COMPARATIVE PERSPECTIVES ON RESTORATIVE JUSTICE IN MELANESIA, NEW ZEALAND, AND IRAN

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I. Introduction: What is Restorative Justice?

If one thing is clear about "restorative justice" (RJ), it is that it has no clear definition. As the term is used today, "restorative justice" most often refers to a movement within criminal justice and criminology in Western states beginning in the 1970s, which responded to concerns about the ineffectiveness of the dominant approach to criminal justice in addressing the underlying causes of crime by seeking to reconceptualize criminal justice through an alternative "paradigm"[1] Common definitions refer to elements of its processes and outcomes, or normative and operational values.[2] For example:

- "Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through inclusive and cooperative processes."[3]
- "[A] philosophy of justice emphasizing the importance and interrelations of offender, victim, community, and government in cases of crime and delinquency."[4]
- "[A]n ethos with practical goals, among which to restore harm by including affected parties in a (direct or indirect) encounter and a process of understanding through voluntary and honest dialogue."[5]
- "Restorative justice is deliberative justice. It is about people deliberating over the consequences of crimes, and how to deal with them and prevent their recurrence."[6]

In Western legal systems, because RJ is usually seen as an "alternative" to our existing approaches to criminal justice, it can be helpful to define it in comparison to its opposite, retributive

[1] *See* Theo Gavrielides, *Alternative Dispute Resolution Through Restorative Justice: An Integrated Approach*, in COMPARATIVE DISPUTE RESOLUTION 394, 397 (Maria F. Moscati et al. eds., 2020).
[2] Daniel W. Van Ness, *An Overview of Restorative Justice Around the World*, Workshop at Eleventh UN Congress on Crime Prevention and Criminal Justice in Bangkok, Thailand, 5 (Apr. 22, 2005).
[3] *Id*. at 3.
[4] Clifford K. Dorne, RESTORATIVE JUSTICE IN THE UNITED STATES 8 (2008).
[5] Gavrielides, *supra* note 1, at 394.
[6] John Braithwaite, *Restorative Justice*, in THE HANDBOOK OF CRIME AND PUNISHMENT 323, 329 (Michael Tonry ed., 1998).

justice. Western retributive justice lies on several assumptions, including that the act of breaking the law is in itself the offense,[7] the state is the real victim and therefore has a monopoly on determining the appropriate response,[8] guilt–"a statement of moral quality"–must be assigned to an individual,[9] that individual is a "free moral agent" outside any social or economic context,[10] and justice requires that the guilty party "get what is coming to them" through the imposition of some kind of physical or psychological pain.[11] Additionally, while there is often a heavy focus on procedural fairness, the decisionmakers in the adjudication process are professionals, distant from its outcomes.[12] The process is deeply adversarial, and the focus on procedural equity (as opposed to equity in circumstances) treats unequals as equals, obscuring and perpetuating underlying social and economic inequalities.[13] The frequent result of such a system is a cycle of trauma and violence, in which the punishment of offenders for harm causes further harm to individuals and communities.

Restorative justice, in contrast, assumes that crime is a violation of relationships between people,[14] which causes harm to the victim, to the offender, and to the larger community.[15] Crime often grows out of injury,[16] and therefore justice will seek to repair injury rather than inflict further harm.[17] As a rupture of relationships, crime creates obligations between victim, offender, and community to make things right.[18] The first step in achieving justice, then, is to identify the needs of the affected parties, beginning with the victim,[19] who should be empowered to participate rather than having justice done "to and for them."[20] "Restoring" the victim may include compensating property loss or injury; restoring a

[7] Howard Zehr, CHANGING LENSES 83 (25th anniversary ed. 2015).
[8] *Id*. at 85.
[9] *Id*. at 69, 72.
[10] *Id*. at 73-75.
[11] *Id*. at 78-81.
[12] *Id*. at 77.
[13] *Id*. at 82.
[14] *Id*. at 183.
[15] *Id*. at 187.
[16] *Id*. at 184.
[17] *Id*. at 188.
[18] *Id*. at 198.
[19] *Id*. at 192-93.
[20] *Id*. at 195.

sense of security, dignity, or empowerment; or restoring deliberative democracy, social support, or harmony based on a feeling that justice has been done.[21] Determining needs and responsibilities is fundamentally about accountability, which also requires offenders "to share in the responsibility of deciding what needs to be done."[22] Finally, the process by which "justice is done" should be meaningful to the parties, and should "put power and responsibility in the hands of those directly involved: the victim and offender. It should also leave room for community involvement."[23]

While RJ is gaining recognition in the West, it a diverse and varied movement, with diverse and varied sources, and its underlying principles have existed in legal systems around the world for centuries.[24] Further, very few–if any–systems are solely retributive or solely restorative. This paper will examine the history and usage of restorative practices in criminal justice in three legal systems from around the world: customary law in Melanesia, common law in New Zealand, and Islamic law in Iran.

II. Melanesia

A. Historical and Legal Background of Melanesia

"Melanesia" refers to the region of the South Pacific that includes what is now Papua New Guinea (including the island of Bougainville), the Solomon Islands, Fiji, and Vanuatu.[25] The region is characterized by its extreme cultural and linguistic diversity, making it difficult to generalize about its customary law, as each locality and community may have its own customs.[26] However, by looking at some examples of *kastom*[27] from throughout the region, it is possible to get a general idea of many common dispute resolution practices and their underlying principles.

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[21] Braithwaite, *supra* note 6, at 328.
[22] Zehr, *supra* note 7, at 202.
[23] *Id*. at 204.
[24] *See* Braithwaite, *supra* note 6 at 331; Zehr, *supra* note 7, at 101-128.
[25] Miriam Kahn & Roger M. Keesing, *Melanesian Culture*, ENCYCLOPEDIA BRITANNICA (Apr. 23, 2014), https://www.britannica.com/place/Melanesia.
[26] Sinclair Dinnen, *Restorative Justice in the Pacific Islands: An Introduction*, in A KIND OF MENDING 1, 8 (Sinclair Dinnen ed. 2010).
[27] *Kastom* is the pidgin word for "custom." *Id*.

Traditionally, society throughout the region is organized along tribal or kinship lines, with most people living in small communities.[28] Due in large part to geographic barriers, there is great linguistic and cultural diversity between communities and little overarching sense of nationality.[29] Power tends to be diffused among tribal elders rather than concentrated in one person or institution, and this decentralized form of governance has largely survived the colonial period.[30] As is often true of "chthonic" societies,[31] there are few written laws or formalized legal institutions in traditional Melanesian communities, and notions of law and justice are inseparable from other aspects of everyday life.[32]

Prior to European colonization of the region, each community applied its own version of *kastom*, including dispute resolution practices.[33] While as diverse as the region's population, many of these practices shared elements of what is now recognized as "restorative justice," including: diffuse sources of power (chiefs and "big men"); community-based participation and inclusion of all affected parties; deliberation and compromise; reciprocity and equivalence; a focus on the restoration of broken relationships; holistic and contextual views of criminal or deviant behavior; personal and community accountability; and a preference for compensation over punitive punishment, although the latter remained available for the most serious offenses.[34] Beginning in the late 18th century, the region was colonized by various European powers, including the Dutch, Portuguese, French, German, and British,[35] and Western legal systems based in civil or common law were introduced to displace customary law, although *kastom* remained dominant in rural areas with limited state reach.[36] While European colonizers largely had extractive economic ventures as their goal rather than permanent settlement, Christian missionaries also

[28] *Id*.
[29] *Id*. at 7.
[30] *Id*. at 8.
[31] *See generally* H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD 60-97 (5th ed. 2014).
[32] Dinnen, *supra* note 26, at 8.
[33] Grant Follett, *Defining the Formless: Customary Law in the Pacific*, 39 ALTERNATIVE L.J. 125, 125 (2014).
[34] *See* Dinnen, *supra* note 26, at 8-9.
[35] Sophie Foster & Francis J. West, *Pacific Islands*, ENCYCLOPEDIA BRITANNICA (Nov. 17, 2020), https://www.britannica.com/place/Pacific-Islands.
[36] Follett, *supra* note 33, at 125.

played a significant role in the colonial project, converting much of the indigenous population and introducing Christian notions of morality into the legal system.[37]

Throughout the colonial period, state legal institutions were essentially superimposed over the existing small-scale community organizational structures, with territory split up arbitrarily.[38] Colonial administrators, in an effort to "divide and conquer," developed a mixture of Western-style state courts to impose Western law and local courts to impose customary law.[39] State courts, staffed by trained judges, were concentrated in urban areas with heavy expatriate populations and handled mostly commercial disputes with the metropole and serious criminal offenses, while "native courts" handled conflicts between indigenous people in more rural areas.[40] The focus of the legal system in this era was on effective colonial administration and establishing a "semblance of order," meaning that Western law had little penetration into the daily life of the indigenous population.[41] The colonial administrators largely refrained from interfering with customary practices unless they threatened colonial power and control.[42]

The transition to independence began in the 1970s and saw a gradual replacement of the dualist colonial legal system by a more standard Western-style system.[43] However, while this system was well-understood in some places, in others, its obvious tensions with the indigenous systems created conflict, leading to a return to *kastom* for dispute resolution in many places.[44] Additionally, many of the constitutions of the newly-independent states sought to include both Western law and *kastom* in their official legal systems, although the exact nature of the relationship remains uncertain.[45] For example, some states established formal specialized courts to apply *kastom*, while in other areas *kastom* continues to apply informally.[46] Further, while customary dispute resolution may today be recognized in formal law

[37] *See* Foster & West, *supra* note 35.
[38] Dinnen, *supra* note 26, at 7, 10.
[39] *Id*. at 10.
[40] *Id*. at 11.
[41] *Id*.
[42] *Id*.
[43] *Id*. at 12.
[44] *Id*. at 12-13.
[45] *Id*. at 14.
[46] *Id*. at 16.

in some places in the region, the formalization distorts its values and in itself reflects the legacies of colonialism.[47] By recognizing it as customary *law*, *kastom* is seen through a rigid and legalistic lens that is foreign to traditional Melanesian societies.[48] Even so, all Melanesian states have tried to formalize *kastom* to some degree post-independence.[49] This paradox is a source of tension in the application of *kastom* today, including in reconciliation and sentencing for crime.

B. Kastom *dispute resolution and restorative justice*

As stated previously, the diversity and heterogeneity of the Melanesia region makes it difficult to generalize about customary practices, because each locality may have its own. However, by looking at some examples of customary dispute resolution practices in Bougainville, Vanuatu, and the Solomon Islands, it is possible to identify certain characteristics that are common to most of these customs, and which are aligned with contemporary notions of restorative justice.

i. Reciprocity

Historically, reciprocity was one of the fundamental guiding principles of social and community relationships in the region.[50] It included the mutual obligation to give, which, if breached, could justify a violent response, viewed as another form of reciprocal exchange.[51] Such retaliatory violence was eventually banned in some places by colonial administrators, and increasingly rejected as distasteful and even immoral after the arrival of Christianity.[52]

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[47] Mark Findlay, *Crime, Community Penalty and Integration with Legal Formalism in the South Pacific*, 21 J. PAC. STUD. 145, 146 (1997).
[48] *See id*. at 147.
[49] *Id*. at 148.
[50] Valter Boege & Sr. Larraine Garasu, *Bougainville: A Source of Inspiration for Conflict Resolution*, in MEDIATING ACROSS DIFFERENCE 163, 165 (Morgan Brigg & Roland Bleiker eds., 2011).
[51] *Id*.
[52] *Id*. at 166.

ii. Reconciliation

Today, reconciliation is the ultimate goal of conflict resolution, and has its roots both in traditional Melanesian notions of reciprocity and in Christian values.[53] Reconciliation encompasses both a settlement between the parties directly affected–the victim and offender, in Western parlance–and a restoration of peace and harmony within the larger community.[54] In Vanuatu, for example, these twin goals of reconciliation are as described as follows: "Blong mekem shake han mo kam gudfala fren bakegen," which means "make the parties shake hands and become friends again," and "mekem gud fes," literally "clean his face," or regain community respect.[55] These goals can sometimes conflict–parties may be made to "shake hands" for the good of the community even if they haven't truly reconciled.[56]

Reconciliation is achieved through an open, deliberative, community-oriented process in which "past wrongs are acknowledged, responsibility for them is shared and accepted, and the basis for a common future is created."[57] Self-analysis and reflection is encouraged from all parties; in Bougainville, for example, the value of *hamaraha* is promoted, which is a "reminder to stabilize, keep calm, and retrace your steps, to look around you."[58] Communities take a holistic view of the conflict, looking to find and address its underlying causes.[59] Additionally, these processes acknowledge that harm reverberates outward from individuals to larger communities, so both individual commitment and community participation are essential for repairing harm.[60]

iii. Process-orientation

The dispute resolution process is run by local leaders–usually a local chief–who play the role of mediator or facilitator and hold a public meeting with the parties, where they discuss the dispute and

[53] *Id*.
[54] *Id*. at 164.
[55] Miranda Forsyth, *The Kastom System of Dispute Resolution in Vanuatu*, in WORKING TOGETHER IN VANUATU 175, 177 (John Taylor & Nick Thieberger eds., 2011).
[56] *Id*. at 178.
[57] Boege & Garasu, *supra* note 50, at 166.
[58] *Id*. at 167.
[59] Forsyth, *supra* note 55, at 177.
[60] Boege & Garasu, *supra* note 50, at 167.

allocate responsibility.[61] The parties must establish a common understanding of the causes and history of the conflict.[62] Each community has its own procedures, and the subject matter handled varies depending on the chief's values, community support, and the availability of the state legal system to intervene.[63]

The procedure is not adversarial, and each party has obligations to the other: offenders must recognize their role in causing harm and victims must become willing to reconcile.[64] Participation in the process is voluntary, and any decision is made by consensus; thus, any party unhappy with the settlement may reject it.[65] Once a solution is agreed upon, it is ratified by community ritual, but may be repeatedly modified or renegotiated in the future.[66] In this sense, the participatory and inclusive process–which may never definitively end–is as important as the outcome.[67]

iv. Sanctions and compensation

Sanctions are generally limited to the social or spiritual arenas, and usually consist of some form of shaming, which in these communities may be just as painful as physical violence and is felt communally rather than individually.[68] Sanctions are not designed to be punitive because of the recognition that punishment improperly focuses on individual offenders and destroys community relationships.[69] Instead, the community works together to make sure the offender does not reoffend, thereby taking communal responsibility.[70] The exchange of gifts also plays an essential role in reconciliation, as it represents the physical manifestation of forgiveness.[71] Traditionally, the objects exchanged were valuables like pigs, shell money, kava, or food, but today, cash is often used.[72] The exchange generally takes place at a ceremony that represents the culmination of the entire process and the

[61] Forsyth, *supra* note 55, at 176.
[62] Boege & Garasu, *supra* note 50, at 167.
[63] Forsyth, *supra* note 55, at 176-77.
[64] Boege & Garasu, *supra* note 50, at 169.
[65] *Id*.
[66] *Id*. at 169, 171.
[67] *Id*. at 171.
[68] *Id*. at 170-71.
[69] *Id*. at 172.
[70] *Id*. at 172.
[71] *Id*.
[72] *Id*.; Forsyth, *supra* note 55, at 176.

bringing of the community back together.[73] Importantly, there are no clear "winners" and "losers," and thus compensation may flow in both directions.[74] Reciprocity is essential, and one-sided compensation is regarded as a failure.[75]

In some areas, such as in parts of the Solomon Islands, "state law" retributive sanctions may be complementary to the goal of restoring community harmony.[76] Recourse to the formal legal system may also accompany customary settlements, but instead of reconciliation, it represents a cutting off of the offender from their community.[77] Therefore, while communities sometimes ask for formal criminal sanctions in the most serious cases, they are usually inappropriate when the community isn't first given the option to decide whether they are necessary.[78]

v. Pluralism and embrace of difference

In this highly linguistically and ethnically diverse region, even rural areas are "cosmopolitan," and most people are used to interacting with people who are different from them.[79] As a result, conflict resolution customs tend to be pragmatic and pluralistic.[80] Throughout the region, Christianity and indigenous custom often work together in conflict resolution practices.[81] Christianity represents an example of a foreign concept that was widely adopted by communities already used to interacting with "foreigners," and which now offers a sense of universality that transcends linguistic and ethnic differences.[82] In this way, conflict resolution customs in the region tend to acknowledge mutual differences between peoples from different communities while also emphasizing a shared Christian faith that can be used to find common ground.[83]

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[73] Boege & Garasu, *supra* note 50, at 173.
[74] Forsyth, *supra* note 55, at 177.
[75] Debra McDougall & Joy Kere, *Christianity, Custom, and Law: Conflict and Peacemaking in the Postconflict Solomon Islands*, in MEDIATING ACROSS DIFFERENCE 141, 151 (Morgan Brigg & Roland Bleiker eds., 2011).
[76] *Id*. at 144.
[77] *Id*. at 153.
[78] *See id*. at 154.
[79] *Id*. at 147.
[80] *Id*. at 143.
[81] *Id*. at 143-44.
[82] *Id*. at 148.
[83] *Id*. at 157.

C. Formalizing customary dispute resolution practices into "introduced" law

While a defining characteristic of customary law is its informality, every state in the Melanesia region has tried to formalize *kastom* to some degree in the era following independence. The process by which *kastom* is recognized in formal, "introduced" law requires the framing of *kastom* within a Western legal lens that is at odds with many of its underlying values and is in itself a reflection of the lingering effects of colonialism in Melanesian society.[84] This is especially apparent in the formalization of customary dispute resolution practices–based fundamentally in RJ values–into state courts and the official penal and criminal procedure codes of many of these states.[85] Historically, colonial administrations used criminal sanctioning to exert power over the indigenous people of the region, so the increasing formal recognition of customary reconciliation, sentencing, and sanctioning practices in "introduced" law is deeply paradoxical and a continuing source of tension.[86]

Most jurisdictions in the region have passed legislation providing that customary law of dispute resolution is to be applied in lower-level "Village," "Island," or "Local" magistrate Courts, which are similar to the "native courts" of the colonial era.[87] Such legislation includes Vanuatu's Island Courts Act, which provides that "an island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order."[88] These courts are presided over by village leader magistrates and employ *kastom* to settle both civil and criminal disputes and decide on appropriate sanctions for harms occurring within their jurisdiction.[89]

Higher level state courts also increasingly recognize customary dispute resolution practices in criminal cases, usually in one of two ways. First, a state court may legitimate traditional, informal

[84] *See* Findlay, *supra* note 47, at 146-47.
[85] *See id*. at 148.
[86] *Id*.
[87] *See* Tessa N. Cain, *The Incorporation of Customary Law & Principle into Sentencing Decisions in The South Pacific Region*, in PASSAGE OF CHANGE 165, 172 (Anita Jowitt & Tessa N. Cain eds., 2010).
[88] Vanuatu Island Courts Act art. 10 (1983).
[89] *See* Dinnen, *supra* note 26, at15.

reconciliation efforts that have already taken place before the formal criminal case begins by taking them into account in the sentencing process (e.g. the Fijian case *R v. Lati*).[90] In these cases, reconciliation is viewed not as the final outcome of the case, but as merely a mitigating factor to be considered in sentencing.[91] Depending on the circumstances, including the severity of the offense, state courts have given varying weight to customary reconciliation efforts.[92] As the court in the Solomon Islands case *R v. Funifaika* stated, "The payment of compensation or settlements in custom do not extinguish or obliterate the offence. They only go to mitigation. The accused still must be punished and expiate their crime."[93] While this approach may give some legitimacy to customary dispute resolution efforts, communities may also feel that the issue has already been resolved through *kastom* and the state court's involvement is both unnecessary and unwelcome.[94]

Second, the state itself may facilitate and promote reconciliation based on customary practices as part of formal proceedings, usually after codifying *kastom* into legislation (e.g. Sec. 163 of the Criminal Procedure Code of Fiji).[95] This method shares the goal of recognizing and preserving customary dispute resolution practices, but shifts the process from being primarily open and community-oriented to being more private and limited to the parties directly involved, which conflicts with the goals and values of *kastom*.[96] Another significant problem with this approach is that the "state is *not* community," and removing the process from the local community context undermines and confuses its goals and purposes.[97] As one scholar has pointed out, "Customs develop to regulate relationships and transactions between individuals in a particular community. The state, as a legal, but artificial, entity that sits outside communities–does not fit neatly into the contours of custom."[98] Additionally, community chiefs may feel

[90] Findlay, *supra* note 47, at 156.
[91] Cain, *supra* note 87, at 172-73.
[92] *Id*. at 174.
[93] *Id*. at 173.
[94] *Id*. at 172.
[95] Findlay, *supra* note 47, at 155-56.
[96] *Id*. at 157
[97] *Id*.
[98] Follett, *supra* note 33, at 128.

disempowered when conflicts affecting their communities are dealt with by the state system, regardless of whether *kastom* is applied by state courts.[99] This can undermine chiefs' authority in their own communities and lead to the erosion of community social organization.[100]

D. Other challenges to kastom's *restorative values*

Despite the potential for *kastom* to resolve conflicts in a restorative way, many have also observed its failures to adequately address harms that occur because of underlying power imbalances in Melanesian societies. In particular, *kastom* dispute resolution practices may actually reinforce patriarchal cultural values, protecting men at the expense of women, children, and other vulnerable community members.[101] In domestic violence cases, women are often pressured by their communities and the local chiefs or magistrates themselves to "reconcile" with their husbands and drop any formal criminal charges against them.[102] In societies where social ties are based on patrilineal relationships, as many Melanesian communities are, the unequal power of two parties in a domestic dispute means that the husband will usually avoid a penalty for abuse to his wife.[103] Therefore, a wife's decision to "reconcile" may not be genuine, and may not prevent future harm to herself or her children.[104] In fact, a common complaint about *kastom* from non-chiefs is that it "discriminates against women and youth, both procedurally by denying them a voice and also substantively, for example by fining a woman more than a man in a case of adultery."[105]

Additionally, the increasing economic inequality in the region due to extractive capitalist development and rapid urbanization have undermined the effectiveness of *kastom's* restorative responses

[99] Forsyth, *supra* note 55, at 181.
[100] *Id*. at 178.
[101] *See* Dinnen, *supra* note 26, at 18.
[102] Nick Goodenough, *Reconciliation and the Criminal Justice Process in the Solomon Islands*, 10 J. SOUTH PAC. L. 1, 7 (2006).
[103] Findlay, *supra* note 47, at 157.
[104] *Id*.
[105] Forsyth, *supra* note 55, at 179.

to crime and conflict in recent years.[106] The rapid pace of urbanization and accompanying uneven development–particularly since the 1990s–have had a corrosive effect on community cohesion, weakening the effectiveness of traditional legal systems that rely on community engagement and collective responsibility for wrongdoing.[107] Disparities of wealth and power between both groups and individuals, increased pressures on land, and a general lack of state capacity have all led to increased crime and even armed conflict in many places in the region during the late 1990s and early 2000s.[108] Identity issues among youth in urbanizing areas who are caught between traditional ways of life and modernization is thought to have fueled increasing criminal behavior and violent encounters between youth and police, undermining faith in the formal criminal justice system.[109] Further, in this context of economic inequality, some have observed a trend of increased corruption in customary compensation payments.[110] As people begin to view compensation as a money-making opportunity, the customary practice loses its genuineness and thus its power to resolve conflict in a restorative manner.[111]

In situations such as these where "restoring" the balance of power to what it was before the harm occurred actually seems unjust, some in the region have advocated for what has been termed "transformative justice."[112] Such an approach shares many similarities with restorative justice, except that instead of restoring the status quo, it seeks to address the underlying inequalities that contribute to an unequal balance of power.[113] Transformative justice approaches seek to eliminate the unjust conditions giving rise to conflict in the first place–including the ravages of colonialism, capitalist inequalities, rapid urbanization, and patriarchal customs–to prevent future harm from occurring. While an analysis of TJ

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[106] Dinnen, *supra* note 26, at 16-20; *see generally Pacific Plunder*, THE GUARDIAN (May 31, 2021), https://www.theguardian.com/world/ng-interactive/2021/may/31/pacific-plunder-this-is-who-profits-from-the-mass-extraction-of-the-regions-natural-resources-interactive (analyzing economic and social effects of extractive industries in the greater Pacific Islands region).
[107] *Id*. at 16.
[108] *Id*. at 19.
[109] *Id*. at 20.
[110] Goodenough, *supra* note 102, at 6-7.
[111] *See id*.
[112] Dinnen, *supra* note 26, at 23.
[113] *Restorative Justice and Transformative Justice: Definitions and Debates*, CTR. FOR JUST. AND RECONCILIATION (Mar. 25, 2013), http://restorativejustice.org/rj-library/restorative-justice-and-transformative-justice-definitions-and-debates/11558/#sthash.ojLOws9y.Qt8aLviy.dpbs.

initiatives in the region is beyond the scope of this paper, it should be noted that many in the region have recognized the limitations of RJ and are already engaged in this work.[114]

III. New Zealand

A. Legal and historical background of New Zealand's common law system

Centuries ago, chthonic societies in Europe also engaged in "restorative" or at least "deliberative" approaches to criminal justice–in other words, approaches that involved community participation and decision-making about how to address social harm.[115] However, this was largely displaced by the Norman conquest, which was the precursor to the development of the common law in England.[116] Societies subject to Norman domination began to conceptualize crime as a matter of "fealty to and felony against" the king rather than as a breach of community values.[117] As Europe moved toward the age of empire and then the development of the modern nation-state, crown or state control over criminal justice and punishment–and the framing of crime as a harm against the state–became essential to ensuring the state's monopoly on power.[118] The codification of crime and the shift to using incarceration rather than compensation as punishment for crime are also characteristic of this process.[119]

However, throughout this transition, trial by a lay jury (i.e. members of the victim's and/or offender's community) was one way common law systems retained an element of this deliberative tradition.[120] Today, RJ as a "communitarian" or "deliberative" form of justice–which transfers the power of adjudicating and punishing crime away from the centralized state to individual citizens and their

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[114] *See, e.g.*, Rita Naviti, *Restorative Justice and Women in Vanuatu*, in A KIND OF MENDING 95-100 (Sinclair Dinnen ed., 2010); Alan Rumsey, *Tribal Warfare and Transformative Justice in the New Guinea Highlands*, in A KIND OF MENDING 73-94 (Sinclair Dinnen ed., 2010); Margaret Jolly, *Epilogue: Some Thoughts on Restorative Justice and Gender*, in A KIND OF MENDING 265-80 (Sinclair Dinnen ed., 2010).
[115] *See* Braithwaite, *supra* note 6, at 329.
[116] *Id*. at 323.
[117] *Id*.
[118] *Id*. at 335.
[119] *Id*. at 336.
[120] *Id*. at 329.

communities–has begun to re-emerge in several English-speaking common law systems.[121] Some common RJ processes, including conferences or circles, are thus consistent with community-based traditions in the common law, such as the jury.[122] Traditionally, common law systems relied less on written, codified law than on oral testimony and gave judges a great deal of discretion in deciding cases.[123] Today, most common law jurisdictions also rely heavily on legislation, but judges retain a large amount of discretion relative to their civil law counterparts, meaning courts have more flexibility to try and adopt new approaches.[124] Common law prosecutors also enjoy significant discretion and thus the power of diversion, allowing them to selectively employ pre-trial RJ practices as they find appropriate.[125]

New Zealand, as a former British colony, follows a common law system.[126] But before European colonization, the indigenous Maori of New Zealand had their own customary legal system, which had as its focus the maintenance of the complex interactions between individuals and their *wahanau* (family), *hapu* (larger family), and *iwi* (tribal) communities.[127] European colonization began in the late 18th century, when British settlers involved in missionary and commercial ventures arrived in the territory, commonly by way of what is now Australia.[128] In 1823, the courts of the British penal colony in New South Wales extended their jurisdiction to New Zealand, but it did not officially become a British colony–and thus subject to British law–until the 1840 Treaty of Waitangi between Maori chiefs and the British Crown.[129] The Maori and English translations of the treaty contained significant differences; for example, the English version said the Maori chiefs ceded "all rights of sovereignty" over the land to Queen Victoria,

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[121] Alejandra Diaz-Gunde & Ivan Navarro Papic, *Restorative Justice and Legal Culture*, 20 CRIMINOLOGY & CRIM. JUST. 57, 62 (2018).
[122] *Id*.
[123] *See* Glenn, *supra* note 31, at 254-57.
[124] *See* Kathleen Daly, *Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects*, in RESTORATIVE JUSTICE FOR JUVENILES 59, 67-68 (Allison Morris & Gabrielle Maxwell eds., 2001).
[125] Van Ness, *supra* note 2, at 7.
[126] Geoffrey Palmer, *Law: Legal History*, TE ARA: THE ENCYCLOPEDIA OF NEW ZEALAND (June 20, 2012), https://teara.govt.nz/en/law/page-1.
[127] David Carruthers, *Restorative Justice: Lessons from the Past, Pointers for the Future*, 20 WAIKATO L.R. 1, 2-3 (2012).
[128] *1769-1840 Trade and Settlement*, AN ENCYCLOPEDIA OF NEW ZEALAND (A.H McClintock ed., 1966), https://teara.govt.nz/en/1966/history-settlement-and-development/page-2.
[129] *The Establishing of Sovereignty*, AN ENCYCLOPEDIA OF NEW ZEALAND (A.H McClintock ed., 1966), https://teara.govt.nz/en/1966/history-settlement-and-development/page-3.

while the Maori version said they ceded only the rights of governance.[130] These differences, as well as breaches by the Crown and the continued annexation of Maori lands by British settlers, caused escalating conflict in the decades that followed.[131]

As interpreted by the British Crown, the most significant impacts of the Treaty of Waitangi were that it placed all Maori under British authority and established the English common law as the dominant legal system in the colony.[132] New Zealand, first as a British colony and then as a member of the Commonwealth, followed English common law uniformly until the mid-20th century, although its courts are now independent.[133] Despite the imposition of the English common law system and marginalization of Maori traditions as part of the settler-colonial project, the customary legal system and the values undergirding it still retain strong influence among Maori communities today.[134] Additionally, starting in the 1970s, more elements of Maori customary law–particularly relating to land rights–were officially recognized in New Zealand's legal system.[135] For example, the Waitangi Tribunal was formed in 1975, during a period of widespread protests for indigenous rights, to investigate breaches of the original treaty.[136] Today, Maori customary law is often recognized as part of New Zealand common law, as long as it meets certain requirements, including that "it has continued without interruption since its origin."[137]

Maori custom–like the *kastom* of Melanesia–has many characteristics consistent with a restorative approach to criminal justice, and which stand in sharp contrast to the dominant, European criminal justice model.[138] For example, in Maori custom, criminal responsibility belongs to the

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[130] Claudia Orange, *Treaty of Waitangi: Interpretations of Te Tiriti o Waitangi*, TE ARA: THE ENCYCLOPEDIA OF NEW ZEALAND (June 20, 2012), https://teara.govt.nz/en/treaty-of-waitangi/page-2.
[131] Claudia Orange, *Treaty of Waitangi: The First Decades After the Treaty*, TE ARA: THE ENCYCLOPEDIA OF NEW ZEALAND (June 20, 2012), https://teara.govt.nz/en/treaty-of-waitangi/page-3; Claudia Orange, *Treaty of Waitangi: Dishonouring the Treaty: 1860-1880*, TE ARA: THE ENCYCLOPEDIA OF NEW ZEALAND (June 20, 2012), https://teara.govt.nz/en/treaty-of-waitangi/page-4.
[132] Orange, *The First Decades After the Treaty*, *supra* note 131.
[133] *New Zealand: Legal System*, FOREIGN LAW GUIDE, https://referenceworks.brillonline.com/entries/foreign-law-guide/new-zealand-legal-system-COM_323118 (last visited Dec. 3, 2021).
[134] Juan Tauri, *Indigenous Perspectives and Experiences: Maori and the Criminal Justice System*, in INTRODUCTION TO CRIMINOLOGICAL THOUGHT 1, 3-6 (R. Walters and T. Bradley eds., 2005).
[135] *New Zealand: Legal System*, *supra* note 133.
[136] *Id*.
[137] Palmer, *supra* note 126.
[138] Carruthers, *supra* note 127, at 2; Tauri, *supra* note 134, at 6.

community rather than the individual, the victim plays a key role in proceedings while the state plays virtually none, and the goal of the system is reintegration and the restoration of social bonds rather than retribution or deterrence.[139] The 1980s in New Zealand saw widespread dissatisfaction with the way the dominant criminal justice system dealt with youth offenders.[140] Maori youth in particular were overrepresented in the justice system and more likely to be separated from their families through the child welfare system.[141] There were also concerns that the criminal justice system treated offenders as if they existed in a vacuum, divorced from any societal context or obligations to their communities.[142] Throughout the mid-1980s, pilot youth court programs utilizing family conferences inspired by Maori tradition began proliferating at the local level in various parts of the country.[143] In 1988, a report by the Department of Social Welfare recommended a separate court system for juvenile offenders and the use of conferences involving the offender, family, and victim, which was seen as likely to resonate with Maori communities.[144] The Oranga Tamariki Act of 1989[145] incorporated these suggestions and marked New Zealand's first attempt to legislate a restorative approach to criminal justice on a national level.[146]

B. RJ in New Zealand's youth offender system

The four primary principles to be considered in the application of Parts 4 and 5 of the Oranga Tamariki Act, which relate to youth offenders and the youth justice system, are: "(a) the well-being and best interests of the child or young person; (b) the public interest (which includes public safety); (c) the interests of any victim; and (d) the accountability of the child or young person for their behaviour." [147] In laying out further principles guiding the administration of youth justice, the Act also specifies that:

[139] Tauri, *supra* note 134, at 6.
[140] Carruthers, *supra* note 127, at 3.
[141] *See* Tauri, *supra* note 134, at 2-6.
[142] Carruthers, *supra* note 127, at 3.
[143] *Id*. at 4.
[144] *Id*. at 4.
[145] Also known as the Children's and Young People's Well-Being Act.
[146] Carruthers, *supra* note 127, at 5.
[147] Oranga Tamariki Act 1989 s 4A(2).

- Criminal proceedings should not be initiated against a youth offender if there are alternative courses of action available.[148]
- Any measures "dealing with" youth offenders should be designed to strengthen family and community (i.e. *whanau*, *hapu*, and *iwi*) conflict-resolving capacities[149] and should aim to address the underlying causes of the harmful behaviour.[150]
- Any sanctions imposed on the youth offender should be the least restrictive possible and designed to promote responsibility to family and community.[151]
- The interests of the victims should be considered in determining any measures taken regarding the youth offender.[152]

The Act created a Youth Court to adjudicate offenses committed by minors[153] and codified a system of family group conferences as a mandatory component of this process.[154] In almost all cases involving youth offenders, such conferences *must* be held before official criminal proceedings can be initiated.[155] Family group conferences involve the input of various parties involved in the alleged harm, and may be attended by the offender, their parents or guardians, their family members, their lawyers or advocates, the prosecutor, the victim(s), and anyone else the child or their family thinks important to attend.[156] Conferences create their own procedural rules[157] and their proceedings are privileged.[158] Their primary goal is to decide on the best course of action to take with regard to the child offender–whether to initiate formal criminal proceedings, for example, or "whether the matter could be dealt with in some other way" and "what restorative justice actions could be undertaken."[159] The conference aims to

[148] *Id*. s 208(2)(a)
[149] *Id*. s 208(2)(c).
[150] *Id*. s 208(2)(fa).
[151] *Id*. s 208 (2)(f).
[152] *Id*. s 208 (2)(g).
[153] *Id*. ss 272-95.
[154] *Id*. ss 247-71.
[155] *Id*. ss 245-46.
[156] *Id*. s 251.
[157] *Id*. s 256.
[158] *Id*. s 271.
[159] *Id*. s 258.

determine whether the child accepts responsibility for the offense[160] and may also offer recommendations as to what custody arrangements or other forms of social support would most benefit the child.[161] Ultimately, the conference is tasked with formulating a plan specific to the facts of the case and the child's needs, and may recommend, for example, that no formal criminal proceedings be initiated.[162] Recognizing the financial limitations many youth offenders and their families face, the Act includes a provision allowing the Chief Executive to provide financial assistance as necessary to effectuate the conference's plan.[163] As they function within New Zealand's common law system, conferences represent a formalized mechanism for prosecutorial discretion, with the ultimate goal of diverting youth offenders from the formal court system.

C. RJ in New Zealand's adult criminal justice system

In the 1990s, New Zealand courts began recognizing restorative justice principles in sentencing for adult offenders as well,[164] and three courts in Timaru, West Auckland, and Rotura embarked on pilot diversion programs initiated by judges, which were found to be effective in preventing re-offending.[165] Public opinion in the late 1990s favored reform to sentencing laws and other aspects of the justice system[166] and led to the passage in 2002 of both the Sentencing Act and the Victims' Rights Act, which involve RJ in the pre-sentencing phase.[167] These Acts were accompanied by the Parole Act of 2002 and closely followed by the Corrections Act of 2004, which involve RJ in the post-sentencing phase.[168] Additionally, New Zealand police have used various forms of pre-arrest, pre-charge, and pre-conviction

[160] *Id*. s 259.
[161] *Id*. s 258.
[162] *Id*. s 260.
[163] *Id*. s 269.
[164] *See, e.g., R v Clotworthy*. [1998] NZCA 15 651.
[165] Carruthers, *supra* note 127, at 6.
[166] *Id*. at 7.
[167] *Id*. at 11.
[168] *Id*. at 15-16.

diversionary programs for years to redirect adult offenders away from the criminal court system in favor of "alternative resolution" options, such as Community Justice Panels.[169]

i. RJ in the pre-sentence phase

The Sentencing Act of 2002 provides that when sentencing an offender, courts "must take into account," among other factors: "the effect of the offending on the victim;"[170] "the offender's personal, family, whanau, community, and cultural background;"[171] "any outcomes of restorative justice processes that have occurred;"[172] "any offer of amends, whether financial or by means of the performance of any work or service;"[173] "any agreement between the offender and the victim as to how the offender may remedy the wrong;"[174] "the response of the offender or the offender's family, whanau, or family group to the offending;"[175] and "whether . . . [an offer of amends] has been accepted by the victim as . . . mitigating the wrong."[176] Offenders may request the court to hear testimony about how "support from the family, whanau, or community may be available to help prevent future offending,"[177] representing an acknowledgment of community responsibility for harm. Courts may adjourn the proceedings to allow restorative processes to take place[178] and may even order a "sentence of reparation" be paid to the victim.[179] Further, the Act was amended in 2014 to *require* courts to adjourn proceedings to allow restorative processes to occur in certain specific cases.[180]

The Victims' Rights Act, while not conferring any legally enforceable rights, is intended to emphasize the victim's general right to participate in the adjudication of offenses committed against them and to protect their dignity and safety throughout the process.[181] It includes provisions regarding victim

[169] *Id*. at 8-10.
[170] Sentencing Act 2002 s 8(f).
[171] *Id*. s 8(i).
[172] *Id.* s 8(j).
[173] *Id.* s 10(1)(a).
[174] *Id.* s 10(1)(b).
[175] *Id.* s 10(1)(c).
[176] *Id.* s 10(2)(b).
[177] *Id.* s 27(1)(d).
[178] *Id.* s 25.
[179] *Id.* s 32.
[180] Sentencing Amendment Act 2014 s 4.
[181] Carruthers, *supra* note 127, at 11-12.

impact statements,[182] the protection of victims' privacy,[183] victims' rights to information regarding the case,[184] and victims' access to supporting services, including counseling.[185] It also specifies that a victim may request a restorative justice meeting with the offender, and provides guidance for how to conduct such a meeting.[186] The Act reflects an acknowledgment of the role victims can and should play in addressing the harms they have experienced, and attempts to specify how their needs may be met.

Together, the Sentencing Act and the Victims' Rights Act form the basis for RJ practices in the pre-sentence phase of New Zealand's adult criminal justice system. They represent an attempt to expand the scope of stakeholders involved criminal cases beyond the common law's traditional adversarial system to include victims, families, and larger communities, and may be regarded as formally sanctioning judges' wide discretion in making sentencing decisions.

ii. RJ in the post-sentence phase

Restorative processes continue to occur after sentencing, while the offender is incarcerated, and even after release. The Parole Act of 2002 emphasizes while the primary purpose of the Parole Board in making release decisions is ensuring the safety of the community,[187] it also should consider the rights of the victims as defined in the Victims' Rights Act–including the outcomes of any restorative processes[188]–and must inform offenders of their rights to participate in decision-making that directly concerns them.[189] When an offender is due to be released, the Department of Corrections is required to provide the Parole Board with reports of any restorative processes he/she has engaged in at any point.[190]

The Corrections Act, too, provides that while incarcerated, "offenders must, where appropriate and so far as is reasonable and practicable in the circumstances, be provided with access to any process

[182] Victims' Rights Act 2002 ss 18-27.
[183] *Id*. ss 15-17.
[184] *Id*. ss 11-14.
[185] *Id*. s 8.
[186] *Id*. s 9.
[187] Parle Act 2002 s 7(1).
[188] *Id*. s 7(2)(d).
[189] *Id*. s 7(2)(b).
[190] *Id*. s 43(1)(b).

designed to promote restorative justice between offenders and victims."[191] Referrals for such processes may come from any number of sources, including the Parole Board, victims, offenders, probation officers, or social workers.[192] Generally, the state and the courts play less of a role in RJ processes at these stage– they tend to be organized and initiated by the offenders and victims themselves and their families and communities, and have as their goal the ongoing mending of relationships.[193]

iii. RJ in police diversion programs

New Zealand police have used some version of discretionary diversion–pursuant to official policy or simply unofficially–for several decades.[194] For adult offenders who accept responsibility for the harm they caused, diversion schemes redirect them away from the judicial system and require them to make amends informally, such as through the completion of community work.[195] Diversion can take place pre-arrest, pre-charge, or post-charge, in place of a conviction.[196] A national pre-charge warning program began in 2010, allowing police to issue warnings to low-level offenders who admitted responsibility rather than pursuing criminal charges.[197] However, complaints about inconsistency in application and disparities between its application to Maori and white New Zealanders have plagued the program since at least 2015.[198]

Other diversion initiatives at the pre-sentence stage include Community Justice Panels, which were created as part of an Alternative Resolutions initiative in various localities starting in about 2011, usually by the local police themselves.[199] These panels are staffed by trained community representatives, who may include community leaders, social workers, church leaders, coaches, and teachers.[200] Panels

[191] Corrections Act 2004 s 6(1)(d).
[192] Carruthers, *supra* note 127, at 16.
[193] *Id*.
[194] *See id*. at 8-9.
[195] *Id*. at 8.
[196] *Id*. at 9.
[197] Carruthers, *supra* note 127, at 9.
[198] *Review of Pre-Charge Warnings*, INDEPENDENT POLICE CONDUCT AUTHORITY (Sep. 14, 2016), https://www.ipca.govt.nz/site/publications-and-media/2016-media-releases/2016sep14-pre-charge-warnings.aspx.
[199] Carruthers, *supra* note 127, at 9.
[200] *Justice Panels: Innovative Way to Achieve Justice*, N.Z. L. SOC'Y (Feb. 11, 2016), https://www.lawsociety.org.nz/news/lawtalk/issue-881/justice-panels-innovative-way-to-achieve-justice/

work with victim and offender to resolve the conflict and hold the offender accountable at the community level, often by requiring them to make restitution to the victim.[201] In 2018, the panels were re-termed Te Pae Oranga, reflecting the increasing incorporation of a Maori RJ framework, and as of 2021, there are sixteen across New Zealand, with plans to add twelve more.[202] Both pre-charge warnings and Te Pae Oranga are thus based in the "formalised use of discretion (in place of charges) to reduce the use of court processes for low-level offending, while ensuring crime is still addressed and victims are supported."[203]

D. Colonial legacies and critiques of cooptation

As previously noted, the shift toward recognizing RJ responses to crime in New Zealand came in response to concerns about the disproportionately high representation of Maori in the criminal justice system.[204] Disparities in the rates of incarceration between indigenous peoples and European settlers are apparent in many settler-colonial states today, including the United States, Canada, and Australia.[205] In particular, many Maori felt that "by not effectively and appropriately responding to social harm (which included developing culturally appropriate programmes) criminal justice agencies contribute to the drivers of re-offending and victimization."[206] Thus, the use of conferences and other restorative practices–many of which draw from Maori tradition–was thought to be a more culturally appropriate practice that would help to address some of these disparities.[207] However, as currently practiced, New Zealand's RJ reforms continue to form part of the existing common law criminal justice system, and therefore should not be confused with being *rooted* in indigenous practices.[208] They do not attempt to re-establish Maori

[201] *Id*.
[202] Hon Poto Williams, *Budget 2021 Invests to Reduce Reoffending*, BEEHIVE (June 2, 2021), https://www.beehive.govt.nz/release/budget-2021-invests-reduce-reoffending.
[203] *Justice Panels*, *supra* note 201.
[204] *See generally*, Moana Jackson, THE MAORI AND THE CRIMINAL JUSTICE SYSTEM (1988).
[205] *E.g.* Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, PRISON POLICY INITIATIVE (Oct, 8, 2021), https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/; Clark Scott, OVERREPRESENTATION OF INDIGENOUS PEOPLE IN THE CANADIAN CRIMINAL JUSTICE SYSTEM (2019); Jens Korf, *Aboriginal Prison Rates*, CREATIVE SPIRITS (Aug. 22, 2021), https://www.creativespirits.info/aboriginalculture/law/aboriginal-prison-rates.
[206] Tauri, *supra* note 134, at 5.
[207] *Id*.
[208] Daly, *supra* note 124, at 67-68.

forms of justice present before European colonization, but merely attempt to make the common law criminal justice system more culturally appropriate.[209] In fact, many aspects of Maori justice–like the indigenous justice systems of Melanesia–are incomprehensible to the common law tradition, and vice versa.[210]

Some Maori scholars have critiqued this approach as a cooptation of indigenous practices by the state.[211] Using family group conferencing as an example, they point to the fact that conferences occur largely within state institutions–usually the Department of Social Welfare–rather than in *marae*, which are Maori meeting houses.[212] Additionally, most of the "facilitators" of RJ practices like conferences are professionalized, and meetings often involve actors like the police, prosecutors, and social workers, rather than Maori elders.[213] Because such practices rely on Westernized notions of what constitutes Maori custom, they may actually have a disempowering effect on Maori communities and undermine the goals they aim to achieve.[214] In other words, making the dominant common law system more responsive to Maori does not address the fundamental problems associated with the denial of indigenous sovereignty.[215]

IV. Iran

A. Islamic criminal law, qisas*, and restorative justice*

Many have remarked that central theme of Islam is justice–it is the ultimate goal of Islamic law and Islamic society.[216] In states that follow Islamic law, *shari'a*, as God's divine law, is the part of law completely "contiguous" with justice, while positive law may or may not contain justice, even if it is based in *shari'a*.[217] The concept of human dignity and the community of believers (*ummah*) are also both

[209] *Id*.
[210] *Id*.
[211] Tauri, *supra* note 134, at 12.
[212] *Id*. at 14-15.
[213] *Id*. at 15.
[214] *Id*. at 15-16.
[215] *Id*. at 16.
[216] Susan C. Hascall, *Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?* 4 BERKELEY J. MIDDLE EASTERN & ISLAMIC L. 35, 46 (2011).
[217] *Id*. at 49.

central to Islamic justice and jurisprudence.[218] Thus, the interests of the community have always played a significant role in Islamic criminal law, and even in Islamic states, the community and the state are not necessarily one and the same.[219] While the state has a role in determining and meting out punishment, it is not the final arbiter of justice–that role belongs to the *ummah*.[220]

Mercy and forgiveness feature prominently throughout the *Qur'an* and are strongly recommended in Islamic criminal law.[221] Rehabilitation, then, is not just desired so that an offender may become a productive member of society, but that he/she can repair his/her relationship with God.[222] This is often done through genuine repentance, which may be viewed as a form of taking responsibility and being held accountable for wrongs.[223] For example, verse 5:39 of the *Qur'an* states: "But whoever repents after their wrongdoing and mends their ways, Allah will surely turn to them in forgiveness. Indeed, Allah is All-Forgiving, Most Merciful."[224]

Islamic criminal law thus seeks to strike a balance between protecting the dignity of individuals and protecting society at large, which is manifest in the division of crimes between those more harmful to individuals (*qisas*) and those more harmful to society as a whole (*hudud*), with *ta'zirat* crimes falling somewhere in the middle.[225] This three-tiered division of crimes is based on their prescribed punishments. The most serious crimes are *hudud* (sing. *hadd*), for which the punishment is fixed in either the *Qur'an* or *Sunnah*.[226] These are considered crimes against God, and therefore their punishment can't be altered from what is commanded in the scriptures, and the offender cannot be forgiven or pardoned by anyone but God.[227] *Ta'zirat* are crimes against the community, for which punishment is discretionary.[228] These are offenses either mentioned in the *Qur'an* with no specified punishment or not mentioned, but considered

[218] *Id*.
[219] *Id*. at 51.
[220] *Id*. at 52.
[221] *Id*.
[222] *Id*. at 53.
[223] *Id*. at 54.
[224] Qur'an 5:39 (Khattab).
[225] Hascall, *supra* note 217, at 51.
[226] *Id*. at 54.
[227] *Id*.
[228] *Id*. at 55.

severe enough to disrupt the community.[229] Finally, *qisas* crimes are intentional harms against the individual, which generally include murder and wounding.[230]

Qisas roughly means "retaliation in kind," and victims of *qisas* crimes are entitled to impose a retaliatory penalty equal to that of the initial harm:

> We ordained for them in the Torah: 'A life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth–and for wounds equal retaliation.' But whoever waives it charitably, it will be atonement for them. And those who do not judge by what Allah has revealed are truly the wrongdoers.[231]

Retaliation is not mandatory, however; victims may instead seek a *diya* compensation payment ("blood money") or choose to forgive the offender and forgo punishment altogether.[232] The three options the victim has under *qisas*–retaliation, compensation, and forgiveness–correspond to the three levels of justice outlined in the *Qur'an*: *adl*, *ihsan*, and *ita'i dhil-qurba*.[233] *Adl* refers to absolute, literal, or retaliatory justice; *ihsan* to kindness or "granting someone more than their due"; and *ita'i dhil-qurba* to kinship or treating others as family.[234]

It is the victim–not the state–that has the ultimate choice of which option to pursue, but there are many factors to consider in order to get to that point.[235] For instance, before *qisas* may be imposed, the state must prove that the harm was intentional, and in cases of doubt, will impose a *diya* penalty instead.[236] In this way, Islamic criminal law recognizes that "it is better to err in forgiving than in punishing."[237] If the procedural elements for proving guilt aren't met, or if the victim requests it, *diya* will be imposed instead, payable to the victim or their next of kin.[238] Finally, the victim may forgive the

[229] *Id*. at 55.
[230] *Id*. at 56.
[231] Qur'an 5:45 (Khattab).
[232] Hascall, *supra* note 217, at 56.
[233] Naija Humayun, *The Islamic Position on Capital Punishment: A Restorative Justice Model Which Aligns with International Law, and Inspires Reasoning for Prison Industrial Complex Abolition in the U.S.* 12 BERKELEY J. MIDDLE EASTERN & ISLAMIC L. 9, 20 (2021).
[234] *Id*. at 21.
[235] Hascall, *supra* note 217, at 57.
[236] *Id*. at 58.
[237] *Id*. at 59.
[238] *Id*. at 59-60.

offender entirely, giving up their right to either *qisas* or *diya*.[239] Such mercy is praised throughout the *Qur'an* and *Hadith*, with at least thirty-five verses counseling forgiveness over retribution[240] ; for example: "If you retaliate, then let it be equivalent to what you have suffered. But if you patiently endure, it is certainly best for those who are patient."[241] Also essential to the law of *qisas* is the limitations it places on retaliation. For example:

> O believers! The law of retaliation is set for you in cases of murder–a free man for a free man, a slave for a slave, and a female for a female. But if the offender is pardoned by the victim's guardian, then blood-money should be decided fairly, and payment should be made courteously. This is a concession and a mercy from your Lord. But whoever transgresses after that will suffer a painful punishment. There is security of life for you in the law of retaliation, O people of reason, so that you may become mindful of Allah.[242]

Thus, a victim may not retaliate in any way that is disproportionate to the initial harm, as that would make them an offender as well.[243] Viewed in their historical context, such verses were intended to stop the cycle of violence and retaliation that characterized tribal life at the time of the Prophet.[244]

Despite its association with violence and corporal punishment, the law of *qisas* actually has many attributes consistent with restorative justice, although it does not discount the value of retribution and punishment for crime. In *qisas*, individuals–both victims and offenders–are encouraged to take personal responsibility for their actions.[245] The offender is encouraged to repent, but the victim must also explicitly make the choice to enact punishment, which is limited only to retaliation in kind.[246] There is a strong emphasis on human dignity, respect, and community, as there is elsewhere in Islamic law.[247] Reconciliation between victim and offender is seen as the most honorable and Godly outcome.[248] By contrast, RJ attributes aren't present in *hudud* crimes, primarily because they are crimes against God and

[239] *Id*. at 60.
[240] Arzoo Osanloo, FORGIVENESS WORK: MERCY, LAW, AND VICTIMS' RIGHTS IN IRAN 22 (2020).
[241] Qur'an 16:126 (Khattab).
[242] Qur'an 2:178-79 (Khattab).
[243] Hascall, *supra* note 217, at 73-74.
[244] Osanloo, *supra* note 241, at 23.
[245] *See* Hascall, *supra* note 217, at 48.
[246] *Id*. at 75.
[247] *Id*.
[248] *See id*. at 60.

not about harms to individuals or the community–they cannot be "restored."[249] Therefore, Islamic law maintains the value of punishment as retribution for these crimes.[250]

B. Qisas *and the development of the Iranian crim-torts system*

Iran has been a majority Shi'a Muslim country for centuries, but the degree to which Islamic law permeates its official legal system has varied. The early 20th century "Constitutional Revolution," beginning in 1906, produced the first real centralized statutory law codifying civil and criminal law, which was influenced by French legal codes but largely conformed with Shi'a Islamic principles.[251] This early "revolution" saw tensions between those who felt that sacred, *shari'a* law should not be codified and those who wanted a more "modern" or secular penal code that did not rely so heavily on corporal punishment.[252] The resulting "Customary Penal Code" of 1917 was modeled on French law but publicly framed as a codification of customary interpretations of *shari'a*.[253] About a decade later, reflecting the increasing influence of secular legal scholars, the 1926 Penal Code was promulgated.[254] This code looked even more like typical European penal codes–for example, murder was now a public offense and not *qisas*.[255] This trend of secularization continued up until the Islamic Revolution of 1979.[256]

Upon the 1979 Revolution, Ayatollah Khomeini moved to dissolve the secular judicial system and secular codes and integrate *shari'a* into state law, as criminal and family law in particular were seen as areas appropriate for *shari'a*.[257] The dissolution of the existing judicial system during the period immediately after the Revolution made it more difficult for Iranians to resolve disputes, leading to the increased use of alternative dispute resolution (ADR) practices derived from Islamic law.[258] The 1980s

[249] *Id*. at 75.
[250] *Id*.
[251] Osanloo, *supra* note 241, at 38.
[252] *Id*. at 39.
[253] *Id*. at 39.
[254] *Id*. at 39-40.
[255] *Id*.
[256] *Id*. at 40.
[257] *Id*.
[258] *Id*. at 41.

saw the development of new criminal codes based in *shi'a fiqh* jurisprudence, a process which wouldn't be finalized until 2013.[259]

The development of the penal code and current criminal law practices in Iran also take influence from pre-Islamic customs, as well as European civil law traditions.[260] As the state increasingly took over the role of adjudicating disputes, these practices became codified.[261] Based on Islamic jurisprudence, Iran's Law of Islamic Punishment divides crimes into categories based on their prescribed punishment[262]:

- "*Hadd* is a punishment for which the grounds for, type, amount and conditions of execution are specified in holy *Shari'a*.[263]
- "*Qisas* is the main punishment for intentional bodily crimes against life, limbs, and abilities," with punishment equivalent to the harm caused.[264]
- "*Diya* . . . is a monetary amount under holy *Shari'a* which is determined by law and shall be paid for unintentional bodily crimes against life, limbs, and abilities or for intentional crimes when for whatever reason *qisas* is not applicable."[265]
- "*Ta'zir* is a punishment which does not fall under the categories of *hadd*, *qisas*, or *diya* and is determined by law for commission of prohibited acts under *Shari'a* or violation of state rules," for which the punishment is at the discretion of the state.[266]

Diyat, then, is a separate category for injuries that would be *qisas* but do not have the requisite intent to allow retaliation, and the amounts of appropriate compensation are determined according to the *Hadith*.[267]

A 1991 amendment to the code added *ta'zirat* punishments to *qisas* crimes that were previously private only, such as intentional murder.[268] This laid the foundation for the modern Iranian "crim-tort"

[259] *Id*.
[260] *Id*. at 56.
[261] *Id*. at 56-57.
[262] QANUNI MAJEZATI ISLAMI [ISLAMIC PENAL CODE] Tehran 1392 [2013], art. 14.
[263] *Id*. art. 15.
[264] *Id*. art. 16.
[265] *Id*. art. 17.
[266] *Id*. art. 18.
[267] Osanloo, *supra* note 241, at 43.
[268] *Id*.

system, where a victim files a complaint for *qisas* (tort) and the state, at its discretion, brings a *ta'zir* (crime) case, adjudicating them both together.[269] Thus, *ta'zirat* crimes may or may not have a private victim, as they also encompass crimes of public order.[270] In *qisas-ta'zir* cases, only the victim has the right of retribution, and if they forego it, the state holds a second hearing as to whether to impose the *ta'zir* punishment (usually imprisonment) based on a theory of deterrence or public safety.[271] If the victim foregoes *qisas* retribution, they may ask for *diya* compensation instead, which operates similarly to the crime being pled down to a lesser offense.[272] They hybrid crim-tort systems give plaintiffs a place to tell their stories, have them validated by the judges and other witnesses, and recalibrate the power dynamics between offender and victim.[273] Additionally, by limiting the right of *qisas* retaliation to the victim of a crime, the state limits the punishment for crimes and prevents vigilante justice, while still giving the victim the right of retaliation if they wish it.[274] Those who commit an act of retaliation without the legal right to do so are subject to *ta'zir* punishment.[275]

Crimes are also divided in the code into "forgivable" and "unforgiveable" categories, with victim having the right of forbearance only for forgivable crimes such as intentional homicide.[276] Again based in Islamic jurisprudence, only *qisas* and *diyat* are "forgivable."[277] If *ta'zirat* punishments are also sought by the state, the victim's decision to forgo the sanction may also have an effect on the severity of that punishment.[278] *Hudud* crimes, on the other hand, are unforgiveable, and therefore by law the punishment can't be altered, even if the victim offers forgiveness.[279] However, in practice, courts have found ways to

[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id*. at 52.
[273] *Id*. at 67.
[274] *Id*. at 58.
[275] *Id*.
[276] *Id*. at 45.
[277] *Id*. at 45.
[278] *Id*.
[279] *Id*.

use the plaintiff's forgiveness in *hudud* cases to quash the finding of guilt: where forgiveness by the victim-plaintiff injects doubt into the sufficiency of evidence, the verdict can be set aside.[280]

The Code of Islamic Punishment and the Code of Criminal Procedure saw their most recent reforms in 2013 and 2015, respectively.[281] Most of the changes were to *ta'zirat* crimes, giving judges more discretion in sentencing and allowing for penalties aimed at rehabilitation.[282] For example, Chapter Nine lays out alternative penalties to incarceration, including public service and probation.[283] Other changes "colored in" provisions relating to reconciliation and represent a more restorative approach, emphasizing victims' right to forgo retaliation.[284] These reforms provide a framework for judges to fulfil what is widely regarded as their moral obligation to work toward reconciliation between the parties.[285] In the Iranian justice system, which also takes influence from European inquisitorial systems,[286] the judge's own knowledge (*elm-e qazi*) plays a crucial role in determining intent, which is a requirement for *qisas*.[287] Thus, procedurally, most of the judge's questioning is focused on the finding of intent, and in trying to encourage reconciliation, a judge may tailor his questioning in a way that places doubt on intent.[288]

C. Seeking forgiveness in practice

As we have seen, the Iranian state, through its penal code, creates the framework according to which the victim's right to *qisas* retaliation operates, but it does not determine the terms of forbearance, which are considered part of extra-judicial agreements between the parties.[289] Before the penal code and its reforms, "there was little-to-no formal regulation of the terms of the extra-judicial negotiations between opposing parties. But the new penal code emphasizes *mianjigari* [mediation] and the role of

[280] *Id*. at 45-46.
[281] *Id*. at 62.
[282] *Id*. at 62, 65.
[283] QANUNI MAJEZATI ISLAMI [ISLAMIC PENAL CODE] art. 64.
[284] Osanloo, *supra* note 241, at 63.
[285] *Id*. at 67.
[286] *Id*. at 47.
[287] *Id*. at 84-86.
[288] *Id.*
[289] *Id*. at 103.

judiciary officials in seeking reconciliation and settlement (*solh va sauzesh*)."[290] Thus, judges and state officials must balance the competing interests of encouraging reconciliation and preserving the victim's right to *qisas*.[291] Forbearance may occur at any stage of the trial, but most often it happens between the ruling and implementation of a sentence.[292] At this stage, the judge may convene a reconciliation meeting between victim and offender, which may lead to the extra-judicial offer of forbearance.[293] If the victim chooses forbearance, the case is usually then remanded for sentencing on the corresponding *ta'zir* crime, in what is known as an Article 612 hearing.[294] Judges look at all kinds of mitigating factors–including that the victim chose forbearance–when deciding the appropriate *ta'zir* sentence.[295]

The judge-coordinated reconciliation meetings and other conflict resolution practices carried out by state officials fill in the gaps in the law with respect to how *qisas* and forbearance are to be practiced.[296] Much of this began in the 1990s, when there was a push to reduce executions of youth offenders: the 2013 and 2015 reforms served to make *qisas* sentences more difficult to enforce and therefore encourage forbearance.[297] In practice, this creates system of "forgiveness work": judicial actors, social workers, lawyers, and others involved in the work of navigating this phase and working with victims to try to secure forbearance.[298] While the state is tasked with enforcing the plaintiff's decision regarding *qisas*, it is not prevented from trying to persuade them to choose forbearance, as long as the state's representatives remain impartial and don't appear sympathetic to the defendant.[299] The focus of this effort, then, is not on sparing the defendant, but on sparing the victim the harm they may experience if they are responsible for killing or maiming him.[300] As one judge put it to a victim, "You want to draw

[290] *Id*.
[291] *Id*. at 100.
[292] *Id*. at 125.
[293] *Id*. at 106-110.
[294] *Id*.
[295] *Id*. at 111-12.
[296] *Id*. at 124.
[297] *Id.* at 142.
[298] *See id*. at 126-27.
[299] *Id*. at 131.
[300] *See id*. at 133-34.

blood? Spilling more blood will not wash away the blood that has been spilled."[301] In 2018, the most recent year with available data, of 460 adjudicated *qisas* cases in Iran, 272 resulted in forbearance, a rate of 59%.[302]

These reconciliation practices are not without their problems, however. As demand for reconciliation services increases, activists and professional actors get involved who may not share the same values as victims and their families.[303] Further, the collection of funds for compensation is largely unregulated, which can lead to fraud.[304] Efforts to secure forbearance may also sometimes look like pressuring the victim and their family to forgo retaliation, and often takes on a gendered component.[305] The desire to protect the "honor" of the victim often plays into the decision to seek or forego *qisas* retribution: families may see retribution as the only way to vindicate the victim's honor if it has been called into question.[306] This is especially true for female victims whose sexual history may come under scrutiny.[307] Further, in Iranian society, women are traditionally responsible for upholding the honor of their families, and thus the decision of whether or not to forgo retaliation–or how much compensation to receive–often falls to female family members.[308] Finally, there is the most obvious way that patriarchal values play into this process: if a woman is killed, her *diya* compensation is half that of a man's.[309] However, the Iranian legislature has taken steps in recent years to close this gap.[310]

The values underlying "forgiveness work" are derived from multiple sources, including both Shi'a jurisprudence and pre-Islamic Persian practices.[311] *Bakhshesh* (forgiveness) and *gozasht* (forbearance) have their roots in the *Qur'an* and in Persian Sufi tradition, in which the Imam 'Ali–the

[301] *Id*. at 134.
[302] *Id*. at 28.
[303] *Id*. at 133.
[304] *Id.*
[305] *Id*. at 51-53.
[306] *Id*. at 49-50.
[307] *See id*. at 50.
[308] *Id*. at 51-53.
[309] *Id*. at 54.
[310] *Id*. at 54-55.
[311] *Id*. at 134.

"incarnation of God's attributes of mercy, tolerance, forgiveness, and generosity"–played a large role.[312] *Diyat*, too, reflect the pre-Islamic tribal practice of paying compensation to settle disputes and prevent cycles of retaliation.[313] The *Qur'an* states: "Allah only accepts the repentance of those who commit evil ignorantly or recklessly then repent soon after–Allah will pardon them. And Allah is All-Knowing, All-Wise."[314] "Forgiveness work," then, as practiced in contemporary Iran, represents a Persian and Islamic form of restorative justice–an approach to addressing harm that centers the needs of the victim, evaluates the harm within its social context, invites community involvement, encourages reconciliation, and counsels against actions that will cause further harm, even if it preserves victim's right to take them.

V. Conclusion

The study of Melanesia serves as an example of how indigenous, chthonic societies without a centralized state practiced RJ in their dispute resolution practices, and the challenges of trying to integrate those indigenous practices into formal, positive law in the post-colonial era. Many aspects of indigenous RJ practices may be incompatible with an urbanizing world based in capitalism and individual rights. Introduced notions of individual "human rights"–particularly women's rights–are often in tension with a legal system that is both fundamentally communitarian and patriarchal. These tensions point to a common criticism of RJ: "'Restoring balance' is acceptable as a restorative justice ideal only if the 'balance' between offender and victim that prevailed before the crime was a morally decent balance."[315] In other words, RJ should not serve to make structural injustice worse. However, many in the region–including many women–are recognizing these limitations and responding to them. New restorative and transformative justice initiatives, many of which reflect a hybridization of indigenous and introduced law approaches, are springing up, especially following violent conflicts in the 1990s and 2000s.

[312] *Id*. at 24.
[313] *Id*. at 44.
[314] Qur'an 4:17 (Khattab).
[315] Braithwaite, *supra* note 6, at 329.

New Zealand offers another example of RJ in a colonial state but is different from Melanesia in that European settlers are now the majority in the country, having replaced Maori customary law with the British common law. Recognition in recent years that the dominant criminal justice system was failing the Maori minority led leaders to embark on reforms attempting to make it more culturally appropriate. The common law's flexibility, including the great deal of discretion it affords both judges and prosecutors, may have made it more receptive to incorporating elements of Maori custom. However, these reforms left the underlying common law system–which both denies Maori sovereignty and is still largely based in the retributive justice paradigm–intact, and therefore face criticism of cooptation and cultural appropriation from many Maori. European scholars have also warned about the risk of cooptation of RJ by criminal justice agents and the dangers of trying to implement it in a top-down manner. "[Restorative justice] is meant to be delivered locally and within the specific context and suffering of ad hoc cases."[316] Thus, the issue of cooptation will always be present in Western states–particularly settler colonial states–who try to formalize RJ processes "based on" or "inspired by" indigenous practices, both because formalization is often incompatible with RJ's values and because implementing these processes through the existing Western justice system continues to reinforce the underlying colonial power dynamics.

Finally, the study of "forgiveness work" in Iran shows that even a system widely regarded as retributive may still have elements of RJ. Reconciliation, forgiveness, and mercy all have spiritual aspects to them that resonate with Islamic values, and Islamic law's focus on the *ummah* lends itself to community-oriented approaches to criminal justice. Additionally, the complex dynamic between the written law and law as it is practiced plays out in the informal ways judges and other actors try to achieve forbearance. In contrast with other systems that self-consciously embrace RJ values, however, the Iranian system does not discount the value of retributive punishment. This demonstrates that few justice systems are solely retributive or restorative, and that many systems that aren't explicitly modeled on RJ values may still include aspects of them in their approaches to criminal justice.

[316] Gavrielides, *supra* note 1, at 402.