Feasibility of Implementing Restorative Justice into Tonga's Justice System

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Attestation of Authorship

"I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements), nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning."

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Elizabeth Lutui

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To our Heavenly Father, Your grace, mercy, and peace has been a sense of comfort during this arduous journey. Thank You for providing me with a better support system than I deserve and the opportunity to keep trying.

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Abstract

The term 'restorative justice' is a broad term and has therefore begotten a plethora of definitions and meanings. However, restorative justice is believed to be a philosophy with practical goals aiming to repair harm through voluntary and honest dialogue by both parties. Restorative justice shifts the view from the traditional meaning of crime and gives it a fresh rehabilitative approach. Crime violates not only the law but people and their relationships. This violation imposes an obligation on the offender and a sense of 'accountability' to make things right for those that have been directly affected – victim, offender, and community. Through this, restorative justice essentially helps to promote repair, reconciliation and reassurance by seeking a balanced approach which engages the harmed parties. This is a radically different response to crime in comparison to the traditional criminal justice system which tends to focus on the identification and punishment of offenders.

The Kingdom of Tonga is a small island in the Pacific that, like most Pacific Islands, is embedded with a rich history of traditions and practices. Its core values are founded upon Christian principles that promotes a close-knitted society that is stronger when together. This is illustrated using the of a basket woven together with each strand in place. Tonga calls this the *faa'i kavei koula* (the four golden strands) where each strand represents a value that are woven together and creates the existing society of Tonga.

For this reason, countries such as Samoa, Fiji, New Zealand, and Australia were reviewed in the following study to provide an understanding as to how Tonga's justice system could be improved upon to implement restorative justice. These four countries will provide insight into indigenous forms of conflict resolution can be integrated into its justice system. The information gathered can then utilised in improving Tonga's justice system to incorporate restorative justice into their processes.

This analysis has been designed to answer the following research questions: "Can restorative justice be implemented in Tonga and how?" and "what are the benefits and disadvantages of implementing restorative justice in Tonga?".

To guide this study in answering the research question, doctrinal research methodology will be employed. Doctrinal research is a theory-based methodology that involves the analysis of relevant legislation and cases to provide an analysis of how the law has developed. This analysis is intended to critique and improve the law. Doctrinal has developed into a research method that also includes the social context in which the law is applied. This development has allowed for the research methodology to involve the body of literature to provide insight. Dent has likened this research method to a qualitative literature review. As this study will focus on the legislations in each jurisdiction, cases, as well as literature to analyse the feasibility of implementing restorative justice, doctrinal seemed the most fitting to apply.

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Chapter One – Introduction

1.0 Introduction

Most justice systems today still have a strong focus on serving punitive punishments as a form of reparation. The push for change and betterment has been continuous, however, initiatives for reform in the justice system have yet to consider community participation. Attempts to reform the criminal justice system have been primarily system driven with a greater focus on improving areas such as the structure of the system, its process, and how offenders are to be treated and punished[1]. Consequently, the ability of a legal system to bridge the gap between conventional and restorative justice falls short. Consider any justice system at present, if and when a crime occurs, who benefits from the way the system functions? In other words, weighing the question – 'who does the system serve' versus 'who should the system serve'. In addition, it is important to address and identify who is best suited to respond to each type of crime. The inability to address offences within the community it occurs in is the root of the issue. Without moving to a more relationship focused model of justice, interventions and reforms in the criminal justice system prove inadequate.

Tonga is a country that has centred itself on Christian values. The existing core values that have shaped the country are parallel to the values held by restorative justice proponents and functioning restorative justice systems. However, the current legal environment in Tonga places a strong emphasis on punitive punishment. Literature suggests that a singular focus on punitive punishment increases the risk of reoffending due to the lack of variety in deterrence methods employed. Thus, implementing restorative justice into the existing justice system would not be a foreign concept. Rather, the implementation would be a return to Tonga's foundational values.

Restorative justice advocates for a shift in focus from punitive punishment to victim and community healing by encouraging the community to build an environment in which they can reintegrate offenders, mend broken relationships as well as prevent future offences. Bazemore[2] and Van Ness[3] agree, stating that responses to crime that are focused on restorative justice principles and values allow for broken relationships to be mended.

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[1] Gordon Bazemore "Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration" (1998) 41 American Behavioral Scientist 768.
[2] Bazemore, above n 1.
[3] Daniel W Van Ness "New Wine and Old wineskins: Four Challenges of Restorative Justice" (1993) 4 Criminal Law Forum 251.

Restorative theory posits that this has a greater impact in rebuilding communities and strengthening their relationships.

When considering the feasibility of implementing restorative justice in Tonga, the foundational values inherent in its culture is a considerable advantage. However, Tonga's current system was modelled after the British system, including its legal system. The main concern here is that Tonga's current system was never contextualised to the community it operates in. Therefore, Tonga should consider exploring alternative forms of justice, such as restorative justice, which can work in tandem with its core values[4]. This will strengthen the system by building a support system within society to assist in rehabilitating and reintegrating the offender[5].

1.1 Motivations

Restorative justice is a topic that has attracted global interest, both in practice and theory[6]. One of the reasons behind this global interest is its holistic response to crime which intends to restore balance in both the community and justice system[7]. Restorative justice proponents believed that restoring balance in the community is necessary as crime harms relationships. The imbalance proposed here is that the system places the state as a victim rather than the individual affected[8]. Practical applications of restorative justice literature are either in the midst of its pilot run, in the planning stages for implementation, or currently established [9].

A key point made by Bazemore[10] noted that restorative justice is based upon indigenous rules of behaviour and practices. Van Ness and Nolan[11] explained that its origins can often be traced back to religion (and its corresponding code of) ethics. Therefore, interest in indigenous approaches in dispute resolution evolved within the restorative justice movement[12]. There are islands in Polynesia and Melanesia have a variety

[4] Carol A Hand, Judith Hankes and Toni House "Restorative justice: the indigenous justice system" (2012) 15 Contemporary Justice Review 449.
[5] Brenda Morrison and Eliza Ahmed "Restorative Justice and Civil Society: Emerging Practice, Theory, and Evidence" (2006) 62 Journal of Social Issues 209.
[6] Gabrielle Maxwell and Hennessey Hayes "Restorative Justice Developments in the Pacific Region: A Comprehensive Survey" (2006) 9 Contemporary Justice Review 127.
[7] Van Ness, above n 3.
[8] Daniel W Van Ness and Pat Nolan "Legislating for Restorative Justice" (1998) 10 Regent University Law Review 53.
[9] Dennis Sullivan and Larry Tifft *Handbook of Restorative Justice: A Global Perspective* (Routledge, London, 2007).
[10] Bazemore, above n 1.
[11] Van Ness and Nolan, above n 8.
[12] Bazemore, above n 1.

of indigenous forms of restorative justice operating as part of their justice system. However, Tonga is one of the islands that has yet to do so and will be explored further in this study.

With regards to Tonga, these Christian values were a result of the influence of British missionaries. However, Christian principles fostered a heavily collectivist culture[13] which formed a society that emphasized these founding values and principles; promoting harmonious living through the *faa'i kavei koula* (the four golden strands), deeply etched into the social fabric of Tonga[14]. The four strands consist of traditional guiding principles such as loyalty, humility, reciprocity, and respect which wove together into a basket holding the values of God, love, kinship, and forgiveness. The influence of Christianity allowed Tonga to re-evaluate the concept of forgiveness, especially in matters that affected its social relationships – kinship. This is illustrated through traditional practices of apologies being considered sufficient for dispute resolution. With these pre-existing conditions, it seems only natural for restorative justice to also exist within such a society[15]. Therefore, considering that Tonga's culture enriches and supports restorative justice values, perhaps barriers to implementation lies in its legislative framework.

The guiding legislation for Tonga's criminal justice system is the Criminal Offences Act 2020[16] which consists of 204 articles. This legislation is not only highly punitive, but it also appears more western in nature than expected, especially considering the four golden strand's philosophy held by the nation as a guiding principle. A legal system imposed on its people needs to reflect the said country's core values to ensure its effectiveness in guiding the chosen community[17]. The only aspect of Tonga's culture that is reflected in the constitution is the reference to traditional hierarchy and land succession. Notably, there is no mention of Tonga's foundational values and principles. It is fair to say that this is a by-product of western influence which dates to the creation of the 1875 Tonga Constitution.

This could be understood as a by-product of western influence, which dates to the creation of the 1875 Tonga Constitution. Latukefu's[18] writing provides context regarding the amount of influence missionaries held in Tonga's society. So much so, Christianity was

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[13] Mele Katea Paea and others "Talanoa he Vā Māfana: an Indigenous Tongan Approach to Leadership" [2023].
[14] Tae Tuinukuafe and others *Fofola e Fala kae Talanoa e Kainga: A Tongan Conceptual Framework for the Prevention of and Intervention in Family Violence in New Zealand - Famili Lelei* (2012).
[15] Tracie Mafile'o "Community Development: a Tongan Perspective" in Mary Nash, Robyn Munford and Kiera O'Donoghue (eds) *Social Work Theories in Action* (Jessica Kingsley Publishers, 2005) 125.
[16] Criminal Offences Act 2020 (TO).
[17] Hand, Hankes and House, above n 4.
[18] Sione Latukefu *Church and State in Tonga* (University of Queensland Press, 2014).

introduced and written into Tonga's legislation before any traditional practices or customs. As a result, Tonga's political and justice systems are quite westernised in nature. Therefore, it is necessary to understand how Tonga's justice system could be improved and more adapted so that it is in tune with Tonga's culture. This necessitates comparisons between other countries that practice restorative justice to provide further insight into how Tonga could implement the programme successfully.

New Zealand is an example of a developed country with indigenous roots that currently practices restorative justice. History notes that when conflict arose within Māori society, meetings between the affected family/community took place to collectively discuss how to respond[19]. This traditional practice continued through to the 1980s where communities would meet in the marae using a programme called 'Aroha' to deal with historical sexual abuse. 1999 marked the beginning of change in how New Zealand police responded to minor offences by diverting cases involving youth offenders to restorative justice programs. Simultaneously, legislations and processes were developed to deliver these restorative justice programs for adult offenders. Another notable development in New Zealand is the restorative justice processes established for responding to Māori historical land grievances via the Waitangi Tribunal and Treaty Settlement[20]. However, the most well-known contribution by New Zealand to the restorative justice movement is the creation of the Children, Young Persons, and their Families Act 1989[21]. This legislation utilised one of the most well-known restorative practices – family group conferencing.

Australia, influenced by New Zealand, followed suit in legislating the use of restorative conferencing in response to crime. One of the major events noted in Australia's restorative justice history was in 1991 when family group conferencing was trialled in Wagga Wagga, New South Wales. The difference between New Zealand and Australia in implementing restorative justice was in the department that administered this scheme. The conferencing scheme was administered and primarily run by the police department. This was in hopes that minor offences would be filtered and diverted by the police department to restorative practices to solve them outside of the courts[22].

For comparisons closer to Tonga in terms of social structure, values, and beliefs, Samoa is the perfect example. Both Tonga and Samoa employ a traditional form of apology when responding to dispute resolutions. However, Samoa has one of the most well-known

[19] Heather Devere and Kelli Te Maihāroa "Restorative Justice: Blending Western and Indigenous Restorative Justice Principles" in Katerina Standish and others (eds) *The Palgrave Handbook of Positive Peace* (Springer, Singapore, 2022) 429.
[20] Maxwell and Hayes, above n 6.
[21] Children, Young Persons, and Their Families Act 1989 No 24.
[22] Maxwell and Hayes, above n 6.

practices of traditional apologies called the *ifoga*. *Ifoga* is the act of humbling oneself and illustrating this by bowing down outside of the victim's home. This is done by the offender and their family whilst covering themselves in fine woven mats. The offending party will remain in this position until the victim and their family are ready to discuss how reconciliation can be reached.

One of the distinguishing factors between Samoan and Tonga is the clear hierarchy set in Samoa's social structure regarding families and tribes. This is illustrated through their use of titles. The key role to note in the social structure is the *Matai* (Chief). In each village, a council of *Matai* (Chief) called the *Fono* (village council) is responsible for key judicial decisions. This council was responsible for upholding the laws, responding to disputes, and maintaining order and customs[23].

Despite Samoa's criminal justice system evolving with time, traditional forms of conflict resolution have been integrated into their present justice system with the *Fono* (village council) still operating under the 1990 Village Fono Act[24]. Restitution for offences is not only monetary in value but can also include food, fine woven mats, and other traditional crafts. The use of this dual system has been documented and provides a basis for understanding how traditional conflict resolution can co-exist with contemporary methods of criminal justice.

Further exploration of restorative justice systems in the Pacific Islands is problematic because the history and practice of other traditional conflict resolution systems throughout Polynesia has not been well documented[25]. This proves especially true for Tonga. Its history, tradition, and customs are often passed down orally throughout generations. Most of the literature regarding Tonga, its history, and practices only exist due to interviews that have been conducted to gather information to inform research. Therefore, comparable research regarding Tonga and restorative justice is extremely lacklustre. Thus, to understand if restorative justice is beneficial for Tonga's justice system, it is necessary to draw comparisons with surrounding Pacific Island nations.

Mackesy-Buckley[26] is the first piece of literature regarding Tonga and restorative justice. The political uprising in 2006 resulted in riots destroying Tonga's main business

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[23] Michael Ligaliga "Indigenous Conflict Resolution: A Samoan Perspective" in Kelli Te Maihāroa, Michael Ligaliga and Heather Devere (eds) *Decolonising Peace and Conflict Studies through Indigenous Research* (Springer, Singapore, 2022) 215.
[24] Village Fono Act 1990 (WS).
[25] Maxwell and Hayes, above n 6.
[26] Sean Fergus Mackesy-Buckley "Taimi Tonu - Just in Time: an Evaluation of Tonga's Restorative Youth Diversion Scheme" (Open Access Te Herenga Waka-Victoria University of Wellington, 2008).

district. Mackesy-Buckley[27] and team developed and employed the Youth Diversion Scheme to respond to the youth offenders that were involved. This was with the hope that the youth cases could be diverted away from the court and addressed in the community through conferencing. The trial returned mixed results. Some participants reportedly felt empowered through the program, whereas others felt dissatisfied after the conclusion of the group conferences. Participants reported that dissatisfaction was especially prevalent in conferences where their guardian was absent. This illustrates the strength of the collectivist culture in Tonga, where the absence of a guardian lowered the results of productivity of these conferences. Additionally, Mackesy-Buckley reported that structural issues were present during the trial. Most notably, lack of staff, relevant training, budgeting, and legislative support. The issues raised may present interesting points for further exploration through this research.

The purpose of this study is to review the existing literature as it relates to restorative justice. Specifically, the implementation of restorative justice in legal systems that apply indigenous forms of dispute resolution. As Tonga is the focus country of this study, reviewing legislations in the Pacific Islands that employ restorative justice will be pertinent for answering the research questions. These questions are as follows: "Can restorative justice be implemented in Tonga and how?" and "what are the benefits and disadvantages of implementing restorative justice in Tonga?".

1.2 Approach

To find a solution for the problem and answer the question described in section 1.1, the following approach has been chosen. The nature of this study involves examining documents and legal systems of chosen countries, as a result Doctrinal Research methodology has been chosen to guide this study.

Hutchinson and Duncan[28] states that the core of doctrinal research methodology is a systematic explanation of the regulations pertaining to a chosen legal category. A systematic explanation explores the relationship between those rules, obstacles faced due to those rules, and how they can be improved upon in the future. In practice, doctrinal research methodology is more than just acquiring knowledge about a specific legal category; it is about locating, and analysing documents directly related to the chosen area of said law, to determine its nature and restrictions. Hence, doctrinal research methodology was chosen for this study as it requires "reading, analysing, and linking new information

[27] Mackesy-Buckley, above n 26.
[28] Terry Hutchinson and Nigel Duncan "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17 Deakin Law Review 83.

to existing literature"[29]. Essentially, the doctrinal research methodology is focused on "reading and analysing primary sources of legal doctrine"[30]. Further, this method does not allow for basic descriptions or superficial research which will be pertinent in deciding the value of contribution to the body of knowledge this study will have.

1.3 Expected findings

Any findings will be explained and discussed further in chapter five which focuses on restorative justice principles and practices. Chapter five intends to build upon the information gathered and gaps identified in the preceding chapters two and four; and discuss how it aligns with the principles and practices of restorative justice. This will allow for an informed argument regarding the feasibility of implementing restorative justice in Tonga. Chapter six will conclude the study and answer the research questions – taking into consideration the informational gaps identified and arguments formed throughout the thesis. Further, chapter six will aim to outline a recommendation. It is expected that because Tonga provides an organic environment for restorative justice, implementing it into the legal should work. It is expected that the viability of translating restorative justice principles into practice, even in a potentially synergistic environment, is an area that will need further exploration.

1.4 Thesis structure

The following thesis is divided into six chapters. The first chapter is a brief introduction into the context of the study. Chapter two compiles relevant literature in the current body of knowledge on restorative justice theory and practice. This allows for insight into the history, advantages, and disadvantages of the restorative justice theory, and how it has translated into practice – with focus on the chosen countries. Chapter three provides an explanation of the chosen methodology as well as justifying why it is the most suitable methodology for this study. Chapter four will focus on Tonga and the existing legal justice system. This will be compared to the legal system of the chosen neighbouring Pacific countries for this study. This chapter is intended to provide insight into the positives and negatives of Tonga's justice system and how it fares against with neighbouring Pacific countries that employ restorative justice practices. Chapter five, as mentioned previously, primarily focuses on restorative justice principles and practices. This chapter intends to compare the similarities and differences of Tonga's principles and practices with those of

[29] Terry Hutchinson "The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law" (2015) 8 Erasmus Law Review [i].
[30] Hutchinson and Duncan, above n 28.

restorative justice. A further understanding can be gained as to how restorative justice principles and practices could fill the gaps identified in chapter four. Chapter six will provide a summary of the information provided in chapters two through to five and conclude this study.

Chapter Two – Literature Review

2.0 Introduction

The following chapter will review literature pertaining to restorative justice and the selected countries that have employed restorative justice in their justice system. A brief review of restorative justice and Tonga will be necessary in providing context for the advantages and disadvantages of implementing restorative justice into Tonga's justice system. For comparison purposes, literature relating to New Zealand, Australia, Samoa, and Fiji will be reviewed. These countries have been chosen due to their closeness in proximity, similarity in traditions and values, as well as the coexistence of restorative practices in their justice system. This will be instrumental for gaining insight into the feasibility of implementing restorative justice in Tonga.

2.1 Restorative justice history

Restorative justice is a movement that continues to grow within the criminal justice system. Restorative justice advocates for the transformation of the criminal justice system – globally and socially – using innovative ways in involving the community to heal the relationships affected by an offender's actions[31]. Van Ness and Nolan[32] state that restorative justice differs from the traditional criminal justice system as it perceives crime as an "injury" to society that needs "repairing". Thus, placing the focus on reintegrating both the victim and offender back into the community. This perspective places greater emphasis on the accountability an offender has for the harm caused to the victim.

Bazemore[33] added to this, explaining that the current punitive justice system takes crime at face value and doles out punishment to fit the gravity of the crime. It does not delve deeper to understand the underlying conditions that perpetuated the crime and how it could be prevented in the future. Viewing crime through a restorative justice lens enables the conventional criminal justice system to expand its perspective in how it holds offenders accountable – putting the onus primarily on the offender to repair the damage their offence has caused[34].

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[31] John Braithwaite "Restorative Justice and Social Justice" (2000) 63 Saskatchewan Law Review 185.
[32] Van Ness and Nolan, above n 8.
[33] Bazemore, above n 1.
[34] Theo Gavrielides *Restorative Justice Theory and Practice: Addressing the Discrepancy* (Criminal Justice Press 2007).

The term 'restorative justice' is a broad term and has therefore begotten a plethora of definitions and meanings. However, the overarching understanding is that restorative justice is a philosophy with practical goals aiming to repair harm through voluntary and honest dialogue by both parties[35]. Restorative justice shifts the view from the traditional meaning of crime and provides a fresh rehabilitative approach[36]. Crime violates not only the law but people and their relationships. This violation imposes an obligation on the offender and a sense of accountability to make things right for those that have been directly affected – victim, offender, and community[37].

Through this, restorative justice essentially helps to promote repair, reconciliation, and reassurance by seeking a balanced approach which engages the harmed parties[38]. The restorative justice process involves all parties affected to meet and openly discuss how accountability and reconciliation can be achieved. This is a radically different response to crime in comparison to the traditional criminal justice system which tends to focus on the identification and punishment of offenders[39]. Noticeably, literature on the subject posits that restorative justice revives an indigenous approach to conflict resolution[40].

This is achieved through a process in which the damage and suffering caused to the victim and community is addressed through support, facilitation and implementing a solution. The core motivation of this process is to enable restoration rather than punishment. In restorative justice, the community plays an important role of setting the terms for holding the offender accountable for their actions.

Melton[41] puts forward that the old saying of "law as a way of life" can be used to explain the relationships that exist in tribal communities. In these communities, one can find tribes that have divided into groups in which members naturally fall into a structure that can be likened to a legal system. Everyone carries a sense of responsibility that allows them to coexist as a group and community. As a result, the indigenous approach to issues

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[35] Gavrielides, above n 34.
[36] Theo Gavrielides and Vasso Artinopoulou *Reconstructing Restorative Justice Philosophy* (Routledge, 2016).
[37] Zvi D Gabbay "Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices" (2005) 2005 Journal of Dispute Resolution 349.
[38] As cited in Gavrielides, above n 34.
[39] Lorenn Walker "Restorative Justice: Definition and Purpose" in Katherine S van Wormer (ed) *Restorative Justice Today: Practical Applications* (1st ed, SAGE Publications, Incorporated, Thousand Oaks, United States, 2012) 3.
[40] Daniel Van Ness and Karen Heetderks Strong *Restoring Justice: An Introduction to Restorative Justice* (5th ed, Anderson Publishing, Waltham, MA, 2015).
[41] Ada Pecos Melton "Indigenous Justice Systems and Tribal Society Indian Tribal Courts and Justice: A Symposium" (1995–1996) 79 Judicature 126.

within the community calls for its members to come together and deal with it in its entirety. Dealing with an issue in its entirety allows for a more effective restoration process.

The western justice system, in comparison, is more fragmented. Its process is divided into steps which require each phase to be fulfilled before moving forward. Thus, disturbing the healing process for both the offender and victim. However, due to the tribal nature of the indigenous approach, the blame for the offence is shared with the offender's family[42]. This means that the offender and their family are held accountable for the offending behaviour and responsible for rectifying this. The reason why this comes quite naturally in the pacific is due to their customary practices surviving western influence. Though some customary processes of punishment such as exiles, beatings, whippings, and so forth, have been viewed as too harsh[43]. There are also traditional rituals and practices that are restorative in nature founded upon values and principles unique to Pasifika culture[44].

Bazemore[45] posits that community conflict and disharmony is the root of crime. When crime occurs, it is a breakdown in the community and its social fabric and therefore justice cannot be fully achieved in the hands of the government. Instead, to address the root of the issue, dispute resolution methods are a more appropriate response. This allows the shared community values to be re-established and upheld by those directly involved and affected, providing the opportunity to break the cycle of broken relationships. Restorative justice, then, assumes that creative dispute resolution methods are pre-existing practices within the community which encourages an environment for restorative justice to exist naturally. For restorative justice specifically, the process of resolving conflict is just as important as the outcome. Successfully resolving conflict provides the community with confidence in their ability to prevent future crime within their own community.

Van Ness and Nolan[46] states that as interest in studying and implementing restorative justice continues to grow, inevitably, questions around whether a fully restorative system is more effective grows as well. Naturally, this poses the question of what a restorative response to crime could look like if accompanied by traditional approaches to crime. Consequently, the door opens for a greater exploration into how deeply restorative justice values may penetrate both official and unofficial responses to crime. Bazemore[47] explains that there is no simple explanation as to why interest in

[42] Melton, above n 41.
[43] Maxwell and Hayes, above n 6.
[44] Braithwaite, above n 31.
[45] Bazemore, above n 1.
[46] Van Ness and Nolan, above n 8.
[47] Bazemore, above n 1.

implementing restorative justice techniques rose suddenly. Especially during a time in which majority of the criminal justice systems were leaning towards a more punitive model. However, the rapid uptake in interest is believed to have occurred during a period where different philosophies of justice, political, social, and cultural movements were coming together. Bazemore[48] and Young[49] further explain that restorative justice has been directly influenced by new developments in the victims' rights movement allowing for their role in community justice to be expanded upon. This movement has inspired a re-emergence in indigenous dispute resolution, especially in literature.

Restorative justice values can be found not only in American and British history but various indigenous cultures also[50]. A few examples provided by Garvey[51] include the practices of Greece, Romania, India, and Aboriginals. Garvey[52] further explained that restorative justice failed to grow together with the modern nation state so the responsibility of resolving conflicts eventually shifted over to the nation state. Van Ness[53] concurs, attesting to the great influence of indigenous justice process on restorative processes which can be seen in two key elements. The first is evident in two of restorative justice's most well-known forms of practice – conferences and circles. Conferences are an adaptation of Māori conflict resolution and Circles from Native Americans conflict resolution practices. Secondly, the philosophy of indigenous justice, which strives for repairing the harm the community has suffered due to crime[54].

Restorative justice is the result of informal participatory practices in earlier communities before centralised settlement systems were in place[55]. Informal practices are important to note as this is common in Tonga and accepted as a part of the "culture" in the justice system. This can be found in most Pacific cultures as some values and principles are consistent throughout the Pacific. Tonga's culture is based upon Christianity and family. Its fundamental values are weaved together by what is referred to as the f*aa'i kavei koula* (the four golden strands). The four golden strands represent the core principles that hold Tongan communities together. These principles are *faka'apa'apa* (respect),

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[48] Bazemore, above n 1.
[49] MA Young *Restorative Community Justice: A Call to Action* (National Organization for Victim Assistance, Washington, DC, 1995).
[50] Mark S Umbreit and others "Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls Symposium: Restorative Justice in Action" (2005–2006) 89 Marquette Law Review 251.
[51] Stephen P Garvey "Restorative Justice, Punishment, and Atonement The Theory and Jurisprudence of Restorative Justice" (2003) 2003 Utah Law Review 303.
[52] Garvey, above n 51.
[53] Daniel W Van Ness "An Overview of Restorative Justice Around the World" [2005].
[54] Van Ness, above n 53.
[55] Michael S King "Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice Critique and Comment" (2008) 32 Melbourne University Law Review 1096.

fetokai'aki/tauhi vaha'a (reciprocity), *'anga fakatōkilalo* (humility), and *mamahi'i me'a* (loyalty)[56]. These principles and values are a common thread amongst most Pacific cultures. Further, these values are grounded in Chirstian values such as love, kindness, and forgiveness[57]. For instance, Māori culture values prior to Western influence consisted of collaboration, reconciliation, and reciprocity. The purpose was to collaborate on matters that require consensus, reconciling of grievances through conferences, and reciprocation for restoring balance within their whanau[58]. This formed the basis for New Zealand's restorative justice practice as the restorative tradition for Māori people is to hear and help their community heal. This is done in the form of a *hui* (meeting) where the families in dispute come together with the elders for a discussion[59].

2.2 Samoa

Samoa is a Pasifika country that is rich in history, culture, and values. As is the norm for Pasifika culture, their cultural identity heavily emphasises *aiga* (family/extended family/kinship)[60]. *Fa'asamoa* is a term used to describe the core of Samoan culture which consists of one's role and identity in society, reciprocation of resources, and family[61]. Vakalahi[62] notes that family is essentially a support system, therefore, if disputes arise within the family, the support system is disrupted. Importance is placed on *Fa'amatai* (chiefly system) their social structure stems from this[63]. For instance, title to land is entrusted within the family, not an individual or tribe. Their ancestry and key roles of the *Matai* (chief) is indicated in a set of titles that exist in both the family and village[64].

This differs from Tonga where society consists of three social classes – royalty, chiefs, and commoners – with the King as the ultimate ruler[65]. The key difference here is that while a social structure exists in Tonga, most of the emphasis is placed on royalty in

[56] Tuinukuafe and others, above n 14.
[57] Tuinukuafe and others, above n 14.
[58] Devere and Te Maihāroa, above n 19.
[59] Paul Takagi and Gregory Shank "Critique of Restorative Justice" (2004) 31 Social Justice 147.
[60] Halaevalu F Ofahengaue Vakalahi and Meripa T Godinet "Family and Culture, and the Samoan Youth" (2008) 11 Journal of Family Social Work 229.
[61] Leilani Tuala-Warren *A Study in Ifoga: Samoa's Answer to Dispute Healing* (4 The University of Waikato 2002).
[62] Ofahengaue Vakalahi and Godinet, above n 60.
[63] Tuala-Warren, above n 61.
[64] Marie Ropeti "A Pacific Perspective on Restorative Justice: The Power of Saying 'Sorry'" in Anne Hayden, Loraine Gelsthorpe and Allison Morris (eds) *A Restorative Approach to Family Violence: Changing Tack* (Routledge, 2016) 131.
[65] Helena Kaho "The Family Group Conference: A Tongan Perspective" (2016) 2016 New Zealand Law Review 687.

society[66]. Similar to Samoa, the ancestry in Tonga is indicated in a set of titles for the family and the village. In formal settings or family functions, there is a *ulumotu'a* (the head of the extended family) who acts as a representative of the family and takes on the leadership role. In this same setting, there is a *mehikitanga*[67] (the eldest female of the siblings) who is treated with high regard and honoured during events[68]. The structure in terms of this title is often complicated. The *mehikitnaga* in each function is dependent on which generation is hosting the event.

Each village has a f*ono* (Village Council) where key decisions are made through discussions. The *Fono* (Village Council) is where judicial decisions are also made. The council made up of *Matai* (Chief) comes together and decide the laws that will govern their village and how they are to proceed when these laws have been breached. Punishments enforced by this council vary from a beating, traditional forms of apology, or being banished from the village[69]. The *Fono* (village council) operates under the 1990 Village Fono Act[70] which outlines their responsibility for maintaining the order and customs of their village. For offending parties, the response has seen a shift from the harsher punishments listed above to include fines that are payable via money, food, and/or fine mats[71]. For example, in the case of a dispute, the highest chief of the village will go to the affected village, bow down, and present their gifts. It is a sign of both respect and humility towards the hurting party. Upon reaching reconciliation, they continue to coexist with mutual respect.

The traditional form of apology in Samoa is known as *ifoga* (to bow down with respect) which is often used for disputes between families outside of an adversary environment – court[72]. This practice involves the party gathering outside of the house in the early morning, bowing down whilst covering themselves with an *ietoga* (fine mat) as a way of seeking forgiveness. The offending party will also present gifts of fine mats and food and will not move until forgiveness has been rendered[73]. Filoiali'i and Knowles[74] note that Samoa is a country that is traditionally non-violent, so *ifoga* (to bow down with respect)

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[66] Sōsefo Fietangata Havea "The Cultural Preservation of Tonga: Traditional Practice and Current Policy" (Thesis, Massey University, 1996).
[67] Seu'ula Johansson Fua "Looking Towards the Source – Social Justice and Leadership Conceptualisations from Tonga" (2007) 45 Journal of Educational Administration 672.
[68] Kaho, above n 65.
[69] Tuala-Warren, above n 61.
[70] Village Fono Act.
[71] Maxwell and Hayes, above n 6.
[72] Tuala-Warren, above n 61.
[73] Sanele Faasua Lavata'i *The Ifoga ritual in Samoa in anthropological and biblical perspectives* (Fachbereich Evangelische Theologie, der Universitat Hamburg, 2016).
[74] La'auli A Filoiali'i and Lyle Knowles "The Ifoga: The Samoan Practice of Seeking Forgiveness for Criminal Behaviour" (1983) 53 Oceania 384.

is performed in disputes involving bodily harm or death. The reputation of the family or village is also considered in high regard, so *ifoga* (to bow down with respect) is performed when their reputation has been disrespected. The primary aim of this tradition is for keeping the peace and to prevent any form retaliation[75]. It involves the entire community in the process and requires everyone involved to come to a consensus in their decision for reconciliation.

Disputes are mediated by the *Matai* (Chief) who is responsible for ensuring the injured party has received and accepted the apology. This maintains a close-knit community due to its consideration of both parties during the reconciliation process and through the efforts taken to restore balance. Keeping this tradition alive is how Samoa moderated a complete takeover from a western justice system[76]. As an apology to the village, the *Matai* (Chief) will approach the *Fono* (Village Council) to seek forgiveness. In this setting, the *Matai* (Chief) will enter the village house to perform the *ifoga* (to bow down with respect) while simultaneously the family will perform this outside. The family will remain outside until they are called upon[77]. The *ifoga* (to bow down with respect) also emphasises the collectivism evident in Pasifika culture. Tunufa'i[78] explained that if the *ifoga* (to bow down with respect) is performed by both maternal and paternal family of the offender's family, it illustrates that the family, in its entirety, have come together to take responsibility for the actions of an individual.

Tonga, Samoa, and Māori cultures are similar in that Christianity has influenced how they respond to crime. Through Christianity, forgiveness and empathy has become a response to crime and offending parties through traditional forms of apology. However, the difference here is that Māori and Samoa's traditional forms of apology involve apologising to the affected party. On the other hand, in Tonga, this involves apologising to the King for disturbing his peace. Overall, restorative justice embodies the values of *"...participation, respect, honesty, humility, interconnectedness, accountability, empowerment, and hope"*[79]. The emphasis on apology, repentance, healing, and the need for forgiveness can be found in Christian faith and principles embedded into the social fabric of Pasifika culture.

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[75] Lavata'i, above n 73.
[76] Filoiali'i and Knowles, above n 74.
[77] Lavata'i, above n 73.
[78] Laumuaotumua Tunufa'i "E Agatonu a Manu'a o Fesili: Investigating the Attitudes of an Auckland Samoan Population Toward the New Zealand Criminal Justice System" (Auckland University of Technology, 2013).
[79] Fred WM McElrea "Customary Values, Restorative Justice and the Role of Prosecutors: a New Zealand Perspective" (paper presented to Restorative Justice and Community Prosecution Conference, Cape Town, South Africa).

2.3 Fiji

The social structure in Fiji revolves around its communities – family, extended family, sub-clans, and clans. If one was born into a particular group in the social structure, it is expected they act accordingly until death. For instance, chiefs in Fiji are expected to be the protector and peacemaker of the community. It is their role to act as an arbitrator for conflict resolution[80]. In terms of dispute resolution, Fiji has a range of traditional ceremonies for apologies which are utilised depending on the gravity of the offence.

For instance, *matanigasau* is a ceremony that promotes reconciliation within the extended family. A ceremony called *bulubulu* is utilised for offences involving injuries that promotes burying the past and moving forward. *veisorosorovi* is a ceremony that promotes discussions between affected parties to find reconciliation. This ceremony involves the presentation of the *tabua* (whale's tooth). To consider the ceremony successful, the *tabua* must be accepted by the injured party. Quinn[81] puts forward that once the *tabua* (whale's tooth) is accepted, the accepting party is required to follow through with their end of the agreement.

Cretton[82] noted that forgiveness through customary practices does not necessarily equate to being forgiven by the legal system and if required, offenders will still be expected to answer to the justice system. Ratuva[83], on that same note, suggests that the opposite is also true. Customary apologies in Fiji may be utilised alongside or in place of the western justice system. Efforts were made to incorporate these processes into restorative justice in 2005 during political tensions. A draft legislation was brought before the parliament called Reconciliation, Tolerance and Unity Commission[84]. While the legislation did not officially pass, customary practices were integrated into the law regarding the justice system[85].

For dispute resolution ceremonies, the chief, senior members of the sub-clans and clans will come together with the parties involved. Apologies will be offered to the affected parties before a *yagona*[86] (kava – traditional drink) ceremony takes place to symbolise the

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[80] Alumita L Durutalo "Fiji" (2007) 19 The Contemporary Pacific 578.
[81] Joanna R Quinn "The Prospects for Customary Law in Transitional Justice: The Case of Fiji" (2019) 36 wyaj 249.
[82] Viviane Cretton "Traditional Fijian Apology as a Political Strategy" (2005) 75 Oceania 403.
[83] Steven Ratuva, Anita Jowitt and Tess Newton "Re-inventing the Cultural Wheel: Re-conceptualizing Restorative Justice and Peace Building in Ethnically Divided Fiji" in Sinclair Dinnen (ed) *A Kind of Mending* (ANU Press, 2010) 149.
[84] Durutalo, above n 80.
[85] Graham Hassall "Mediation of Public Policy Disputes in the Fiji Islands" in Dale Bagshaw and Elisabeth Porter (eds) *Mediation in the Asia-Pacific Region: Transforming Conflicts and Building Peace* (Routledge, 2009) 73.
[86] This is a traditional drink made from the kava plant. Can be utilised in both formal and informal settings.

parties involved burying the past and reconciling for the future[87]. If the matter disputed is a serious offence, the *kava* ceremony is replaced with a *tabua* (whale's tooth) presentation. The *tabua* (whale's tooth) is representative of wealth and is rarely refused when offered as a symbol of seeking forgiveness. During the ceremony, if the injured party accepts the *tabua* (whale's tooth) and the cup of *yagona*[88] (kava - traditional drink), forgiveness is rendered. The purpose behind this custom of dispute resolution is to allow for both parties to start a new journey once the ceremony is completed[89].

A significant point to note is the emphasis on forgiveness in Fiji's traditional form of apology without connecting it to Christianity. While forgiveness is evident throughout the Pacific, Fiji's culture emphasises the importance of forgiveness for society to live harmoniously. Ratuva[90] explains that kinship is of significance in Fijian culture, and they believe that the community is interconnected so learning how to live harmoniously is pertinent for solidarity. Hassall notes that in Fijian culture, reconciliation is prioritised over retributive methods[91]. Durutalo[92] explains that indigenous knowledge in Fiji, punishments are not intended to alienate the offender from society but to rehabilitate and deter them from reoffending.

The role of the chief in this matter is crucial for navigating through the dispute presented to him. The chief is supposed to act as an impartial listener, recognise the root cause of the dispute, ensure the offending party is held accountable and takes responsibility accordingly. The chief is to ensure that through this process, reconciliation and forgiveness is achieved[93]. This role can be found in restorative justice conferencing processes, often referred to as a mediator/facilitator. The guidelines, description, and standards facilitators are held to is identical to this practice in Fiji[94]. It is interesting to note that restorative justice advocates have always credited indigenous cultures for influencing its practices, however, Fiji is never mentioned[95].

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[87] Alumita Durutalo, Anita Jowitt and Tess Newton "Informal Justice in Law and Justice Reform in the Pacific Region" in Sinclair Dinnen (ed) *A Kind of Mending* (ANU Press, 2010) 165.
[88] S "Apo" Aporosa "Kava and ethno-cultural identity in Oceania" in Steven Ratuva (ed) *The Palgrave Handbook of Ethnicity* (Springer Nature, 2019) 15.
[89] Cretton, above n 82.
[90] Ratuva, Jowitt and Newton, above n 83.
[91] Hassall, above n 85.
[92] Durutalo, above n 80.
[93] Alan Howard "Restraint and Ritual Apology: The Rotumans of the South Pacific" in Graham Kemp and Douglas P Fry (eds) *Keeping the Peace: Conflict Resolution and Peaceful Societies Around The World* (0 ed, Routledge, New York, 2004) 53.
[94] Marian Liebmann *Restorative Justice* (Jessica Kingsley Publishers, 2007).
[95] Holly Ventura Miller *Restorative Justice* (Emerald Publishing Limited, Bingley, United Kingdom, 2008).

2.4 Australia

Restorative justice was first introduced in Australia in the 1990s via the "Wagga model". New South Wales decided to adapt the conferencing model utilised in New Zealand to suit the needs of their community before introducing it to their juvenile justice system. They created a scripted process that the police in Wagga Wagga could use when dealing with juvenile offenders. These conferences were run by the police and included the offender, victims, and community for an open discussion regarding the effects of the offence committed. The aim was to resolve emotional harm as well as addressing the needs of the victim. Upon determining its effectiveness, it was then implemented in other police stations across Australia. The only change in implementing this model across Australia was the facilitator of the conferences and the scale it was conducted in. For instance, Victoria is the only state in which the conferences are administered by a church body. Furthermore, New South Wales, Western and Southern Australia managed to implement conferencing into their juvenile justice procedure while Victoria is the only state in which the conferences are administered by a church body[96].

Due to its adaptability, it was also implemented in schools and workplaces in both New South Wales and Queensland. According to the Australian Institute of Criminology in 2005, out of the eight states that previously used the conferencing process, only five use it. In some states, conferencing is only available for select cases whereas four have a legislation for establishing it as a part of their justice system via diversion[97]. For example, the Youth Offenders Act 1997 No 54[98] in New South Wales clarifies the difference between police cautions and youth justice conferences[99]. This is something that should be considered as a starting point for Tonga, especially as Tonga does not currently dedicate a separate legislation for responding to youth offenders[100]. It is important to note that there is no difference in the type of offence in which a police caution or youth justice conference can be utilised. That is also the case with the criteria used by the justice authority to determine where cases can be diverted to. However, this legislation considers the youth justice conference as a higher level of diversion if the investigating officer believes that the victim has suffered significant harm as a response to the offence. The officer may also

[96] Liebmann, above n 94.
[97] Liebmann, above n 94.
[98] Young Offenders Act 1997 No 54 (AU).
[99] Both are diversionary programs that are administered by police outside of court. A police caution is when the offender is cautioned by the police to not commit the same offence twice for the purposes of deterring youth from reoffending. Youth justice conferences are for restorative purposes to promote healing. Both are at the discretion of the investigating officer and goes onto the offender's record.
[100] Mackesy-Buckley, above n 26.

divert cases to youth justice conferences if the circumstances deem it necessary – regardless of the gravity of the offence[101].

Another option provided by the 1992 Queensland Juvenile Justice Act[102] was the ability to refer cases to restorative justice before the sentencing process. This is important in that it allows for diversion to community conferences to assist in determining the appropriate sentence[103]. Through this legislation, leeway is provided for sentencing where if the community conference is successful, the case may be dismissed without recording the conviction. However, the court also has the discretion to bring the case back for sentencing despite a successful conference if the court believes it is appropriate. One of the disadvantages of the discretion of the court procedure is that participants of the conference may feel their efforts of reconciliation seem futile[104].

2.5 New Zealand

The youth justice system in New Zealand has shifted its focus from punishment towards a more restorative approach. This was done in hopes of offering a holistic approach in response to crime to prevent youth from reoffending once they reach adulthood[105]. As the justice system in Tonga is highly punitive, the shift in New Zealand to include restorative values may be a reference to note. Restorative justice, initially, dealt with offences in connection with a guilty plea. Charges that are defended must go through the adversary system as a part of "due process". Restorative justice practitioners and their interest in restorative justice became the main driving force for its development in New Zealand. Notably, The Children, Youth Persons and their Families Act had been passed before the term "restorative justice" circulated in New Zealand[106]. The legislation led New Zealand to restructure the youth justice system to include family group conferences. This would be the first step towards a justice system that is more consistent with traditional Māori practices and restorative justice principles. This change for New Zealand has significantly decreased cases being referred to the court as well as incarceration rates[107]. It should be noted that there is no evidence regarding an increase in reoffending after these family group conferences.

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[101] Van Ness and Nolan, above n 8.
[102] Now known as the Youth Justice Act 1992 (AU).
[103] Van Ness, above n 3.
[104] Van Ness and Nolan, above n 8.
[105] Liebmann, above n 94.
[106] Fred WM McElrea "A New Model of Justice" [1993] The Youth Court in New Zealand: A new model of justice 14.
[107] Umbreit and others, above n 50.

The 1989 Children, Young Persons, and Their Families Act[108] was created as a response to the disproportionality in the criminal justice system. Judge McElrea[109] states that the primary objective of this legislation was to encourage families to hold their young ones accountable for their actions. This was to guide them in fostering a more socially productive future. This legislation shifted the power from professionals to the families and communities to decide the best form of responding to offending behaviour in children and juvenile offenders. As a result of this legislation, the Family Group Conferences was established to employ these responses. Both this legislation and conferences were supposed to serve as a culturally appropriate response towards the Māori community. This was done by placing *whānau* (family/wider family) at the centre stage of the justice process [110][OBJ][111][OBJ].

New Zealand established the *Rangatahi* (Youth) Courts in 2008 which were held in a *marae* (traditional Māori meeting place)[112]. These were established as "culturally responsive" restorative justice processes targeting Māori and Pasifika youth offenders[113]. Māori customs and values[114] are upheld when cases are diverted to the *Rangatahi* (Youth) Court. This revived Māori culture and customs that existed prior to European contact. When there was a breach in the community, a communal discussion was held to discuss the breach and how the integrity of the community could be restored[115]. This encouraged the active participation of the offender, victim, elders, families, and extended families in the process. The aim of these community processes was to restore the *mana* (authority) to victim and their family, which they were denied due to the offence and instil measures to restore order. This also illustrated that the collective claimed responsibility for the actions of an individual[116]. Since its conception, *Rangatahi* (Youth) Courts has seen a high attendance and reported high levels of satisfaction[117].

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[108] Children, Young Persons, and Their Families Act 1989 No 24.
[109] McElrea, above n 79.
[110] McElrea, above n 106.
[111] William Flavell "Kia tū pakari ngā māhuri: Amplifying the Voices of Rangatahi Māori in the Criminal Justice System and Their Educational Experiences" (Auckland University of Technology, 2023).
[112] Tamasailau Sualii-Sauni, Juan Tauri and Robert Webb "Exploring Maori and Samoan Youth Justice: Aims of an International Research Study" (2018) 2 Journal of Applied Youth Studies 11.
[113] Ventura Miller, above n 95.
[114] i.e., the use of powhiri (welcome ceremony), karanga (traditional calls of welcome and reply), karakia (blessing), etc. The court process ends with the sharing of food and drinks and a closing powhiri (closing ceremony).
[115] David Carruthers "Restorative Justice: Lessons from the Past, Pointers for the Future" (2012) 20 Waikato Law Review 1.
[116] Carruthers, above n 115.
[117] Heemi Taumaunu "Rangatahi Courts of Aotearoa/New Zealand" (2014) 22 Maori Law Review 21.

Cultural contextualisation is important for justice systems to work in the community it is implemented in. The ability to freely express indigenous processes is significant for communities that place importance on their traditions and values. This was evident in the Youth Diversion Scheme trialled by Mackesy-Buckley in Tonga where it was initially met with disapproval. Mackesy-Buckley adapted the Youth Diversion Scheme to include traditional practices of Tongan apology called *hu lou ifi* (to enter with humility) which was utilised as a model for dialogue. Once *hu lou ifi* was employed, Mackesy-Buckley[118] reports that participants were more comfortable with open dialogue. With regards to feasibility of implementing restorative justice in Tonga, these are the points that need to be considered.

2.6 Indigenous approaches

Indigenous approaches to justice influenced the development of circle methods for conferencing in restorative justice. This expanded the range of participants of conferencing from the victim, offender, to their supporters, leaders, and members of the community. King[119] provided an example of this circle method being used concurrently with their current criminal justice system can be found in Western Australia. In Australia, the use of conferencing as a restorative justice practice is considered to have the most influence. This was a critical element in the deterring approach they had taken for their juvenile justice practice. The circle method practice was adapted in their Aboriginal sentencing courts.

Despite the positive results found, it is expected that a level of dissatisfaction will also exist. The literature found that there was a small number of participants who were left dissatisfied following participation in mediation or conferencing. Their dissatisfaction was a result of either unresolved issues, incomplete conference agreements, failure to provide reports of medication results, or a disagreement regarding how a meeting was facilitated. King[120] noted that the participants dissatisfaction was not in the restorative approach itself but rather the process in which it was carried out. This was also the case with the Youth Diversion Scheme. The juvenile cases diverted to the Youth Diversion Scheme returned mixed results. This was evident in the participants who did not receive the support of their family. Mackesy-Buckley[121] reports that youth offenders felt unsupported and were not active in productive dialogue.

[118] Mackesy-Buckley, above n 26.
[119] King, above n 55.
[120] King, above n 55.
[121] Mackesy-Buckley, above n 26.

Literature posits that restorative justice, and problem-solving courts are softer options for justice and thus have little effect on deterring future offences. However, King[122] disagrees and asserts that addressing the offending behaviour itself and the consequence of that behaviour is, in fact, more challenging. The concerns raised here is validated by the Youth Diversion Scheme. Mackesy-Buckley[123] wrote that the community in Tonga were initially concerned that justice could not be achieved through the diversion scheme. The community felt that it was unfair that some offenders were punished in court while others were not.

Umbreit, Vos, Coates, and Lightfoot[124] suggests that the roots of the criminal justice system and its focus on state harm can be found in eleventh-century England after the Norman invasion of Britain. During the time of William, the Conqueror's son – Henry I – a decree was issued guaranteeing that violent crimes would be under royal jurisdiction due to disturbing the King's peace. Umbreit, Vos, Coates, and Lightfoot[125] note that this is the significant shift from a victim-offender perspective within the community. Before the decree had been issued, crime was viewed as a conflict between the individuals involved and that reparations were to be made to the victim for the harm committed.

This is important to note as Tonga is currently considered a constitutional monarchy, modelled after Britain's Westminster system. One of Tonga's most historical forms of restorative practice can be found when the King's peace has been disturbed, called *hu lou ifi* (to enter with humility). As a sign of humility, the offending family will wear leaves (*lou*) from the chestnut tree (*ifi*) and enter (*hu*) the King's palace displaying humility and apologise for their wrongdoing.

As per Tongan and most Pasifika traditions, one must not visit a place empty handed. This is especially true when entering the palace, offending families will present gifts of traditional crafts and food as an offer of apology. The social structure is important when appearing before the King, commoners are not to speak directly to the King in formal settings so a *Matāpule* (Chief) must be present as a representative of the family[126]. This is the most traditional form of apology in Tonga, yet it is not directed towards the victim but the King. This is representative of the key difference between retributive and restorative systems.

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[122] King, above n 55.
[123] Mackesy-Buckley, above n 26.
[124] Umbreit and others, above n 50.
[125] Umbreit and others, above n 50.
[126] Meredith Filihia "Rituals of Sacrifice in Early Post-European Contact Tonga and Tahiti" (1999) 34 The Journal of Pacific History 5.

This then begs the question if *hu lou ifi* is an appropriate model for restorative justice in Tonga. Mackesy-Buckley[127] trialled the Youth Diversion Scheme in Tonga amidst the 2006 riots in Nuku'alofa. The justice system was overwhelmed with the number of youth offenders involved in the protests for democratic reform. Therefore, this diversion scheme trial was more than welcomed to relieve the pressure on the court system.

One of the most well-known practices of restorative justice is dialogue between parties. This is prevalent across countries in the Pacific that have adopted restorative justice – i.e., Australia (Conferencing Circles), New Zealand (Family Group Conferencing and *Rangatahi* (Youth Courts), and Samoa (Fono). The Youth Diversion Scheme was no different, modelled after the already existing *Hu Louifi*. It was modified to fit the context of a community and encouraged dialogue between the involved parties. Although it was met with challenges, it is a great starting point for insight when considering restorative justice in Tonga.

Restorative justice values are also rooted in principles of Christian culture which emphasised crime as harm committed against an individual and their family[128]. It is important to note that the shift from retribution to restoration is also evident in the Bible itself[129]. The Old Testament is heavily focused on retribution, specifically Exodus 21:24[130],[131] where the Just Deserts theory (retributive justice) has emerged. Whereas the New Testament emphasises forgiveness for the offender in 2 Corinthians 2:5-6[132],[133]. This highlights the harm against an individual and the forgiveness that should follow.

Compared to western countries, the situation in the Pacific Islands is different due to their existing customary practices that prevailed western influence. Customary practices tend to already have restorative principles and values instilled alongside punitive elements. Maxwell and Hayes[134] states that traditional forms of apology such as *Ifoga* (to bow down with respect) can be considered harsher than the diversionary process Australia and New Zealand have for restorative processes. However, they are both examples of customary

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[127] Mackesy-Buckley, above n 26.
[128] Don John O Omale "Justice in History: An Examination of 'African Restorative Traditions' and the Emerging 'Restorative Justice' Paradigm" (2006) 2 African Journal of Criminology & Justice Studies 33.
[129] Fred WM McElrea "A Christian Approach to Conflict Resolution" [2001] What does the Lord require of Christians in conflict?
[130] "Exodus 21:24 NIV - eye for eye, tooth for tooth, hand for—Bible Gateway" <https://www.biblegateway.com/passage/?search=exodus+21%3A24&version=NIV>.
[131] *"eye for eye, tooth for tooth, hand for hand, foot for foot"*
[132] "2 corinthians 2:5-6 NIV - Forgiveness for the Offender - If - Bible Gateway" <https://www.biblegateway.com/passage/?search=2+corinthians+2%3A5-6&version=NIV>.
[133] "*if anyone has caused grief, he has not so much grieved me as he has grieved all of you to some extent – not to put it too severely."*
[134] Maxwell and Hayes, above n 6.

practices moderating the impact of a western justice system. It is moderated to include compensation for a victim, forgiveness, and restore the balance within the wider community.

Most of Pasifika history and traditions – social structure, customs, and conflict resolution – is based upon oral traditions that has been passed down from generation to generation. Tonga's criminal justice system is no different. Despite being modelled after a Western justice system and the lack of Tongan culture and values present in its legislation, every member of Tonga knows that if they approach the judge, a part of that *mamahi'i me'a* (gratitude) and *fetokai'aki* (humility) will be present. None of this will be recorded anywhere, but it is a part of Pacific culture of approachability need to help, it is common sense.

However, the literature on restorative justice agrees with regards to its holistic approach through an indigenous lens. This is steered by unwritten customary laws, traditions, and practices. Like other indigenous cultures, these are learnt through oral techniques by elders and leaders. Melton[135] explained that a holistic philosophy is justice that connects those involved in an issue and focusing on reaching peace and harmony. The range of this process includes the disclosure of the issue, discussing it, agreeing to a solution, make amends, and restore relationships broken because of conflict. These methods are based on ideas and principles that healing and living harmoniously with nature.

Therefore, the underlying values of restorative and reparative justice. Most Pacific cultures emphasise these same values as a part of encouraging kinship and harmonious communities. For these reasons, restorative justice to co-exist in these environments is almost expected. The literature agrees that restorative justice has been influenced by indigenous forms of justice. Thus, implying that Pacific culture naturally fosters an environment for restorative justice to grow and prosper. If that is the case, can it not also, succeed in Tonga?

2.7 Conclusion

This chapter focused on reviewing the history of restorative justice and its development. As literature regarding restorative justice emphasises its roots in indigenous practices, a review of the culture and traditional forms of apology of Samoa and Fiji was included. A brief comparison with Tonga was included throughout the chapter to identify the gaps and the strength of the research question.

[135] Melton, above n 41.

It is evident in this chapter that restorative practices are rooted in indigenous forms of dispute resolution. In reviewing restorative justice and New Zealand, this chapter outlined Māori customs and practices were utilised in establishing the *Rangatahi* (Youth) Courts. The use of *Rangatahi* (Youth) Courts in New Zealand has illustrated that the integration of customs and traditions into the justice system is possible. In reviewing Australia and the Wagga Model, the adaptive nature of restorative justice is evident. While the conferencing practice of restorative justice promotes kinship and healing, the inclusion of cultural customs is not highly emphasised as the *Rangatahi* (Youth) Courts. This provides flexibility for how each conference is approached as well as allowing for the support system of family to be participation.

Reviewing the cultural values, social structure, and traditional forms of apology in Samoa and Fiji provided a strong basis and direction in how to approach this study. Most Pasifika cultures and their values are similar in nature. The overall intent to maintain peace and promote harmonious living. As both countries currently practice restorative justice and maintained their traditional apologies, this chapter highlighted that Tonga may be lacking in the preservation of traditions and customs.

Chapter Three – Methodology

3.0 Introduction

The literature review outlined in chapter two has identified gaps that the following study could further explore with regards to the restorative justice and Tonga. One aspect to consider with the chosen methodology is the information and type of information readily available in the body of literature. This includes journal articles, books, e-books, and legislations. Based on this, the most appropriate research method to employ will be doctrinal research methodology. Therefore, the following chapter is designed to provide insight into why doctrinal research methodology has been chosen.

3.1 Legal research methodology

The research process can be broken down into three groups – method, approach, and purpose[136]. With regards to legal research, Pradeep[137] notes that it is a systematic investigation into the problems identified. Barkan[138] offers that it can be organised into a model consisting of five steps. First, identifying the legal significance. Second, arranging the legal issue into a logical sequence. Third, identifying the legal sources. Fourth, researching the issue identified and then fifth, communicating a solution[139]. This can be explored in three methods of research – doctrinal, socio-legal, and critical.

Socio-legal research is described as focusing on assisting law reforms for social welfare. Socio-legal research method is the analysis of the law with the added consideration for the context in which the law is applied. For this, there are various methods under socio-legal research that could be applied due to the multiple contexts that fall under "social". This allows for a broader scope of information the researcher can collect and would then depend on the researcher's chosen context of study. The type of analysis available with this research method permits for a deeper understanding into the nuances outside of legal discourse[140]. Pradeep[141] notes that the socio-legal research is dependent on the depth of knowledge of the researcher in both law and the selected field.

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[136] Chris Dent "A Law Student-Oriented Taxonomy for Research in Law 2016 ALTA Conference Special Issue" (2017) 48 Victoria University of Wellington Law Review 371.
[137] Pradeep M D *Legal Research- Descriptive Analysis on Doctrinal Methodology* (2019).
[138] Steven M Barkan "On Describing Legal Research" (1982) 80 Michigan Law Review 925.
[139] Barkan, above n 138.
[140] Dent, above n 136.
[141] M D, above n 137.

Critical research method goes further than socio-legal method by questioning the law as well as the social but includes the individuals involved[142]. Dent[143] notes that this is the most difficult method of legal research as it requires the research to demonstrate a high level of knowledge in both the law and theory studied. This method questions the law, the social context, as well as the individuals affected by both the law and the chosen social context. This method requires that the researcher skilfully demonstrate both the law and the chosen social theory. Critical research method questions the theories that reinforces the chosen social context and then provides a more refined understanding of it.

Doctrinal research, on the other hand, is established in problem-solving, which is essentially traditional legal research. Taekema[144] and Hutchinson and Duncan[145] describes doctrinal research as locating the law, interpreting the law, and then analysing it. Thus, doctrinal research methodology seems to be the most popular form of research applied for legal research.

3.2 Doctrinal research methodology

Law is a rules-based discipline. The doctrines that emerge from law can reference itself as a form of authority[146]. This refers to legislations and case law. Gawas[147] refers to this as the doctrine of precedent. Hutchinson[148] explains that doctrinal research is the process of identifying relevant doctrine, analysing the content, and then combining the essential features that emerge. This is supposed to provide a coherent statement of the law studied, illustrating a complete understanding of the concepts apparent in the legal principles. Dobinson and Johns[149] assert that the dynamic relationship between law and its fact, when explored further, gleans a principle that can be added to the body of knowledge. This is ultimately the purpose of any research conducted.

Through doctrinal research, an explanation can be provided regarding the difficult areas of the law as well as provide a recommendation of developments that can be made. The law itself does not need to reveal or consider social context which is why legal

[142] Dent, above n 136.
[143] Dent, above n 136.
[144] Sanne Taekema "Methodologies of Rule of Law Research: Why Legal Philosophy Needs Empirical and Doctrinal Scholarship" (2021) 40 Law and Philosophy 33.
[145] Hutchinson and Duncan, above n 28.
[146] Dent, above n 136.
[147] Vijay M Gawas "Doctrinal Legal Research Method—a Guiding Principle in Reforming the Law and Legal Sytem Towards the Research Development" (2017) 3 Internation Journal of Law 3.
[148] Hutchinson, above n 29.
[149] Ian Dobinson and Francis Johns "Legal Research as Qualitative Research" in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (2nd ed, Edinburgh University Press, Edinburgh, 2017) 18.

commentary is necessary. It allows for explanation into how law engages with consideration for social context and raises issues by comparing different legal frameworks. Therefore, Dobinson and Johns[150] state that there is argument with regards to doctrinal research methodology and its relation to social sciences.

Hutchinson[151] argues that social science research refers to social relations as an experience whereas doctrine-based research focuses primarily on cases. The key difference between the two research processes is that the information collected in a social science study can be measured. However, the primary sources of a doctrinal study are legislations and case laws. This can be further understood when Westerman's[152] stance on the legal system is considered. Westerman[153] put forward the legal system itself functions as theoretical framework in which the relevant facts have already highlighted. The researcher, thus, only needs to select the facts relevant to the issue they are reviewing. Westerman explains that the researcher does not need to view the legal system as an entity that needs to be understood but rather direct their focus towards providing new developments. Therefore, the information collected is pre-existing and can only be examined to draw a conclusion rather than quantified.

3.3 Criticism of Doctrinal Research

There are two main criticisms that the literature draws on with regards to doctrinal research. Hutchinson highlights Westerman's[154] explanation as one of the weaknesses of doctrinal research. Hutchinson[155] states that this confines the researcher's view solely on the law and fails to consider its impact on the public or the context it was created in. Hutchinson notes that the context the law exists in is essentially the values that moulded the legal system. However, Westerman provided a distinction between legal doctrine and legal science. Legal doctrine draws its concepts from the legal system whereas legal science does not. Westerman goes on to conclude that the researcher does not need to restrict themselves to legal doctrine or science. The researchers simply need to focus on the issues that are more deserving of attention and if that requires the interaction of legal doctrine and science then apply the theoretical tools accordingly.

[150] Dobinson and Johns, above n 149.
[151] Hutchinson, above n 29.
[152] Pauline C Westerman *Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law* (2009).
[153] Westerman, above n 152.
[154] Westerman, above n 152.
[155] Hutchinson, above n 29.

McConnell and Smith[156] offer that another weakness of doctrinal research is its vulnerability to the researcher's bias in their analysis. Hutchinson concurs stating that a researcher's opinion can easily be put forward and disguised as an objective analysis of the law. McConnell and Smith explained that this is evident when doctrinal research involves normative analysis. They emphasise the important of avoiding shallow and unconvincing arguments by acknowledging any philosophies included in the analysis may be based on.

Despite the criticism, Westerman[157] suggests changing one's perspective or focus to allow for adaptability. For instance, hypothetically, a new legal development arises so research is conducted as to how this new development is consistent with the existing legal system. However, if the existing legal system cannot accommodate this new development, the focus of the research can then shift to accommodate this problem. The research can then be adapted to focus on what changes can be made to the existing system to accommodate this new development. Therefore, the recommendations that will emerge from the research will be based on the changes needed to modify the legal system to integrate the new developments. The belief is that this approach will maintain the integrity of the legal system whilst providing a coherent statement on the law. Recommendations can be justified by referencing coherent statements of the law as well as underlying legal principles.

The purpose of doctrinal legal research is to ask what the law is in a specific field. Therefore, the purpose of the researcher is to collect primary sources – case law and relevant legislation – and secondary sources – literature – related to the chosen field. Due to the nature of research being conducted, it is most often conducted from a historical perspective[158]. The historical lens applied is important as the study is supposed to describe the chosen body of law and how it is applied. Thus, the research is to rely on case laws, legislations, judgements, and so forth to provide the historical perspective. The purpose of the literature as a secondary source is to assist in strengthening the argument formed from primary sources. This method is constructive and designed to provide an analysis of how the chosen body of law has developed. Due to the nature of this method, doctrinal tends to be the most utilised research method applied for legal research[159].

The point of interest for this research is to conduct a study that accounts for the nature of law and the context in which it is applied. Therefore, it is relevant to select both

[156] Lee McConnell and Rhona Smith *Research Methods in Human Rights* (Routledge, 2018).
[157] Westerman, above n 152.
[158] Dent, above n 136.
[159] Hutchinson, above n 29.

primary and secondary sources, review them according to the authority they hold[160]. If social context is taken into consideration, the development, application, and practicality can be discovered. Dobinson and Johns[161] argue that law can be known but not predicted as it is ultimately left to be tested inside the courtroom. However, academic legal research can engage in describing social context. Thus, the fact that there is room for improvement can always be argued because law can be reasoned. With this perspective, doctrinal research methodology can be compared to a thorough social science literature review and will be utilised for the purposes of this study.

3.3 Design of study

Hutchinson[162] provides a list of steps that undertaking doctrinal research tends to follow – gathering relevant information, identifying the legal issues involved, analysing the issues within a legal context, exploring background information on the issue identified (this is referred to as secondary sources dictionaries, textbooks, law reports, papers on policies, and journal articles), locating relevant primary sources (legislations and case law), combining all this information in context, and drawing a conclusion. The researcher needs to utilise problem-solving skills and inductive reasoning to analyse the information collected, determine a meaning, and then condense this into writing.

The first requirement is the research question that will guide this study which is: "what are the advantages and disadvantages of implementing restorative justice as an alternative form of justice in Tonga?" If beneficial, "can restorative justice be implemented as an alternative form of justice in Tonga?". The main motivation behind this study is to determine why restorative justice has not been implemented into the Tonga's justice system. The literature review conducted in chapter two provided the foundation of the following design.

The literature review outlined in chapter two provided insight into the development of restorative justice in New Zealand and Australia. Samoa and Fiji are neighbouring Pacific countries that are primarily indigenous and has incorporated restorative practices into their justice system. To form a basis for the study into Tonga's justice system, the cultural apologies, social structure, and values of Samoa and Fiji were reviewed. This will provide insight into possible factors that may have prohibited Tonga's justice system from implementing restorative justice.

[160] Hutchinson and Duncan, above n 28.
[161] Dobinson and Johns, above n 149.
[162] Hutchinson, above n 29.

As culture, principles and values may not be the only barrier with regards to Tonga and restorative justice, legislations and cases will be reviewed. Analysis into the current legislative framework in Tonga will highlight any weaknesses into the current justice system and whether restorative justice can meet those needs. As literature posits that restorative justice is rooted in indigenous practices, it is necessary to explore the influence or correlation of culture and customs in the restorative justice process. This will also be pertinent for analysing the possibility of implementing restorative justice into Tonga's justice system.

The information reviewed in chapter two acknowledges that indigenous forms of apology can co-exist with the currently existing justice system. Therefore, the following chapters is designed to explore how traditional forms of apology have been incorporated into legislation in neighbouring Pacific countries. This provides an in-depth look into the main research question regarding the advantages and disadvantages of implementing restorative justice into Tonga's justice system.

Therefore, to achieve this, information will be collected and screened for its relevance to the subject matter. Relevant legislation will be reviewed to identify the existing gap in Tonga's justice system. To ensure that the comparisons to Tonga's justice system is strong, this will be narrowed down to legislations in Samoa and Fiji. While Māori culture is surely comparable to Tonga, the influence of cultural traditions in legislation is expected to stronger in Samoa and Fiji compared to a heavily westernised country such as New Zealand.

Literature regarding Tonga's customs and values will be collected for comparison against restorative justice values and principles. Not only does this provide an outline for comparison but it can also provide support for the legislations gathered. The most referenced strength for restorative justice is that it is rooted in indigenous practices. Therefore, comparison of values and principles is necessary for gaining insight if restorative justice will enrich Tonga's customs and values for its application to be beneficial. Once all this information is collected and reviewed accordingly, a conclusion can be drawn to answer the research question.

Chapter Four – Tonga

4.0 Introduction

Based on the information gathered in the literature review in chapter two has highlighted that the restorative justice is rooted in indigenous practices. Other Pacific countries such as Samoa and Fiji employ traditional forms of apology in response to crime which is supported by their existing social structure. Countries such as New Zealand and Australia have illustrated the co-existence of restorative practices in their existing justice system. The literature review has highlighted how those legislations for Samoa and Fiji should be explored and compared to with Tonga's justice system. Therefore, the following chapter is designed to explore Tonga's customs, values, principles, and legislation. This will then be compared to Samoa and Fiji's legislation to grasp how their customs and values are incorporated into their justice system. This is pertinent for identifying and exploring how Tonga's justice system can be improved. A brief review of Tonga's customs and values is necessary for understanding its strengths and weaknesses in supporting restorative justice.

4.1 History of Tonga

It is important for a justice system in the Pacific Islands to reflect the culture and customs of the country it is implemented in. For instance, countries such as Fiji, Vanuatu, Papua New Guinea, and Samoa have customary law in place to regulate their practices[163]. It does not replace their existing justice system, but it does provide protection for their customs and values. Whereas Tonga does not have one in place and thus leaves the country's culture and customs vulnerable to westernisation[164]. This is prevalent in Tonga's tumultuous history in which traditional customs have continuously changed depending on the environment. Therefore, a brief review into Tonga's history is necessary for understanding the context into the creation of their legal system.

The influence of Western society on Tonga dates to the 1800s when Taufa'ahau (King George) slowly came into power[165]. As Tonga was progressing from a fragmented society into a centralised nation, missionaries had arrived. The mindset of the King at the time perceived the *palangi* (European) way as superior due to the wealth, power, and knowledge they possessed. As a result, he would seek their advice for several matters that

[163] DE Paterson "South pacific customary law and common law: Their interrelationship" (1995) 21 Commonwealth Law Bulletin 660.
[164] Debra McKenzie "Challenging the binary of custom and law: a consideration of legal change in the Kingdom of Tonga" (Thesis, 2017).
[165] Stephanie Lawson *Tradition versus democracy in the Kingdom of Tonga* (Department of Political and Social Change, Research School of Pacific Studies, The Australian National University, 1994).

he wanted to either address or implement. The King was so infatuated with their mission teachings that he wanted to become a leader that would mirror Abraham and other prominent figures of the Bible. Thus, implying that King George wanted to become a well-respected leader of a great nation that would be looked upon favourably in history[166].

Tonga became a society that was reconstructed based on Christian principles and values due to the influence of the visiting missionaries. Vava'u[167]. The most notable statement in this legislation made by King George was his declaration that the Sabbath day, moving forward, was to be honoured and observed. King George noted that the nation was to utilise the Sabbath day as a time for tending to their religious duties. Through the Code of Vava'u[168].

One of the most interesting features of the code is the section addressing crime and punishment. While it provided a structure for Tonga's justice system, it also removed any power from the chiefs for mediating disputes. Instead, four magistrates were to handle disputes for everyone, including commoners and chiefs. This shift is important to note as the social structure in Tonga places chiefs above commoners. However, the missionaries were unhappy with the power the chiefs held and their treatment of commoners[169]. The missionaries believed that chiefs and commoners alike were to be equal before God and have the right to a fair trial. While seemingly fair at face value, it was only the beginning of Tonga's customs being dissuaded and later punishable by fines.

The relationship between the King and a few of the missionaries he considered as trusted advisers began to sour. At this time, the King wanted to solidify his political stance. Any advice provided by the missionaries that did not align with that, later led to the King finding a new person to consult[170]. The King aimed to implement a constitution to enhance his and Tonga's political stance. In 1860, the King asked a missionary named Reverend Shirley W. Baker to draft the country's flag, constitution, and 1862 Code of Laws[171]. Baker, during his travels to Australia in 1972, upon his request for assistance, received a copy of the laws for New South Wales[172]. This was the foundation of the Tonga's laws and

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[166] Latukefu, above n 18.
[167] Appendix A in Sione Latukefu *Church and State in Tonga* (Australian National Univeristy Press, Canberra, 1974).
[168] Latukefu, above n 167.
[169] Finau Pila Ahio "Christianity and Taufa'ahau in Tonga: 1800-1850" (2007) 23 Melanesian Journal of Theology 22.
[170] Paul Van Der Grijp "The Making of a Modern Chiefdom State: The Case of Tonga" (1993) 149 Bijdragen tot de Taal-, Land- en Volkenkunde 661.
[171] George E Marcus "Memoir No 42 The Nobility and the Chiefly Tradition in the Modenr Kingdom of Tonga Chapters 6 & 7: Pages 122-166" (1978) 87 The Journal of the Polynesian Society 121.
[172] Van Der Grijp, above n 170.

implemented as the 1875 Constitution of Tonga. With all this in mind, it is not that surprising that Tonga's government, laws, and justice system is quite Eurocentric.

Amid all these changes, a discussion erupted between locals who wanted to revive Tongan customs that were initially banned. Missionaries deemed Tongan customs as heathen activities so practising any Tonga customs were deemed sinful. This included presenting gifts of condolences for funerals. Discussions about reviving these customs arose as the people wanted to present gifts of condolences for the King's son who had passed [173].

Tonga's customs have continued to grow despite the lack of protection by legislation[174]. Tonga's customs and values provide a sense of belonging for Tongans and influence how Tonga has developed as a nation[175]. This was established as *anga fakatonga* (the Tongan way)[176]. The concept and importance of *anga fakatonga* is taught and instilled in children from a young age. The significance of Tonga's values and its correlation to obedience and kinship teaches children that failure to uphold these values is *fakamaa* (shameful) which then brings shame to the family. This, in Tonga's society, is referred to as *vale* (socially inept)[177]. *Vale* refers to behaving in ways that is deemed morally, socially, and legally unacceptable[178]. Therefore, Tongans often promote fulfilling their responsibilities to the community by acting in kindness and love[179].

Social hierarchy and cultural understanding have reinforced rules of respect everywhere in Tonga. For instance, wearing a *taovala* (a unisex dress mat) and *kiekie* (a dress mat for women) is a sign of respect. This is something that has successfully been incorporated into the rules of decorum for the court in Tonga. McKenzie[180] writes that one could not enter the court if these traditional mats are not worn. The only exception to this custom is foreigners and prisoners. The Tongan community exempt 'outsiders' from any obligations or duties owed to the social hierarchy as they simply do not know about it.

Shame on wrongdoing is how a prisoner loses their place in society. Therefore, despite being Tongan and the expectation to abide by the rules of society, they lose their

[173] Latukefu, above n 167.
[174] McKenzie, above n 164.
[175] Latukefu, above n 167.
[176] Marcus, above n 171.
[177] Moana Pahulu Hafoka "Foreigners in Their Own Homeland: An Interpretative Phenomenological Analysis of Criminal Deportation and Reintegration Experiences" (PhD, Washington State University, 2019).
[178] Futa Helu "Identity and change in Tongan society since European contact" (1993) 97 Journal de la Société des Océanistes 187.
[179] Hafoka, above n 177.
[180] McKenzie, above n 164.

place in society once held in prison. The only way prisoners can be reintegrated into society is through forgiveness from both the affected individual, their family, and the community. McKenzie[181] suggested that the concept of forgiveness is fundamental for a legal system in Tonga to be adaptable to a Tongan concept. In Tonga's lowest level court, the Magistrate courts, defendants appear in front of Tongan judges. There is an expectation that before attending court, as a Tongan, one has apologised to the injured party. If an apology was not provided, some Magistrates will order they do so then appear before them again. Apologies in Tonga, like most Pacific countries, have a long history and do not simply refer to a verbal apology. It often involves taking action to show an understanding of one's wrongdoing and humbling oneself[182].

4.2 The Criminal Offences Act

The Criminal Offences Act[183] guides Tonga's justice system. This document consists of 204 clauses to address crime. Punishments for offences committed can be found in part 4, section 24 subsection (1)[184]. This includes monetary compensation, community service, whippings, imprisonment, and death. While it outlines the maximum that can be imposed for fines and the duration, it does not mention if apologies can be taken into consideration for sentencing. However, it does mention that a crime punishable by imprisonment can be given a fine as a substitute [185]. It should be noted prior to the following review that the language in the Criminal Offences Act is gender neutral. Offenders are referred to as "person/persons", there are only a handful of clauses in which a specific gender has been referred to. This occurs in clauses in which specific forms of punishments are outlined. For instance, section 31 addresses whippings in which subsection (1)[186] prohibits the sentencing of females to be whipped. This is also the case for death sentences which prohibits the sentencing of pregnant woman.

The most applicable clause for this thesis is section 204 of the Criminal Offences Act[187], addressing a discharge without conviction. Section 204 subsection (1) notes that if the Court is of the opinion that a conviction is inappropriate, an order can be made. Inappropriate here refers to the circumstances of the case, nature of the offence, and the character of the offender. They have provided two options for such a situation. The first is an order for complete discharge. Second is an order for discharge subject to the offender

[181] McKenzie, above n 164.
[182] McKenzie, above n 164.
[183] Criminal Offences Act 2020 (TO).
[184] Criminal Offences Act 2020 (TO).
[185] Criminal Offences Act 2020 (TO).
[186] Criminal Offences Act 2020 (TO).
[187] Criminal Offences Act 2020 (TO).

not committing any further offences for 3 years. While this section allows for an exoneration, that is not the point. Subsection (3)(b) (iii)[188] allows the Court to make an order of compensation to the victim because of any physical or emotional harm suffered because of an offence. Prior to section 204, there is no other mention of emotional harm being considered.

One fascinating aspect of the Criminal Offences Act is that children aged 7 years and above can be convicted of an offence[189]. If a Magistrate or jury can establish that a child can comprehend the level of their wrongdoing, they can convict them accordingly (s16)[190]. However, there is no separate clause provided for the punishments that inflicted for children or youth offenders. For punishments such as whippings and death sentences, an age restriction is in place. If the offender is a male under the age of 16, a light rod is necessary and cannot exceed 20 strokes. For anyone under the age of under 15 years of age, death sentences cannot be imposed. Therefore, Tonga's justice system restricts corporal punishment from being inflicted on anyone under the age of 15 years. However, it fails to provide how children the age of 7 years and above are to be dealt with. Thus, the only interpretation that can be taken away from this is that monetary compensation, community service, and imprisonment apply to children as well.

4.3 Apologies in court cases

The lack of detail in the Criminal Offences Act leaves judges to consider other case law as precedence for sentencing when faced with circumstances that is not considered in the present legislation. Therefore, looking into cases in Tonga that may provide leeway for restorative justice is necessary. The Criminal Offences Act does not mention or consider apologies as a mitigating factor for sentencing even though it plays a crucial role in Magistrate courts[191].

However, the appearance of apologies in sentencing judgements has evolved over time. Cases heard in 1996 provided a chance for written apologies to be delivered to the hurting party. It is important to note, however, that the cases in which written apologies would be found are not cases between two individuals in which a harm has occurred. For instance, *Fifita v Minister of Police & Kingdom of Tonga*[192] and *Bank of Tonga v Peacock & Peacock*[193] are both cases from 1996 and are not between two individuals in which

[188] Criminal Offences Act 2020 (TO).
[189] Criminal Offences Act 2020 (TO).
[190] Criminal Offences Act 2020 (TO).
[191] Criminal Offences Act 2020 (TO).
[192] *Fifita v Minister of Police & Kingdom of Tonga* [1995] TOSC (TOSC).
[193] *Bank of Tonga v Peacock & Peacock* [1996] TOSC (TOSC).

reparation must be sought. Rather, it is a case between an individual and an organisation or between two organisations.

Written apologies were delivered in both instances and neither had a significant influence on the outcome. While apologies are a key component of restorative justice, the focus is the influence of apologies in criminal cases between two individuals. Restorative justice focuses on the harm suffered by an individual and by extension, the family and community. Therefore, cases that specifically involve two individuals in which apologies made an appearance will be mentioned. The purpose behind this is to focus on the evolution of apologies itself from written to a traditional Tongan apology. The question here then, is whether it was considered a mitigating factor in sentencing.

In 1998, in *Vaka'uta v Napa'a* [194], a case regarding psychological harm suffered by the plaintiff after witnessing the death of her son. In 1997, the defendant drove a truck recklessly on the road and struck the 9-year-old. The plaintiff put forward that the defendant caused psychological injury due to negligence. In this case, the defendant submitted to the court that damages should be dismissed as he offered his apology and gifts to the plaintiff as a part of his obligation as a Tongan. The judge noted that the apology was provided and accepted by the plaintiff. However, the judge also noted the lack of customary law in Tonga which limits its recognition.

In 2001, a significant case to note is the drink driving case of *R v Holani*[195]. The defendant in this took the family van and drove recklessly on the road with several passengers in the car. He eventually lost control of the vehicle and collided with a parked vehicle. This resulted in the death of one of the passengers and several other passengers injured. However, the defendant could not recall any of these events due to his level of intoxication. The defendant was initially sentenced to 18 months imprisonment, suspended for two years subject to his enrolment in an alcohol education course. He was also instructed to abstain from consuming alcohol for the duration of his sentence and disqualified from driving for three years.

The Court of Appeal intervened in the case as they found that too much weight had been given to the mitigating factors rather than the weight of the offence. One of the mitigating factors considered was the traditional Tonga apology offered to the grieving family. The judge noted the remarkable attitude displayed by the grieving family in the letter provided to the Court. The family noted plead for the court to display mercy on the defendant as they considered him as their son. The most notable part of the letter is they

[194] *Vaka'uta v Napa'a* [1998] TOSC (TOSC).
[195] *R v Holani* [2001] Court Appeal (Court Appeal).

asked for the defendant to be fined and they will pay on his behalf. The judge noted that while this can be considered as a mitigating factor, it is only to a certain extent due to the gravity of the offence. The 18 months imprisonment sentence and disqualification from driving for three years were upheld. However, the suspension of his sentence and orders that the defendant refrain from drinking and enrol in an alcohol education course were quashed.

In 2004 case, *R v Saafi*[196], is a remarkable case to note as this is the first time where the importance of considering culture has been mentioned. This is a manslaughter by negligence case which resulted in the death of two passengers and various injuries to the remaining five passengers. The driver claimed to have lost consciousness due to the combination of exhaustion and alcohol. The judge noted in his sentencing remarks that the defendant offered tradition Tongan apologies to both families of the deceased and has offered a verbal apology to the Court. The most notably portion of the sentencing remarks is that the judge noted that the Courts in Tonga have the right to consider the attitude of victims' families in sentencing.

The judge noted that this is especially true in a country like Tonga where the culture places emphasis on apology and restitution. Further noted in the sentencing remarks that this important for how victims deal with the aftereffects of the offence in the community. As the defendant is a young, first-time offender who displayed great remorse and accountability, a suspended sentence was imposed. He was sentenced to 120 hours of community service, attend a rehabilitation program, and disqualified from driving for 2 years. The judge ordered that if the defendant wishes to start driving again after the 2 years, he is to obtain his driver's licence first.

However, sentencing judgements in 2012 starts noting that apologies were made to families and whether it had been accepted. This can be found in *Rex v Tau'alupe*[197], a drink driving case which resulted in the death of one of the passengers. In this case, a family conference was conducted in which the defendant, the defendant's family, and the victim's mother participated in. The judge notes a report was provided regarding these proceedings as the defendant's counsel felt the need for restorative justice to be utilised. However, the only mitigating factors noted for the judgment is that the defendant was a young first-time offender. Further noted is that the defendant stayed behind at the crash site to assist the victim, the police, and pled guilty. The judge noted that despite the counsel's attempt for restorative justice, the crown's approach is more orthodox.

[196] *R v Saafi* [2004] TOSC (TOSC).
[197] *Rex v Tau'alupe* [2012] TOCA (TOCA).

The essence of Tongan culture of collectivism and shame appeared in the courts in 2008 case *R v Hu'akau*[198]. This is a case in which a 27-year-old sexually assaulted a 9-year-old girl where he lured the child to his house by requesting, she run an errand for him. After sexually assaulting her, he gave her 50 cents to run the errand he initially called her to the house for. The child, rightly, went straight home and reported him to her mother. The judge noted that this offence, alongside murder and treason, is the most serious. The victim not only suffered physical harm but has been greatly affected psychologically.

The judge noted accounts by the parents who put forward that her behaviour has since the offence, and they will be moving out of the country as a means of helping her to heal. While the defendant was imprisoned, his family presented a traditional Tongan apology to the aggrieved family on his behalf. The defendant's father is a church bishop and following Christian values, continues to support his son. However, in line with the Tongan culture of shame, the extended family reported he should change his surname as he is a disgrace to the family. The defendant was sentenced to 8 years imprisonment with no suspension. His sentence was reduced from 11 years to 8 due to his guilty plea, lack of previous convictions, and his display of remorse.

An appeal in 2010 illustrated the importance of Tongan apology and restitution as a mitigating factor. *Kofutu'a v R* is a manslaughter case in which the defendant brutally beat the victim for lying about having cigarettes at her home that they could pick up. The victim was able to make it back to her home but later died in the hospital due to a brain injury caused by the beating. The defendant was initially sentenced to 15 years imprisonment which was then appealed by his council and reduced to 13 years with three years suspended. The appeal was accepted, and sentence reduced as the sentencing judge had not considered all the mitigating factors in his sentencing. One of the mitigating factors noted in the appeal determination is that the defendant's family made a great degree of restitution to the grieving family on his behalf. Other factors included the age of the defendant and the lack of provocation in the attack.

There are a few cases in 2014 in which apologies were made and accepted by the receiving party. One to note is *Rex v 'Ofa anors*[199], a case regarding child abuse which resulted in the death of the child. There were three participants in this case in which one had made an apology to the child's father and family. The apology was accepted by the family and noted by the court. This defendant's sentence was reduced from five years to two years. There are other mitigating factors that influenced the reduction of this sentence

[198] *R v Hu'akau* Supreme Court CR 16/2008.
[199] *Rex v 'Ofa anors* [2014] TOSC (TOSC).

with the judgement implying the apology being one of them. The amount of influence the apology had on the sentencing is not noted. However, it is a great starting point.

Another case is, *Hu'ahulu v Rex*[200], a case of rape in which the sentence was reduced from 13 years to five. At the time of the ruling, the offender accepted the jury's verdict and apologised to the victim's family for his actions. Therefore, taking into consideration the mitigating factors, the sentence was reduced to five. Mitigating factors included that he was of a young age, a first-time offender, accepted the verdict delivered, and that he had apologised.

2015, is a year of interest. There are two cases that should be noted for the same reason. It was the first time in which a traditional form of apology appeared in judgements as something to consider. This does not this is the first time traditional Tongan apologies has made an appearance in court. However, it is the first instance in which it was recognised as something significant to Tongan culture. *R v Nisa*[201] is a manslaughter case in which the victim was stabbed several times with a knife by a 16-year-old offender. The sentencing judge held that a formal ceremony was offered by the offender and his family in which gifts and apologies were presented to the family of the deceased. The family noted that the defendant showed remorse and thus forgave him for his actions. The judge noted during sentencing that apologies are an important aspect of Tongan culture and allowed for a six-month reduction as a mitigating factor.

R v Helu[202] is a manslaughter case in which the importance of apologies in the Tongan culture had been noted for sentencing. The victim was beaten to death by a 19-year-old offender. The offender pleaded guilty and accepted responsibility for his actions in causing death to another individual. He made an apology to the family of the deceased which resulted in the father of the deceased writing to the court to inform the court that they accepted the apology. The judge noted in sentencing the remorse and acceptance of apologies are not only important to Tongan culture but small nation in which communities live closely together. The judge allowed three and half year's mitigation.

While only a select few cases were chosen, it adequately depicts the evolution of apologies as well as the growth of its influence in the sentencing process in Tonga's justice system. Apologies have evolved from written form that did not bear much influence in the sentencing process to traditional forms of apologies and its importance being noted in sentencing. Despite this growth, it does not change the fact that Tonga's Criminal Offences

[200] *Hu'ahulu v Rex* [2014] TOCA (TOCA).
[201] *R v Nisa* [2015] TOSC (TOSC).
[202] *R v Helu* [2015] TOSC (TOSC).

Act is lacking. This is especially evident when compared to neighbouring Pacific Countries.

4.4 Comparative analysis of chosen Pacific legislations

Considering the findings in section 4.3, it is only reasonable to compare and analyse these findings against relevant legislations from other neighbouring countries. These legislations and countries are chosen based on similarities in culture, tradition, customs, and values to Tonga. This will allow for a closer look at the gaps inherent in Tonga's legislations.

4.4.1 Fiji Sentencing and Penalties Act

For instance, in Tonga, a separate legislation dedicated to sentencing procedures does not exist. However, Fiji has their 2009 Sentencing and Penalties Act[203] as a guideline for sentencing as well as the Criminal Procedure Act 2009[204] which outlines what is deemed as criminal in the court of law. However, it also has a dedicated legislation to how these crimes are to be sentenced. One of the most interesting parts of the Sentencing and Penalties Act is Part 2[205].

This section includes emotional and psychological harm suffered by the victim. Albeit it refers to domestic violence cases, but this section considers whether the offender sought out counselling or assistance for their offending behaviour. Tonga's Criminal Offences Act[206] also considers emotional and psychological harm, however, it is only mentioned at the end of the legislation with regards to suspending a conviction. This section also considers whether the offender has made any effort to make restitution for the injury, loss, or damage suffered by the victim because of an offence. The judge is to take this into consideration when sentencing an offender. Thus, implying that the court expects the offender to be proactive in righting their own wrongs before sentencing.

Part 11[207] of Fiji's Sentencing and Penalties act is dedicated to the involvement of traditional and community leaders. This section is surprising for three reasons. First, it is expected for traditional and community leaders to be involved in the sentencing process. Second, their involvement influences the sentencing processes as their part is to identify and review what the appropriate sentences are for certain offences. Third, if there is a case presented in which the involvement of traditional and community leaders is not necessary,

[203] Sentencing and Penalties Act 2009 (FJ).
[204] Criminal Procedure Act 2009 (FJ).
[205] Sentencing and Penalties Act 2009 (FJ).
[206] Criminal Offences Act 2020 (TO).
[207] Sentencing and Penalties Act 2009 (FJ).

the court has the power to involve them if they wish to do so. This section is of particular interest when compared to the lack of power the chiefs in Tonga have over disputes. It must be reiterated the dispute resolution was in the power of the chiefs until the involvement of missionaries. The power to respond to disputes shifted to the magistrate courts when the Code of 1839[208] was implemented. This section could be modelled if restorative justice was to be implemented in Tonga.

Part 7[209] of this legislation must be mentioned. This details what other sentences could be ordered if the judge feels that the circumstances of a case does not meet the general sentencing provisions outlined in part 4[210] of this legislation. This section notes that the Sentencing and Penalties Act, essentially, does not limit the power of a judge to impose any other sentence they deem necessary. This section goes on to detail regulations that give effect to schemes for sentencing orders. The purpose here is to not limit the ability of a judge to impose any other sentence that may also meet the provisions provided in section 4[211], even if it is not explicitly listed.

4.4.2 Samoa Sentencing Act

Samoa has four legislations that guides its criminal justice system. First is the Crimes Act[212] which outlines what is considered criminal in the court of law. Second is the Criminal Procedure Act[213] provides insight into how court proceedings occur for each jurisdiction. Third is the Community Justice Act[214] for the purposes of guiding judges in implementing community-based sentences. Part 2 section 6 outlines that the Court has the authority to encourage or facilitate an agreement in accordance with Samoan customs and traditions. This is of importance as this is the section that allows for sentences to carried out according to Samoan customs and traditions which is includes the *ifoga* mentioned in chapter two. Samoa is another Pacific country with an existing Sentencing Act[215]. The act consists of four parts totalling to 89 articles, yet it is more detailed than the 204 found in Tonga's Criminal Offences Act[216]. The point of difference here is similar to that found in Fiji's Sentencing and Penalties Act[217] – a separate legislation dedicated to guiding the sentencing

[208] Appendix A in Latukefu, above n 167.
[209] Sentencing and Penalties Act 1990 (FJ).
[210] Sentencing and Penalties Act 1990 (FJ).
[211] Sentencing and Penalties Act 1990 (FJ).
[212] Crimes Act 2013 (WS).
[213] Criminal Procedure Act 2009 (WS).
[214] Community Justice Act 2008 (WS).
[215] Sentencing Act 2016 (WS).
[216] Criminal Offences Act 2020 (TO).
[217] Sentencing and Penalties Act 2009 (FJ).

process. That is already more responsive to crime than the Criminal Offences Act. Reason being is that it allows for further consideration of the environment it is applied in.

Like Fiji, there is a section in this legislation that notes whether an offender was proactive in making amends with the victim. Specifically, subsection (b) of section 2 notes that the judge may consider if there was an agreement between the two parties for reparations[218]. It is important to note the victim is involved in deciding how the offender may make amends. However, the most interesting part in this section is that it takes into consideration how the defendant's family or family group responded to the offence. The inclusion and consideration of kinship in this process is worth noting as most Pasifika cultures is founded upon a collective community. While Fiji's Sentencing and Penalties Act[219] includes the traditional and community leaders, it does not consider the role the family plays in the response. Respect for elders is part of any Pasifika custom, however, the importance placed on kinship is pertinent to Pasifika custom. Responsibility placed upon the family and family group because of one's action is prevalent throughout the Pacific as there is importance placed on the tight knitted relationship. This is also something that is knitted into the social fabric of Tonga. However, it is not evident in its founding laws nor the Criminal Offences Act[220].

The Sentencing Act includes a section in Part 2 that outlines the mitigating factors that the judge must consider during sentencing[221]. There are a few subsections in section 6 that are of particular interest. Subsection (f) notes the effect of an offence on a victim must be considered and subsection (h) allows for the overall environment that the defendant is to be taken into consideration. The reason why these two subsections are of interest is that these are surrounding factors that are not often taken into considered in a justice system that is heavily retributive.

4.4.3 New Zealand cases

When considering restorative justice in its relation to Tonga, the overarching values and principles must be considered. The four core values refer to *mo'ui fakatokolahi* which maintains that Tonga's society should live in a cooperative manner. They are expected to achieve this by helping each other (*fetokoni'aki*) to cultivate healthy relationships (*tauhi vā*). In cultivating and maintaining healthy relationships, it is expected that every member

[218] Sentencing Act 2016 (WS).
[219] Sentencing and Penalties Act (FJ).
[220] Criminal Offences Act 2020 (TO).
[221] Sentencing Act 2016 (WS).

of society will fulfil their cultural obligations (*fatongia*) to each other and the community[222].

Separate to the overarching values of Tonga, there are the principles held in the *faa'i kavei koula*. The first principle is *faka'apa'apa* which expects that mutual respect will be shown to all members of society. This is especially true for members of society that Tongans are culturally obligated to show respect to (royal family, elders, and those in leadership roles)[223]. The second principle is *tauhi vā* which incorporates *fetokoni'aki*. It is expected that members of society are to cultivate a healthy relationship with all members of society by connecting, cooperating, and helping one another to maintain harmony in the community. Third principle involves *anga fakatōkilalo* which expects all members of society to behave in a manner that shows humility. This principle works in conjunction with the final principle – *mamahi'i me'a* – which can be translated as loyalty, commitment, and/or obedience. This principle believes that all Tongans must show commitment to all their obligations – familial, cultural, or religious – with the utmost humility. This, in turn, contributes to further cultivating relationships.

Section 4.1 of this chapter highlighted that Tonga was built upon King George's love for Christianity. Tonga's overarching values and principles are interwoven with the Christian belief that Tonga was founded upon[224]. McElrea[225] notes the connection between Christianity and restorative justice. Restorative justice values consist of, *"repentance, forgiveness, reconciliation, renewal,* [and] *healing."*[226].

Restorative justice provides participating parties with the opportunity to have grace. Both for each other but also for the situation. It is through this grace that opens an environment for the values of restorative justice to thrive. For instance, when participating in restorative processes, forgiveness is something that can only be provided by the victims. However, victims are not forced to express forgiveness. It is only because the victim is genuine seeking a better outcome for both participants that allows for restorative justice to proceed.

This is evident in the expressions of apologies noted in the cases outlined in section 4.3. However, genuine expressions of remorse where forgiveness, reconciliation, and

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[222] Telesia Kalavite "Indigenous Intergenerational Relational Rhythms: Sustaining Tongan language and Culture Across Time (Tā) and Space (Vā)" 8 Art/Research International 636.
[223] Helen Kavapalu "Power and Personhood in Tonga" [1995] 37 Social Analysis: The International Journal of Social and Cultural Practice 15.
[224] Kalavite, above n 222.
[225] Fred WM McElrea "Restorative Justice: a Christian approach to conflict resolution" [n.d] (49) 49 Reality Magazine.
[226] McElrea, above n 225.

healing were achieved in the restorative justice process is more evident in the sentencing remarks of more recent cases in New Zealand. This is not to undermine the genuine expressions of remorse displayed in the previously mentioned cases. However, the cases in Tonga are expressions of apologies and restitution. It does not go the extra mile to include open dialogue between parties. It is important to note though, that open dialogue can only take place with the consent of both parties. Particularly the consent of the victim.

A case in New Zealand which highlights the importance of restorative justice for healing is *R v Harvey*[227]. This is a case which resulted in the loss of a life. In 2022, a man, his partner, and friend decided to test drive their four-wheel drive vehicle down one of the fords. Despite the extreme rainfall, the defendant wanted to see how his newly purchased vehicle would fare in these conditions. The notable fact of this case is that the defendant and his friend were aware that things could go very wrong. The judge notes that this is indicated with how they took their seatbelts off and wound their windows down. The victim in this case, did not do either. The flow of the water forced the vehicle off the ford and to roll over several times 15 to 20 meters downstream. The defendant and his friend were able to escape, however, the victim was unable to due to the force of the water. She evidently drowned and was later found by Search and Rescue.

An additional charge of burglary and intimidation was added on top of the reckless driving causing death charge due to an incident that occurred. In August, the defendant drove intoxicated to the friend's house, forced his way inside and kept repeating that he was sorry. The friend kept pleading that the defendant to stop because his son was in the house. However, the defendant failed to do so. These charges were added due to the significant emotional harm suffered by the friend and those present.

In sentencing, the judge noted the strength displayed by the defendant to sit in a room full of people who have suffered the loss of their loved one. While the judge did not go into detail regarding the report, out of respect for the family, he did note that it was a productive meeting. The judge noted that the family were receptive to the process, did not blame the defendant for what occurred, and that there was open and honest dialogue exchanged. An interesting outcome from this restorative process is the discussion future counselling sessions that the defendant could participate in and that they all wish to stay in touch moving forward. As a result of this, the family had requested leniency during sentencing. For the charge of reckless driving causing death, the sentence was reduced from 30 months imprisonment to seven months home detention. He was also to complete 150 hours of community work concurrently. For the burglary charge he was given 2 months

[227] *R v Harvey* [2023] NZDC (NZ).

home detention and one month home detention for the intimidation charge – served concurrently. The defendant was further disqualified from holding or obtaining a driver's licence for one year from the date of sentencing. This was the sentencing provided after discounting the guilty plea, restorative justice report, pre-sentencing report, and victim impact statements.

A case in New Zealand that highlights the weight of restorative justice processes in sentencing reports is the case of *R v Littlewood*[228]. This is a case that took place in the district court of Christchurch in 2024. The defendant stole a total of $464,000 from her employer from the year 2012 until her misconduct was discovered in 2023. From 2023 up until her sentencing hearing in September 2024, the judge notes that her various expressions of remorse. The first is the defendant's expression of guilt and noting *"I lied, I stole, and I am full of guilt"*. The judge noted that she did not shy away from her role in the misconduct and provided a deduction for this.

The judge noted that the restorative justice report was impressive and detailed. The victim in this case was her workplace so her boss participated in the conferencing process. The judge noted that boss was extremely receptive to the process and tried to participate in a supportive and understanding manner. The restorative justice report received another deduction from the total sentencing. The judge also considered the defendant's attempts for reparations. The judge noted that the defendant tried all avenues available to her so that she could repay the amount stolen. This included selling her portion of her home and withdrawing from her KiwiSaver account. A deduction was awarded. In totality, the sentencing was discounted from 5 years to 2 years after considering character, guilty plea, reparations, victim impact statements and restorative processes.

Both cases illustrated the impact of restorative justice processes in the court proceedings. Other than the sentencing process, the overall impact of the restorative process on the relationship between both parties. The judge in *R v Littlewood*[229] noted that it was impressive that the defendant's boss (the victim) ultimately showed his support for the defendant despite the misconduct that had occurred. This was reflected in the discount he provided for sentencing. The same ultimately occurred in the case of *R v Harvey*[230]. The judge in this case noted that prior to his sentencing, he needs to consider the request made by the family for leniency. It should also be noted that one of the results from this

[228] *R v Littlewood* [2024] NZDC (NZ).
[229] *R v Littlewood* [2024] NZDC (NZ).
[230] *R v Harvey* [2023] NZDC (NZ).

restorative conferencing is that it provided the defendant with the opportunity to seek further counselling.

4.5 Conclusion

In conclusion, this chapter has provided insight into the areas of Tonga's justice system that can be considered for further improvement. The most notable being the failure to address youth offenders adequately as well as include clauses that allow for Tonga's traditional customs to be considered in sentencing processes. In comparing Tonga's justice system with Samoa and Fiji, it has become evident that Tonga lacks a separate legislation dedicated to guiding the judges in the sentencing phase of trials. This may be starting point to consider for formalising traditional Tongan apology in the law akin to Samoa and Fiji.

This is a starting point that should be explored further as it is evident through this chapter that Tongan apology has been recognised by the courts. A series of cases have been provided which outline the timeline and evolution of its recognition in the court process. One facet to note is that the apologies were performed without being prompted by the courts. This illustrates the strength of Tongan culture and customs. The only aspect left to be addressed is the lack of support from the law for Tongan culture and customs. This has also been noted in 1998 case *Vaka'uta v Napa'a.* where the judge noted the lack of customary law in Tonga.

The lack of recognition for Tonga's customs and traditions is not surprising when Tonga's history is taken into consideration. Section 4.1 outlined that Tonga's history and highlighted the heavy influence of western missionaries on the creation of Tonga's laws and legal system. Despite this, Tonga's traditions and values has prevailed which is notable and should contribute as a motivating factor for formalising its place in the justice system.

Chapter Five – Restorative Justice

5.0 Introduction

Restorative justice is a process in which all parties injured by an offence are provided an opportunity for open dialogue to discuss the extent they have been harmed. Through this process, the participants openly discuss how the harm can be repaired. Braithwaite[231] stated that the concept behind restorative justice is that if crime results in harm, the justice should process should heal. Following this, restorative justice posits that those affected by an offence committed should be central in the justice process.

The following chapter will review literature regarding restorative justice principles and practices with consideration for the gaps in Tonga's justice system highlighted in chapter four. The sentiment here is that restorative justice principles agree with the founding principles of Tonga's social fabric. If the intention behind restorative justice naturally coincides with the principles and values of Tonga, the only other obstacle for implementing restorative justice as a practice would be the current justice system. Thus, the following chapter aims to further explore restorative justice principles and practices that could enrich existing customs and practices of Tonga.

5.1 Restorative justice principles

There are three main principles which underpin the restorative justice process. There have been various variations of restorative justice principles as the body of literature continues to evolve. However, the intent behind these principles remains the same. The first principle – justice heals - promotes that justice is achieved when the process focuses on repairing the harm caused by an offence.

This principle is intended to address the needs of the victim, offender, and the community[232]. As the overall expected outcome of restorative justice, this became the overarching principle for the movement. This principle aligns with one of Tonga's core values – *'ofa* (love). As mentioned in the literature review provided in chapter two, Tonga's core values are founded in Christian principles in which forgiveness is heavily emphasised. With *'ofa* (love) as a core value, it is expected that forgiveness will correspond when the circumstances call for healing. These are principles and values not only complement each other but enrich the overall experience and restorative justice process.

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[231] John Braithwaite "Restorative Justice and De-Professionalization" (2004) 13 The Good Society 28.
[232] Van Ness and Strong, above n 40.

The second principle provided is that justice is inclusive[233]. This principle seeks to provide all affected participants with the opportunity to be actively involved in the justice process according to their wishes. The current justice system allows the government to monopolise the justice system process while shifting the directly affected parties into a passive position[234]. This results in offenders being silenced in the court room while the lawyers to act as their representative. Meanwhile, the victims are not heard nor are their needs are taken into consideration during the entirety of the process. The community, throughout this justice process, are barely acknowledged. Therefore, there is no incentive for them to assist in the reintegration and rehabilitation process. Not only does the process fail to flow, but it is also staggered and fails to provide a satisfying outcome for the parties involved. Thus, this principle was created to restore that flow into the justice process and promote that true justice results in healing[235]. Through this principle, the process seeks accountability from the offender. Any practices applied should be able to provide the offender the opportunity to take accountability for their actions and the aftermath of their actions.

The third and final guiding principle for restorative justice is that justice shares. Van Ness and Strong[236] explain this principle to promote the role and responsibility that both the government and community hold in the justice process. The government plays a role in upholding a just order whereas the community is responsible for maintaining a peaceful society. This requires fostering an environment in which both the offender and victim can be successfully reintegrated and rehabilitated back into the community. When reintegrating and rehabilitating parties are successful, the previously broken social relationship is restored and a sense of belonging in the community has been instilled[237]. This involves the community coming together and committing to respecting each other's rights. The rights they have as a community must also be considered. The community has a right to address and resolve conflict that occurs within their community as that is origin of the issue.

One of the core values for Tonga involves *faka'apa'apa* (respect) and *fetokai'aki* (humility). Both values are at its strongest when applied together. For respect to be applied in any context, one must find a sense of humility first. The humbling of oneself allows for

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[233] Helen Bowen, Jim Boyack and Stephen Hooper *New Zealand Restorative Justice Practice Manual* (Restorative Justice Trust, Auckland, 2000).
[234] Margaret Urban Walker "Restorative Justice and Reparations" (2006) 37 Journal of Social Philosophy 377.
[235] Daniel W Van Ness and others *Restoring Justice* (Routledge, 2022).
[236] Van Ness and Strong, above n 40.
[237] Paula Kenny and Liam Leonard *The Sustainability of Restorative Justice* (Emerald Group Publishing, 2014).

the community's interests to be placed above individual interests even if both interests are not in agreement. This is the collective nature of indigenous communities that promote the community's harmonious existence. Once all the moving parts within a community is restored, peace is achieved.

5.1.1 Restorative justice principles and Tonga

The overall theme in restorative justice is that it provides a considerable amount of weight to reconciliation and reciprocity. If the process employed results in both parties reconciling by reciprocating in open and honest dialogue, it is considered to have fulfilled the restorative needs. This aligns with the overall aim of the four golden strands in Tonga. It is intended to produce a community that is living harmoniously by reconciling their differences and reciprocating each other's needs. The overall question here is how this can translate into a legal framework. As New Zealand has the most robust form of literature regarding restorative justice, it is best to consider their perspective for incorporating indigenous values.

Restorative justice was essentially implemented as a means of responding to the overrepresentation of Māori offenders in the prison system. Maori concepts relating to justice have received greater attention by policymakers to respecting the Treaty of Waitangi. This can be seen in the Sentencing Act 2002 section 8 which opted to include the consideration and inclusion of the offender's family, whanau, community, and cultural background in sentencing. The inclusion of the overall whanau community can be seen in the Family Group Conferencing adopted in the restorative processes which allowed for extended families to be included in the mediating process. In 2008, the Rangatahi Courts were established in different parts of the country in response to Māori youth offenders. The Rangatahi Courts operate within the currently established legal framework. However, it also utilises the tikanga Maori which allows for the Family Group Conferences to take place in a *marae* (traditional meeting house)[238].

5.1.2 Restorative justice and New Zealand

To gain deeper insight into potential legislative frameworks for integrating restorative justice into Tonga's justice system, it is imperative that comparisons are drawn from a neighbouring nation. This will provide a better appreciation of how Tonga's culture and values can form a basis for an effective and successful restorative justice system in Tonga. As New Zealand is a leading nation for establishing restorative justice practices, it seems

[238] Global Research Dictorate *Legal Research Guide: Māori Customary Law* (LL File No 2013-009216 2013).

most appropriate as a comparison. Especially with regards to the role Māori culture and values played in informing the restorative processes established.

Chapter 2 provided a brief history of New Zealand's journey with restorative justice. As it implied, the beginning of restorative justice was not a result of parliamentary action but rather due to local activists wanting a more modern justice response[239]. Similar to Tonga, New Zealand's criminal justice system was modelled after British Criminal Law. It is a system that is adversarial and focuses on conflict and confrontation rather than cooperation. The lack of cooperation in a justice system results in alienating the victim and defendant in the process and renders it subservient to gamesmanship and evidence. Jackson[240] puts forward that this a result of a justice system that is shaped by Pākehā values, traditions, and concepts of justice. A justice system that essentially removes crime from the community and social circumstances prevents the opportunity for a collaborative response. This contributes to the rates of reoffending. Jackson[241] attributes this to the level of recidivism in Māori offenders, noting the disconnect in values upheld by Māori and a Western justice system.

Māori beliefs and practices are embodied by *tikanga*[242]. *Tikanga* governs Māori society and provides a framework and tools for thought and understanding[243]. For Tonga, this is embodied in the overarching values and principles held by Tongans to guide how they maintain their society. Initially, Māori *tikanga* was not recognised as a part of common law in New Zealand. However, the tumultuous journey that Māori have gone through to have culture and custom recognised in the legal system provide insight for Tonga's situation.

The Waitangi Tribunal began in the 1980s in which the old common law of Māori was rediscovered. Rediscovered in the sense that Māori customs was initially recognised in the 1856 Constitution. This provided allowed for Maori customs to govern certain districts in New Zealand. However, this was later repealed in the Constitution Act 1986[244].

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[239] Sarah Mikva Pfander "Evaluating New Zealand's restorative promise: the impact of legislative design on the practice of restorative justice" (2020) 15 Kōtuitui: New Zealand Journal of Social Sciences Online 170.
[240] Moana Jackson "Criminality and the Exclusion of Maori Essay on Criminal Law in New Zealand—Towards Reform" (1990) 20 Victoria University of Wellington Law Review 23.
[241] Jackson, above n 235.
[242] New Zealand Law Commission *Māori Custom and Values in New Zealand* (Law Commission, Wellington, New Zealand, 2001).
[243] Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law The Harkness Henry Lecture" (2013) 21 Waikato Law Review 1.
[244] David W McIntyre "Self-Government and Independence—New Zealand Constitution Act 1852" (2012) Te Ara - the Encyclopedia of New Zealand <https://teara.govt.nz/en/self-government-and-independence/page-2>.

Williams[245] notes the pioneering legislative changes for recognising Māori customs came about from the 1980s to the 1990s with the environmental and family laws. These changes later snowballed and eventually reached the sentencing laws.

The parliament passed the Children, Youth Persons, and their Families Act 1989 which overhauled the treatment of youth offenders. This institutionalised the use of the Family Group Conferencing[246]. This was quickly viewed as a success with regards to justice reform. Therefore, one of the leading advocates of restorative justice – Judge Fred McElrea – quickly advocated those restorative processes be extended to adult offenders[247].

Thus, conferencing and mediating processes were piloted in small areas of the country in the 1990s[248]. The very first restorative justice group was founded in 1995 called Te Oritenga and offered community group conferences. Other restorative justice groups started forming and offering community group conferences across the country. These groups would consist of *"…social workers, lawyers, religious ministers, teachings, and other community organisers"*. These panels, such as the Te Whanaua Awhina on the Hoani Waititi Marae received government funding to support their community panels[249].

It is groups such as these early community panels that led to a four-year pilot programme implemented by the Ministry of Justice in 2001. This involves court-referred cases for community conferencing in four district courts. The result of this four-year pilot programme would lead to the Parliament passing three criminal justice acts to incorporate restorative justice into New Zealand criminal justice system.

In section 6 of the Corrections Act, subsection (1)(d) notes that one of the guiding principles of the corrections system is that offenders are to be provided with access to processes that are designed to promote restorative justice between offenders and victims. This legislation outlines the guiding principles to consider when offenders are on home detention or due for release. Prior to releasing an offender, subsection (2)(d) of section 7 notes that the parole board must ensure that the rights of the victim and restorative justice outcomes/reports have been provided the appropriate weight. Section 43 subsection (1)(b) requires that the Department of Corrections inform the Parole Board if the offender has engaged in any restorative justice processes and any reports that arise from it.

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[245] Williams, above n 243.
[246] Emily Watt "A History of Youth Justice in New Zealand" 6 Court in the Act.
[247] Douglas Bruce Mansill "Community Empowerment or Institutional Capture and Control? The Development of Restorative Justice in New Zealand's Adult Systems of Social Regulation, Control and Punishment" (Auckland University of Technology, 2013).
[248] Helen Bowen and Jim Boyack "Adult restorative justice in New Zealand/Aotearoa" Plenary Speakers.
[249] Pfander, above n 239.

The Victims' Rights Act 2002 notes in section 11 that when victims encounter a government agency, they must be provided with information regarding agency, programmes, remedies, and services available. This legislation notes services as restorative justice processes. Section 9 states that victims are also provided the opportunity to request restorative justice meetings with the offender[250].

The Sentencing Act 2002 refers to restorative justice in 7 different sections – 8, 24A, 25, 26, 62, 69E, and 80C. First, is the most well-known section 8 which refers to the principles for sentencing and dealing with offenders. This section is known for section (i) which directs judges to consider *"...the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose"*. This is the first instance in which the background, whanau, and culture is taken into considering for sentencing. However, section (j) explicitly illustrates that restorative justice conferencing has an influence on sentencing procedure. This section notes that the judge must consider the outcomes of restorative justice processes that have occurred or likely to occur in relation the case at hand.

The Sentencing Act 2002 provided the judge with the discretion to refer cases to restorative justice processes if they deemed it appropriate. However, the Sentencing Act Amendment 2014 inserted a new section – 24A. This new section required the judges to adjourn proceedings prior to sentencing so that restorative justice processes could take place. This section allowed for an appointed coordinator to make inquiries into the case and explore whether restorative justice would be appropriate. In subsection (2)(a), it is also noted that the wishes of the victim must also be taken into consideration. A considerable shift in language that implemented a tool for victim advocacy in legislation. This notes the victim's wishes as one of the inquiries that must be met prior to deeming if a restorative justice process is appropriate.

As restorative justice also aims to prevent future offences by addressing the root of the issue, section 71 of the Sentencing Act 2002 should be noted. This section allows the offender that a judge hear from a person/s of their choosing at sentencing. Section 27(1)(a) notes that the selected person/s is to inform the judge on the offender's *"personal, family, whanau, community, and cultural background…"*[251]. Section 71 has a specific deterrence method in that it allows for the options exhausted by the family, whanau, and community to prevent offending behaviour and what support is available for the future.

[250] Judge Louis Matthew Bidois "The value of restorative justice" (2016) 42 Commonwealth Law Bulletin 596.
[251] Sentencing Act 2002.

Subsection (1)(e) allows the court to take this information into consideration, if relevant, to the sentencing at hand

5.2 Restorative justice practices

There are three core practices in restorative justice – circles, family group conferencing, and victim-offender mediation. All three practices have one aspect in common, it requires facilitating a conversation between the parties involved. Restorative justice promotes healing by opening a discussion between the parties to encourage honest dialogue regarding the consequences of the offence. Thereby integrating the restorative principles of healing and inclusion mentioned in section 5.1. The difference between the three restorative processes is the origin of the method and how the process is facilitated.

The victim-offender mediation process originated in Ontario Canada in 1974. The judge who applied this process believed that a face-to-face meeting between the victim and offender would be therapeutic. This process has many variations which allows for adaptations to be made depending on what the circumstance calls for. Some victim-offender mediations involve arranging a face-to-face meeting between the victim and offender for settlement purposes – restitution. More commonly applied victim-offender mediations involve meeting with a mediator to engage in meaningful conversations[252].

The circle process is based on the indigenous values and culture of the North Americans. This was established in 1990 as the "sentencing circle" process. As stated in the name of this process, this method is traditionally employed prior to the sentencing process. This method is community based and involves the affected parties, their families, supporters, as well as the community. This method is the only one out of the three core practices that empowers the participation of the community. With the involvement of the community, sentencing circles incorporates all three principles of restorative justice[253]. Johnstone and Van Ness[254] further noted that since the community is involved in sentencing circles, this method could also be applied for resolving community disputes. As a part of the culture and tradition in North America, the participants come together, sit in a circle, and then pass an object (talking piece) clockwise. Only the person holding the object is permitted to speak and they are free to talk about whatever they wish in relation to the topic the circle has been for.

[252] Gerry Johnstone and Daniel W Van Ness *Handbook of Restorative Justice* (Routledge, 2013).
[253] Tina Maschi and George Leibowitz "Restorative Justice" in (SAGE Publications, 2014) 3.
[254] Johnstone and Van Ness, above n 252.

Family group conferencing, as mentioned in chapter two's literature review, originated from New Zealand in 1989. The key difference between conferencing and the mediation process is that family group conferencing, as stated in the name, empowers the support of the families and extended families. Victim-offender mediation process involves utilising the facilitator as a means of communication to ensure that discussions are conducted in a safe space. The most notable point here is that family group conferencing conducts a meeting in which the offender and victim alongside their families to discuss and reach a solution[255].

This method was based on the cultural values of both Māori (indigenous people of New Zealand) and aboriginals (indigenous people of Australia). Outcomes of this process have proven successful in reducing the rate of reoffending however, some concerns were raised. Some advocates of the victim-offender mediation process were concerned about the use of family group conferences for cases involving juvenile offenders. They believed that their voice in these discussions may be overpowered by the presence of their families. However, the involvement of a facilitator to mediate between the families pacifies this concern[256].

The representative processes of restorative justice outlined above illustrated how restorative principles have been integrated. As mentioned in section 5.1, the core principles of restorative justice are healing, inclusion, and sharing. The affected parties must be empowered to actively participate in these processes for the purpose of healing. The government must remain in a passive position to primarily maintain order. All three processes not only involved the affected parties but were placed at the forefront of the process.

The government, represented by the facilitator of these meetings, maintains a position of order rather than an active participant. The role of the facilitator is to remain neutral and lead the discussion in a productive manner to ensure a resolution is achieved. Therefore, the government is involved as a third party rather than an injured party. The rights of the involved parties are maintained and ensured by conducting these meetings in a safe environment. It is the role of the facilitator to ensure that respect is maintained in the meeting and does not reach a point of hostility. If a meaningful conversation cannot be attained, healing and peace is not achieved.

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[255] Sandra Pavelka O'Brien "Restorative justice: principles, practices, and application" (2007) 14 The Prevention Researcher 16.
[256] Johnstone and Van Ness, above n 252.

One of the key elements for ensuring restorative principles are achieved through these restorative processes is through the act of apology. In restorative justice, there are four elements that needs to be fulfilled by both parties to make amends – apology, changed behaviour, restitution, and generosity[257]. The element of interest for this study is the apology. The act of apology involves a three-part process where each part must be satisfied in the order laid out. The first step is to acknowledge the wrongdoing that has occurred - accountability. This requires the offender to not only admit to the wrongdoing that has occurred but that they are responsible for it.

Once fulfilled, the second step is to show remorse. This involves the offender showing regret for their actions by apologising for the harm caused. The purpose is for the victim to feel validated in their experience so that healing can begin. The final step is allowing the victim to see that the offender, because of their actions, is now powerless. The power dynamic here is crucial. The victim, who once felt defenceless, needs to see that the offender is now defenceless. The act of apology needs to have met all three elements to truly fulfil the restorative aspect of justice[258].

The most important aspect of *fofola e fala* is that the concept provides an open space for dialogue where everyone is essentially the same. This means that all participants on the "mat". All matters of social hierarchy do not apply here, which opens the floor to a more productive dialogue. It is a space where all participants are united for an open and honest conversation to assist with sharing the load rather than carrying that weight individually[259]. Therefore, this seems to be the most appropriate restorative process to apply. However, the issue lies in how it can be incorporated into the current justice system in Tonga.

Insight could be gleaned from how restorative justice was implemented in New Zealand. As mentioned in section 5.1.2, the initial move towards implementing restorative justice was through the Children and Young Persons and their Families Act 1989[260]. Through this legislation, the Family Group Conferencing was introduced through section 208(a) which permitted for alternatives to criminal proceedings to be employed[261]. Additionally, Green[262] puts forward that while this legislation does not directly refer to

[257] Elmar GM Weitekamp and Hans-Jürgen Kerner *Restorative Justice* (Willan Publishing, Cullompton, United Kingdom, 2002).
[258] Weitekamp and Kerner, above n 257.
[259] Sesimani Havea *Tongan Ethnic-Specific Approaches to Family Restoration* (Ministry of Social Development).
[260] Carruthers, above n 115.
[261] Children, Young Persons, and Their Families Act 1989 No 24.
[262] David Green "Interweaving the Status and Minority Rights of Maori within Criminal Justice Ko Nga Take Ture Maori" (2015) 21 Auckland University Law Review 15.

tikanga, the reference implies that it is relevant while it is implemented. As Tonga's current Criminal Offences Act fails to address child or youth offenders, this seems to be a great starting point to model after.

The concept of *fofola e fala* is very similar to the Family Group Conferencing as it requires all parties to come together for a discussion. The difference here lies in the cultural aspect. Havea[263] notes that the essence of this practice is the concept of *fa'utaha* (unity). *Fa'utaha* emphasises the importance of establishing strong relationships to maintain harmony and balance as a collective. *Fofola e fala* requires *talanoa* with the mutual understanding and respect amongst participants so that any differences can be discussed openly and understood[264]. Therefore, it is a practice that provides a holistic response that embodies the *faa'i kavei koula*[265]. This is an important aspect of this practice because traditionally, communication was not reciprocal. As a part of *anga fakatonga*, the elders speak while the youth listen. If there were disparaging points of view, it was not known because the youth understood that they do not speak in these matters as a form of *tauhi vā*[266].

To truly represent these cultural needs in the legislative framework, New Zealand's sections 25 and 27 of the Sentencing Act 2002 must be considered. Section 25(b) provides the judges with the power to adjourn proceedings to refer cases to a restorative justice process. However, section 27, as mentioned prior, allows the offender to request the judge to consider their background and upbringing when sentencing. Green[267] noted that section 27, in particular, was the starting point for permitting Māori perspectives. A more practical application that attempted to incorporate *tikanga* was implementing the Rangatahi Courts. In a now repealed section 4(4) of the District Courts Act 1947[268], permitted judges to refer court proceedings to another location as their discretion. Interestingly, while seemingly more inclusive of *tikanga*, the outcome was still reviewed by the sentencing judge.

Therefore, it seems that the application in the Sentencing Act 2002 seems the most appropriate to model. Utilising sections 8, 24A, and 27 to incorporate restorative processes

[263] Havea, above n 259.
[264] Makelesi Latu "Talanoa: a contribution to the teaching and learning of Tongan Primary School children in New Zealand" (Auckland University of Technology, 2009).
[265] 'Aulola He-Polealisi Fuka-Lino "Fofola e Fala kae Alea e Kāinga: Exploring the Issues of Communication Regarding Tongan Youth Suicide in South Auckland, New Zealand" (Auckland University of Technology, 2015).
[266] Fuka-Lino, above n 265.
[267] Green, above n 262.
[268] As noted in Green, above n 262.

and cultural customs into the legislative framework. Green[269] and Higgins[270] both agree that *tikanga* is only generally recognised in the legislative framework but that if these sections can act as a gateway for fully utilising *tikanga* principles.

5.3 Apologies and Tonga

For Pasifika countries, culture and custom heavily influence their apology practices. The significance of a traditional form of apology as well as the practices employed is dependent on the culture and social fabric of that community. Compared to western culture where apologies are often verbal, Pasifika culture utilises a combination of verbal and physical expressions of remorse. Depending on the context in which the apology is delivered, if deemed necessary, the act of apologising will also include instances of public shaming. The practice of public apologies is utilised to strengthen the interconnectedness of the community[271].

Prior to addressing practices of apology in Tonga, it is first important to understand how apologies are phrased. When apologising verbally to someone in Tonga, one would say *fakamolemole* (sorry). However, when one is seeking forgiveness for an incident that has occurred, the phrase then changes to *kole fakamolemole* (beg for forgiveness). This phrase calls for the participation of both parties in the apology process. It requires the wrongdoer to beg for forgiveness rather than simply asking for it as the phrase appreciates that a wrong has occurred. The phrase also necessitates for balance to be restored so it requires that a form of reconciliation to be found through forgiveness. Thus, shifting the power to the harmed party because if forgiveness cannot be found, the ritual is deemed unsuccessful and other measures to restore the balance in society will be taken[272]. The phrase *kole fakamolemole* underpins the existing rituals of apology in Tonga.

The literature review in chapter two outlined the importance of kinship in the Pacific Islands. It is a fundamental value of any Pasifika culture which is the foundation of their social fabric. This is the same case for Tonga, as mentioned in chapter four. Kinship, in Tonga is ultimately based in the concept of family, of all levels – immediate, extended, and clan. The collective response knitted into Tonga's society became the basis for the

[269] Green, above n 262.
[270] Luke Higgins "Marae-based Courts and the Sentencing Act 2002: Paving a Way to Parallelism?" (University of Otago, 2018).
[271] James B Lutui "Apology: A Moral, Cultural, and Restorative Perspective" in *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomson Reuters New Zealand Ltd, Wellington, New Zealand, 2015).
[272] Elizabeth Latif "Apologetic Justice: Evaluating Apologies Tailored toward Legal Solutions Note" (2001) 81 Boston University Law Review 289.

apology rituals employed in the sense that it is expected for the community to apologise for the wrongdoing of an individual.

This is illustrated in the case of *R v Hu'akau*[273] mentioned in chapter four where the family performed the formal Tongan apology whilst the son was imprisoned. A formal traditional apology involves a speech acknowledging the wrongdoing and begging for forgiveness accompanied with a presentation of gifts – fine mats, food, and money. The gifts presented are not intended as compensation but as an illustration of their remorse and disposition to make amends[274]. This is similarly illustrated in other Tongan customs. For instance, if a death has occurred, it is customary to offer condolences to the grieving family and contribute to the funeral proceeds by way of food, fine mats, and money. The same is true for weddings, birthdays, as well as any other event that calls upon the support of the family/community. Therefore apologies, are often performed and presented in front of the hurting party's family and extended family.

The purpose for conducting a public apology is for its shaming aspect. To acknowledge and take accountability for the wrongdoing in a public arena affects the offending family's social standing[275]. However, when forgiveness is provided by the aggrieved family, the shame has been remedied and the balance in society is restored[276]. Therefore, the collectivist nature of Tonga's culture has greatly influenced the traditional apology rituals. It places significance on restoring harmony in society and maintaining it.

There are aspects of traditional forms of apology which incorporate restorative values. As noted in the literature review in chapter two, Tonga's society is founded upon four core values that embody *anga fakatonga* (the Tongan way) - respect, love, humility, and reciprocity. Importance is placed on these four values as well as Christianity to guide Tonga's society in maintaining peace and harmony. Therefore, forgiveness is naturally a great influence in how peace and harmony is achieved. Lutui[277] notes that cultural apologies are effective due to the cultural expectations that innately exists in the Pasifika. Thus, utilising every aspect that is unique to the Pasifika culture accentuates the aspects of restorative justice, illustrating regret, compensation, restoration, and healing.

[273] *R v Hu'akau*, above n 198.
[274] Lutui, above n 271.
[275] Hafoka, above n 177.
[276] Bridget Fa'amatuainu "Self-represented litigation and meaningful access to justice in Aotearoa and Samoa" (2023) 19 AlterNative: An International Journal of Indigenous Peoples 13.
[277] Lutui, above n 271.

A notable advantage of restorative justice to is its adaptability. Morris[278] states that the essence of restorative justice is its ability to adapt to any form so long as it reflects the values and purpose of restorative justice. Paterson[279] notes that reconciliation is best illustrated through a ceremony because its purpose is to restore harmony in the community by healing its members. Restorative justice promotes apologies as a pertinent tool for conflict resolution[280]. Both restorative justice and traditional cultural apologies place importance on an in-person mediation process for attaining accountability from the offender. Thus, concluding that both processes are consistent in its values and intended outcomes. This, in conjunction with the adaptability of restorative justice, begs the question if there are any existing practices in Tonga's customs that could be adapted accordingly[281].

Evident by the cases reviewed in chapter four, the traditional Tongan apology rituals has been recognised by the courts since the late 1990s as a mitigating factor. Sentencing remarks have also noted the importance of traditional forms of apology to the culture and customs of Tonga. However, as noted by the Acting Attorney General, it was never formally integrated into law.

While restorative justice has not been implemented in Tonga, similarities can be drawn based on the information outlined in both sections 5.1 and 5.2. Chapter four highlighted that the justice system and Tonga's customs do not share many similarities with regards to their perspective or focus. As highlighted in chapter one, the essence and foundation of Tonga's culture and social fabric focuses on four principles – respect, loyalty, humility, and reciprocity. These four principles were built upon King George's love for Christianity which he instilled in Tonga when it first became a nation. When focusing further on Christianity, one of its most basic principles is forgiveness/reconciliation[282]. Forgiveness, in its nature, is the act of acknowledging one's wrong doings and forgiving those actions to learn and move on[283].

This is the one aspect in which both Tongan customs and the justice system have come to agree on over the years. The first appearance of Tongan customs in the sentencing

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[278] Allison Morris "Critiquing the Critics: A Brief Response to Critics of Restorative Justice" (2002) 42 British Journal of Criminology 596.
[279] Don Paterson "Customary reconciliation in sentencing for sexual offences: a review of Public Prosecutor v Ben and Others and Public Prosecutor v Tarilingi and Gamma" (2006) 10 Journal of South Pacific Law 1.
[280] Carrie J Petrucci "Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System" (2002) 20 Behavioral Sciences & the Law 337.
[281] Lutui, above n 271.
[282] Matthew J Mills "Forgiving in the Presence of God" in Myra N Blyth, Matthew J Mills and Michael H Taylor (eds) *Forgiveness and Restorative Justice: Perspectives from Christian Theology* (Springer International Publishing, Cham, 2021) 109.
[283] Mills, above n 282.

process was through the act of apology in 2015 through *R v Nisa*[284] where traditional gifts and food were presented to the grieving family. This case was the first instance in which a judge during sentencing remarks noted the importance apologies carry in Tongan culture. It is important to question if the act of apology in itself is unique in the judicial system.

In the court of law, admitting one's guilt is considered a mitigating factor for sentencing. It illustrates one's acknowledgement of their wrongdoing and acceptance of the consequences for the actions taken. This is evident in *R v Tau'alupe*[285] where the judge noted in his sentencing remarks that the offender pled guilty. Similarities can be drawn with the act of apologising. Essentially, both are an acceptance of responsibility. The significant difference between the two lies in the intention behind it. The court of law mitigates admission of guilt as it shows remorse for an offence. However, apology rituals promote healing for the receiving party and provide closure for the overall situation[286]. This coincides with one of the cornerstones for restorative justice – making amends/reconciliation[287].

The previous chapter Illustrated the evolution of apologies and its influence in the sentencing process. One of the starting points for restorative justice practice are apologies ordered by the court. This practice is evident in Tonga in *Fifita v Minister of Police & Kingdom of Tonga*[288] and *Bank of Tonga v Peacock & Peacock*[289]. In both cases, the court ordered public apologies to be made by the accused parties. Written apologies were published for the public to view through the newspaper.

The significant influence of apologies in sentencing can be found in an appeal case *Kofutu'a v R*[290], a manslaughter case that was initially sentenced to 15 years in prison. When appealed, the sentence was reduced to 13 years in prison as the sentencing judge had not taken into consideration the apology and restitution made outside of court. In the cases reviewed in chapter four, the offenders apologised to the victims for the harm caused. In both cases, the offender and their family presented their apologies in the form Tong''s traditional customs – *R v Nisa*[291] and *R v Helu*[292]. This opens a pathway for including Tongan customs in the justice system because their efforts were noted in the Judge's

[284] *R v Nisa*, above n 201.
[285] *Rex v Tau'alupe*, above n 197.
[286] Carrie Menkel-Meadow "Restorative Justice: What Is It and Does It Work?" (2007) 3 Annual Review of Law and Social Science 161.
[287] Van Ness and Strong, above n 40.
[288] *Fifita v Minister of Police & Kingdom of Tonga*, above n 192.
[289] *Bank of Tonga v Peacock & Peacock*, above n 193.
[290] *Kofutu'a v R* [2010] TOCA (TOCA).
[291] *R v Nisa*, above n 201.
[292] *R v Helu*, above n 202.

remarks. It is evident that traditional forms of apology are an existing practice in Tonga's justice system. However, efforts to include it in the legislative framework was non-existent at the time.

Chapter two included the Youth Diversion Scheme trialled in Tonga in which restorative justice processes were utilised to respond to juvenile offenders that participated in the 2006 riots[293].

In 2020, the acting attorney general in Tonga put forward to the parliament for an amendment to clause 89 of Tonga's constitution which refers to the power of the courts. The acting attorney general acknowledged the existing history of Tongan apologies being reflected in courts but noted that it has yet to be written into the law. Therefore, he wanted to include an amendment in which judges would be required to consider Tongan traditions and customs when making decisions in court[294].

5.3.1 Summary of comparative analysis to inform legislative framework for Tonga

It is clear here that the overall values of restorative justice and Tonga's customs not only complement each other but overlap with one another. Restorative justice principles aim to heal, inclusivity, and reciprocating. Whereas Tonga's principles aim for respect, reciprocation, nurturing relationships, and love. At the root of all these principles and overall theme is for a society that reciprocates each other's needs and heals any breakdowns the social fabric when it is apparent. Family Group Conferencing is the most well-known restorative process. It is used in response to youth offending and employed in the Rangatahi Courts.

From early stages of restorative justice advocacy in New Zealand, Family Group Conferencing was utilised in the four-year pilot programme. Māori traditions value the inclusivity of extended family and community in addressing matters. Family Group Conferencing allowed for that aspect to be fulfilled. Family, extended family, and community were invited to participate in this community conferencing to discuss the offending at hand. This was also written into the Sentencing Act 2002 which noted that the judge was to consider the offender's familial and cultural background for sentencing.

This should be noted due to its similarity to Tonga's reconciliation framework called *fofola ae fala kae talanoa ae kainga*. It promotes open dialogue between both direct

[293] Mackesy-Buckley, above n 26.
[294] Radio New Zealand "Tonga courts to consider tradition and custom during trials | RNZ News" (2020) <https://www.rnz.co.nz/international/pacific-news/428902/tonga-courts-to-consider-tradition-and-custom-during-trials>.

and extended family in the family's home. Concerning matters are brough to the centre and then discussed by all. The overall aim is to reach reconcile and provide a way to move forward for all parties present.

However, the clear difference here between the inclusion of Māori reconciliation methods and those utilised in Tonga is the support of legislative framework. New Zealand's Sentencing Act 2002 section 8 highlights the familial and cultural backgrounds that should be taken into consideration. Further, restorative justice has been supported by legislation so far as to implement the Sentencing Amendment Act 2014 that changed the language of referring court cases from the discretion of judges to mandatory referrals to restorative justice. Legislative support is where Tonga lacks in terms of informing any form of framework for implementing restorative justice.

It is evident that the legislative framework in Tonga needs to be reviewed. The aspects lacking can be informed and filled in by the legislations reviewed prior. For incorporating Tong''s customs into the court proceedings, Samoa's Sentencing Act seems the most appropriate. Particularly part 2 section which provides the judges with the discretion to facilitate an agreement that aligns with Samoa's customs and traditions. One of the aspects that Tonga's legislation lacked was a separate sentencing act. This is of importance as this is the legislation that will guide judges towards referring a case towards restorative processes. New Zealand's Sentencing Act 2002 seems the most appropriate to model as it is inclusive of victim rights and deterrence aspects. For instance, section 24a allows the judge to adjourn the proceeding to deem if restorative justice is appropriate for the case at hand. However, it also notes that this is to be done with the victim's consent.

5.4 Restorative justice and Tonga

With regards to Tonga and restorative justice, based on are the most appropriate avenue to explore. Apologies refer to the acknowledgement of wrongdoing and acceptance of the consequences. Khouri[295] highlights the complexity in admitting one's wrongdoing which requires an unreserved display of humility. This, in and of itself, is the essence of an apology. Legislating the traditional apology rituals will open the floor to sympathetic dialogue between parties. This is vital for addressing the emotional needs of all parties so that healing can be facilitated.

Also mentioned in section 5.2 is the efforts made in 2020 to include Tongan customs and traditions in law. One of the concerns mentioned in the article against

[295] Nina Khouri "Sorry Seems to be the Hardest Word: The Case for Apology Legislation in New Zealand" (2014) 2014 New Zealand Law Review 603.

amending the law was the potential risk of using apology rituals to abuse the system[296]. These concerns were not unfounded and previously mentioned in the literature as one of the disadvantages of restorative justice. Khouri[297] agrees that one of the main concerns is that legislating apologies risks devaluing the significance of genuine apologies. This essentially offers the use of apologies for strategic gamesmanship in court rather than expressing remorse. Khouri[298] argues that the effectiveness of apologies as a mitigating factor is dependent on whether the apology offered satisfies the victim – acceptance of apology.

The offering and acceptance of apologies fulfils the element of apology for reconciliation/making amends of restorative justice. However, it falls short of principle two regarding the active participation of victims, offenders, and communities in the justice process. This may be fulfilled by encouraging an open discussion between the two affected parties. An open conversation between the affected parties is pertinent for healing in restorative justice. The practices implemented for restorative justice are intended to achieve the principles set out. It is only then, that the process could be considered fully restorative. For instance, if the purpose is to promote healing, the practice implemented needs to be founded upon a principle and applied to accomplish it accordingly. The apologies mentioned in chapter four only applied the principle yet failed to apply the practice aspect to complete the process. Therefore, there is room to complete the process and build upon.

Another aspect that is important to note here is the cohesive nature of restorative justice. It emphasises a collective response to crime. This is a feature of restorative justice that is fitting for a Pasifika environment where kinship is given special value. In Pacific culture, there is no sense of individuality, everything revolves around a collective culture[299]. This includes responses to disputes and thereby would extend to crime. Restorative justice, as previously mentioned, requires the participation of the parties and community.

The purpose of the four golden strands is to weave these values together in a cohesive manner that would become the foundation for a tight-knitted community. It requires the collaboration of every individual in the community for a harmonious society[300]. Thus, if there is a disturbance in the community, it requires the collective action of the

[296] Radio New Zealand, above n 294.
[297] Khouri, above n 295.
[298] Khouri, above n 295.
[299] Kenneth Brown "Customary Law in the Pacific: An Endangered Species?" (1999) 3 Journal of South Pacific Law 9.
[300] Wiliame Iupeli Gucake "Koe Tu'i Ko E Pule, the King Is Sovereign: An Analysis of the 2017 Dissolution of the Tongan Parliament" (2020) 27 Canterbury Law Review 81.

community to repair it. Therefore, the justice system responding to those same disturbances will need to follow suit to be effective.

Chapter two and section 5.2 of this chapter mentioned core restorative practices such as Family Group Conferencing and Conferencing Circles. Essentially, both practices involve fostering an environment that provides a sense of safety for discussions to take place. In alignment with the principle of respect, healing, and forgiveness, this environment is supposed to provide the grace that restorative justice provides[301]. The intention is to encourage dialogue that results in healing for both parties. This is also evident in the *Fono* offered in Samoa and *Bulubulu* in Fiji. All these practices are indigenous forms of dispute resolution; therefore, similar practices should be expected to already exist in Tonga.

There are two existing practices in Tonga that will be compared to the principles of restorative. These practices are rooted in the core values of Tonga which are respect, love, humility, and gratitude. Therefore, the following will review if the rituals engage with any of the restorative principles.

The first is the *hu lou ifi* (to enter with humility) mentioned in chapter two. This is an ancient practice that is essentially an apology to the King for a disturbance that has occurred in the community. The two disputing families would don chestnut leaves (humbling attire), prepare food and traditional Tongan mats (restitution), and enter the palace to apologise (remorse) for their actions[302]. The *ifi* (chestnut leaves) is an indication of humility as these leaves were used for making the fire for *umu* (traditional underground oven). This is notable because in formal events, the existing social structure places lower ranking individuals with the cooking duty. Therefore, dressing in *ifi* (chestnut leaves) to perform the apology signifies that you are of lower status.

Traditionally, the *hu lou ifi* (to enter with humility) practice is likened to the justice system itself. The offender apologises to the monarch for causing a disturbance in the community. Initially, it may not seem fitting for restorative justice since *hu lou ifi* is a practice intended for apologising to the King. Although it fails to acknowledge the correct injured party, the ritual itself contains restorative aspects. In its essence, it calls for an apology, a presentation of genuine remorse and humility, as well as restitution. Hafoka[303] puts forward that the *hu lou ifi* is utilised for seeking forgiveness from the aggrieved party and placing shame on the offending party. When restitution is presented, the receiving party must accept it to complete the process. If forgiveness can be reached, shame is dispelled

[301] McElrea, above n 129.
[302] Filihia, above n 126.
[303] Hafoka, above n 177.

from the offending party, then they are provided the opportunity to be reintegrated into the Tongan community. As noted in chapter four, traditional Tongan culture utilises forgiveness to reintegrate individuals into society through forgiveness.

If the *hu lou ifi* practice is to be amended for a complete restorative process, participation of the injured party and community must be included. Proving an environment for dialogue is necessary as there is currently no mediation between the families during this ritual. In the traditional form of this practice, the participation principle for restorative justice cannot be fulfilled. *Hu lou ifi* is not commonly practiced anymore which has allowed for other practices of apology to form as a means of removing the shame brought about by deviant behaviour.

The second practice available is called *fofola ae fala kae talanoa e kainga* which refers to the placement of the traditional fine mat to open a conversation for the family[304]. *Talanoa* is not unique to Tonga; it is a concept that exists throughout the Pasifika[305]. However, for the purposes of this study, it will be discussed with regards to what it means to Tonga. Tecun, Hafoka, ‘Uluave and ‘Uluave-Hafoka[306] explained that *talanoa* abides by *anga fakatonga* (the Tongan way) thereby upholding the cultural rules and values of the formal or informal context it is applied in. Whether formal or informal, at the centre of *talanoa* are social relationships which correlates with one of Tonga’s cultural values called *tauhi vā.*

This is a more personable approach for a restorative justice process and is often referenced in the body of literature as the *talanoa* approach. *Talanoa* depending on the context it is used in can either simply refer to talking, having a discussion, or telling a story[307]. This is true in both formal and informal settings. Dialogue is a significant aspect of Pasifika culture. History, customs, and traditions were originally passed down from generation to generation verbally[308].

Latukefu[309] notes that tradition and social classes tend to be preserved by socio-political figures in society as well as families. Socio-political figures such as chiefs and

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[304] Fuka-Lino, above n 265.
[305] David Fa’avae, Alison Jones and Linitā Manu’atu “Talanoa’i ‘A e Talanoa—Talking about Talanoa: Some dilemmas of a novice researcher” (2016) 12 AlterNative: An International Journal of Indigenous Peoples 138.
[306] Arcia Tecun (Daniel Hernandez) and others “Talanoa: Tongan epistemology and Indigenous research method” (2018) 14 AlterNative: An International Journal of Indigenous Peoples 156.
[307] Mele Tupou-Vaitohi “Using the Pasifika Talanoa Research Methodology in Equity Legal Research” (2022) 27 Comparative Law Journal of the Pacific 1.
[308] Timote M Vaioleti “Talanoa Research Methodology: A Developing Position on Pacific Research” (2006) 12 Waikato Journal of Education.
[309] Sione Latukefu “Oral Traditions: An Appraisal of Their Value in Historical Research in Tonga” (1968) 3 The Journal of Pacific History 135.

their attendants will preserve information regarding traditions, ceremonial processes, and traditional lore. Families, on the other hand, preserve history regarding their origins, lineage, and titles held by their family.

Certain aspects of Tonga's history are etched into traditional songs and dance. There are also figures in society referred to as *tangata 'ilo/fefine 'ilo* (one who knows) who are well-informed regarding history. As there were no formal keepers of history, these individuals were sought out by many and most of our knowledge today were passed down through *talanoa*. Therefore, it is only fitting that the *talanoa* approach is utilised by Pasifika as a means for dispute resolution as well as a Pasifika research method.

To better understand how *tauhi vā* applies in *talanoa*, its meaning should be broken down first. *Tauhi* refers to nurture or caring, *vā* refers to the space between two things. Thus, *tauhi vā*, in this context refers to nurturing one's social relationships. This is the basis for the kinship in Tonga[310]. It advocates for nurturing one's social relationships to ensure peace and harmony in the community through reciprocity, loyalty, respect, and humility. With regards to *talanoa*, those same values will be applied when dialogue is taking place regardless of the level of formality.

Traditionally, in Tonga, this process applies if there is a dispute within the family. The *fofola ae fala* (placing of the mat) in this context refers to preparing your living room for dialogue to occur. This does not refer to any type of mat, but a traditional fine mat. When a fine mat is placed in the living room, one is preparing to receive guests. Essentially, a family meeting has been called to discuss a disturbance that has occurred within the family home[311]. An important aspect of *talanoa* is the space in which it takes place in. Different protocols apply depending on the environment. A family home, as noted earlier, is a place of comfort so less rules apply. However, for cases where the offence may be more serious, certain protocols of formality apply. This includes dress codes, speeches, and/or a presentation of gifts[312].

The combination of cultural values and *talanoa* foster restorative aspects. For instance, reciprocity is pertinent for the process of *talanoa*. It requires all participants in a *talanoa* to actively contribute to the conversation taking place. Therefore, it is imperative for the *talanoa* to take place in a safe and respectful environment that cultivates sincere communications by all participants. When this is achieved, it allows for the participants to

[310] Tevita O Ka'ili "Tauhi vā: Creating beauty through the art of sociospatial relations" (PhD, University of Washington).
[311] Vaioleti, above n 308.
[312] Tecun (Daniel Hernandez) and others, above n 306.

get to the root of the topic discussed, and if relationships were successfully nurtured will be illustrated in how the *talanoa* concludes.

Talanoa (dialogue) is significant for solving conflicts in the environment conflict arises in. Restorative justice posits that when conflicts are brought directly to the environment it occurred in, offenders are forced to confront the individual affected by their actions. This can often be jarring and leave the offender with no opportunity to provide excuses[313]. *Talanoa* supports this by allowing the parties to engage in conversation. To openly discuss the effects of the dispute and how they can be resolved. In most cases, this discussion is facilitated by the elders or head of the family. Their role is to listen to both parties and provide advice as to how the dispute should be approached and resolved. At the end of this process, both parties should have found closure and are ready to begin healing.

This practice is currently utilised in New Zealand as a prevention method for family violence[314]. The *talanoa* method fulfils the healing, inclusion, and sharing restorative principles. Healing is promoted through open dialogue and mediation. This process involves the whole family rather than the two disputing individuals; therefore, inclusion is achieved simultaneously with the sharing principle. The responsibility this dispute and disturbance within the family is equally shared between every individual present at the *talanoa*.

5.4.1 Legislative reforms

Based on the information gathered in chapters four and five, the following suggestions are proposed as possible starting points for incorporating restorative processes and traditional practices into Tonga's current justice system.

5.4.1.1 Review legislative framework

It is evident from the information gathered in chapter four that the legislation framework in Tonga should be reviewed in its entirety. Tonga currently only has one legislation to govern its criminal justice system – Criminal Offences Act 2020[315]. The Criminal Offences Act 2020 consists of 204 sections; however, it fails to specifically address child and youth offenders. Nor does it refer to any traditional customs of Tonga or a victim's rights in the justice process. Prior to integrating any possible amendments or reforms to the legislative framework, it is important to further review for any other gaps that need to be addressed.

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[313] Hannah Goodyer "Rethinking Justice in New Zealand—A Critical Assessment of Restorative Justice" (2003) 9 Canterbury Law Review 179.
[314] Tuinukuafe and others, above n 14.
[315] Criminal Offences Act.

5.4.1.2 Suggested integrations

Though a further review of the Criminal Offences Act 2020[316] is needed, the following suggestions are proposed based on the review conducted in this thesis. A separate legislation is necessary for responding to child and youth offenders. The current legislation cannot fully address child and youth offenders in a way that not only maintains their dignity but is able to appropriately apply deterrence methods. The Criminal Offences Act 2020 notes in section 16 that if the court determines the level of comprehension of a child over 7 years of age, they can be convicted[317]. However, it fails to outline how a child's level of comprehension is determined. Traditionally, children in Tonga are taught obedience and respect for their elders from a very young age. Therefore, proper mechanisms for determining their level of comprehension are absolutely vital for maintaining the integrity of the children and the system. Appropriate comparisons can be drawn from New Zealand Children, Young Persons, and Their Families Act 1989[318]. It is a legislation established to address young offenders and provide parallel alternatives to the justice system such as the Rangatahi Court.

Another suggestion based on the information gathered is establishing a separate legislation to guide the sentencing process. New Zealand has the Sentencing Act 2002[319], Fiji has the 2009 Sentencing and Penalties Act[320], and Samoa has their Sentencing Act 2016[321] to guide their sentencing process. It is through these legislations that allow for family, background, and community to be considered in the sentencing process. Fiji's 2009 Sentencing and Penalties Act[322] allows for traditional and community leaders to be involved in the sentencing proceedings. Samoa's 2016 Sentencing Act[323] provides the judges with the discretion to encourage agreements that is in accordance with their traditions and customs, such as the *ifoga*. However, Tonga's Criminal Offence's Act provides sentencing guidelines in part 4 of the legislation[324]. Punishments provided involve some more archaic methods such as whippings and death sentences. It is believed that this legislation would benefit from implementing a separate legislative framework to guide sentencing in a manner that is more robust. To include customs and traditional practices

316 Criminal Offences Act.
317 Criminal Offences Act.
318 Children, Young Persons, and Their Families Act 1989 No 24.
319 Sentencing Act 2002.
320 Sentencing and Penalties Act 2009.
321 Sentencing Act 2016.
322 Sentencing and Penalties Act.
323 Sentencing Act.
324 Criminal Offences Act.

such as *fofola e fala*, Samoa's Sentencing Act 2016 and New Zealand's Sentencing Act 2002 would be the most appropriate model.

5.4.1.3 Necessary expertise

To assist with incorporating the above suggestions or any future changes that is necessary, it is important to assign qualified individuals. Individuals qualified in this area refer to individuals knowledgeable in law, restorative justice, as well as the traditions and customs of Tonga. It is believed that that this be of extreme benefit to have a collaborative effort of qualified and well-versed individuals for a more robust review and less intrusive manner of implementing the resulted suggestions.

5.5 Conclusion

This chapter has provided insight into restorative justice principles and practices. It is evident through this chapter that restorative justice principles and practices are focused on restoration and healing rather than punitive measures. There are principles that are aligned with Tonga's core values and are also illustrated in pre-existing traditional practices of apology. Comparisons of principles and practices were drawn against rituals such as *hu lou ifi* and *talanoa*. *Hu lou ifi* will require amendments to ensure it engages with all principles of restorative justice as well as its participants. While the ritual has restorative aspects, it fails to include active participation by the parties to ensure that the parties can begin healing. The *talanoa* method, on the other hand, fulfils all restorative principles. The process can be likened to one of the existing restorative practices called Family Group Conferencing.

One of the most notable speeches was delivered by royal was delivered by Queen Salote in 1964 where she emphasised the importance of maintaining Tongan culture. The words she spoke is relevant in this study as it provides insight into how restorative justice could fit into the Tongan context. Queen Salote stated that customs is one's heritage. Possession and knowledge of those customs will allow for it to be modified to easily meet the demanding nature of modern society[325]. This way of thinking allows for practices or frameworks to be reconstructed in such a way that it is adaptable to any modern-day context. Therefore, if restorative justice is implemented in Tonga, it does not necessarily mean that a new framework should be developed. Rather, it allows for an existing practice to be modified and applied.

[325] Barbara Burns Mcgrath and Tevita O Ka'ili "Review of Queen Sālote of Tonga: The Story of an Era, 1900-1965" (2002) 75 Pacific Affairs 657.

Chapter Six – Conclusion

6.0 Introduction

The previous chapters have gathered sufficient information to critically review Tonga's justice system, and to introduce restorative justice concepts. The following sections review the benefit of implementing restorative justice in Tonga. However, despite the benefits, this study concludes that it does not recommend implementing restorative justice as an alternative form of justice. Rather it recommends the integration of restorative practices into the existing system. The information gathered was used to compare countries with indigenous roots that are currently practicing restorative justice. The countries chosen for this study were New Zealand, Australia, Fiji, and Samoa. This was designed to answer the following research questions: "Can restorative justice be implemented in Tonga and how?" and "what are the benefits and disadvantages of implementing restorative justice in Tonga?".

6.1 Overview

To place this study in context, a literature review was conducted in chapter two that provided an overview of restorative justice and its existence in countries such as New Zealand, Australia, and Samoa. Tonga's customs and values was included in chapter two as a brief comparison of what Tonga may be lacking as a country. As a result of the information gathered, it was decided that doctrinal research methodology was the most appropriate methodology to guide the collection of information for chapters four and five. Chapter four was designed to delve deeper into Tonga's justice system and compare it against neighbouring countries - Samoa and Fiji. Comparison of justice systems was necessary considering that Samoa and Fiji currently employ restorative justice in their legislative practice. Through this, the fact that Tonga fails to include traditional customs into its legislation became apparent. It further highlighted that Tonga's justice system is westernised and responded to crime through a euro-centric lens.

However, reviewing Tonga's history and the western influence prevalent in Tonga's history provided a sense of understanding as to how Tonga's justice system came to be the way it is. Samoa and Fiji's legislation proved that traditional customs could coexist in legal systems and became a great basis for approaching the research question of this study. Chapter five was designed to take the information learned in chapter four and analyse how it aligns with restorative justice principles and practices. Chapter five illustrated that

since restorative justice is founded upon indigenous practices of dispute resolution, Tonga also had existing practices that aligned with restorative justice principles.

Essentially, establishing that the values, principles, and practices of both Tonga and restorative justice complement each other well. Chapter four illustrated that there is a history of traditional forms of apology being recognised in the courts since the late 1990s. However, the issue highlighted here is the lack of support in the legislation which has also been noted by Mackesy-Buckley[326] after the Youth Diversion Scheme trial ended. The most surprising revelation in this study is that efforts were made to amend the constitution to include Tonga's traditional customs in 2020. However, there is no closure to that revelation as reasons regarding why the King did not sign the proposal drafted was not disclosed.

6.2 Implementing restorative justice as an alternative form of justice

Section 6.1 has provided sufficient information to conclude that the advantages of implementing restorative justice outweigh the disadvantages. This then leads towards the second research questions, "Can restorative justice be implemented as an alternative form of justice in Tonga?". Taking the above into consideration, this study puts forward that it should not be implemented as an alternative form justice in Tonga. Rather it is suggested that it would be more beneficial to review the current legislative framework and reform it to incorporate restorative processes and traditional practices.

The series of cases provided in chapter four illustrated the existence of Tonga's apology customs in court proceedings since 1998. In the early 2000s, the importance of Tongan apology and restitution to the culture of Tonga was noted in the sentencing remarks by the judge. This is the first instance in which Tongan culture influenced the sentencing process and considered by the judge as a mitigating factor. This resulted in a reduction in the sentence imposed. The existing practice of Tongan apology and recognition as a mitigating factor in the justice process. Therefore, suggesting that Tonga's justice system process is already adept for integrating restorative justice practices. Rather, it lacks the formal recognition of restorative justice and Tongan culture and customs in the law.

The restorative justice trial conducted by Mackesy-Buckley[327] provided insight into the mindset of the Tongan community towards restorative justice practices. Predominantly the conferencing practice of restorative justice utilised. Mackesy-Buckley notes the initial hesitance of the participants towards playing an active role in open dialogue. However, this does not negate the fact that upon utilising the *hu lou ifi*,

[326] Mackesy-Buckley, above n 26.
[327] Mackesy-Buckley, above n 26.

participants were more open due to familiarity. Thus, suggesting that there is an opportunity to explore this and improve further for future administration. It is important to note that it is responses to the trial may not be necessarily due to familiarity. It may also be due to a lack of understanding regarding meaning and traditional form of this practice.

As acknowledged by the acting attorney general in 2020, the practices already exist and are acknowledged in the court. The problem is the lack of acknowledgement by the legislation. While the reason why the proposed amendment was not implemented into the constitution in 2020 has not been disclosed, there is comfort in knowing that efforts were made. This acknowledges that seeds have been planted, discourse exists, and that there is room for growth. Khouri[328] concluded that apologies have the power to initiate mediation and healing as it responds to needs that restitution cannot meet. A justice system that encourages the use of apologies endorses an effective and beneficial form of conflict resolution for social healing essential for cohesive living. It is a social act that requires all parties involved to act with *"honesty, generosity, humility, commitment, and courage"*[329]. Therefore, the legislation needs to create a space in law which provides an environment that maintains this type of behaviour.

The guiding legislation for the criminal justice system is the Criminal Offences Act 2020[330]. This legislation fails to reference traditional customs of Tonga, but it also fails to adequately address victim's rights, child, and youth offenders. This study has highlighted the need to implement a separate legislation to address child and youth offenders as well as sentencing procedures. Rather than compressing the entirety of the criminal justice system into one legislation, it is believed that the justice system would benefit from establishing separate legislations. For example, New Zealand's Children, Young Persons, and Their Families Act 1989[331] and Sentencing Act 2002[332]. Both legislations address separate aspects of the criminal justice system. As they are separately legislations, it is able to adequately address the issues at hand. As this study established the lack of traditional Tongan customs acknowledged in the legislation, *fofola e fala.* The study has established that apologies has been acknowledged as a mitigating factor in the sentencing proceedings. However, *fofola e fala* offers a more holistic response with deterrence aspects. Samoa's Sentencing Act 2016 and New Zealand's Sentencing Act 2002 would be the most appropriate model for legislative reform.

[328] Khouri, above n 295.
[329] Page 633 in Khouri, above n 295.
[330] Criminal Offences Act.
[331] Children, Young Persons, and Their Families Act 1989 No 24.
[332] Sentencing Act 2002.

6.3 Advantages and disadvantages of implementing restorative justice

With regards to the main research question, "What are the advantages and disadvantages of implementing restorative justice as an alternative form of justice in Tonga?" this study puts forward that the advantages outweigh the disadvantages.

Chapters two and five has established that restorative justice is grounded in indigenous forms of conflict resolution. Restorative justice values essentially advocate for the use of open dialogue to reach a solution that promotes forgiveness and rehabilitation. Chapter four explored the values and social structure of Tonga that places significance on a collective community guided by Christian values. Thus, the values of restorative justice and Tonga are essentially in agreement. This is evident in the traditional form of apology utilised and recognised by the courts.

The Tongan environment has a maturing influence because of the emphasis of collectivism that results in a close-knitted community. This helps to mould the culture into an appreciative, humble, respectful, and Christian-based society. Historically, people who committed wrongs would apologise to the chiefs – appointed by the king – then the chief would decide on how to deal with the situation. However, the influence of the chiefs has weakened over time because the missionaries were not satisfied with the way they wielded their power. The 2006 riots mark the rise in youth crime due to politics and money taking centre stage. The youth are in need of a new and positive path with better role models to guide them in making that change. This is one of the advantages of restorative justice which can be utilised by harnessing the close relationships of the community for accountability and build a support system within society.

Contextualising the justice system to the culture, traditions, and values it is applied in will assist in deterring future offences. It was evident in the cases outlined in chapter four that traditional apologies provided by the offender were not promoted by the court. Thus illustrated the depth of which *anga fakatonga* has been instilled in the Tongan community. The apologies delivered has been noted as a mitigating factor in the cases outlined and the forgiveness provided by harmed party allows the healing process to begin. Implementing restorative justice utilising existing Tongan rituals of apology will not disturb the existing justice system as the courts have already recognised Tongan apology.

Further, implementing restorative practices that provide an opportunity for open dialogue will provide the platform needed for emotional resolution. Restorative justice views crime as a breakdown in society that illustrates broken social relationships. Dialogue allows for discourse to take place and contextualise how crime is committed as well as how

it is viewed in the community it exists in. This addresses the root cause of a problem and how it can be resolved. *Talanoa* is a pre-existing apology ritual available in Tonga. Meaning that it is a method of conflict resolution that was established for Tongan people and embodies the culture and values for that purpose. Facilitating a system that is relative to the culture and people it is implemented upon is pertinent for estimating its effectiveness within that community. The reason for this is that the culture, traditions, and values of a country should provide the context for the legal and justice system employed.

When the constitution and legal system were first conceptualised, it was with the assistance of a missionary. Thus, Tonga's traditions and customs were not integrated into the law, yet Tongans are subjected to that same system for maintain order in society. It is important to read the constitution in the context that it was written in, to better understand the vision that the King conceptualised for the Tongan people and future generations. The legal system imposed upon the Tongan people tends to be extremely westernised and does not really work. For instance, adversarial and rehabilitation programs are imposed but reoffending is still evident in society. If a system is to be implemented, it needs to contextualise how crime is committed and the circumstances within the community it is committed in. If the restorative justice system can incorporate and embody these values in the foundation of its processes, then it will be a positive influence on Tonga as a nation.

The benefit of restorative justice is that it does not contradict nor depart from the basic paradigm of the common law[333]. However, to implement restorative justice successfully, an initial multi-layered foundation must be established. First are the legal organisations, relevant non-profit organisations and others who will either be working or participating in restorative justice. These organisations need to be informed as their support and engagement is crucial to the restorative initiative[334]. The facilitator plays an extremely important role in the process of restorative justice and can be detrimental to how effective the system is. The facilitator must be competent, skilled, and knowledgeable, can remain impartial and trustworthy. A skilled and knowledgeable facilitator will take the necessary actions to manage power imbalances and take the appropriate actions if there is a risk of victimisation[335]. With regards to Tonga, it is suggested that the best facilitators will be church ministers due to the strong foundation of Christianity in Tonga. It is believed that the church ministers will not only restore both parties from the harm of the offence instil the Christian values Tonga was built on.

[333] Van Ness and Strong, above n 40.
[334] Van Ness and Strong, above n 40.
[335] Ministry of Justice *Restorative Justice: Best Practice in New Zealand* (Crown Copyright 2011).

Reoffending occurs because they are unable to separate themselves from the only life they know. Therefore, if the ministers can hold multiple conferences with both parties, the result should be more permanent. Imprinting a positive influence using a Christian perspective will not only restore the victim but the offender as well. Before any system is imposed, it is important to find out the needs for each community - figuring out how they work and what will fit them best. This is since if a system does not fit in well, it will not work. Restorative justice programs are developed as a response to crime; therefore, they must not only anticipate but compensate for social change. The ultimate overarching goal is restoration, one person at a time and leading to a much wider social process.

Despite the constant disagreement over what restorative justice is, and what is not, restorative justice is concerned with the needs of the people and offers them the opportunity to heal. As established in the report, the current punitive system is primarily concerned with the identification of an offence and the punishment for it[336]. Restorative justice is exactly what Tonga needs now and implementing it into the legal and justice system will be beneficial. The core values held by Tonga correlate with the principles of restorative justice and as such, its implementation should not be met with resistance, because as Christians, they are more likely to be open-minded. Restorative justice is most effective when both parties are cooperative enough to come to an understanding about the best approach to repairing the harm. It encourages the offender to take responsibility for their actions, the resulted harm and reintegrating themselves into the community. Additionally, it does not leave crime to the government to solve alone, it takes the initiative in involving the community in responding and reducing crime.

6.4 Conclusion

In conclusion, this study has found that implementing restorative justice, in theory, should not be a problem. Literature perceives restorative justice in two broad ways. The first is the process of the idea, the other is the values. The conception process is characterised by bringing together the affected parties of the wrongdoing – offenders, victims, families of parties, community, and professionals. Furthermore, the values of restorative justice are characterised by a set of principles which distinguishes it from the traditional punitive system. It promotes the healing and restoration of all who have been affected as well as the accountability the offender owes to the system through punishment[337]. Giving voice to those directly affected, endorses the role of the government morally, ethically and their relationship with the community. Restorative justice affords healing, reparation and

[336] Walker, above n 39.
[337] Morrison and Ahmed, above n 5.

reintegration of both parties and encourages them to better their efforts to prevent future harm[338].

The current legal system in Tonga is purely punitive which increases the risk of reoffending due to the lack of deterrence methods employed. The core values that help shape Tonga are correlate with those of restorative justice. Both encourage respect and humility for others, helping others to change, forgiveness and the interconnectedness of its members with a positive influence from the community. The only difference is that Tonga strongly believes in Christianity and endorses spiritual guidance – especially for the younger generation.

Restorative justice can be viewed as an approach to dealing with crime that involves the offender, the victim(s), and their community. It promotes a collectivist response to crime that is non-existent in the current justice systems that are heavily focused on punitive approaches. Literature posits that restorative justice is founded upon indigenous approaches to dispute resolution that involves open discussions that promotes understanding and healing amongst all parties. The involvement of the families and communities is a practice that is prevalent throughout the Pacific as all Pasifika cultures are rooted in kinship. There is no individualism in Pasifika culture as most matters are approached with a collectivist mindset rather than an individualistic mindset. Therefore, it comes as no surprise that restorative justice already exists in some Pacific Islands. However, Tonga has yet to implement this into their justice system nor formalise the restorative practices they currently utilise.

This begs the questions of why not? What other aspects could be holding back Tonga? Does the legislative framework not encourage the implementation of restorative justice processes? This study has only begun to touch upon exploring these questions. However, this requires a deeper look into Tonga's justice system and possibly exploring beyond the literature and legislations. Chapter four has highlighted that Tonga's guiding legislation has yet to consider establishing a separate legislation to respond to child and youth offenders. Perhaps offering recommendations and insight into creating a more robust legislation would allow Tonga's justice system to adequately address and respond to the different levels of offending. Therefore, this study recommends taking that approach to address these aspects for future studies.

[338] Morrison and Ahmed, above n 5.

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