of New Zealand society – for instance in the legal and political sectors – puts them at a unique cultural disadvantage in the justice system. As Quince observes, Maori “did not have influence in the framing or enforcing of laws, with the result that the legal system did not take account of their norms and values, and instead promoted and protected the interests of those in the dominant power structures.”<sup>145</sup> There is a significant under-representation of Maori at almost every level within the criminal justice system, from the police through to lawyers and jurors.<sup>146</sup> This allows for an indirect prejudice (or in some cases perhaps direct prejudice) against Maori offenders, as their cultural identity is not recognised as a meaningful factor within either legislation or the judicial process. Such an unhealthy relationship with the justice system makes it unsurprising that the Maori may be over-policed, over-arrested, and consequently over-represented in the criminal justice system.

The intention of this discussion was to offer insight into both how and why Maori peoples feature so prominently in the New Zealand criminal justice system. The breadth of Maori over-representation, particularly among juveniles, has been examined, and suggestions as to

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<sup>142</sup> The 2013 average weekly income for Maori was NZ\$591 compared to NZ\$758 for non-Maori. See Statistics New Zealand, ‘Income for all people by Maori, Non-Maori, region and sex’ (Statistics New Zealand). Available online at <<http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7465#>> accessed 19 March 2014.

<sup>143</sup> Department of Corrections, *Over-representation of Maori in the Criminal Justice System: Childhood Economic Disadvantage*, (Department of Corrections New Zealand 13 May 2008). Available online at <<http://www.corrections.govt.nz/resources/over-representation-of-maori-in-the-criminal-justice-system/3.0-early-life-environmental-influences/3.2-family-structure%2c-context-and-processes/3.2-2.html>> accessed 19 March 2014.

<sup>144</sup> María B Vélez and Kelly Richardson, ‘The Political Economy of Neighbourhood Homicide in Chicago: The Role of Bank Investment’ [2012] 52(3) *Brit J Criminol* 490. See also, Carol Hayden, Tom Williamson and Richard Webber, ‘Schools, Pupil Behaviour and Young Offenders: Using Postcode Classification to Target Behaviour Support and Crime Prevention Programmes’ [2007] 47(2) *Brit J Criminol* 293.

<sup>145</sup> *Supra* [88], 12.

<sup>146</sup> *Supra* [88], 13.

the cause of this have been discussed. As will now be shown, youth offending levels reached such a great extent as to trigger governmental concern, and with that came a burgeoning desire to remedy the situation. We will now consider this need for change, examining how new legislation came about, and just what this legislation entails.

## **A Need for Reform**

### ***Consultation on new legislation***

The 1980s in New Zealand saw a resurgence of traditional Maori values, triggered by governmental recognition that the western-style justice system adopted since colonisation in the nineteenth century was remarkably ineffective, particularly regarding the country's indigenous people. This was notably apparent within the juvenile justice system, which was widely held by the Maori to be “antithetical to their traditions; it was oriented toward punishment rather than solutions, was imposed rather than negotiated, and left family and community out of the process.”<sup>147</sup> This is supported by McLaughlin et al., who contend that the basis for the legislative change to the youth justice system can “be found in Maori criticism of the dominant western juvenile justice system which had stripped the community of responsibility for dealing with its own youth.”<sup>148</sup> It was apparent, therefore, that the time had come for change in the justice system.

Dissatisfaction with the way youth justice was handled in New Zealand led to the unprecedented move of governmental consultation with Maori, in an attempt to gain both understanding of indigenous justice and a Maori perspective on how the system could be improved. As such, the Department of Social Welfare convened a Ministerial Advisory Committee which travelled to many *marae* throughout the country, seeking Maori input on suggested changes to legislation.<sup>149</sup> The report resulting from this this Committee was released in 1988 titled, *Puao Te Ata Tu – Daybreak*. This report highlighted institutional racism as a profound problem within the Department of Social Welfare. It made many recommendations and was heavily critical of the “lack of Maori involvement in [justice]

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<sup>147</sup> Howard Zehr, ‘Restorative Justice’ in Luc Reyhler and Thania Paffenholz (eds), *Peacebuilding: A Field Guide* (Lynne Rienner Publishers 2000) 332.

<sup>148</sup> Eugene McLaughlin et al., ‘Introduction: Justice in the Round – Contextualising Restorative Justice’ in Eugene McLaughlin et al. (eds) *Restorative Justice: Critical Issues* (SAGE Publications UK 2003) 10.

<sup>149</sup> Emily Watt, ‘A History of Youth Justice in New Zealand’ (Research Paper 2003) 23. Available online at <<http://www.justice.govt.nz/courts/youth/documents/about-the-youth-court/History-of-the-Youth-Court-Watt.pdf>> accessed 11 March 2014.



processes and the lack of support for family-centred decision making.”<sup>150</sup> Most notable was the demand by Maori to be afforded the resources to take control of their own disputes, and participate in decision-making processes. It pushed for a decrease in the number of cases instigating criminal proceedings against young people, and “advanced the view that decisions must involve the families, including *whanau*, *hapu* and *iwi* and should not be usurped by professionals.”<sup>151</sup>

As a result of the report, the Children, Young People and Their Families Act was enacted the following year which paved the way for the formalisation of restorative justice. The key features of this Act will now be examined.

### ***Children, Young People and Their Families Act 1989***

The Children, Young People and Their Families Act 1989 (hereinafter the CYPFA) is characterised by an underlying desire to divert young people from a life of offending by utilising non-custodial and culturally appropriate measures. The intention is to “encourage the police to adopt low key responses to offending by young people wherever possible”<sup>152</sup> and to encourage victim participation in the process of conflict resolution. Lynch summarises the key aims of the CYPFA as being: “to divert young people from prosecution and formal court orders where public safety is not at risk, to involve the young person’s family in decision making through a statutory forum known as the *family group conference*, and to curb the power of state agents and other professionals in favour of empowering the family and community.”<sup>153</sup>

Possibly the most significant provision in the CYPFA is section 208, which has been described as the “bedrock of the youth justice system”<sup>154</sup>. Section 208 expounds a set of legislative principles outlining the measures to be taken when dealing with youth offending. These principles urge for a minimalist approach to instituting criminal proceedings against

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<sup>150</sup> Supra [88], 19.

<sup>151</sup> Allison Morris and Gabrielle Maxwell, ‘Restorative Justice in New Zealand: Family Group Conferences as a Case Study’ [1998] 1(1) *Western Criminology Review*. Available online at <<http://wcr.sonoma.edu/v1n1/morris.html>> accessed 10 October 2014.

<sup>152</sup> Allison Morris, Gabrielle M Maxwell and Jeremy P Robertson, ‘Giving Victims a Voice: A New Zealand Experiment’ [1993] 32(4) *The Howard Journal of Criminal Justice* 304, 307.

<sup>153</sup> Supra [128], 221.

<sup>154</sup> Nessa Lynch, ‘Playing Catch-Up? Recent Reform of New Zealand’s Youth Justice System’ [2012] 12 *Criminology and Criminal Justice* 507, 508.

young people, “unless the public interest requires otherwise”.<sup>155</sup> Further to this, it encourages that those measure adopted when dealing with offending must be carried out in such a way as to “foster the ability of families, *whanau*, *hapu*, *iwi*, and family groups to develop their own means of dealing with offending by their children and young persons”.<sup>156</sup> This demonstrates a new commitment to returning dispute resolution to communities, particularly in an indigenous context. Emphasis is also placed on reaching the heart of the problem rather than simply trying to manage the symptoms of offending. This is exemplified by the provision stating that, “any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending.”<sup>157</sup> Finally, a notably “innovative aspect”<sup>158</sup> of the CYPFA is the requirement that any measure taken to deal with offending must have “proper regard for the interests of any victims of the offending and the impact of the offending on them”.<sup>159</sup> This inclusion of the interests of victims in the legislation marks a crucial change in attitude towards victims, and means they are no longer simply sidelined as witnesses in criminal proceedings. While making no direct reference to restorative justice in the CYPFA, the framers of the Act created a piece of legislation which embodies strongly restorative principles and desired outcomes.

It is also worth noting that the CYPFA is not the only piece of legislation in New Zealand to endorse the use of restorative justice when dealing with offending. For example, the Victims’ Rights Act 2002 encourages the facilitation of a face-to-face meeting between victim and offender where appropriate.<sup>160</sup> This applies if a victim requests to meet their offender, whereby the relevant authority must refer the case for restorative justice providing necessary resources are available. Additionally, the Sentencing Act 2002 allows for the cultural background of the offender to be taken into account when meting out sentences.<sup>161</sup> This is particularly pertinent to ensuring restorative outcomes because, as Roberts notes, “the culture of certain minorities may render some dispositions culturally inappropriate, or may create disproportionate hardship.”<sup>162</sup> The same Act makes direct reference to restorative justice,

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<sup>155</sup> Children, Young People and Their Families Act 1989, s 208(a).

<sup>156</sup> Children, Young People and Their Families Act 1989, s 208(c)(ii).

<sup>157</sup> Children, Young People and Their Families Act 1989, s 208(fa).

<sup>158</sup> Supra [128], 224.

<sup>159</sup> Children, Young People and Their Families Act 1989, s 208(g)(ii). This originally stated that “due regard” must be given to the interests of victims, but was amended by the Children, Young Persons, and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010 (2010 No 2) s 6(2).

<sup>160</sup> Victims’ Rights Act 2002, s 9(1).

<sup>161</sup> Sentencing Act 2002, s 8(i).

<sup>162</sup> Julian V Roberts, ‘Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002’ [2003] 36 ANZJ Crim 249, 260.

requiring that the court “must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case”.<sup>163</sup> These attempts to place restorative responses to offending on a legal footing are what make New Zealand such a trailblazer in the context of youth justice.

As a result of the above pieces of legislation, the most prominent form of restorative justice in New Zealand is the family group conference. These conferences are directly provided for by Part 2 of the CYPFA and will now be examined in further detail.

### ***Family group conferences***

Family group conferences are undoubtedly of considerable importance in New Zealand, as they represent the government’s “first statutory attempt to become more culturally sensitive and include Maori values in the legal system through restorative practices”.<sup>164</sup> This argument for the cultural relevance of restorative justice is supported by Gilbert and Settles, who state that the use of such practices “could offer new strategies that work synergistically and more effectively within the multi-dimensional environment of modern society.”<sup>165</sup> The inclusion of family group conferences in the CYPFA is therefore a development of great significance.

A family group conference may be convened either by court order or by a police officer. They may be utilised at all stages of the justice system: as a diversionary tactic to avoid formal criminal proceedings, arranged to take place prior to the trial, or occurring at the sentencing stage of the process. If a juvenile offender is taken to the Youth Court it is a requirement for the court to send the young person for family group conferencing, excepting cases where the offence committed carries a mandatory life sentence.<sup>166</sup> It is additionally a requirement that courts must consider conference recommendations.<sup>167</sup> Regarding police referrals for conferencing, this is handled by a specialist police unit known as the Youth Aid section. Where the young offender is known to the police and has a history of offending, or where the crime committed is relatively serious, the Youth Aid section will refer the young person to their local Youth Justice Co-ordinator for consideration of a family group

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<sup>163</sup> Sentencing Act 2002, s 8(j).

<sup>164</sup> Stephanie Vieille, ‘Frenemies: Restorative Justice and Customary Mechanisms of Justice’ [2013] 16(2) *Contemporary Justice Review: Issues in Criminal, Social and Restorative Justice* 174, 179

<sup>165</sup> Michael J Gilbert and Tanya L Settles, ‘The Next Step: Indigenous Development of Neighbourhood-Restorative Community Justice’ [2007] 32(1) *Criminal Justice Review* 5, 5.

<sup>166</sup> Children, Young People and Their Families Act 1989, s 246.

<sup>167</sup> *Supra* [37], 31.

conference.<sup>168</sup> Youth Justice Co-ordinators will also be responsible for arranging conferences ordered by the Youth Court.

Family group conferences involve a greater number of participants than most restorative justice practices, as noted in the previous chapter. Gal describes the participants of a typical family group conference as including “the offender, the victim,<sup>169</sup> and their respective communities of support, including usually family members and friends, teachers, spiritual leaders, or others who have meaningful relationships with them”.<sup>170</sup> In addition to this there will often be a police representative or social worker, or the young offender’s advocate if the case has been referred by the Youth Court. In terms of location, essentially the conference may be held wherever the young person and their family wish, whether that be at home, school, on a *marae* or, if they are involved in the case, a Department of Social Welfare office.<sup>171</sup>

A typical family group conference will usually begin with the Youth Justice Co-ordinator welcoming the participants and carrying out introductions. These introductions may also on occasion be preceded by prayers or a *karakia* (blessing) in Maori.<sup>172</sup> This will be a particular feature if the conference has been referred by a *Rangatahi* (young person) Court, which were set up specifically for Maori youth and often relocate proceedings to the young offender’s local *marae*.<sup>173</sup> Subsequent to this the young person is expected to initiate discussion by admitting to carrying out the offence,<sup>174</sup> describing what happened and how it has affected others.<sup>175</sup> If the victim is attending they will then do likewise, explaining the experience from their perspective and relating how the harm caused by the offence has impacted upon them and their support network.

The facilitator of the conference - usually the Youth Justice Co-ordinator – is expected to play a relatively low key role. They will meet with the offender and the victim individually beforehand to explain the process of a family group conference, and will ensure that the

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<sup>168</sup> Children, Young People and Their Families Act 1989, s 247.

<sup>169</sup> The victim is not required to attend however. They may send an advocate on their behalf, or have no involvement at all.

<sup>170</sup> Supra [25], 122.

<sup>171</sup> Supra [152], 308.

<sup>172</sup> Ibid.

<sup>173</sup> Supra [128], 227.

<sup>174</sup> Conferences cannot be held where the young person will not admit to the offence. See the Children, Young People and Their Families Act, s 259.

<sup>175</sup> Gabrielle Maxwell, Allison Morris and Hennessey Hayes, ‘Conferecing and Restorative Justice’ in Dennis Sullivan and Larry Tiftt (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge 2007) 93.

procedure is understood at the outset of the conference, but will not otherwise take an active role in proceedings. Morris and Maxwell suggest that the function of the Youth Justice Coordinator is to provide “that everyone understands the tasks that need to be done, that all relevant issues are discussed and that the venting of emotion is managed as constructively as possible.”<sup>176</sup> In this sense, the facilitator has a subtle yet challenging role. They must not influence the substantive outcome of the conference, yet must ensure that there is full exploration of all issues and that the result is satisfactory for all involved. Vieille highlights this issue, arguing that “[o]ften, the participation empowerment and the resulting rehabilitation of the young person will depend on the professionals involved, their knowledge of [family group conferences], and their ability to encourage participation.”<sup>177</sup>

It has been suggested that one of the most important features of the family group conference is the ability of the young person to take time out with their family for private discussion.<sup>178</sup> As Morris and Maxwell explain, “the family and the young person are given the opportunity to discuss privately at some point how they think the offending should be dealt with. When the conference reconvenes with all the participants present, this plan is then discussed and agreement is sought or amendments are made.”<sup>179</sup> This provides the family with a more formal basis for discussing the best way to deal with the offence and move forward, but without the pressure of having to make immediate decisions under professional scrutiny.

The use of a family group conference in the aftermath of offending not only benefits the young person by granting greater participation in resolving the dispute, but also offers a much more significant role to the victim in obtaining justice. By allowing victims to take a level of control in the process, and giving them the opportunity to substantively affect the outcome of a case, they are able to take an active interest in proceedings in a way that is simply unattainable through traditional courtroom justice. There is an expectation on the young offender that through the conferencing process they must “interact with the victim, to express their remorse about what has occurred, to apologise for what they have done”.<sup>180</sup> The conventional justice system does not make this possible, as it allows the offender no opportunity to apologise for their wrongdoing or have any form of conciliatory interaction with the victim. As such, family group conferencing offers the victim an enhanced forum for

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<sup>176</sup> Supra [151].

<sup>177</sup> Supra [164], 181.

<sup>178</sup> Supra [25], 122.

<sup>179</sup> Supra [42], 8.

<sup>180</sup> Supra [42], 5.

emotional healing and closure, as well as the ability to “participate fully in the delivery of a form of justice which is fair and inclusive of all.”<sup>181</sup>

The dividing factor between family group conferences and other forms of restorative justice is that, as the name suggests, family group conferences involve the family and support network of the young person. This allows for a much more communal response to offending, and the involvement of these additional participants affords increased potential that the resulting conference plan will be followed with commitment. This is because they have the wherewithal to relate to the offender to a greater extent than any professional or social worker, and provide additional support in the aftermath of the conference. As McElrea explains, it “is natural that the emphasis should be on families when dealing with children and young persons, because families are their natural community, the source of their relationships of dependence or interdependence, and the most likely basis of social control.”<sup>182</sup> In addition to this, allowing the young person’s family to participate in the conference provides a forum for outcomes that are negotiated rather than imposed, and that are appropriate to individual circumstances rather than generic. Morris et al. support this, arguing that by including young offenders and their families, conferences are “encouraging a process which is culturally sensitive and creating a decision-making forum which is consensual rather than hierarchical.”<sup>183</sup>

It is submitted that the desired outcome of a family group conference is dual faceted. On the one hand, the unique attraction of restorative justice – particularly for victims – is the potential for emotional healing and cathartic benefit of successful interactions. As Morris et al. suggest, “[i]t is intended that the offender should accept responsibility for the wrong done to the victim and should offer to make amends to the victim. In particular, it is intended that attendance at the family group conference should in part be a healing experience for victims.”<sup>184</sup> On the other hand, it is natural and only reasonable for victims to expect some form of concrete restitution as a result of the meeting. With minimal guidance from the facilitator of the conference, this is something that must be agreed upon by the participants themselves. The Youth Justice Co-ordinator must then seek acceptance of the conference

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<sup>181</sup> David McKenna, ‘Restorative Justice: Issues of Definition and Effectiveness – A Victim’s Perspective’ in Monica Barry et al. (eds), *Children, Young People and Crime in Britain and Ireland: From Exclusion to Inclusion – 1998* (The Scottish Executive Central Research Unit 1999) 34.

<sup>182</sup> Frederick W M McElrea, ‘The New Zealand Youth Court: A Model for Use with Adults’ in Burt Galaway and Joe Hudson (eds), *Restorative Justice: International Perspectives* (Criminal Justice Press 1996) 75.

<sup>183</sup> Supra [152], 306.

<sup>184</sup> Supra [152], 311.

plan from either the relevant enforcement officer or the Youth Court, depending on which authority referred the case.<sup>185</sup> Once the conference plan has been accepted it is binding on all those involved, including law enforcement agencies.<sup>186</sup> Typical conference plans usually involve some form of financial payment to the victim and often include written apologies and community work. In particularly serious cases however, custodial sentences may be agreed upon.<sup>187</sup> Lynch notes that in addition conferences plans should intend to address “any criminogenic needs such as drug or alcohol abuse and disengagement from education”.<sup>188</sup> As such the resulting agreements of family group conferences may be wide-ranging, and this variety of outcomes allows conference plans to be malleable to the needs of each case.

## **Conclusion**

This chapter has sought to analyse the development of restorative justice in New Zealand. It has traced the evolution of dispute resolution, from early indigenous traditions of justice in the form of Maori conflict resolution on the *marae*, through to contemporary responses to offending. It has followed the sharp rise in offending as a result of *pakeha* colonisation, through to the ensuing development of a culturally sensitive approach to youth offending in the 1980s. Consequently, this chapter provides a firm understanding on the history and current standing of restorative justice in this innovative country.

Parallels between the underlying philosophies of Maori justice processes and contemporary restorative justice have been considered. These have included ideas of redressing the balance when an offence has been committed, compensation for victims as a method of restoration, and utilising community to reintegrate offenders. The profound effect of European colonisation of New Zealand was also discussed, with a focus on the weakening of Maori justice mechanisms. The chronic over-representation of Maori youth within the justice system was then considered, and the case was made that this is arguably a direct result of colonisation. Pursuant to this was a discussion regarding the consultation process prior to the implementation of the CYPFA, and the role of the *Daybreak* report was highlighted. Finally the chapter provided an in-depth description of the use of family group conferences, illustrating not only the process itself but also the way in which they may represent a more culturally appropriate response to offending for Maori. As such, this chapter has helped to

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<sup>185</sup> Children, Young People and Their Families Act 1989, s 263.

<sup>186</sup> Children, Young People and Their Families Act 1989, s 267.

<sup>187</sup> Supra [164], 181.

<sup>188</sup> Supra [128], 224.

illustrate how the earliest forms of indigenous justice have contributed towards, and are reflected in, the current system of restorative youth conferencing in New Zealand. This knowledge will be used in subsequent chapters in considering the extent to which restorative justice has been proved successful in both New Zealand and Northern Ireland, and which cultural features have influenced these levels of success.

The focus of the next chapter will be on Northern Ireland, examining the early Irish systems of justice encoded in the Brehon laws and discussing the ways in which restorative justice principles have been incorporated into the contemporary Northern Irish criminal justice system. As with this chapter, the aim will be to reflect upon traditional justice mechanisms and to consider the current role of restorative justice, in order to assist in subsequent evaluation on the connection between culture and successful restorative justice.



## **Chapter III**

### **The Evolution of Restorative Justice in Northern Ireland**

Northern Ireland's distinctive history offers a unique insight into the application of restorative principles, both from the perspective of an indigenous society and within a transitional setting in the aftermath of conflict. Both will be examined here in this chapter. The aim of this chapter is to establish a detailed understanding of how traditional justice processes as well as social and political contexts have combined to create the current climate of restorative justice-based practices within Northern Ireland. These findings will then be utilised in subsequent chapters when considering the link between pre-existing cultural ideals and the success of restorative justice developments.

The historical roots of the contemporary Northern Irish legal system can be traced back to the ancient system of the Brehon laws, which was characterised by a reparative attitude to dispute resolution. Much of this system remains shrouded in mystery however, due to the loss or destruction of crucial documents as well as difficulties in translating the surviving literature. This problem will be discussed below, along with the key principles underlying the Brehon laws and an overview of the native Irish approach to dealing with offenders in their community. The chapter will then move on to outline the slow progression of English settlement in Ireland, examining issues encountered throughout colonisation and the vast changes implemented along the way, eventually resulting in the partition of Ireland in 1921. The extensive unrest caused as a result of the foundation of the Northern Ireland state is of tremendous significance in the structure of the current criminal justice system. It is therefore important to trace the history of these 'Troubles' as well as the subsequent peace process which consequently led to a surge in the use of restorative justice practices culminating in their statutory entrenchment. Finally, the chapter will examine the restorative justice programmes currently in use in Northern Ireland, considering both 'informal', community-led initiatives and the state-based Youth Conferencing Service. This should demonstrate how in a state with such a fractious political context as Northern Ireland, restorative justice may be used as a powerful mechanism in the transition towards peace. By developing an understanding of how political and cultural factors have framed this form of alternative justice, it becomes possible to identify the factors pertinent to implementing successful restorative justice processes.

## **The Brehon Laws**

The Brehon laws are so called due to the order of judges that presided over the system and adjudicated where dispute arose – the ‘brehons’. To give the system its proper designation however would be to know it as the *Fénechas*.<sup>189</sup> It is thought to have been in existence since before the dawn of the Christian era – it was certainly in place before the appearance of St Patrick in Ireland in the year 432<sup>190</sup> – and did not die out until the beginning of the eighteenth century.

Before exploring the real substance of these laws however, it is important to acknowledge the difficulties faced in attempting to research them. There are two key issues to address here: the first being the destruction or loss of many manuscripts; the second relating to difficulties in translating those texts that are still in existence. Many written materials were destroyed at the hands of the Normans throughout the course of colonisation, and others hidden out of fear of discovery.<sup>191</sup> Thus few Brehon texts remains, and undoubtedly many have since been lost or forgotten. The nature of the surviving Brehon works is an additional obstacle. Writing materials at the time were of high value and therefore used economically, often to such an extent that the content was rendered virtually nonsensical.<sup>192</sup> This is further complicated by the fact that the laws were written in the extinct Irish language, *Berla Féine*,<sup>193</sup> creating an arduous task for translators. It is therefore clear that any attempt to detail the Brehon laws is somewhat of a jigsaw puzzle, piecing together scattered fragments of information, and should not be presumed to be without flaws.

### ***The philosophy behind the Brehon laws***

Of the remaining books of law of ancient Ireland the most pertinent to this work is the *Book of Aicill*, essentially containing the Irish Criminal Code.<sup>194</sup> One of the more interesting aspects of these written volumes is that they were recorded in the form of poetic verse as a useful tactic for committing them to memory.<sup>195</sup> The relevance of this is noted by numerous sources, with Kleeffield opining its social value, arguing that “the greater the gravity of the

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<sup>189</sup> ‘Art. IV. – The Brehon Law Commission’ [1852] 2(7) *The Irish Quarterly Review* 659, 659.

<sup>190</sup> M J Gorman, ‘The Ancient Brehon Laws of Ireland’ [1913] 61(4) *U Pa L Rev* and *American Law Register* 217, 219.

<sup>191</sup> Lawrence Ginnell, *The Brehon Laws: A Legal Handbook* (London, T F Unwin 1894) 14.

<sup>192</sup> W N Hancock (ed), *Ancient Laws of Ireland and Selected Other Brehon Law Tracts* (Dublin, HM Stationery Office 1879) x.

<sup>193</sup> P W Joyce, *A Smaller Social History of Ancient Ireland* (London, Longmans, Green & Co. 1905) 75.

<sup>194</sup> *Supra* [191], 177.

<sup>195</sup> *Supra* [191], 78.

case, the more important it was that judgment be expressed poetically.”<sup>196</sup> In this way, the Irish code of conduct could be memorised and transmitted orally through the generations, allowing customs to be maintained over the years.

The early Irish legal system, whilst by no means perfect, was largely non-adversarial and methods of dispute resolution were “based on ideas of compensation, restitution and group culpability”.<sup>197</sup> Even for the most serious offences the Brehon judges aimed to avoid corporal punishments and favoured a system of fines, whereby the sentences “aimed to restore harmony and to re-integrate the offender into the community”.<sup>198</sup> This is supported by O’Mahony and Doak, who claim that “early Irish society had an appreciation of the value of reparation over and above restitution as a solution to social harms.”<sup>199</sup> These values can be seen to resonate with the Maori philosophy on justice discussed in the previous chapter. Both societies emphasised the importance of community ties and restoration in the administration of justice. Approaches to achieving these aims were very different however, as will be explored in the following sections.

### ***Brehon administration of justice***

The role of the brehon was a complex one that required around twenty years of study in order to gain the necessary level of proficiency.<sup>200</sup> It also evolved into a hereditary profession, leading some to refer to the brehons as a caste, arguably inaccurately.<sup>201</sup> It has been said that they “were the successors to Celtic druids and while similar to judges, their role was closer to that of an arbitrator.”<sup>202</sup> Disputants were encouraged to take their disagreements before a brehon, whereby the brehon would adjudicate and offer a judgment in accordance with the law. For the most part this process was voluntary and consensual; parties could go before a brehon if they wished but were equally free to settle disputes privately.<sup>203</sup>

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<sup>196</sup> John C Kleeefield, ‘From Brouhahas to Brehon laws: Poetic Impulse in the Law’ [2010] 4(1) *Law and Humanities* 21, 22.

<sup>197</sup> Supra [46], 40.

<sup>198</sup> Rachel Monaghan, ‘The Return of “Captain Moonlight”: Informal Justice in Northern Ireland’ [2002] 25 *Studies in Conflict and Terrorism* 41, 42.

<sup>199</sup> Supra [37], 24.

<sup>200</sup> Supra [191], 84.

<sup>201</sup> Sir Henry Sumner Maine, *Lectures on the Early History of Institutions* (New York, Henry Holt & Co. 1875) 26.

<sup>202</sup> The Courts Service of Ireland, *Brehon Law*. Available online at <<http://www.courts.ie/Courts.ie/library3.nsf/pagecurrent/3CBAE4FE856E917B80256DF800494ED9?opendocument>> accessed 24 June 2014.

<sup>203</sup> Supra [191], 86.

It is also worth noting that this was a legal system loved by its people and requiring very little enforcement. Ginnell is particularly vocal on this point, stating that “[l]aw supported by public opinion, powerful because so inspired, powerful because unanimous, was difficult to evade or resist, though there were no men in livery to enforce it.”<sup>204</sup> As with the Maori tribal system, this was a community dependent on each other; discord and conflict had the potential to threaten the survival of the clan as a whole, and therefore emphasis on social harmony was a central feature of both day-to-day life and the justice system. Consequently, the Irish people were careful to maintain relationships between kin and enforce justice collectively. As has been noted, the “absence of either a court system or a police force suggests that people had strong respect for the law”.<sup>205</sup> This is supported by Joyce, who claims that “the whole tenor of Irish literature, whether legendary, legal, or historical, ... shows the great respect the Irish entertained for justice pure and simple according to law, and their horror of unjust decisions.”<sup>206</sup>

In terms of tangible compensation for victims, the Brehon laws relied on a fairly complex system of pecuniary fines. The amount of the fine was calculated by the brehon presiding over the case according to customs laid down by the law, and each case was judged on its own merits with many elements taken into account. The specific fine used in cases of bodily injury, murder or manslaughter was known as the *eric* fine, meaning the ‘honour-price’ of the individual.<sup>207</sup> The *eric* fine was influenced by numerous additional factors due to the seriousness of the offences it corresponded to. The most important of these factors was that of intent, which was granted great significance by the Irish people. This differs from the Maori who, it will be remembered from the previous chapter, required reparation regardless of intent. The Brehon laws dictated that the *eric* for murder be twice that for manslaughter,<sup>208</sup> and less also for loss of eye, ear or limb.<sup>209</sup> They also recognised such issues as contributory negligence and provocation as mitigating factors to be considered in passing judgments and awarding damages.<sup>210</sup>

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<sup>204</sup> Supra [191], 187.

<sup>205</sup> Supra [202].

<sup>206</sup> Supra [193], 72.

<sup>207</sup> Supra [191], 188.

<sup>208</sup> Ibid.

<sup>209</sup> Supra [193], 89. There were also standard damages for very specific injuries, such as those that raised a lump, those that caused blood loss, and those that left a mark on the face. See Lawrence Ginnell, *The Brehon Laws: A Legal Handbook* (London, T F Unwin 1894) 195.

<sup>210</sup> Supra [191], 195.

Another significant factor that could influence the amount of reparation in sentencing was the status of both victim and offender within the clan which, as O'Mahony and Doak observe, may make it "difficult to conceive the Brehon system as fully restorative in terms of contemporary benchmarks".<sup>211</sup> The system did not always go against the lower ranked party however, for example members of the clergy were punished more severely than the common man, as this was seen to be a more substantial abuse of power and reflection upon professional character.<sup>212</sup> In a similar vein, those offences "committed upon a poor clansman who could ill afford it, was punished more severely than a similar offence upon a wealthy person".<sup>213</sup> This demonstrates the respect that the Irish had for all members of its community, and the understanding that the entirety of the clan were essential for it to function effectively. It also illustrates the sheer complexity of the Brehon laws, perhaps unexpected in such an ancient justice system.

As alluded to above, the brehons did not sanction corporal or capital punishments – their judgments revolved solely around pecuniary compensation. Outside of the legal system however, such punishments were known to be practised, and it is important to recognise this and acknowledge that the Brehon system of law was not a perfect forum for justice. These more informal methods of punishment included drowning, hanging, or blinding offenders, and Joyce notes additionally that "[a] very singular punishment was to send the culprit adrift on the open sea in a boat, without sail, oar, or rudder".<sup>214</sup> There were no prisons in this early Irish society whereby offenders could be removed from the community, however the most severe legally-sanctioned punishment, reserved for particularly heinous crimes, allowed criminals to be expelled from their clan. As Ginnell explains, "[a] person so expelled became an outlaw, with no status or right whatever, no legal capacity, and no protection from the law, and anyone who gave him food or shelter became liable for his crimes."<sup>215</sup> These modes of punishment highlight the fact that early Irish society did not wholly embrace a reparative outlook on justice and were in fact willing to take matters into their own hands where compensation was held to be insufficient.

Thus far the intention has been to provide an in-depth understanding of the early Irish legal system, noting the ways in which the Brehon administration of justice can be seen to resonate

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<sup>211</sup> Supra [37], 24.

<sup>212</sup> Supra [191], 193.

<sup>213</sup> Ibid.

<sup>214</sup> Supra [193], 90.

<sup>215</sup> Supra [191], 191.

with restorative principles with its emphasis on reparation both to victims and at a community level, and also the ways in which it diverges from contemporary expectations of restorative justice. By prioritising compensation for victims over punishing offenders, the Brehon system set itself uniquely apart from the punitive-focused, state-based justice mechanisms adopted by its English neighbours. Through studying the earliest foundations of Irish justice it becomes possible to reflect upon the influence these cultural values have had on contemporary attitudes towards offending, and particularly in this work whether they have influenced acceptance of restorative justice practices.

It is now important to consider the movement to colonise Ireland, focusing particularly on the Anglo-Norman settlement, which will be shown to have had a long-lasting and far-reaching impact on both the legal and political landscape of Ireland.

### **Colonisation of Ireland**

The process of colonising Ireland differed drastically from that of New Zealand which, it will be remembered from the previous chapter, was complete within a century of the first Englishman setting foot upon the land. It is hard even to term it a ‘settlement’, for the term ‘invasion’ is assuredly more apt. It took the English almost five hundred years to bring all of Ireland under its rule, with many failed attempts along the way. It was not until the years following the accession of King James I in the seventeenth century that the law of England prevailed throughout Ireland. The intention here is to trace the timeline of events leading to English rule over Ireland, and to examine the changes implemented by the settlers over the centuries. The importance of this lies in the fact that colonisation of Ireland was the starting point of a long period of conflict for the jurisdiction. It is out of this conflict that methods of alternative justice were developed, as will be discussed later in the chapter.

The inclination to inhabit Ireland first became a reality when, in the year 1155, King Henry II’s plan to conquer the country was endorsed by Pope Adrian IV. Richard de Clare, the Earl of Pembroke, was then tasked with leading the Anglo-Norman invasion of Ireland in 1171.<sup>216</sup> Control remained flimsy and largely localised however, as evidenced by the writ issued by King John in 1204 ordering the Irish courts to apply English common law throughout Ireland.<sup>217</sup>

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<sup>216</sup> Supra [202].

<sup>217</sup> Ibid.

Despite these attempts to assert control over Ireland, the fourteenth century in particular saw a decline in English influence. This is due to the fact that the Normans actually began to integrate into the Irish culture, rather than assimilating the Irish to their own ways as intended. This was particularly the case outside of the ‘Pale’ – this being the part of Ireland directly under English control, now recognised as the area of Dublin and much of the east coast of Ireland. It has in fact been observed that the English “found to their chagrin that the settlers were becoming more Irish than the Irish”.<sup>218</sup> This extended to all aspects of Irish culture, and Joyce notes that many English settlers adopted Irish customs, including the Brehon Code, “to which they became quite as much attached as the Irish themselves.”<sup>219</sup>

As a result of the above, the Statute of Kilkenny was enacted in 1366 in an attempt to establish the supremacy of English law over the Irish system. Kleefield describes this piece of legislation as a “concerted effort ... to purge [the natives] of their ‘Irishness’”.<sup>220</sup> Amongst other things, the statute prohibited the use of Irish surnames, the Gaelic language and inter-marriage between the English and the Irish. Most significantly however, it vehemently condemned the use of the Brehon laws, declaring as follows:

“that no Englishman be governed in the termination of their disputes by March law nor Brehon law, which reasonably ought not to be called law, being a bad custom; but they shall be governed, as right is, by the common law of the land, as liege subjects of our lord the king; and if any do to the contrary, and thereof be attainted, he shall be taken and imprisoned and adjudged as a traitor”.<sup>221</sup>

This enactment marked the beginning of a concentrated endeavour by the English to assert their dominance over the Irish people and, as was discussed above, many documents written in the Gaelic language and containing valuable information on the Irish laws were either concealed or forcibly taken and destroyed by the English settlers. In much the same way that the colonisers of New Zealand denounced the customs of the native people out of ignorance for a system that bore little resemblance to their own, the settlers of Ireland - particularly those living within the Pale and therefore largely unexposed to the ways of the Brehon Code – showed little respect for a way of life they did not understand. This was recognised in the Brehon Law Commission of 1852, which states that the English settlers “were totally unable

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<sup>218</sup> Supra [196], 52.

<sup>219</sup> Supra [193], 77.

<sup>220</sup> Supra [196], 52.

<sup>221</sup> Statute of Kilkenny 1366, Art. IV.

to comprehend the language and peculiarities of the system which they so strongly condemned.”<sup>222</sup>

In spite of this, the use of the Brehon laws continued well into the sixteenth century, with certain Anglo-Saxon lords even keeping brehons in their employ.<sup>223</sup> For example, “as late as 1554 ... the Earl of Kildare obtained, by a decision made under Brehon law, an eric fine of 300 cows, for the killing of his foster-brother”.<sup>224</sup> This clearly demonstrates the difficulties that the English Parliament had in bringing Ireland under its control; several centuries on from the first settlement attempts and English dominance remained confined to a small tract of land. This resilience could not be allowed to continue by the English indefinitely however, and under the reign of King Henry VIII in the mid-sixteenth century the Irish system began to crumble. This was largely due to a scheme known as the ‘surrender and re-grant’ of land to the native noble families, which consequently extended the boundaries of English law.<sup>225</sup> The ultimate defeat of Brehon law came about following the accession of King James I in 1603, whereby the Irish people were received into the King’s protection. By the ninth year of King James I’s reign in 1612, it was declared that English common law would be the jurisprudence of Ireland, and the country was subsequently divided into counties.<sup>226</sup>

In this way, after a lengthy process and with much resistance from the native Irish people, the country was finally brought under control of the English government. This was far from the end of the conflict between England and Ireland however, for there were a myriad of religious and cultural differences between the settlers and the native Irish. These differences became apparent soon after colonisation was completed and would continue through to modern times, resulting in the ‘Troubles’ of Northern Ireland. This will be the focus of the next section and is of great significance to those with an interest in restorative justice, as the ‘Troubles’ were hugely influential in framing both community-based and state-based restorative justice initiatives in Northern Ireland.

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<sup>222</sup> Supra [189], 659.

<sup>223</sup> Supra [190], 221.

<sup>224</sup> Sophie Bryant, *Liberty, Order and Law under Native Irish Rule: A Study in the Book of the Ancient Laws of Ireland* (London, Harding & More Ltd 1923) 2.

<sup>225</sup> Supra [202].

<sup>226</sup> Supra [190], 221.



## **Conflict in Northern Ireland**

In the aftermath of colonisation, undercurrents of unrest soon became apparent in Ulster - the last province to have been colonised by the English. It took a long time to bring this final area of land under English control; as was established above, the majority of Ireland had been colonised by the mid-sixteenth century, whereas it was not until 1703 following a lengthy military campaign that Ulster was conquered. By this point only five percent of the land of Ulster remained in the hands of the native Irish.<sup>227</sup> Problems arose from the vast cultural and religious differences between the two communities, with the majority of English settlers being Protestant and the Irish being Catholic.

Over the following two centuries there were many clashes between English-controlled institutions and the Irish people. The government institutions based in Dublin were keen to reflect British society in their way of controlling the affairs of Ireland, and were thus inevitably prejudiced against those of the Catholic religion. The most significant uprising against the British establishment at this time was the Irish Rebellion of 1798 which acted as the catalyst for a more forceful approach, culminating in the Union with Ireland Act 1800. This Act of Union allowed for more direct control of Ireland, abolishing the Irish Parliament and government and bringing Irish affairs under the jurisdiction of Westminster.<sup>228</sup> This move did little to improve relations with the Irish people and instead triggered a number of attempts to overthrow the union throughout the nineteenth century. The most famous rising however, occurred in the Easter week of 1916. It was quashed violently by the state and saw the leaders of the rebellion executed. Darby notes that the unintended consequence of this from the point of view of the British government was that it created “a wave of sympathy for the IRA<sup>229</sup> and its political wing, Sinn Féin”.<sup>230</sup> Sinn Féin was consequently successful in the elections of 1918. This led to a War of Independence between Britain and the IRA, eventually leading to a treaty and the Government of Ireland Act in 1920, which resulted in the partition of Ireland in 1921.<sup>231</sup>

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<sup>227</sup> John Darby, ‘Conflict in Northern Ireland: A Background Essay’ in Seamus Dunn (ed), *Facets of the Conflict in Northern Ireland* (Hampshire, Macmillan Press Ltd 1995). Available online at <<http://cain.ulst.ac.uk/othelem/facets.htm#chap2>> accessed 27 June 2014.

<sup>228</sup> Ibid.

<sup>229</sup> Abbreviation for the Irish Republican Army – an Irish revolutionary military organisation.

<sup>230</sup> Supra [227].

<sup>231</sup> Ibid.

The creation of Northern Ireland and what is now known as the Republic of Ireland did little to calm the feelings of unrest in either of the two new entities. The southern counties were divided over whether to accept the partition, with many proponents of Irish independence unwilling to accept the compromise.<sup>232</sup> In the six counties of Northern Ireland meanwhile, Westminster retained ultimate authority and a subordinate government in Belfast was established. Those in authority were viewed with deep suspicion by many of the population however, and were seen as responsible for the worsening of the conflict. As Doak and O'Mahony observe, “[s]ince the foundation of the state in 1921, the police, courts and their surrounding processes were widely seen as the face of the British state.”<sup>233</sup> It is hardly surprising that the original Irish population, now the Catholic minority, were mistrustful of those in power. The system became one deeply discriminatory towards this minority, leading to further unrest and the infamous ‘Troubles’ of Northern Ireland.

### ***The ‘Troubles’***

The Northern Ireland ‘Troubles’, “began with the struggle of the minority Catholic population of Northern Ireland for civil liberties in the late 1960s.”<sup>234</sup> This effort was spearheaded by the Northern Ireland Civil Rights Association in 1967,<sup>235</sup> who wanted equality and demanded the liberal reforms which would be fought over for several decades. These demands included the following: “a universal franchise; an end to electoral gerrymandering; the fair allocation of public housing; an end to discrimination in local government employment; the repeal of the Special Powers Act 1922; and the disbanding of the exclusively Protestant reserve police force”.<sup>236</sup>

The main players in the conflict were the state forces (largely made up of the British army, the police, and locally recruited soldiers), the republicans (principally the IRA), and the loyalists. For the most part, republicans tended to come from Catholic backgrounds and were in favour of a united Ireland, whereas loyalists comprised a section of the Protestant

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<sup>232</sup> Trevor Lloyd, ‘Partition-within-Partition: The Irish Example’ [1998] 53(3) *International Journal* 505.

<sup>233</sup> Jonathan Doak and David O’Mahony, ‘In Search of Legitimacy: Restorative Youth Conferencing in Northern Ireland’ [2011] 31(2) LS 305, 305.

<sup>234</sup> Jane Winter, ‘Abuses and Activism: The Role of Human Rights in the Northern Ireland Conflict and Peace Process’ [2013] 1 EHRLR 1, 1.

<sup>235</sup> *Supra* [227].

<sup>236</sup> *Supra* [234], 1.

population who claimed to be defending the Union with Britain.<sup>237</sup> The IRA were particularly aggressive in their campaign of violence against the British army, and by 1972 it became clear that the government based in Belfast had lost control. Consequently, Westminster parliament chose to suspend the government in Northern Ireland and take direct control by using the powers available to it under the Government of Ireland Act 1920.<sup>238</sup> This did nothing to improve the view held by the majority of the Irish people that state institutions could not be trusted. Doak and O'Mahony refer to this as a "legitimacy deficit"<sup>239</sup> in the state, and as a result many of the paramilitary groups resorted to 'self-policing'. This form of community justice assuredly was not one favoured by proponents of restorative justice, as Gormally explains: "Though without doubt demanded by the community, this alternative justice system relied on the brutality of kneecappings and terrible beatings."<sup>240</sup> Unfortunately, while so many harboured a deep mistrust of the state this situation would endure, and it was not to change significantly until the 1990s.

### *A step towards peace – the Belfast Agreement*

Following ceasefires in 1994, the political discord in Northern Ireland culminated in the Belfast Agreement of 1998.<sup>241</sup> Winter notes however, that the title of the treaty is somewhat anomalous, as "[t]he 1998 treaty agreement was not really an agreement – it is a little known fact that, until the agreement was actually signed, the parties had never sat down in the same room with one another to negotiate. Instead, it was a compendium of items that all the parties could accept, or at least live with."<sup>242</sup> Ellison is equally as sceptical in his assessment of the peace process, arguing that "it might be more accurate to speak of an absence of war rather than the attainment of a normatively constructed peace."<sup>243</sup>

Regardless of how the treaty was secured however, the Belfast Agreement did work to achieve a tentative peace in Northern Ireland and, as Payne et al. note, it "delivered a

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<sup>237</sup> Brian Gormally, 'Community Restorative Justice in Northern Ireland – An Overview' (Restorative Justice Online April 2006). Available online at

<<http://www.restorativejustice.org/editions/2006/april06/gormallyarticle>> accessed 23 January 2015.

<sup>238</sup> Supra [229].

<sup>239</sup> Supra [233], 305.

<sup>240</sup> Supra [237].

<sup>241</sup> The full designation of the treaty is the 'Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland'.

<sup>242</sup> Supra [234], 5.

<sup>243</sup> Graham Ellison, 'A Blueprint for Democratic Policing Anywhere in the World? Police Reform, Political Transition, and Conflict Resolution in Northern Ireland' [2007] 10 *Police Quarterly* 243, 264.

practical solution to the previously intractable problems that had blighted the province.”<sup>244</sup> In terms of the concrete pledges made within the agreement, it was acknowledged firstly that Northern Ireland will remain a part of the United Kingdom so long as the majority of the people continue to consent to this.<sup>245</sup> Perhaps the most significant factor of the Agreement however, is the commitment to repairing relations between community and state in Northern Ireland.<sup>246</sup> This can be seen in various clauses throughout the Agreement. Doak and O’Mahony note the vast importance of this, stating that “[i]n order for political progress to be matched by inter-communal reconciliation, it was vital that the new criminal justice arrangements were perceived as being fair and morally correct within both communities.”<sup>247</sup> Examples of this commitment to improving relations between state and community in the Agreement are evident in such clauses as follows: “this agreement offers a unique opportunity to bring about a new political dispensation which will recognise the full and equal legitimacy and worth of the identities, senses of allegiance and ethos of all sections of the community in Northern Ireland.”<sup>248</sup> This would suggest a desire to depart from the corrupt and discriminatory system that had caused such a divide between the Catholic and Protestant communities. The commitment to change can also be seen in the creation of an Independent Commission on Policing in Northern Ireland, which aims to ensure that the police service is “professional, effective and efficient, fair and impartial, free from partisan political control; accountable, both under the law for its actions and to the community it serves; representative of the society it polices, and operates within a coherent and co-operative criminal justice system, which conforms with human rights norms.”<sup>249</sup> Such a statement asserting the need for fair dispensation of justice by the state demonstrates clear intent to regain the trust of those sections of the community that had been hitherto isolated from the state.

Further to this, there are clear examples of a willingness to embrace restorative justice principles throughout the Agreement, demonstrating the desire to secure peace in Northern Ireland. Accordingly, the Agreement states that “it is essential to acknowledge and address

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<sup>244</sup> Brian Payne et al., *Restorative Practices in Northern Ireland: A Mapping Exercise* (Queen’s University Belfast, Restorative Justice Forum (NI) November 2010) 14.

<sup>245</sup> Belfast Agreement 1998, Constitutional Issues, 1.

<sup>246</sup> Supra [244], 14.

<sup>247</sup> Supra [233], 309.

<sup>248</sup> Belfast Agreement 1998, Policing and Justice, 1.

<sup>249</sup> Belfast Agreement 1998, Policing and Justice, 2.

the suffering of the victims of violence as a necessary element of reconciliation.<sup>250</sup> As such, a review was commissioned of the criminal justice system, which not only outlined existing research on restorative justice but also made suggestions for its implementation within the youth justice system.<sup>251</sup> In addition, reference is made to the community-based restorative justice initiatives which aim to aid the peace process. The Agreement states that the parties “recognise and value the work being done by many organisations to develop reconciliation and mutual understanding and respect between and within communities and traditions, in Northern Ireland and between North and South, and they see such work as having a vital role in consolidating peace and political agreement.”<sup>252</sup> Initiatives such as these have been hugely influential, during the peace process and beyond, in improving community relationships and encouraging societies to move away from the culture of self-policing and punishment beatings of the past decades. The most prominent of these community-based initiatives will now be examined.

### **Community-Based Restorative Justice Initiatives**

An important feature of restorative justice programmes in Northern Ireland resides in the examination of certain ‘informal’ community-based initiatives, many of which can be attributed to the ‘Troubles’ of the previous decades. As McEvoy and Mika explain, “[w]hile there has been an interest in restorative justice in Northern Ireland for some time, its recent prominence is due largely to attempts during the Northern Ireland peace process to use restorative justice theory and practice as an alternative to paramilitary violence.”<sup>253</sup> It is perhaps unsurprising that such schemes were instigated by communities in Northern Ireland, when the conflict created such a prominent mistrust of state institutions. Communities were, after all, already accustomed to self-policing, and therefore offering up alternative forms of justice which provided recourse from the brutal punishment violence was a viable course of action for many. Gormally supports this, stating that “for clear historical reasons, the communities in Northern Ireland have become well-organised at a neighbourhood level with a high level of structure and activity. Into this culture of willingness to organise and take

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<sup>250</sup> Belfast Agreement 1998, Reconciliation and Victims of Violence, 11.

<sup>251</sup> Jim Dignan and Kerri Lowey, *Restorative Justice Options for Northern Ireland: A Comparative Review* (Belfast, Criminal Justice Review Group: Review of the Criminal Justice System in Northern Ireland March 2000).

<sup>252</sup> Belfast Agreement 1998, Reconciliation and Victims of Violence, 13.

<sup>253</sup> *Supra* [40], 535.

collective responsibility for problems has come a set of ideas and practices that actually allow success in an area very close to people's hearts – safety and justice.”<sup>254</sup>

The two foremost community-based restorative justice schemes in Northern Ireland are Community Restorative Justice Ireland (hereinafter referred to as CRJI) and Northern Ireland Alternatives (hereinafter referred to as Alternatives). CRJI primarily operates within republican areas, whereas Alternatives' roots lie in loyalist territories.<sup>255</sup> Both initiatives favour forms of facilitated mediation as their method of choice in dispute resolution, whether this be an informal 'shuttle mediation' process or a more formal conference.<sup>256</sup> They also take great care to offer a fair service without bias to any party, and are well regulated. As Ellison and Shirlow note, each organisation “has a clear code of practice, as well as taking due cognizance of human rights considerations, both the rights of the offender and the victim are prioritised at all stages of the process.”<sup>257</sup>

CRJI was established in 1994 - following the first IRA ceasefire - in order to provide an alternative to the violent paramilitary punishments in many communities.<sup>258</sup> Community members who are either involved in a dispute or who have been victimised in some way are encouraged to bring their grievance before CRJI where they would otherwise have taken it to the IRA. CRJI will then meet with the various parties to the dispute to discuss potential solutions, tailoring the process to suit each individual case. They will use victim-offender mediation, shuttle mediation or family group conferencing depending on which method is most appropriate in the circumstances. This adaptability is one of the key benefits of restorative justice, as supported by Eriksson, who observes that the “inherent flexibility of restorative processes makes it capable of being highly sensitive to the political, social and cultural context in which it is applied, and consequently suitable for a wide range of situations.”<sup>259</sup>

Alternatives was formed in 1996, following a pilot project in a particularly loyalist area of Belfast which sought to establish a scheme promoting non-violent dispute resolution

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<sup>254</sup> Supra [238].

<sup>255</sup> Ibid.

<sup>256</sup> Supra [40], 538.

<sup>257</sup> Graham Ellison and Peter Shirlow, 'From War to Peace: Informalism, Restorative Justice and Conflict Transformation in Northern Ireland' [2008] 11 SLCD 31, 43.

<sup>258</sup> It should be noted that, although initially intended to cater specifically to young offenders, this organisation is not limited to youth justice. See Brian Payne et al., *Restorative Practices in Northern Ireland: A Mapping Exercise* (Queen's University Belfast, Restorative Justice Forum (NI) November 2010) 20.

<sup>259</sup> Anna Eriksson, 'Challenging Cultures of Violence through Community Restorative Justice in Northern Ireland' [2008] 11 SLCD 231, 235.

techniques. This was known as the Greater Shankill Alternatives Programme, and pursuant to its substantial success in reducing punishment attacks was “extended to a number of loyalist areas under the aegis of Northern Ireland Alternatives.”<sup>260</sup> Alternatives works specifically with young people, particularly those under threat of paramilitary violence, and uses a model that it refers to as the Intensive Youth Programme.<sup>261</sup> It places strong emphasis on encouraging the young person to learn from the offence and make reparation to the community.

One of the key features of both CRJI and Alternatives is the presence of ex-combatants (from republican and loyalist<sup>262</sup> paramilitaries respectively) as voluntary facilitators. This has been the subject of much controversy due to the violent pasts of many of the individuals, however it is submitted that allowing this kind of contribution from former combatants is actually a hugely constructive way of both reintegrating them into communities and diverting them from aggressive methods of dispute resolution. As Ellison and Shirlow opine, by “developing social justice campaigns and programmes former combatants have provided examples and models of leadership that aim to prevent the resumption of punishment attacks and whilst doing so provide alternative non-violent approaches.”<sup>263</sup> Eriksson supports this, maintaining that “the presence of former combatants and political ex-prisoners is crucial in providing moral, political, and military leadership during such transformations.”<sup>264</sup>

What has become clear from the introduction of restorative justice initiatives such as CRJI and Alternatives in Northern Ireland since the 1990s is that in a community plagued by a lack of confidence in traditional state institutions the provision of alternative forms of dispute resolution may be used as a valuable tool in the transition to peace. This is supported by McEvoy et al., who claim that in ‘unstable’ transitional societies such as Northern Ireland, “restorative justice becomes a bellwether for the societal transition to peace and a key political and ideological site of contest between the state and informal structures which have emerged over the period of conflict.”<sup>265</sup> Some have even suggested that the unique cultural and legal history of Northern Ireland makes it particularly suited to the use of restorative

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<sup>260</sup> Supra [257], 41.

<sup>261</sup> Supra [259], 244.

<sup>262</sup> The most active loyalist groups being the Ulster Volunteer Force (UVF) and Ulster Defence Association (UDA).

<sup>263</sup> Supra [257], 48.

<sup>264</sup> Supra [259], 232.

<sup>265</sup> Kieran McEvoy, Harry Mika and Barbara Hudson, ‘Practice, Performance and Prospects for Restorative Justice’ [2002] 42 Brit J Criminol 469, 470.

justice due to the parallels between the core themes of the Brehon laws and community restorative justice, such as the emphasis on societal relationships and the importance of reparation. For example, O'Mahony and Doak suggest that "Irish society may be particularly receptive to any new restorative mechanisms that might be introduced, given the traditional prominence afforded to strong community ties and community-based forms of justice under the Brehon law."<sup>266</sup> In a similar vein, McEvoy and Mika support this view, claiming that "the development of indigenous forms of 'law' in community-based restorative justice schemes can be an empowering and educating aspect of community development, particularly for communities traditionally estranged from the State."<sup>267</sup>

Despite the new-found prominence of community-based initiatives however, it was important for the formal state institutions in Northern Ireland to try to regain the confidence of the Irish people with regards to justice. As discussed above, the Belfast Agreement showed a new commitment to improving the relationship between the state and local communities, particularly in terms of reforming the criminal justice system. This is notably apparent in the reforms made to the youth justice system, whereby following the Justice (Northern Ireland) Act 2002 the Youth Conferencing Service was established in Northern Ireland, mainstreaming the use of restorative justice for young offenders for the first time. This is not to say however, that the introduction of state-based restorative justice was welcomed by all in Northern Ireland. There has in fact been fierce debate over 'ownership' of restorative justice between proponents of both state-based and community-led programmes, and this is reflected in the critical writings on the subject. In their Criminal Justice Review report for example, Dignan and Lowey claim that the only legitimate form of restorative justice is a fully integrated, state-led system which would discard the use of community programmes, contesting that the research is "overwhelmingly supportive"<sup>268</sup> of this viewpoint. McEvoy and Mika are deeply critical of the above Review however, including the state-centric critique of community-based schemes, which they argue were marginalised as a result of its recommendations.<sup>269</sup> In contrast to Dignan and Lowey, McEvoy and Mika afford considerable value to these schemes, arguing that "[t]heir legitimacy and moral authority to operate is derived firmly from the geographical communities in which they operate."<sup>270</sup> As

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<sup>266</sup> Supra [37], 6.

<sup>267</sup> Supra [40], 555.

<sup>268</sup> Supra [251], 56.

<sup>269</sup> Supra [40], 543.

<sup>270</sup> Supra [40], 545.



such the introduction of the state-based Youth Conferencing Service in Northern Ireland has been subject to intense scrutiny by those who would contest that ownership of restorative justice should belong to communities. This development will now therefore be considered.

### **The Youth Conferencing Service**

As noted above, the criminal justice system in Northern Ireland was substantially reformed in light of the Belfast Agreement and the subsequent Criminal Justice Review. The Review made a multitude of recommendations for changes to all areas of the justice system, and particularly pertinent to this piece of research were the suggestions with regard to juvenile justice and the commitment to improving support offered to victims of offending. The Review states that “[c]rime harms individual victims, their families, the community and quality of life generally. It is a Government priority to ensure that the interests of victims are properly taken into account by the criminal justice system.”<sup>271</sup> Further to this, “one commissioned report recommended the formal integration of restorative principles into the heart of the juvenile justice system, practically to keep at risk young people from entering into the formal justice system through early intervention.”<sup>272</sup> In light of the above recommendations it was decided that new legislation should be introduced, resulting in the Justice (Northern Ireland) Act 2002.

The Justice (Northern Ireland) Act 2002 places youth conferencing at the centre of the youth justice system in the form of both diversionary and court-ordered conferences, and aims to bring together the victim and their offender (along with each party’s respective supporters) in a structured, facilitated meeting. The legislation stipulates that the newly-created Youth Conferencing Service will convene a diversionary conference following referral from the Public Prosecution Service. This will occur in cases where the prosecutor considers a conference appropriate and where they would otherwise have instituted court proceedings against the young person.<sup>273</sup> As is usual in restorative justice practices, before the conference can be arranged it is necessary that the young person both admits to committing the offence and consents to involvement in the process.<sup>274</sup> The Public Prosecution Service describes the purpose of referring a young person for a diversionary conference as being: “(i) to deal quickly and simply with less serious offenders; (ii) to reduce the risk of re-offending; (iii) to

<sup>271</sup> Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland: A Consultation Paper* (Criminal Justice Review Group August 1998) 41.

<sup>272</sup> *Supra* [244], 15.

<sup>273</sup> Justice (Northern Ireland) Act 2002, s 58(1).

<sup>274</sup> Justice (Northern Ireland) Act 2002, s 58(3).

engage the offender in a restorative process with the victim and society as a whole; (iv) to reduce to a minimum the offender's involvement with the criminal justice system.<sup>275</sup> With regards to court-ordered conferences, in cases where a young person has been brought before a court and found guilty, it is a particularly "distinctive feature"<sup>276</sup> of the Northern Ireland justice system that they must be referred for a youth conference. The only exceptions to this are cases involving offences which carry a sentence of life imprisonment, offences which are triable only on indictment and offences which fall under the scheduled offences of Part VII of the Terrorism Act 2000.<sup>277</sup> As with diversionary conferences, the young person must consent to taking part in a conference before it may be convened.<sup>278</sup>

The Youth Conferencing Service is the organisation at the heart of this form of restorative conferencing institutionalised by the Justice (Northern Ireland) Act 2002. It initially originates from a pilot scheme operating in Belfast in 2003 and was later extended across Northern Ireland. Muncie describes the role of the Youth Conferencing Service as being "not only to encourage young people to recognise the effects of their offending and to take responsibility for their actions, but also to devolve power by actively engaging victim, offender and community in the restorative process."<sup>279</sup> Very few jurisdictions have taken the step of creating a specialist organisation for the provision of restorative practices such as youth conferencing, and as such the Northern Ireland Service is very much a trailblazer in this field. As O'Mahony and Doak observe, "Northern Ireland's approach was very much a product of the peace process, and in this sense the Youth Conferencing Service largely owes its existence and funding levels to the political will to implement the Review in its entirety."<sup>280</sup>

Conferences are facilitated by Youth Justice Co-ordinators employed by the Youth Conference Service. These individuals often have backgrounds in other aspects of criminal justice or social work, but all are trained in restorative practices to a professional level. Once the Youth Conference Service has received a conference referral, either from the Public Prosecution Service or the courts, there will usually be a time period of around a month

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<sup>275</sup> Public Prosecution Service, *Guidelines for Diversion* (Belfast, Public Prosecution Service Northern Ireland November 2008) 3.

<sup>276</sup> *Supra* [233], 314.

<sup>277</sup> Justice (Northern Ireland) Act 2002, s 59(2).

<sup>278</sup> Justice (Northern Ireland) Act 2002, s 59(6).

<sup>279</sup> John Muncie, 'Illusions of Difference: Comparative Youth Justice in the Devolved United Kingdom' [2011] 51 *Brit J Criminol* 40, 47.

<sup>280</sup> *Supra* [37], 192.

whilst the conference is arranged. In this time the Youth Justice Co-ordinator will meet with the victim<sup>281</sup> and the young person separately, along with their respective support networks, in order to prepare them for the conference, ensuring that they have realistic expectations about the process and possible outcomes of the meeting. At the meeting itself, the Co-ordinator will facilitate the meeting, encouraging respectful and constructive dialogue between the parties in an effort to reach a consensual outcome. As with the New Zealand family group conferences, the aim of the meeting is to compose a ‘conference plan’ as a way of meeting the needs of the victim and preventing the young person from re-offending. The conference plan is submitted either to the prosecutor or the court for acceptance, and “then becomes a statutory order, monitored by a Youth Conference Co-ordinator. Non-compliance may result in breach action.”<sup>282</sup> The conference plan can include a range of possible outcomes, however Payne et al. assert that a “successful outcome will involve a form of reparation, such as charity work, an apology and restitution to the victim and participation in programmes to support desistance from reoffending.”<sup>283</sup> It may be observed that there are certain parallels between the Northern Ireland process of youth conferencing, and the family group conferencing system in New Zealand. The two are not identical however, and it has been observed that the emphasis in Northern Ireland is on placing the victim at the heart of the process.<sup>284</sup> This is in contrast to the New Zealand system which prefers to focus on diverting young offenders away from a life of repeat offending.<sup>285</sup> This will be explored in greater detail in subsequent chapters.

The importance of the role played by the Youth Conferencing Service must not be underestimated in the context of the wider peace process. The conferencing scheme offers substantial opportunities for the state to open channels of communication with many communities that were formerly estranged from state institutions and lacked confidence in the criminal justice system. Notably, the mandatory requirement of an attendant police officer in conferences allows for dialogue with young people in a non-hostile environment, such as would rarely be available otherwise.<sup>286</sup> Unfortunately, the value of restorative justice is arguably compromised by the conflict and lack of cooperation between community- and

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<sup>281</sup> If they wish to attend. As with all forms of restorative justice the process is entirely voluntary and if the victim does not wish to attend the conference in person they may choose to take part via telephone link or appoint a representative to take their place, or even contribute indirectly through the use of a written statement.

<sup>282</sup> Supra [273], 47.

<sup>283</sup> Supra [244], 27.

<sup>284</sup> Supra [37], 89.

<sup>285</sup> Children, Young People and Their Families Act 1989, s 208(d).

<sup>286</sup> Supra [233], 319.

state-based programmes, which has led to underlying tensions within the justice system and may “impede the ‘legitimacy’ mission”<sup>287</sup> embarked upon by the state in order to regain the trust of its peoples. It must be hoped however, that integrating restorative justice into the justice system of Northern Ireland through legislation may provide a valuable tool in re-establishing a working relationship between state and community. This is supported by O’Mahony and Doak, who argue the importance of basing changes to the criminal justice system in legislation in order for them to work effectively. They assert that legislation “gives the necessary framework for such changes to occur and direction for those making the key decisions in the criminal justice process.”<sup>288</sup>

### **Conclusion**

The aim of this chapter was to explore the lengthy history of restorative justice in Northern Ireland. Principles of restorative justice in this unique society can be traced back to the pre-Christian era in the reparative ideals and emphasis on community seen in the Brehon laws. The Irish fought for the right to keep these laws throughout the drawn-out process of Anglo-Norman colonisation, and the willingness with which many of the English settlers embraced the laws only confirms their suitability for the community. Restorative values were largely forgotten in the aftermath of colonisation and British rule in Ireland. It was not until the ensuing conflict caused by the ‘Troubles’ that they were rediscovered as the subsequent peace process acted as a catalyst for the use of restorative justice in Northern Ireland. The creation of the Youth Conferencing Service and enactment of the Justice (Northern Ireland) Act 2002 as a result of the Belfast Agreement have been hugely influential in strengthening the peace process and integrating restorative justice practices into the criminal justice system of Northern Ireland. There have been issues however, due to conflict with community-based schemes, over who ‘owns’ restorative justice. The contested nature of restorative justice in Northern Ireland has led to tensions potentially undermining its efforts in improving youth justice. Consideration of these complex developments should have provided an understanding of both the history and current status of restorative justice in Northern Ireland.

Pursuant to this, the next chapter intends to explore the existing substantive research on restorative justice in both New Zealand and Northern Ireland. The objective of this is to understand the relative success of restorative justice practices in the two countries, in order to

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<sup>287</sup> Supra [233], 322

<sup>288</sup> Supra [37], 176.

examine the impact that the integration of restorative justice into their formal justice systems has had on youth offending.

## **Chapter IV**

### **Evaluating Restorative Justice in New Zealand and Northern Ireland**

Having considered the historical progression of restorative justice and current level of integration into the criminal justice systems both of New Zealand and of Northern Ireland in the previous chapters, it is now pertinent to explore the extent to which restorative practices may be considered ‘successful’ in the two countries. The aim of this chapter is to examine the existing evidence on the practical operation of restorative justice, with the aim of assessing the impact it has had upon the youth justice systems of New Zealand and Northern Ireland. The research uncovered in this chapter will then be synthesised with knowledge gained concerning the historical development of restorative justice in the final chapter. This will ultimately allow for an analysis as to whether the successful implementation of restorative justice resonates more firmly within certain cultures, and if so, which factors contribute towards this.

While ‘success’ is a concept notoriously difficult to define, it is important to attribute a specific meaning to the term in order to develop a clear basis for analysis. The two particular measures of success under consideration here will be victim satisfaction levels, and rates of recidivism. The choice has been made to limit the evaluation to these measures as these are the factors most commonly cited as indicators of success in relation to the restorative justice schemes in Northern Ireland and New Zealand respectively. As was established in the previous two chapters, the Youth Conferencing Scheme in Northern Ireland places greater emphasis than its New Zealand counterpart on ensuring the victim’s interests are of the highest priority. New Zealand’s system of family group conferencing, on the other hand, is largely concerned with the offender’s successful reintegration into society. In addition, whilst increased rights and satisfaction for victims is of paramount importance for proponents of restorative justice, the most persuasive argument for the integration of restorative justice into the formal criminal justice system for policy-makers is to provide evidence that such practices yield lower levels of reoffending than conventional custodial sentences can achieve. It is also important to determine the longevity of the impact of restorative justice on reoffending – whether it truly reforms offenders and the effects last a lifetime, or whether any benefit is purely short-term - thus data examining rates of recidivism for longer periods of time following restorative justice processes is a source of valuable information. Choosing to

examine victim satisfaction and reoffending statistics should therefore give an interesting insight into whether the two countries are achieving their primary goals.

Before the substantive evidence may be considered, it must first be acknowledged that, as with almost every subject of investigation, measuring satisfaction levels and reoffending rates is an imperfect science. The first part of the chapter therefore will be devoted to exploring the issues inherent in researching the specified areas of restorative justice. It will then move on to assess the key studies applicable firstly to New Zealand and secondly to Northern Ireland. Factors relevant under the header of victim satisfaction will include whether victims felt better as a result of the process, whether they felt involved in the process, and whether they agreed with the outcome of the process. When examining recidivism, the most important aspect will be to determine how reoffending rates for restorative justice practices compare to other forms of disposal.

### **Issues with Measuring Victim Satisfaction & Recidivism**

Consistently positive victim feedback is one of the most sought after outcomes of any restorative justice initiative. As discussed in previous chapters, the extension of victims' rights and participation in the justice process is a key goal of restorative justice. However, the nature and extent of these is not always an easy thing to assess. With regards to establishing a quantitatively sound method of measuring levels of victim satisfaction with restorative justice practices, the most obvious obstacle is the issue of what exactly constitutes 'satisfaction'. By its very nature, satisfaction is a subjective concept, and one that has been described as "notoriously fuzzy"<sup>289</sup> to define. The problem with the subjective nature of satisfaction is that individual expectations are likely to affect the victim's view of the restorative justice process. As Morris and Maxwell explain, "failure to deconstruct the concept of 'satisfaction' almost certainly reflects the fact that people vary in both their level of expectation and the type of outcomes they view as appropriate"<sup>290</sup>.

By reviewing the literature on the topic however, it becomes apparent that there is a selection of recurring themes which may be used to ascertain just what is meant by victim satisfaction. Common ideas include those of fairness, regarding both process and outcome; involvement in the decision-making process; whether the victim would recommend restorative justice to

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<sup>289</sup> Hennessey Hayes and Kathleen Daly, 'Youth Justice Conferencing and Reoffending' [2003] 20(4) JQ 725, 734.

<sup>290</sup> Supra [151].

others; and whether restorative justice was thought to be preferable to the traditional court procedure. These factors will all be taken into account throughout this chapter with the view of gaining a well-rounded understanding of victim satisfaction with restorative justice practices.

Recidivism statistics are not always of the utmost priority for purist advocates of restorative justice, instead viewed as somewhat of an incidental yet fortunate by-product of the process. Often the focus rests more on recognition of the wrong done to the victim and need for compensation from the offender, who is actively encouraged to take responsibility for his/her actions throughout the process. It is undoubtedly the case however that the capacity of restorative justice to have a positive effect on reoffending rates is the “litmus test”<sup>291</sup> for most policy-makers. Hayes and Daly support this, noting the importance of practices having a demonstrably “constructive impact”<sup>292</sup> on the justice system for policy-makers. As with measuring levels of victim satisfaction however, there are issues when it comes to assessing the effect of restorative justice on reoffending rates.

One of the primary challenges when studying reoffending data is to establish what is considered to be a recidivist event. Definitions are not consistent throughout the research, for example some may consider any interaction with the justice system (i.e. police cautioning) to be a recidivist event, whereas others may require reconviction for the offence to constitute recidivism.<sup>293</sup> As Maltz notices, “[t]here are so many possible variations in the method of computing recidivism that one doubts if more than a handful of the hundreds of correctional evaluations are truly comparable.”<sup>294</sup> This may be dealt with by the categorisation of recidivist events in data, for example in their 2004 New Zealand government report, Maxwell et al. recorded reoffending statistics according to whether the offence was minor or resulted in a custodial penalty.<sup>295</sup> It must also be acknowledged that not all reconvictions will have been detected as, unless the recidivism data includes self-reported crimes, research will be based on reported crimes which will by no means encompass all offences committed.<sup>296</sup>

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<sup>291</sup> Supra [73], 46.

<sup>292</sup> Supra [289], 725.

<sup>293</sup> cf. methodology for measuring reoffending in: Gabrielle Maxwell and Allison Morris, ‘Restorative Justice and Reconviction’ [2002] 5(2) *Contemporary Justice Review: Issues in Criminal, Social and Restorative Justice* 133 and D Lyness and S Tate, *Northern Ireland Youth Re-Offending: Results from the 2008 Cohort* (Belfast, Youth Justice Agency Statistics and Research Branch: Statistical Bulletin 2/2011, July 2011).

<sup>294</sup> Michael D Maltz, *Recidivism* (Orlando: Florida, Academic Press Inc. 1984) 22.

<sup>295</sup> Gabrielle Maxwell et al., *Achieving Effective Outcomes in Youth Justice: Final Report* (Wellington, Ministry of Social Development February 2004).

<sup>296</sup> Supra [294], 22.



Some offenders may in addition have a greater likelihood of being detected than others through simple environmental factors. For example, localities with particularly low socio-economic status are more likely to be the focus of police attention, thus offenders are at greater risk of detection than in more prosperous areas.<sup>297</sup>

Further to this, there is the question of follow-up periods used in recording reoffending. For example, there is no uniform agreement over exactly *when* the follow-up period should begin. Does this period begin following the initial arrest, or following the restorative justice process? The risk of analysing studies that measure reoffending from the point of initial arrest is critiqued by Hayes, who notes that in these cases the “results demonstrate the effects of initial arrest or assignment on recidivism, rather than the effects of a legal intervention.”<sup>298</sup> Similarly, there is a lack of consistency in determining the end of the follow-up period. Some studies may choose to measure reoffending just a few months after the restorative justice process, whereas others will return to examine recidivism rates two or three years later. Maxwell and Morris argue the importance of continued study of offender recidivism over a period of years, on the basis that “if effective interventions slow the rate of reoffending, then a significant number of those who do reoffend may not do so until after a year or more.”<sup>299</sup> For this reason, the research under evaluation in this chapter will focus on studies with a follow-up period of at least twelve months.

There are moreover other issues to consider, not necessarily specific to studying victim satisfaction or recidivism, but relevant to research on restorative justice in general. Arguably the most problematic of these is the issue of self-selection bias. This arises from the fact that restorative justice is, by definition, a voluntary process. As such, the victims and offenders taking part in restorative justice programmes are potentially more likely to be receptive to the process than others. This is an unavoidable issue however, as if a study was conducted in which participants were to be randomly assigned either to a restorative justice practice or to a traditional court process, the voluntariness of restorative justice would be removed, thereby negating the essence of its restorative nature.<sup>300</sup> A final issue to be aware of when researching restorative justice is the unique context of every programme. For example, low

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<sup>297</sup> Gabrielle Maxwell and Allison Morris, ‘Family Group Conferences and Reoffending’ in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing Ltd. 2001) 244.

<sup>298</sup> Hennessey Hayes, ‘Assessing Reoffending in Restorative Justice Conferences’ [2005] 38 ANZJ Crim 77, 83.

<sup>299</sup> *Supra* [297], 245.

<sup>300</sup> Jeff Latimer, Craig Dowden and Danielle Muise, ‘The Effectiveness of Restorative Justice Practices: A Meta-Analysis’ [2005] 85(2) *The Prison Journal* 127, 139.

levels of victim satisfaction or high levels of reoffending may have very little to do with restorative justice as a concept in general, but everything to do with a poorly managed system or inexperienced staff. Maltz supports this point, arguing that “success may be due more to the personalities of the staff running the programme than to the nature of the programme: given that same staff, *any* programme would show signs of success.”<sup>301</sup>

Having acknowledged the various pitfalls inherent in studying restorative justice, and in particular data on victim satisfaction and recidivism, the chapter will now move on to consider the evidence itself. Meta-analyses of restorative justice thus far have painted an encouraging picture for restorative justice, with the most well-known of these – the Latimer et al. 2005 meta-analysis – finding that in all but one of the 22 restorative justice studies examined, victim satisfaction levels were higher than in a comparable control group.<sup>302</sup> This is supported by a separate meta-analysis by Bonta et al. which synthesised the results of 39 studies using a range of restorative justice-based practices.<sup>303</sup> Results found average victim satisfaction levels of an impressive 81.6%.<sup>304</sup> Such studies have also reported a positive impact on recidivism rates for restorative justice programmes, with Latimer et al. stating that “compared to comparison and/or control groups who did not participate in a restorative justice programme, offenders in the treatment groups were significantly more successful during the follow-up periods.”<sup>305</sup> Further to this, Bonta et al. reported a 7% reduction in recidivism following the use of restorative justice.<sup>306</sup> The chapter will now proceed to examine whether these results may be replicated on a smaller scale specific to New Zealand and Northern Ireland in turn. This will first involve a discussion of the key research regarding the system of family group conferencing in New Zealand.

## **New Zealand**

As was discussed in the second chapter of this work, the family group conferencing process in New Zealand was implemented following the enactment of the CYPFA. The effects of this Act would be felt immediately, with a 75% immediate reduction in Youth Court appearances and a 71% reduction in prosecutions against young people, as well as a 63%

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<sup>301</sup> Supra [294], 21.

<sup>302</sup> Supra [300], 136.

<sup>303</sup> James Bonta et al., ‘Restorative Justice and Recidivism: Promises Made, Promises Kept?’ in Dennis Sullivan and Larry Tiffit (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge 2006) 114.

<sup>304</sup> Ibid.

<sup>305</sup> Supra [300], 137.

<sup>306</sup> Supra [303], 114.

drop in young offenders being imprisoned, in the first year of the Act's operation.<sup>307</sup> Maxwell and Morris also observed the sudden effect the Act had on Youth Court statistics, remarking that in 1990 the appearance rate for young people aged 14-16 was 160 per 10,000 in the Youth Court, whereas in the three calendar years preceding the Act this number averaged at 630 per 10,000.<sup>308</sup> It is thought that around 60% of young people who came to the attention of the police in the first year the Act was in operation were offered diversionary treatment, and 40% were dealt with through the use of family group conferences.<sup>309</sup> The diversionary intent of the Act can therefore be seen to have had an immediate impact on the youth justice system.

Although the dramatic reduction in Youth Court appearances for young offenders did not continue in the same vein and in fact showed a gradual increase through the 1990s,<sup>310</sup> the figures are still pointing towards a more diversionary route for young people who come into contact with the police than they were prior to the Act. For example, there were less than half the number of juvenile prosecutions in 1996 than in 1989, and less than half the number of juvenile imprisonments,<sup>311</sup> demonstrating a significant proportion of young offenders still being diverted away from the traditional justice system. Further to this, Lynch observes that as of 2012, "approximately 80% of apprehensions are resolved by the police without recourse to prosecution" through the use of the diversionary schemes introduced by the 1989 Act.<sup>312</sup> As such, it is clear that diversionary options and family group conferences are much more the norm for use with juvenile offenders than they were prior to the 1990s. The effect that these processes have had on the victims involved will now be examined.

### ***Victim satisfaction***

One of the most straightforward methods for gauging victim satisfaction with restorative justice is simply to ascertain whether victims felt better subsequent to the process. This question tends to be the baseline marker for most studies on victim satisfaction and will be asked at some stage. Research conducted in New Zealand typically reports relatively high

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<sup>307</sup> Frederick W M McElrea, 'The New Zealand Model of Family Group Conferences' [1998] 6 *European Journal on Crime Policy and Research* 527, 532-533.

<sup>308</sup> Gabrielle Maxwell and Allison Morris, 'Youth Justice in New Zealand: Restorative Justice in Practice?' [2006] 62(2) *Journal of Social Issues* 239, 250.

<sup>309</sup> Supra [152], 307.

<sup>310</sup> Supra [307], 532.

<sup>311</sup> Suzanne Goren, 'Healing the Victim, the Young Offender, and the Community via Restorative Justice: An International Perspective' [2001] 22 *Issues in Mental Health Nursing* 137, 146.

<sup>312</sup> Supra [128], 226.

levels of victim satisfaction, with one study showing that 81% of victims felt better as a result of participating in the restorative justice process.<sup>313</sup> Maxwell et al. describe similar levels of satisfaction in a New Zealand government report on restorative justice best practice, with only 5% claiming that they felt worse following their family group conference.<sup>314</sup> This same study also reports that 69% of victims stated the family group conference had helped to put matters behind them.<sup>315</sup> A further study by Morris and Maxwell into the use of family group conferences in New Zealand found slightly lower, but still encouraging, statistics on victim satisfaction, with around 60% of victims interviewed expressing satisfaction, describing the process as “helpful, positive, and rewarding”.<sup>316</sup>

It can be helpful for restorative justice researchers to have victims explain in their own words exactly how the experience made them feel. Some examples of the specific benefits gleaned from family group conferencing are described by victims as follows:

“At the beginning I thought it was probably a waste of time but this changed very quickly. People were honest and straight-up. I walked away feeling something had been achieved.”<sup>317</sup>

“I got the ill feelings out of my system.”<sup>318</sup>

“At the family group conferences I saw [the offender] face-to-face and saw them acknowledge they had done wrong.”<sup>319</sup>

“I think they are a good thing. They managed to clear the air for us and let us talk about things. They are certainly worthwhile.”<sup>320</sup>

Another feature known to increase victim satisfaction is the concept of procedural justice. This concerns the victim feeling that their views are taken into account during the process of restorative justice, that they are able to say everything they wish to say to the offender, and that they are treated with respect and in a fair manner by all involved. It is also quite simply

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<sup>313</sup> Gabrielle Maxwell, ‘Crossing Cultural Boundaries: Implementing Restorative Justice in International and Indigenous Contexts’ [2008] 11 SLCD 81, 83.

<sup>314</sup> Supra [295], 158.

<sup>315</sup> Ibid.

<sup>316</sup> Supra [151]. See also Allison Morris, Gabrielle M Morris and Jeremy P Robertson, ‘Giving Victims a Voice: A New Zealand Experiment’ [1993] 32(4) *The Howard Journal* 304, 311.

<sup>317</sup> Supra [295], 156.

<sup>318</sup> Supra [152], 312.

<sup>319</sup> Supra [295], 159.

<sup>320</sup> Supra [295], 161.

a sense of being involved in the process which, as has been discussed in previous chapters, is a factor missing all too often in the traditional courtroom process for victims. Procedural justice may indeed lead to victims feeling that the process itself was fair, even if they were dissatisfied with the overall outcome. The Maxwell et al. study conducted a thorough analysis of these points when interviewing victims following their family group conferences, and the overall results present a fairly positive outlook for restorative justice. 86% felt they had the opportunity to say what they wanted during the conference and 83% agreed they had the chance to explain the effect of the offending to the offender's face.<sup>321</sup> This is supported by further research by Maxwell and Morris which found that "seven or eight out of ten victims were able to express their views and given a chance to explain the impact of the offending on them."<sup>322</sup> Further to this, 90% in the Maxwell et al. study stated they had been treated with respect throughout the course of the process.<sup>323</sup> A significantly lower 55% answered in the affirmative when asked whether they had felt involved in making decisions however.<sup>324</sup>

It is generally accepted that fair process is intrinsically linked to victim satisfaction in restorative justice, and this is supported by the above findings. Gal has also reported research findings claiming that positive feedback regarding restorative justice practices coincides with "involvement in the process, having an opportunity to release bad feelings, being able to affect the outcomes, and having the opportunity to confront the offender and the offender's family."<sup>325</sup> This has been supported elsewhere, with further research stating that "[g]enerally, the victims who felt better as a result of the [family group conference] said that they had been involved in rather than excluded from the process."<sup>326</sup> This again emphasises the connection between inclusion for victims in the justice process and higher satisfaction levels. The importance of this has also been stressed by victims themselves in interview follow-ups to restorative justice:

"To know what is happening is to be involved."<sup>327</sup>

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<sup>321</sup> Supra [295], 155.

<sup>322</sup> Supra [308], 253.

<sup>323</sup> Supra [295], 155.

<sup>324</sup> Ibid.

<sup>325</sup> Supra [25], 128.

<sup>326</sup> Supra [152], 311.

<sup>327</sup> Supra [313], 83.

“It was a chance to express how you feel and this gives you a certain amount of relief.”<sup>328</sup>

“It was great. I could air out my grievances. Share what could be done.”<sup>329</sup>

“Initially I was angry. I told the young person what she had done and that it had to be dealt with. Later on it was more constructive. I felt she was more receptive. Hoped my presence had emphasised the severity of her actions.”<sup>330</sup>

Pursuant to considering the extent to which victims were able to express themselves throughout the restorative justice process and were included in making decisions, the factor of whether they were then satisfied with the outcome is relevant. Returning again to the Maxwell et al. report on restorative justice, the numbers are once more highly encouraging, with 87% of victims claiming they agreed with the eventual decisions made during the family group conference.<sup>331</sup> These levels of satisfaction with conference outcomes are notably higher than most studies report however. Another study, for example, found that only half of the victims interviewed were satisfied with the outcomes and about a third claimed to be dissatisfied.<sup>332</sup> In a similar vein, an evaluation conducted by Morris, Maxwell and Robertson showed that 62% of victims agreed with conference decisions, however 35% wanted either harsher penalties for the offender or a greater level of reparation.<sup>333</sup> A further 8% were not happy with the conference outcome, but for the reason that they felt more attention should have been paid to the welfare of the young person.<sup>334</sup>

In terms of providing an explanation for studies which yielded lower levels of victim satisfaction, there are a few recurring themes that may prove useful in determining best practice for restorative justice. One of the most common reasons proffered is that victims felt that they were not included to a great enough extent throughout the process. This may be a result of poor technique by the facilitator of the family group conference, for example by dominating the interactions and not allowing the victim to fully participate. Victims may also not have been kept abreast of developments subsequent to the conference. This point has

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<sup>328</sup> Supra [295], 157.

<sup>329</sup> Supra [152], 312.

<sup>330</sup> Ibid.

<sup>331</sup> Supra [295], 158.

<sup>332</sup> Supra [151].

<sup>333</sup> Supra [152], 314.

<sup>334</sup> Ibid. Note that these percentages add to more than 100 as some victims expressed a wish for both harsher penalties and more attention on welfare.

been reinforced by Morris and Maxwell, who claim that one of the most frequent reasons given for victim dissatisfaction is that victims “were simply never informed about the eventual outcome of the family group conference.”<sup>335</sup> This suggests that not only inclusion in the process, but a high degree of professionalism by staff involved in restorative justice practices is important in ensuring victim satisfaction. This is not to say that all the blame for victim dissatisfaction lies at the feet of the facilitators of restorative justice. The problem may be with the process of family group conferencing itself. As was explored in the second chapter, one of the key features of family group conferences in New Zealand is that the young offender and their supporters are able to take the time to discuss privately ways in which to move forward from the offence. This feature may in itself serve to make the victim feel excluded from the decision-making process of the conference. This has been supported by Maxwell and Morris, who note that dissatisfaction with levels of involvement in conferences is “probably an inevitable consequence”<sup>336</sup> of these private deliberations.

One of the more prominent reasons for a negative outlook on restorative justice is simply that in some cases offenders did not follow through on every aspect of the reparation agreed upon during the conference. Regardless of whether there are reprisals for the young person for breaching the terms of the conference plan, the initial lack of respect for decisions made during the conference will have an adverse effect on opinions of restorative justice for the victim.<sup>337</sup> This may also be the case where victims hold a continued fear of the offender and do not believe them to accept responsibility for the offence or that any apology offered is genuine. Of particular concern are situations where the young person has been involved with gangs, whereby the victim may fear reprisals following the conference.<sup>338</sup>

A final point to consider when examining why victims may express dissatisfaction with the restorative justice process is related to an issue previously discussed, namely the subjective nature of victim satisfaction. Each individual victim who agrees to take part in a restorative conference will go into the process with different expectations of meeting the young offender and their family, of the outcome of the conference, and of the way it will make them feel. Going into the process with a view that it will be the panacea to all problems caused by the offence is unlikely to result in a satisfied victim. This will particularly be the case if victims are not provided with adequate briefing in preparation for the conference. As Morris,

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<sup>335</sup> Supra [151].

<sup>336</sup> Supra [308], 253.

<sup>337</sup> Supra [295], 163.

<sup>338</sup> Supra [152], 316.

Maxwell and Robertson observe, “[i]f victims attend [family group conferences] with false or unrealistic expectations it is not surprising that they remain dissatisfied.”<sup>339</sup>

Levels of victim satisfaction may not be perfect, but realistically this will never be the case with any form of justice system and overall results demonstrate an encouragingly positive response to family group conferences in New Zealand. It is now important to examine whether this positive trend continues in relation to recidivism.

### ***Recidivism***

To give some idea of the recidivism statistics typically to be expected from the conventional justice system, the annual reports from the New Zealand Department of Corrections provide useful context. Data from a 12-month follow-up in the aftermath of custodial sentences show that overall reconviction levels in 2010/11 were at 43.3% with re-imprisonment levels at 27.0%.<sup>340</sup> The same data from 2011/12 demonstrates similar rates, with 44.2% reconviction and 26.7% re-imprisonment.<sup>341</sup> When these statistics are narrowed down solely to young offenders<sup>342</sup> they are even more concerning, with the 2011/12 data showing rates of 69.1% reconviction and 45.5% re-imprisonment.<sup>343</sup> Follow-up at 24-months does not show signs of improvement, with young offenders displaying startlingly high levels of reconviction at 78.2% and re-imprisonment rates of 53.3%.<sup>344</sup>

With these figures in mind, comparative statistics for young offenders following restorative justice interventions will now be considered. Maxwell and Hayes carried out a review of restorative justice across the Pacific Region - including research from New Zealand - examining the reoffending rates of 1483 young people. This review reports that more than 20% of the total sample of young people reoffended within 18 months of being dealt with by the police.<sup>345</sup> When this sample is sub-divided into the different methods of disposal, it was found that 37% of those young people referred for a family group conference reoffended, in

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<sup>339</sup> Supra [152], 315.

<sup>340</sup> Department of Corrections, *Annual Report: 1 July 2012 – 30 June 2013* (Wellington, New Zealand Department of Corrections October 2013) 97.

<sup>341</sup> Ibid.

<sup>342</sup> Note that in this case, young offenders are defined as those under the age of 20.

<sup>343</sup> Supra [340], 96.

<sup>344</sup> Supra [340], 98.

<sup>345</sup> Gabrielle Maxwell and Hennessey Hayes, ‘Restorative Justice Developments in the Pacific Region: A Comprehensive Survey’ [2006] 9(2) *Contemporary Justice Review: Issues in Criminal, Social and Restorative Justice* 127, 131.



comparison to 51% of those who were processed through the Youth Court.<sup>346</sup> Recidivism rates were lowest for group of young people who were simply given warnings by the police, at 9%;<sup>347</sup> however this is perhaps to be expected as these are more likely to have been very minor infractions rather than the type of offence leading to a pattern of reoffending.

In the Maxwell et al. New Zealand government report referred to previously, 520 of the young people who took part in a family group conference were later interviewed and asked whether they had since offended. This was used alongside the official police data as an additional measure of honesty.<sup>348</sup> The results were as follows:

*Self-report data:* No offences detected – 30%

Minor penalties – 44%

Custodial penalties – 26%

*Official statistics:* No offences detected – 31%

Minor penalties – 47%

Custodial penalties – 22%<sup>349</sup>

The above level of reoffending does compare favourably with the young offender statistics provided by the New Zealand Department of Corrections seen above, although the numbers regarding minor penalties are perhaps higher than proponents of restorative justice would wish. When the follow-up data examining the number of convictions at one, two and three years after the young offender had turned 17 is considered however, the outcome is less encouraging.<sup>350</sup> The data found that after one year, the percentage of young people with one or more convictions was 55%.<sup>351</sup> After two years this rose to 67%, and after three years 73% of the young people were found to have one or more convictions.<sup>352</sup> This may seem disappointingly high, however after reviewing multiple reconviction studies, Morris and

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<sup>346</sup> Ibid.

<sup>347</sup> Ibid.

<sup>348</sup> Supra [295], 186.

<sup>349</sup> Supra [295], 187.

<sup>350</sup> It should be noted however, that over this time period the information available on the young offenders did decrease considerably. After the first year, 99% of the original sample could be used; after the second year, this dropped to 95%; and after the third year only 51% of the sample could be used. See Michael D Maltz, *Recidivism* (Orlando: Florida, Academic Press Inc. 1984), 188.

<sup>351</sup> Supra [295], 188.

<sup>352</sup> Ibid.

Maxwell report that the proportion of offenders reconvicted following a family group conference is “certainly no worse and is probably better than samples dealt with in the criminal justice system.”<sup>353</sup>

With regards as to whether young people who reoffend in the aftermath of a restorative justice process are prone to persistent recidivism, it is again Maxwell and Morris who provide the most comprehensive research. Following a youth justice study conducted from 1990-91, reconviction data was re-examined in 1994 for 161 young offenders who had undergone a family group conference.<sup>354</sup> Results showed that in the four years since the conference, just over a quarter of the young people had been persistently reconvicted.<sup>355</sup> More positively however, more than a third of the sample had not been reconvicted at all and 14% were reconvicted only once over the four years.<sup>356</sup> These statistics are supported by further research from Maxwell et al. which studied reoffending rates after young offenders who had taken part in a family group conference had turned 17. This found that in the first two years of follow-up, 33% of the sample had not been reconvicted, with 22% only reconvicted in a minor capacity and a further 26% showing signs of serious persistent recidivism.<sup>357</sup>

Maxwell and Morris also explored the longer-term impact of restorative justice when they returned to young offenders who had taken part in family group conferences in 1990-91 in an analysis of reconviction rates that took place, on average, six and a half years after the initial process. This study found that 29% had not been reconvicted, 14% had been only once reconvicted, and 28% had been persistently reconvicted.<sup>358</sup> Despite the fact that the rate of reconviction shown here is higher than is perhaps desirable, there is a consistency to the number of offenders who either did not reoffend or who were persistent reoffenders that suggests other factors come into play in determining reoffending habits. At the very least it may be assumed from comparing data on family group conferencing with official statistics that restorative justice does not have any form of long-term detrimental effect on recidivism.

Case studies have also been used to illustrate the positive impact family group conferences may have on young offenders. For example, in one case described by MacRae and Zehr, a

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<sup>353</sup> Supra [151].

<sup>354</sup> Gabrielle Maxwell and Allison Morris, ‘Restorative Justice and Reconviction’ [2002] 5(2) *Contemporary Justice Review: Issues in Criminal, Social and Restorative Justice* 133, 135.

<sup>355</sup> Ibid.

<sup>356</sup> Ibid.

<sup>357</sup> Supra [295], 192.

<sup>358</sup> Supra [297], 250.

young man in New Zealand assaulted his own grandmother for rent money.<sup>359</sup> When the police were informed the case was referred for a family group conference. The eventual conference plan contained several different elements, ranging from apology and reparation to the grandmother, carrying out community work, and attending counselling sessions. All of these outcomes were completed and the young man committed no further offences.

Wearmouth, McKinney and Glynn similarly offer an account of a restorative justice encounter in which a 15-year old Maori boy had been demonstrating a consistently negative attitude in school and was involved in increasingly anti-social activities outside it.<sup>360</sup> This culminated in him using his mother's car for joy-riding, crashing into a neighbour's garden and causing property damage. His restorative justice meeting was conducted according to Maori custom and concentrated on strengthening the *mana* of those involved. The boy repaired the damage done to his elderly neighbour's garden and did not take his mother's car joy-riding again. It was also noted that his "behaviour and attitude to work at school improved markedly."<sup>361</sup>

From the above studies we can glean an overview of the impact restorative justice has had on youth justice in New Zealand thus far. It has the potential to offer victims a way of being included in the decision-making process in the aftermath of offending and may enable them to move on from the offence. There are ways in which the system may be improved for victims, but overall satisfaction levels are encouraging. Restorative justice, and in particular family group conferencing, may also lead to lower levels of recidivism than the conventional justice system is able to deliver. Rates of reoffending are perhaps higher than one would wish for, but providing they are no worse than those offered by the criminal justice system – and indeed statistics presented here show reconviction following restorative conferencing to be marginally better - restorative justice will certainly prove itself to be a viable option.

This chapter will now turn to Northern Ireland in order to examine the comparative levels of victim satisfaction and recidivism offered by the Youth Conferencing Service and community restorative justice initiatives.

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<sup>359</sup> Allan MacRae and Howard Zehr, 'Righting Wrongs the Maori Way' (Yes! Magazine 8 July 2011). Available online at <<http://www.yesmagazine.org/issues/beyond-prisons/righting-wrongs-the-maori-way>> accessed 15 October 2014.

<sup>360</sup> Janice Wearmouth, Rawiri McKinney and Ted Glynn, 'Restorative Justice: Two Examples from New Zealand Schools' [2007] 34(4) *British Journal of Special Education* 196, 198.

<sup>361</sup> *Supra* [360], 199.

## Northern Ireland

As was discussed in the previous chapter, the Youth Conferencing Service originated from a pilot scheme in the Greater Belfast and Fermanagh and Tyrone areas of Northern Ireland in 2003. Since then it has expanded to cover the whole of Northern Ireland and youth conferences are now mandatory for young offenders in all but the most serious of cases.<sup>362</sup> It is thought that approximately half of all convictions now culminate in a youth conference,<sup>363</sup> and over time this increase has seen a shift towards diversionary conferences as the more prominent form of conferencing. This is illustrated by the following statistics on youth conferencing referrals (not including other referral types, such as community orders):

Year	Total referrals	Diversionary conferencing (%)	Court-ordered conferencing (%)
2009/10	1927	49	46
2010/11	2111	50	45
2011/12	1843	55	40
2012/13	1675	51	41
2013/14	1846	47	44

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Community restorative justice initiatives are also still prevalent in Northern Ireland, however they are not necessarily specific to youth offending and in-depth statistics are not readily accessible. Information has been collected where available however, and the effect that restorative justice processes in Northern Ireland may have on victim satisfaction levels will now be examined.

<sup>362</sup> Justice (Northern Ireland) Act 2002, s 59(2).

<sup>363</sup> Tim Bateman, 'Youth Justice News' [2010] 10(1) *Youth Justice* 84, 89.

<sup>364</sup> M Decodts and N O'Neill, *Youth Justice Agency Annual Workload Statistics 2013/14* (Belfast, Youth Justice Agency Statistics and Research Branch: Statistical Bulletin 3/2014, 8 August 2014) 15.

### *Victim satisfaction*

One might expect, given the greater commitment to the interests of victims seen in the restorative justice schemes of Northern Ireland, that victim satisfaction levels are likely to be more positive than those seen in New Zealand. A study by Beckett et al. provides an encouraging initial view of this, with an evaluation concerning 50 referrals made to the Youth Conferencing Service reporting that 79% of victims or victim representatives rated their experience as being either 'satisfactory' or 'very satisfactory'.<sup>365</sup> A follow-up evaluation to the Beckett et al. study conducted by Campbell et al., and utilising figures from a greater number of conferences, confirms these findings. 14% of victims claimed to feel 'much better' and 34% felt 'better' after the conference, with a further 44% saying they felt the same.<sup>366</sup> A total of only 7% of victims said the conference had made them feel either 'worse' or 'much worse'.<sup>367</sup> In addition to this, it was reported by Campbell et al. that 91% of victims who attended a conference received an apology from the young offender<sup>368</sup> and of these, 85% were either 'happy' or 'sort of happy' with the apology.<sup>369</sup> In a re-analysis of the Campbell et al. evaluation, O'Mahony and Doak report moreover that 92% of victims stated they had the opportunity to say everything they had wanted to say during the conference.<sup>370</sup> Results thus far would appear then to suggest that the Youth Conferencing Service does generate impressive levels of victim satisfaction.

In terms of whether victims regarded the conferencing process as fair, and whether they felt they were sufficiently involved in the decision-making process, results seem to show similarly high levels of satisfaction. In the Beckett et al. evaluation, only two out of the fifty victims interviewed felt the process was in any way unfair.<sup>371</sup> This positive outlook continues in the larger Campbell et al. report, which found that when victims were asked how involved they felt they had been in discussing the crime, 80% answered 'a lot', 18% 'a little', and only 2% felt they were 'not at all' involved.<sup>372</sup> Likewise when asked how involved they had been in making suggestions for the conference plan, a combined 87% of victims

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<sup>365</sup> Helen Beckett et al., *Interim Evaluation of the Northern Ireland Youth Conferencing Service* (Queen's University, Belfast, Northern Ireland Office Research and Statistical Bulletin 1/2005, December 2004) 11.

<sup>366</sup> Catriona Campbell et al., *Evaluation of the Northern Ireland Youth Conferencing Service* (Queen's University, Belfast, Northern Ireland Office Research and Statistical Series: Report No. 12, October 2005) 99.

<sup>367</sup> Ibid.

<sup>368</sup> Supra [366], 75.

<sup>369</sup> Supra [366], 77.

<sup>370</sup> Supra [37], 92.

<sup>371</sup> Supra [365], 11.

<sup>372</sup> Supra [366], 95.

answered either ‘a lot’ or ‘a little’, and only 13% felt they had not been at all involved.<sup>373</sup> The evaluation took an equally comprehensive approach in gauging how fair victims perceived the conferencing process to be. It found that 92% of victims felt the experience was fair and 98% stated their views were either ‘definitely’ or ‘sort of’ taken seriously.<sup>374</sup> In O’Mahony’s re-analysis of the data, which supplemented the Campbell et al. statistics with further interviews, it was additionally found that 93% of victims claimed they had been satisfied with the process.<sup>375</sup> These are encouraging statistics, which are supported further by victim statements regarding their restorative justice experience:

“[I am] pleased with being involved in the process.”<sup>376</sup>

“Relieved and satisfied. I got to have my say.”<sup>377</sup>

Furthermore, a valuable measure of satisfaction is to ascertain whether victims would recommend the process to someone in a similar situation to them. If victims feel restorative justice is sufficiently worthwhile as to suggest it as an alternative to the conventional criminal justice system, it is a sound endorsement for the potential of restorative justice for victims. In strong support of this, Beckett et al. report that every one of the fifty victims interviewed in their evaluation “would recommend conferencing to an individual in a similar position, even where their own experience was not entirely satisfactory.”<sup>378</sup> Further to this, the more extensive Campbell et al. evaluation reported that 80% of victims interviewed answered in the affirmative when asked whether they would advise other victims to take part in the youth conferencing process.<sup>379</sup> 11% also replied that they would advise it conditionally, depending on the specific situation or offence relating to the victim in question.<sup>380</sup> In addition to this, when examining victim satisfaction surveys in 2007/08, Jacobson and Gibbs state that 93% of victims claimed they would recommend conferencing to another victim.<sup>381</sup> The corresponding figure for the 2008/09 survey was also high at 90%.<sup>382</sup> These numbers are

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<sup>373</sup> Supra [366], 96.

<sup>374</sup> Supra [366], 100.

<sup>375</sup> David O’Mahony, ‘Criminal Justice Reform in a Transitional Context: Restorative Youth Conferencing in Northern Ireland’ [2012] 12 *International Criminal Law Review* 549, 561.

<sup>376</sup> Jessica Jacobson and Penelope Gibbs, *Making Amends: Restorative Youth Justice in Northern Ireland* (London, Prison Reform Trust 2009) 13.

<sup>377</sup> Ibid.

<sup>378</sup> Supra [365], 11.

<sup>379</sup> Supra [366], 101.

<sup>380</sup> Ibid.

<sup>381</sup> Supra [366], 12.

<sup>382</sup> Ibid.

further supported by the O'Mahony and Doak re-analysis of the data, which noted that when victims were asked whether they would recommend the youth conferencing process to others in a similar situation, 88% agreed that they would.<sup>383</sup> It has been suggested that these particularly convincing figures, showing a willingness to recommend even in cases where the victim may not have been entirely satisfied with their own experience, may be explained by a desire for victims to be given the opportunity to confront the young offender, have a say in the outcome of the process, and achieve some form of emotional closure from the event.<sup>384</sup> Whatever the reasoning, it is clear that an extraordinarily high number of victims who undergo restorative youth conferencing in Northern Ireland appear willing to recommend it to others in a similar position.

Similarly, a valuable way of gauging the extent to which victims are satisfied with the conferencing process is to ask whether they would have preferred the case to have gone through the traditional justice system. Indication of a preference for restorative justice processes over those found in the conventional justice system make for a convincing argument regarding the benefits of youth conferencing for victims of offending. When this question was asked of those victims interviewed by Beckett et al., it was found that 91% "indicated an explicit preference for conferencing"<sup>385</sup> over the court process. Campbell et al. corroborated this finding with reports that 81% of victims stated they were happier with use of the conferencing process than if the case had gone to court.<sup>386</sup> This is further supported by O'Mahony and Doak, who found a strong victim inclination for conferencing over the courts, with only 11% stating they would have preferred the court process.<sup>387</sup> Examples of reasons given for choosing the youth conferencing process may be seen from the answers provided when victims were asked during interviews whether they would rather their case had been dealt with via the courts:

"It's too easy for the perpetrator [in court]. The victim is invisible in the process."<sup>388</sup>

"No, because [the young person] wouldn't have got help with his addiction, wouldn't have got the opportunity he has now."<sup>389</sup>

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<sup>383</sup> Supra [37], 95.

<sup>384</sup> Supra [366], 101.

<sup>385</sup> Supra [365], 11.

<sup>386</sup> Supra [366], 98.

<sup>387</sup> Supra [37], 95.

<sup>388</sup> Supra [366], 99.

<sup>389</sup> Ibid.

A final beneficial measure of victim satisfaction is to determine the extent to which victims agreed with the eventual conference plan and outcome of the process. As was seen above when considering New Zealand, this is the area most likely to yield lower levels of victim satisfaction, as victims may wish for greater reparation or perhaps harsher punishments for the young offender. It is therefore promising that Jacobson and Gibbs report from victim satisfaction surveys in 2007/08, that 93% of victims expressed satisfaction with conference outcomes, with the equivalent figure in 2008/09 at 89%.<sup>390</sup> Such encouraging levels of satisfaction are strengthened by findings from O'Mahony's re-analysis of the Campbell et al. evaluation, which report that 79% of victims felt the agreed plan was fair and were satisfied with the overall outcome of the conference.<sup>391</sup> Further to this, 83% of victims stated that there was nothing more they would have added to the conference plan.<sup>392</sup>

The levels of victim satisfaction demonstrated by the Youth Conferencing Service in Northern Ireland have thus far proved to be immensely encouraging and the feedback overwhelmingly positive, even more so than in New Zealand. This is perhaps to be expected due to the increased emphasis the Northern Ireland system places on the needs of the victim, but is nonetheless impressive. It is now important to ascertain whether this is maintained when recidivism rates are examined.

### ***Recidivism***

As with when the New Zealand statistics regarding rates of recidivism were examined, the level of reoffending subsequent to restorative conferencing will be compared with reoffending rates following other forms of baseline disposal. Case studies will also be used to examine the positive impact restorative justice may have on young offenders, when implemented both by the Youth Conferencing Service and other community restorative justice initiatives.

Early statistics following the introduction of the Youth Conferencing Service can be used to examine reoffending rates from both forms of restorative youth conferencing, as well as from other methods of dealing with offending. The figures published in 2006 for example, show that 70.7% of young offenders released from immediate custody went on to reoffend within

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<sup>390</sup> Supra [376], 12.

<sup>391</sup> Supra [375], 562.

<sup>392</sup> Ibid.



one year.<sup>393</sup> This is compared to 50% who underwent a community service order and 28.7% who were fined for offences,<sup>394</sup> although it is worth noting that rates are likely to be so low for fining due to the much more minor nature of the offences in question. When these rates are compared to the 2006 data on reoffending for restorative justice-based disposals, figures show that 47.4% of young offenders reoffended following a court-ordered conference, and only 28.3% of those who took part in a diversionary conference went on to reoffend within one year.<sup>395</sup> Results from the 2006 cohort of young offenders can therefore be seen to have produced substantially lower rates of recidivism when offered a restorative justice referral than when a custodial sentence was used.

The above statement appears to be particularly true of diversionary conferences; a fact which is reinforced by examining the 2008 figures. These show that just 29.4% of young people reoffended within one year of taking part in a diversionary conference.<sup>396</sup> This number rises to 45.4% for court-ordered conferences, and increases significantly to a 68.3% rate of recidivism for those who were discharged from custody.<sup>397</sup> Such figures are further supported by O'Mahony and Campbell, who comment that of those young offenders who are diverted away from the conventional criminal justice system, only around 20% are thought to reoffend over a one to three year follow-up period.<sup>398</sup> This is in comparison to about three-quarters of those who are put through the youth court system over a similar follow-up period.<sup>399</sup> Such data presents a very convincing argument for the use of restorative youth conferencing in reducing levels of recidivism among young offenders.

Statistical evidence may additionally be supported on the micro-level by case studies. For example, Jacobson and Gibbs describe a restorative encounter with a 16-year old boy who broke into church property in Northern Ireland and was subsequently charged with burglary and criminal damage.<sup>400</sup> The boy agreed to a court-ordered youth conference and met with the victim who in this case was represented by a clergyman from the church in question. During the conference the boy showed remorse and apologised. As part of the conference

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<sup>393</sup> Supra [363], 88.

<sup>394</sup> Ibid.

<sup>395</sup> Supra [376], 10.

<sup>396</sup> D Lyness and S Tate, *Northern Ireland Youth Re-Offending: Results from the 2008 Cohort* (Belfast, Youth Justice Agency Statistics and Research Branch: Statistical Bulletin 2/2011, July 2011) 3.

<sup>397</sup> Ibid.

<sup>398</sup> David O'Mahony and Catriona Campbell, 'Mainstreaming Restorative Justice for Young Offenders through Youth Conferencing: The Experience of Northern Ireland' in Josine Junger-Tas and Scott H Decker (eds), *International Handbook of Juvenile Justice* (Springer Netherlands 2006) 97.

<sup>399</sup> Ibid.

<sup>400</sup> Supra [376], 8.

plan he donated money to a charitable foundation and completed voluntary work with the church.<sup>401</sup> Jacobson and Gibbs report that the boy “has not reoffended. He has returned to school and will shortly take up vocational training.”<sup>402</sup> Similarly, Maruna et al. conducted an interview-based evaluation of the Youth Conferencing Service and concluded from speaking to the young people involved that, “many of them felt the conferencing process was helpful, even occasionally crucial, in accounting for their current, positive, life circumstances 12 months or more later.”<sup>403</sup> Cases such as these may not at first glance seem as pertinent as substantive evidence on reoffending rates when arguing for the use of restorative justice to combat recidivism among young offenders. It is personal studies such as the above however, that really demonstrate the strong and lasting impact that a positive restorative justice encounter may have on individuals.

In terms of gathering data on the two key organisations to offer community restorative justice processes in Northern Ireland – CRJI and Alternatives – very little in the way of official statistics is available. In an analysis of 14 restorative justice initiatives in Northern Ireland however, Payne and Conway found through the use of questionnaires and interviews with practitioners that Alternatives has a “remarkable 7-8% recidivism rate”.<sup>404</sup> CRJI also offers an example of the positive work it does with young people in the community with a case study in its 2013 Annual Report. This case involved a young boy who was physically and verbally abusive both to his peers and his mother; he was also considered to be at risk of self-harm and suicide, and had been placed on the Child Protection Register.<sup>405</sup> CRJI worked intensively with the boy for an 18-month period, at the end of which he had been removed from the Child Protection Register and no longer required intervention from social services. As well as this, he had received a community award for the work he had done in the local area and was involved in numerous local extra-curricular activities.<sup>406</sup> This is just one case among many and illustrates the valuable work carried out by community restorative justice initiatives in Northern Ireland.

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<sup>401</sup> Ibid.

<sup>402</sup> Ibid.

<sup>403</sup> Shadd Maruna et al., *Youth Conferencing as Shame Management: Results of a Long-Term Follow-Up Study* (Belfast, Youth Conferencing Service 2011) 24.

<sup>404</sup> Brian Payne and Vicky Conway, ‘A Framework for a Restorative Society? Restorative Justice in Northern Ireland’ [2011] 3 *European Journal of Probation* 47, 60.

<sup>405</sup> Community Restorative Justice Ireland, *Annual Report 2013* (Belfast, Community Restorative Justice Ireland 2013) 9.

<sup>406</sup> Ibid.

All of the above evidence is a valuable tool in examining the impact that the introduction of restorative justice, and in particular the Youth Conferencing Service, has had in Northern Ireland. It is hard to dispute the information gathered on victim satisfaction levels, which are overwhelmingly positive, particularly regarding the willingness of victims to advise others in a similar position to take part in restorative conferencing. This combined with the stated preference for the conferencing process over the conventional courtroom system demonstrates the benefits restorative justice clearly offers to victims. In addition to this, the reoffending statistics appear even more convincing for the Northern Ireland system than they do for its New Zealand counterpart. It is particularly noteworthy that the rates of recidivism are so much lower for diversionary conferences than for court-ordered conferences, suggesting that the sooner young offenders can be diverted away from the formal justice system, the better the chance that they will be successfully reintegrated into society without falling into habits of reoffending.

### **Discussion**

The research shown above clearly demonstrates that restorative justice does indeed have the wherewithal to impact upon both victim satisfaction and recidivism in a positive manner. What is also apparent from the evidence collected is that the Northern Ireland system is stronger on both counts than New Zealand, despite the efforts of family group conferencing in New Zealand to focus on successful reintegration of offenders into society.

Studies examined above indicate surprisingly low rates of victim satisfaction for New Zealand when considering involvement in the decision-making process as well as dissatisfaction with conference outcomes, with less than two-thirds agreeing with the outcome in one study. In comparison, Northern Ireland results are incredibly positive, with unanimously high levels of victim satisfaction in all areas. This resonates with the principle of prioritising victims' interests in Northern Ireland, as was stated earlier in the chapter. What is more puzzling however, is the disappointingly high level of reoffending seen in a country such as New Zealand, which places so much emphasis on successful reintegration of offenders. Rates of recidivism in New Zealand, particularly when considered over a follow-up period of several years, are not showing the lasting impact that proponents of restorative justice would wish to see. This is evident in the research, with one study suggesting a 73% reoffending rate after three years. By comparison, and indeed by any standard, the Northern Ireland data is very impressive, with reports that there is as little as a 20% recidivism rate

over a one to three year period. Discussion as to the reason behind the discord between the values and results of restorative justice in these two jurisdictions will be the focus of the next chapter.

## **Conclusion**

The aim of this chapter has been to explore the impact that restorative justice has had on the youth justice systems of New Zealand and Northern Ireland, focusing in particular on how the victim experiences restorative justice and whether such processes can have a significant effect on recidivism rates among young offenders. It has discussed the difficulties faced in measuring these factors, and explored the available empirical evidence surrounding restorative justice in New Zealand and Northern Ireland. Results have shown that although restorative justice fares well in relation to traditional criminal justice procedures in both cases, Northern Ireland is undoubtedly out-performing New Zealand in terms of producing successful outcomes.

Pursuant to this, the next chapter will consider precisely *why* there is such disparity between these two systems which are, on the surface, remarkably similar. It will consider the differences in restorative conferencing processes which could be affecting outcomes. More importantly however, it will consider the relationship between the history of restorative justice in the two countries, as discussed in previous chapters, and the level of success being shown by current restorative justice practices. It will attempt to infer whether cultural factors are influencing the results presented here, for example whether the current transitional context of Northern Ireland may be encouraging a greater interest in justice without violence, or whether the cultural divide between Maori and *pakeha* in New Zealand is preventing successful reintegration into society for young indigenous people. From this, it will attempt to draw conclusions as to what kind of cultural, political or historical climate makes for successful integration of restorative justice values into a criminal justice system.

## Chapter V

### Analysing the Link between the Success of Restorative Justice and Pre-Existing Cultural Ideals

It has long been recognised that there is a vital connection between restorative justice practices and certain ancient codes of indigenous justice and practices of acephalous societies. Perhaps the most prominent of such associations is that between traditional Maori justice mechanisms and the current family group conferences within the New Zealand criminal justice system. Many other similar relationships have been acknowledged however, from sentencing circles incorporating Aboriginal Canadian processes,<sup>407</sup> to the Navajo peacemaking practices of Native American culture.<sup>408</sup> Such a link was also illustrated in Chapter III with reference to the ancient Brehon system in Ireland. This has caused some to question therefore, whether restorative justice is in fact “a reincarnation of ways of doing justice that have always been known, and in some traditions, never forgotten?”<sup>409</sup> With this in mind, the focus of this chapter asks whether restorative justice holds a particular resonance with certain cultures – specifically those of New Zealand and Northern Ireland – and if so, what facets of these cultures, be they social, political or historical, make for successful integration of restorative justice into a criminal justice system.

Themes from previous chapters will be synthesised in order to draw conclusions on the way in which certain pre-existing cultural components of New Zealand and Northern Ireland have impacted upon the success of their respective restorative justice practices. This will involve an examination of the youth conferencing processes utilised by the two countries, considering how specific features may have affected the success of restorative justice, as outlined in the previous chapter. Further to this we will return to the core themes of restorative justice as illustrated in Chapter I, this time discussed within the particular contexts of New Zealand and Northern Ireland. The chapter will contemplate areas of overlap between the varying underlying conceptions of justice, asking how this may impact both positively and negatively on the success of restorative justice in the two countries.

The chapter will then move on to explore the idea of impaired cultural identity within the countries in question, and how this may create a more fertile ground within which restorative

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<sup>407</sup> Supra [84].

<sup>408</sup> Supra [51].

<sup>409</sup> Ann Skelton, ‘Vintage? A New Wine Infused with *Ubuntu* and Dignity’ [2014] 2(3) *Restorative Justice: An International Journal* 253, 253.

justice can take root. This will involve returning to the subject matter of Chapters II and III, respectively touching upon the cultural isolation experienced by Maori New Zealanders as a result of European colonisation, and the cultural divide caused by the ‘Troubles’ in Northern Ireland. Ideas of social and economic disadvantage will also be discussed briefly, examining how restorative justice may remedy feelings of social exclusion caused by the above. Pursuant to this concept is the resulting conflict between communities and the state. This is evident in both countries, but is perhaps particularly pertinent to Northern Ireland. This chapter will also consider how restorative justice may be used to contribute towards the resolution of such conflicts by providing a bridge between local communities and authority figures.

Finally, the chapter will examine some of the factors which have acted as catalysts in propelling criminal justice reform in New Zealand and Northern Ireland. These reforms occurred at different times and were triggered by different circumstances, yet consequently resulted in the adoption of similar models of restorative justice. It will be considered here how this awareness resulted in a new attitude towards the way in which justice was handled in each country, and thus how new legislation provided an atmosphere in which restorative justice was enabled to thrive. The subsequent success of restorative justice in New Zealand and Northern Ireland will be discussed in relation to this point, examining the extent to which state authority may have contributed towards the relative successes of restorative justice. This should ultimately provide a thorough assessment of how cultural factors within New Zealand and Northern Ireland have affected the successful integration of restorative justice.

### **How the Restorative Conferencing Process Affects Outcomes**

The first question to consider is how the procedural features of a restorative justice process may have influenced the success rates seen in Chapter IV. There are certain aspects of the restorative youth conferencing process that may instigate either positive outcomes or negative reviews from key participants, particularly if these aspects relate to specific community or cultural values. The most important of these will now be discussed.

As was established in Chapter II, the New Zealand system of family group conferencing – instituted by the CYPFA – was introduced in an effort to combat the dire over-representation of Maori youth being processed by the criminal justice system. Not only was this a significant development in making New Zealand the first country actually to institutionalise a form of restorative justice, but additionally the unprecedented move was made of consulting

with Maori during the creation of the legislation. Despite this bold transformation of youth justice however, levels of success since its implementation have not been wholly positive, as demonstrated in Chapter IV.

One possible explanation for this discrepancy is that, despite the abundance of assurances from the New Zealand government that the new legislation aims to provide culturally appropriate responses to offending, there remain certain elements within the system that appear “quite alien to indigenous models”.<sup>410</sup> These elements risk inciting the potentially harmful effect of patronising Maori participants; particularly for those from more traditional Maori communities the idea of being told by *pakeha* authority figures what amounts to a ‘culturally appropriate’ process for them may result in high levels of dissatisfaction. This issue may also prove conversely problematic, for example Quince notes that one of the concerns with restorative justice based on indigenous processes is that it places an assumption that all modern Maori still adhere to *tikanga maori*, which simply is not the case.<sup>411</sup>

Even for those Maori who do choose to identify with their cultural heritage however, family group conferences are not altogether representative of indigenous forms of justice. For example, both the people involved and the location of conferences fail to correspond with Maori values. To illustrate, the presence of a state authority figure may be anathema to those who would favour a traditional Maori process, and equally in many conferences the involvement of a tribal elder – a vital element of Maori justice - is not incorporated.<sup>412</sup> As such this may have resulted in the lower levels of victim satisfaction identified in several of the New Zealand studies. Moreover, one of the key differences between contemporary family group conferences and traditional Maori processes is the location of the conference. Maori protocol would call for meetings to be held on the *marae*, however the majority of family group conferences are convened at Department of Social Welfare offices. Olsen, Maxwell and Morris identify the problem with this, suggesting that by holding conferences on government territory, “the symbolic (and hence potentially the actual) power remained with the professionals. This may have discouraged the participation of families and young people in the process of deciding on the best outcome and hindered families in the process of

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<sup>410</sup> Supra [295], 11.

<sup>411</sup> Supra [88], 21.

<sup>412</sup> Supra [164], 178.

taking responsibility for their young people.”<sup>413</sup> This factor may therefore contribute not only to lower victim satisfaction results, by holding conferences in a location un conducive to strong participation, but also to disappointing levels of recidivism as more appropriate outcomes may be missed through unsuitable environmental factors. It should be noted however, that one way in which the New Zealand government have aimed to remedy this particular issue is through the introduction of the Rangatahi Courts. These take place on the *marae*, are held in the presence of Maori elders, and are chaired by a judge familiar with principles of *tikanga maori*.<sup>414</sup> This is still a relatively new initiative with only ten courts as of 2014<sup>415</sup> and thus empirical evidence is in short supply, yet it may be a valuable tool in reducing the above concerns.

Similar issues have arisen in Northern Ireland, whereby the facilitator and practical circumstances of youth conferences are not always suited to the conference participants. As detailed in Chapter III, the political atmosphere in Northern Ireland is immensely fractious, with not only a divide between republican and loyalist communities, but also a widespread distrust of state authority. As such any new justice initiatives, including those provided for by the state-based Youth Conferencing Service, must be handled with care. This has caused difficulties therefore, since many such restorative justice initiatives utilise police officers as facilitators or liaison officers, inviting accusations of a lack of neutrality.<sup>416</sup> In the same way that failing to incorporate Maori elders into New Zealand restorative justice initiatives may have reduced victim satisfaction levels and offender cooperation, the presence of state representatives in Northern Ireland youth conferences potentially creates a similar scenario, perhaps even discouraging certain victims from participating in the first place and preventing some offenders from fully opening up to the process.

An additional factor detracting from a wholly satisfactory restorative justice experience for victims has been noted by the two prominent community-based restorative justice initiatives in Northern Ireland - CRJI and Alternatives. It has been observed that due to the long-standing presence of republican and loyalist paramilitaries in Northern Ireland, along with

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<sup>413</sup> Teresea Olsen, Gabrielle M Maxwell and Allison Morris, ‘Maori and Youth Justice in New Zealand’ in Kayleen M Hazlehurst (ed), *Popular Justice and Community Regeneration: Pathways of Indigenous Reform* (Greenwood Publishing Group 1995) 53.

<sup>414</sup> Supra [93], 226.

<sup>415</sup> Heemi Taumaunu, ‘Rangatahi Courts of Aotearoa/New Zealand – An Update’ (Auckland, 21<sup>st</sup> Pacific Judges Forum March 2014) 2. Available online at <<http://pjc2014.org.nz/assets/Uploads/10.-Judge-Taumaunu-paper.pdf>> accessed 20 January 2015.

<sup>416</sup> Supra [46], 42.



their attendant reputation for punishment beatings in so-called ‘self-policing’ areas of Northern Ireland, many victims have misunderstood the purpose of the initiatives. Payne and Conway explain this problem, remarking that some victims are under the impression that CRJI and Alternatives are there to fix the problem rather than facilitate the dispute and encourage participants to engage with its resolution.<sup>417</sup> Clearly if victims agree to participate in a restorative justice programme with certain expectations of what the process will entail and what outcomes will be achieved and ultimately these expectations are entirely unmet, satisfaction levels may suffer. It goes without saying that this will be the case for any restorative justice process however, not only initiatives based in Northern Ireland.

A final feature of the restorative conferencing process which could potentially reduce both victim satisfaction and victim participation in the New Zealand and the Northern Ireland jurisdictions is a practical concern along the lines of conference scheduling. Morris, Maxwell and Robertson have reported that victims would be most likely to attend New Zealand family group conferences if they were scheduled for 6pm or later, however they found that the vast majority were in fact held between 9am-4pm as a time more convenient to the professionals or police officers involved in the conference.<sup>418</sup> This point has also been reiterated by O’Mahony and Campbell as pertinent to Northern Ireland.<sup>419</sup> Although this provides an explanation for lack of victim participation as opposed to victim satisfaction, it is not too much of a stretch to see how the two may be linked: if the needs of victims are not catered for in the restorative justice process by enabling their meaningful involvement, they are not going to provide positive feedback and are highly unlikely to recommend the process to others. This is also a particularly undesirable concern for justice systems in societies such as Northern Ireland and New Zealand, where there is already an undisguised mistrust of authority. For victims of such societies to be overlooked in this way will do nothing to improve relationships between state and community. Equally, it may also be asserted that this factor could have an impact on the offender’s likelihood to reoffend: it is often stated that being forced to confront the consequences of their actions and accepting responsibility for said actions through meeting the victim is a key component of adjusting offender attitudes, thus decreasing the chance of recidivism (see Chapter IV). The removal of this stimulus may therefore negate some of the potential for restorative justice to impact upon recidivism.

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<sup>417</sup> Supra [404], 63.

<sup>418</sup> Supra [152], 310.

<sup>419</sup> Supra [398], 18.

From the above it can be seen that the specific procedural aspects of restorative conferencing may affect how restorative justice is perceived by victims and ultimately how successful it proves to be. In order to gain a more well-rounded view of the ways in which the success of restorative justice may be linked to the cultural aspects of a jurisdiction however, the chapter will now move on to consider the core themes of restorative justice in relation to New Zealand and Northern Ireland, with the view of discussing whether their cultures demonstrate a particular resonance with restorative justice values.

### **Are Restorative Values Prevalent in New Zealand and Northern Ireland Culture?**

It will be recalled that a significant portion of Chapter I was devoted to discussing the core themes of restorative justice. This included examining the ways in which restorative justice differs from the more conventional retributive justice route. These comprised of such factors as an alternative attitude towards offending itself, whereby restorative justice views dispute as conflict between individuals in a community and sees harm done to relationships through criminal offending, rather than taking the stance that it is a harm done to the state. Not only this, but restorative justice recognises the importance of placing victims at the heart of the criminal justice system, as opposed to utilising them as mere witnesses, and stresses the necessity of enabling the offender to accept responsibility for his/her actions in a way that creates meaningful outcomes. Alongside this, undoubtedly one of the most recognisable features of restorative justice practices is the involvement of the victim and offenders' communities of care, allowing for support networks to assist in upholding outcomes and creating an environment whereby successful societal reintegration is possible. These themes will be returned to here, with the intention of asking whether they were pre-existing in the cultural landscape of New Zealand and Northern Ireland. This should help to establish whether certain countries are inclined to adopt restorative justice more readily than jurisdictions with a more traditionally punitive attitude towards justice.

#### ***Community values***

Goren has been a particularly vocal critic of the way in which a retributive stance on crime is the complete antithesis of the Maori outlook on dealing with offenders. She claims that by isolating offenders through imprisonment, “[f]amily and community bonds are stretched to their limits or fractured by institutionalisation far from home, by policies that interpret family contact as a privilege to be earned by compliance ... and by eliminating family members

from treatment planning, process and evaluation.”<sup>420</sup> Given the Maori values discussed in Chapter II, it is not hard to see how a restorative approach to justice chimes with indigenous New Zealand society. A key element of Maori justice protocol is that of a community gathering on the *marae* to seek redress for offending. The philosophy emphasises that no person’s *mana* may be diminished by the process, as this has a counterpart effect on all members of the community.<sup>421</sup> These features of the Maori justice process are in no way satisfied by a westernised approach to offending, whereby offenders are removed from the community and the community have no input into the resolution of the offence. Restorative justice, on the other hand, provides for such views and as such may be more naturally suited to remaining Maori communities in New Zealand.

Parallels may also be drawn between the above observation and the current situation in Northern Ireland. As Doak and O’Mahony state, “[i]ronically, the conflict-ridden history of Northern Ireland has meant that society has been less exposed to a wider globalised erosion of ‘community’ and certain community values have even been preserved or developed as a form of ‘social cement’.”<sup>422</sup> This notion of a strong sense of community within the factions dividing Northern Ireland mirrors the close-knit local communities which form the basis of Maoridom in New Zealand. There is additionally a long-standing foundation of community-based, collective enforcement of justice in Ireland, as seen from the principles of Brehon law discussed in Chapter III. As such, Northern Ireland may be more likely to respond positively to the community-oriented values of restorative justice. It is also particularly important in the wake of the ‘Troubles’ that Northern Irish neighbourhoods be enabled to rebuild and replenish community ties, a factor that is largely denied through the use of retributive justice. As Chapman notes, state justice mechanisms at this time are very much a “blunt instrument”<sup>423</sup> in comparison to the efficacy of community action and the assumption of a collective responsibility for wrongdoing. If offenders are removed from society at this crucial stage of political transition rather than supported in taking responsibility for actions, making amends and striving for successful reintegration, when they eventually re-enter communities there is the risk that they may be hopelessly unequipped to contribute to society in a positive manner.

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<sup>420</sup> Supra [311], 141.

<sup>421</sup> Supra [38], 341.

<sup>422</sup> Supra [233], 321.

<sup>423</sup> Tim Chapman, ‘The Problem of Community in a Justice System in Transition: The Case of Community Restorative Justice in Northern Ireland’ [2012] 12 *International Criminal Law Review* 573, 582.

The absolute importance of allowing local community and support networks a say in the delivery of justice has manifested itself in both New Zealand and Northern Ireland, although in somewhat different formats. The New Zealand family group conferences, for example, stress the significance of incorporating supporters of both victims and offenders into the process. Hayes and Daly remark upon this, observing that the “implicit idea behind elevating lay actors over legal authorities or social workers is that a family social group not only has some degree of collective responsibility for the law-breaker’s behaviour, but it can also render better, perhaps more culturally appropriate, decisions.”<sup>424</sup> This returns to the Maori concept that social structures work on the basis of a relational group responsibility for the actions of individual members, whereby any decrease in *mana* from one person is felt by all. As Vieille comments, “[t]he strength of Maori communities and approach to justice comes from a deep-seated sense of collective identity, which informs every aspect of living and knowing.”<sup>425</sup> Due to the strong community roots felt by those who identify with Maori culture, it may be inferred that young offenders are more likely to listen and respond to decisions made by those from their own community as opposed to a *pakeha* judge or other authority figure, still viewed by many as the oppressors. As such, the level of community involvement provided for by restorative justice, and in particular the family group conferencing programme adopted by the New Zealand criminal justice system, may be more culturally appropriate for the Maori youth so heavily over-represented within the offending statistics.

Northern Ireland has also ensured a degree of community involvement in the distribution of the justice process, however in a slightly more controversial respect than its New Zealand counterpart. This is due to the presence of ex-combatants acting as facilitators within certain of the community-based restorative justice schemes. This has been met with predictably mixed reactions, ranging from those who believe that the use of these ex-paramilitaries is a front for maintaining control of localised areas<sup>426</sup> to those who feel that by presenting ex-combatants with a sense of purpose away from a life of punishment violence they will be able to contribute positively towards a more peaceful society in the transition from conflict. The latter viewpoint is supported here, which additionally is endorsed by Ellison and Shirlow who state that, “it is through the leadership and persuasion efforts of former prisoners involved in

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<sup>424</sup> Supra [289], 730.

<sup>425</sup> Supra [164], 186.

<sup>426</sup> Kieran McEvoy and Harry Mika, ‘Punishment, Policing and Praxis: Restorative Justice and Non-Violent Alternatives to Paramilitary Punishments in Northern Ireland’ [2001] 11 *Policing and Society: An International Journal of Research and Policy* 359, 375.

initiatives such as restorative justice that we have seen significant reductions in punishment violence in the areas where the projects are operational.”<sup>427</sup>

It is also submitted that the presence of ex-combatants in restorative justice initiatives will help to contribute towards the normalisation of peaceful dispute resolution, as disputants may be steered in the direction of restorative justice rather than relying on paramilitaries to solve problems through punishment beatings. Furthermore, utilising ex-combatants in such a way may have been a shrewd move by community-based restorative justice schemes, in the sense that it potentially boosts credibility in a region plagued by a legitimacy deficit. Any initiative felt to be connected to state agencies would no doubt suffer from a consequent high degree of mistrust, whereas schemes endorsed by those who were actually involved in the conflict would naturally be more trusted by local communities. As important as bridging the gap between the state and community undoubtedly is for Northern Ireland, an additional priority must be to rebuild stable communities in the aftermath of the ‘Troubles’ in which offenders may be reintegrated. This is a climate that facilitators of restorative justice, particularly those with such an in-depth understanding of local communities as ex-combatants possess, have the potential to actualise. As such, in the same way that the presence of Maori social groups may aid the likelihood of successful restorative justice outcomes, the involvement of influential members of the community in Northern Ireland may help to create an environment in which restorative justice is able to thrive.

It cannot go unnoticed, from observations made in Chapters II and III, that countries such as New Zealand and Northern Ireland have certain historical traits that may make them notably suited to concepts such as restorative justice. Both had pre-existing community ideologies meaning that restorative justice fit more naturally with their cultural or political climates, in comparison to more punitive-minded jurisdictions which may have met the new initiatives with an apathetic response. Gormally describes the implementation of community-based restorative justice schemes in Northern Ireland as having been “developed indigenously by communities seeking for solutions to practical problems.”<sup>428</sup> This precisely illustrates the above point: restorative justice was not forced upon the communities of Northern Ireland, but rather the communities themselves recognised its value, thus creating a naturally receptive clientele. This theory has been reinforced by Mika and McEvoy who claim that in Northern Ireland, restorative justice “emanates and resonates with basic community needs and

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<sup>427</sup> Supra [257], 53.

<sup>428</sup> Supra [237].

available resources, and it flows from a pre-existing and largely compatible cultural and value base, and the logic of its exposition is to be found in political circumstances and developments as they bear on local areas.”<sup>429</sup> There are parallels to be drawn between the circumstances of Northern Ireland and the implementation of restorative justice in New Zealand. Here also was a country with a past of drawing inwards from local communities in order to resolve disputes. Maxwell suggests, as the above Northern Ireland commentators have, that this is why restorative justice has been adopted so readily by New Zealand: “it evokes a past when the clan, the tribe, the village or the community gathered to resolve among themselves the wrongs that could otherwise threaten their cohesion.”<sup>430</sup> For these reasons, New Zealand and Northern Ireland may have a particularly strong cultural heritage making them inherently suited to the use of restorative justice practices.

While the above claim may be valid, it should also be treated with a certain amount of caution. There is sometimes a tendency amongst commentators to overstate the extent to which ancient practices of justice are in fact genuinely ‘restorative’, noted by Daly as the act of romanticising pre-modern methods in an effort to justify contemporary restorative justice schemes.<sup>431</sup> This issue was previously raised in Chapters II and III, as it was observed that neither Maori accounts of the vengeful killing of intruders, nor the Brehon threat of banishment for heinous crimes could be described as restorative in nature. In addition to this concern it has been observed that, even where recognisable restorative justice processes have been identified among indigenous peoples, proceedings were often dominated by tribal elders who spoke for the community or even on behalf of victims.<sup>432</sup> This was acknowledged in the New Zealand context in Chapter II, wherein it was noted that tribes would gather on the *marae* to discuss an offence until the elders reached a consensual judgment. Likewise the ancient Brehon system was presided over by an order of judges – the *brehons* – who adjudicated and passed judgment in accordance with the law. Such passivity from the key stakeholders is somewhat anathema to one of the key tenets of restorative justice: placing victims at the heart of the process. Thus although contemporary restorative justice practices may contain echoes of a pre-modern system of justice, these ancient philosophies should be

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<sup>429</sup> Harry Mika and Kieran McEvoy, ‘Restorative Justice in Conflict: Paramilitarism, Community, and the Construction of Legitimacy in Northern Ireland’ [2001] 4 *Contemporary Justice Review* 291, 306.

<sup>430</sup> *Supra* [313], 93.

<sup>431</sup> Kathleen Daly, ‘Restorative Justice: The Real Story’ [2002] 4(1) *Punishment and Society* 55, 63.

<sup>432</sup> Anthony Bottoms, ‘Some Sociological Reflections on Restorative Justice’ in Andreas von Hirsch et al. (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Hart Publishing 2003) 90.

neither blindly revered nor relied upon wholly as a perfect example of justice in its purest form.

### *Crime as conflict*

One of the key tenets of restorative justice is the concept of returning the resolution of dispute back to the hands of those most affected by it. It states that meaningful outcomes are best achieved when the victim and offender are active participants in the process. Poor relations between Maori communities and the largely *pakeha*-oriented governing bodies of New Zealand, and the fractured communities of Northern Ireland and their state authorities, mean that devolving disputes to the key stakeholders is of more importance than in other, more stable societies. In fact, O'Mahony attributes some of the success of restorative justice in Northern Ireland to this element of the process, noting how it returns "'ownership' in the delivery and administration of justice back into the community and the hands of those most affected by crime."<sup>433</sup> This has been supported in the New Zealand context by Maxwell, who opines that through allowing a degree of self-determination in the justice process, there is a greater chance of "meaningful involvement."<sup>434</sup> This point applies to both jurisdictions and may help to explain the largely positive levels of victim satisfaction surrounding restorative youth conferencing in comparison to the traditional criminal justice system.

It is not only victim satisfaction being used to assess the success of restorative justice here however, but also recidivism. The lower levels of recidivism experienced by restorative justice when measured against conventional justice systems may also be explained by returning ownership of justice to the key participants. As Vieille notes, "[o]ffenders get to experience justice, as it is not handed down to them but requires their participation, their commitment and agreement."<sup>435</sup> By allowing offenders to contribute in this way, whereby decisions are not simply decreed by authority figures or state representatives but actually bear relation to the offence committed, and responsibility for the offence is a necessary prerequisite, lower rates of reoffending are to be expected, as was demonstrated in Chapter IV. This may be particularly pertinent to the political and cultural backdrops of New Zealand and Northern Ireland however, where for separate but equally compelling reasons there exists a mistrust of authority. Handing justice back to those most affected by the offence and facilitating the agreement of mutual and culturally meaningful outcomes, rather than dictating

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<sup>433</sup> Supra [375], 568.

<sup>434</sup> Supra [313], 83.

<sup>435</sup> Supra [92], 10.

appropriate responses, is therefore more likely to result in lower levels of recidivism and subsequently successful restorative justice.

The nature of the cultural isolation experienced within both New Zealand and Northern Ireland has been touched upon here. There will now however, follow a more in-depth discussion on how exactly restorative justice may help to remedy this isolation through the use of a culturally appropriate response to offending. It will be proposed that restorative justice has the ability to effect this in ways that are not provided for by the conventional criminal justice system.

### **A Restorative Response to Cultural Isolation**

One of the predominant explanations offered for the significant over-representation of Maori young offenders within the New Zealand criminal justice system is that they are suffering from a form of impairment to their cultural identity as a result of colonisation, as was explored in Chapter II. It will be discussed here whether restorative justice may help to repair this fractured identity through the use of culturally appropriate responses to offending. This idea has been considered by various commentaries, with Marie observing that “a secure Maori identity is believed to act as a protective factor for an offence-free lifestyle, while a compromised Maori identity indicates a heightened risk that an individual will offend or reoffend. On these grounds, the Department of Corrections provides a culturally based rehabilitation to Maori.”<sup>436</sup> Vieille has also remarked on this, stating that “a common assumption among the Maori is that one of the reasons for the high rate of young Maori offences is their disconnect from their own communities and culture. It appears therefore, logical that reconnecting the youth with their heritage when carrying out justice, would contribute to reducing their chances of reoffending.”<sup>437</sup> This section aims to assess whether there is any truth in these claims. It will then move on to ask whether parallels may be drawn between the disrupted social identity of the Maori in New Zealand and the cultural divide between republican and loyalist factions in Northern Ireland, in which case restorative justice may be equally relevant in resolving these political conflicts.

The challenges facing modern Maori in a largely non-Maori New Zealand society are entirely valid, and are felt even by those who have distanced themselves from the traditional, tribal-

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<sup>436</sup> Dannette Marie, David M Fergusson and Joseph M Bode, ‘Ethnic Identity and Criminal Offending in a New Zealand Birth Cohort’ [2009] 42(3) ANZJ Crim 354, 356.

<sup>437</sup> Supra [164].



based communities. Quince describes how this has generated new forms of Maori social group, which have “emerged as a response to the challenges of colonial New Zealand. The best example is the advent of ‘Urban Maori’, groups of people who originally came to the city to seek work and who created networks based around ‘being Maori’.”<sup>438</sup> It may be the case therefore that restorative justice approaches, with their emphasis on the inclusion of community or support networks for the victim and offender, would appeal to these ‘Urban Maori’ groups. It may allow for the feel of a contemporary *hapu* or *iwi*, without the necessity of non-Maori authority figures passing judgment in a way that shows no recognition or understanding of the challenges facing Maori society. As such, the use of restorative justice as a culturally appropriate justice mechanism may aid in remedying the cultural isolation felt by many modern Maori.

For the considerable level of over-representation of Maori youth in the criminal justice system to have occurred, it seems likely that cultural isolation must be felt from a young age. For this reason, many initiatives have been implemented in schools in an attempt to curb the divide between Maori and non-Maori youth before it reaches unacceptable levels. It is thus the case that, over the last decade, the New Zealand Ministry of Education have introduced strategies to provide for “greater Maori involvement and authority in education.”<sup>439</sup> These schemes have largely been met with approval, with Wearmouth et al. claiming that when restorative justice processes are used within the context of Maori students, it “can help address issues of power imbalances between school authorities and the individual student and their community.”<sup>440</sup> Similarly, the New Zealand Ministry of Education reports that in certain of the Far North<sup>441</sup> schools where Maori values are included, the “[Education Review Office] reviews of Far North schools indicate that schools which recognise and respond to cultural and community values have the best performing Maori students.”<sup>442</sup> This reinforces the idea that acknowledging important cultural concepts and values at school age can have a positive effect on performance. By encouraging the early prevention of feelings of cultural isolation in young Maori, this may have a subsequent impact on offending habits in later life. This is achieved through applying traditional Maori justice techniques in a contemporary

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<sup>438</sup> Supra [119], 25.

<sup>439</sup> Ministry of Education, *New Zealand Schools Nga Kura o Aotearoa: A Report on the Compulsory Schools Sector in New Zealand 1999* (New Zealand, Ministry of Education 2000) 76.

<sup>440</sup> Supra [100], 45.

<sup>441</sup> In which a large number of Maori communities still reside, the Maori language is in usage, and *tikanga maori* is commonly practised.

<sup>442</sup> Supra [439], 79.

format, through the medium of restorative justice. As Quince notes, restorative justice practices “are not reconstructions of indigenous models of justice. At best, they are attempts to forge a culturally appropriate modern criminal justice system, for which many Maori agree there is a place.”<sup>443</sup>

One of the most notable consequences of the cultural impairment seen as a result of colonisation in New Zealand is the lack of Maori in high-ranking and high-earning positions, be this in business, law, healthcare or politics.<sup>444</sup> In relation to law, this has had the effect that the legal system pays very little heed to the cultural needs of Maori with regard to the dispensation of justice. As Quince observes, “Maori offenders have little, if any, connection to the legal system due to being at the bottom of the social and economic strata of New Zealand; a situation both partially caused and exacerbated by the incompatibility of tikanga principles and processes with the legal system.”<sup>445</sup> Maxwell reiterates this, noting that “inevitably systems belong to those with whom the locus of power resides”,<sup>446</sup> which in this case is almost solely in the hands of non-Maori figures. There is therefore significant potential for restorative justice to contribute towards returning dispute resolution to communities. Not only were family group conferences introduced following consultation with members of Maori society, but they bear resemblance to Maori systems of justice through the inclusion of support networks and also allow active participation in agreeing upon outcomes of the conference. Thus restorative justice is providing Maori with the means to contribute towards meaningful resolutions, recognising the value of their justice mechanisms and thereby reducing feelings of cultural and societal exclusion.

The above issue of cultural isolation due to the exclusion of certain sectors of society from decision-making authority is one area in which clear parallels may be drawn between New Zealand and Northern Ireland. As Dignan and Lowey explain, “[a]lthough other jurisdictions that have introduced restorative justice approaches do experience inter-communal tensions, in none of them – with the possible exception of South Africa – do they approach the intensity or ferocity experience in Northern Ireland.”<sup>447</sup> This demonstrates the contextual challenges faced in introducing new justice initiatives in Northern Ireland, particularly when many

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<sup>443</sup> Supra [88].

<sup>444</sup> Statistics New Zealand, ‘Earnings from Main Wage or Salary Job for Maori and Non-Maori by Industry (ANZSIC 2006 from 2010 onwards)’ (Statistics New Zealand). Available online at <<http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7468#>> accessed 5 February 2015.

<sup>445</sup> Supra [119], 17.

<sup>446</sup> Supra [313], 89.

<sup>447</sup> Supra [251], 16.

working-class communities are traditionally estranged from the justice system. Restorative justice may have the potential to rebuild these relationships through engaging in dispute resolution at a more local level. McEvoy and Eriksson note however, that for this to work “requires a concurrent emphasis on organic and bottom-up styles of partnership, and a willingness from the state in particular to cede some ownership and control”.<sup>448</sup> This may in part be helped by the use of an “independent public sector organisation”<sup>449</sup> in Northern Ireland – in the form of the Youth Conferencing Service - in contrast to the state-owned system in New Zealand. The implementation of restorative justice practices in Northern Ireland does devolve some of the ownership of justice to those who have long felt excluded and isolated from decisions made by state authorities. As such it possesses the potential to resolve some of the deep-seated political tensions and cultural fractures caused by the years of the ‘Troubles’ in Northern Ireland, in the same way that it could contribute towards repairing the loss of cultural identity felt by the Maori in New Zealand.

These attempts at a deeper level of cultural resonance within the administration of justice in New Zealand and Northern Ireland may be reflected through the success of restorative justice initiatives, illustrated by the previous chapter. Results from studies showed in almost all cases a significantly higher level of victim satisfaction than those produced by the conventional criminal justice system, and the majority of findings demonstrated lower levels of recidivism. What is interesting however is that research from Chapter IV indicated a fairly consistent pattern of Northern Ireland out-performing New Zealand. This may be the result of more damaging procedural issues in New Zealand such as the appropriateness of the conference location, as discussed above. It may, on the other hand, be attributed to a more intense level of cultural impairment than that seen in Northern Ireland. This is not to diminish in any way the seriousness of the ‘Troubles’ in Northern Ireland which have caused a ferocious divide in community loyalties, it is merely to say that European colonisation of New Zealand had such a devastating impact on Maori culture that the effects are still felt to this day. The *pakeha* refused to recognise any form of Maori justice system because it bore no resemblance to the laws they were accustomed to, and therefore it was scorned and effectively quashed in an attempt to force it out of existence. It is only in recent decades that there has been a resurgence in Maori values and that the New Zealand government has made

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<sup>448</sup> Kieran McEvoy and Anna Eriksson, ‘Who Owns Justice? Community, State and the Northern Ireland Transition’ in Joanna Shapland (ed), *Justice, Community and Contested Society: A Contested Terrain* (Willan Publishing 2008) 158.

<sup>449</sup> *Supra* [313], 90.

efforts to heal the scars of colonisation. It is unsurprising therefore, that Maori satisfaction and cooperation with new processes has not been immediate. Time is needed and initiatives may need to be altered in response to feedback before true reconciliation can occur and feelings of cultural isolation may be mitigated. In addition, it must be acknowledged that while restorative justice may contribute towards the rebuilding of trust between community and state, in and of itself it is only one factor in a wider process of reform. Further components, such as those of an economic or social nature must also be considered in any attempt to heal cultural divides.

It should also be noted that community-based initiatives have played a much more prominent role in the development of restorative justice in Northern Ireland than they have in New Zealand. A state-based process did not emerge until around a decade subsequent to the establishment of community restorative justice in Northern Ireland, whereas the CYPFA has governed family group conferencing in New Zealand from the outset. As such, users of restorative justice in New Zealand are limited to participation in a state-owned process, whereas there is the potential alternative of community-based programmes in Northern Ireland. In two countries where there is a considerable mistrust between various sectors of the community and the state, this is a significant point. Overall levels of success of restorative justice in Northern Ireland may be more positive due to the pre-existence of community-based initiatives where relationships between the organising bodies and the participants are significantly stronger than those found within the state-based conferencing schemes.

The chapter will now move on to consider briefly how communities suffering from social and economic disadvantages are more likely to come into contact with the criminal justice system and, moreover, how restorative justice may be of particular benefit to individuals within these communities.

### **Using Restorative Justice to Overcome Social and Economic Disadvantage**

An oft-cited explanation for offending in general is that offenders more commonly come from more deprived backgrounds, and those from areas of social or economic disadvantage are thus more likely to offend.<sup>450</sup> This has been supported by research from both New Zealand and Northern Ireland. Marie, Fergusson and Boden, for example, suggest that “a

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<sup>450</sup> Clifford Shaw and Henry McKay, *Juvenile Delinquency and Urban Areas* (Chicago, University of Chicago Press 1942).

substantial component of the connection between ethnicity and crime in New Zealand is mediated by social, economic and related factors.”<sup>451</sup> This is reinforced by findings demonstrating that test groups of Maori offenders had been subjected to greater levels of disadvantage in terms of social, family and childhood backgrounds than other test groups.<sup>452</sup> Hayes and Daly report a similar scenario from additional New Zealand-based research, noting that offenders were entering the criminal justice system with “various degrees of negative life experiences, social marginality and disadvantage”.<sup>453</sup> Likewise, Ellison and Shirlow place partial blame for young offending in the wake of the Northern Ireland ‘Troubles’ on a challenging backdrop for young people. They claim that, “Northern Ireland’s already dire economic situation was made worse by the decades of socio-political conflict that impacted even more directly upon those who were already marginalised and excluded. For some young people, their futures bleak and prospects limited, reacted as many young people do in similar situations and turned to youth offending and anti-social activity.”<sup>454</sup>

Offenders with such backgrounds are perhaps unlikely to respond well to the conventional criminal justice system, in which the majority of judgments are meted out by white, upper class, male authority figures<sup>455</sup> – it is improbable that such individuals have suffered through similar hardships and consequently they may not have the depth of understanding necessary to relate to young offenders. The more informal nature of restorative youth conferencing in comparison to the courtroom setting, as well as the use of facilitators skilled in encouraging young people to be forthcoming conference participants, is more likely to yield positive contributions from those from more deprived backgrounds.

In addition to this, one of the key tenets of restorative justice works on the principle that whilst offenders must be made to take responsibility for their actions, conferences must be conducted in a respectful manner and in a way that enables them to be reintegrated into society following the process. As Braithwaite and Mugford explain, “disapproval of a bad act is communicated while sustaining the identity of the actor as good.”<sup>456</sup> It can be argued therefore, that part of the success of restorative justice in achieving lower levels of

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<sup>451</sup> Supra [436], 364.

<sup>452</sup> Ibid.

<sup>453</sup> Supra [289], 756.

<sup>454</sup> Supra [257], 37.

<sup>455</sup> Stephen Shute, Robert Hood and Florence Seemungal, *A Fair Hearing? Ethnic Minorities in the Criminal Courts* (Willan Publishing 2005) 4.

<sup>456</sup> John Braithwaite and Stephen Mugford, ‘Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders’ [1994] 34(2) *Brit J Criminol* 139, 142.

reoffending than the conventional criminal justice is a result of building young offenders back up in the aftermath of the offence rather than further increasing stigmatisation and marginalisation. This is particularly relevant to those young offenders from more disadvantaged backgrounds. In Northern Ireland this is likely to be those from working class loyalist or republican areas, and in New Zealand many Maori are more likely to come from areas of social or economic deprivation than non-Maori. The reintegrative principles of restorative justice may be beneficial in helping young offenders from these backgrounds feel included and part of a community once more, resulting in a lower likelihood of reoffending.

The above discussion has alluded to the deep divides between community and state felt in both New Zealand and Northern Ireland. This will now be explored in more detail, with particular reference to the legitimacy deficit in Northern Ireland, including suggestions as to how restorative justice may be utilised to rebuild relationships between communities and the state authorities.

### **Bridging the Gap between Community and State**

Although this section will include a comparative discussion regarding New Zealand, the focus will rest on Northern Ireland and the chasm created between community and state as a result of the preceding decades of inter-community conflict. It will examine the institutional legitimacy deficit created by these ‘Troubles’ and observe how this consequently forced communities into establishing their own forms of justice. It will also ask whether the conflict in Northern Ireland and the subsequent emerging community justice scene could be said to have generated a receptive environment for the use of restorative justice.

Campbell et al. describe the ongoing legitimacy deficit in the wake of the ‘Troubles’ as being “characterised by mistrust and hostility towards the police in some areas and has resulted in the growth of a crime prevention vacuum and the emergence of informal community justice measures.”<sup>457</sup> These informal justice tactics have consisted of the brutal punishment beatings and kneecappings discussed in Chapter III, and such violence has been labelled by commentators McEvoy and Mika as “symptomatic of fractured relationships between the state criminal justice system and working class communities.”<sup>458</sup> The result of this form of

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<sup>457</sup> Supra [366], 1.

<sup>458</sup> Supra [426], 378.

paramilitary policing has been an “intense politicisation of informal justice and a high-profile contest between community and state over the ownership of justice in the jurisdiction.”<sup>459</sup>

The resulting weakened state structures, viewed with high suspicion by the local communities of Northern Ireland, created a dynamic whereby alternative justice processes were granted the opportunity to flourish. Some of these alternative, informal problem-solving techniques were the violent paramilitary measures referenced above, however others were the genesis of a burgeoning community restorative justice scene. These new schemes allowed local communities to take ownership of justice and responsibility for their offenders in circumstances where it was felt the criminal justice system was comprehensively failing. They were able to resolve disputes utilising methods appropriate to the communities themselves, without having to resort to state assistance. As Eriksson observes, in Northern Ireland “there is a strong tradition present of not seeking help from the state or any other outside agency; instead, the community looks inwards for help and support.”<sup>460</sup> This emphasis on community self-sufficiency and the supportive nature of these communities aids understanding as to how initiatives developed into those of a restorative nature. Support on this point comes from Chapman, who states that the “process of legitimising an alternative to violent retribution did not start from the premise that restorative justice was the solution. It was a bottom-up approach out of which a form of restorative justice emerged.”<sup>461</sup> In this way, localised restorative justice initiatives were born out of a desire by communities not only to find more peaceful resolution to disputes, but also to resolve such disputes on their own terms, without interference from a mistrusted state.

There were several benefits for Northern Ireland communities in using these localised restorative justice initiatives over surrendering disputes to state mechanisms. One of the most valuable of these lies in the fact that community programmes have the clear advantage of a more in-depth knowledge of neighbourhoods and thus a closer understanding of what solutions are culturally and socially appropriate responses to offending. This is in contrast to those involved in state-based processes who are often distanced from the realities of working-class life. CRJI and Alternatives have been forerunners in this regard; as Eriksson notes, “[b]y utilising existing social networks with which they are intimately familiar, and by tapping into the power and information existing within the community, they are arguably

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<sup>459</sup> Anna Eriksson, ‘A Bottom-Up Approach to Transformative Justice in Northern Ireland’ [2009] 3 *The International Journal of Transitional Justice* 301, 302.

<sup>460</sup> *Supra* [459], 311.

<sup>461</sup> *Supra* [423], 575.

more effective than the criminal justice system”.<sup>462</sup> Similarly, Chapman observes that by working at this level, community restorative justice schemes “have the confidence and courage to challenge the prejudices and oppressive relations within many local communities.”<sup>463</sup> As such, initiatives such as these may possess the wherewithal to generate change within communities with regard to conflict resolution and establishing new social norms for overcoming disputes. This is particularly pertinent to Northern Ireland with its recent history of such brutal punishment violence.

A further incentive to take disputes to restorative justice programmes stems from the idea, briefly referenced above, that members of communities should be offered opportunities to contribute towards resolving problems themselves as the ones most affected by offending. As has been noted, “it makes sense that communities themselves should take primary ownership over the establishment of programmes as part of a broader ‘legitimation process’.”<sup>464</sup> Devolving power back to communities allows them to participate in developing appropriate responses to offending without taking recourse to state mechanisms. One of the drawbacks to this particular system of restorative justice however, is the potential either for miscommunication or even a complete lack of communication between community initiatives and the state. Without sufficient cooperation with state authorities, offenders run the risk of being processed twice by the differing justice procedures thus being exposed to a system of double jeopardy. This issue was addressed in Northern Ireland through the use of Protocol,<sup>465</sup> first developed in 2005, intended to improve ties between community-based schemes and the state. The Protocol states that any community-based scheme is required to pass cases to the Public Prosecution Service via the police, which will then refer low level offences back to the scheme to be dealt with according to Protocol framework.<sup>466</sup> This does however raise the concern that restorative justice risks being ‘colonised’ by the state, with community processes essentially taken over by the more dominant entity. As Boyes-Watson notes, “[i]f a defining element of restorative justice is ownership of the healing process by the community, then enlisting the state to do restorative justice is akin to dressing the wolf in the proverbial garb

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<sup>462</sup> Supra [459], 307.

<sup>463</sup> Supra [423], 585.

<sup>464</sup> Supra [459], 305.

<sup>465</sup> Northern Ireland Office, *Protocol for Community-Based Restorative Justice Schemes* (Northern Ireland Office 5 February 2007).

<sup>466</sup> Supra [465], para 2.



of the sheep.”<sup>467</sup> This point is reinforced further by Pavlich who raises concerns of an “imitator paradox”,<sup>468</sup> whereby through greater integration into the conventional criminal justice system, restorative justice effectively becomes itself another form of conventional justice. As such, the importance of state involvement in restorative justice processes should not be underestimated, yet it should perhaps be tempered.

Accordingly, this raises the point of how restorative justice may bridge the gap between community and state, initiating communication through a need to preserve the integrity of justice. There is, for example, the potential for initiatives such as CRJI and Alternatives to act as intermediaries between communities and the police or other state authorities, thus opening channels of communication. It has been said that already the police view CRJI as a “gateway to the community”.<sup>469</sup> It should additionally be noted however, that whilst the focus thus far in this discussion has been on the potential for community-based restorative justice to rebuild relationships between community and state, the implementation of the state-based Youth Conferencing Service has also granted the possibility for improved relations. An example of this is the fact that it is mandatory for a police officer to be present at youth conferences in Northern Ireland. Although this poses the risk of an adverse effect on the conferencing process through decreased cooperation from either victim or offender who may be suspicious of such an authority figure, it may in fact establish a setting whereby individuals can converse with the police on a slightly more informal basis. O’Mahony supports this, reporting that conferences provide opportunities for constructive interaction between police officers and young people in a safe environment.<sup>470</sup> Through generating positive interactions between members of local communities and state authorities, individuals are more likely to feel part of a cohesive society and, as was discussed earlier in the chapter, increased feelings of social inclusion arguably makes offenders less likely to reoffend. As a result, restorative justice could play a part in rebuilding the damaged relationship between the state and the communities of Northern Ireland. This is reinforced by Doak and O’Mahony, who state that “[j]ust as restorative justice values may work to resolve micro-conflicts between victims, offenders and their respective communities, they may also assist in boosting

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<sup>467</sup> Carolyn Boyes-Watson, ‘In the Belly of the Beast? Exploring the Dilemmas of State-Sponsored Restorative Justice’ [1999] 2(3) *Contemporary Justice Review* 261, 262.

<sup>468</sup> George Pavlich, *Governing Paradoxes of Restorative Justice* (Cavendish Publishing 2005) 14-15.

<sup>469</sup> *Supra* [459], 314.

<sup>470</sup> *Supra* [375], 569.

democracy and inter-communal healing through forging better relationships between civil society and the various faces of the formal criminal justice system.”<sup>471</sup>

Taking consideration of the above, it must now be asked how the use of restorative justice in bridging the gap between community and state in Northern Ireland is reflected in its success as discussed in Chapter IV, and why these same results have not been seen in New Zealand. The existence of community-based restorative justice schemes alongside the state-based Youth Conferencing Service allows for a multi-faceted approach to restorative justice within Northern Ireland; one which - where appropriate - permits referrals to independent and localised community restorative justice services, thereby delivering a process suited to the needs of the individual. The wider array of options available for young offenders in Northern Ireland ensures that there is an increased likelihood of finding an approach suitable for each case. If the process used is able to meet the needs of the victims, offenders and their respective support networks, positive outcomes – including raised victim satisfaction and a disinclination to reoffend - are more likely. It is submitted that the presence of this factor in the Northern Ireland backdrop to restorative justice is one of the reasons for its more encouraging empirical results as seen in Chapter IV. This is further supported by research from New Zealand, which suggests that “the state’s ownership of [family group conferences] affects the flexibility of the process and the extent to which it can accommodate Maori expectation of a community-based justice.”<sup>472</sup> Communities in New Zealand however, have no other option but to utilise the state-based services; programmes tailor-made for differing cultural localities are not available and thus the potential for successful restorative justice processes may have been limited.

The state-based systems in New Zealand and Northern Ireland perhaps should not be judged too harshly however. What is important is that both governments recognised the potential of restorative justice within their respective jurisdictions, so much so that forms of restorative youth conferencing have been integrated into their formal criminal justice systems. The resulting shift in attitude towards justice and offending was potentially in itself a driving force behind the varying successes of restorative justice. This will now be examined in more detail, with the aim of determining the extent to which the states themselves may be credited with the success of restorative justice.

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<sup>471</sup> Supra [233], 311.

<sup>472</sup> Supra [164], 181.

## **To What Extent is the Success of Restorative Justice Attributable to the State?**

As established previously, Northern Ireland implemented its state-based restorative justice scheme alongside existing community-based initiatives. New Zealand's government, on the other hand, came to the realisation of a need for change independently in recognition that the existing criminal justice system was not working for certain sectors of society. As such, the CYPFA was enacted in a unique fashion, with unprecedented levels of consultation with the indigenous Maori of New Zealand. In this way, the New Zealand state may be said to have created a fertile ground for the success of restorative justice, through not only recognising a need for change, but acting on this realisation in a way that attempted a culturally appropriate response to youth offending.

Concerns over the significant over-representation of Maori youth in the criminal justice system became the deciding factor leading to governmental agreement that the current justice mechanisms were not effectively dealing with offenders from certain communities within New Zealand. Out of these concerns emerged the new, culturally-sensitive legislation – the CYPFA. This framed new attitudes towards youth offenders and, as Lynch notes, the “most notable aspects had their gestation in the particular social and cultural context of New Zealand, particularly the increasing recognition of the importance of bi-culturalism.”<sup>473</sup> Maxwell et al. support this, describing the main objective of the new youth justice system as being to “promote the wellbeing of children, young people and their families, and family groups by providing services that are appropriate to cultural needs, accessible, and are provided by persons and organisations sensitive to cultural perspectives and aspiration.”<sup>474</sup>

The desire to meet Maori needs and expectations within the delivery of justice can be seen throughout the values embodied by the CYPFA. For example, there is a new focus on “repairing harm, reintegrating offenders, and restoring the balance within the community affected by the offence.”<sup>475</sup> Not only are these key tenets of restorative justice in itself, but they are some of the key principles encountered when exploring *tikanga maori*. In particular the emphasis on encouraging community involvement when dealing with offending is vital to the Maori way of life. It will be remembered from Chapter II that societal ties within the tribal system are of central importance to the Maori philosophy, and any imbalance caused by offending is felt collectively. Thus the matter of justice is seen as a community

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<sup>473</sup> Supra [154], 518.

<sup>474</sup> Supra [295], 7.

<sup>475</sup> Supra [308], 243.

responsibility, and the whole community must contribute towards the resolution of the offence in order to restore balance. It is therefore significant that the “involvement of the whanau, hapu and iwi is explicitly recognised within the new legislative framework in both discussions and decisions about appropriate solutions to juvenile offending.”<sup>476</sup>

Further to this, Olsen, Maxwell and Morris have noted additional similarities between the CYPFA and Maori forms of justice, observing that “[a]s in the traditional Maori model, social balance is achieved [by family group conferences] by reintegrating young people in their family and determining appropriate means of redress for victims.”<sup>477</sup> It is clear therefore, that in drafting the CYPFA the New Zealand government made a real effort to replicate some of the central values of Maori justice mechanisms. Whether or not this was effectively achieved, the recognition that justice systems must be appropriate for all members of society – particularly those traditionally alienated since the time of colonisation – was an important step forward in creating an environment in which successful justice practices may flourish.

The matter of whether the new legislation has indeed signalled progress for the recognition of Maori justice processes has been a divisive one. Views have ranged from embracing the changes wrought in New Zealand as formal acknowledgment of the value in utilising Maori forms of justice, to more critical outlooks which are sceptical of the worth of family group conferencing. Maxwell et al. have come down in favour of the former viewpoint, claiming that the CYPFA strove “to empower Maoridom. It sought to involve Maori directly in decisions about their young people and thus to acknowledge their identity as tangata whanau (the people of the land) and ethnic partners with the Crown.”<sup>478</sup> Tauri, on the other hand, is deeply cynical regarding the motives of the state in introducing the new legislation. He asks, “[w]hether the family group conferencing process provides Maori with a culturally appropriate avenue for addressing their justice needs, or simply signals a continuation of the State’s willingness to utilise the symbols and practices of Maoridom, in its ongoing program of biculturalism”.<sup>479</sup> This perspective questions whether the institutionalisation of restorative justice is truly an attempt at assimilating Maori justice into the New Zealand criminal justice system, or it is simply a way of *appearing* to take action whilst achieving very little in the way of meaningful progress in recognising the validity of Maori practices. It is submitted

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<sup>476</sup> Supra [295], 10.

<sup>477</sup> Supra [413], 49.

<sup>478</sup> Supra [295], 10.

<sup>479</sup> Supra [118], 158.

here however, that the latter opinion is not a hugely helpful one in creating an environment for the development of contemporary restorative justice processes. It is of course important that Maori justice needs are met in a culturally appropriate manner, however this does not mean that it is either practicable or appropriate for an exact replica of traditional Maori protocols to be instituted in today's society. What is needed is a form of justice that resonates with the Maori philosophy but is also applicable to the modern world; something that the New Zealand government made a clear attempt to enact with the CYPFA. As Maxwell et al. opine, "[a] distinction must be drawn between a system that attempts to re-establish the indigenous model of pre-European times and a modern system of justice that is appropriate to contemporary Maori culture. The New Zealand system is an attempt to establish the latter, not to replicate the former."<sup>480</sup>

Northern Ireland must not be discounted from this discussion, as here too there was a recognised need for the development of new attitudes towards offending in the wake of the 'Troubles'. These attitudes were triggered by the emergence of community-based restorative justice initiatives, but also can be seen in the Criminal Justice Review and the new Police Service of Northern Ireland (PSNI) created in the aftermath of the Belfast Agreement. Chapman notes that resulting from this was a clear priority "to gain credibility as a legitimate police service among local communities especially those in nationalist areas. This resulted in a genuine eagerness to engage with local people through community policing. Relationships and cooperation between community restorative justice projects and the police were actively strengthened."<sup>481</sup> For example, the Review not only recommended the incorporation of restorative justice within the formal criminal justice system, but particularly stressed the importance of principles such as: prioritising the needs of victims; ensuring offenders are held accountable; and devolving responsibility for the decision-making process to the parties themselves.<sup>482</sup> Through placing emphasis on these factors, their value to the process of re-establishing state legitimacy and creating a new framework for offending was highlighted. This focus on repairing the state's legitimacy deficit is reflected moreover throughout the PSNI's key policies. There is repeated reference to the need for partnership between police and communities, encouraging community participation in the justice process, and

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<sup>480</sup> Supra [295], 11.

<sup>481</sup> Supra [423], 577.

<sup>482</sup> Supra [251], 57.

responding to the needs of all communities.<sup>483</sup> As such, there have been tangible attempts by the state to ensure the success of new restorative justice initiatives through improved inter-community relations, the establishment of a Youth Conferencing Service, and a more legitimate police presence.

From this, it must be acknowledged that the states in question undoubtedly played a significant role in reforming attitudes towards justice and implementing change within their respective criminal justice systems. The introduction of family group conferencing in New Zealand in particular can largely be credited to governmental recognition that alterations were necessary for a more effective youth justice system. A historical resonance in the form of long-standing Maori justice traditions may have been pre-existing, but the state's active role in enforcing a new form of culturally sensitive practice is likely to have created a wider audience and a heightened sense of the credibility of restorative justice. Similarly in Northern Ireland, although community-based restorative justice practices had developed holistically in response to a community need, state endorsement of such initiatives and willingness to cultivate these new attitudes towards offending can only have contributed towards the success of restorative justice.

## **Conclusion**

The intention of this chapter has been to explore the link between the relative successes of restorative justice in New Zealand and Northern Ireland and certain culturally-based characteristics which may have facilitated its implementation. The focus of this has centred on social, historical and political features of the two jurisdictions. It has examined procedural aspects of the respective restorative youth conferencing processes, correlation between core themes of restorative justice and cultural context, the potential for restorative justice to make amends for historical cultural injustices, and the role of the state in promoting restorative justice practices. The aim of this has been to ascertain how pre-existing cultural ideals within New Zealand and Northern Ireland have influenced the successful integration of restorative justice.

When considering how the restorative justice process may have affected its results, it was suggested that certain elements may have acted to inhibit successful conferencing outcomes. Foremost of these was the issue of the use of an unsuitable facilitator or other authority

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<sup>483</sup> Police Service of Northern Ireland, 'About Us'. Available online at <<http://www.psni.police.uk/about-us.htm>> accessed 14 May 2015.

figure. Suspicion of state representatives is a factor present in both New Zealand and Northern Ireland, and the presence of such an individual may have impeded the effectiveness and productivity of many conferences. On the other hand, there are also measures which may counteract these problems, such as the use of community-based restorative justice initiatives in Northern Ireland and the introduction of Rangatahi Courts in New Zealand. The longer established community-based processes of Northern Ireland, when contrasted to the recent New Zealand solution, may account for higher levels of victim satisfaction simply due to their longevity and greater visibility levels amongst local communities.

The chapter then moved on to discuss whether the key principles underlying restorative justice were pre-existing within the cultures of New Zealand and Northern Ireland. It was submitted that the particularly community-oriented Maori tribal systems in New Zealand and similarly-minded factions within Northern Ireland resonated closely with the emphasis on community embedded in restorative justice philosophies. This is particularly true of Maori ideologies of collective responsibility for the actions of offenders, and can also be seen in the Northern Ireland tradition of drawing inwards from communities in order to resolve disputes. Furthermore, the concept of treating crime as conflict between individuals as opposed to a harm done to the state – a central tenet of restorative justice - is reflected in the increased levels of community ‘ownership’ of justice in New Zealand and Northern Ireland. It was proposed that the active participation required of offenders by these restorative justice processes may have contributed to the lower levels of recidivism experienced in comparison to the conventional criminal justice systems.

Impairments to cultural identity suffered by inhabitants of both communities yet experienced in different ways were next considered. It was asked whether the success of restorative justice may be attributed to remedying this through the use of culturally appropriate responses to offending. It was concluded that despite the attempts within New Zealand to implement changes at a young age in order to diminish the disconnect experienced between Maori and non-Maori, the fractured identity is still felt to such an extent that it will take time and effort for restorative justice to establish a long-lasting impact among communities. Additionally, it was noted that the community-based restorative justice initiatives in Northern Ireland perhaps renders it more appropriate for areas suffering from such impairments, in that they are better equipped to provide culturally suitable responses to offending.

The use of restorative justice in reintegrating offenders from socially or economically disadvantaged backgrounds was also discussed – in particular the Maori of New Zealand and those from working-class loyalist or nationalist communities in Northern Ireland. It was suggested that the principle of reintegration advocated by proponents of restorative justice may be beneficial in reducing the marginalisation of individuals from such communities and aid in social inclusion, conceivably resulting in lower levels of recidivism. Pursuant to this was a discussion of how restorative justice may be used to bridge the gap between communities and states. The emphasis here was on the deep discord within Northern Ireland in the wake of the ‘Troubles’ and the resulting legitimacy deficit. It was suggested that the use of community-based restorative justice initiatives such as CRJI and Alternatives not only provided a form of intermediary service between community and state but also, alongside the Youth Conferencing Service, allowed for a multi-faceted approach to restorative justice. This wider array of options thus increases the likelihood of finding an approach that meets the needs of participants, and consequently it may result in more successful restorative justice in terms of victim satisfaction and reoffending levels.

Finally, the chapter considered the extent to which the success of restorative justice was down to the recognition of its inherent value by the states of New Zealand and Northern Ireland. This was particularly pertinent to New Zealand, following the government decision to implement the CYPFA. It was submitted that there was clear intent embodied within the legislation to cater to the needs of Maori and provide more culturally appropriate responses within the justice system. Moreover, even if the execution of the new family group conferencing processes is not yet perfected, the attempt to institute such practices in a more contemporary and culturally aware manner shows great potential for future progress. As such, the state contributed towards creating a receptive response to restorative justice which may in part account for its increased levels of success over the conventional criminal justice system.

Ultimately, it is submitted that certain pre-existing cultural ideals were indeed present in New Zealand and Northern Ireland which combined to create a cultural climate in which restorative justice does hold particular resonance. This can be seen in the Maori justice mechanisms within New Zealand and the ancient Brehon traditions of Northern Ireland, as well as the more recent values generated by the ‘Troubles’. The strong emphasis on community, need for ownership of justice, and principles of reintegration ongoing in the two countries all mirror the core themes of restorative justice. Despite this however, it is



proposed that a share of the success of restorative justice is in fact attributable to state awareness and recognition of a need for new forms of justice. Pre-existing cultural ideals may have been present, but a trigger to act on these ideals in an appropriate manner is necessary to truly influence justice systems and effect change. This willingness to implement change and evolve new attitudes towards justice through the blending of indigenous practices and contemporary values is reflected in the higher levels of success experienced by restorative justice in comparison to the conventional criminal justice system.

## Conclusion

The aim of this work has been to provide a thorough analysis of contemporary restorative justice practices in New Zealand and Northern Ireland. It has traced the development of both community-led and state-based initiatives from their earliest roots through to their modern-day counterparts. The success of these existing practices has been evaluated according to research regarding victim satisfaction and recidivism levels in order to acquire a well-rounded overview of just how effectively restorative justice has been implemented within the criminal justice systems of the two jurisdictions. The overall intention of this work has been to identify the factors which may have influenced these levels of success; to ask whether there is a particular cultural resonance between restorative justice and certain countries and, if this was found to be the case, which precise social or political dynamics act to produce more efficacious restorative justice processes.

With regards to New Zealand, it is undoubtedly the case that the current status of restorative justice – and in particular that of family group conferencing – has been framed in large part by a desire to reflect Maori values in a more culturally appropriate manner within the criminal justice system. Issues of severe over-representation of Maori youth in the offending statistics led to the realisation that significant changes were necessary, and thus in the aftermath of unprecedented consultation with Maori themselves, the CYPFA was implemented. This legislation designated New Zealand as the first country to institutionalise a mode of restorative justice, in the form of family group conferences. One of the forefront aims of this was to create a process whereby, to some extent, Maori were enabled to ‘take back’ the justice process into their communities. It combined many traditional philosophies, such as the need for community involvement and the importance of offender reintegration, with a system arguably more applicable to modern day life. In spite of this however, the research in Chapter IV indicated that although the response to restorative justice in comparison to conventional criminal justice mechanisms was generally positive, overall results were somewhat less successful than might have been hoped for. This was particularly evident in relation to victim satisfaction with the outcome of restorative justice processes, and to long-term recidivism rates.

State-based restorative justice in Northern Ireland is arguably less culturally driven than New Zealand but rather owes its foundations more to the political and social landscape of the province. Despite this, a potential predisposition towards restorative justice as a result of the

early Brehon laws of Ireland is perhaps reflected in the implementation of bottom-up, community-based schemes. Out of the ‘Troubles’ and born from a desire to utilise alternative methods of dispute resolution to paramilitary violence – whilst avoiding recourse to state justice – came a surge in the use of community-led restorative justice initiatives. Pursuant to the Belfast Agreement, these community schemes were soon followed by the state-commissioned Criminal Justice Review leading to the introduction of the Youth Conferencing Service. These two areas of restorative justice in Northern Ireland were examined in Chapter IV, focusing as with New Zealand on victim satisfaction and reoffending levels. Results from this research were comparatively a resounding success, whether measured against the conventional criminal justice system or the family group conferences of New Zealand.

Whilst the success of restorative justice in comparison to conventional justice was an important focus of Chapter V, the dissonance between the results from New Zealand and Northern Ireland was also in need of discussion: which elements at play were producing the more positive outcomes seen in the research from Northern Ireland? One of the key conclusions drawn was the idea that the more prominent community-based restorative justice initiatives within Northern Ireland may have led to greater success levels amongst a nation plagued by a mistrust of the state. Their tradition of drawing inwards from the community as a method of dispensing justice aligns with the key tenets of restorative justice, as a way of regaining the ownership of disputes. The wholly state-led schemes of New Zealand potentially do not permit this dynamic to such a great extent. This raises the suggestion that it is perhaps not necessarily the presence of a long-standing indigenous community such as the Maori which leads to successful restorative justice practices, but rather a particularly strong sense of community identity, as seen in Northern Ireland in the wake of the ‘Troubles’. In addition to this it was suggested that the cultural impairment suffered by Maori in New Zealand was in some ways more severe than the harms in Northern Ireland. This fractured community identity may have caused such long-lasting repercussions that it will take time before restorative justice produces more positive results. The strength of communities in Northern Ireland may at present make them more predisposed towards successful restorative justice outcomes.

Whilst a strong communitarian spirit and cultural tendency to adopt alternative justice measures is a sure benefit for any jurisdiction hoping to implement restorative justice, it is of equal importance that there is state recognition of its value. In both New Zealand and

Northern Ireland, there were definite triggers for the need to alter attitudes towards offending, in the form of severe Maori over-representation in juvenile offending and the ‘Troubles’ respectively. New forms of state-based restorative justice were the result of these triggers. A willingness to provide alternative and potentially more appropriate justice mechanisms is a significant factor in influencing cultural attitudes and effecting change. Finding a balance between community and cultural needs and contemporary justice values may be the key to introducing effective state-based restorative justice measures.

In conclusion it is submitted that it is through a combination of pre-existing cultural ideals, strong community identity and state readiness to implement change that truly successful restorative justice may be instituted. Any forthcoming further empirical evidence will be a valuable tool in order to fully understand the wider potential application of restorative justice. For example it is notable that restorative justice is used almost exclusively in the youth justice arena, thus its potential for expansion into the field of adult offending would be an area worth exploring. Moreover, an increasing number of jurisdictions are developing restorative justice initiatives either within or alongside their formal criminal justice systems. Further evaluation of those with a history of reparative-minded tribal justice – such as Taiwan and the Atayal tribe – would allow fascinating insight (building on the research in this work) into whether they prove more receptive to restorative justice practices. Meanwhile it must be hoped that restorative justice continues to gain recognition as a viable prospect in the field of criminal justice.

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