

# Justice without the State

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**A**s anarchists, we reject the state and its abusive criminal justice system, but we still need to deal with conflict and abuse in our midst. When we ignore or refuse to deal with abuse in our communities, we become part of the abuse—we force survivors and their supporters out of the community, and protect the people who have hurt them. A justice system must aim both to reduce the harm from any conflict, and to protect those with less power from those with more. We must find our own solutions to this problem. It is immature to criticise the state system without developing alternatives for our own communities; it reminds me of rebellious teenagers criticising their parents' bourgeois lifestyle, but refusing to leave home and all its luxuries. A mature movement will develop its own justice system, from its own values, to meet its own needs.

Fortunately, there is a huge amount of knowledge and experience that we can turn to for help and inspiration. The majority of human history has relied on community justice models for solving problems, whereas the state system is only a late-comer. This essay takes a brief look at different models of justice. As a reminder of where we are, I start by listing the problems I have with the state system. I look at some customary justice models practiced in communities today, as well as restorative justice. Restorative justice uses the principles and methods of customary justice, but the term usually refers to programmes that operate outside a customary setting, or that have been endorsed by the state. There are criticisms of customary and restorative justice, some of which lead to the development of transformative programmes. Finally I discuss the relevance of this for anarchists. My ideas on community justice come from an anarchism where the community is as important as individuals. My definition of community reflects this: a group of people who are accountable to each other, “each member acknowledges the existence of common values, obligations, and understandings and feels a loyalty and commitment to the community that is expressed through the desire and willingness to advance its interests” (Gyekye 1996:35). It may not be what we have now, but it is surely what we are working to build.

## **State criminal justice system**

Andrea Smith (2005) argues that an understanding of power, control and violence means that we need to address interpersonal, state and structural violence simultaneously.<sup>1</sup> A truly just system would protect the powerless from the powerful, but the state protects those with power from those with none. By defending the powerful against challenge, the state system ensures that they continue to dominate and control—this can only lead to abuse and violence against the least powerful. Capitalism is a system created so a few people can get huge amounts of money from the work of many, many low paid people. The workers have little control over the system. They are kept in line by habit, the remote chance that they may move further up the pyramid, and coercion from the state justice system. State justice criminalises dissent, and creates the illusion that capitalism is a safe and functional system. Police are encouraged to threaten, bully and terrorise those on the margins, simply for being different. Loaded slogans like ‘building safer communities together’<sup>2</sup> protect those who conform from seeing that reality.

The state justice system exists to protect its own interests and values, and to maintain the status quo. In New Zealand, European law is considered the only legitimate law, reflecting European values, including individuality, competition, patriarchy, and private property. Other cultures, including the indigenous culture, are expected to fit in, to adopt European values, and to ignore their own.

When the state system took away our responsibility to deal with conflict and violence in our communities, we lost the skill and confidence to deal with it ourselves. When the law is enforced as a moral code, it takes away our power to develop our own values. We need to set up alternative ways of working out our problems and staying safe, and we need to organise against the state system.

In summary, state justice is founded on inequality: at all stages it is racist<sup>3</sup>, anti-poor, anti-youth, anti-woman. State justice is founded on violence: police, lawyers, judges, guards, social workers are given power over victims and offenders, and there are few among us who haven’t been abused by their power. Victims have almost no power in the state system, and are often re-victimised and bullied by the process. Above all, the state system doesn’t work for anyone who actually needs it. It is effective at protecting the property rights of land owners, but not the safety of women. If the state system does not protect homeless people, poor people, brown people, young people, women, etc, then what is it good for?

## **Different models of community justice**

### *Customary justice systems*

Traditional societies have no state system, and maintain order through equality<sup>4</sup>, respect,

and collective responsibility (Elechi 2006:11). Until the state took control, conflicts were resolved locally, involving everyone affected by a dispute, and aiming to restore community balance. These systems of justice therefore seem an obvious place to start when looking at models for community justice. I am defining customary justice as that which has evolved with the local belief system over generations to solve local problems. The customary justice systems I discuss are those still being practiced. Local religion is central, and customary law is indigenous to the communities that use it. Many books and articles have been written about the local varieties of customary justice systems (eg van Ness & Strong 1997, Mead 2003, Elechi 2006, etc). My brief discussion is based largely on an African justice system (as described by Elechi 2006), a proposed Māori justice system, and Native American justice systems (as described by Smith 2005).

In traditional communities conflict was generally between family members, and community strength was necessary for individual survival. Customary law developed to keep or restore community functioning. This means trying to find solutions that people see as just and fair, and that work long-term. It means the ‘rights’ of individuals are less important than in the Western legal tradition.<sup>5</sup> It also means that customary legal systems generally don’t have a set of rigid rules, and aren’t aiming for consistency either in process or solution. Instead, they focus on the fairness of the process, and the principles or values that are important, to find the most peaceful and enduring solution for the people affected. “Social solidarity is a primary feature” (Elechi 2006:18).

Oko Elechi describes the Afikpo model of justice. In the community he is from “it is an offense against the community to report a crime or take a conflict to the state courts or police until the community had mediated on the matter” (p 6). The indigenous justice system is perceived to be more effective and legitimate than the Nigerian state criminal justice system (imposed under colonisation). The goal of Afikpo justice is to repair the harm done to victims and communities by offenders. This means restoring the victim’s emotional and material loss, as well as empowering and vindicating them. The community gives appropriate support for victims and their families. Offenders and their families are held responsible, they are persuaded to compensate the victim and to apologise to the victim, the victim’s family and the community. The system is humane: the community supports the offender through teaching and healing, but the offender “must first acknowledge the wrong, then, show remorse, shame, and accountability through reparation and expiation” (p xvi). Decisions are made by consensus of all participants, which includes the victim, the offender and all others affected. The system “commands nearly total acceptance and participation”, whereas the Nigerian state criminal justice system is “ineffective and largely ignored by the Afikpo people” (p 2). It is most successful when offenders are strongly connected with others in the community, and value their love, respect and relationships (ie, when there is more to lose). However, in its use now, the Afikpo system excludes serious violent crimes, which are handled by the state system.

A Māori Criminal Justice Colloquium in November 2008 discussed problems with the New Zealand state justice system, and has set up a working group to develop an alternative system for Māori. Moana Jackson argued that the principles of tikanga<sup>6</sup> provide a process for addressing social harm. A Māori justice system could be as simple as reconstituting kawa<sup>7</sup>, not just in our marae, but in our communities and everywhere that we are. His vision is a system “which helps us deal with wrong by re-enforcing what is right, which helps us deal with hurt by dealing with those who are hurt, by helping us deal with injustice by re-defining what is injustice and what is just in our terms” (Jackson, 27/11/2008). Edward Durie (27/11/2008) proposed making the criminal justice system irrelevant, in much the same way that the Afikpo system does in Africa. He suggested setting up a system that uses the mediation and conflict resolution skills our communities already have, instead of resorting to state solutions. Te Wānanga o Raukawa already has such a system: staff and students at Te Wānanga work under te kawa o te ako, and an internal disputes process deals with breaches of kawa. The goal is for the mana<sup>8</sup> of everyone involved (including that of Te Wānanga) to be upheld or restored. Even serious offences, such as sexual assault, are handled by this process rather than referral to the state system. Te kawa o te ako is effective for maintaining the learning environment. I hope, but don’t know, that it is empowering for victims. Staff and students understand the importance of kawa; those who breach kawa may participate in the resolution process for different reasons, such as to continue to work or learn at Te Wānanga, to avoid the shame of being excluded from Wānanga, or simply because they see it as fair.

Many Native American communities<sup>9</sup> are developing their own systems for dealing with criminal behaviour based on traditional methods. Smith (2005) looks at the ability of these programmes to deal with sexual and domestic violence. She gives an example of a programme where the sexual/ domestic violence working team talks to the offender giving the choice to participate or go through the criminal justice system. If they choose the community model, everyone involved (victim, perpetrator and advocate, family, friends, and the working team) develops a healing contract, and everyone in the community is responsible for holding the offender accountable to the contract. Offenders must deal with the humiliation of being known as an offender and being held to account by the community. They must work to being forgiven by the community and the victim. The State system would remove these offenders from society. When these serious but common offences are dealt with in the community, offenders have a better chance of developing ethical relationships.

These programmes are often very effective, particularly when the communities are isolated and there is less opportunity for social connections outside the community. However, some programmes are unable to deal well with sexual and domestic violence. Many Native domestic violence advocates argue that prison is more appropriate than community interventions, or that the threat of prison is necessary for keeping offenders in their programmes. Programmes focused on maintaining community or family unity

often pressure victims to forgive and move on, or blame the victim if she is an adult.

"Traditional approaches toward justice presume that the community will hold a perpetrator accountable for his crime. However, community members often do not regard sexual violence as a crime when cases involve adult women, and they will not hold the offender accountable. Before such approaches can be effective... we must implement community education programmes that will sufficiently change community attitudes about these issues." (Pp 141-2)

To summarise, customary justice systems use the wisdom of ancestors that has developed from generations of trial and error, and which is stored in the local religion. Key principles of the systems are that they involve everyone affected by the conflict or offending; that they are more concerned with a fair process than they are with rules for that process; that they are focused on vindicating and upholding the dignity of the victims; that offenders are held accountable to the victim and the community; that the community is responsible for supporting the victim and holding the offender to account; and, that the systems are therefore dependent on a strong community with common values. There are potential problems with customary justice and I discuss these together with restorative justice in the following section. To me, the main point is that community justice systems are legitimate when they are being developed and maintained by the communities that use them, and they are accountable to those communities. Customary justice provides a starting point for thinking about what we might do.

### *Restorative justice*

In its customary setting, restorative justice "has been the dominant model of criminal justice throughout most of human history for all the world's peoples" (Braithwaite 1998:1). In the 1970s, some people working with offenders took many of the principles of customary justice, and began applying them outside their traditional settings. A group of workers and academics saw this as a new (old) direction for justice, and came up with the name restorative justice. The term is sometimes applied to customary justice models, but I am using it here to refer to its use in non-traditional environments. Restorative justice models look at actions that cause social harm, rather than at 'crime' (defined as a violation of the state and its laws). Like the customary justice systems that it comes from, restorative justice is focused on restoring victims, offenders and communities, and repairing that harm, including harm to relationships (as opposed to punitive or rehabilitative justice, which focus respectively on punishing or rehabilitating the offender). Restorative justice involves the victim, the offender, and anyone else affected by a conflict all working to find a resolution. It is based on the experience that people are more likely to honour a resolution if they participate in finding it.

An aim of restorative justice is to restore compassion to the justice process. It is victim focused. Solutions come from looking at the harm done to victims, and exploring their rights and well-being, rather than the behaviour of offenders (Van Ness 1997). Care needs to be taken to avoid re-victimising the victim; they must not feel under any pressure to participate, and the process and outcome must be desirable to them.<sup>10</sup> The offender is required to accept responsibility and to engage with those affected (the victim and the community) in identifying harm and repair. Howard Zehr (1997:68) defines the problem: “wrong creates obligations; taking responsibility for those obligations is the beginning of genuine accountability”. He summarises the process into three questions: who has been hurt, what are their needs, and whose obligation is it to correct this (Zehr 2002). However, there are very relevant criticisms of restorative justice, which also apply to customary justice.

### *Criticisms of customary and restorative justice*

Both customary and restorative justice are open to the tyranny of the majority. They reflect the dominant values in the community, and may not ensure the safety of minorities or less powerful members of the community. For example, restorative justice tends to work well for property crime, because the majority of people understand property ownership and want to keep property safe. It can fail to work for sexual or domestic violence, because many people will blame a woman (in a way they would never blame a property owner), and don't value the safety of women enough to make it work. Like the State system, community and restorative justice systems may reinforce privilege and unjust power structures. For example, more articulate and educated people may be more able to talk their way out of real accountability; socially popular people, or those central to the community in some way, may not be held to account, whereas socially marginalised people generally are; and richer people are more able to offer compensation.

For restorative or customary justice to be effective, communities have to be totally committed to holding offenders to account, rather than respecting their privacy and keeping a comfortable relationship with them. For example, if a community will not actively watch and challenge abusive partners (this includes telling other people of the abuse), it will fail to keep survivors of domestic violence safe. Smith (2005) argues that a community's desire to put an issue behind them and return to normal relations means that “restorative justice models often promote community silence and denial around issues of sexual/ violence without concern for the safety of survivors”(p 160).

A basic assumption of restorative justice is that our society is fundamentally fine and fair, and the best outcome is restoration of that fineness. Restorative justice looks for individual solutions to individual problems rather than looking for systemic problems. Ruth Morris (1999:8) argues that “you can't restore a community to

wholeness that never was whole.” For example, what solutions can restorative justice offer for sexual violence in societies with a rape culture, or for any ‘crime’ on colonised lands?

In summary, customary and restorative justice systems come from an understanding of crime as social harm rather than law-breaking. Crime is a conflict between individuals that results in harm to victims, communities and the offender. The aim of restorative justice is to reconcile those affected as well as repairing the harm caused. The process is participatory, involving victims, offenders and their communities, rather than the state. However, both restorative and customary justice are open to the tyranny of the majority. These systems require a common understanding of abuse and a commitment from the community that isn’t always met. Finally, by focusing on individuals, restorative justice approaches cannot change a culture of abuse.

Clearly, there isn’t a simple solution. We need to try to deal with the violence and abuse within our communities now, and customary/ restorative justice programmes provide a humane method for doing this. Simultaneously, we need to transform our communities into ones that will not breed and tolerate abuse in the future.

### *Transformative justice*

Education is transformative. It can change the way we understand control, power and powerlessness. It can help us recognise the ways that we are abusive, controlling, violent, even when that behaviour is considered acceptable by many people. It can show us tools, and give us skills and confidence to use them to resolve conflict or approach problems non-violently.

Programmes that aim to change the culture of a community as a way of making it safer, rather than treating problems as solely the fault of individuals, have been called transformative. These programmes understand that the context of violence is important: how the behaviour has been learnt, established, practised and maintained. This means that we are all partially responsible for the violence in our communities: rather than simply holding offenders accountable to the community, transformative justice also holds the community accountable for teaching and condoning violent behaviour and failing to teach alternatives. It aims to correct this, by teaching alternatives to violence and creating communities that do not accept violence as normal. Transformative programmes may focus on victims and perpetrators of social harm (the National Network of Stopping Violence Services is an example), or on community outreach (the It’s Not Okay campaign and the many in-school programmes about healthy relationships are examples of this). Both methods are essential. Transformative justice aims to build communities that are committed to understanding and condemning violence and abuse,

“it is insufficient to educate the victim or the perpetrator if the [community] condone and collude with violence” (Second Māori Taskforce on Whānau Violence, 2004:32).

## What does this mean for us?

Can this work in an anarchist community? We don't have the family ties of traditional communities, we don't have a common religion (even though our politics have some common ground, how far that goes is debatable). Everything we offer is perhaps more easily found somewhere else, where there are less expectations on or accountability for behaviour. It is demonstrably easy to leave an anarchist community when challenged on behaviour. A community justice model could work if 1) we really want it to, 2) we are more obviously intentional in the building of our communities, and 3) we start doing it.

What follows is a list of points for considering how community justice might work.

- ***Community justice works best when there is a community.*** Smith found that customary justice was most effective in isolated communities, because the community was more important to offenders, and they weren't able to just dump one set of friends who were trying to hold them to account, and move on to another group. Modern communities tend to be ill-defined and permeable. I would prefer not to achieve the goal of a safe community by having people leave if called on abusive behaviour. Ideally, people would want to fix things because they see it as their responsibility. The benefits of being part of the community have to be enough that most people would choose to stay and fix things rather than leave. Is this possible?
- ***Community justice is easiest where the well-being of the community is considered more important than the rights of the individual,***<sup>11</sup> eg kin-based communities. This means that individuals are always considering the effects of their actions on other members of the community. It is difficult to create this within a society that is overwhelmingly individualist. How do individualistic values, like personal freedom and privacy, interact with socialist values, like collective responsibility and cooperation? In most of us, these values are constantly in conflict, and we each shift around on this continuum. Some of us will respond to being called on behaviour by claiming our rights, others will willingly take on responsibility. Do we feel like a community has a right/ responsibility to hold individuals to account? What level of coercion is acceptable, and under what circumstances?
- ***Community justice works when there are shared values.*** Traditionally, there was the common belief system/ religion as a code of ethics. How does this work in a group that rejects the dominant culture, that is characterised by non-conformity,

and that is still defining appropriate principles for behaviour? What does our morality or code of ethics look like? It's easy to say 'our community is against any form of oppression, sexism, inter-personal violence, etc'. In reality, those values conflict with other values that we don't usually talk about, like having a nice time with our friends, not getting involved in other people's lives, making our own choices about how we live, and not being told what to do. If I hear that one of my friends is behaving abusively and hurting someone, will I confront them the next time I see them? Will I avoid talking about it because I want to hang out with my friend and I don't like difficult conversations?

- ***Community justice works when communities are united against a behaviour.*** When someone is challenged on that behaviour, even a couple of people undermining that stance can be enough to give the person a way out of feeling responsible for putting things right.
- ***Community justice works when it is focused on the needs of the people who have been hurt.*** If ownership is not with those directly involved, and the community (or a working group) takes control of abuse in the community, then we are copying the bureaucracy of the state system. We are taking control away from the victim and others affected. The process needs to stay participatory and not be controlled by experts deciding what is best for us, directing, arbitrating, judging, rather than mediating and facilitating. Are we capable of letting go and actually trusting those involved to direct the process?
- ***Strong communities have the skills and trust to resolve conflicts early,*** before they turn into big problems that need a formal intervention. We need to get better at challenging each other on shit behaviour. This means we need to get better at letting people know when their behaviour is hurting us, but it also means we need to get better at welcoming and hearing those challenges, however they come. How do we hear criticism without being defensive or criticising the process? How do we make our boundaries clear without being controlling? Building a culture that supports and models good communication is fundamental.
- ***A fair system needs to be centered on the most marginalised,*** for example queer, working-class, brown, women, and those who can't rely on their strong social networks, university informed arguments, or most radical rhetoric. Community justice seems pointless to me if it just repeats the crime of the state system in protecting the most powerful.
- ***We need to be honest about where our communities are at,*** and not pretend we're safer or more enlightened than we really are, or that abuse isn't a problem for us. For example, Smith (Incite statement Gender Violence and the Prison Industrial Complex) warns of "a romanticized notion of communities, which have yet to demonstrate their commitment and ability to keep women and children safe

or seriously address the sexism and homophobia that is deeply embedded within them.” Anti-prison advocate Herman Bianchi claims that even with the best community programmes, there should still be prisons, for dangerous violent people, and for “those people who have received the opportunity to do penitence, to come to reconciliation, to settle the dispute, and refuse, refuse, refuse.” Whether or not we agree, we need to face this honestly. Statements that we don’t need prisons or police because the majority of crime is property, poverty or drug related, offer no answer to the huge amount of abuse in society and in our communities. We need to have some response to that abuse.

## ***The way forward***

I see three parallel strategies as essential: creating systems that keep us safe now; educating ourselves and others about abuse to create a culture that is safer; and, fighting the fucked-up and abusive state system.

### ***1. We need to start now, but we don’t need to start big.***

We don't need to start with a large, well-defined, functional community, and we don't need to find a single solution that can be used in every situation. My first step towards creating something that keeps us safe is working in community with those closest to me, ie, a small intentional group who have some common values. From here, I can gain skills in talking about values and confronting poor behaviour. I can take these skills to my other relationships. I don't have the power to make anyone change their behaviour, but I do have the power to participate in ethical relationships where my values are reflected. I can choose relationships that re-enforce good behaviour and challenge poor behaviour, and I can refuse to participate in other relationships. When I need to, I can call on other people to help me. If enough people are thinking, working and organising on this, we will come up with a set of things that have worked and things that haven't. This body of knowledge can help us build better systems.

### ***2. We need to be talking about abuse.***

We must get better at naming abusive behaviour when we see it, and at putting pressure on people for as long as it takes until they change their abusive behaviour. We should aim (i) to talk about abuse when it is relevant rather than avoid it, (ii) to educate ourselves so that we have a common understanding of abuse and how to respond to it, and (iii) to organise groups, workshops and programmes to talk and educate others about abuse. We have to learn that abuse is serious. Educating ourselves and others is

necessary to avoid re-victimising survivors of abuse, and to support rather than attack those people who are challenging abusive behaviour. For me, education has meant first looking at and healing from the abuse in my life. My next step has been working in a small closed collective where we have been able to build trust. We talk about the abuse around us, how it affects us, how we contribute to it, what we're doing to fight it. This is a safe environment where we can build our understanding of abuse. There are many local organisations educating about abuse that we can learn from and support.

### ***3. We need to be organised, creative and strong in our opposition to the state system.***

We need coherent messages that expose the violence of the state criminal justice system, while still acknowledging that interpersonal violence is a real issue that needs solutions.

## **Summary**

There is no denying that there is behaviour in anarchist communities that needs to be addressed: there are conflicts, abuses of power, abusive relationships, violence. We need to have a constructive way of dealing with conflict and poor behaviour, and a way of keeping safe from violence and dangerous behaviour, without involving the state. Communities all over the world are working on this, using customary, restorative, and transformative justice models. We can organise now to build skills and practice methods. It isn't enough to leave it to some future to resolve, or to take our failures as a reason to stop trying. We can build healthy communities, we can create strategies for sorting even our worst shit without involving the state, and we can expose the state as the bully it is. We need to start now and to support each other's work towards this.

## **Notes**

1. Smith gives colonisation, police brutality and prisons as examples of state violence, and racism and poverty as examples of structural violence.
2. Public relations slogan of the New Zealand police.
3. The mean incarceration rate for all New Zealanders in 2008 was 179 per 100 000, for Māori it was 617 per 100 000 (<http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx>); compared with the OECD mean of 150 per 100 000, or excluding the US 130 per 100 000 (World Prison Population List, 8th Edition. UK Home Office, 2008).

4. Elechi uses the term equality to mean that valuing the contribution of all community members is important in conflict resolution, rather than that all community members have equal status or prestige.
5. Traditionally, a variety of penalties could be threatened, such as shaming, death or banishment, that are now illegal or less effective for coercing offenders (for example, in such interdependent communities, banishment could be considered worse than death, now it is often barely a punishment).
6. Used here to mean Māori law
7. Used here to mean the principles that Māori law is based on
8. Used here to mean something similar to reputation and respect
9. This is especially true of Canada, where the sovereign status of Native nations gives them the opportunity to develop their own community-based justice programmes.
10. The process generally involves a mediator, and meetings can be held separately with victim and offender, who may choose not to meet face to face at all.
11. This doesn't mean that individuals aren't important. Gyekye (1996:36) describes it as "emphasis on activity and success of the wider society, not necessarily to the detriment of the individual, but rather to the wellbeing of every individual member of society". Even though these communities are usually hierarchical, they also usually operate by consensus, in that anyone can participate in a decision that affects them.

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