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MĀORI AND THE CRIMINAL JUSTICE SYSTEM: FINDING EFFECTIVE SOLUTIONS TO MĀORI CRIMINAL OFFENDING

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Contents

Abstract

Finding effective solutions to Māori criminal offending has been a significant issue within New Zealand for many years. Progress, however, has been very slow, particularly over the last twenty years. This paper argues that greater priority needs to be given to the development of new responses in order to deal more effectively with Māori offending. Māori assert that as the indigenous peoples of New Zealand, the criminal justice system should be more reflective of Māori cultural perspectives, the appropriate inclusion of Māori cultural perspectives will have a greater influence on Māori offending, and the Treaty of Waitangi provides the framework for greater Māori involvement in the administration of criminal justice programmes. Opponents of tribal justice initiatives argue that there should only be one legal system where everyone is treated equally under the law, while parliamentary sovereignty should be maintained. This paper argues that traditional Māori customs incorporated within tribal justice systems provides the appropriate cultural environment to address Māori offending, while the Treaty of Waitangi guarantees the continued exercise of tino rangatiratanga over tribal processes. It also argues that the operation of tribal justice systems within the existing State framework maintains judicial and governmental integrity, as well as the notion of equality under the law. This paper proposes a model that demonstrates the practical operation of tribal justice systems in partnership with the judiciary and the Crown.

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Criminal Justice System-Treaty of Waitangi-Tribal Justice Systems

I INTRODUCTION

Finding effective solutions to Māori criminal offending has been a significant issue within New Zealand for many years. Despite the numerous reports, initiatives, and policy and legislative changes aimed at reducing Māori offending, successive governments have thus far failed to develop effective strategies to address this problem. As a result, there has been a distinct lack of progress, strategic direction, coordinated effort and systematic responses to Māori offending, particularly over the last twenty years. Identifying and agreeing on ways to reduce Māori offending has proved to be a difficult task, with the issue effectively being consigned to the 'too-hard basket', perhaps in the hope that the problem will self-correct.[1] The problem, however, will not self-correct. In order to find more effective solutions, New Zealand needs to accept that the existing criminal justice system is not working for Māori, and give priority to the development of new responses in order to deal more effectively with Māori offending. The historical and contemporary factors that influence Māori offending are varied and complex, but the high social costs of criminal offending highlights the need for greater urgency, political will, pragmatism and cooperation.

Māori rates of criminal offending have shown few signs of slowing.[2] Not content with being bystanders in this process, Māori have actively campaigned for changes to the criminal justice system to be able to deal with victims of crime and Māori offenders in a more culturally effective way. These proposals have centred primarily on the inclusion of indigenous perspectives to address criminal offending and victimisation, and on greater tribal involvement and control throughout this process, which Māori assert would have a greater impact on the reduction of Māori offending. Māori argue that as the indigenous peoples of New Zealand, the criminal justice system should be more reflective of Māori cultural perspectives, the appropriate inclusion of Māori cultural perspectives will have a greater influence on Māori offending, and the Treaty of Waitangi (the Treaty) provides the framework for greater Māori involvement in the administration of criminal justice.

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[1] Charlotte Williams *The Too-Hard Basket: Māori and Criminal Justice Since 1980* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 2001) ix.

[2] Statistics have consistently shown over the last twenty years that while Māori comprise approximately 12% of the population, they represent over half of the prison population. See for example, The Ministry of Justice *Conviction and Sentencing of Offenders in New Zealand: 1997 to 2006* (Ministry of Justice, Wellington, 2008).

One of the most comprehensive Māori proposals for criminal justice reform came in 1988 with the release of Moana Jackson's report, *The Māori and the Criminal Justice System – A New Perspective: He Whaipaanga Hou, Part 2* (*He Whaipaanga Hou*).[3] Based on the recorded views and analyses of over 6000 Māori conducted over an extensive consultation period,[4] the report reflects the perceptions, experiences, anxieties and frustrations that Māori have encountered with the criminal justice system, as well as the willingness for Māori to be more involved in the process of dealing with Māori offenders. The report offers Māori perspectives on the causes of Māori criminal offending, it highlights inadequacies within the criminal justice system in dealing with Māori offenders, and it makes a number of proposals to improve the justice system. The most controversial aspect of the report is the proposal for a parallel justice system. This proposal was firmly rejected on the basis that there can only be one legal system in New Zealand where everyone is treated equally under the law.[5] Negative reaction to this aspect of the report appears to have led to the dismissal of the entire report and its findings.[6] The dismissal of *He Whaipaanga Hou* is apparent from the lack of exposure and debate concerning the report's findings, the lack of reform within the criminal justice sector consistent with this report, and the fact that the high rate of Māori offending is still an unresolved issue. To overlook the entire report on the basis of this supposed 'radical' approach is unfortunate because scope for reform has immediately been constrained by the prevailing monocultural attitudes that are resistant to change and cultural differentiation. It also indicates that the bases for a Māori parallel justice system are misunderstood. In addition, valuable Māori insights, commentaries and perspectives from the report are wasted,[7] hopes for effective reforms have been dashed, and opportunities for constructive debate, mutual understanding and progress over the last twenty years have been lost.

Despite this response, *He Whaipaanga Hou* is as current and relevant to the criminal justice debate today as it has been over the last twenty years. The fact that Māori perspectives, hopes and aspirations for a better justice system form the basis of

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[3] Moana Jackson *The Māori and the Criminal Justice System – A New Perspective: He Whaipaanga Hou* Part 2 (Ministry of Justice, Wellington, 1988) [Jackson, *He Whaipaanga Hou*].
[4] Ibid, 2.
[5] Ibid, 3.
[6] See for example, Williams, above n 1, 95.
[7] See for example, Foreword Statements by the Secretary for Justice, David Oughton, in Jackson, *He Whaipaanga Hou*, above n 3, 3.

this report makes it a valuable resource for understanding why the criminal justice system does not work for Māori and how it can be improved. Any serious consideration for criminal justice reform should utilise these and other available resources. To expend more time and resources trying to understand why the justice system does not work for Māori for the sake of further exploration is time-wasting, particularly when Māori initiatives such as *He Whaipaanga Hou* already provide a comprehensive explanation of Māori offending and the steps needed to correct it. What is needed now is action, informed discussion, open and meaningful dialogue, understanding and mutual respect. We should not be afraid to move forward using the information already available, no matter how uncomfortable that information may be. Furthermore, we should not be afraid to address the tough issues, to accept that many of the responses to Māori offending have not worked, and to move in new directions. Participants in the debate for criminal justice reform need to understand why the current system does not work for Māori, find ways to make the system more responsive to Māori needs, and resolve any obstacles or difficulties that will inhibit progress or change. The twentieth anniversary of *He Whaipaanga Hou* provides a timely opportunity to re-assess how the criminal justice system might be improved and to discuss what issues need to be resolved in order to develop better systems and processes for Māori. The motivation for this paper thus comes from the urgent need for criminal justice reform, as highlighted twenty years previously in *He Whaipaanga Hou*. The hope is that another twenty years will not pass before realising that many of the solutions to this problem have been available to us to be debated, tried and tested.

The purpose of this paper is to re-emphasise the need to develop a criminal justice system that reflects Māori values and social norms, and that responds to the needs of Māori communities. It will argue that Māori perspectives should be incorporated into criminal justice processes in a more meaningful way and for greater Māori involvement in the administration of criminal justice processes in order to address Māori offending. Such a contention invariably calls for the development of justice programmes that provide for tribal jurisdiction over various criminal matters, although it does not necessarily call for the establishment of a separate justice system as the only expression of tribal justice. It proceeds on the basis that progress is more likely to be achieved where the debate is focussed on the establishment of cooperative, working relationships between Māori and the Crown, whereas progress is

likely to be impeded where the debate is focussed on the extreme claims for exclusive sovereignty and control. It is beyond the scope of this paper to address the myriad issues that relate to Māori offending. It will however identify and discuss three key issues in Part II of this paper that need to be resolved in order to develop a more culturally responsive criminal justice system. The first issue to be considered is the function of tribal authorities and what role they might play in the administration of criminal justice programmes. Criminal justice in traditional Māori society was a responsibility held by tribal leaders. It was an effective method of crime control because tribal leaders had the mandate to maintain social order within tribal communities through the exercise of tino rangatiratanga (chiefly authority). This part will argue that the traditional role of tribal authorities, as well as the guarantee of their continued exercise of tino rangatiratanga under Article II of the Treaty, provides the basis for a return to tribal control over Māori criminal justice matters in the present. It will discuss the relevance of the Treaty to the criminal justice debate, as well as the application of international law standards to indigenous self-determination and tribal justice systems, the need for Crown action, and the need to rebuild tribal authorities in order to establish effective tribal justice programmes today. The second issue to be considered is the need to incorporate Māori cultural values and methods to criminal justice processes. If the justice system is to be more responsive to Māori offenders, the processes, methods, and underlying values need to be culturally relevant and applicable to the offender. The third issue to be considered is the need for differentiation within the criminal justice system. Opponents of tribal justice systems argue that there should only be one legal system where everyone is treated equally under the law. This part will argue, however, that the notion of 'one law for all' is a simplistic and narrow-minded approach to criminal justice because it assumes that the exclusive application of a monocultural justice system is both valid and effective in dealing specifically with Māori offending. Non-Māori need to accept that this approach to criminal justice has failed, and will continue to fail unless the system is adjusted to be more culturally relevant to Māori. It will also argue that the notion of 'one law for all' should not preclude the application of 'one substantive law' administered through different but equally valid and respected institutions.

Whenever proposals for the exercise of Māori self-determination arise, such as the administration of tribal justice programmes, one of the main concerns is how it

will operate in practice without impacting on New Zealand's territorial integrity, political unity, or the rights of other citizens. Part III of this paper will propose a criminal justice model that will enable tribal authorities to deal with Māori offenders according to their own customs and within culturally appropriate institutions, but which does not diminish the function or authority of the judiciary or the Crown. It does not propose a justice system that operates separately and independently from the existing judicial system. Rather, it proposes a model that enables tribal authorities to work in partnership with the judiciary by allowing for the tribal management of various criminal offences while operating within the jurisdiction of the judicial system.

If progress and development is to be made, society needs to be able to discuss and agree on ways to move forward, or else the problem of Māori offending will remain unresolved.

II KEY ISSUES FOR CRIMINAL JUSTICE REFORM

A The Traditional Role of Tribal Authorities

Māori seek to play a greater role in the administration of criminal justice processes for Māori offenders through the operation of tribal-based programmes, including the tribal administration of criminal justice. This claim is based on the fact that Māori had their own traditional institutions and processes to deal with criminal offending in pre-colonial times. This was a function that fell within the role of tribal authorities as they exercised sovereign authority over tribal affairs. Māori assert that restoring this function to tribal authorities in the present will have a positive effect on Māori offending. Claims for a more culturally responsive criminal justice system are also based on the fact that Māori were a distinct sovereign people who exercised self-determination over their own affairs prior to their interaction with the British settlers, that they lived according to their own laws, traditions and customs, and that in their interaction with the colonial State they did not fully consent to outside governance.[8] Māori argue that as the indigenous peoples of New Zealand, who continue to assert their right to exercise tino rangatiratanga, they should be restored to being fully self-determining in the present. In terms of developing a more culturally responsive criminal justice system that values Māori perspectives and institutions, Māori simply want to do what their self-determining right entitles them to do, which is to ensure the well-being of their own people.

1 *Tino rangatiratanga*

Māori are a culturally distinct people who exercised their own sovereign authority at a tribal level prior to the imposition of British rule. This sovereign authority, expressed by terms such as mana motuhake or tino rangatiratanga, enabled tribal groups to exercise autonomous control over lands and resources, and to manage their own affairs, which included the maintenance of their unique tribal identities, culture, language and social order. The exercise of tino rangatiratanga represents the power for tribal groups to decide for themselves and to manage their own affairs.

[8] Mark Bennett "Indigeneity as Self-Determination" (2005) 4 Indigenous Law Journal 75, 79.

Tino rangatiratanga is a very real authority that ensured that Māori society functioned and operated in an ordered way for many centuries. Māori society consisted of numerous independent sovereign nations interspersed throughout the country, each with their own extant rights, identities, entitlements and inter-tribal links. No tribe had the right to tell another tribe what to do, nor to impinge on their decision-making authority or processes.[9] This philosophical and cultural understanding underpins Māori claims for autonomous control over their own affairs today.

Tribal jurisdiction over criminal proceedings is sourced in the right for tribal leaders to exercise tino rangatiratanga over their own affairs. Tino rangatiratanga is the political authority that represents, and is ultimately sanctioned by, the will of the tribal collective. It is manifested by the appointment of tribal leaders, who are entrusted with the responsibility to protect the interests of the tribal group, maintain harmony within the community and make decisions that ensure the social, economic, cultural and spiritual well-being of the collective. Tribal authorities played a fundamental role in the daily operations of traditional tribal life. In the event of criminal conduct, it was the responsibility for tribal leaders to take appropriate action against criminal offences, punish wrongdoers, comfort victims and restore social order.

Tino rangatiratanga provided the mandate for tribal leaders to assert control and maintain order within traditional Māori society, which ensured, inter alia, that harmony and balance between individuals, and between the collective groups that made up the tribe, was upheld. Where the harmony or balance within the collective was broken as a result of a criminal act, the exercise of tino rangatiratanga authorised corrective measures to be taken in order to restore that balance.

2 Tribal justice processes

Each tribe had their own institutions and processes for resolving disputes. Criminal justice processes would take place within settings that were culturally familiar and relevant to the participants, such as on a marae, while the laws that

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[9] Moana Jackson *He Waka Eke Noa: A Report for the Faculty of Law, Victoria University of Wellington* (Victoria University of Wellington, Wellington, 1997) 84, 93 [Jackson, *He Waka Eke Noa*].

ensured social order reflected the norms of that society. Because the laws reflected their tribal way of life, "each individual knew what was prohibited, where the prohibition came from, who would be empowered to decide corrective action, who would administer corrective action and what the corrective action would be".[10]

Criminal justice processes, facilitated by a suitably appointed elder or group of elders, took place between the offender, the victim and their representative whānau. These processes were based on concepts of restorative and reparative justice, which focussed on addressing the harm suffered by the victim (as well as the harm suffered by the offender through the commission of the offence) and on healing community relationships. Participants could negotiate an appropriate sanction or penalty for the offender (which could also be imposed on the offender's whānau) and suitable redress for the victim as a means of ensuring that satisfactory outcomes were achieved. Resolution occurred when each side was satisfied that the harm had been remedied and that balance had been restored.[11]

Moana Jackson observes that although tribal justice systems did not prevent all criminal infringements, just as the Pākehā law has not done so in Western society, it provided a recognisable legal framework that ensured that Māori society functioned in an ordered way.[12] Tribal justice systems provided an effective sense of legal order and social control within Māori society because the jurisdiction of tribal authorities over criminal proceedings was respected, anti-social behaviour was measured against cultural values that the offender knew and understood, consequences for wrongdoing were enforced, order was maintained and balance was restored. The close relationship between the offender, victim, venue, and tribal leaders provided an intimate setting that promoted responsibility, accountability, rehabilitation and deterrence.[13] The marae was an appropriate and respected venue to conduct remedial proceedings because it symbolised the mana or authority of the tribe, it provided a culturally supportive and familiar environment for the participants, and it allowed for the application of tikanga Māori. The marae is a multi-purpose venue situated at the

[10] Carey N Vicenti "The Re-emergence of Tribal Society and Traditional Justice Systems" (1995) 79, 3 Judicature 134, 137.
[11] Jackson, *He Waka Eke Noa*, above n 9, 84.
[12] Jackson, *He Whaipaanga Hou*, above n 3, 43.
[13] Ibid, 111.

heart of tribal societies that provides the cultural context for tribal members to understand the importance of values and social order and to comprehend the consequences of criminal actions on the rest of society. It also provides a culturally relevant setting for the application of Māori perspectives to criminal offending, and the resolution of disputes within the community, rather than the culturally-isolated, single-purpose, retributive environment of a court. Tribal justice systems therefore operated and existed effectively within traditional Māori societies, albeit along a different axis from the ideals and structures of Western, individual-based criminal justice systems.

3 *The Treaty of Waitangi*

In any debate surrounding Māori issues, the scope and relevance of the Treaty is tested and challenged. There is a seemingly endless jurisprudence contesting the application of the Treaty in different situations, while some would argue that the Treaty is of historical or moral interest only.[14] After nearly 170 years of cohabitation, New Zealand still struggles to agree on the status and applicability of the Treaty, particularly for contemporary issues. The significance of the Treaty, however, is ongoing. As the Rt Hon Sir Geoffrey Palmer observed, "Treaty business will never be finished. Remember the Treaty always speaks. Our problem is that its voice has been muffled".[15] The Treaty is therefore relevant to contemporary Māori issues, including claims for tribal justice systems. The issue is to determine what rights the Treaty accords to Māori in relation to the tribal management of criminal justice matters and how power might be allocated to tribal groups to operate their own justice programmes.

The Treaty is of fundamental constitutional significance to New Zealand. This 1840 agreement between many of the Māori tribal chiefs and the Crown, which provides the legal basis for the cession of sovereignty to the Crown, and which engineered the formation of a new bicultural State in the South Pacific, is surely

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[14] Dr David V Williams "Myths, National Origins, Common Law and the Waitangi Tribunal" (23rd Annual Australia and New Zealand Law and History Society Conference, Murdoch University, Western Australia, 2-4 July, 2004) para 47.

[15] Rt Hon Sir Geoffrey Palmer "Where to from Here?" in Geoff McLay (ed) *Treaty Settlements: the Unfinished Business* (VUWLR, Wellington, 1995) 241, 241.

without modern-day equivalent. In an increasingly competitive and globalised world, the undisputed cession of sovereignty to another State is unthinkable. The fact that the Treaty effectively achieved this in times of peace surely underscores its constitutional value and importance to New Zealand, and therefore the need to accord it greater constitutional significance. While the precise terms of the Treaty are disputed, the Treaty should nevertheless be seen in the context of its constitutional effects and consequences. By the Treaty, an independent people lost their standing at international law,[16] while the British obtained sovereign authority and control. But in that transaction, Māori retained certain guarantees; the transfer of kawanatanga to the Crown was conditional upon the retention of tino rangatiratanga, which therefore acts as a restraint on Crown sovereignty. Although the scope of the Treaty is disputed, its constitutional impact and relevance to New Zealand society is significant and far reaching. As the Court of Appeal identified:[17]

> Moreover a nation cannot cast adrift from its own foundations. The Treaty stands...Whatever constitutional or fiduciary significance the Treaty may have of its own force, or as a result of past or present statutory recognition, could only remain.

Participants in the debate need to accept that Māori claims for tribal justice programmes are centred on the Treaty, and work towards an outcome that will allow for the mutual application of the Treaty obligations. It will inevitably raise competing visions of sovereignty, self-determination, autonomy and nationhood, but it is a debate that needs to be discussed and agreed upon.

Māori claims for the continued exercise of their tribal self-determination are based on Article II of the Treaty, which in the Māori text guarantees the retention of "tino rangatiratanga" in exchange for the cession of "kawanatanga" (governorship) to the Crown. Māori understand this passage to mean that the right to govern themselves and to manage their own affairs, as they had previously done for many centuries, did not end with the signing of the Treaty. Rather, Māori were guaranteed the right to continue to manage their own tribal affairs, while also allowing the Crown the right to

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[16] Rt Hon Dame Sian Elias "The Treaty of Waitangi and the Separation of Powers in New Zealand" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brooker's, Wellington, 1995) 206, 213 [Elias, "The Treaty of Waitangi and the Separation of Powers in New Zealand"].

[17] *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 308-309 (CA) Cooke P.

govern. This was perhaps a novel arrangement for the British settlers, whose aptitudes for colonial expansion and control was suddenly constrained by Māori ambitions to not only negotiate the retention of their own self-governing regimes, but to do so by way of a formal treaty. Historical events from 1840 onwards, however, have since confirmed the British inclination for colonial domination, their disrespect towards non-European methods of societal and religious order, and their inability (or unwillingness) to accommodate indigenous models of self-determination within their governing institutions. While precedents for the establishment of power-sharing arrangements between settler States and indigenous peoples may not have been common or popular at the time, the reality is that the Treaty demanded the development of a custom-made legal system that reflected the conditions of Aotearoa/New Zealand and accommodated and incorporated the interests of both the indigenous Māori and the immigrant settlers within their governing and legal structures.

For a bilingual document that was hastily and inexpertly drafted, the Treaty is surprisingly coherent in that it "identifies the crucial rights, obligations and privileges" between Māori and the Crown.[18] The Treaty did not specifically outline what shape Māori/Crown governing structures would take, but good faith and mutual respect between the two Treaty partners presumably would have enabled the development of a system of laws and government that would accommodate this unique blueprint for a new bicultural existence. The blueprint is the Treaty, and the bicultural existence was based around the dual operation of kawanatanga and tino rangatiratanga. The inconvenient truth, however, is that it was not the Treaty but colonial will that deprived Māori of their self-governing status, that imposed a unitary monocultural legal system, and that made the retention of Māori customs and collective land ownership incompatible with the new order. The 'sovereignty' that the Crown presumed to exercise under the Treaty was evidently unrestrained by the guarantee of Māori tino rangatiratanga, while Māori aspirations for their continued self-determination were superseded by their need to be civilised. By virtue of its

[18] Elias, "The Treaty of Waitangi and the Separation of Powers in New Zealand", above n 16, 207.

physical force, the Crown "took land, removed people from their homes, attempted to dissuade them from observing their customs, and imposed its rule".[19]

Finding appropriate expression for the Treaty within New Zealand's constitutional arrangements is perhaps the most important, yet problematic, issue for the country. The Treaty debate, centred as it is on the quest for control, is highly contested, whether that quest for control relates to sovereign authority, land, resources or people. The issues are politically, legally and socially complex, while the debate is further complicated by competing conceptions of sovereignty, self-determination, citizenship, nationhood, autonomy, and the status other minority groups.[20] The prospects for a quick resolution are not bright, particularly when the debate is pitched at the highly contested level of exclusive sovereign control.

In terms of the criminal justice debate, Māori claims for the development of tribal justice programmes raise issues relating to the scope and extent of tribal self-determination, and how it might impact on parliamentary sovereignty and equality under the law. Māori aspirations to be more involved in the management of their own affairs, such as health, education or criminal justice, have often been conflated with claims for full self-determination, which are seen as a threat to the country's political and territorial integrity. Claims for indigenous self-determination have proven to be a difficult issue to resolve, especially when seen as providing a right for Māori to secede from the State. Claims for tribal justice systems have therefore been placed in the too-hard basket, because they are seen in the same context as claims for separate autonomy. For the purposes of establishing a more effective criminal justice system, however, it is necessary to differentiate between 'criminal justice' claims for the Māori administration of tribal justice programmes within the existing State framework, and 'constitutional' claims for full self-determination. Māori claims for tribal justice programmes should be considered within the context of a criminal justice system that is struggling to cope with Māori offending, and which needs immediate action, and not within the wider context of constitutional reform. The criminal justice system operates as a branch of the government, and could be more responsive to specific

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[19] Judith Resnik "Multiple Sovereignties: Indian Tribes, States, and the Federal Government" (1995) 79, 3 Judicature 118, 119.
[20] Bennett, above n 8, 77.

policy changes without requiring significant constitutional change. Law enforcement is regarded as a core function of executive government and it is historically where the least play has been allowed to Māori in managing their own affairs,[21] but just as the health, education and social welfare departments, for example, have devolved a range of services to Māori entities, which recognises the value and potential of Māori involvement, the criminal justice system could similarly devolve justice services to Māori entities to operate tribal justice programmes without limiting parliamentary sovereignty. Tribal justice programmes should not be seen as limiting the jurisdiction of the judiciary over criminal proceedings, but rather as an opportunity for tribal authorities to work in partnership with the judiciary. The impact of establishing tribal justice programmes on the criminal justice system or on the constitution will not be as significant as first feared. The criminal justice system, for example, currently allows for the referral of offenders to diversion, family conferencing and restorative justice programmes. The development of formal tribal justice programmes, and of working relationships between Māori and the judiciary, should be seen in the same context as providing an opportunity for tribes to work in partnership with the judiciary, and not as a limit on the role of the judiciary.

As long as tribal justice claims are equated with wider constitutional claims for full self-determination, progressing initiatives to effectively address Māori offending will be slow. In order to move forward it is important to move on from the highly conceptual contest for sovereign control and establish common ground that will enable cooperation and working relationships between Māori and the criminal justice system. Participants in this debate need to set realistic, achievable and pragmatic goals. To that end, it is necessary to re-evaluate what it is that is being claimed in the criminal justice debate, and to deal specifically with those issues.

The Treaty recognises the right for Māori to manage their own affairs by guaranteeing the ongoing exercise of tribal tino rangatiratanga. In order to develop timely and effective responses to Māori offending, Māori claims to develop tribal justice programmes based on their right to exercise of tino rangatiratanga should be seen as operating within the existing State framework rather than as a separate

[21] Williams, above n 1, 31.

autonomous system. Developing effective responses to Māori offending is stalled when tribal justice claims are perceived as claims for exclusive sovereign control. Sovereignty claims are a matter for wider constitutional consideration and, in the interest of expediency and practicality, should not restrict initiatives for criminal justice reform. The debate needs to be narrowed to the criminal justice context, while efforts should be focussed on developing criminal justice responses that value Māori input and involvement, that establish cooperation and partnership between Māori and the Crown, and that are not seen as a fetter on judicial jurisdiction or parliamentary supremacy.

4 Crown action

The Crown needs to respond by developing remedies that are specific to the problem of Māori offending. In *New Zealand Māori Council v Attorney-General*, the Privy Council recognises the need for the Crown, in fulfilment of their Treaty obligations, to take steps that are proportional to the circumstances. The case outlines that:[22]

> While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. Again, if as is the case with the Māori language at the present time, a taonga is in a vulnerable State, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise for example, if the vulnerable State can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action.

In relation to Māori offending, the taonga is the Māori offender who is vulnerable to factors that contribute to criminal offending, and to the culturally alien environment of the existing criminal justice system that has failed to effectively address Māori offending, rehabilitation and re-offending. The Crown needs to prioritise the development of a culturally responsive justice system, and to recognise the potential

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[22] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC) Lord Woolf for the Court.

for tribal groups to work in partnership with the judiciary by adopting a more culturally effective way to deal with offenders. It means that the Crown needs to develop specific responses to ensure that Māori offenders are dealt with effectively within the criminal justice system, as well as address the broader factors that contribute to the high rates of Māori offending. By dealing specifically with Māori offending, by allocating adequate time and resources, and by developing specific remedies, positive outcomes can be achieved and progress will be made. By failing to take corrective steps specific to Māori offending, the issue becomes too big and unwieldy and nothing is achieved, as has been demonstrated over the last twenty years.

5 *International law*

While domestic recognition of indigenous and Treaty rights continues to stutter, limited by the conservative legal position that the Treaty is only enforceable to the extent that it is incorporated into domestic law,[23] international law has developed significantly in the post-World War II era to give greater recognition of indigenous peoples' rights. There are a number of international instruments that recognise the need to protect the cultural identity of indigenous peoples, and in particular, to maintain their own juridical institutions.

(a) International Covenant on Civil and Political Rights

Article 27 of the ICCPR provides:[24]

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This passage is relevant to the Treaty debate in that it reflects international concerns for the vulnerability of indigenous peoples within States, and the need to protect their

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[23] *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590, para 13.
[24] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

cultural identity. Enabling Māori to exercise their tribal authority through the operation of tribal institutions such as tribal justice systems will allow Māori to influence the lives of Māori offenders through the transmission of their own religious and cultural practices, and to do so within culturally instructive and supportive environments.

New Zealand ratified the ICCPR, enacting the New Zealand Bill of Rights Act 1990 (NZBORA) in fulfilment of its international commitments. There is no clear legally enforceable right to establish a Māori criminal justice system, except perhaps under section 20 of NZBORA, which is a reflection of Article 27 of the ICCPR. Caren Wickliffe asserts that if a Māori criminal justice system could be seen as necessary for the enjoyment of culture, and if a Treaty right to such a system exists, then the government could arguably have a legal obligation to develop a Māori criminal justice system under section 20 of NZBORA.[25] Māori could argue that the holistic practice and enjoyment of culture includes all aspects that comprise Māori life, including the maintenance of tribal justice systems. The development of tribal justice systems would, therefore, fall within the wider development of tribal institutions that will enable Māori to enjoy their culture.

(b) International Labour Organisation Convention No. 169

The International Labour Organisation (ILO) also recognises the need to strengthen indigenous peoples' institutions, the need to remove State policies of integration and assimilation, and in particular, the need to develop a criminal justice system that is responsive and inclusive of indigenous peoples' needs. The ILO Convention No. 169,[26] recognises the vulnerability of indigenous peoples in relation to criminal justice and outlines a number of specific provisions to remedy this. The preamble firstly recognises:

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[25] Caren Wickliffe "A Māori Criminal Justice System in the Context of Rethinking Criminal Justice" in F W M McElrea *Re-thinking Criminal Justice – Vol 1 Justice in the Community* (Legal Research Foundation, Wellington, 1995) 25, 30.

[26] Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No 169) (27 June 1989) International Labour Organisation 76th Session (entry into force 5 September 1991).

> The aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.

Article 6 provides that governments shall "establish means for the full development of [indigenous] peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose". In the application of national laws and regulations, Article 8 provides that due regard shall be had to indigenous peoples' customs or customary laws, and that indigenous peoples "shall have the right to retain their own customs and institutions" as long as they are not incompatible with fundamental human rights. Article 9 provides that where compatible with the national legal system and internationally recognised human rights, "methods customarily practiced by the peoples concerned for dealing with offences committed by their members shall be respected", while the "customs of [indigenous] peoples in regard to penal matters shall be taken into consideration by the authorities and courts". Article 10 goes on to provide that when imposing sentences on indigenous peoples, regard should be had to their "economic, social and cultural characteristics", and that "preference shall be given to methods of punishment other than confinement in prison". ILO Convention No. 169 therefore provides strong and specific recognition for the development of institutional responses to address criminal offending, including the administration of indigenous institutions and the incorporation of indigenous customs.

(c) The United Nations Declaration on the Rights of Indigenous Peoples

The recently adopted United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) also provides for the development of indigenous institutions and structures that allow for the tribal administration of justice processes.[27] References are made throughout the Declaration recognising the right for indigenous peoples to maintain and strengthen their distinct political, legal, economic, social and cultural institutions,[28] to maintain and develop their own decision-making

[27] UNGA "The United Nations Declaration on the Rights of Indigenous Peoples" (13 September 2007) UN Doc A/61/L.67.
[28] Ibid, Article 5 and Article 20.

institutions,[29] to be actively involved in the development of social programmes affecting them, and where possible, to administer such programmes through their own institutions,[30] and for States to respect and promote the inherent rights of indigenous peoples that derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies.[31] Article 34 specifically recognises the right for indigenous peoples to maintain their own juridical systems or customs. It provides that:

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

The Declaration therefore recognises the right for indigenous peoples to develop and maintain their own tribal justice systems.

(d) Summary

These international instruments provide general recognition for the need to respect and promote indigenous institutions, and the important role that tribal structures play in the protection and development of indigenous peoples' culture. Holistic approaches within tribal communities means the maintenance of tribal justice processes are an integral aspect of the protective and developmental functions of tribal authorities. They are regarded as essential, inter-related components that comprise tribal life. International law recognition of tribal institutions recognises the right for tribes to be self-managing in all aspects of tribal life, including criminal justice.

These instruments also provide specific recognition of the right for indigenous peoples to develop and maintain their own juridical systems and for the incorporation of indigenous customs and perspectives when dealing with criminal offenders. Regard should be had to external factors that may contribute to indigenous criminal offending at the sentencing stage, while ILO Convention No. 169 also recognises that

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[29] Ibid, Article 18.
[30] Ibid, Article 23.
[31] Ibid, Preamble.

the imprisonment of indigenous offenders is not the only, or indeed the most effective, way to deal with criminal offending. It recognises that indigenous methods of dispensing justice are equally valid and worthy of consideration.

New Zealand has not signed or ratified ILO Convention No. 169 or the UN Declaration so it is not legally bound by these instruments. They are, nevertheless, influential in the debate for criminal justice reform in that they signify the acceptance of emerging international norms concerning indigenous peoples by the international community, and reflect how far international law has come in recognising and protecting the rights of indigenous peoples. The international acceptance and development of indigenous justice systems could, therefore, influence the development of tribal justice systems within New Zealand. New Zealand should work towards recognising and implementing tribal justice initiatives in line with internationally accepted standards for indigenous peoples.

6 Rebuilding tribal authorities

Tribal authorities traditionally provided the appropriate institutions and forums for the administration of tribal justice processes, and they held the mana or authority to oversee and enforce the dispensation of tribal justice. Attempts to strengthen and re-traditionalise tribal justice systems stem from dissatisfaction with the inability of the criminal justice system to address Māori offending, and the fact that tribal justice systems operated effectively within traditional tribal structures.[32] Māori assert that the cultural relevance of tribal institutions will have a greater influence on Māori offenders by being able to address criminal issues in a Māori way.

The historical events of colonisation, colonial rule, land wars, land confiscations, legislation, and Māori urban migration from the mid-1900s had the effect of, firstly, reducing the economic, social, cultural and political role of tribal authorities as a result of the alienation of lands and resources, and through the isolation of its people, and secondly, by limiting the function of tribal authorities and the exercise of their tino rangatiratanga through legislation and parliamentary control.

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[32] Ada Pecos Melton "Indigenous Justice Systems and Tribal Society" (1995) 79, 3 Judicature 126, 133.

The challenge for tribal groups throughout the years has been to remain economically viable, culturally valid, and politically relevant for its tribal members. This challenge has seen many smaller hapū groups either amalgamate with larger groups or become non-existent. Notwithstanding these obstacles, Māori have managed to retain their tribal identities through times of economic and political hardship, while commercial activities and Crown settlements have seen the re-emergence of tribal growth and development. The settlement process for historical Treaty grievances has been particularly influential in helping tribes to rebuild because it has seen the significant transfer of land, cash and other settlement assets to tribes, while the process of settling Treaty grievances has seen the mobilisation and unification of Māori tribal support, which has given new strength to tribal groups and Māori society. The settlement process has not been ideal in that it has generated much inter and intra-tribal tension. It has, nevertheless, enabled a pathway for tribal groups to rebuild economically, socially, politically and culturally, and to generate necessary momentum for the development of tribal-based programmes and the exercise of tribal self-management. This rebuilding process is essential if tribes are to be regarded as valid and legitimate political entities for the development of tribal justice programmes. The revitalisation that has come as a result of the settlement process and the growth of tribal economies has demonstrated what tribal groups can achieve when their efforts and resources are not largely consumed by the need to defend their existence.[33]

The mandating process that the Crown has required of tribes in order to enter into settlement negotiations has helped to identify the 'Treaty partner'. This process recognises the legitimacy of tribal groups to represent their people and to negotiate with the Crown over historical breaches of the Treaty and for the ongoing management of tribal issues. It recognises that tribes have recognised rights under the Treaty, and it provides the opportunity to establish ongoing partnerships with the Crown. This Treaty partner relationship could lead to the devolution of more tribal development programmes to iwi, including the devolution of criminal justice programmes. The mandating and settlement process has also helped to re-generate the level of membership activity within tribes by providing opportunities for members to register, vote, participate in tribal decision-making processes, and re-kindle tribal

[33] Douglas B L Endreson "The Challenges Facing Tribal Courts Today" (1995) 79, 3 Judicature 142, 142.

links, regardless of the member's physical location in relation to the tribe. Conditions since 1840 have changed, which means that tribal members are able participate in tribal processes, while tribes are able to provide support to their members, regardless of where they live. The mandating and tribal registration process has also helped to restore the mana of the tribe and the role of tribal authorities. Tribal groups maintain a registry of members whose interests they represent, while members are able to endorse and sustain their tribal leaders and representatives through voting and participatory processes.

The right to develop initiatives for Māori development, and the potential for culturally targeted programmes, lies within the traditional role of tribal authorities. How tribal authorities structure their organisations to deal with contemporary issues is a matter for those groups to work through based on their needs, circumstances, membership and resources. The 'iwi' is largely recognised as the "enduring, traditional, and significant form of social, political, and economic organisation for Māori".[34] Many established iwi entities already have clear structures in place to manage assets, economic activities, and social and cultural development programmes, while some of the smaller and under-resourced tribal groups will need to rebuild or develop their structures to be able to respond to contemporary demands. In order to manage tribal justice programmes, tribal entities will likely have to create specific tribal justice structures within their iwi organisations in order to facilitate and administer justice programmes. This will involve the designation of institutions, venues, procedures, personnel, training procedures and suitably appointed facilitators to be able to administer these programmes. The Crown could establish compliance and mandating requirements to ensure that tribal groups have the resources, personnel, structures and processes to administer justice programmes. Economic activity and Treaty settlement packages will provide some of the resources necessary to develop the required infrastructure for tribal justice programmes. The Crown can assist in this development by providing additional financial, resource and logistical support as well as suitable training.

[34] See for example, Runanga Iwi Act 1990 (repealed), s 6.

B Indigenous Criminal Justice Methods

The second issue for criminal justice reform compares Western and indigenous approaches to criminal justice, and finds that the Māori offender is less responsive to the monocultural processes and sentencing regimes of the current justice system. If the criminal justice system is to deal more effectively with the Māori offender, the processes and outcomes need to be more relevant to the Māori offender's cultural understanding. As Charlotte Williams identifies:[35]

> A justice system that is regarded as alien and unreflective of their society by a significant sector of the population is not a good system. All citizens need to be able to see themselves in their institutions of government and to regard them as basically fair.

Within New Zealand, dual justice systems exist; one is based on Western justice paradigms and the other is based on indigenous justice paradigms.[36] In the formation of New Zealand's criminal justice system, however, only Western justice paradigms were given validity as the Crown looked to impose its rule on the newly settled colony. Indigenous methods of criminal justice, which have existed within tribal communities for centuries, were regarded as quaint and uncivilised. The monocultural attitude of the imposed British rule assumed that Māori would willingly accept the imposition of English institutions, and that Māori were not competent to share in the administration of those institutions.[37] From a Māori perspective, the problem with the existing criminal justice system is that it is regarded as culturally and philosophically alien, and as part of the machinery of government that has attempted to dominate and control the Māori way of life, for which there is much dissent. Crown policies of the 1800s and early 1900s, which attempted to integrate and assimilate Māori into mainstream society, have given way to bicultural and devolution policies, as the government has looked to be more inclusive of Māori perspectives. The introduction of Family Group Conferencing (FGC) procedures for youth offences,[38] and perhaps more recently with moves towards restorative justice

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[35] Williams, above n 1, 2.
[36] Melton, above n 32, 126.
[37] Jackson, *He Whaipaanga Hou*, above n 3, 49.
[38] Children, Young Persons, and Their Families Act 1989, s 247.

and alternative dispute resolution frameworks provide examples of a justice system looking to be more inclusive of Māori perspectives, and as society increasingly looks for better alternatives to the retributive, adversarial nature of the current criminal justice system, and for greater recognition of victim's rights. These initiatives have introduced a degree of cultural appropriateness to the justice system that has demonstrated that justice systems can be adapted to better meet the needs and concerns of Māori.[39] The effectiveness of these initiatives is limited however because control remains with the Crown and the processes are directed within Western institutions, while the care of offenders and victims remains outside the control of their kinship groups.[40] As Moana Jackson identifies:[41]

> Justice for Māori does not mean the attempted grafting of Māori processes upon a system that retains the authority to determine the extent, applicability, and validity of those processes. No matter how well-intentioned and sincere such efforts, they will merely maintain the co-option and redefinition of Māori values and authority that underpins so much of the colonial will to control.

Because law enforcement is a key function of government, the pressure to retain discretionary schemes such as FGC and restorative justice initiatives within a unitary system is greater.[42] Chris Cunneen argues, however, that the incorporation of culturally appropriate conferencing programmes is "nothing more than tokenism if there is no framework provided for significant indigenous input or control over the form and substance of conferences".[43] What is needed is not the adoption of cultural methods onto Western processes, but the re-establishment of indigenous systems that will allow Māori to reclaim their traditional philosophies and jurisprudence, as well as make just decisions that will help to restore balance and harmony in both the lives of offenders and their victims.[44]

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[39] Juan Tauri "Family Group Conferencing: A Case-Study of the Indigenisation of New Zealand's Justice System" (1998) 10 Current Issues in Criminal Justice, 168, 174.
[40] Moana Jackson "Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality" in F W M McElrea *Re-thinking Criminal Justice – Vol 1 Justice in the Community* (Legal Research Foundation, Wellington, 1995) 33, 34 [Jackson, "Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality"].
[41] Ibid.
[42] Williams, above n 1, 112.
[43] Chris Cunneen "Community Conferencing and the Fiction of Indigenous Control" (1997) 30 The Australian and New Zealand Journal of Criminology 292, 304.
[44] Jackson, "Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality", above n 40, 34.

1 Indigenous justice paradigms

Attempts to re-traditionalise justice programmes stem from discontent over the court system's inability to address Māori offending and the lack of tribal control. Western approaches to criminal justice are almost diametrically opposed to that of indigenous justice approaches, which provides one explanation as to why Western justice systems have struggled to deal with indigenous offenders. Indigenous justice systems, which have been developed and refined over time, reflect the values and philosophies of tribal life. Tribal responses to criminal offences are directed to restore or maintain those philosophies and values. The imposed Western justice system, however, struggles to address the needs and concerns of Māori offenders through its individualised, hierarchical, adversarial, retributive, punitive and culturally isolated processes. Western justice systems do not provide the necessary cultural context to help the offender understand the impact or consequences of their criminal behaviour on the victim, the community and themselves.

Indigenous justice processes are directed at building and mending relationships, and achieving positive outcomes for all involved. They commence with an effort to get an acknowledgement of guilt or wrongdoing, to identify the tapu that has been infringed as a result of the offending, and to restore peaceful relationships on the basis of suitable redress.[45] For reparation to be effective, it is essential for the offender to make amends through apology, asking forgiveness, making restitution and engaging in acts that demonstrate a sincerity to make things right.[46] The adversarial nature of Western justice systems, a determination of actus reus and mens rea, and the required standard of proof beyond a reasonable doubt "legitimises deception" on the part of the offender, and removes the focus of restoring the victim.[47] Western justice systems are characterised by the separation of the branches of government, and of division between religious and State functions. The function of the justice system is to apply the legislation's criminal code, administer justice and punish the offender for crimes that are regarded as offences against the State, while the imprisonment of offenders would see the offender isolated from the support of their family or

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[45] Jackson, *He Waka Eke Noa*, above n 9, 84.
[46] Melton, above n 32, 126.
[47] Vicenti, above n 10, 138.

community.[48] The justice process is fragmented into arrest, pre-trial, depositions, trial and sentencing stages, opposing parties are placed in a hostile, State-sanctioned court environment to determine a defendant's guilt or innocence, while the trial is presided over by a court-appointed judge and jury.[49] There are winners and losers.

Tribal justice systems on the other hand are based on the holistic philosophies of indigenous peoples, which regard relationships between people, ancestors, nature, iwi, hapū, whānau, and the application of religion, spirituality and karakia as integrated and interconnected. Restorative and reparative principles guide criminal justice proceedings, which are aimed at repairing the harm suffered by the victim, mending relationships, healing the community and restoring harmony and balance to the collective. The process takes place within culturally relevant settings. It is presided over by tribal elders who are acquainted with the parties, and attended by representative whānau for the victim and the offender. The collective nature of tribal society means that the responsibility for criminal acts and the harm suffered as a result of criminal offending goes beyond the particular circumstances of the offender and victim; the burden is also shared by the collective. The offender is dealt with according to the (usually unwritten) laws that govern tribal society, which are taught to all tribal members by way of example and practice.[50] Tribal laws are considered a way of life, and are reflective of societal norms, while justice is considered a part of that life process.[51] Participants in this process learn and understand the impact and consequences of criminal behaviour on the community because the offence is seen within the context of the offender's relationship with, and responsibilities to, the collective. Because tribal justice processes look to restore the spirituality and the wairua of the participants, the application of religion and spiritual cleansing will play a significant role. Proceedings usually allow for negotiation and deliberation between the participants, while the process is dealt with in its entirety, rather than being broken up into stages.[52] While tribal processes are aimed primarily at restoring the victim, tribal processes are also directed at repairing the spiritual, emotional, physical or

[48] Jackson, *He Whaipaanga Hou*, above n 3, 111.
[49] Melton, above n 32, 128.
[50] Ibid, 126.
[51] Ibid, 133.
[52] Ibid, 128.

social imbalance of the offender that led to the commission of the offence.[53] The culturally familiar and supportive setting will ensure that the offender is rehabilitated, while also ensuring the effectiveness of any sentence. Resolution is said to occur when the harm for the victim and their whānau is remedied and relationships are restored.

The aims of indigenous justice processes to restore balance and harmony within tribal communities by way of reparation and apology does not mean that the process or sanctions are soft, meaningless or simply "warm fuzzies".[54] They are based on laws and processes that have defined centuries of tribal existence, and that have meaning to tribal members. The imposed sanctions reflect the seriousness of the infringement and tribal abhorrence to criminal behaviour, while tribal decisions are binding and enforced. The infringement of a person's tapu through criminal offending such as rape or incest was treated seriously. In extreme cases, the resulting sentence was banishment or death.[55] The banishment of an offender was considered severe, because the person was removed from the community that defined them and gave their life purpose.[56] It reflects the seriousness with which criminal behaviour was viewed and the remedial steps that were necessary in order to restore the victim's well-being.

Traditional Māori society thus had a functional and effective criminal justice process that ensured that social order was maintained or restored. Preserving the tapu of the individual and the collective was fundamental. Criminal acts were thus defined as wrong, while consequences were severe because damaging the tapu of the victim was regarded as damaging the people as a whole.[57]

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[53] Moana Jackson "Justice and Political Power: Reasserting Māori Legal Processes" in Kayeleen M Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Avebury, Aldershot, 1995) 243, 247.
[54] Moana Jackson, *He Waka Eke Noa*, 84.
[55] Ibid, 83.
[56] Ibid.
[57] Ibid, 84.

The current justice system has incorporated a number of changes to its procedures that appear to mirror indigenous methods of dispute resolution. The Victims' Rights Act 2002, for example, recognises the rights of victims of offences and outlines a number of principles and provisions to improve their treatment.[58] Section 9 of this Act encourages the facilitation of meetings between the victim and the offender to resolve issues relating to the offence, thus recognising the increasing emphasis and value of restorative justice processes. The Sentencing Act 2002 also outlines a number of provisions allowing the offender to make reparation for an offence,[59] or any other measure to make amends.[60] At the sentencing stage, the court can also hear from witnesses to speak on cultural or other issues that may have impacted on the commission of the offence or how the whānau or community may be able to assist the victim or the offender.[61] These principles and processes that are slowly being recognised and incorporated into Western legal systems are fundamental components of indigenous approaches to criminal offending, which recognise that justice systems can be adapted to better meet the needs and demands of Māori.[62] Indigenising the justice system through the incorporation of Māori approaches improves the cultural appropriateness of the justice system, but it also removes the cultural connection between practice and theory, it locates cultural values away from its traditional base and it confines indigenous processes within Western structures. It also devalues and de-legitimises Māori aspirations to manage their own affairs as guaranteed by the Treaty, and to address criminal offending according to their own customs, procedures and institutions. Attaching Māori concepts onto Pākehā processes maintains the outdated and outmoded policies of integration and assimilation by acknowledging the value of Māori concepts but denying the authority to exercise them. Moreover, it will not bring the necessary improvements to Māori offending or the control that Māori seek. The justice system needs to acknowledge and respect the rightful application of indigenous approaches to criminal proceedings conducted through Māori-administered institutions and structures.

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[58] Victims' Rights Act 2002, s 3.
[59] Sentencing Act 2002, s 12.
[60] Sentencing Act 2002, s 10.
[61] Sentencing Act, 2002, s 27.
[62] Tauri, above n 39, 174.

C *Differentiation*

The third issue to be discussed is how power might be allocated to tribal groups allowing for the application of alternative criminal justice programmes. One of the major objections to initiatives for tribal justice programmes, whether they constitute a separate Māori justice system or whether they operate within the existing justice system, is the notion of 'one law for all' and that everyone must be treated equally under the law. Moana Jackson's proposal for a Māori parallel justice system was firmly rejected on the basis that there can only be one law for all New Zealanders operating under a single legal system.[63]

The notion of a single, unitary legal system stems from the underlying principles of Western political thought that State authority is absolute, unlimited and indivisible. Informed by Diceyan principles of parliamentary supremacy,[64] New Zealand inherited a Westminster-style system of government that set about imposing its will on the indigenous inhabitants, and which clearly did not represent Māori aspirations to retain their own structures. The first sitting of Parliament in 1854, for example, was a colonial settlers' Parliament. Although Māori made up the majority of the population at the time, there was no Māori representation, while Māori played only a limited role in its choice.[65] The "new propertied" government that evolved from that point was fixated on civilising and integrating Māori into mainstream society.[66] As Dr David Williams points out:[67]

> Integration is precisely what cats do to mice. They integrate them. The majority swallows up the minority; makes it sacrifice its culture and traditions and often its belongings to conform to the traditions and the culture of the majority.

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[63] See for example, above n 6.
[64] See for example, AV Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, London, 1959) 39-40, which provides that "the principle of Parliamentary sovereignty means neither more nor less that this, namely, that Parliament…has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament".
[65] Hon Dr Michael Cullen (24 May 2004) 617 NZPD 13192.
[66] Jackson, *He Whaipaanga Hou*, above n 3, 110.
[67] Williams, above n 14, para 43.

Integrationist policies saw the installation of an English-style legal system that took no account of indigenous institutions, values and philosophies, and of the Treaty. Māori have since been excluded from playing any major role in managing their own affairs. The one law that society protests should be maintained is thus manifested through a combination of legislation, institutions and processes that are distinctly English. It is unsurprising, therefore, that Māori struggle to see a future for themselves in a model that rejects their customs, values and institutions. As Moana Jackson identifies, to replace ancient Māori customs and traditions on the basis of their inferiority with a wholly unfamiliar Pākehā system represents the "height of monocultural arrogance".[68]

The notion of one law for all, which for Māori translates to the application of one English law to the exclusion of Māori perspectives and processes, is simply not credible in light of the Treaty guarantee of tino rangatiratanga, and the historical fact that Māori were previously a fully self-governing people who lived by their own laws and customs. The Rt Hon Dame Sian Elias asserts in her extra-judicial writing that the unqualified assumption of parliamentary supremacy in New Zealand, grounded firmly in English history, is "not compelled by fundamental legal principle or by logic".[69] She suggests that political institutions and community expectations have moved on from the "monolithic and obsolete view of the fundamentals of law as a quest for the power that trumps", and asserts that we need to re-discover our "constitutional fundamentals".[70]

Our constitutional fundamentals are based partly in the assertion that the Treaty cedes to the Crown the right to govern, but in return, guarantees to Māori the right to maintain their authority, their institutions, their customs and their cultural identity. It recognises that in the Treaty we are one nation in which we all have equal rights, but as a society we reflect the culture, identity and values of two peoples – Māori and Pākehā. It also represents a vision of equality within New Zealand that values diversity rather than sameness, and that regards Māori as robust, self-governing

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[68] Moana Jackson "Criminality and the Exclusion of Māori" (1990) 20 VUWLR Monograph 3 23.
[69] Elias, "The Treaty of Waitangi and the Separation of Powers in New Zealand", above n 16, 213.
[70] Rt Hon Dame Sian Elias GNZM "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (Speech to the Institute for Comparative and International Law, Melbourne, 19 March 2003) 3.

communities.[71] Because the resulting legal system has not equally reflected these two sets of cultures, the system needs to be re-ordered to ensure that it better reflects the values of Pākehā and Māori. Māori share the same abhorrence to criminal behaviour as Pākehā, and can accept a single criminal code as the one substantive law to apply to all criminal offending; criminal and anti-social behaviour can be articulated and agreed upon in any language. Where Māori diverge is in the administration of justice for Māori offenders. Māori see greater benefit in applying the one substantive law for criminal offences committed by Māori within their own institutions and applying their own perspectives and processes in dealing with the offender. In terms of the criminal justice system, the notion of one law for all could be maintained through the application of one substantive law administered not through one system or institution but through different but equally valid and respected systems or institutions.

Māori aspirations for greater involvement in criminal justice processes should not be seen as a threat to parliamentary supremacy or sovereignty, but as an opportunity to make a greater contribution to themselves and to the country.[72] It recognises that Māori systems could hardly fail to be more productive than existing Western systems, and that the only way Māori are able to address Māori offending is if they are able to manage justice processes in their own way.[73] Non-Māori do not appear to appreciate that the ability for Māori to improve their own situation depends on the extent to which Māori are allowed to operate free from outside interference.[74] In their attempt to prevent what they perceive as the injustice of tribes having their own justice systems, non-Māori fail to appreciate that by depriving Māori of the opportunities to deal with matters in their own way, they are part of a greater injustice by forcing their culture on Māori.[75] As Sir Kenneth Keith identifies:[76]

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[71] S. James Anaya, "Keynote Address: Indigenous Peoples and Their Mark on the International Legal System" (2006-2007) 31 Am Indian L Rev 257, 259.

[72] Maui Solomon "The Context for Māori" in Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Victoria University of Wellington, Wellington, 1998) 60, 63.

[73] John Pratt "Assimilation, Equality and Sovereignty in New Zealand/Aotearoa: Māori and the Social Welfare and Criminal-Justice Systems" in Paul Haveman (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford University Press, Auckland, 1999) 316, 326.

[74] Vicenti, above n 10, 135.

[75] Ibid.

[76] Sir Kenneth Keith "Treaty Claims: The Unfinished Business" (New Zealand Institute of Advanced Legal Studies, Wellington, 9-10 February 1995).

> There are a variety of ways in our constitutional experience, our present knowledge, and our present experience, in which power can be organised. It is far too simple to say, as Ministers of Justice from time to time say, that there must be one law for all. We know from our experience that this is not true of each of us. We are subject to different legal regimes for different purposes. We need a more subtle although still principled approach to the recognition and allocation of power. The great values of the principle of equality must not be eroded by its being applied unthinkingly when diversity is to be encouraged and respected.
>
> So I would stress then that there is in our experience, in principle and in practise a range of ways in which power can be organised and we do not have to think of one system for all.

Claims to re-establish tribal justice systems are based on the important role that tribal leaders and tribal authorities traditionally played in protecting tribal interests and tribal identity through the maintenance of culture, customs, lands, language and social order. Tribal leaders were able to maintain harmony and control through the exercise of their chiefly authority or tino rangatiratanga, which ensured that laws were upheld and order was sustained. Where laws were broken, customary remedial procedures were implemented to ensure that behaviour was corrected and balance was restored. These remedial procedures were based on Māori principles such as manaakitanga, whānaungatanga, mana, tapu and aroha. Maintaining cultural identity and tribal order hinged on the exercise of tribal tino rangatiratanga, which was guaranteed to continue after the arrival of the British settlers under Article II of the Treaty. These are but some of the cornerstones of Māori cultural identity, development and order, and provide the bases for the re-establishment of tribal justice systems for Māori to be able to address the problems of Māori offending within their own cultural institutions, because Pākehā methods have failed. The least disruption and controversy would occur if tribal justice systems were established to operate within the existing legal and judicial framework of the State. Room needs to be made for the establishment of tribal justice programmes that will apply national laws for criminal infringements, but do so within tribal institutions and according to customary values.

III A PROPOSED MODEL FOR TRIBAL JUSTICE SYSTEMS

Having addressed some of the key issues for the development of tribal justice systems, this paper will now consider how tribal justice systems could operate in practice. Tribal groups want to be able to deal with Māori offenders within the context of culturally supportive values and environments, and to have more control over that process, whereas non-Māori want to ensure that any exercise of tribal authority does not limit the power of the State, and that the law is applied equally to all. This proposed tribal justice model will outline a system that will enable tribes to administer their own justice programmes over Māori offenders under the jurisdiction of the existing justice system, thus maintaining the jurisdictional integrity of the criminal justice system, the judiciary and the government, while also accommodating Māori aspirations. In order for this model to function effectively, emphasis is placed on the Treaty principle of partnership between Māori tribes and the Crown, which will enable the shared responsibility of addressing Māori offending.

A Tribal Justice Systems

1 Tribal jurisdiction

The District and Youth Courts will be able to refer cases involving Māori offenders charged with summary, indictable or youth offences to tribal groups, who will have the jurisdiction to deal with Māori offenders within their own justice systems. Māori offenders will be able to elect whether they want their case to be dealt with through court or tribal justice processes. Offenders will be informed of this option at the earliest opportunity and can make their election at any pre-trial or pre-depositions stage. It will be necessary for the Court to approve any request for a tribal justice referral where it is satisfied that the offender is Māori, that the offender will be referred to an approved tribal authority, and that referring the offender to a tribal justice process will be the best course in light of the alleged offence. The court can request probation and victim impact reports to assist with its decision.

2 Approved tribal authorities

Tribes wanting to administer their own tribal justice systems will need to apply to the Ministry of Justice (the Ministry) to have their application approved. It will be necessary to establish a National Tribal Justice Authority (NTJA) within the Ministry. One of the functions of the NTJA will be to establish a set of compliance standards for tribal justice systems. This will be done in consultation with Māori, who will need to meet these requirements in order to have their justice programmes approved. The establishment of compliance standards will ensure that tribal groups have the necessary resources to effectively administer justice programmes and to ensure consistency across tribal programmes. Some of the compliance standards may include the requirement for iwi organisations to be mandated, thus demonstrating the authority of an iwi organisation to act on behalf of an iwi. Tribes may also be required to outline their procedures and programmes for dealing with offenders, including hearing and sentencing processes. Other requirements could also include the designation of qualified personnel and appropriate facilities for hearings, the recording and reporting of hearings, sentencing guidelines, dispute resolution processes, and where practical or necessary, secure facilities. The courts could also appoint officials to oversee tribal justice processes to ensure consistency and compliance with national standards. The monitoring of tribal justice systems and processes by the NTJA will ensure that tribal justice programmes are functional, effective and consistent with national standards.

3 Court referrals

Where possible, offenders should be referred to an approved tribal authority that they affiliate most strongly with. This will place the offender within the surroundings of their whānau support base and cultural heritage, which will provide the cultural context to help the offender understand their place within society and their social obligations to others. Affiliation to a tribal authority is normally determined through whakapapa or ancestral connections. Where offenders have been alienated from their tribal group it may be more appropriate or practical to refer offenders to a local tribal authority, or one that the offender has a local connection with. Other factors that will influence the referral of offenders include the mode and costs of

transfer, accommodation, distance, and proximity of whānau support. Urban Māori Authorities (UMAs), for example, may play an influential role for urban Māori offenders who have had little or no contact with their traditional tribe. UMAs represent the dynamic and fluid nature of Māori society in that they reflect the desire for urban Māori to retain their cultural identity as a result of their isolation from their traditional tribal base. Although UMAs do not fit within the orthodox description of traditional tribes (iwi), as confirmed by the fisheries settlement litigation of the 1990s,[77] they still play a significant role in the social and cultural development of urban Māori, and may yet play a role in the development of tribal justice systems for urban Māori. It will be important for the Crown to recognise UMAs as valid Māori entities that provide vital cultural links and services to urban Māori if UMAs are also to develop tribal justice programmes.

4 Type of offence

In light of the need for criminal justice reform, the presumption will be that referrals to tribal justice programmes are the best and preferred course for a Māori offender. It may be necessary, however, for the courts to make a determination in each case, based on factors such as the type and seriousness of the offence, the willingness of the offender to participate in tribal justice processes, repeat offenders and the likelihood of the offender to respond positively to tribal processes.

It will be necessary to determine what type of offences should be heard within tribal justice processes. This process should be done in consultation with tribal groups wanting to operate tribal justice programmes. Where offences are considered too serious to be dealt with by tribes, the courts could still take advantage of tribal justice processes to supplement the court process. Offenders, victims, or their whānau may still wish to participate in tribal justice programmes to address the cultural, remedial or restorative aspects of the justice process. The offender will ultimately be dealt with by the court in the case of serious offences, but utilising tribal justice processes enables the court to access the cultural benefits of tribal justice systems for Māori offenders as well as work in partnership with tribal groups. The outcomes of

[77] *Manukau Urban Māori Authority v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17 (PC) Lord Hoffman for the Court.

tribal processes may also assist the court in its decisions as with pre-hearing or pre-sentence reports.

5 Identification

The onus will be on the offender to identify their Māori ethnicity and, where possible, their iwi affiliation. Where a person's ethnicity is disputed the court may require offenders or their whānau to provide evidence such as family history records or witnesses to establish their Māori ancestry. Police, lawyers and court administrators will likely require training to be able to assist offenders and their whānau to satisfy any identification requirements and to be sensitive to their needs, particularly where offenders have been isolated from their tribal base.

6 Tribal justice programmes

One of the main objectives of tribal justice programmes is to provide an environment for Māori to deal with offenders within culturally supportive and appropriate settings, and to apply their own cultural perspectives to criminal offending. In order for tribal processes to achieve their purpose, offenders and their whānau will need to have the cultural knowledge and understanding necessary to make tribal justice programmes effective. This will be an issue particularly where offenders who have been alienated from their cultural base lack the necessary cultural understanding. As a result of colonisation and urbanisation, many Māori, particularly urban-based Māori, will have lost contact with their traditional tribal groups, while their cultural understanding may be limited. *He Whaipaanga Hou* identifies a number of factors that have isolated Māori from the traditional cultural strengths of their whānau and hapū.[78] The weakening of their cultural and spiritual strength and identity has made them vulnerable to many of the factors that influence criminal behaviour. As a result of this cultural isolation, Māori offenders will not be required to demonstrate an extensive knowledge of their tribal background or cultural understanding in order to participate in tribal justice programmes since many of the young offenders that the tribal process is designed to assist have either lost contact

[78] Jackson, *He Whaipaanga Hou*, above n 3, 57.

with their Māori or tribal heritage or have a limited knowledge of their tribal background. One of the purposes of tribal processes is to re-connect Māori with their cultural heritage and to correct their behaviour through the application of customary principles.

Before hearing and deciding the offender's case, it may be necessary to culturally re-educate the offender in order to help them understand important principles such as whakapapa, tikanga, tapu, tautoko, cultural identity, collective responsibilities and social order. These and other principles will provide the cultural context to help the offender understand the consequences of their criminal behaviour, the impacts of their behaviour on other people, collective responsibility, accountability and the need to repair the harm caused. The cultural re-education of Māori offenders will not be a quick process, and will likely involve cultural teaching through various stages. Tribes could require offenders to satisfy certain requirements of this learning process, such as compulsory attendance and participation, or to demonstrate their cultural learning and understanding, before having their cases heard within the tribal justice system. Where offenders are not able to satisfy the necessary learning or progress, tribes could refer offenders back to the courts to be dealt with there. The onus is therefore on the offender and their whānau to recognise the benefit of having their case heard within the tribal setting, to take ownership of the process, and to make it work.

7 *National Review Authority*

Tribal decisions will be reviewed and moderated by a National Review Authority (NRA). The NRA will review decisions and outcomes to ensure that satisfactory outcomes are achieved, that decisions are being enforced and upheld, and that progress is being monitored. Tribal groups will be required to provide reports to the NRA on tribal decisions and outcomes, as well as the progress of offenders. The courts will review these reports to monitor tribal decisions and the progress of the offender, as well as to ensure that decisions are being upheld and that the tribal justice systems are operating as they should.

8 Ratification

For tribal decisions to be legally enforceable, they must be ratified by the courts. This step enables the courts and tribal groups to work in partnership with each other by allowing tribes to administer their own justice processes, while the operation of tribal justice systems under the jurisdiction of the judiciary ensures that national standards of criminal justice are achieved. Offenders will therefore be required to re-appear before the courts after they have been through the tribal process to have the tribal decision ratified. The court will be informed by tribal reports outlining whether the offender has complied with tribal orders and decisions and whether the case has been resolved satisfactorily. The tribe will be able to provide feedback to the court based on other circumstances and observations that demonstrate whether the offender has remedied their behaviour or not and whether they have taken steps to rehabilitate. Where parties to tribal justice processes are satisfied with the outcome the court can endorse that tribal decision. Where a satisfactory outcome has not been achieved, or where an offender has not complied with tribal orders, the court could either refer the offender back to the tribal justice system or it can deal with the case within the court system. It is therefore incumbent on participants in tribal justice processes, particularly the offender and their whānau, to take ownership of the remedial and restorative processes that tribal justice systems provide. If they choose not to make these processes work effectively their only other option is to revert back to the court system that Māori are trying to avoid. The responsibility to make this process work is therefore a collective responsibility for all of the participants.

B Summary

The purpose behind this proposed model is establish a way forward in the criminal justice debate that allows Māori to administer tribal justice programmes according to their preferred methods, while also maintaining the integrity of the judiciary. While some of the finer administrative and logistical details still need to be worked through, it provides an outline to establish working relationships between tribal justice systems, the courts and the government. The effectiveness of this model depends on the ability of the judiciary and tribal groups to work in partnership together. The foundation for this partnership relationship is based on respect for the

role of the judiciary to enforce the law, as well as respect for the role of Māori institutions and traditional customs in dealing with Māori offenders. The same laws that apply to non-Māori offenders will also apply to Māori offenders, thus maintaining the principle of equality under the law, while the administration of justice through tribal justice programmes will enable more effective outcomes for Māori offenders. In order for this model to be implemented, it will be necessary to rebuild and strengthen tribal groups to ensure that tribes have the necessary resources to provide effective support services to its members. Settlement proceeds will aid the tribal rebuilding process, while the Crown should also provide specific financial, resource and training support to help tribal groups to rebuild and to develop their tribal justice institutions. This process may take a number of years to develop, but it will be essential for tribal groups who wish to administer justice programmes to develop adequate systems and infrastructures.

IV CONCLUSION

In order to find more effective solutions to Māori offending, New Zealand needs to accept that the existing criminal justice system is failing Māori, and that the administration of tribal justice systems, which were in operation before the assertion of British rule under the authority of tribal tino rangatiratanga (of which the continued exercise was guaranteed under Article II of the Treaty), and which contains the necessary cultural customs to address Māori offending, provides the best option to address the high rate of Māori offending today. The operation of tribal justice systems should not be seen as a limit on parliamentary or judicial authority, or as the operation of a separate legal system. Rather, the operation of tribal justice systems within the existing State framework should be seen as providing an opportunity for Māori to make valuable contributions to themselves within their own cultural institutions, and as an opportunity for Māori to work in partnership with the Crown, while also maintaining and respecting the right of the Crown to govern. The proposed model provides a practical format to implement and develop tribal justice systems, which enables the operation of tribally-administered justice systems under the jurisdiction of the courts. Participants in this debate need to address the issue of Māori offending with greater urgency, openness, pragmatism and cooperation in order to develop more effective solutions.

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VI GLOSSARY OF MĀORI TERMS

Aroha: love, sympathy.

Hapū: extended kin group, consisting of many whānau.

Iwi: extended kin group, consisting of many hapū.

Karakia: prayer.

Kawanatanga: governorship.

Mana: integrity, authority.

Manaakitanga: care for, show respect.

Mana Motuhake: autonomy, independence.

Māori: native people.

Marae: meeting house for whānau, hapū or iwi.

Pākehā: non-Māori, European.

Tangata Whenua: local people, native people.

Tapu: sacred, taboo.

Tautoko: support.

Tikanga: customs.

Tino Rangatiratanga: chiefly authority.

Wairua: spirit, soul.

Whakapapa: genealogy, heritage.

Whānau: kin group.

Whānaungatanga: relationship, kinship.