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A PARALLEL CRIMINAL JUSTICE SYSTEM FOR NEW ZEALAND: Reform in the Public Interest?

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INTRODUCTION

One of the fundamental characteristics of a developed society is the existence of a legal system that provides justice to its citizens in resolving the many and varied disputes that inevitably arise.

When "justice" is not delivered by the system, or if the perception is that "justice" is not being delivered, the very foundation of society's system of law come under threat. In the New Zealand of the 1990's there is a widespread perception within Maoridom that the current criminal justice system has failed to deliver justice to it. (1) This perception was noted in the Report of the Royal Commission into Social Policy, (2) and was of sufficient concern to warrant further investigation into ways in which the system could be improved.

Maoridom has also been active in seeking alternatives to the current criminal justice system that might deliver them "justice". In November 1988 the Department of Justice published a report entitled The Maori and the Criminal Justice System: He Whaipaanga Hou - A New Perspective by Moana Jackson. The report represented the culmination of an extensive period of consultation with over 6000 Maori throughout New Zealand, and provided government with over 200 recommendations on how the criminal justice system should be changed to further the interests of the Maori people.

The report comprises essentially four parts: a review of the reasons for Maori offending, a review

of system - based factors affecting the impact of the criminal justice system on Maori, suggestions for changing the existing system to make it more culturally sensitive to Maori, and the proposal for an alternative system. While many of the recommendations offer ways of improving aspects of the current system, the report's main recommendation, and that which has been subject to the most controversy, was the call for the implementation of a parallel system of criminal justice for Maori offenders. Met initially by strong opposition from politicians of the two major political parties, and subsequently consigned to the shelves of law libraries, the proposal nevertheless remains on the agenda of Maoridom (3) and therefore warrants serious academic consideration.

It is also the view of the writer that the proposal for a parallel system of criminal justice should not be considered solely in the New Zealand context. As has been noted elsewhere, the problems of indigenous peoples throughout the world are remarkably similar. Whether it be the problem of a disproportionately high level of criminal offending, the struggle to regain wrongly taken land or the challenge of retaining their culture and institutions, many parallels can be drawn between the indigenous people of New Zealand and those of the United States, Canada and Australia. New Zealand can learn a great deal from the ways in which these three nations have dealt with the challenges of acknowledging the special status of their indigenous peoples, both their successes and their failures. Accordingly, this paper will make reference where appropriate to initiatives taken in the United States, Canada and Australia in evaluating the position of Maoridom in New Zealand and, more particularly, the need for a

parallel system of criminal justice to be introduced into this country.

"A WORKABLE AND CREDIBLE SYSTEM OF JUSTICE"

The co-authors of the section on Justice in the Royal Commission on Social Policy's report, Warren Young and Caroline Bridge, considered that there were three objectives of a workable and credible justice system.

> (1) To provide a fair and efficient means of dispute resolution.
>
> (2) To uphold the rule of law in a manner consistent with individual justice in the protection of society; and
>
> (3) To provide a forum for the appropriate punishment of those who commit offences. (4)

In order to achieve these objectives the system should, inter alia;

> ...protect the rights of minorities and disadvantaged groups. In the institutions of justice... it is vital that procedures are seen to be acceptably fair from not only a majority point of view but also from the perspective of minority groups and the consumers of the system... (5)

Is the current criminal justice system succeeding in meeting these objectives ? Young and Bridge think not;

> The system is failing to provide an adequate service or adequate redress to significant sectors of the population, and it is therefore failing efficiently and effectively to regulate relationships between citizens. (6)

In the following section of this paper the writer will examine Maori grievences against the current criminal justice system as articulated in Jackson's report against the backdrop of the system's objectives as specified in the Royal Commission's report.

THE CRIMINAL JUSTICE SYSTEM - INCAPABLE OF DELIVERING JUSTICE TO MAORIDOM ?

Before considering the perceived imperfections of the criminal justice system, Jackson placed considerable emphasis on breaches of the Treaty of Waitangi by the pakeha as a major factor in the social conditions leading to Maori offending. (7) In his view the imposition of pakeha law by the colonists resulted in the removal of one of the cohesive forces in Maori society, namely the peculiarly Maori institutions that had a direct effect on the security, values and self-esteem of the people. (8)

Although the settlers increasingly saw the replacement of Maori beliefs and customs by pakeha law as an inevitable step in the process of colonisation, Maoridom expected the Treaty of Waitangi to protect their rights. As Jackson points out, Article One of the Maori version of the Treaty gave to the Crown something less than the absolute concept of sovereignty conferred by the pakeha

version, (9) and Maoridom held the expectation that its laws and institutions would operate alongside those of the Crown. This did not occur, however, other than in isolated instances which will be discussed later in this paper. Instead, there was a very real assumption held by the settlers that Maoridom would willingly accept the imposition of English institutions. This was, according to Jackson, to "deny Maori participation both in the development of law and the machinery of those institutions", (10) in the years following the signing of the Treaty.

The link between the actions of colonial government's in imposing English law on the newly formed nation of New Zealand to the point of almost total exclusion of things Maori, and modern day perceptions by Maoridom of inherent unfairness in the criminal justice system is perhaps best summed up in an unattributed quotation that appears in the body of Jackson's report. Blunt, bitter and resentful at the position of Maoridom in New Zealand society, the message is incapable of misinterpretation;

> Maybe that's why we don't believe in justice because the Pakeha law all started wrong in injustice - in land, in wars and all those things. (11)

Aside from the disenchantment with the legal system evident in such attitudes, the imposition of pakeha law weakened the religious and legal traditions Jackson saw as vital in monitoring behaviour and providing community stability. (12) Dismissal of both the Treaty and the notion of Maoridom's special rights as tangata whenua became an inevitable part

of the colonisation process, and contributed to the pressures which now shape the young Maori offender. (13)

The young Maori offender, of course, is subject to the modern day criminal justice system. It is a system based largely on European conceptions of how society should deal with those who break its rules, and those rules of course reflect European conceptions of right and wrong. Is that necessarily a bad thing ? Do New Zealanders of European origin have something to be ashamed of for codifying its rules and beliefs to the exclusion of those of other cultures ?

The conflict arises because Maori see the criminal justice system as insensitive and dismissive of Maori ideals, a system into which they have had little cultural input. (14) While the two peoples may share an equal abhorrence for certain "criminal" behaviour, such as acts of violence, their conception of how they should be dealt with is quite different. Jackson emphasises, for example, the pakeha system's insistence on holding the individual offender solely responsible for his or her behaviour while Maori regard the whanau, or family, as being equally liable due to the concept of kinship obligation. (15) It is questionable, however, that such an obligation has continued relevance in modern society. With the increasing urbanisation of Maori (16) and the move away from large families spanning three or more generations living under the same roof, it is unrealistic to expect that the level of whanau control will be anywhere near as strong as it once was. In any event the pakeha law inevitably prevails, as there is no separate basis for according credence to Maori values nor sufficient

flexibility in the existing criminal justice system to achieve that goal.

Again, the question arises - should there exist a parallel system for dealing with Maori alleged offenders in a more culturally appropriate fashion ? A less philosophical, but no less important question is whether such a system would work in practise and be beneficial to both Maoridom and New Zealand as a whole. Full discussion of these questions follow later in this paper, but it is necessary to note their relevance at this stage if we are to understand the end point Jackson seeks to arrive at.

If one is to fully understand the significance of Jackson's challenge to the legitimacy of the criminal justice system, for that is what his thesis represents, it is necessary to appreciate that he does not accept a number of the fundamental precepts upon which the system is based. The principle of equality before the law, for example, in which the statute law treates everyone equally and those charged with the responsibility of dispensing justice do so impartially, is termed a "legal myth" by Jackson. (17) This stems from his belief that the protections are monoculturally defined and unable to necessarily guarantee fairness in a bi-cultural sense. (18)

In a nutshell;

> Maori people question the belief that the ideal of "one law for all" can be meaningfully applied to people of different cultures when the "one law" does not reflect those other cultures. (19)

Leaving aside the question of the inherent monocultural unfairness of the criminal justice system for the moment, Jackson also raises a number of specific complaints of prejudicial and unfair actions by agents of the state. (20) While more specifically directed, a large element of the negative perceptions held by some in Maoridom against agents of the system rest again on the "monocultural approach" which underlies the system. Whether it be the police, who Jackson considers use monocultural stereotypes in exercising their prosecutorial discretion, (21) or the courts where formal pakeha procedures are used to try offenders of all racial backgrounds, there remains a strong element of criticism at the overall system because of its inherent racial discrimination. The courts, for example, reflect "inherent constitutional racism" (22) because the judicial disposition of cases is Westminster based and mirrors the features of its common law precedents. Similarly, lawyers are seen by Maori, according to Jackson, as servants of the court rather than of the defendant. Insensitive to cultural realities, arrogant in their superior knowledge, lawyers all too often fail to provide adequate legal representation to Maori defendants. (23)

The jury system also comes under criticism. Jackson notes that the realities of population distribution mean that most potential jurors are pakeha, while a large proportion of the accused are Maori. This, we are told, means that from a Maori perspective there can be no trial by one's peers nor a fair trial. (24) Similarly, the court administration are accused of showing insensitivity in dealing with Maori, for example by constant mispronunciation of defendants names. (25)

The end result of these criticisms, regardless of their validity, is clearly a lack of confidence by many Maori in the criminal justice system. The fact that so many Maori proportionate to population size go through the process has only worsened the problem. Even though they comprise little over 10% of the total population, almost half the number of male inmates in our prisons are of Maori descent. (26) The situation is even worse with respect to female inmates, where Maori make up 56% of the muster. (27)

Interestingly, Jackson avoids the use of statistical data even though he acknowledges the seriousness of the problem of Maori offending. In particular he rejects the use of statistics to compare offending levels between racial groups. This, in Jackson's view, provides the pakeha with grounds for "negative and inaccurate conclusions". (28) The statistics quoted by the writer above, for example, would in Jackson's mind "illustrate the simplistic and essentially racist way in which statistics can be used". (29) But while Jackson is correct in asserting that the use of such statistics does not per se suggest appropriate remedial initiatives, it is the writer's submission that using statistics is a legitimate and necessary way of determining the exact scope of the problem of offending, whether it be Maori or pakeha. While there are limitations to the value of using statistics, and these should be recognized, nothing is achieved by fooling ourselves that the problem they so graphically highlight does not exist.

One of the limitations of statistics is their inherent inability to provide a picture of the

reasons for offending. Nor can they explain Maori concerns at the operation of the criminal justice system in practise. In the writer's submission it is important for the purposes of this paper to recount the experiences of a young Maori man's battle with a criminal justice system that he does not accept as legitimate. The name of that individual is Francis Shaw, and his fight to receive justice on his marae rather than in the Porirua District Court created considerable public controversy last year.

Francis Manewha Shaw is in his early twenty's and of Ngati Toa, Ngati Raukawa, Ngati Kahungunu and pakeha descent. From the age of eight when a child psychologist was called in to talk to him, (30) Shaw's life became a constant battle with agencies of the state. Social welfare homes, the streets and, in 1981, Lake Alice Mental Hospital were homes he knew better than that provided by his mother and eleven brothers and sisters.

Some years later, on 22 September 1988, Shaw went to a party with his partner, Karena Little. An argument broke out between Shaw and the partner of the party's host, Helen Parata, as part of the continuing feud between Little and Parata over an incident three years earlier. (31) The host, Maurice Ribbon, arrived on the scene during the middle of the argument and, after a fight in which Shaw claims he was stabbed in the arm and had a skateboard broken over his head, Shaw was thrown out of the party. Sometime later that evening, Ribbon went outside after hearing a number of gunshots. Upon seeing Shaw, Ribbon called to him to stop firing. In response Shaw shot Ribbon in the hip, resulting in a number of criminal charges being laid against him. The most serious charge was one of wounding of a

person with intent to cause grievous bodily harm, and it was upon this charge that he was eventually sentenced to three years imprisonment.

After being on the run for seven months Shaw was finally captured by police on 27 April 1989. During his first interview with the police, Shaw made his intentions clear;

> While I've been on the run I have been trying to get this case heard on a marae. (32)

While this plea received the support of his whanau, the victim Maurice Ribbon, and Ngati Raukawa elders who wished to decide the fate of their tribal member, both the government and the judiciary rejected the idea. Notwithstanding a request by the New Zealand Maori Council, the then Minister of Justice, Rt Hon Geoffrey Palmer, refused to intervene in the judicial process on the grounds that it would be constitutionally improper for him to do so. (33) In Mr Palmer's view;

> The case must be heard by the courts in accordance with our system of criminal law, which has to be applied equally to all accused. (34)

The compromise offered by the government, namely a hui between the families of Shaw and Ribbon to "... resolve matters beyond the jurisdiction of the courts", (35) was rejected by Shaw as unacceptable. Accordingly, Shaw was scheduled to appear before the Porirua District Court to face a number of criminal charges. In the twelve appearances he made before that court, Shaw maintained a total disregard of court protocol; refusing to stand when asked,

refusing to plead or have legal representation and continuing with his quest to have the matter heard on a marae. Shaw's most dramatic stand was to undertake a hunger strike that was to last forty nine days in a bid to bring renewed attention by the authorities and the public for marae based justice. Inevitably, the bid failed and Shaw remained in prison without having had the matter heard on his home marae.

A number of lessons can be drawn from Francis Shaw's experiences with the criminal justice system. The first is that prior to any change in the system to incorporate Maori values occuring there must be an acknowledgement by both politicians and the pakeha public that basic concepts of fairness require reform of the system. In the writer's view achieving this acknowledgement has in fact been made more difficult as a result of the Shaw case. While Shaw sought the intervention of marae based justice, the issue at stake was not so much his guilt or innocence, rather it was more to do with the sanction he would receive for breaking the law. It is quite likely that the public saw Shaw's demand for marae based justice as a tactic to gain treatment more favourable than that likely to be dispensed by Judge Bates in the Porirua District Court.

Offences involving firearms fall into a particularly category, and the public mood as expressed through the media and talkback radio was unsympathetic to Shaw's plight. His total disregard of court protocol was no doubt seen as disrespectful to the court system, an institution of fundamental importance in our society, and even his hunger strike may have been seen by some as a publicity stunt.

The second point to note for future reference is the position of Maoridom on Shaw's plea. While both the New Zealand Maori Council and Ngati Raukawa supported the request for a marae hearing, the other two tribes of which Shaw was a descendent, Ngati Toa and Ngati Kahungunu, rejected the idea. (36) Without a unified Maori position in favour of parallel institutions of justice, proposals such as those made by Jackson have little chance of being implemented. Clearly this is a matter that only Maoridom can resolve itself, and its task is made more difficult in the writer's submission by the lack of one nationally accepted representative body with authority to speak for all of Maoridom.

Finally, it is important to note that the opposition of Shaw's request for marae justice was based upon the principle of equality before the law. In the following sections of this paper the writer will discuss in some detail the concept of legal pluralism, and in particular whether it necessarily involves breaching the principle of equality before the law.

LEGAL PLURALISM: A NEW CONCEPT IN NEW ZEALAND ?

The concept of a separate system dispensing justice in cases involving Maori alone is by no means a recent innovation. In the period immediately after the signing of the Treaty of Waitangi there were a number of legislative measures enacted to provide for the separate resolution of civil and criminal disputes involving Maori. As early as 1844, for example, the Native Exemption Ordinance was gazetted

by Governor Fitzroy to "exempt in certain cases aboriginal native population of the colony from the ordinary process and operation of the law". (37)

The practical effect of this ordinance was that a magistrate could not serve a warrant in cases involving only Maori. (38) Instead, the charge was to be presented by two chiefs of the tribe concerned who would also execute it. The ordinance was, however, short lived with Fitzroy's successor Governor Grey repealing it in 1846. Notwithstanding his decision with respect to the ordinance, Grey made a recommendation, which was subsequently accepted by the Colonial Office in the United Kingdom, that the newly drafted Constitution Act 1852 include a section providing that;

> the laws, customs and usages of the aboriginal or native inhabitants of New Zealand ... should for the present be maintained for the government of themselves in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs or usages should be so observed. (39)

During the remainder of his first term as Governor, ending in 1853, Grey made no attempt to establish the districts envisaged by the Constitution Act. It was not until some years later, in 1858, that Parliament took the lead and enacted the Native Districts Regulation Act and the Native Circuit Courts Act. Under the latter piece of legislation, the Governor in council was given the power to appoint native districts within which a different system of justice would apply to all resident, both Maori and pakeha. (40) It was not, however, a

license to Maoridom to continue their traditional ways of dispute resolution. The legislation actually sought to do away with muru and other "injurious native customs" and to substitute punishment "in cases in which compensation is now sought by means of such customs". (41)

But if the legislation was not an open acceptance by the colonists of Maori legal values and institutions, nor was it a measure designed to assimilate Maoridom into the imperial legal tradition overnight. In this respect the parliamentary debates of the time provide a useful indication of the competing theories that existed at the time as to the extent to which Maori should be subject to British law.

In the introduction debate of the Native Districts Regulation Bill the Colonial Secretary, Hon C W Richmond, traversed what he identified as the three schools of thought on the applicability of British law to Maoridom. The first school, Richmond noted, were those who proposed the maintenance and administration by officers of the government of such native customs that were not repugnant to the principles of humanity. (42) As authority for this viewpoint Richmond quoted a dispatch from Lord Stanley to the Governor Of New Zealand, Fitzroy. (43) In the dispatch Lord Stanley stated that he knew of;

> ... no theoretical or practical difficulty in the maintenance under the same sovereign of various codes of law for the government of different races of men. (44)

The sole qualification held by Lord Stanley was that native customs and laws must not be "abhorrent from the universal and permanent laws of God". (45)

The second school of thought is fundamentally different; namely that true humanity required British laws to be enforced against the aborigines. As authority for this viewpoint Richmond cited a report of a House of Commons select committee, (46) extracts from which he quoted in Parliament. Reading the extracts in the modern context, one finds them to be quite offensive, particularly the assertion that;

> ... the rude inhabitants of New Zealand ought to be treated in many respects like children; that in dealing with them firmness is no less necessary than kindness. (47)

The natives were now considered British subjects, the argument went, and accordingly they should not conduct themselves in a manner inconsistent with that status.

It was the third viewpoint, which lay somewhere between the first two, which was accepted by Richmond's government. While the eventual objective was the assimilation of Maori law into the colonial legal system, it was to be "induced" by encouraging an acceptance by the natives that it would be to their advantage to adopt British laws and tribunals. (48) Richmond attributed this view to Sir George Grey, although after commenting that Grey's polices were only "playing for time" he noted that something more was now needed. (49)

One method used in the pursuit of this goal was the adaptation of British institutions to a Maori context in an effort to win their approval. An example of this was the jury, which under the legislation was to assist the Resident Magistrate and his Native Assessors in determining the guilt or otherwise of people on trial. It was Richmond's hope that this would show the Maori the merits of the British system and "induce confidence" in it. (50)

Notwithstanding the intentions of the legislature, no native districts were ever formed, so the separate system remained untried in practise. Governor Grey returned to New Zealand for a second term of office and refused to set up districts either under the Constitution Act or under the Native Districts Regulation Act and associated legislation.

The increasing desire on the part of the authorities, no doubt shared by the bulk of the settlers, was to see a state of affairs where only the British law was used to determine civil and criminal disputes. This was reflected in the decision to repeal the Native Districts Regulation Act 1858 and the Native Circuit Courts Act 1858 in 1891. The desire to make British law totally dominant at the expense of traditional Maori customs and laws was formally recognized by Parliament even earlier in the rather inappropriately titled Native Rights Act. This legislation provided that;

> the jurisdiction of the Queens Courts of Law extends over the persons and properties of all her Majesty's subjects within the colony. (51)

As will become evident, Jackson would not consider even separate districts as provided for in the 1858 legislation as the ideal situation. While they did represent an attempt to provide scope for Maori input in to the law, in the writer's view it is clear that this was only welcome within narrow confines. There remained an underlying belief held by the colonists that the British system was inherently superior, for all races, and that Maori would come to that conclusion themselves if gently pointed in the right direction. The institutions to be used in the separate native districts, such as juries and magistrates, were distinctly British and quite foreign to the Maori. Scope did exist, however, for Maori to adapt these institutions to make them more appropriate to deal with alleged offending by their own people.

THE CONSTITUTIONAL BASIS OF A PARALLEL SYSTEM OF CRIMINAL JUSTICE

A nation's criminal justice system does not exist in a constitutional vacuum; the characteristics of that system and its part within the wider framework of rules by which stability and order is maintained in society is determined by the constitutional ground rules. With respect to existing systems, problems of a constitutional nature rarely arise because the system is generally considered to be legitimate and is accepted as being in the best interests of society.

The position is different with respect to a proposal to implement a parallel system for Maori as proposed in Jackson's report. Such a challenge to the status quo must, if it is to succeed, establish a

constitutional basis sufficient to justify such fundamental reform, in addition to demonstrating benefits in practise. Jackson was no doubt mindful of the need to provide such a basis for his proposal, and in the body of his report he spent considerable time establishing a theory upon which a parallel criminal justice system could operate legitimately.

The theory is premised upon the submission that Maori have the right to maintain its customs, laws and institutions eminating from two sources; the Treaty of Waitangi and indigenous rights.

There are, of course, a number of difficulties associated with an analysis of specific claims as to what the Treaty actually means, not to mention the problems of defining indigenous rights and relating it to a claim for a parallel criminal justice system for Maori. First of all, New Zealand has no written constitution against which such matters would normally be specified, along with a procedure to amend the nation's legal framework. Further, the constitutional significance of the Treaty is by no means a simple issue. While it is generally accepted that the Treaty is the founding document of New Zealand, (52) there is a school of thought that the Treaty itself conferred no legal rights to Maori other than those enjoyed by British subjects. (53)

It is not the purpose of this paper to delve in to the complex, and perhaps insoluble, question of the exact legal significance of the Treaty. It is sufficient at this point to state the writer's submission that, irrespective of other rights it may or may not confer, the Treaty can be considered to be an important source of public policy that can

appropriately be considered by the courts, Parliament and the executive. As the Law Commission has noted, (54) recent decisions of the courts in this country have made it clear that they view the Treaty as a source of public policy to be applied in appropriate circumstances. In Huakina Development Trust v Waikato Valley Authority (55), for example, Chilwell J in interpreting a statute that made no express reference to the Treaty or to Maori interests spoke of the Treaty as "part of the fabric of our society". (56) Similarly, the Court of Appeal in the Maori Council case (57) stated that when interpreting ambiguous legislation;

> ... the court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. (58)

The question of how the Treaty should be interpreted also represents a hazardous minefield across which one must tread carefully. Given the controversy that has characterised the debates on land and fishing rights, even though these rights are specifically referred to in Article 2 of the Treaty, the writer is somewhat sceptical that any measure of agreement could be reached on Maori claims for a separate legal system under the broad heading of rangatiratanga. Accordingly, rather than seeking to be definitive on these points this paper will cover both sides of the argument and offer some tentative conclusions.

The Treaty, of course, has become an industry in itself in recent years. As New Zealanders of all racial backgrounds continue to seek more information about this country's past, so the trend of burgeoning bookshelves of material on the Treaty and

its significance in modern day New Zealand will continue. While this development can only be positive, with more informed debate being the most likely result of this growing quest for knowledge, it would be quite unrealistic to expect that any degree of consensus as to the legal effect of the Treaty will result from this debate. Why ?; because the Treaty, whether one considers the English version, Maori version, or both, is a document inherently incapable of one definitive definition. The wording is wide enough to mean all things to all people. As Sir Henare Ngata once noted;

> Those who study the Treaty will find whatever they seek. Those who look for the difficulties and obstacles which surround the Treaty will find difficulties and obstacles. (59)

A less charitable view expressed by one author is that the Treaty was;

> ... hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution. (60)

Jackson does not share either view, and is prepared to assert in quite specific terms the content of the rights accorded to Maori under the Treaty. He articulates the Maori view that the Treaty of Waitangi was intended to be the ultimate protection of their taonga; their way of life, institutions and culture. (61) Article 1, states Jackson, implied that the Queen would provide for the good order and security of the country while recognizing the special tangata whenua status of the Maori and the rights which accompanied it (62) Thus the Treaty is the starting point for considering the

constitutional basis of a parallel system of criminal justice for Maori. Jackson submits that the Treaty has a two fold significance; firstly as a charter in its own right recognizing Maori authority to establish or participate in the structures that deal with criminal offending, and second as a guarantee that Maoridom's indigenous rights will be protected. (63)

It is appropriate to deal with the question of indigenous rights first, as by their very definition they preceded the signing of the Treaty. Jackson submits that Maori have indigenous rights due to their tangata whenua status which derived from their long existence in New Zealand. (64)

The concept of indigenous rights, or aboriginal rights as they are sometimes called, is by no means a new one. Difficulties arise, however, both in their definition and legal effect. Jackson appears to recognize this limitation in their practical value and adopts a definition of tangata whenua rights that can only be described as general;

> While tangata whenua status does not give the Maori people an exclusive understanding or sense of belonging to the land, it does give them a pre-eminent right to be heard and participate in what happens to and within it. (65)

In particular Jackson shys away from the question of whether tangata whenua rights imply eventual dismemberment of the state, preferring to;

> see the maintenance of such rights as part of a continuum for indigenous people to have authority over their own. (66)

Central to this concept is the establishment of a parallel criminal justice system that will enable Maori to deal with their own in a culturally appropriate fashion.

The Treaty of Waitangi itself has been the subject of differing interpretations on the part of Maori and pakeha, with the pakeha definition having carried most weight over the years since its signing. The recurring theme that arises time and again throughout Jackson's paper is that the Treaty promised Maori people the retention of their mana - their traditional status and authority. In particular, the reference to rangatiratanga in Article 2 is cited as authority for guaranteeing valued rights such as the maintenance of their own law and institutions.

Much of the conflict that has arisen in recent years relates to the difference in the two cultures' understanding of terms such as "sovereignty" and "rangatiratanga". There seems little doubt that the early pakeha settlers, and many of their ancestors, considered that the Maori were signing over to them the right to govern New Zealand in the widest possible sense. A central element in giving the Crown authority to govern New Zealand is the ability to impose the British legal system on the nation's population. The current government is an adherent to that view, with the Prime Minister, Mr Palmer, stating that;

> The essence of sovereignty is, in fact, a legal system. The provision of civil order in a society comes through a legal system and one can argue very much that part of what Maori may have given up under the Treaty arrangements and part of what they were surrendering themselves to was a system of British justice. (67)

Nor did the Prime Minister's opposition to a parallel system of criminal justice for Maori stop there. In addition to rejecting the use of the Treaty to justify such a system on constitutional grounds, Mr Palmer rejected it on the grounds that;

> Not only is it contrary to the principle that all New Zealanders are equal under the law, it strikes at the heart of law in a democratic system. Such an approach cannot be tolerated. (68)

This view was shared by at least one Maori member of parliament, the then Minister of Police Hon Peter Tapsell, who was strongly of the view that "there must be one single system of justice in New Zealand". (69) Mr Tapsell also considered that a marae based system would divide not only Maori and European but also Maori from Maori. Mr Winston Peters, Opposition Spokesperson on Maori Affairs, shared that view and referred to the tribal basis of Maoridom which, in his view, meant that no one set of marae based judicial principles could be agreed upon by all the tribes. (70)

In the writer's submission it is important to consider the significance of the principle of equality before the law as it relates to Jackson's proposal. Not only is it of academic interest, but

as importantly it is often the point at which pakeha public opposition to a separate legal regime for Maoridom crystallizes. Jackson himself recognized this point when he acknowledged that previous attempts to achieve a separate system for Maori had been labelled "symptomatic of apartheid". (71) As noted earlier in this paper, it is the writer's contention that before the public could be persuaded to accept Jackson's proposal it is first necessary to persuade them that implementing such a system would not be contrary to basic fairness and the principle of equality before the law. The following section of this paper will offer an opinion on whether such an approach would be possible.

EQUALITY BEFORE THE LAW: INCONSISTENT WITH A PARALLEL CRIMINAL JUSTICE SYSTEM FOR MAORI ?

While Britain has never had a written constitution, it has operated under a system of constitutional convention and practise that has subsequently become the basis for the New Zealand constitution. One of the central features of this system is the doctrine of the rule of law, notwithstanding the fact that in modern times the doctrine's significance has been questioned by academic commentators such as Sir Ivor Jennings. (72)

The leading proponent of the doctrine of the rule of law was A V Dicey, who in 1885 published the first edition of his book Introduction to the Study of the Law of the Constitution. The concept has retained considerable support from commentators, although no one definition of its exact scope enjoys total acceptance. de Smith considered that the concept implied;

1) that the powers exercised by politicians and officials must have a legitimate foundation.

2) that the law should conform to certain minimum standards of justice, both substantive and procedural. (73)

Thus "like should be treated alike, and unfair discrimination must not be sanctioned by law". (74) The writer accepts the validity of these features of the doctrine of the rule of law, and indeed their desirability as worthwhile principles to adhere to in a democratic society. The concept is not, however, capable of being used to sustain an argument that no deviation can be permitted from a legal system that treats all members of society the same in all circumstances.

The key words in de Smith's definition, which has also been used by the Law Commission in determining the extent of Maori fishing rights under the Treaty of Waitangi, (75) are that "like should be treated alike". Adherence to a theory that prevented forms of positive discrimination or recognition that certain groups may require separate treatment from time to time would be more likely to prevent justice being done than actually promote it. Already there are numerous pieces of legislation where powers, rights and obligations exist for some and not for all. (76) As the writer has highlighted earlier in this paper, as early as the 1850's the New Zealand Parliament on occasion accepted the legitimacy of legal pluralism with regard to Maoridom and the principle of equality under the law should not be used to undermine that.

In the writer's submission the end goal - the achievement of a fair and just result - must not be lost sight of in considering principles such as equality before the law. Rigid adherence to a principle of treating everyone the same under the law may in certain circumstances actually be oppressive or unjust to some people. There may also be competing principles worthy of consideration. It is a fundamental requirement of any legal system, for example, that justice must not only be done but must be seen to be done. The appearance of the integrity of the system is vital if it is to retain the confidence of the people subject to it, and it is clear that the unwillingness or inability of the existing system to incorporate Maori values and beliefs has helped create a lack of confidence on the part of Maoridom that the system exists to protect their rights and liberties as well as sanction breaches of the law in the interests of the wider community. In addition, it is the writer's submission that the Law Commission is justified in its view that to subject Maori to all of the rules of English derived law, many of which are of the greatest technicality, is to deny rather than promote real equality. (77)

Jackson recognized the significance of the principle of equality before the law, and expressed strong views on its continued relevance to New Zealand society. In particular, he rejected any suggestion of maintaining the existing procedures on the grounds that they are culturally neutral. This, Jackson says, is a legal fiction as the tenets of equality and impartiality between the races do not exist in practise. (78) Jackson also claims that the pakeha is pre-occupied with process, specifically their own procedures which are considered superior

to others, at the expense of giving the Maori justice. In the writer's submission this criticism is not without validity, and it certainly has a historical foundation in the English settlers who believed that Maori would benefit from participating in a British system of justice transplanted in New Zealand.

As the writer pointed out earlier, we must always look to the end result that is sought. So the question must be asked; "Is the current criminal justice system a pre-requisite to the achievement of a just and fair result ? In Jackson's view it is not;

> the justice of a criminal court system ... lies in the fair and appropriate way in which its processes work towards an end result: it is not dependent upon those processes being the same, but upon their being fair. (79)

Accordingly Jackson wrote of the need to re-define the processes and to base them in "culturally appropriate attitudes that will ensure fairness" (80) to Maori. The key to this would be the fact that the processes would be based in Maori, and not in the English legal tradition. At this point Jackson rejects the validity of the idea that one law for all is important, instead stating that the purpose of the criminal law should be to reflect the state of our society, in which case it can only be relevant if it recognizes the partnership intended by the Treaty of Waitangi. (81)

It is from this foundation that Jackson re-defines the principle of equality before the law from a Maori viewpoint to mean one indivisible concept of

justice for Maori offenders. This would be achieved, of course, through processes that differ from those currently existing. Similarly, the pakeha would continue to have the right of recourse to a criminal justice system that is culturally specific to them, in other words the status quo.

It is appropriate at this point to again consider de Smith's definition of the rule of law, particularly his view that the law should conform to minimum standards of justice, both substantive and procedural. (82) While it may be acceptable to provide Maori with a separate system of criminal justice to deal with criminal offending, it would not be acceptable in the writer's submission if the people subject to that system did not receive a minimum standard of justice. With regards to procedure, while the forum for determining the guilt or innocence of the defendant may be different, it is vital that the defendant receive natural justice - the right to be heard, the right to legal representation and so on. As New Zealand citizens accorded equal rights under Article 3 of the Treaty of Waitangi, anything less would be unacceptable to the national interest.

It is as a nation comprising many races, including Maori and pakeha, that New Zealand is subject to various United Nations resolutions on human rights, and our country's reputation for fairness and respecting the democratic process would be seriously harmed if a separate Maori criminal justice system did not conform to acceptable standards of procedural justice.

The issue of substantive justice is no less vexed. Problems will arise in the writer's submission if

significant differences were to exist between the two criminal justice systems in practise. From a public policy viewpoint it is undesirable to sanction particular behaviour when committed by a person of one race and effectively condone it by not sanctioning it if committed by a person of another. The victim of the offence, whose rights in recent years have become a more important and visible part of the criminal justice system (83) may be in a position where the availability of redress is dependant solely upon the colour of her attackers skin. Allowing such a regime would be a recipe for racial division and conflict.

But to what extent would the Maori criminal justice system proposed by Jackson differ from the current criminal justice system ? Would the difference include questions of substantive law as well as procedure, and if so to what extent ? The following sections of this paper will outline the philosophical and cultural basis of the system Jackson proposes and give what detail is available on how such a system would operate in practise. Only after undertaking such an analysis, and comparing the proposal with similar initiatives in overseas jurisdictions, will we be in position to make an informed judgment as to the desirability of implementing a parallel system of criminal justice for Maori in New Zealand.

MAORIDOM'S RESPONSE TO THE PROBLEM OF CRIMINAL OFFENDING

In addressing the need to find solutions to the problems of Maori criminal offending, Jackson recommended the implementation of both short term and long term strategies. Initiatives to change

specific features of the current criminal justice system in the short term were considered necessary because of the delays inherent in implementing the parallel criminal justice system that is integral to Jackson's long term strategy, even once a decision was made in favour of it. The short term initiatives flow directly on from Maori dissatisfaction with the operation of the current system, and it appears that their main objective is to make the system more culturally sensitive to the needs and views of Maori and therefore more effectively just in dealing with Maori offenders.

While it is the proposal for an alternative system that has received most media and public attention, the other suggestions for changing elements of the current system also warrant serious consideration. The government, while unequivocally rejecting the proposal for a separate criminal justice system, has accepted that the proposals relating to the current system deserve consideration, and accordingly they are currently under review. (84)

It may be that in the final analysis Maoridom's dissatisfaction with the criminal justice system will be addressed by government acceptance of some or all of Jackson's proposed short term initiatives without the implementation a parallel system for Maori. Accordingly it is important to consider whether such an approach, if eventually adopted by the government, would be effective in redressing the problems of Maori offending and dissatisfaction with the current system. Alternatively, can the problems only be satisfactorily resolved through the implementation of the parallel system proposed in Jackson's report ? The following section of this paper will address these issues after outlining the

specific proposals for changing elements of the criminal justice system.

THE SHORT TERM STRATEGY

Throughout the report the importance of the Treaty of Waitangi is never far from the surface, and in proposing a number of changes to the operation of the current system the Treaty again underlies Jackson's approach. He sees the starting point for remedial initiatives as being the continuing cultural denigration of Maori which has reinforced the monocultural environment from which Maori offending arose in the first place. (85) This cannot be changed, in Jackson's opinion, unless Maori are accepted by the pakeha as tangata whenua and partners to the Treaty. From this acceptance of a "genuine partnership" would come wide ranging remedies based on a cultural co-existence that will seek social and racial equity rather than simply administrative reform. (86)

The Treaty is given such prominence in determining solutions to the problems identified in the report as a result of Jackson's conclusion that because the causes of offending lay in the tearing of the fabric of responsibility established by the Treaty, therefore their alleviation lies in re-establishing the equally shared pattern and balance of co-existence which the Treaty envisaged. (87) The Treaty is seen by Maoridom as having both a symbolic and practical significance, as Jackson points out;

> If the mana of the Treaty as seen by the Maori is re-established, it provides both a symbolic and practical framework for initiatives which can remedy that offending. (88)

Notwithstanding his pre-occupation with the Treaty, Jackson recognises the practical disadvantages endured by many Maori, and not simply those relating to the operation of the criminal justice system. He noted the economic deprivation, in particular the lack of resources available for the retention and transmission of Maori spiritual and cultural values. (89) The education system perpetuates the problem of Maoridom's lower socio-economic status, Jackson claims, because it leaves many Maori without the qualifications needed to gain worthwhile employment. (90) With respect to the problem of unemployment, which like criminal offending disproportionately affects young Maori, Jackson argued for the re-introduction of short term work schemes to get Maori unemployed off the dole in addition to long term job creation for employment of a more permanent nature. (91)

Another specific goal stated in the report is the process of addressing monocultural attitudes within society, and in particular its consequence of cultural denigration which Jackson sees as lowering the esteem of many young Maori and thereby contributing to their high level of criminal offending. (92) Jackson suggests that television and radio staff should be required to undergo training in Maori protocol and language in order to make them more culturally sensitive to the views and beliefs of Maoridom. (93) In addition, more input from Maori should be encouraged with the formation of adequately resourced Maori radio stations operating on a regional basis.

It is clear that Jackson hopes to achieve through such initiatives an acceptance on the part of pakeha

New Zealanders that Maori ideas and principles can be appropriate in addressing problems such as Maori offending. Such a goal is understandable given that the achievement of such an acceptance is a necessary prerequisite to the partnership between the Treaty signatories that Jackson wishes to see operate in practise. Without that commitment to genuine biculturalism, in the writer's submission, Jackson's proposals to make the criminal justice system more culturally sensitive in its dealing with Maori offenders are doomed to failure.

Just as Jackson expects the media to operate in a more bi-cultural fashion, so too is there an obligation upon the institutions within the current criminal justice system to become familiar with traditional Maori beliefs and then acknowledge the part that they played and continue to play in devaluing them. (94)

The issue of how criminal behaviour is defined and recorded is considered by Jackson to be an important first question when analysing any possible systemic reduction in the rate of Maori offending. (95) In particular, the statistical methods by which Maori offending rates are calculated and the laws which those rates are designed to show have been breached require consideration. (96) As previously noted, Jackson has an aversion to the use of statistics intended to show the rate of Maori criminal offending. One reason for this is the fact that they are used to compare Maori with pakeha, which leads to negative and inaccurate conclusions, while another is their constant repetition which reinforces the negative syndrome of pakeha superiority without addressing the causes of that

syndrome nor suggesting appropriate remedial initiatives. (97)

Nevertheless, Jackson realistically notes that there will continue to be a demand for such statistics; a demand he is prepared to accept provided certain changes occur in the method of collating the statistics and in using them. Firstly, statistics should reflect personal cultural affiliation rather than observer affiliation by the police. Secondly, the results should be used in a culturally sensitive way. They should be given to the Maori people to enable them to interpret the information in an appropriate fashion, (98) although Jackson gives no indication of how in practise the use of such statistics would differ from the status quo.

In the writer's submission the more significant suggestions made by Jackson fall into two distinct categories. In the first category are those suggestions which seek to remedy the concern held by Maoridom of its exclusion from contributing to the formulation of the criminal law. Through a number of mechanisms, some new and others adapted from present practise, Jackson has sought to provide scope for a significant Maori contribution to the ongoing evolution of the criminal law. The second category comprises a number of suggestions as to how existing agents of the system can be changed to become more culturally sensitive to the needs and aspirations of Maoridom. Implementation of these suggestions would, in Jackson's opinion, lead to a reduction in the monocultural bias against Maori and a commensurate rise in the level of respect for the system on the part of Maoridom.

The proposed changes to the law combined with the initiatives to provide Maori with a greater say in its development, while not necessarily more significant than those changes in the latter category mentioned above, would be more visible to the public in the short term and therefore are of considerable importance. In the writer's submission long term institutional changes envisaged by Jackson would stand less chance of either governmental or public acceptance if a backlash occurred against those reforms already introduced.

Starting from the premise that there has been and continues to be an exclusion of Maori concepts from the development of the criminal law, Jackson states that the result has been a growing disrespect on the part of Maoridom for existing legal institutions which in turn has made them less effective in establishing a climate of socially accepted sanctions and deterrents. (99) This problem is heightened by legislative devises such as consorting laws and laws on minor offences which, he says, are unnecessary and unfairly defined. (100) Minor offences not involving violence should be repealed according to Jackson because they are open to subjective definition and therefore often lead to instances of police harassment and racism. (101)

More important than the attempt to highlight specific legislation in need of amendment, however, is Jackson's strategy to give Maori a voice in the law. The strategy has two main elements; the foundation of a Maori Law Commission to operate at the general level of law reform, and the development throughout New Zealand of Maori Legal Service organisations to provide legal advice to Maori. In the writer's submission each of these

proposed institutions warrants serious consideration.

The Maori Law Commission would be autonomous from government and would act as a resource body with a number of functions. Jackson envisages that the new body would exist;

> (a) to foster the study and development of traditional concepts of Maori law,
> (b) to co-ordinate Maori responses to legislation,
> (c) to promote consultation within the Maori community to ensure its participation in the law making process,
> (d) to submit Maori proposals for law reform,
> (e) to undertake research into specific areas such as criminal offending and to develop appropriate strategies to deal with it. (102)

Another of its tasks would be to monitor the activities of the iwi or regionally based Maori Legal Service bodies. (103) Bearing in mind Maoridom's dissatisfaction with both the standard of legal representation and its lack of cultural sensitivity, (104) Maori Legal Services would employ a pool of Maori lawyers and community workers to provide advice in a culturally appropriate way. In addition, they would have an educative function to ensure that Maori understand the criminal law and their rights under it. A pilot scheme, in which Jackson is involved, is presently operating in Wellington based upon models Jackson observed in practise in Canada and the United States. Although the question is not addressed, it seems likely that the resources to fund the organisations would come from the public purse, perhaps via the Iwi

Transition Authority which under the government's devolution policy is assuming the role of the Department of Maori Affairs on behalf of the iwi authorities who after an interim period will have significant autonomy and financial resources.

In addition to the practical assistance the two bodies would provide to Maoridom, Jackson considers that the founding of a Maori Law Commission and a national network of Maori Legal Services would have value of a symbolic nature. Together they would present a clear symbol of the fact that the laws of the country were being formulated in a way which reflects the partnership embodied in the Treaty of Waitangi. (105) According to Jackson this would help reduce the Maori people's skepticism about the general laws efficiency, and in particular their dissatisfaction with the criminal justice system. (106)

The benefits that Jackson believes would flow from giving Maori a voice in the law making process do not prevent him from arguing forcefully for institutional change in a number of agents whose functions are an integral part of the criminal justice system. Ranging from the police to the courts and the Department of Justice, Jackson leaves no stone unturned in his efforts to replace what he sees as the current monocultural focus of those institutions with a commitment to genuine bi-culturalism founded on the Treaty of Waitangi.

In his report Jackson deals with the need for institutional change in the police first, and it is appropriate to do so because the police officer is usually the first point of contact the young Maori has with the criminal justice system. If Jackson's

findings are to be accepted, all too often this contact is unjustly harsh and culturally insensitive. The specific change suggested by Jackson is the introduction of a permanent Maori support structure within the police. (107) Its function would be to provide the police with a range of Maori expertise that could contribute to the development of cultural initiatives within the force. It would do so in a number of ways; for example by developing appropriate and mandatory awareness projects for use in cadet training, and assisting in the development of management training programmes. (108) Jackson envisages that over a period of time such programmes would produce more culturally aware police officers, which in turn would enable the Maori community to feel a greater degree of respect for the police because they are able to have an input into their training programmes. In terms of Maori offending, Jackson asserts that the continuing input of Maori initiatives will reduce the likelihood of the police acting against Maori in a prejudicial manner, thereby minimizing the effects systemic factors have on the rate of offending. (109)

Some moves towards implementing training programmes in Maori language and culture have already been made, although they have not been welcomed by all police officers. Following a working party report to Police Commissioner John Jamieson, a formal pilot scheme to teach Maori language and culture to police officers is to be introduced in 1991. (110) It follows on from a similar course that has been operating in the Rotorua police district, which according to the officer in charge of the course, District Arms Officer Bill Rakuraku, has gained a

positive reaction from the Maori community. It was his view that;

> They are all for it. They see it as a stepping stone to them understanding better how police work. (111)

The Police Association, however, have criticised the proposed course as absurd and unnecessary. Association Secretary Graham Harding commented that teaching Maori language and culture would do nothing to help police deal with crime more effectively as;

> Much of the client base the police deal with would not speak the language. (112)

In spite of this opposition it appears likely that the pilot scheme will still take place next year and the assessments of those police officers who take part in the first course will no doubt be important in determining the programmes future.

In the meantime there are measures that Jackson believes can be taken in the short term to ease the existing tension between Maori and the police. The disbanding of the team policing units, (113) and in particular the removal of the prosecutorial power from the police (114) are the two most important suggestions. The power to prosecute should be given to an independent agency, a reform seen by Jackson as essential if both the perception and reality of discriminatory prosecutions is to be removed. (115) In Jackson's view;

> An independent prosecutor's office would provide both a practical and symbolic sign for Maori people, or indeed any person appearing

> before the courts, that the charges laid by the police have been impartially assessed prior to the hearing. (116)

A corollary to the development of such an office is Jackson's proposal for a system of public defenders to replace the current duty solicitor scheme. (117) Referring to experience in the United States and Australia, Jackson expressed the view that it would be the most effective form of legal aid for Maori alleged offenders and the most efficient way of providing a stable pool of defence counsel. (118)

Aside from the police, the institution which Jackson places most emphasis on the need for change is the Department of Justice. In his opinion, the removal of systemic bias and the provision of fair treatment of Maori offenders can only be achieved with major changes in the department's philosophical base and in its policy, planning, research and service delivery. (119) Jackson places this emphasis on the role of the department because it;

> ... touches on so many areas of their lives and seems to prejudicially operate against so many of their young. Indeed the mere fact that the people dealt with by the criminal justice process are predominately Maori, but the people controlling and managing it are overwhelmingly Pakeha has created many of the institutional inadequacies undercovered in this and other reports. (120)

Jackson talks of the need for a committment to accord Maori ideals and strategies equal value with those of the pakeha, again using the Treaty as authority. (121) From this will come a long term

conceptual study of the department's operational base which Jackson hopes will eventually lead to a new structure in which Maori play an equal part. (122) In the meantime, Jackson calls for immediate changes in the department's training, management and policy making procedures. (123) This would involve a positive discrimination scheme to recruit and retain Maori staff, not just as a symbol of a general commitment to a Maori cultural perspective but as a way of involving Maori in the processes of the law. (124)

The remaining changes to the criminal justice system suggested by Jackson relate to the actual process that an alleged Maori offender currently is subject to after arrest, and should in the writer's submission be seen as proposals that seek to pave the way for the acceptance of the appropriateness of Maori values and beliefs in a parallel criminal justice system for Maori. Certainly the proposals are made in an effort to make the current process more culturally sensitive to Maori, a goal which they would undoubtedly achieve.

Jackson proposes the amendment of the Juries Act 1981 to make provision for Maori defendants to have the right of trial before an all Maori jury. (125) This, says Jackson, has a bi-cultural basis; namely the preservation of rangatiratanga in the Treaty of Waitangi and the commitment contained in the Magna Carta that people should be tried by their peers. (126) During the trial itself Jackson says there should, in certain circumstances, be cultural defences available to Maori. (127) Concepts such as utu could be advanced as a defence, if not as a total exculpation of the actions taken, at least to reduce the gravity of the particular charge a Maori

defendant faces. Jackson does, however, recognise the need for limits on such a defence - such as clear definitions of the particular concepts able to be used as defences and the types of cases in which they would be appropriate. (128)

Changes are also required, in Jackson's view, at the sentencing stage. First of all, he suggests the mandatory education of judges in traditional Maori cultural concerns and contemporary issues. (129) Secondly, Jackson suggests that the sentencing aspects of the Criminal Justice Act 1985 be examined with a view to providing more scope for community input into both the sentencing process and how the sentence itself is served. (130) Included in this would be provision for cultural remedies, for example muru by which redress for wrongdoing is delivered by the whanau of an offender to that of his victim. (131) While reparation in the Criminal Justice Act contains some aspects of muru, Jackson criticizes its emphasis on financial payment on the individual basis of offender to victim as being too narrow. (132) Where the offender is Maori and there is no dispute as to guilt, Jackson argues for the imposition of a mutually mediated muru. (133)

There is no specific indication in the report as to whether this would be done within the court system, or outside it by a Maori forum. Clearly, however, the tenor of the report suggests that it would be a function outside the perview of the general courts. If so, what forum would undertake this task, and upon what legal authority ? A clue comes later in the report during Jackson's discussion of the growing importance of diversion schemes to keep young Maori out of the criminal justice process. Reflecting on the fact that the existing scope for

district Maori committees to exercise limited judicial powers under the Maori Community Development Act 1962 has not been taken up, Jackson proposes the re-constitution of those committees as community or marae based judicial committees comprising both the traditional leadership and a representative group of Maori. (134) After receiving training in legal issues by Maori Legal Services the committees would have the right to hear all charges relating to both the Maori Community Development Act and equivalent offences under the Summary Offences Act 1981 where the offender is Maori and there is no dispute as to guilt. (135)

The pakeha adversarial system would, says Jackson, be replaced by Maori ideals of mediation and restoration and the committees would have the power to involve the whanau in sentences such as muru. (136) This whanau involvement would reinforce the idea of group responsibility and ensure that the offender is made to feel the remorse and shame necessary before rehabilitation is possible. (137) The scope of this type of diversion is quite wide, as Jackson envisages that all Maori who commit an offence within the committees' jurisdiction and who do not dispute guilt would be diverted. There would, however, be discretion for the committees' to decline jurisdiction in favour of the general courts if it felt it was inappropriate to take on the case. (138)

It will be apparent to the reader at this point that Jackson's proposals for reform of the current criminal justice system are comprehensive and detailed. Aimed both at reducing Maori dissatisfaction with the way the current process operates and at ensuring future Maori participation

in the development of the law, many of Jackson's proposals not only have merit but have the added advantage of falling within what could be described as "the art of the possible".

But given that Jackson places considerable emphasis on these proposals, what further significance can be given his call for a parallel criminal justice for Maori ? What additional benefits to Maoridom does Jackson seek to achieve by the implementation of such a system ? The writer will now proceed to an analysis of Jackson's proposed parallel system with these questions in mind.

THE LONG TERM STRATEGY - A PARALLEL CRIMINAL JUSTICE SYSTEM FOR MAORI

A modern legal system operates at three levels. The first is the legislative process, where decisions are made to prohibit certain actions because of their detrimental effect on society. These are substantive questions, determined by the legislature's judgment as to what is necessary to maintain order in society. The second stage is essentially procedural; persons suspected by the authorities of having broken the law are committed to trial to determine their guilt or innocence. The third and final stage applies only to those found guilty of an offence. At this point efforts are made to punish the offender, and provide the victim of the offence with a remedy where appropriate.

There is one other component that requires consideration; that of jurisdictional rules, which is of particular significance if a parallel criminal justice system for Maori were to be introduced. It is currently a non-issue because New Zealand is a

unitary state and therefore has none of the federal/state jurisdictional problems that exist in countries such as Australia and the United States. All persons living in New Zealand, of whatever race and from all parts of the country, are subject to the same substantive law enacted by a unicameral legislature and enforced by a single police force and a standard nationwide court system. If a parallel system for Maori were to be implemented it would be necessary to have clear jurisdictional rules to ensure that no confusion exists over whom the system applies to and in what circumstances.

There is also a need to maintain a degree of flexibility in considering how a parallel system might interact with the current system. It may be that the extent to which a parallel system operates could be limited to the procedural and punishment stages. This would mean in practise that all New Zealand residents would be subject to the same substantive law, but that the procedures for determining both the verdict and sentence differ for Maori defendants. Alternatively, a judgment could be made that variations in substantive law are justified in addition to procedural and sentencing variations.

While the emphasis in Jackson's report is on procedural and sentencing variations, he also sees the need for variations in substantive law. Revival of the Maori justice system that Jackson seeks is based upon quite different precepts to the current system, and it is to these principles that the writer will now turn to.

PHILOSOPHICAL AND CULTURAL DEFINITIONS OF MAORI JUSTICE

The system Jackson envisages would be based upon the cultural imperative that a criminal justice system should not only impose sanctions but should also seek "restoration of balance among offenders and victims, their families and the wider community". (139) This was the focus of Maori justice as it operated prior to the arrival of the English settlers, along with an approach that joined people together in a process of mediation as opposed to the adverserial nature of the current criminal justice system. (140) As the writer has previously noted, this process involved both the victim and the victim's whanau in helping to determine the sanction to be applied.

The initial acceptance by pakeha settlers of Maori methods of maintaining social order was short lived for two reasons. First, and most importantly, they were seen as an impediment to the successful colonisation of New Zealand. The implementation of one law for all, with Maori receiving no rights other than those accorded British citizens, was the end result of this judgment. The second factor was the prevailing view of the settlers that the Maori had no legal system, and that order was maintained by "lore", defined as "quaint and barbaric customs. (141) The settlers took what could be termed a narrow institutional perspective when looking at traditional Maori methods of delivering justice. The lack of a both a Maori Parliament to make law, and other centralized forms of authority to enforce it meant that settlers accustomed to European institutions were encountered with a system of dispensing justice that was as foreign to them as theirs was to Maoridom.

The question of "What is Law ?" has also been the subject of considerable academic study in the intervening years since the colonisation of New Zealand, but it remains difficult to determine whether or not particular traditional mechanisms of social control involve the application of "law". In any event, the practical consequences of such a judgment are not significant as there has been no suggestion that traditional procedures should be resurrected en masse anywhere in the developed world. To do so would be quite inappropriate and counterproductive to the goal of achieving justice for Maoridom or any other indigenous people. Certainly Jackson does not seek to revive the old ways where it is clearly inappropriate to do so. In arguing its relevance to modern society Jackson argues that;

> ... Maori justice was not crystallized 200 years ago. It has adapted and changed and is capable of accomodating today's values. (142)

Accordingly it is the principles and values that underlay the traditional Maori system of justice that Jackson seeks to transplant into a parallel system. Jackson acknowledged that this process could not take place overnight, however, given the practical difficulties involved in implementing a parallel system. (143) It would also require financial resources to assist Maori work through their views on how to deal with Maori offenders, a role that his proposed Maori Law Commission would play a major part in guiding. (144)

One of the major difficulties with the proposal to implement a parallel system for Maori is the fact that all the structures involved would be new within

Maori terms. Jackson acknowledges this fact, (145) which arises because traditional Maori culture did not have a court institution as such. Instead of drawing on past experience, therefore, the proposed Maori Law Commission would examine overseas examples of legal pluralism for ideas. Jackson specifically mentions North American jurisdictions, (146) where tribal courts have quite wide powers to deal with offending on Indian reservations. But in the final analysis any system implemented would reflect the "Maori way" involving;

> ... the creation of a distinct process to hear, sentence and dispose of charges against Maori offenders in which the authority to determine the procedure and the law is retained in Maori hands. (147)

While it is not entirely clear from the above quotation, it appears to the writer that Jackson does not exclude the possibility of including variations of the current substantive law within the perview of his proposed system. Certainly Jackson expresses Maori disagreement with the pakeha notions of criminal jurisprudence prevalent in the current system, and he stresses the need to subject Maori to a process that seeks to mediate cases to the satisfaction of all rather than one that is purely retributive. (148) This would not, in his view, necessarily ensure a result that was any more or less harsh than that imposed by the pakeha system; rather the method of its imposition and fulfillment would be different. (149)

It is at this stage that Jackson addresses the key point of how the two criminal justice systems would interact. While acknowledging that the underlying

philosophies of dispute resolution would differ between the two systems, Jackson considers that Maori concepts of criminal wrongdoing do not differ greatly from those of the pakeha. (150) Indeed;

> ... the different Maori and pakeha processes could actually administer a common criminal code if it was developed through meaningful Maori participation, and if it incorporated or adapted the particular notions of wrongdoing which are contrary to Maori law and Maori ideals of social order. (151)

The implication that can be taken from this statement is that unless the current criminal law is significantly amended to make it more acceptable to Maoridom, Jackson would seek substantive changes in the law to be administered by the Maori system. The report, however, is deficient in this respect as it does not specify what areas of the law would be different between the two systems in such circumstances.

In the writer's opinion it would not be appropriate for variations in substantive law to exist between the two systems. It is unacceptable in principle to prohibit certain acts for people of one race and condone them by leaving them unsanctioned when committed by people of another race. Such a regime would effectively create two classes of citizen, and would inevitably lead to an increase in the level of racial tension in society. The key difference between substantive and procedural variations is the question of culpability; a parallel system that encompasses substantive variations from the current system is in effect given the power to set and enforce different standards of acceptable behaviour.

Were both systems to operate under the same criminal code, culpability for illegal acts is not determined on racial grounds. The differences only go to the procedure by which guilt is determined and the appropriate sentence that is handed down. Cultural differences, therefore, would be relevant only in so far as it determines the procedure to determine guilt or innocence of a defendant and, if a guilty verdict is returned, in sentencing the offender.

It is important, however, that Maori have an input into the development of the criminal law, and the Maori Law Commission that Jackson proposes would provide a much needed focus to ensure that this occurs.

Leaving aside the philosophical merits for introducing a parallel system of procedural criminal justice for Maori for the moment, there are a number of practical implications that require attention.

PRACTICAL IMPLICATIONS OF A MAORI CRIMINAL JUSTICE SYSTEM

The first question to consider is that of the proposed system's jurisdiction. It is Jackson's view that the system should have authority to hear and determine all cases involving alleged offenders and victims who identify themselves as Maori. (152) If the victim is an institution or a non-Maori they would have the right to have the matter heard either within the Maori system or have it transferred to the general courts of law. (153) Self identification of race is a consistent theme throughout the report, and has become widely accepted in recent years. This form of identification has more merit in the writer's submission than adopting a definition that

determines race on the basis of how much Maori blood an individual has. Such definitions are unable to take into account the perspective of the individual him or herself as to their culture and race, and therefore are inappropriate in determining who should be subject to any parallel system introduced.

The major difficulty, in the writer's submission, with the jurisdiction proposed by Jackson is its all encompassing nature. As mentioned above, under Jackson's proposal all Maori offenders would be subject to the jurisdiction of the parallel system. This would presumably include defendants facing criminal charges of every degree of seriousness from shoplifting through to murder. It would also include those Maori who live in urban areas and have no active tribal affiliation. There appears to be no scope in Jackson's proposal for either the defendant or the court to refer the case to the general courts. In the writer's submission such flexibility should be permitted, for example where the defendant has no cultural awareness or his or her Maoridom. In such cases the existing system may be a more appropriate vehicle for delivering justice. Similarly, where the offence is particularly serious there will be occasions where the Maori structure is not appropriate to hear the case. This latter point would depend, of course, on the procedures operating in the Maori system, the quality and expertise of the "judges" and the scope of the sanctions able to be handed down by the "courts". These points will be addressed in more detail later in this paper.

The writer is not aware of any ethnic based alternative judicial system operating anywhere in the world that exercises jurisdiction for all criminal offences. In the United States, for

example, tribal courts based in Indian reservations are not responsible for dealing with the most serious criminal offences. Instead, the federal judicial system exercises this jurisdiction pursuant to the Federal Major Crimes Act. (154) A system of tribal courts was in fact submitted to the Royal Commission on Social Policy as a solution to the lack of confidence among Maori in the current system. The Wellington Maori Legal Service, of which Jackson is an employee, proposed the implementation of a court system to be funded by both government and tribal resources to resolve disputes and impose penalties. The courts would have jurisdiction;

> ...over tribal members (wishing to opt for the tribal system) charged under the Summary Offences Act 1981, Transport Act 1962, Crimes Act 1961, Criminal Justice Act 1985 (for breaches of probation, periodic detention and community service); disputes dealt with by the Family Court (except matrimonial property disputes); children and young people; matters relating to land held by members of the tribe. (155)

The major difference between this proposal and that contained in Jackson's report is the strong implication that the tribal courts would exercise jurisdiction over the same substantive law as the current system. This proposal also gives Maori defendants the choice as to which court system they wish to be tried under, and this is an important improvement.

Both proposals share the same drawback, however, that of including the most serious criminal offences within their jurisdiction. It is unrealistic in the

writer's submission to expect that a newly established Maori court system, particularly one based on less formal or legalistic procedures, could adequately sit in judgment over defendants charged with serious offences that often will require complex legal argument before a result can be reached.

Accordingly, it is the writer's submission that if a parallel system were to be introduced, it have the following jurisdiction.

Maori defendants should have the choice of using the parallel system in preference to the general courts of law where;

1) the victim is Maori, or if a non-Maori agrees to have the case heard in the Maori courts; and
2) the defendant is charged with an offence which carries a maximum punishment of three or less years imprisonment; and
3) the Maori courts decide it is appropriate to hear the case.

Another option would be for Parliament to enact a Major Crimes Act, similar in concept to the legislation operating in the United States, that would specify those offences that could not be heard by the Maori system leaving it to have jurisdiction over all other criminal offences. In addition it would be necessary for the Maori courts to have the discretion to refer a case to the appropriate general court for determination.

In his report Jackson does not recommend a specific structure for implementation, instead he expresses

the view that the development of such a structure would follow naturally on from research on the applicability of Maori concepts and principles into a modern system. (156) He does float one option however; that of a system of runanga consisting of selected people to hear and determine cases. (157) Jackson proposed a panel of "judges" rather than one individual as it "would stress the community responsibility to remedy wrongs committed against it". (158) There is no reference in the report to any requirement for legal qualifications as a prerequisite for election to a runanga. Given the antipathy of Maoridom towards pakeha lawyers, and the current lack of Maori lawyers, it is reasonable to presume that Jackson does not envisage there being a requirement for potential "judges" to hold legal qualifications.

While lawyers are by no means the sole repository of human wisdom, serious questions are raised if those deciding upon criminal cases are to be non-lawyers. Notwithstanding Jackson's acknowledgment of the need to train those to be involved in the parallel process, (159) it is the writer's submission that the absence of a compulsory requirement to have legal qualifications would in itself be a sufficient reason to significantly limit the jurisdiction the system would exercise. It is unacceptable to have persons without the necessary training determining important questions of law which in the final analysis may determine the fate of the defendants liberty. Even allowing for procedural variations in the rules of evidence, cross examination and the like, "judges" need to have a knowledge and understanding of the criminal law and how it should be applied. If the "judges" of the parallel system were not of sufficient quality, the system would

inevitably end up as a poor relation of the status quo, and place at risk the credibility of the entire New Zealand justice system.

The only lay persons who currently exercise judicial powers in New Zealand are Justices of the Peace, and their jurisdiction is limited to conducting preliminary hearings of indictable offences (160) and the hearing of certain summary offences. (161) It has been suggested by the Governor-General designate, Dame Cath Tizard, that a Maori justice system could be similar to that which Justices of the Peace operate under. (162) Such an innovation would provide scope for tribal discipline, supervision and sentencing in limited circumstances only, and therefore would fall short of satisfying those who advocate the system outlined in Jackson's report. Notwithstanding that, it is an option worthy of further consideration by the government.

Maori appearing before a parallel system, regardless of its jurisdiction, are entitled not only to the protection of the rules of natural justice, but also that provided by international agreements to which New Zealand is a party guaranteeing certain human rights. Of particular importance is the International Covenant on Civil and Political Rights, which New Zealand has ratified. This Covenant came into force in 1976 and provides for basic procedural fairness in the execution of the criminal law. Among the rights it protects are the right to a fair and public hearing by an independent and impartial tribunal and the right to be presumed innocent until proven guilty. (163)

There are currently moves to codify minimum standards of criminal procedure in the New Zealand

Bill of Rights Bill which is currently before Parliament and is expected to pass prior to this years General Election, (164) and any parallel system that was introduced would be required to meet these standards.

One right specified in the New Zealand Bill of Rights is that of the right to present a defence. (165) In the pakeha context, it has been normal practise to interpret this, inter alia, as a right to legal representation. In the United States, for example, the right to legal counsel is protected by an amendment to the Constitution which was ratified as long ago as 1791. (166) In New Zealand the importance of ensuring that defendants have access to a lawyer is reflected in the enactment by Parliament of the Legal Aid Act 1969 to provide defendants of moderate means sufficient funds to retain counsel.

In the writer's submission it is fundamental that defendants in any future parallel system have access to legal counsel. There could, however, be provision for the defendant to be advised by members of his whanau or iwi in addition to his or her lawyer.

Jackson envisages that sittings of the parallel system would take place on a marae. (167) The current courts, he says, "exhibit varying degrees of monocultural inappropriateness". (168) In particular;

> They can be seen in a physical environment insensitive to the needs of clients, in an apparent emphasis on procedural correctness rather than concepts of "justice", in an expeditious despatch of cases to the detriment

> of a right to be heard, in a sense of collusion between the Prosecutor and defence counsel which limits input by the defendant, and in a general atmosphere of monocultural exclusiveness. (169)

If a parallel system was to be introduced, resources would be required to provide an infra structure able to cope with hearing cases on a number of marae throughout New Zealand. This would not only involve the physical requirement of a "court room", however informal in setting, but more importantly the provision of administrative staff to provide the necessary backup to those judging cases. If the state undertook to provide this staffing resource, which would be expensive, the question arises whether they should be employees of and therefore accountable to the Department of Justice, or whether they should be under the control of the Iwi Transition Authority or some other Maori controlled body. The question of accountability is important in this respect. While a certain degree of autonomy may be devolved to Maori to help them achieve the goal of a more culturally sensitive justice system, the resources are provided through the taxes of all New Zealanders who therefore have a legitimate interest in being kept informed through their parliamentary representatives as to how the money is spent and for what purpose.

The question of an appeal structure also requires consideration. It is common practise in western jurisdictions to allow a defendant convicted of a criminal offence a right of appeal, and the New Zealand Bill of Rights Bill recognizes the existence of this right in the New Zealand context. (170) A problem arises, however, if there is no "higher

court" to appeal to. If a Maori system were to be implemented three options for providing a right of appeal are immediately apparent. First, a centralized Maori appeal court could be created to hear appeals from the tribal courts operating on marae throughout New Zealand. Alternatively, a new Appeal court could be formed with equal representation of Maori and pakeha judges to hear appeals eminating from both systems. The final alternative is to simply use the existing Court of Appeal structure to hear all appeals from both systems.

Another important question is that of security. If, as Jackson proposes, defendants charged with violent offences are included within the jurisdiction of the parallel system, there needs to be facilities to prevent, as far as possible, their escape. Currently such defendants who do not receive bail are held in remand prisons until their trial. Clearly it would be out of the question from a financial viewpoint alone to build separate prisons for Maori defendants, and it would be equally wrong for alleged violent offenders to be left in the community just because they were Maori. The whole community is place at risk in such an event, not just those on the marae where the defendant may be held.

There is no indication of Jackson's attitude on this question, nor that of the place of imprisonment after conviction through the parallel process. In a media interview, however, Jackson acknowledged that prison would remain as a sanction for violent offenders after conviction in the system he proposes. (171) In the writer's submission there is no other alternative to imprisonment for certain

types of offenders, whether Maori or pakeha, and penal reforms such as those recommended by the Roper Report (172) should be implemented where appropriate on non-racial grounds.

Having traversed many of the practical difficulties that arise with respect to Jackson's proposal for a parallel system of criminal justice for Maori, it is appropriate to look to the experience in the United States, Canada and Australia with implementing parallel legal structures to varying degrees. Such an examination may provide solutions to some of the practical problems discussed, or throw up alternative methods of achieving the goal of making the current criminal justice system more acceptable to Maori.

OVERSEAS JURISDICTIONS AND LEGAL PLURALISM

In this section of the paper the writer will undertake a brief analysis of the methods by which native justice is achieved in the United States, Canada and Australia. Each of these three countries provides an appropriate comparison to New Zealand given their historical ties as part of the British Empire, and the similar problems facing their indigenous peoples, including a disproportionate level of criminal offending and an alienation from the mainstream justice system.

There are, of course, limitations on the significance that can be attributed to a study of the various mechanisms through which indigenous peoples may gain access to justice. It can not be presumed, for example, that many or all of an indigenous people's problems would be solved simply by giving them a greater degree of legal autonomy.

There are a raft of economic and social problems that are common to indigenous peoples throughout the world that also require attention, and obviously they are beyond the scope of this paper.

Nevertheless it is appropriate to briefly examine overseas experience, particularly in the United States, in the expectation that it may provide examples of both success stories to follow and failures to avoid.

The aim of Jackson's paper, and indeed of initiatives taken in the jurisdiction the writer will refer to later in this paper, is to achieve what has been termed by one author "native justice" (173) This has been defined as;

> ... an understanding of and sensitivity to the social, cultural and legal mores that guide the native party involved in the proceedings. (174)

Of the three countries under scrutiny, the United States has the most scope for parallel legal institutions to operate. The existence of tribal courts in over sixty reservations, (175) reflects the special constitutional status enjoyed by Indians in the United States. These courts are established under the inherent power of the tribes to devise mechanisms for the administration of justice, (176) although they are heavily dependant upon funds provided by the federal government. (177)

In theory the tribal courts enjoy a wide jurisdiction, encompassing all civil disputes between non-Indians and Indians living on reservations, (178) and all criminal offences except those specified in the Federal Major Crimes Act.

(179) The excluded offences include murder, manslaughter, rape and other serious crimes of violence. As a separate system, tribal courts are not subject to state law nor are they part of the regular United States court system for the purpose of appeals, (180) except on constitutional issues. (181)

The degree of autonomy from the justice system as a whole, however, is less marked in practise. Aside from a dependence upon federal government funding referred to earlier in this paper, there are other limitations on the operations of tribal courts. One major limitation, which is largely self-imposed, is the exercise by tribal courts of their discretion to cede to state courts matters which they perceive as requiring special expertise. The result is that tribal courts are rarely used for resolving civil disputes, their primary focus being the hearing of misdemeanours and other non serious criminal matters. This is compounded by provisions of the Indian Civil Rights Act, which as recently as 1981 restricted tribal courts penalty powers to a $500 fine or six months imprisonment or both. (182) Such limited sanctions are clearly insufficient to enable the tribal courts to deal with more serious crime.

Tribal court judges are elected by the residents of the reservations they serve, and although they are provided with training after their election there is no requirement that they hold legal qualifications. (183) This lack of legal training, combined with a high turnover among judges, means that many are unfamiliar with either the code their courts operate under or federal laws. There appears to be little impetus to address this problem, which perhaps has

relatively little significance so long as tribal courts continue to have limited jurisdiction.

There is no means universal satisfaction among Indians of the role that the federal government permits tribal courts to play. Separatist Indian groups reject the view expressed by some commentators (184) that the rule of law requires the Indian tribes to continue to be reconciled into the United States constitutional system. In the words of one writer, these groups;

> ... see the rule of non Indian law infected with the politics of greed, racism and genocidal exploitation. (185)

This statement, of course, reflects similar feelings to those behind Jackson's call for a parallel criminal justice system for Maori.

Similar sentiments are held among Indians in Canada, which like New Zealand has a problem of a disproportionately high number of indigenous peoples offending. Indians comprise just 2% of Canada's population, yet they make up 10% of that nations 12,500 prison inmates. (186) Notwithstanding an acknowledgment of this problem, calls for a native run justice system have gone unheeded. The only substantive Indian involvement in native justice has been the appointment of Indian Justices of the Peace in the northwest territories and the hiring of special native police constables in the same area. (187)

There is currently an investigation into the impact of the criminal justice system in Alberta, Canada on the Indian population, and this is due to report to

the provincial government by December 1990. (188) Included in its brief is the task of recommending changes to the current system to make it more culturally sensitive to the Indian population, however the writer would be surprised if this went as far as implementing parallel legal institutions even to the degree operating in the United States.

Like Canada and New Zealand, no separate system of tribal courts exists in Australia. Since an amendment to the federal constitution in 1967 it has been abundantly clear that Parliament has paramount power to make laws over Australians of all races. This power is shared, however, with the states, who have jurisdiction for criminal law. Queensland has been the only state to establish a tribal court system for the aboriginals, and it has no sovereign powers. Instead it operates pursuant to state legislation, and has only limited powers of a community order type. (189)

CONCLUSION

In addition to punishing persons convicted of committing a criminal offence, a criminal justice system exists to protect the individual's right to carry on their lawful business with impunity in the knowledge that they enjoy the law's protection. Accordingly it is in the interests of all in society that the legal system be retained to ensure order where there may otherwise be chaos.

A problem arises, however, if a minority group within society perceives that the system exists not to protect their rights as citizens, but simply to punish their young in a discriminatory fashion. In the writer's submission the Royal Commission on

Social Policy was correct in stressing the importance of minorities perceiving the system to be treating them fairly. (190) In a democracy it is not enough for the legal system to protect just the interests of the majority; the individuals that make up a minority also have civil and political rights.

In Jackson's report the views of Maoridom on the operations of the criminal justice system were presented to the country as a whole for the first time. Regardless of whether or not other New Zealanders accept the validity of his criticisms of the current system, it cannot be questioned that Maoridom's perception of the system is that it neither protects their interests or recognizes their cultural values. The report addresses two interrelated problems that Jackson says arise from this; Maori offending and the cultural insensitivity of the system, and the recommendations that have been discussed at some length in this paper are intended to try and solve those problems.

While the most important problem, because of its adverse effect on society, is that of the disproportionately high level of criminal offending among Maori, it is the writer's submission that it is unlikely that Jackson's proposals would if implemented improve the situation in the short term. Other initiatives to improve the economic and social position of Maoridom are more likely to achieve this goal.

The real question at the heart of this paper is how New Zealand's criminal justice system can be reformed to ensure not only that Maori no longer feel alienated by it, but that they actively endorse its operations as a means of protecting their

rights. This is dependant upon reaching a state of affairs where Maori consider that the system is able to deliver a fair and just result.

In seeking to achieve this objective, however, any reforms implemented must not only be in the best interests of Maoridom but also in those of the country as a whole. Reforms implemented that do not achieve that balance will inevitably fail to attract the public support which in a democracy is necessary if they are to be long lasting. Also, in addressing one injustice we must be careful not to create another.

In the writer's submission there is little chance of a parallel system of criminal justice being implemented so long as public opinion remains firmly against it, regardless of its merits. There is, however, considerable scope for change within that constraint that would give the existing system more flexibility in dealing with Maori offending.

Earlier in this paper the writer referred to the limited judicial powers currently provided to Maori under the Maori Community Development Act 1962. Jackson acknowledged the potential value of this legislation, and proposed the re-constitution of the district committees provided for under the Act into marae based judicial committees comprised of both the traditional leadership and a representative group of Maori. (191) The committees' would have jurisdiction to hear cases under the Summary Offences Act 1981 where the offender is Maori and there is no dispute as to guilt. (192)

In the writer's submission this is a proposal that should be implemented by the government. It provides

considerable scope for the exercise of tribal discipline upon particularly young offenders who have broken the law for the first time, and it is possible that such offenders would be less likely to reoffend after having their actions sanctioned by their own people. Similarly, such a system of judicial committees' would have scope to hand down sentences based on Maori values of mediation and restoration, with the whanau of both the offender and the victim being involved.

The system outlined above suffers from few of the practical disadvantages that stand in the way of the introduction of a more comprehensive parallel criminal justice system. Because only those offenders who admit their guilt are diverted to the marae based committee, there is no need to have "judges" with legal qualifications, nor is there a need for legal counsel to necessarily be involved. Persons appearing before the committee would be given the option of being represented either by a lawyer or another advisor, perhaps a member of his or her whanau.

The writer suggests that a right of appeal against sentence from the judicial committees' to the District Court be provided, and that the committees' have discretion to decline jurisdiction in favour of the general courts where it is appropriate to do so. Similarly, Maori offenders would have the choice of which jurisdiction they wished to be sentenced under.

Just as the more comprehensive system proposed by Jackson could not be implemented overnight, nor can the system outlined above commence operations immediately. A pilot scheme would be the most

sensible way to begin the process of implementation, as it would allow any practical difficulties that arise to be ironed out prior to the system operating across the country. Departmental consultation with a body such as the New Zealand Maori Council or the Iwi Transition Authority would determine a tribal area prepared to exercise judicial powers under the Maori Community Development Act, once the Act was amended to specify the jurisdiction of the judicial committees' and the range of sentencing options available to them. After the holding of elections to determine the composition of the judicial committee, its members would receive training in legal issues as they relate specifically to the sentencing powers they will be expected to exercise.

Diversion to the marae for a hearing to determine a Maori offender's sentence would occur prior to a District Court hearing provided that his or her guilt has been unequivocally admitted to the police. The defendant would at this stage be formally advised of their option to either remain within the jurisdiction of the current system or be sentenced on the marae.

Where the offence committed is more serious than those contained in the Summary Offences Act, or where there is dispute as to guilt, the defendant would continue to be subject to the jurisdiction of the general courts of law as at present.

There are too many practical difficulties, in the writer's submission, to warrant further consideration of a parallel system with such wide ranging jurisdiction as that envisaged by Jackson. In addition, as the system of tribal courts operating in the United States has shown, the

benefits of such a system should not be overstated. Maori offending will remain a problem even under such a system unless other initiatives are taken to remedy their low socio-economic status. While a parallel system may improve Maori confidence in the integrity of the law, it is the writer's submission that this objective can be achieved through other means that have less potential for increasing the level of racial tension and division.

The key problem that must be addressed is the lack of input Maoridom currently is able to exercise into the legal process at all levels. Jackson himself recognized this and offers a number of proposals that if implemented would go a long way to solving the problem. At a legislative and policy level a Maori Law Commission would coordinate Maori views on law reform and present them publicly to government. In conjunction with the current Law Commission, it would actively protect and further the interests of Maoridom in a way that is currently not occurring. Secondly, Jackson's proposal for a Maori support structure within the police has considerable merit. (193) It has the potential to ease some of the current tension and distrust that all too often characterises the relationship between the police and Maori. Finally, judges of both the District and High courts' should be given training in Maori culture and language in an effort to improve their understanding of Maoridom.

Implementation of these proposals would, in the writer's submission, not only address the problems of Maori alienation from the law but would be capable of gaining support from the wider community. They would be less likely to create a white backlash, other than from that section of the

community which still believes that Maori should be assimilated into the community in the widest possible sense. These proposals may even reduce racial tension as more Maori accept the view that the legal system exists to protect their rights just as much as it does for the rest of the community.

The writer has reached the views expressed in this conclusion after giving consideration to the practical difficulties in implementing the proposals contained in Jackson's report. Somewhat less weight has been given to the constitutional arguments that Jackson advanced to underpin his proposal on. Without downgrading the importance of the Treaty of Waitangi as both the founding document of New Zealand and as a guide for addressing land grievances, the writer rejects its relevance to the question of a parallel legal system. The Prime Minister, Mr Palmer, is justified in his view that a legal system lies at the heart of a nation's sovereignty and that this was surrendered by Maoridom with the signing of the Treaty of Waitangi. (194)

The obligation of government to ensure sufficient flexibility in the legal system to protect Maori interests derives, therefore, not from the Treaty nor from Maoridom's status as tangata whenua. Rather it stems from the responsibility of the system to;

> ... protect the rights of minorities and disadvantaged groups. In the institutions of justice ... it is vital that procedures are seen to be acceptably fair from not only a majority point of view but also from the perspective of minority groups and the consumers of the system. (195)

It will be noted that the writer quoted this passage from the report of the Royal Commission on Social Policy earlier in this paper. (196) This quotation warrants repetition at this point as it reminds us of the objective that the criminal justice system has not, as yet, managed to achieve. Those objectives must be achieved, however, and it is the writer's hope that this paper's analysis of Jackson's report, combined with the specific reforms suggested in this conclusion, will contribute to that process.

FOOTNOTES

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83. cf for example Victims of Offences Act 1987

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