

Te Tai Haruru

Journal of Maori Legal Writing

VOLUME 3

Articles

"Coming ready or not! The emergence of Maori hapu and iwi as a unique order of governance in Aotearoa New Zealand"
by Dr Nin Tomas

"The bottom of the heap? Why Maori women are over criminalised in New Zealand"
by Khylee Quince

"Tino rangatiratanga and sustainable development. Principles for developing a just and effective system of environmental law in Aotearoa"
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"Me He Korokoro Tui: Searching for legal Maori language and the rights to use it"
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"Are parole boards working or is it time for an indigenous re entry court?"
by Valmaine Toki

"Indigenous Peoples and Foreign Policy: the New Zealand experience"
by Dr Maria Bargh

JOURNAL OF MAORI LEGAL WRITING 2010

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**JOURNAL OF MAORI
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2010**

NGA MIHI

Nga korero e whai ake nei, no etahi nga rangatira o te ao Maori i tino marama i tino mohio ki nga ture o te Pakeha me nga tikanga o te ao Maori. No reira, tena koutou katoa.

It is with great pleasure that I introduce the articles contained in this issue of the *Journal of Maori Legal Writing*. As always, the *Journal* contains a compilation of perceptive articles on the current legal issues facing our communities, written from a uniquely Maori perspective informed by the law and tikanga.

The *Journal* was established by Dr Nin Tomas, the first Maori legal academic to obtain a Doctor of Philosophy (PhD) (Law). Dr Tomas' thesis examined the core principles of tikanga Maori and their use as regulators of human relationships and natural resources in Tai Tokerau. It is appropriate that this issue of the *Journal* begins with her article "Coming Ready or Not! The Emergence of Maori Hapu and Iwi as a Unique Order of Governance in Aotearoa New Zealand". This important article delves into the dynamic nature of Maori custom law in the context of emerging Maori corporate governance structures. Dr Tomas argues that these structures and the models and principles that underpin them, present a timely challenge to New Zealand's constitutional arrangements and the way in which the state sees itself – domestically and internationally.

The other contributions to the *Journal* are equally important. Carwyn Jones in his excellent article, "Tino Rangatiratanga and Sustainable Development: Principles For Developing a Just and Effective System of Environmental Law in Aotearoa" reminds us of the need to develop an environmental legal framework which responds to the values and aspirations of all New Zealanders. In many ways, his analysis echoes the arguments of Dr Tomas, which are grounded in the recognition of the sovereignty and dignity of Maori and indigenous peoples throughout the world, as we continue to work towards revitalising our culture and legal frameworks.

Dr Maria Bargh writes about New Zealand's foreign policy, indigenous peoples and the core assumptions that underpin foreign policy in New Zealand. Dr Bargh highlights the poor levels of Maori participation in Crown foreign policy and the basis for future, increased involvement.

Mamari Stephens in "Me He Korokoro Tui" explains the groundbreaking and inspirational work that has been undertaken on the Maori legal language project, which is another step in the direction of building a legal system with the tools to fully integrate tikanga Maori. Khylee Quince and Valmaine Toki complete the *Journal*, by examining themes that address, firstly, the experience of Maori women and the criminal justice system. Drawing on a breath of New Zealand and international jurisprudence, Khylee explores the experience of Maori women against the backdrop of colonisation and tikanga Maori. Finally, Valmaine Toki concludes this issue with a persuasive and timely argument for the establishment of an indigenous court.

In keeping with the tikanga established by Dr Tomas in the first *Journal*, this issue opens with a tribute to the late Michael Bruce Taggart, Professor of Law, friend and mentor at the University of Auckland who died in 2009. He is sadly missed.

Kerensa Johnston, 2010.

TRIBUTE TO MICHAEL BRUCE TAGGART
1955 – 2009



*The measure of a man
Rests not on how long he lived
Or even what he achieved,
which may be greater or lesser,
But on how well those who knew him
Tell his story*

Whaia te iti kahurangi: me tuohu koe he maunga teitei
Pursue that which is beyond you: bow only to lofty mountains

Mike Taggart – teacher, colleague and friend

Dr Nin Tomas

Mike Taggart was a big man with a kind heart. But in the classroom he could be a tyrant. The faded denims, running shoes and sweaty T-shirt were thin disguise for a physical giant who made no apology for his pursuit of excellence. Mike taught me Contract Law in the mid 80s. I remember spending 4 classes on Mistake, at the end of which I still had no clue what he was on about (it had something to do with oats). I and the other students had, nevertheless, by then long succumbed to his arm-swinging, bug-eyed, enthusiasm as he became increasingly heated over some point. Classes had a predictable (to some of us anyway) format. 10 minutes telling us that he really knew nothing much about the particular aspect of Contract he was teaching; another 10 minutes or so detailing what made the entire subject unclear; 20 minutes explaining how issues might or had been addressed doctrinally; and the rest of the time disassembling articles that erudite others had no doubt spent hours pondering over before finally putting pen to paper. Only the bravest students, who the rest of us secretly derided as already knowing the answers anyway and just showing off, asked questions. I remember sitting in the front row and whispering to my neighbour, “what happened to Representation?” Mike overheard, and quick as a flash responded, “Yeah, tell me, where was I during the 4 classes I just missed on *Mis*-representation?” All the more embarrassing because I had attended every single class. I am not sure whether it was the lesson he intended to teach, but I learned from Mike that to *clearly articulate what you do not understand and what does not fit*, is far more important than blindly following established pathways.

Later on, as a colleague, I realised that my first impression of Mike was actually accurate. He gave no quarter in any intellectual debate, although he insisted he was a realist and thinking too much about principles could drive you crazy. But his in-house wardrobe did improve after he became Dean. He bought a “good” suit for “official” wear, which he kept in his office and took off as soon as events were over. Dancing, however, was not one of his strong points. Moreover, despite his extended decanal wardrobe, the sight of a sweating, helmeted, Mike, carrying his bike up three flights of stairs in consideration of other lift-users, after riding in from Mount Albert in the morning, was not an uncommon sight. If the phone went soon after, or students were waiting for him, that condition could persist for some time while he sorted out their needs first, before his own.

There were other aspects to Mike Taggart that I and his other colleagues knew and loved. Mike the family man, who carried Nicky and the kids in his heart wherever he went and always talked about them; Mike the mother hen, protecting anyone he thought was getting a rough deal and making sure he or she got a chance; Mike the funny man who laughed longer and louder than anyone else because he actually did get the joke, but always added several nuances of his own; Mike the big kid who liked to play – and to win – even if he was playing with other, *real* kids.

In 1996, I spent several weeks with Mike, Nicky and the kids in Saskatoon, Canada. It was my son Inia’s first experience of staying with people who were not his own relatives, for any length of time. The kids “jelled” in the unorchestrable way that kids sometimes do, and it was the beginning of a friendship based on “wedgying”, and practical jokes that often ended in tears, tantrums and self-imposed solitude. During this period we spent time at Thunderchild (Indian) Reserve with Trish Monture and her family. Mike helped build a Mike-sized hitching rail, we all learned

how to make dream-catchers, watched the northern lights over a bonfire, sang songs, paddled Indian canoes on the lake and watched some beavers making their house. Katie, Trish's youngest girl who was only about 3 then, was very mindful of the "mo'kitos" (which were enormous by any standard) and kept a keen eye out for any that might be about to land on her new friends and bite them. It was a happy time.

The Taggarts are fond of practical jokes. One of Mike's favourite tricks was, whenever he ate a creamy dessert and there was a likely sucker around, to insist that his cream was slightly off. He would delicately sniff the cream on his spoon, cringe, and then ask the unwary recipient of his intended prank whether their dessert was all right. At some point, after a bit more to-and-froing, the other person would always be suckered into leaning over and sniffing Mike's cream-filled spoon. Once they were up close and focused, his spoon would "slip" and he would roar with laughter as they snorted in shock through a cream-covered nose. Clever variations of approach could catch the same person several times. He got me at least twice.

The weetbix eating contest, therefore, was some form of recompense. Mike had it on good authority (either from his brother or his rugby mates) that no one could eat 8 dry weetbix in one go. During dinner one evening, Inia, now in his 20s, insisted that he would do it for \$20. Mike agreed, brought out the weetbix and his wallet, and then watched in disbelief as Inia chomped his way through the 8 weetbix, non-stop. Only after Mike's \$20 was safely in his pocket was it revealed that paying Inia to eat weetbix was like throwing Brer Rabbit into the briar patch. Additionally, at Med School he had learnt how to keep his saliva pumping throughout. Never gracious in defeat, a while afterwards an anonymous post-it, in familiar handwriting, turned up in my law school mailbox. Attached to a Craccum photograph of a saggy-eyed, under-the-weather Inia at a university student Ball, it simply read, "is there a doctor in the house?"

We farewelled Mike at the University Chapel, on Saturday, 22nd August 2009. Throughout the service, I could not help thinking how proud he would be watching Nicky and the kids from his new vantage point, and how fortunate each of us is to have shared different aspects of his life. As a Faculty, we could compile a book of "Mike" stories of all kinds. These are just mine.

One of the truly endearing qualities of Mike Taggart is that he never ever really twigged to just how brilliant he was, he just kept striving to be good. Neither did he truly appreciate the extent of the love and esteem his colleagues have always had for him, or the unmendable tear in the wairua of the Law School that his leaving would create. Some people are not expendable – Mike was the heart of Auckland Law School – we are making do without him but the gap remains.

3 days after Mike died, Katie Monture-Okanee, beautiful little Indian dancer, also passed away, aged 16. It is some comfort to know that she has Mike to guide her on the other side, and that he will have her to swish mo'kitos for him and finally, maybe, teach him that white men *can* dance real good.

Na reira, haere atu ra e te rangatira, haere ki te hono wairua, ki te ukaipo o nga tangata katoa. Mau e tiaki to matou kotiro i tera tua o te arai. Noho kouruatahi i to kourua takotoranga. Haere, haere, haere atu ra.



With Katie swishing mo'kitos at Thunderchild Reserve 1996 – photo Nin Tomas



After the weetbix contest in 2003 – photo Nicky Taggart

**Michael Taggart – student,
Emeritus Professor Brian Coote**

Michael Bruce Taggart was the most enthusiastic student I ever had (some might say “the only”!). A large, beefy, rugby-playing type, exuding energy, he was physically not at all the stereotypical nerd. But I never did observe the sweaty T-shirts. So, might it possibly have been the sight of Nin in the front row of his classroom which brought on the perspiration, understandably enough! What, for me, distinguished him from other students were his absolute passion for the law, and his pursuit of excellence both of which were to last him for the rest of his career.

He did not take his second year Contract course with me. (Had he done so, he would, *of course*, have felt less hesitant about teaching it himself – with or without Nin in the front row of the lecture theatre!). The classes he did take with me were two LLB (Hons) seminars for the meetings of which, to my great delight, he would have read more widely than I had myself. Not surprisingly, some of this boundless enthusiasm for the law had an inspirational effect on the other members of the two groups, almost all of whom went on to take postgraduate courses at leading overseas law schools.

My other main contact with him was as supervisor of his Honours dissertation. His topic was some recent English legislation, which had recast (I won’t say necessarily ‘reformed’) the law relating to exception clauses. That seemed to justify a new edition of my own book on such clauses and it was arranged between us that, as well as writing the dissertation, he would subsequently join me as joint author of the new edition. In the event, for a number of reasons at the English end, the new edition was never written. But the dissertation did, at least, score an A+ grade towards his degree.

I was asked to confine myself to my experience of Mike as a student but I can’t help mentioning that it was he who initiated production of the history of the Law School which I, with others, recently wrote to mark its 125th anniversary. He took a continuing interest in its progress, even in his illness, reading each chapter as it was written.

One of Mike’s great friends, and his closest rival for top student of his year, was Ron Paterson who, after a stint teaching in North America and then at this Law School, went on to become the New Zealand Health and Disability Commissioner. It seems to me rather a nice touch that Ron should recently have been appointed to the Chair left vacant by his old friend and academic rival.

In a reference I provided for Mike at the end of his LLB (Hons) course, I concluded by saying “I have the highest regard for him both as a student and as a man. One cannot say better than that.” That remained how I saw him, for the rest of his life.

ARTICLES

Coming Ready or Not! The Emergence of Maori Hapu and Iwi as a Unique Order of Governance in Aotearoa New Zealand

DR NIN TOMAS*

I INTRODUCTION

This article examines the emergence of Maori Hapu and Iwi as modern Maori governing entities in Aotearoa New Zealand. It argues that two major Maori Hapu and Iwi have, through the application of Maori custom law principles¹ and legislation, become part of the official constitutional framework of Aotearoa New Zealand government. It further asserts that these two Maori Hapu and Iwi have, by reconstituting themselves within a protective legislative framework, ensured that they will continue to have a strong influence in the national framework of government in the future. They will sit alongside central and local government as a form of “tangata whenua” governance that is unique to Aotearoa New Zealand.

Within a wider context that is framed by custom law and New Zealand legislation, the article explores three seminal questions that inevitably arise in debates about Maori governing systems. They are: (1) Maori Identity – How does one determine who is Maori and a Hapu or Iwi member? While in the past “Maoriness” has been legislatively determined by non- Maori, today Maori assert control over the process of determining who is and is not “Maori” and a Hapu and Iwi member according to Maori custom law principles and seek to have their definitions protected by legislation and interpreted in line with their own views;² (2) How is a “Maori” system of Hapu and Iwi governance different from the system of government already operating in Aotearoa New Zealand? Again, Maori are now re-asserting traditional principles of Maori custom law as the institutional basis for providing a level of self-government that is legally protected by legislation;³ (3) What examples exist of modern Maori Hapu and Iwi governance in operation and how successful are they in achieving what Maori want? This part of the article focuses on the legislatively protected outcomes of two major Treaty Settlements and how Maori are

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¹ The principles of Maori custom law are discussed in Section II of this Article. Recognition as an official source of law in Aotearoa New Zealand was affirmed in *The Public Trustee v Loasby* (1908) 27 NZLR 801 and reaffirmed by the Court of Appeal in *Ngati Apa v AG* [2003] 3 NZLR 643. The Waitangi Tribunal has also relied on Maori custom law values, concepts and principles in its deliberations over Maori interpretations of the Te Tiriti o Waitangi/Treaty of Waitangi, since its inception in 1975.

² Notably, the delivery of Maori education in Kura Kaupapa (Maori Language Schools) is now protected by a statutory kaitiaki (guardian) body established to ensure its Maori philosophical base, principles and content are not changed to the detriment of Maori. See s155 of the Education Act 1989, as amended by the Education (Te Aho Matua) Amendment Act 1999. The Act has strengthened the control Maori exercise over processes associated with determining Maori identity by focusing on educating the young.

³ The Waikato Raupatu Claims Settlement Act 1995 and the Ngai Tahu Claims Settlement Act 1998, discussed later, are both examples of Treaty Legislation that have strengthened Maori Hapu and Iwi self-government considerably.

implementing the new regime of limited self-governance according to principles derived from Maori custom law.

Focusing on Hapu and Iwi governance does not mean that national Maori governance, and a good relationship with the Crown and central government, is not important. Quite the opposite. Some of the issues that arise when discussing Hapu and Iwi governing entities are also relevant to discussions about national Maori representation.⁴ However, the new ground that this article breaks is in highlighting the effective use of statute law and Maori custom law working together to achieve political, cultural, social and economic goals that benefit Maori society, and Aotearoa New Zealand as a whole, by constructing strong and durable Hapu and Iwi governance systems.

Under Maori custom law, Maori society operated a system of localised group government based upon kinship links. After the signing of Te Tiriti o Waitangi in 1840, a Westminster system of central and local government based on different values and ideals was introduced by the British.⁵ As it extended its legal and political dominance, existing Maori systems based on Maori custom law were marginalised and treated as being social institutions without legal status.⁶ In consequence, Hapu and Iwi had to compete with other “local interest” groups for recognition and protection of their interests by political and legal institutions based on English ideals of good governance⁷ and whose purpose was to acquire Maori lands for British settlers. During this period, statutory provisions that protected Maori rights were restrictively interpreted to justify their non-recognition in the face of competing non-Maori interests.⁸

The world-wide indigenous cultural renaissance that began in the 1970s and 1980s has been reflected in the Treaty of Waitangi Settlement Process in Aotearoa New Zealand, notably in the work of the Waitangi Tribunal,⁹ and has spurred Hapu and Iwi into creating modern governance institutions to serve the corporate and individual interests of their members. The passage of the Declaration on the Rights of

⁴ For discussion see M. Durie, *Nga Kahui Pou - Launching Maori Futures*, Huia Publications, Wellington, 2003, 209-211. See also C James, *Building the Constitution*, Institute of Policy Studies, Victoria University, Wellington, 2000.

⁵ The Treaty of Waitangi is the foundation on which British-based constitutional government in Aotearoa New Zealand has been established and justified. Signed in 1840, it provided for the establishment of British government in Aotearoa (Article 1), while at the same time guaranteeing that the “tino rangatiratanga” of Maori over their “taonga” would be preserved (Article 2). Written in English and then translated into Maori, over 500 Maori rangatira signed the Treaty, most signing the Maori text. There has been ongoing dispute over the terms of the Treaty and Te Tiriti, particularly the usurpation of political authority and Maori resources by the Crown, since 1840. See Appendix 1.

⁶ Although Section 71 of the New Zealand Constitution Act 1852 provided for Districts to be set apart in which Maori could govern themselves according to their “Laws, Customs and Usages”, it was never implemented and was repealed by the New Zealand Constitution Act 1986.

⁷ The introduction of 4 Maori seats into the national parliamentary structure under the Maori Representation Act 1867 guaranteed a voice for Maori in national politics. However, Hapu and Iwi interests, as such, have never been officially recognised in the setting of national policy goals.

⁸ Discussed in *Ngati Apa judgment*, supra n 1, per Elias J. A clear example is Fisheries legislation which, though it had specifically protected Maori fishing rights since 1877, was not successfully invoked until over 100 years later in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, when it was raised as a defence to the unlawful taking of paua (abalone) in the New Zealand High Court.

⁹ The Waitangi Tribunal was established under the Treaty of Waitangi Act 1975. It is a forum for hearing Maori claims that Crown actions, policies and legislation since 1840 have breached the principles of the Treaty of Waitangi. The Tribunal produces a report at the end of each inquiry and has the power to recommend redress if it considers claims to be well founded. Claimant groups then enter into negotiation with the Crown to determine the final outcome, details of which may be set out in legislation.

Indigenous Peoples in 2007¹⁰ has also given international recognition to the legitimacy of establishing indigenous forms of government throughout the world.

The re-establishment of governing institutions as constitutional entities in Aotearoa New Zealand is contested in academic and political fora. In 2003, academic Elizabeth Rata (surname derived from marriage), described the Maori cultural revival as having been “derailed” by a Maori elite who had used it “to acquire political and economic capital from the political regulation of culture and the creation of ethnic boundaries”, in a way that could destabilise New Zealand’s constitutional democracy.¹¹ In 2004, the (then) Leader of the (then) Opposition, National Party, Dr Don Brash, stated that Maori were claiming “a birthright to the upper hand” in Aotearoa New Zealand,¹² and “greater civil, political or democratic rights than other New Zealanders”¹³ on the basis of race. These statements, made by influential New Zealanders, do not give serious consideration to whether the current governing system adequately represents the aspirations of Maori, or whether there is a valid basis for an independent system of Maori governance that draws upon the principles of Maori custom law at Hapu and Iwi level. They start from the premise that the state and its present governing institutions are adequate to the task, and perceive Maori as a threat to the status quo. By exploring the three questions set out above within a legislative and custom law framework, this article will show why this is not so, and how Maori are using both sets of law to overcome the deficiency.

II WHO ARE MAORI? – ENGLISH COMMON LAW-BASED CITIZENSHIP AND MAORI CUSTOM LAW-BASED TANGATA WHENUA STATUS

British imperial expansion into Aotearoa has led to conflicting views of identity and “citizenship” within New Zealand society. The debate is fueled by the fact that Maori society and English-based New Zealand settler society derive their identities and citizenship from different historical foundations. While most other New Zealanders’ identity and citizenship is English-based and legislatively determined, Maori identity and group citizenship is based on rules and principles derived from Maori custom law.

English common law notions of British Nationality and New Zealand Citizenship

The debate about New Zealand identity is underpinned by a legislative history that many younger New Zealanders (i.e. aged under 50) are not aware of. Under British and New Zealand constitutional law, independent New Zealand citizenship has a short-lived history, tracing its ancestry back only 60 years to the British Nationality and New Zealand Citizenship Act passed by the New Zealand Parliament in 1948.

¹⁰ Article 4 of the Declaration of the Rights of Indigenous Peoples states: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs as well as ways and means for financing their autonomous functions”. Article 4, United Nations Declaration on the Rights of Indigenous Peoples adopted by the United Nations General Assembly on 2 October 2007. A/RES/61/295.) Although New Zealand was one of only 4 former British colonial states that voted against the Declaration (the others being the former British colonial states of Australia, Canada and the United States) it can be read consistently with other international documents to which New Zealand is a signatory, to give added force to arguments made under those documents.

¹¹ E. Rata, “An overview of Neotribal Capitalism”, <http://recherche.univ-montp3.fr/mambo/cerce/r6/e.r.htm>, 2003, 2. (last accessed 21 January 2010)

¹² Address by the Hon. Don Brash, National Party Leader, to the Orewa Rotary Club on 27 January 2004, 1.

¹³ Ibid at 6.

Section 3 of this Act restates section 1 of the British Nationality Act, passed by the British Parliament in 1948, which acknowledged that any person born in the United Kingdom and or its former Colonies has the status of “British subject” or “Commonwealth citizen”. Additionally, sections 6 and 7 of the New Zealand Citizenship Act established an officially independent New Zealand citizenship by birth and descent.

Before the enactment of this dual legislation, colonial settlers and their descendants were reliant on their “natural born British subject” status under the English common law to protect their rights as British subjects. According to Blackstone, the origin of this status was that:¹⁴

Natural-born subjects are persons born within the allegiance, power, or protection of the crown of England, which terms embrace ... persons born within the dominions of his majesty ...

Sourced in historical allegiance binding the subject to the king in return for his protection, Blackstone held that while “the thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors”.¹⁵ Tied to the practicalities of vassal and lord under the “feudal system” it produced a complex system of loyalty and allegiance to the ruling sovereign. The idea of loyalty to the sovereign was transplanted wholesale into Aotearoa New Zealand after 1840 and underpins the Westminster system of government that exists in New Zealand today.

Maori custom law principles relating to Group Identity

In contrast to the descendants of the British colonials, Maori citizenship as Hapu and Iwi members has existed within the territory of Aotearoa New Zealand for centuries. While also being primarily determined by customary rules of descent, its nature, form and history are vastly different to those of the English, being derived instead from Maori custom law.

Maori custom law recognises two main relationships in determining Hapu and Iwi membership. The first is the relationship an individual has to their ancestors through physical whakapapa (genealogy) connections. The second is the attachment of that ancestral human relationship to specific territories. While loose analogies can be drawn to the “birth” and “descent” (and residence and occupation) requirements under the English-based law and statutes mentioned above, there are also some significant differences. While English law highlights a politically-based legal relationship existing between “the people” and “the sovereign” and invests the sovereign with supreme authority, Maori custom law highlights a spiritually-based relationship existing between “the people”, “their ancestors” and “the land” as concurrent living entities.¹⁶ Territoriality is literally a matter of life and death within Maori society, with group territorial links strengthening over time as more and more descendants join their ancestors and become one with the land.¹⁷ Local territorial boundaries between different Hapu and Iwi throughout Aotearoa New Zealand were

¹⁴ W. Blackstone, *Commentaries on the laws of England*, Vol 1, Philadelphia, 1902-1915. 366.

¹⁵ Blackstone, *ibid* at 366.

¹⁶ The fundamental principles of Maori custom law that underpin this relationship are discussed in section III of this article.

¹⁷ This is one reference for the term “mana whenua” which underpins Hapu and Iwi assertions of “owning” their territories.

once reliant on agreement between leaders and practically evidenced by birth, occupation, and burial within those boundaries.¹⁸ Since 1840, territorial boundaries have become less fluid, being defined largely through Hapu and Iwi interactions with the Crown.¹⁹ Boundary disputes still sometimes occur, however, between neighbouring groups who continue to justify their claims according to traditional criteria.²⁰

The creation of a new group category of “Urban Maori”

That changes in Maori custom can occur was acknowledged by the Native Appellate Court in *Hineiti Rirerire Arani v Public Trustee of New Zealand*.²¹

Native custom ... is not a fixed thing. It is based upon the old custom as it existed before the arrival of Europeans, but it has developed and become adapted to the changing circumstances of the Maori race today.”

The Privy Council upheld this, noting the different sources of Maori and English law:²²

It may well be that this is a sound view of the law, that [Maori] as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the custom of such a race is not to be put on a level with the custom of an English borough or other local area which must stand as it always has stood, seeing that there is no quasi-legislative internal authority which can modify it.

While this case related to the adoption of a Pakeha child by Maori parents, its rationale is equally applicable to the adoption of new practices and forms of observance that uphold fundamental principles of Maori custom law. Two observations can be made about this case. The first is that the judges recognised the existence of Maori custom law as being cognisable by the Courts. The second is that at the Privy Council level, although the judges did not really understand that unlike English law which ties custom to practices, Maori custom law operates via a system of recognised principles whose application changes to suit different occasions, they were prepared to countenance that some mechanism existed that enabled change to occur.

A more salient point for the purposes of this article, however, is that Maori custom law does not need judicial recognition in order to operate effectively within the Maori community. Once the “internal power of self-government” has produced a new form that is widely agreed upon²³ by the people, that will be sufficient to qualify

¹⁸ Discussed fully in N. Tomas, *Key concepts of Tikanga Maori (Maori Custom Law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present*, PhD Thesis, University of Auckland, 2006, 67-103.

¹⁹ A. Ballara, *The Dynamics of Maori Tribal Organisation*, Victoria University Press, Wellington, 1998.

²⁰ Boundary disputes are now legally determined by the Maori Appellate Court, see for example *Re a claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Trust Board*, 12/11/90, Maori Appellate Court, Te Waipounamu District, Case Stated 1/89, 4 South Island Appellate Court Minute Book, folio 673, 1.

²¹ [1920] AC 198 at 204.

²² *Ibid* at 204-205.

²³ It is generalised Maori agreement, given in accordance with their custom law principles, that is the basis of Maori consent. While practices that Maori have been forced to accept through the enactment of unfriendly

it as being based on “Maori custom”. The emergence and recognition of “Urban Maori” since the 1960s, as a corporate reference to people living outside their traditional territories demonstrates this point.

“Urban Maori” are the result of a population dynamic in which loss of traditional lands, much of it due to legislative processes,²⁴ and the lure of potentially higher incomes in cities, caused individuals to move from their rural homes to urban centres. Once in the city, estrangement from the Hapu and Iwi territorial base and a lack of venues such as marae,²⁵ weakened the ability to constantly reaffirm identity by direct interaction with one’s relatives.²⁶ In this vacuum, a broad sense of shared culture united unrelated Hapu and Iwi members living away from home²⁷ and led to the emergence of a distinctive “urban” identity. These new groupings were often criticised by community leaders because they used traditional conceptions to justify the adoption of novel practices within new forums outside the tuturu (permanent) homeland. John Rangihau, an elder from the Tuhoe Iwi of the central North Island, saw the emergence of distinct urban and national Maori identities as a political ploy aimed at controlling Maori:²⁸

I have a faint suspicion that Maoritanga is a term coined by the Pakeha to bring the tribes together. Because if you cannot divide and rule, then for tribal people all you can do is unite them and rule. Because then they lose everything by losing their own tribal histories and traditions that give them their identity.

• • •

Rangihau feared that successful adoption of “urban” or “Maori” identities could, in time, replace existing Hapu and Iwi identity. The strength of his home people and their distinctive existence mai raano (from time immemorial) would disappear and be replaced by a new, modern Maori identity that only stretched back as far as settler contact. He advocated the optimum conditions for perpetuating the understanding of Maori custom law concepts, principles and practices amongst youth as being to relocate them back on to their traditional marae, where they would be “amidst people who have passed on” and whose ancestral voices were still “echoing through the meeting house”. The pride and groundedness thus provided would enable the young to stand tall in any new situation, secure in their Hapu and Iwi identity.²⁹ In his view, this would avert the danger of second and third generation youth, who were living divorced from their traditional lands in cities, becoming Hapu and Iwi nonentities. However, even Rangihau accepted that when it came to taking a stand on broader cultural matters and defending the need to outsiders, for cultural institutions to support them, emphasising his “Maoriness” was important.³⁰

legislation will never qualify as Maori custom, there are other practices that Maori have willingly adopted and adapted to their own use because they strengthen Maori processes.

²⁴ Loss of land under the Native Land Act 1862 and its antecedents is discussed in depth in: Waitangi Tribunal, *Report of the Waitangi Tribunal in the Orakei Claim - Wai-9*, 1987. For further academic commentary see DV Williams, *Te Kooti Tango Whenua - The Native Land Court 1864-1909*, Huia Publishers, Wellington, 1999.

²⁵ Marae are traditional communal meeting places where important community issues are discussed and provide a focal point of Hapu and Iwi endeavours.

²⁶ R. Walker, *Ka Whawhai Tonu Matou - Struggle without End*, Penguin Books, 1990, 200-201.

²⁷ Ibid at 197-201; see also J Lee, “The Second Great Migration” at <http://www.scholars.nus.edu.sg/post/n/maorijlg5.html>. (accessed 21 January 2008).

²⁸ J. Rangihau, “Being Maori”, in King ed, *Te Ao Hurihuri*, Longman Paul, Auckland, 1975, 174-175.

²⁹ Rangihau, *ibid* at 170.

³⁰ Ibid at 173.

What's more, I don't want to be a Pakeha. There are a lot of things in the Pakeha world which I do not like, compared with those things which I do like in the Maori world. ... I am a New Zealander, a Maori New Zealander and I can't see that it should create such a fuss every time I talk about retention of my culture and setting up Maori institutions like marae and everything else.

The tension between the acceptance of Urban Maori as a distinctive group and traditional Maori who see their principle allegiance as being to Hapu and Iwi is most obvious in the distribution of funding for social services and other resources.³¹ It can be said however, that Maori society now generally accepts that urban groups are the product of historical processes and necessity and would agree that pragmatic ways of reconciling the two so that they do not undermine each other is a good thing. It is this widespread acceptance, based on acknowledgement of the principles of whakapapa (ancestral connection) and whanaungatanga (acknowledged kin-ship) that secures the link between "urban" and "traditional" groups under Maori custom law and evidences the change the Privy Council alluded to in *Hineiti Rirerire Arani* above.

Defining Maoriness by legislation

Rangihau's fears have a historical and legislative basis. For although Maori identify themselves primarily through Hapu and Iwi affiliations, most other New Zealanders usually see things the other way round, with "Maori" being the principal group from which Hapu and Iwi are derived. The term "Maori" (normal or ordinary) was originally used by tangata whenua (people of the land) to differentiate themselves from the newcomer "Pakeha" or foreigners when Aotearoa was first colonised by the British.³² Although "Maori" identity has come under siege in recent years, the identification of individuals as members of Hapu and Iwi has also only recently regained its wider public integrity and been adopted by the courts and the legislature.³³

"Maori" is defined in section 2 of the Maori Affairs Act 1953 as "a person belonging to the aboriginal race of New Zealand: and includes a half-caste and a person intermediate in blood between half-castes and persons of pure descent from that race". The same Act defines "European" as "any person other than a Maori and includes a body corporate".³⁴

³¹ Discussed further in Section III.

³² HW Williams, *Dictionary of the Maori Language*, GP Publications, Wellington, 1992: Definitions of "Maori" are at 179, and "Pakeha" at 252. The terms have since taken on generalised usage and are now commonly used to distinguish the descendants of tangata whenua from the descendants of the early European (mainly British) settlers.

³³ In *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17, the Court of Appeal held that "Iwi" meant traditional tribes and not "Maori society generally". Hapu and Iwi are also recognised in legislation containing Treaty references. At present there are 14 New Zealand Acts "requiring action in respect of the Treaty" and 18 "with Treaty references not amounting to a direction to Act". Te Puni Kokiri, *He Tirohanga a Kawa ki te Tiriti o Waitangi*, Wellington, 2001, 111. While the process is not without its dangers, (see N Tomas, 'Implementing Kaitiakitanga under the Resource Management Act 1991'. *New Zealand Environmental Law Review*, 1, 39-42, 1994), it has enabled Maori custom law concepts and principles to be considered under the New Zealand legal system.

³⁴ The definition of "Maori" has since been streamlined to "a person of the Maori race of New Zealand; and includes a descendant of any such person" in Te Ture Whenua Maori Act 1993. Blood quantum as the standard for determining "Maoriness" was repealed by the Maori Affairs Amendment Act 1974.

The categorisation of “Maori” as “half-caste” or more, had the effect of re-entrenching the stereo-type of being more of something that was already diminished in both race and class terms. That “European” was the counterpoint to being “Maori”, and included all other racial groups, added an extra racist element that many Maori children carried into adulthood. The sense of inferiority these individuals felt as parents, and passed on to their children, was highlighted in the *Te Reo Maori Claim*,³⁵ brought by Maori against the Crown under The Treaty of Waitangi Act 1975. The *Te Reo claim* details how the Department of Education practice of banning Maori language and culture from New Zealand school grounds in the 1900s created a pervasive feeling amongst many Maori, that being Maori was a burden that made one less valuable than members of other races, particularly the Pakeha who controlled most of the institutions of authority within New Zealand.³⁶

This attitude continues to be perpetuated by writers and politicians who still assert blood quantum as being the measure of who is legitimately entitled to call him or herself “Maori”. In 2006, Dr Don Brash responded to a High Court judge’s concern at the shortage of Maori lawyers in Aotearoa New Zealand by saying, “He continues to speak as if the Maori remain a distinct indigenous people. There are clearly many New Zealanders who do see themselves as distinctly and distinctively Maori but it is also clear there are few, if any, fully Maori left here”.³⁷ The direct inference is that blood quantum as per the 1953 legislation remains the correct criteria for assessing “Maoriness” and that most people who assert it do not meet the criteria. His comments re-ignited the “paranoia politics”³⁸ sparked when he delivered a Rotary Club speech in 2004 asserting that Maori enjoyed “special legislative privileges” which should be revoked because we are “all New Zealanders” and there should be equality for all.³⁹ In 2007, these views were still resonating within Aotearoa New Zealand politics. Catherine Delahunty, from the Green Party, countered them by saying that Pakeha New Zealand was in denial that they practiced “democratheid” ie. control by apartheid by the majority, which meant “equality for the assimilated and fairplay for everyone who acts like a Pakeha”.⁴⁰

Modern “Maori” and “Hapu and Iwi” Identities

The recent hostility towards “being Maori” shown by important non-Maori public figures makes retaining a positive Maori identity difficult in the broader Public arena. At the same time, however, it has also strengthened reliance on Maori custom law principles within the Maori community in order to maintain a strong and resilient identity.

³⁵ Widespread testimony from elders from throughout Aotearoa New Zealand who were prohibited from using Maori language and culture while at school and punished if they did so was heard by the Waitangi Tribunal in 1985. see Waitangi Tribunal, *Te Reo Maori Report* - Wai 11, Department of Justice, Wellington, 1986, 34. The claim evidence is also discussed in M. Durie, *Te Mana, Te Kawanatanga - The Politics of Maori Self-Determination*, Oxford University Press, Auckland, 1998, 59-61.

³⁶ In order to remedy the negative impact of these policies, the Maori Language Act 1987, Education Act Amendment Act 1989, and the Maori Television Act 2004 have since been enacted to protect the status of te reo Maori and to promote its use in education and the media.

³⁷ This response to Justice David Baragwanath’s earlier address to the Law Commission was reported in the New Zealand Herald on 26 September 2006.

³⁸ A term used by the Hon. Trevor Mallard to describe Don Brash’s politics in his, “We are all New Zealanders now”, Speech to the Stout Research Centre for NZ Studies, Victoria University, Wellington, on 28 July 2004.

³⁹ Address by the Hon. Don Brash, National Party Leader, to the Orewa Rotary Club on 27 January 2004, 1.

⁴⁰ Catherine Delahunty, “State of the Pakeha Nation Waitangi Day Speech”, 6 February 2006. <http://www.scoop.co.nz/stories/PO0702/S00068.htm> (accessed 21 January 2010).

Defining identity according to Maori custom law principles is complicated further by the use of “ethnicity” as an extra criterion by some, in addition to the traditional requirement for “ancestry”.⁴¹ “Ethnicity” is an anthropological definition that allows for inclusion of multiple factors such as customs, language, participatory practices, residence, ancestry and place of origin to determine identity. An important feature of ethnicity is that it allows for choice. A person *chooses* their ethnicity – they are not born into it – and they can change it at will.⁴² Under Maori custom law, however, identity as Maori still requires proof of whakapapa or “ancestry” to one’s forebears and limits membership of the corporate group. Sometimes proof of specific, lineal, ancestry may be required to distinguish between different Hapu and Iwi members, at other times evidence of “any” Maori ancestry will suffice to distinguish Maori from other ethnic groups.⁴³

Maori custom law is community driven and requires a strong Maori language base to perpetuate the cultural norms that ensure its continued existence. In the 1980s, the Kohanga Reo (Maori Language Nest) movement was instigated by Maori as a desperate attempt to prevent Maori language from dying out. During this period, the Department of Maori Affairs, headed by visionary Taranaki rangatira, Kara Puketapu, encouraged and funded those who could speak the language to open Kohanga Reo (Maori language nests) in garages, sheds, halls and lounges, and to instil the language and customary practices of collectivity into pre-schoolers in the area, irrespective of their Hapu and Iwi origins. Since their initiation in 1982, kohanga reo have played a major role in educating Maori children in Maori culture and values.⁴⁴ The success of the movement is such that legislation was introduced to formally recognise it as part of the New Zealand education system. Primary, secondary⁴⁵ and tertiary Maori language-based institutions⁴⁶ have also received statutory protection and funding as a result.

The positive outcome of the above within Maori communities, particularly in urban centres, has resulted in a strong sense of dual identity and group membership. Large groups of younger Maori particularly, now consider themselves “urban-based Maori” for matters affecting their daily lives and employment, and territorially based “Hapu and Iwi members” for matters concerning their longer-term wellbeing as part of a whakapapa-based group.

⁴¹ T. Moeke-Pickering, *Maori Identity within Whanau: A Review of Literature*, Hamilton, University of Waikato, 1996. T Kukutai, “The Problem of Defining an Ethnic Group for Public Policy: Who is Maori and Why does it Matter?” *Social Policy Journal of New Zealand*, Issue 23, December 2004, 86-108.

⁴² Kukutai, *ibid*.

⁴³ The number of people identifying as Hapu and Iwi has increased. In the period 1991 to 2006, Ngapuhi, the largest iwi group increased from 92,976 to 122,211; Ngati Porou, the second largest iwi group increased from 48,525 to 71,910; Ngati Kahungunu the third largest iwi group increased from 41,778 to 59,946, and Ngai Tahu increased from 20,304 to 49,185. International support for the right of Maori to define themselves according to their own criteria and to have that criteria respected by the state is found in Articles 3,4,9,1,12,13,14,15,18,19, and 20 of the Declaration on the Rights of Indigenous Peoples adopted by the United Nations General Assembly in September 2007.

⁴⁴ In 1996, kohanga reo was the single largest provider for Maori with 46.3 % of Maori children enrolled in early childhood education attending one of 767 kohanga located throughout New Zealand. Education Counts: Schooling: Maori Medium Education; <http://www.edcounts.edcentre.govt.nz/statistic/s/schooling/maori> (accessed 21 January 2010).

⁴⁵ At 1 July 2004, the number of Maori students involved in Maori-medium education was 29,579, or 16.9% of all Maori students. The number of students attending Kura Kaupapa Maori, where the main language, culture and values are Maori has also increased. Education Counts: Schooling: Maori Medium Education; <http://www.edcounts.edcentre.govt.nz/statistic/s/schooling/maori> (accessed 21 January 2010).

⁴⁶ The Waitangi Tribunal process has assisted Maori in gaining equal treatment and access to resources that other tertiary institutions already enjoy - see section 181(b) Education Act 1987 and Waitangi Tribunal, *Wananga Capital Establishment Report* - Wai 718, 1999.

In contrast to Maori endeavours to preserve their uniqueness, the touchiness concerning Maori identity and citizenship in the wider community masks the uncertainty Pakeha feel about their own place in Aotearoa New Zealand. Identification as “Maori” with a distinct and unique language, culture and ancestral links to defined territorial spaces, is a counterpoint to a “Pakeha” identity that has now been set adrift by Britain and which is still struggling to establish itself in the same territory. In this development, “New Zealander” is the first point of cultural attachment to the territory that their ancestors made home less than 200 years ago and to which citizenship was given full legislative recognition only 60 years ago. While some Pakeha refer to themselves as “Tangata Tiriti” in recognition that the Treaty of Waitangi signed in 1840 gave them a legitimate “shared” home in Aotearoa New Zealand,⁴⁷ others see themselves as a second indigenous group that has turned its attention away from its former homeland and refocused its identity on commitment to this land. For this group, the assertion of being “indigenous New Zealanders” can be seen as an act of will, that, together with residence, is sufficient to establish indigeneity without any reference at all to Maori. According to Labour Party politician, Trevor Mallard, “Indigeneity” is a multi-cultural term describing “the diversity of ways in which we belong and identify with our country”, which includes “Chinese and Indian New Zealanders who have become deeply indigenous too, just like other kiwis whose forbears come from a huge range of other countries”.⁴⁸

It is a strange, upside-down mentality that seeks acceptance and equality with Maori who have been displaced, dislocated from their lands, removed from power, and against whom it is now claimed “just because one group has been here longer than another does not make its members more New Zealand than later arrivals, nor does it give them the right to exclude others from full participation in national life”.⁴⁹ This turning of the tables to put Maori on the defensive for practicing exclusionary politics in defining themselves can be offset against Delahunty’s view of Pakeha practicing control by apartheid in New Zealand. This being so, her (then) fellow Green Party member, Nandor Tanczos may have a point when he says the “Maori Rights” debate is not really about Maori, it is about the place of Pakeha in Aotearoa New Zealand, and their increasing anxiety as their dominance of political and cultural affairs is now lessening which highlights the tenuousness of their position in Aotearoa.⁵⁰

Conclusion

The foregoing discussion establishes Maori custom law as living law, being based on widely accepted concepts and principles whose application can change and develop over time to incorporate new ideas and forms. Its existence as a legitimate form of law practiced within Maori communities that speak through their mandated leaders, has, for many years been masked by the operation of the formal New Zealand legal system and its political-legal processes introduced after 1840.

⁴⁷ Green Party Member of Parliament, Nandor Tanczos, *Tangata Whenua, Tangata Tiriti*, Opinion Piece, 12 March 2004, <http://www.greens.org.nz/searchdocs/other7291.html> (accessed 21 January 2010).

⁴⁸ Hon. Trevor Mallard, “We are all New Zealanders Now”, Speech to the Stout Research Centre for New Zealand Studies, Victoria University, Wellington, 28 July 2004, 2. Also see discussion in M. Bennett, “Indigeneity” as Self-Determination”, *Indigenous Law Journal*, Faculty of Law, University of Toronto, Volume 4, 2005 at 71-115.

⁴⁹ Hon. Trevor Mallard, “We are all New Zealanders Now”, Speech to the Stout Research Centre for New Zealand Studies, Victoria University, Wellington, 28 July 2004, 2.

⁵⁰ Green Party Member of Parliament, Nandor Tanczos, *Tangata Whenua, Tangata Tiriti*, Opinion Piece, 12 March 2004, <http://www.greens.org.nz/searchdocs/other7291.html> (accessed 21 January 2010).

New Zealand legislation has, since the mid 1980s, provided some protection to Maori custom law processes by promoting education that highlights Maori language and cultural transfer through the enactment of the Maori Language Act, and through legislation establishing Maori Television.

When supportive legislation has been passed Maori have fleshed out these frameworks by applying traditional custom law principles and adapting their application to suit modern lifestyles. The fundamental criterion for recognition as Maori and Hapu and Iwi member is still the traditional one of proving whakapapa to a known Maori ancestor. While this provides entry into the process of “being Maori” it does not guarantee a positive outcome in any competition for resources amongst members of the group. Other criteria decided on by the group will determine that. It is possible to be “Urban” for some purposes, and “Hapu” or “Iwi-based” for others. There may be other variants that arise in response to changed circumstances in the future. Identification as a New Zealander is generally a third identity, drawn from an amalgam of Maori custom law principles and New Zealand legislation, that is employed by Maori and others in foreign jurisdictions to differentiate themselves as visitors to other peoples’ territories. Its practical manifestation is shared haka.

While the Pakeha search for a unique identity within Aotearoa New Zealand continues, it can no longer undermine the existence of an independent Maori identity. That ability has been eroded by the work of the Waitangi Tribunal in hearing and making recommendations in the Te Reo Maori claim, the establishment of Kohanga Reo, Kura Kaupapa and Wananga, and the legislation passed to protect Maori language and culture as a result of the Te Reo Claim.

III WHAT IS DIFFERENT ABOUT A MAORI SYSTEM OF GOVERNANCE?

Briefly stated, a Maori system of governance is based on principles that are drawn from Maori custom law. In this part of the article I examine the value base and principles of Maori custom law that drive Maori governance.

In 2005, a national gathering of Chief Executive Officers of Maori organisations met in Whanganui-a-Tara (Wellington) to discuss Maori governance for the next 20 years. They identified four aspects of governance as being important. They were: the inclusion of Maori governance values; flexibility of structure to accommodate those values; possession of the relevant skills, and accountability.⁵¹ The participants in the 2005 Hui Taumata all agreed that modern, Pakeha-based management systems and processes of accountability are important tools for Maori to adapt and use in implementing Maori governance, to ensure that finite resources are not lost through mismanagement and lack of accountability by individuals acting in responsible positions.⁵² The more difficult task for them, however, was working out the strategic direction that the group should take. Not only did it require the inclusion of unique Maori values and principles but they had to be durable enough to serve the

⁵¹ “Hui Taumata” are held annually to discuss shared issues of importance to Maori and to create pathways forward. These points are taken from a discussion amongst Chief Executive Officers of Maori organisations to debate the question “What do we need to do to build effective Maori Governance by 2025?” at the National Hui Taumata held in Wellington in 2005.

⁵² This is a classic example of Maori updating their customary practices by incorporating external ideas to better achieve the outcomes the group desire.

collective, inter-generational needs of the group rather than being simply short-term and profit-oriented.⁵³

Maori custom as a source of law

The discussions conducted in the 2005 hui pre-suppose the existence of a unique and coherent Maori system of values and principles. A widely accepted definition of Maori custom law was provided by the, then, Chief Judge of the Maori Land Court and Chairperson of the Waitangi Tribunal, ET Durie, as being:⁵⁴

law generated by social practice and acceptance as distinct from 'institutional law' which is generated from the organs of a super-ordinate authority. Custom was a significant source of English law but has since been mainly replaced by common law (case law) and statutory regulation.

Maori society did not possess a formal legal system with independent courts and supporting bureaucracy, as was developed over centuries in England and then transplanted into Aotearoa New Zealand. In the absence of such a system, Maori custom law has developed in the Maori community through hui held on marae and discussions involving wide sections of the community which are guided by kaumatua and kuia (elders) and rangatira (leaders). Group discussions highlight a series of fundamental principles that form the agreed standards and guidelines necessary to protect the welfare of individuals, whanau and Hapu and Iwi. Appeals to these principles result in decisions that are agreed to, or at least accepted, by members of the community, rather than being imposed by an independent and superior person sitting as judge. The setting and reviewing of normative standards and actions necessary to uphold these principles is an ongoing process that occurs at successive gatherings.

The absence of the threat of any official coercive back-up and direct punishment for not complying with a decision means that Maori society must rely on voluntary compliance and involvement as an active member of the community for enforcement. Thus, maintaining a strong sense of identity, community and belonging between individuals and the group is an essential part of developing and perpetuating Maori custom law as a coherent system. Leaders are not judges and do not have the power to impose their will on their people. They are servants who must carry the wishes of the people in order to retain their mana (status) as leaders. Regular meetings within communities and between Hapu and Iwi leaders facilitates the establishment of common standards at local and national levels, keeps Maori society in touch with itself, and aligns Hapu and Iwi on shared issues.

A distinction needs to be made between genuine Maori custom law, ie. law that is drawn from within the Maori community, and English-law-based Maori customary law that has been imposed on Maori society as being customary. Two examples will suffice to demonstrate the difference. The first is the succession rule

⁵³ per Temuera Hall, Chief Executive Officer of Ngati Tuwharetoa Iwi.

⁵⁴ E.T. Durie, *Custom Law*, (Unpublished Paper for Waitangi Tribunal Members and later referred to the NZ Law Commission), January, 1994.

imposed by Chief Judge Fenton in the *Papakura Claim of Succession*.⁵⁵ The case concerned the inheritance of land held by a sole grantee to an entire block of land situated in Papakura near Auckland. His widow and children claimed succession to the entire estate. The claim was challenged by his nephew and other relatives espousing Maori custom law principles. Fenton CJ held:⁵⁶

It would be highly prejudicial to allow the tribal tenure to grow up and affect land that has once been clothed with a lawful title, recognised and understood by the ordinary law of the country. Instead of subordinating the English tenures to Maori customs it will be the duty of the Court, ... to cause as rapid an introduction amongst the Maoris, not only of English tenures, but of the English rules of descent, as can be secured without violently shocking Maori prejudices.

Fenton adopted and imposed a hybrid system of inheritance based on English rules favouring the wife and children and excluding the claims of other Hapu members to land that had formerly been collectively held. This rule of inheritance is still part of Maori Land Law today and governs inheritance of Maori land on intestacy.⁵⁷

A more insidious inroad into genuine Maori custom has been made by the adoption of the seemingly benevolent doctrine of Aboriginal title, another construct of English-based law, which provides for recognition of Maori custom by the New Zealand legal system but circumscribes it with so many legal restrictions that it is effectively rendered toothless.⁵⁸

Despite the above, Maori society continues to exist, and Maori custom law continues to be practiced within Maori society with the knowledge that it does so under an English-based legal system that has not always been respectful or benevolent. When the courts and/or the legislature have breached Maori custom by denying Maori rights or by confiscating resources without Maori consent the injustice is keenly felt.⁵⁹ Law has never been a one-side only process. Maori society has always possessed its own standards for assessing Crown behaviour according to Maori custom law principles. The inter-generational memory is a long one, and predates the Doctrine of Precedent and Parliamentary sovereignty that are the hallmarks of English-based laws.

Two separate but related sources of Maori custom law can be identified as relevant to governance. One is a set of “constitutional” principles that are included in

⁵⁵ *Important Judgments Delivered in the Compensation Court and the Native Land Court, 1866-1879*, Auckland Native Land Court, 1879, Auckland Southern Reprints 1994, 19-20. Discussed in *DV Williams*, supra note 24 at 179-180.

⁵⁶ *Ibid.*

⁵⁷ see section 109 Te Ture Whenua Maori Act 2003.

⁵⁸ See detailed discussion in *Ngati Apa* supra note 1, which reinforces extinguishment by legislation. The fact that the Labour Government passed the Foreshore and Seabed Act 2003 extinguishing Maori customary ownership of the foreshore and revesting title in itself, ignoring the Court of Appeal and overwhelming Maori rejection, shows conclusively that reliance on the constitutional principles of the Honour of the Crown and acting in Good Faith, and trusting to the influence they might exert within the legislature is sometimes misplaced. Maori have no choice but to strengthen their own political structures to guard against the negative ramifications of such betrayals of faith.

⁵⁹ The protest shown by Maori before the passing of the Foreshore and Seabed Act 2003, included rejection of the Crown's proposal by Hapu and Iwi in their home territories, an urgent Waitangi Tribunal Hearing and a Hiko to Parliament of 15,000 people.

the Maori text of te Tiriti o Waitangi, the other a series of fundamental principles that are drawn directly from Maori society.

Maori Constitutional Principles underpinning Maori Governance

Maori governance aspirations draw upon three basic “constitutional” principles, two seemingly being derived from Te Tiriti o Waitangi but actually drawn from Maori custom law, and one from International law. They are: taonga, tino rangatiratanga and self-determination.

“Taonga” (treasures or precious things) is a generic term used in Article 2 of te Tiriti o Waitangi⁶⁰ to incorporate Maori culture, practices and physical resources that were not specifically named but which were considered important to Maori Hapu and Iwi in 1840. The term extends beyond physical things to also include essential aspects of the Maori worldview and Maori conceptualisations of law that arise from within that worldview.⁶¹ While the term can refer to discrete objects, it is the *value* attributed to the object by the group, rather than the object itself, that makes it taonga. What is considered to be taonga is the result of ongoing evaluation by Maori and can change according to the perceived needs of the group. The principle of “taonga” guides us to acknowledge that there are valuable aspects of the Maori world that require recognition and protection in any governance system. What they are and how they are protected are matters of detail to be decided by the group over time.

“Tino rangatiratanga” (absolute chieftainship) is the equivalent of “sovereignty” in English legal terms. It is reserved by Maori in Article 2 of te Tiriti o Waitangi. Its core meaning is taken from “rangatira” who were the leaders of Hapu and Iwi in traditional Maori society. The addition of the suffix “tanga” transforms the noun into a verb, creating the concept of “leadership” or “chieftainship” and includes the necessary authority that goes with it. “Tino” is a linguistic intensifier whose inclusion in the prefix of the phrase reinforces that rangatiratanga is an expression of the greatest authority conceivable by Maori. It is a concept bursting with potential for overt expression in any number of human institutional forms. The principle of “tino rangatiratanga” asserts the Maori right to control matters relating to the wellbeing of Hapu and Iwi.

“Self-determination” is a self-explanatory term taken from International Law, which reinforces the Maori claim to tino rangatiratanga at a global level.⁶² Like rangatiratanga, it is a concept whose potential may be expressed in a number of different ways both personal and institutional. It is important to Maori because its universal application as a human rights norm gives international support and force to the claims by Maori for recognition of their social, economic, cultural and political rights as members of the global community. Self-determination can piggy-back rangatiratanga and its recognition will achieve many of the same outcomes desired by Maori. However, the two concepts are not the same. Regardless of how humbly it is

⁶⁰ Supra n5 and Appendix 1.

⁶¹ This has been recognised by the Waitangi Tribunal in, Report of the Waitangi Tribunal on the *Manukau Claim*, Wai 8, Department of Justice, Wellington, 1985, by the High Court in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 and by the Court of Appeal in *NZMC v AG* [1987] 1 NZLR 641. (Lands Case) The extent of judicial recognition should not be overstated however, as what is considered to be “justiciable” varies from case to case. While concepts such as “the Crown” and “sovereignty” are unquestioningly accepted as part of New Zealand’s conceptualisation of law, concepts which serve an equivalent symbolic purpose for Maori such as “rangatiratanga” can be a challenge for practitioners and judges trained in English common law traditions.

⁶² Draft Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly on 2 October 2007, supra n10.

conveyed, “Rangatiratanga” is about greatness and prestige and declares to the world at large, “I’m here, take me as I am” – whereas “self-determination” is humbler by comparison, expressing the hope of acceptance as being “equally” part of the human race by others. Whereas Rangatiratanga assumes and asserts an authority that is wholly Maori-derived, even in the face of overwhelming odds, self-determination, as an international law principle, is reliant on States for recognition.⁶³ Despite the New Zealand government opposing the Declaration on the Rights of Indigenous Peoples, the assertion of “tino rangatiratanga” under te Tiriti o Waitangi at domestic level, anchors the Maori claim for independent Hapu and Iwi governing systems within Aotearoa New Zealand. Adoption of the principle of “self-determination” by Maori reinforces Maori claims in the global community and states their far-reaching ambit with precision.

The Treaty of Waitangi is not an ambiguous document.⁶⁴ Its terms are quite clear. The problem is that there are two sets of terms, each of which clearly provides for a different sovereign authority in the one territory. Under the English text the British Crown grants itself authority over Maori people and territory in return for minimal property-saving guarantees, while in the Maori text, Maori Hapu and Iwi retain their existing absolute authority over themselves and their territory, while accommodating British law. At present the English text prevails in Aotearoa New Zealand.

Treaty settlement legislation acknowledges the Treaty as providing a constitutional place for Maori in the overall system of government for Aotearoa New Zealand and recognises that Maori and the Crown are Treaty partners for all time. Although a far cry from the absolute authority enjoyed before 1840, the resources passed to Maori as a result of Treaty settlements will enable Maori to better achieve Hapu and Iwi aspirations.

Recognition of the above three principles, ideally, would enable Maori to live their lives *as Maori*, develop their resources *as Maori*, and control the processes that impact on their identity *as Maori*. Achievement of these aspirations however, relies on the practical implementation of other Maori custom law principles and is best achieved through a system of competent Hapu and Iwi governance that promotes Maori identity, supports language vitalisation, enculturates its people through education, and enhances their quality of life through the provision of a sound economic base.

Fundamental Principles of Maori Custom Law

It is not possible to reduce an entire culture to a defined set of norms because norms change over time. It is possible, however, to indicate the important principles by which that culture defines itself and which provide it with a coherent framework of existence. There is a unique mindset that underpins “being Maori” and from which principles have emerged against which human actions can be assessed. From these principles, normative and prescriptive rules can be produced as guides to behaviour in specific circumstances.

⁶³ The primary subjects of International Law are states and not people. The Declaration sets out guidelines for states to implement the rights of indigenous peoples set out under its Articles.

⁶⁴ See Appendix 1, which contains copies of the English and Maori texts of the Treaty.

Maori custom law coheres around the concepts of Whakapapa, Whanaungatanga, Mana, Tapu and Mauri,⁶⁵ which also produce working principles for defining standards of “good” behaviour and some of the entrenched practices of Maori society. These principles form the basis of Maori custom law in that they provide a common reference point for community discussions and decision-making on matters concerning the welfare of the group as a whole, as well as acting as guidelines for monitoring the relationships between its individual members. A shortcoming of the New Zealand legal system in the past has been the inability of most of its judges to understand or accept the relevance of these principles and therefore, to give them more than minor jural effect.⁶⁶ The following explanations are necessary, not only to overcome that deficiency, but also in order to properly understand how the relationship between Maori custom law and legislation set out at the beginning of this article, operates.

Whakapapa

Whakapapa – is often referred to in short form as “genealogy” or “ancestral connections” and is a fundamental of Maori custom law that is often asserted with rule-like rigidity. The physical fact of descent by birth provides the most durable process for anchoring individuals to territory, and guarantees acknowledgement of belonging but not necessarily actual inclusion, in group activities. Whakapapa links strengthen over time as more and more ancestors return to “te whenua” (the earth), thus consolidating the oneness members of the group feel with Papatuanuku, the earthmother of Maori creation stories. The notion of “home” being tied to ancestral lands and territories is evident in the desire Maori often express of wanting to return home for burial within their ancestral territories when they die. In a political and legal sense, the practice of returning home reinforces the territoriality that Maori Hapu and Iwi claim to particular areas and the collective nature of Hapu and Iwi identity drawn from territoriality that is discussed in Section II of this article.⁶⁷

Whakapapa is also important in determining the way Maori think about the relationship between humans and the rest of their environment. In Maori thinking whakapapa can also be viewed as a process by which change occurs over time and in response to new conditions. As a process of incremental change it provides the flexibility for Maori society to meet new challenges as they arise by integrating them into their cultural paradigm and adjusting it to fit. Colonisation, for example, is a major ongoing event to which Maori have had to adjust. The first stage of withstanding its devastating impact has been completed and Maori are now in the process of rebuilding their institutions, taking the best of what colonisation has provided and adapting it to fit their own thinking paradigm. For Maori, this is just a natural part of developing Maori custom law by “Incorporation” in order to meet new contingencies.

⁶⁵ Although writers often highlight other principles when discussing Maori culture, in my view, all principles can be logically referenced to these five fundamental “working” principles. See *Tomas*, supra n18.

⁶⁶ This will change over time. Inclusion of genuine Maori custom as part of the New Zealand Law School Curriculum is relatively recent in most New Zealand Law Schools and academic writing in the area is sparse.

⁶⁷ The advent of the Native Land Court in 1862, led to Maori Hapu and Iwi territories being defined as they stood at 1840. The “1840s Rule” is discussed in *Williams* supra n 24 at 231-233.

Whanaungatanga

Whanaungatanga is a principle that encourages overt acknowledgement of whakapapa-based relationships. The idea of “being related” has expanded over time – the classic example being the way Maori defined themselves in opposition to Pakeha when settlers came to Aotearoa, thus setting a new category of “Maoriness” based on an ancestry that is proto-Polynesian as opposed to European-based. This shift in conceptualisation was not difficult because Maori have always defined themselves in relational terms. Having previously defined themselves as Hapu and Whanau, it was a small shift to add another layer to existing relationships in order to differentiate the new arrivals from the tangata whenua. Further evidence of this tendency to create new relational categories while retaining the underlying integrity of whakapapa is seen in the way Maori living in the city have aligned themselves in modern times as “urban” Maori.

In both instances the formation of new conceptual categories has provided a distinctive “Maori” voice within the national governing systems of Aotearoa New Zealand by taking up the opportunities provided under existing New Zealand legislation.

Building on their new “Urban” identity, in January 1994, Haki Wihongi and the Te Whanau o Waipareira Trust, in West Auckland, lodged a claim alleging that the Crown had failed to recognise the special status of Te Whanau o Waipareira as a Maori community organisation providing regional social services and had failed to properly consult with it in accordance with its obligations under Article 2 of the Treaty of Waitangi.⁶⁸ The Waitangi Tribunal accepted the claim that they were an emergent group with an independent identity that stood alongside “traditional iwi” and went further by adding that they were also covered by the guarantees under te Tiriti/the Treaty.⁶⁹

The Treaty of Waitangi was signed by rangatira of hapu, on behalf of all Maori people, collectively and individually. Therefore, conversely, protective benefits and rights of autonomy in terms of the Treaty are not limited to traditional tribal communities.

A further claim to a distinct urban identity arose in 1992 when a newly established Maori Fisheries Commission began to work out a mechanism for allocating funding to Maori “Iwi” under Fisheries Settlement legislation.⁷⁰ Following nation-wide debate and a series of court hearings,⁷¹ it was decided that disbursement should be made primarily to “traditional iwi” to whom all Maori could relate, with “urban Maori” receiving a lesser sum. The matter was finally settled with the passage of the Maori Fisheries Act 2004, which gives statutory endorsement to the allocation mechanism worked out by the Commission.

⁶⁸ *Te Whanau o Waipareira Report - Wai 414*. <http://www.waitangi-tribunal.govt.nz/reports/summary>, 1. (last accessed 21 January 2010)

⁶⁹ *Ibid*.

⁷⁰ Claims that the Crown had breached Article 2 of the Treaty of Waitangi by failing to recognise Maori property rights in their fisheries were settled by the passage of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 which provided Maori with \$150 Million, and guaranteed 20% of the national fisheries quota for selected species. It also established the Maori Fisheries Commission to oversee distribution of fisheries assets to “Iwi”.

⁷¹ *Te Waka Hiika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17.

The principle of whanaungatanga is flexible enough to incorporate those who are not blood-related into the corporate life of the group. The practice of including individuals without a whakapapa link is particularly common in the inclusion of non-Maori spouses who are actively engaged in Hapu and Iwi life and accepted as part of the whanau (extended family). This application of whanaungatanga highlights the underlying responsibility owed by the group to those with whom individual members have an acknowledged relationship and creates the expectation that those who are included will, in turn, also contribute as members of the group. However, this type of relationship does not provide the certainty or durability of a whakapapa link.

Tapu

A third important principle Maori use as a guideline for discussion and decision-making is *Tapu*. Tapu denotes what is important and what is not important: things that are considered to be important by the group are often described as being “highly tapu” by its members. The Maori system of articulating value in terms of allocating relative tapu status to people, objects, categories of knowledge and resources links back to a Maori society in which everything was once imbued with a greater or lesser degree of tapu.⁷²

In traditional Maori society, all the things that were essential to the group’s welfare were controlled by the institution of Tapu. Those with authority were able to place temporary and permanent restrictions on access to important resources by members of the group. The normative behavioural standards by which members of Maori society regulated their interactions with each other and with the environment in which they lived were based on acknowledgement of Tapu and the restrictions it carried with it. Breaches of those restrictions were often punishable by death.⁷³

With the advent of colonial law, Tapu as a value system with attendant restrictions lost its pervasive influence as a regulator of behaviour within Maori society. Pitted against a new legal system that had its own set of normative values and system of punishing those who did not conform to the rules and principles that upheld those values, it was relegated to second place. Despite its lack of enforceability, Tapu today continues to inform the status of Taonga, and to convey the values associated with a Maori view of the world and restricted human behaviour.⁷⁴

Mana

The fourth important principle is *Mana*. Mana denotes the association of power and authority between people and between humans and the rest of the world. Maori society identified four sources of power: Mana Wairua – power derived from the spiritual source from which all things derive; Mana Atua – power derived from the gods who were known to Maori; Mana Tangata – power derived from human sources and Mana Whenua – twofold power derived first, through physical association with

⁷² Father Servant, a Marist Missionary who spent the years 1838-1842 in the Hokianga area of Aotearoa wrote: “Nothing is more common amongst the natives than the use of the tapou: the tapou affects people, animals, fields, houses, woods, properties, work, political and religious matters. ... There is another kind which the great chiefs impose on their inferiors. Both kinds are observed with the most scrupulous care”. C Servant, *Customs and habits of the New Zealanders 1834-42*, ed D Simmons, AH & W Reed, Wellington 1973, 34.

⁷³ A good description by a Maori writer can be found in, Makareti, *The Old Time Maori*, V Gollancz, London, 1938, 146.

⁷⁴ C. Barlow, *Tikanga Whakaaro, Key Concepts in Maori Culture*, OUP, Auckland, 1996.

the land, and second, as a referent to the power that is inherent in the land because it is Papatuanuku, the ancestor through whom the gods and humans gained life.⁷⁵

This idea of power and authority informed Maori leadership, which centred around “rangatira”, or individual leaders whose mana was considered to be greater than others because they were either born into a senior whakapapa line or demonstrated ability in a range of activities important to the group. These might include gardening, resource administration, warfare, and spiritual pursuits and people management.⁷⁶ The utility of individuals in promoting the collective wellbeing of the group was acknowledged by the attribution of mana (prestige) by other members.

Maori now often use the term *Kaitiakitanga*, to refer to a model that combines mana and tapu in an institutional framework⁷⁷ that denotes how human interactions with natural resources should be managed around whakapapa and whanaungatanga relationships. Its application in resource management locates humans as an integral part of a wider existence and acknowledges our responsibility for the care of other aspects of existence because we are related.⁷⁸ In Hapu and Iwi terms, this collective responsibility is aimed at maximising the chances of group survival in a constantly changing world through ensuring that important Maori ways of perceiving what makes the world cohere are kept in alignment.

Statutory Protection of Maori custom

The relationship between Maori and the Crown is littered with ironies. One of these is that the demise of Maori custom law and its survival as an independent system have both been fostered by the Crown through legislation. Another is that the Crown has, itself, created the self-flagellating mechanism that has held it accountable for its past wrongdoings against Maori. Yet another is that despite this, the Crown still sees itself as controlling Maori.

There are 4 statutes which that have had a major impact on providing statutory protection for Maori custom: The first is the Treaty of Waitangi Act 1975, which empowers the Waitangi Tribunal to hear Maori grievances against the Crown based on breaches of the principles of the Treaty of Waitangi. In the Te Reo Maori claim the Tribunal heard numerous submissions supporting te reo Maori as a taonga tuku iho (a precious inter-generational possession). The import of the statement made by Ngapuhi rangatira, Sir James Henare that “ko te reo te mauri o te mana Maori” (the language is the life force of Maori authority)⁷⁹ impressed upon the Tribunal the serious consequences of losing the language and the need for urgent action. The Tribunal’s recommendations gave impetus to calls from Maori to pass legislation to protect te Reo. The Maori Language Act 1987, the Education Amendment Act 1990 and the Maori Television Service Act 2003 are three important legislative interventions that followed on from the Te Reo Claim to assist with Maori language rejuvenation.

The Maori Language Act made Maori language an official language of New Zealand, giving it a status that had previously been actively denied in New Zealand’s

⁷⁵ Ibid at 61-62.

⁷⁶ Tomas, supra n18.

⁷⁷ M Marsden and TA Henare, *Kaitiakitanga – a definitive introduction to the holistic worldview of the Maori*, Ministry of Environment, Wellington, 1992.

⁷⁸ Kaitiakitanga is one of several considerations to which decision makers “shall have particular regard to” under section 7 of the Resource Management Act 1991.

⁷⁹ Words spoken at both the 1979 hui and during the Te Reo Claim by Ngapuhi elder, Sir James Henare. As quoted in Durie, supra n35 at 59.

official institutions. It also established Te Taura Whiri i te Reo (the Maori Language Commission) as an institution that is primarily responsible for promoting and monitoring Maori language development and usage within the community.

The Education Act 1989 was amended in 1990 to include section 181 (b) which provides for educational institutions to “acknowledge the principles of the Treaty of Waitangi”. A new section 155 was also inserted into the Act to empower the Minister of Education to designate a state school as a Kura Kaupapa Maori by Gazette notice. Later on, the Education (Te Aho Matua) Amendment Act 1999, amended section 155, requiring Kura Kaupapa Maori to adhere to the principles of Te Aho Matua. The Amendment Act also established Te Runanganui o nga Kura Kaupapa Maori as the kaitiaki (guardians) to determine the content of Te Aho Matua and ensure it is not changed to the detriment of Maori. Te Aho Matua contains 6 compliance sections. They are: Te Ira Tangata (the human essence); Te Reo (language); Nga Iwi (people); Te Ao (the world); Ahuatanga Ako (circumstances of learning) and Nga Tino Uaratanga (essential values). Further reinforcement of Maori education occurred with the establishment of Wananga, Maori tertiary institutions that are classified as “Crown entities” or state-owned tertiary institutions under the State Sector Act 1988 and the Crown Entities Act 2004. Wananga are also subject to section 181 (b) of the Education Act 1989. The statutory protection provided to the governance mechanisms that overarch the establishment of Kohanga Reo, Kura Kaupapa and Wananga, all enable Maori customs to be reinforced in education that is based on Maori traditional principles and practices.

The provision of a Maori Television service whose purpose is to foster and promote Maori language and culture,⁸⁰ also facilitates transmission of te reo to a wide Maori viewing audience using audio-visual media. There is no data yet available to quantify the effect the Channel is having on improving language skills and culture retention.

Conclusion

Maori society continues to organise itself according to traditional principles, some of which are outlined above, that have held it together for generations. Those principles govern Maori collective activities and underpin Hapu and Iwi inter-generational planning.

The preservation and perpetuation of Maori culture and language within educational institutions has been given statutory protection, alongside English-based institutional learning and through the establishment of Maori television. Within these statutory protections, Maori custom law continues to operate and determine the way that inter-generational transfer of the knowledge, values, and behaviour that Maori society consider important is conducted.

Modern Hapu and Iwi governance systems are still in their infancy. The legitimacy of these institutions is linked to the continued existence of Maori as cohesive Hapu and Iwi. The authority for their existence as independent modern entities is derived from within their own communities, the Treaty of Waitangi and International Law. Holding the whole lot together are the principles of Maori custom law.

⁸⁰ Maori Television Service Act 2003.

IV THE PROOF IS IN THE PUDDING - CAN HAPU AND IWI GOVERNANCE ACHIEVE WHAT THE PEOPLE WANT?

In this section, I discuss the Treaty of Waitangi Settlements of two large Iwi, Waikato - Tainui and Ngai Tahu and examine the governing frameworks they have created for themselves. Although encased within the wider framework of “historical Treaty grievances”, settlement legislation has provided a framework and an economic base from which they can develop governance structures that integrate custom law principles into their operation. Although discursive, this section provides conclusive proof that Waikato-Tainui and Ngai Tahu are part of the constitutional framework of Aotearoa New Zealand government, having been overtly recognised as being in partnership with the Crown under the Treaty of Waitangi. While I do not promote either model as the way forward for all groups, they are also proof that Maori Hapu and Iwi *are able to successfully govern themselves* while not only retaining their identity as Maori but also strengthening it.

Working within Two different Law paradigms

The source of English-based law is the sovereign. Since at least 1701 and the Act of Settlement, notionally speaking, the English sovereign has spoken through Parliament and expressed his or her changing will in legislation.⁸¹ In marked contrast, the source of Maori custom law is the people. Since time immemorial the people have expressed their will in community forums and spoken through mandated leaders. In developing modern institutional frameworks in which Maori can develop autonomously as Maori and control their own governance processes, Maori leaders have had to be mindful of the two different sources of law and have had to satisfy the requirements of both. For Maori leaders, having their status as Hapu and Iwi recognised in legislation by the central government of New Zealand, even though it does not reach the 1840 standard of “absoluteness” set out in te Tiriti and the Treaty of Waitangi, is viewed as acknowledgement of the mana and rangatiratanga of the people.⁸² From the New Zealand government’s point of view, transferring funds and other resources to Hapu and Iwi is part of the process of settling historic Treaty of Waitangi grievances for all time, the hope being that at this point, New Zealand society will continue the “one people” aspiration espoused by Lt Governor Hobson in 1840. Despite having different goals, Maori have, nevertheless seized the opportunity of gaining an economic base that can generate revenue to provide for the general social needs of the people and bring Maori society into the 21st century. Thus, although the Treaty Settlement Process has been soundly criticised by Maori commentators,⁸³ it has also provided for the establishment of new institutional forms of Hapu and Iwi governance that suit modern living.

⁸¹ Under the Act of Union 1707 England and Scotland combined to form the Kingdom of Great Britain. Ireland was later joined via the Union with Ireland Act 1800 to form the United Kingdom of Great Britain and Ireland.

⁸² The Waikato-Tainui claim was settled by legislation drafted by the Iwi and confirmed by the passage of the Waikato Raupatu Claims Settlement Act 1995. The Ngai Tahu Claims Settlement Act 1998 follows a similar process and was preceded by the Te Runanga o Ngai Tahu Act 1996 which establishes the membership of the Iwi, their iwi boundaries and a representative corporate governance.

⁸³ For example see Durie, *Launching Maori Futures*, supra n4 at 93-94, who criticises the process for employing an adversarial bargaining approach in the settlement of Crown grievances rather than building “trust and respect” between equal partners.

A. WAIKATO - TAINUI

Legislative Framework of Waikato - Tainui Treaty Settlement

Waikato Raupatu Claims Settlement Act 1995

The Waikato Raupatu Claims Settlement Act 1995 was passed after years of negotiation between Waikato leaders and New Zealand government officials. The Act is based on a 42 page Deed of Settlement entered into between Dame Te Atairangikaahu, the Maori Queen, on behalf of Waikato-Tainui, and the Rt Hon. James Bolger, the Prime Minister of New Zealand, on behalf of Her Majesty the Queen, on 22 May 1995. The Act is novel in that not only does its content mirror much of the originating Deed, but the process entered into resembles an agreement between two Heads of State, the main details of which are then captured in domestic legislation.

The Preamble of the Act is written in both Maori and English and contains a detailed account of the grievance and events leading up to the 1995 legislation. It records that in 1858, Pootatau Te Wherowhero was elected Maori King to “unite the iwi, and preserve their rangatiratanga and their economic and cultural integrity” in the face of increasing colonial settler encroachment.⁸⁴ Chiefs pledged their land to the new King giving him “ultimate authority over the land” and “ultimate responsibility for the wellbeing of the people” thus binding their communities to the Kiingitanga and resisting further alienation of their land.⁸⁵ The New Zealand Government of the time perceived the Kiingitanga as a challenge to the Queen’s sovereignty and a hindrance to Government land purchasing policies, and would not enter into a formal relationship with the Kiingitanga.⁸⁶ As a consequence, in 1863 the Government “unjustly invaded” the Waikato, initiating hostilities and forcing the people to defend their lands.⁸⁷ The New Zealand Settlements Act 1863 was passed, under which:⁸⁸

... the Crown unjustly confiscated approximately 1.2 million acres of land from the Tainui iwi in order to punish them and gain control of the land placed by them under protection of the Kiingitanga.

The devastating result of this was:⁸⁹

... widespread suffering, distress, and deprivation were caused to the Waikato iwi ... as a result of the war waged against them, the loss of life, the destruction of their taonga and property, and the confiscations of their lands, and the effects of the Raupatu have lasted for generations.

⁸⁴ Clause B.

⁸⁵ Clause C.

⁸⁶ Clause D.

⁸⁷ Clause E.

⁸⁸ Clause F.

⁸⁹ Clause G.

A Royal Commission in 1926 (Sim Commission) recommended compensation be paid by the Crown, and the Tainui Maori Trust Board was established to administer an annual sum “for the benefit of those members of the Maori tribes in the Waikato District whose lands had been confiscated”.⁹⁰

The Preamble includes two “official” statements supporting the Waikato claim. The first is a quote from the 1985 Waitangi Tribunal Report in the Manukau Claim.⁹¹

It can simply be said that from the contemporary record of Sir John Gorst in 1864, from the Report of the Royal commission sixty years after that, and from historical research almost a century removed from the event, all sources agree that the Tainui people of the Waikato never rebelled but were attacked by British troops in direct violation of Article II of the Treaty of Waitangi”.

The second quote, from the Court of Appeal in *RT Mahuta and the Tainui Maori Trust Board v Attorney General* [1989] 2 NZLR 513, states that the Sim Commission had failed to convey:⁹²

... the crippling impact of Raupatu on the welfare, economy and potential development of Tainui” and that “Some form of more real and constructive compensation is obviously called for if the Treaty is to be honoured”.

Following Negotiations with the Crown⁹³ a Deed of Settlement was entered into in which the Crown recognised the significance of the “land for land” principle to Waikato and agreed to make full and final restitution to Waikato in respect of the Raupatu claims.⁹⁴ Land transferred to Waikato under the Deed would be held communally in a trust to be established by Waikato and part of that land would be registered in the name of Pootatau Te Wherowhero.⁹⁵

... that name giving expression to the significance of the pledges made by the chiefs to Pootatau Te Wherowhero and of the reaffirmations of those pledges, as expressed in the kawenata, by those who have continued in support of the Kiingitanga.

The restitution provided for in the Deed is to be for the benefit of all Waikato collectively, under the mana of the Kiingitanga”.⁹⁶

The final clause of the Preamble is the Crown acknowledgement that the settlement:⁹⁷

⁹⁰ Clauses I and J.

⁹¹ Clause K.

⁹² Clause N.

⁹³ Clauses O-Q.

⁹⁴ Clauses S (b) and (c).

⁹⁵ Clause U.

⁹⁶ Clause W.

⁹⁷ Clause X (a) and (b).

does not diminish or in any way affect the Treaty of Waitangi or any of its articles or the ongoing relationship between the Crown and Waikato in terms of the Treaty of Waitangi or undermine any rights under the Treaty of Waitangi, including rangatiratanga rights.

In return, Waikato acknowledges the settlement as “fair, final and durable”.

Part I of the Act repeats the Apology made by the Crown to Waikato-Tainui in the Deed of Settlement. Part II sets out the substantive provisions of the settlement.

Section 6 of Part I repeats part of the Preamble, acknowledging the legitimacy of the Waikato claim.

The Crown acknowledges that its representatives and advisers acted unjustly and in breach of the Treaty of Waitangi in its dealings with the Kiingitanga and Waikato in sending its forces across the Mangataawhiri in July 1863 and in unfairly labeling Waikato as rebels. Section 6(1)

The Crown acknowledges that the subsequent confiscations of land and resources under the New Zealand Settlements Act 1863 of the New Zealand Parliament were wrongful, have caused Waikato to the present time to suffer feelings in relation to their lost lands akin to those of orphans, and have had a crippling impact on the welfare, economy and development of Waikato. Section 6(3)

Accordingly, the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as this is now possible, and, with the grievance of raupatu finally settled as to the matters set out in the Deed of Settlement ... to begin the process of healing and to enter a new age of co-operation with the Kiingitanga and Waikato.” (Section 6 (6)).

The Crown acknowledgement of their wrongful actions was a vitally important part of establishing a new, positive political relationship between Waikato-Tainui and the Crown, because for years the injustice had been denied while Waikato people continued to suffer its traumatic aftermath. It needed a dramatic, positive and durable acknowledgment to bring this to an end. The Apology was the first step. Future Crown actions will show whether “the honour of the Crown” and “good faith” are reliable constitutional principles or empty phrases.

Part II of the Act sets out the settlement provisions. The provisions include the custom law principle set out by Waikato in the Deed of Settlement and restated in Section 6 (4) of the Act as “i riro whenua atu, me hoki whenua mai” (as land was taken, land should be returned). The way that Maori perceive the land as being imbued with ancestral values and as the source of their identity, discussed in Section III of this article, informs the inclusion of this principle in the legislation. The main thrust of Part II of the Act is to provide Waikato Tainui with funding to re-acquire its land-base,⁹⁸ to dis-establish the Tainui Maori Trust Board as the Crown appointed body established to receive earlier compensation monies⁹⁹ and to provide for its

⁹⁸ Sections 10-26.

⁹⁹ See Waikato-Maniapoto Maori Claims Settlement Act 1946.

replacement by another body,¹⁰⁰ and to ensure that the framework of other existing legislation does not impinge on the settlement terms.¹⁰¹

Recognition of the Treaty of Waitangi as a constitutional starting point

Included in the Crown apology for its past actions is an acknowledgement that the terms of te Tiriti and the Treaty of Waitangi continue to exist. In doing this it acknowledges the “rangatiratanga” contained in Article 2 of the Maori text of te Tiriti o Waitangi, although notably, the “tino” is missing from the prefix, possibly to reinforce that the English Queen sits above the Maori Queen in the sovereignty rankings.¹⁰² However, when this is referenced back to the 1858 aspirations of Pootatau te Wherowhero on behalf of his people as set out in Clauses B and C of the Preamble, the broad parameters of Maori understandings become clearer. One interpretation of this is that the “ultimate” authority of decision-making within the boundaries of the Kiingitanga region specified in section 7 of the Act as the “Waikato Claim Area”, and “ultimate” responsibility for the wellbeing of the people connected to the Kiingitanga within this region, in terms of fostering the group’s economic development and preserving and fostering cultural integrity. Thus, the belief that the “tino” rangatiratanga of Waikato-Tainui still exists and cannot be unilaterally extinguished in terms of Maori custom law continues within their home territory, despite its absence in the statute.

Although acknowledging that a Treaty relationship does exist, the Deed avoids the more fundamental action of actually stating that a formal constitutional relationship exists between Waikato-Tainui and the Crown, or indeed between the Kiingitanga on behalf of all Maori people and the Crown, as dual sovereigns. However, in recognising its past unjust actions the Crown has, unwittingly perhaps, re-invigorated the very structure that it sought to stamp out in 1863 and provided the funding for a parliament to sit alongside it. The existence of the Kiingitanga as a symbol of Maori unity was strongly reaffirmed when Hapu and Iwi leaders from throughout Aotearoa New Zealand came together to choose the successor to the Maori Queen in 2006. It is very likely that a formal alliance will emerge at a later date between Maori Hapu who choose unitary governance structures as a result of the Treaty Settlement process. The speed with which this happens and the success of such an alliance will depend on how successful individual Hapu and Iwi are in setting up representative governing structures that are able to echo the voices of their people. Waikato-Tainui is the first group to attempt such a feat.

Under the Deed, Waikato-Tainui received \$170 million to establish an economic base for its people and buy back land that had been confiscated. Before any assets were transferred to the group, however, a governance entity had to be established that was acceptable to the group, representative, transparent and accountable.¹⁰³ Waikato-Tainui used the opportunity to establish a Parliamentary structure to sit alongside the Kiingitanga and adopted a parallel role of serving the people to that which the Kiingitanga has carried since 1858.

¹⁰⁰ Sections 27-29.

¹⁰¹ Sections 30-37.

¹⁰² In the Maori text it has been replaced by “mana” a prefix which may appear less overtly challenging than “tino” but which retains its prestige under Maori custom law.

¹⁰³ *Healing the past, building a future - A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, Office of Treaty Settlements, Wellington, 2004, 15.

A New Waikato-Tainui Governance Structure

The following paragraphs discuss the structure of the new Waikato-Tainui governing body in terms of its aspirations, membership, political structure, and the social and economic development it has set in place for its members.

i. The fundamental values driving the Waikato-Tainui

The fundamental values driving the Waikato-Tainui vision for the future are derived from Maori customs and practices that acknowledge whakapapa, strengthen whanaungatanga and preserve the mana of the people. They were espoused in the vision set by the Executive of the post-settlement governing body of Waikato-Tainui as follows:

Our generation in 2050 – “Whakatupuranga Tainui 2050” – underpins our strategic direction. In the changing global environment, the world they live in will be significantly different to ours. So our approach for moving forward is one that embraces change and focuses on developing our people. There are three critical elements fundamental to equipping succeeding generations with the capacity to shape their own future:

1. A pride and commitment to uphold their tribal identity and cultural integrity;
2. A diligence to succeed in education and beyond;
3. A self-determination for socio-economic independence.

The first element recognises the importance of our tribal history, maatauranga, tikanga and reo. With a secure sense of identity and cultural integrity, our future generations will be proud and confident in all walks of life.

Educational success generates life opportunities and choices. Hence, the focus on the second element is to promote a diligence among tribal members of all ages to pursue success in all educational and training endeavours, and beyond. This enables personal growth, contributes to building the capacity of our people, and provides opportunities to utilize that growth and capacity for the collective benefit of our Marae, hapuu and iwi.

Breeding a self-determined people capable of developing and growing our tribal assets, is the focus of the third element. This is consistent with the time-honoured vision we inherited from Kiingi Taawhiao, “Maaku anoo e hanga i tooku nei whare” – to build our own house; and including our mission “Kia tupu, kia hua, kia puaawai” – to grow, prosper and sustain.

Te Arataura – Te Kauhanganui o Waikato Inc. - 2007¹⁰⁴

In acknowledging “change” and “development” the Executive are mindful that this is an inter-generational plan that must be durable enough to capture and serve the needs of the people over a long period of time. Knowledge and memory of who they

¹⁰⁴ The vision espoused by the Executive of the political governing body of Waikato-Tainui in *Waikato Rauapatu Lands Trust Annual Report, 2007*, 6.

once were, who they now are, and who they may be in the future – and preserving the cultural aspects that underpin that identity, are seminal to the group’s future existence as Hapu and Iwi. The perpetuation of language and tikanga (customary rules and practices) through the medium of education is vital to maintaining group identity. The aspiration for education is not limited to Maori matters. It includes “*all* educational training endeavours” that can be of “collective benefit to our Marae, Hapu and Iwi”, thus reinforcing that the main reference point throughout is Waikato-Tainui.

Linking self-determination to socio-economic independence highlights the necessity not only to foster the capacity to make independent Hapu decisions but also to be able to freely exercise that ability. The reference to the words of Kiingi Taawhio, are a reminder that this should be accomplished without undue interference from outsiders, including the Crown, even when they begin to fear Maori success.

ii. Hapu and Iwi Membership

Section 7 of the Waikato Raupatu Claims Settlement Act defines “Waikato” broadly as:

the Waikato descendants of the Tainui Waka who suffered or were affected by the confiscation of their land by the New Zealand government under the New Zealand Settlements Act 1863, being members of [33 Hapu are listed].

Whakapapa and its associated rules and values set the criteria for inclusion in the benefits that arise under the legislation.

In implementing this criterion in line with current Hapu organisation, Waikato-Tainui has constructed two beneficiary lists. The first list is a register of beneficiary marae: ie. marae who signed support for the Deed of Settlement of the Raupatu claim are automatically included as beneficiaries, while those who did not sign but are within the Raupatu claim area can ask to be included. The decision to include or exclude a marae wishing to join will be made by the majority of marae who are current beneficiaries. The second list, is a register of individual beneficiaries who are able to show: (a) that they are a member of one of the 33 hapu by whakapapa; (b) that they belong to a beneficiary marae, and (c) who provide their date of birth. All individuals on the beneficiary list who are over the age of 18 are able to vote on important issues relating to the Settlement. There are currently over 49,000 registered Waikato-Tainui members.¹⁰⁵

Benefits from the settlement may be distributed directly to individuals, or to particular marae for the provision of services to the people. While individuals who receive benefits are limited to those who whakapapa to the Hapu named in the Settlement, those who benefit via the provision of services through marae may include Pakeha and others who have married into the Iwi or who frequent the marae. Thus the broader inclusiveness that informs the principle of whanaungatanga is also being practically applied to modify the strict application of the whakapapa requirement.

¹⁰⁵ *Waikato Raupatu Lands Trust Annual Report, 2007, 24.*

iii. A New Political Governing Structure

The governance structure of Tainui is currently based around Te Kauhanganui, an Iwi Parliament comprising local marae representatives and an executive governing body.

The legal mechanism chosen by Waikato-Tainui for their parliamentary structure is an Incorporated Society, Te Kauhanganui o Waikato Incorporated. It is the legal umbrella for the 66 marae that are the current beneficiaries of the settlement. Each marae elects 3 representatives, who then elect an executive of 11 members that is joined by a representative of the Maori King. The role of the executive is to protect, develop and unify the collective interests of the different Hapu of the Waikato-Tainui region in accordance with the vision set out above.

Settlement assets are held by Waikato Raupatu Trustee Company, whose shareholding is the 12 member executive of Te Kauhanganui. A second company, Tainui Group Holdings Limited, exploits the assets commercially for profit. A third vehicle, Waikato Raupatu Lands Trust, whose shareholding is also the executive of Te Kauhanganui, distributes part of the income earned from the assets to local marae and individual beneficiaries each year for social development.

Within 5 years of the new governing structure being set up, a conflict arose between the relative governing powers of the Kingitanga and Te Kauhanganui. Five members of the Te Kauhanganui Executive had resigned following a lengthy dispute over financial management and this had left too few members to make up a governing quorum. Local marae, who have maintained a strong affiliation to the Kingitanga in its role of symbolising Waikato-Tainui mana and kaitiakitanga since 1858, voted for a Kingitanga appointed council to govern in the interim period between elections for new Executive members. The matter was heard in the High Court in 2000, with Hammond J, upholding the incorporated society as the agreed legal mechanism supporting the government over the socio/political institution of the Kingitanga.¹⁰⁶ While this may be seen as external interference in the politics of Waikato-Tainui and damaging to the mana of the Kingitanga, it also clearly demarcated the line between the kingitanga as spiritual guardians and advisers on Iwi matters, and as active participants in Iwi politics at a sovereign level, and indicated that it had been crossed. Having resolved their respective roles, the two bodies have since worked equably alongside each other to achieve their common goals.

iv. Setting and Achieving Social Goals

The Waikato Raupatu Lands Trust distributes part of the income earned to the beneficiaries of the Settlement, either individually by way of scholarships, or, through marae to achieve charitable purposes for its members. Marae committees can apply for funding for educational purposes, educational facilities, scholarships and bursaries, cultural purposes associated with te reo (language), Waikatotanga (learning about being Waikato), arts and crafts, social and economic welfare and vocational training, te Kohanga Reo, Churches, Marae upkeep and improvement, farms, tourism, job creation, relief of Kaumatua (elders), the poor and disabled, health and sport, communications, radio, television and graphic design.¹⁰⁷

¹⁰⁶ *Kingi Porima & ors v Te Kauhanganui O Waikato Inc, Te Arikiniui Dame Te Atairangikahu, Sir Robert Mahuta*, M208/00, High Court Hamilton, 22 September 2000. Hammond J.

¹⁰⁷ S. Solomon, *The Waikato Raupatu Claims Settlement Act - A Draft Users Guide to the Act as at 28 October 1995*, Beneficiary Roll office, Hopuhopu, 1995.

Education and strengthening of marae infrastructures have remained priorities of Waikato-Tainui Iwi since 1995. Immediately after the Settlement, work began on accounting training programmes and the upskilling of marae staff to enable them to control service delivery to the people. In order to achieve this quickly, a focus was placed on treasurers' roles and responsibilities, strategic planning, budget preparation, performance monitoring, internal controls, preparation of financial statements and bank loan applications.¹⁰⁸ In 2007, \$4 million was paid out in Marae grants, for upkeep, education of staff and service delivery. \$1.7 million was paid in individual education grants to those in tertiary education.¹⁰⁹

v. Establishing and Maintaining a Commercial and Economic Base

Waikato Raupatu Trustee Company Limited holds all the Settlement assets, which include land, fisheries quota, and tourism and managed funds. It is the sole shareholder of Tainui Group Holdings Limited, a company established in 1998 to invest and manage the assets profitably.

In the period 1995-2000, several investments entered into by Waikato-Tainui failed, resulting in a deficit of several million. However, in the last four years it has stabilized its position and posted significant returns on its investments. As a result, Tainui Group Holdings Limited showed a net operating profit of \$11 million in 2004, \$16 million in 2005, \$18 million in 2006 and \$64 million in 2007.¹¹⁰ The total Iwi asset base has also steadily risen from \$209 million in 2004, to \$286 million in 2005, to \$375 million in 2006 and over \$468 million in 2007.¹¹¹

The strong financial performance of Tainui Group Holdings Limited has allowed for greater allocation to the Waikato Raupatu Lands Trust for distribution to Hapu and Iwi beneficiaries.

In achieving its goals the Waikato Lands Trust has set its main procedural values as being the unifying principles of the Kingitanga. These are: Whakaiti (Humility); Whakapono (Trust and Faith); Aroha (Love and Respect); Rangimarie (Peace and Calm); Manaakitanga (Caring); Kotahitanga (Unity) and Mahitanga (Co-operation) – in order “grow, prosper and sustain” the people.¹¹² It has also called upon the good governance skills and requirements set out in legislation and required of prudent business practice in order to be competitive in existing markets.

Waikato-Tainui are adamant that they will not take on the responsibilities the Crown owes to all the people of Aotearoa New Zealand, including Maori living within their territorial boundaries. However, the governance structure established under the Kauhanganui allows Waikato-Tainui to achieve specific goals and to reinforce the inter-generational transfer of knowledge necessary to sustain its people into the future. The effectiveness of Waikato-Tainui governance can be assessed by examining the foregoing discussion against the vision 2025 set by the Executive of the Te Kauhanganui at the beginning of this section and against the fundamental principles set out earlier in this article. Overall, the Hapu and Iwi of Waikato-Tainui are in a much stronger position now, culturally, politically, socially and economically than they were before 1995.

¹⁰⁸ “The Post Settlement Phase – A Tainui Special”, *Kia Hiwa Ra*, Tokomaha 31, 22 May 1995, 1.

¹⁰⁹ *Waikato Raupatu Lands Trust Annual Report*, 2007, 22.

¹¹⁰ *Waikato Raupatu Lands Trust Annual Report* 2005 at 36 and 2007 at 9. (Figures rounded to the nearest \$1 million.)

¹¹¹ *Waikato Raupatu Lands Trust Annual Report* 2005 at 37 and 2007 at 47. (Figures rounded to the nearest \$1 million.)

¹¹² *Waikato Raupatu Lands Trust Annual Report* 2007, 7.

B. NGAI TAHU SETTLEMENT

As with Waikato-Tainui, the Ngai Tahu settlement has also been negotiated against a background of grievance against the Crown for its actions in depriving Ngai Tahu of their lands and economic base during the early colonisation period.¹¹³ The claim covers approximately two-thirds of the South Island of Aotearoa New Zealand and several Hapu are subsumed under the umbrella of Ngai Tahu. The Ngai Tahu claim was settled by two pieces of interlinking legislation.

Te Runanga o Ngai Tahu Act 1996

In 1996, Te Runanga o Ngaitahu Act was passed which defined the Iwi membership of Ngai Tahu Whanui as being the beneficiaries of the Ngai Tahu Claim reported on by the Waitangi Tribunal in 1997. The Act also gave statutory recognition to Te Runanga o Ngai Tahu as being the official Iwi representative for all future Crown/Ngai Tahu interactions. Both Iwi membership and governance structure are discussed later in this section.

Ngai Tahu Claims Settlement Act 1998

The second important statute is the Ngai Tahu Claims Settlement Act 1998. Like the Waikato Rauapatu Settlement Act, the Ngai Tahu Act contains a Preamble that sets out the background of the grievance in Maori and English, using the principles of the Treaty of Waitangi to measure past Crown behaviour. It refers to unfair purchase practices and breaches of the deeds of purchase entered into throughout the area,¹¹⁴ ongoing Ngai Tahu protests since 1840 and a number of inquiries having been held but with little follow-through occurring,¹¹⁵ and ends with the Crown's acceptance that it had not remedied Ngai Tahu's grievances.¹¹⁶

The Preamble of the Act includes the Waitangi Tribunal's findings in the following terms:¹¹⁷

After considering the elements of the Ngai Tahu claim, the Waitangi Tribunal found substantially in Ngai Tahu's favour, ... In particular, the Tribunal could not reconcile the Crown's enduring failure to meet its obligations to Ngai Tahu with its duty to act towards its Treaty partner reasonably and with the utmost good faith. The Tribunal also emphasised that, in acquiring some 34.5 million acres of land from Ngai Tahu for &14,750, the Crown acted unconscionably and in repeated breach of the Treaty of Waitangi. The Tribunal considered that the Crown's actions left Ngai Tahu with insufficient land to maintain its way of life, and to enable the tribe's full participation in subsequent economic development:

¹¹³ A thorough critique of the Ngai Tahu Settlement can be found in L. Carter and J. Ruru, "Freeing the Natives": The Role of Treaty of Waitangi Settlements in the Reassertion of Tikanga Maori", in ed N. Tomas, *Te Tai Haruru, Journal of Maori Legal Writing*, International Research Institute for Maori and Indigenous Education, Volume 2, 2006, 14-36.

¹¹⁴ Preamble, Clause B.

¹¹⁵ Preamble, Clause C.

¹¹⁶ Preamble, Clause D.

¹¹⁷ Preamble, Clauses K and L.

The Tribunal considered that the Crown ought to have restored to Ngai Tahu sufficient land to provide for the future economic social and cultural development of the tribe:

The Preamble details that after the Waitangi Tribunal issued its Report, negotiations were entered into with the Crown, followed by a Deed of Settlement in 1997.¹¹⁸

... in which the Crown acknowledged that Ngai Tahu suffered grave injustices which significantly impaired Ngai Tahu's economic, social and cultural development and which recorded the matters required to give effect to a settlement of all of Ngai Tahu's historical claims.

Section 6 of the Act contains an apology, part of which is set out below, in which:

1. ...The Crown recognises the protracted labours of the Ngai Tahu ancestors in pursuit of their claims for redress and compensation against the Crown for nearly 150 years, as alluded to in the Ngai Tahu proverb 'He mahi kai takata, he mahi kai hoaka' ('It is work that consumes people, as greenstone consumes sandstone').

2. The Crown acknowledges that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngai Tahu in the purchases of Ngai Tahu land. The Crown further acknowledges that in relation to the deeds of purchase it has failed in most material respects to honour its obligations to Ngai Tahu as its Treaty partner, while it also failed to set aside adequate lands for Ngai Tahu's use, and to provide adequate economic and social resources for Ngai Tahu.

4. The Crown recognises that it has failed to act towards Ngai Tahu reasonably and with the utmost good faith in a manner consistent with the honour of the Crown. That failure is referred to in the Ngai Tahu saying 'Te Hapa o Niu Tirenī!' ('The unfulfilled promise of New Zealand'). The Crown further recognises that its failure always to act in good faith deprived Ngai Tahu of the opportunity to develop and kept the tribe for several generations in a state of poverty, a state referred to in the proverb 'Te mate o te iwi' ('The malaise of the tribe')

7. The Crown apologises to Ngai Tahu for its past failures to acknowledge Ngai Tahu rangatiratanga and mana over the South Island lands within its boundaries, and, in fulfillment of its Treaty obligations, the Crown recognises Ngai Tahu as the tangata whenua of, and as holding rangatiratanga within, the Takiwa of Ngai Tahu Whanui.

8. Accordingly, the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and, with the historical grievances finally settled as to matters set out in the Deed of Settlement signed on 21 November 1997, to begin the process of healing and to enter a new age of co-operation with Ngai Tahu.

¹¹⁸ Preamble, Clause U.

The rest of the Act is a comprehensive enactment aimed at giving effect to the matters agreed upon in the Deed of Settlement. Under section 15, Aoraki Mountain is handed back to Ngai Tahu in symbolic acknowledgement of their traditional Maori custom associations. Ngai Tahu would then gift it back to the Prime Minister, for the nation as a whole, under section 16. The Deed also provided for \$170 million to be paid to Ngai Tahu to repurchase a land base, revesting of titles in Ngai Tahu, recognition of Ngai Tahu mana (authority) over several outlying islands, yearly access to traditional resources, and ex officio membership on various Crown Boards governing local resources.

Recognition of the Treaty of Waitangi as a starting Point for Crown/Ngai Tahu relationship – setting new standards for measuring the relationship

Clauses 2, 4, 7 and 8 set out above, all refer to the Treaty and acknowledge that a Treaty-based relationship exists between the Hapu that comprise the Iwi of Ngai Tahu and the Crown. There are several standards against which that behaviour is to be measured. Unilaterally the Crown acknowledges in Clause 4 that its behaviour must be consistent with its own standards of “reasonableness”, “utmost good faith” and “the honour of the Crown”. These are traditional English constitutional standards without which, faith in the actions of the Crown’s ability to safeguard its subjects are brought into doubt and confidence in the notion of a representative democracy is undermined within a significant portion of the population.

A second standard is that of “Treaty partnership” alluded to in Clause 2. Under the Treaty, both parties should be on their best behaviour in their dealings with each other. Against this standard, it is the Crown and not Ngai Tahu who has behaved badly and against whom reparation is sought. This aspect of the relationship has been independently assessed by the Waitangi Tribunal, whose findings and recommendations have led to a process of reconciling the wrong suffered by Ngai Tahu.

A third standard for assessing Crown activity, is that of Maori custom law principles, or the expectations of Ngai Tahu that are drawn from within Maori society as set out earlier in Section II of this article. Although not directly mentioned as such, Maori custom law principles are espoused in the Clause 7 acknowledgement of Ngai Tahu rangatiratanga and mana over the South Island lands within its boundaries, and in the recognition of Ngai Tahu as tangata whenua and as holding rangatiratanga within the Takiwa of Ngai Tahu Whanui.

Although couched in Treaty terms, it is against these three standards that the Crown/Ngai Tahu relationship will be assessed in the future “new age of co-operation” referred to in Clause 8. As with Waikato-Taimui, there is no direct admission that Maori Ngai Tahu have carved out a permanent place in the constitutional framework of Aotearoa New Zealand government. Although the legislation avoids such a direct conclusion, the mutual activity between the two parties, especially when read against a background of Maori custom law principles, and the way Ngai Tahu has conducted itself following the settlement, supports such as outcome.

A New Ngai Tahu Governance Structure

i. Statutory definition of Ngai Tahu – Iwi Membership

Te Runanga o Ngai Tahu Act formalises several governance matters agreed on between Ngai Tahu leaders and the Crown: First, it establishes Te Runanga o Ngai Tahu as the official representative of Ngai Tahu whanui for the future¹¹⁹ and recognises it “for all purposes” including when consultation is required with Ngai Tahu¹²⁰; second, it establishes the territory of Ngai Tahu according to an earlier Maori Appellate Court decision in *Re a claim to the Waitangi Tribunal by Henare Rakihia Tau*¹²¹; and third, it defines the criteria for membership as a beneficiary of Ngai Tahu whanui.¹²² The members of Ngai Tahu Whanui are defined under section 7 (1) (a):

Ngai Tahu Whanui are the descendants of –

(a) ... members of Ngai Tahu iwi living in the year 1848 whose names are set out in the list ... of the book containing the minutes of the proceedings and findings of a committee (commonly known as the Ngaitahu Census Committee) appointed in the year 1929.

The membership is linked to Ngai Tahu elders descended from the primary hapu of Ngai Tahu, Ngati Mamoe and Waitaha – Kati Kuri, Ngati Irakehu, Kati Huirapa, Ngai Tuahuriri and Ngai Te Ruahikihiki. There are currently 41,000 registered members on the whakapapa data-base for Ngai Tahu whanui, a rise of 3,500 since 2006.¹²³

ii. Ngai Tahu – Political Structure

Te Runanga o Ngai Tahu Act 1996 sets up a completely new centralised governing body for Ngai Tahu.¹²⁴ Members of Ngai Tahu Whanui must affiliate to one or more papatipu runanga as set out in the First Schedule of the Act. The runanga are regionally-based rather than Hapu-based organisations whose traditional Hapu boundaries can overlap. Therefore individuals may easily affiliate to two or more runanga. Elected representatives from each runanga form Te Runanga o Ngai Tahu.¹²⁵ The status of Te Runanga o Ngai Tahu is set out in section 15:

- 1) Te Runanga o Ngai Tahu shall be recognised for all purposes as the representative of Ngai Tahu Whanui.
- 2) Where any enactment requires consultation with any iwi or with any iwi authority, that consultation shall, with respect to matters affecting Ngai Tahu Whanui, be held with Te Runanga o Ngai Tahu.

¹¹⁹ Section 6.

¹²⁰ Section 15 (1) and (2).

¹²¹ 12 November 1990, 4 South Island Appellate Court Minute Book 672. Section 5.

¹²² Section 13.

¹²³ *Te Runanga o Ngai Tahu Annual Report, 2007*, 26.

¹²⁴ See section 16. The Charter referred to was adopted by Papatipu Runanga representatives on 21 August 1993.

¹²⁵ See ss 8 and 9 Te Runanga o Ngai Tahu Act 1996.

The Act sets out a formal requirement for Te Runanga to carry out consultation with Papatipu Runanga. It places an obligation on Te Runanga to seek the views of Papatipu members, to “have regard” to those views and to act in the best interests of Ngai Tahu Whanui.¹²⁶ The executive functions of Te Runanga o Ngai Tahu are carried out by:

- The Office of Te Runanga o Ngai Tahu which manages the delivery of social and cultural programmes to its members, and
- Ngai Tahu Holdings Corporation Limited, which manages its commercial activities.

This governance structure was reviewed in 2006. According to the Kaiwhakahaere (Chairman) of Te Runanga, the review was necessary “to make sure we are a strong, strategic and coherent organisation that will be better able to serve Ngai Tahu whanau”.¹²⁷ The governance review found that there was a lack of alignment of goals between social and commercial activities, and between central Iwi and local Hapu interests. Te Runanga appointed an interim Board to perform the Executive Trusteeship function of providing strong corporate governance to Te Runanga until March 2007. According to Solomon, part of the Board’s role “is to ensure Te Runanga has a strong internal structure with the right skills and expertise, so we can continue our commercial growth. In turn this will allow us to deliver sustainable benefits like Whai Rawa, (financial services) the Ngai Tahu Fund and runanga distribution.”¹²⁸

iii. Using Maori custom law principles to define future goals

While the form of Ngai Tahu government is laid out in statute, the values that drive the Runanga are drawn from Maori custom law. Set out in the Iwi’s Annual report each year, they are collective in nature and articulate the Runanga’s obligations to the people as being the following:¹²⁹

Vision

Tino Rangatiratanga – Mo tatou, a, mo ka uri a muri ake nei
For us and our children after us ...

Values

Rakaitirataka

Ngai Tahu staff are committed to upholding the mana of Ngai Tahu at all times and in all that they do.

Whanaukataka

Ngai Tahu staff respect, foster and maintain important relationships within the organization, within the iwi and within the community.

¹²⁶ Section 15 (3).

¹²⁷ *Te Runanga o Ngai Tahu Annual Report 2006*, 11.

¹²⁸ *Te Runanga o Ngai Tahu Annual Report 2006*, 11.

¹²⁹ *Te Runanga o Ngai Tahu Annual Report 2006*, 2.

Manakaakitaka

Ngai Tahu staff pay respect to each other, to iwi members and to all others in accordance with tikanga Maori.

Tohukataka

Ngai Tahu staff pursue knowledge and ideas that will strengthen and grow Ngai Tahu and our community.

Kaitiakitaka

Ngai Tahu staff work actively to protect the people, environment, knowledge, culture, language and resources important to Ngai Tahu for future generations.

Manutioriori/Kaikokiri

Ngai Tahu staff are imaginative and creative leaders who must continually break new ground.

Differences in dialect between Ngai Tahu and other Iwi, including Waikato-Tainui are apparent here, with Ngai Tahu favouring the use of “k” instead of “Ng” in most instances. However, notwithstanding this, the same customary principles are used throughout Aotearoa New Zealand, with their application in different localities changing to suit local circumstances. So for example, while Ngai Tahu place great value on their mountain, Aoraki, as their symbol of ancestral continuity of mana and tupuna, Waikato-Tainui will articulate their relationship with the Waikato River using the same principles and values.

iv. Ngai Tahu – Social Goals

Further to the broad principles set out above, Acting Chief Executive Officer of the Runanga Office, Anake Goodall, highlights the importance of constantly keeping in mind the need to:¹³⁰

genuinely engage with Ngai Tahu whanui and Papatipu Runanga to develop a deeper, clearer understanding of the needs and aspiration of our communities. The challenge is then to translate the many messages into the many actions that will, in combination, truly speak to that collective vision.

The product of engaging in the process of pulling together and articulating the will of the people is “Ngai Tahu 2025”. This is an Iwi vision that identifies nine areas of importance in future iwi development. They are:¹³¹

Te Whakaariki - influencing external decision makers;
To Tatou Ngai Tahutanga - creating a vibrant Ngai Tahu culture;
Ko Nga Whakapapatanga - enhancing communication within the iwi;
Te Whakatipu - supporting local regional governance and initiatives;

¹³⁰ *Te Runanga o Ngai Tahu Annual Report 2007*, 16.

¹³¹ *Te Runanga o Ngai Tahu Annual Report 2006*, 3.

Te Ao Turoa - preserving the natural environment for future generations to enjoy; Whanau - providing dedicated resources to enhance whanau welfare; Matauranga - focusing on the education of iwi members; Te Putea - creating secure investment planning of iwi funds, and Te Kaitiakitanga me te Tahuhu - increasing the effectiveness of their own governance.

These are not simply aspirational. Specific initiatives are linked to each of these goals.¹³² They include the establishment of Whai Rawa, a long term matched-savings scheme for iwi members in 2006, support for early childhood and numeracy and literacy programmes for Ngai Tahu children, and working with Crown organisations to foster the inclusion of Ngai Tahu curriculum in tertiary education. Research into, and funding for, early childhood education, marae based language programmes, and web-based resources for schools, as well as the funding of individual tuition costs and grants and scholarships, also feature prominently in 2007.¹³³ Growth of the cultural capacity of Ngai Tahu has been supported through the funding of projects for whanau and marae weaving, carving, and other cultural projects.¹³⁴ The delivery of health and parenting services by Maori providers, including “no-sweat parenting” roadshows throughout Ngai Tahu, are other social initiatives given support in 2007.¹³⁵

The establishment of Ngai Tahu Finance, provides members with finance rates that are much lower than current market rates.¹³⁶ Maintaining a variety of communication mechanisms is seen as vital to keep Iwi members informed and to encourage involvement in tribal activities. Tahu Communications provides a one-stop shop for iwi communication, which includes a radio station, Tahu FM, creating television programmes and regular publication of the Iwi magazines, *Te Karaka* and *Te Pamui Runaka*.¹³⁷

v. Ngai Tahu – Commercial/Economic Assets

Ngai Tahu Holdings Corporation is responsible for commercial trading of the assets held by Ngai Tahu. These include, Property, Equities, Seafood, Tourism and other commercial ventures which provide revenue for the social aspirations of the Iwi.

With the exception of 2006, when a net loss of \$11 million occurred after the Corporation had written down \$22 million worth of assets, Ngai Tahu Holdings Corporation has steadily improved its net yearly profit margin. In 2002 it showed a net profit of \$2 million; 2003 - \$11 million; 2004 - \$13 million; 2005 – \$16 million; and 2007 - \$60 million.¹³⁸

The Shareholders Equity (Total Assets less Term Debt) has also steadily risen over the years: 2002 - \$276 million; 2003 - \$300 million; 2004 - \$325; 2005 - \$379; 2006 - \$411 million and 2007 - \$480 million.¹³⁹ Ngai Tahu Holdings aims to become a billion dollar corporation within the next 10 years.¹⁴⁰

¹³² Set out in *Te Runanga o Ngai Tahu Annual Reports*, 2006 at 3 and 2007 at 6-7.

¹³³ *Ibid*, at 20.

¹³⁴ *Ibid*, at 22.

¹³⁵ *Ibid* at 26.

¹³⁶ *Ibid* at 27.

¹³⁷ *Ibid* at 27.

¹³⁸ *Ibid* at 10. Figures rounded to the nearest \$1 million.

¹³⁹ *Ibid* at 10. Figures rounded to the nearest \$1 million.

¹⁴⁰ Wally Stone, “Ngai Tahu Group Chairman’s Report”, *Te Runanga o Ngai Tahu Annual Report* 2006, 16.

Conclusion

While several other smaller settlements exist, which provide money to assist the economic development of local Hapu and Iwi, the above examples outline the two largest Iwi, and how they are doing their utmost to support Iwi welfare and development by fleshing out a statutory framework with Maori custom law principles, and implementing them in practices that benefit Hapu and Iwi.

The proof is in the pudding. While both Iwi have experienced years in which significant financial losses have occurred through bad investments, market downturns in ventures such as tourism, and falling prices for resources such as seafood, they have survived to come back stronger. Why? To some extent this is because both institutions have double-glazing. They not only operate according to the tenets of English-based New Zealand law, but they are also held together by the principles of Maori custom law that have bound Maori communities together *mai raano*.

The balance between their money-making activities and feeding the profits back into the community to foster cultural and social goals has also caused internal dissension in both groups, thus highlighting the need for constant internal monitoring and adjustment to reflect changing Iwi needs. Both Iwi have had to balance the enduring personal passion shown by those controlling the political processes to do the right thing for the people who have passed, the present generations, and those yet to come, with the administrative skills essential for successful modern governance.

Waikato-Tainui and Ngai Tahu are the two strongest Iwi government systems in Aotearoa New Zealand. Interaction and political alignment between the two, when it occurs as it surely must, will strengthen them further and ensure that they become major players in the future government of Aotearoa New Zealand. Their experiences are a rich learning ground for the many other Hapu and Iwi, and indigenous groups, whose forms of governance are still in the embryonic stage.

V. CONCLUSION

This article set out to prove that two major Iwi, Waikato-Tainui and Ngai Tahu, have become part of the constitutional order of New Zealand government. It argued that they have achieved this through a combination of legislation passed by the government as part of the Treaty Settlement Process, and, more importantly, by fleshing out that framework with Maori custom law principles that have held Maori society together *mai raano*.

The article examined Maori identity in some depth and from two different viewpoints. The first is as it is perceived within a wider New Zealand society that has been heavily influenced by past New Zealand legislation and Crown policies that have negatively impacted on Maori. This was then contrasted with how Maori society defines itself according to Maori custom law principles that are derived from a different cultural base. This discussion was an essential starting point because the ability to “be Maori” is still contested within Aotearoa New Zealand and without a distinctive Maori identity there can be no true system of Maori governance. The conclusion reached was rather an obvious one, i.e. that Maori have a stronger claim to their identity being linked to the territory of Aotearoa New Zealand than any other groups, including the descendants of the earliest settlers. Although past governments have tried to destroy that identity, present governments have set about remedying

their actions by supporting initiatives aimed at re-invigorating the Maori language and culture through legislation.

Section III of the paper examined some of the Principles that underpin Maori custom law. It asserted that these principles inform the Maori text of Te Tiriti o Waitangi and, therefore, the relationship between Hapu and Iwi and the Crown articulated in the Treaty of Waitangi. It also posited that the Treaty relationship links Maori and the Crown in a partnership *for all time*. While the Crown may try to control that relationship using legislation, Maori will continue to hold the Crown accountable under Maori custom law. Thus while successive governments will change their minds, the institutional memory of Hapu and Iwi will maintain remain steadfastly linked to their territories, ancestors and future generations.

Section III also set out some of the fundamental principles that hold Maori society together and used oral testimony from Maori leaders and references to the Waitangi Tribunal hearings to, first of all confirm the existence of Maori custom law, and second, demonstrate the strength and resilience of those principles in keeping Maori society united, despite long-term, adverse government activity in the past. Although some Maori principles are now included in New Zealand legislation, their impact is still strongest within the Maori community, where they continue to inform communal decision-making.

The *coup de grace* of the argument, however, rests in Section IV. The extremely long winded and official re-articulation of a Treaty relationship based on a “new partnership” in the Deeds of Settlement, Preambles and the Apologies of both the Waikato and Ngai Tahu Settlement Acts is more than sufficient evidence of a constitutional relationship being reaffirmed by legislation. In the aftermath, the Maori custom law principles that guide the actions of both sets of Iwi leaders are proudly displayed in all their official documentation. And they are not simply visionary, they are attached to concrete actions that will maximise the cultural, economic and social survival of the group inter-generationally. Although Waikato-Tainui and Ngai Tahu have chosen different types of political infrastructure, both groups are flexible enough and more than willing to alter their structures to better achieve their Iwi goals. Both groups have also struggled, but in each case their Hapu and Iwi dynamics have held firm and they have gone on to produce some outstanding outcomes for their people.

A final, comforting thought for New Zealanders who may feel that such overwhelming success will renew sovereigntist claims, is that this form of governance does not aspire to take over the role of the central government in meeting its obligations to “all New Zealanders”. It is content to be an adjunct working alongside to achieve some mutual goals for Hapu and Iwi - for us and our future generations – mai raano.

Attachment 1

Te Tiriti o Waitangi and the Treaty of Waitangi (Source: Claudia Orange, The Treaty of Waitangi, Allen and Unwin, Wellington, 1987, 257-259.)

Te Tiriti o Waitangi (Maori Text)

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira - hei kai wakarite ki nga Tangata maori o Nu Tirani - kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu - na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanaranga kia kaua ai nga kino e puta mai ki te tangata maori ki te Pakeha e noho ture kore ana.

Na kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane amua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te tuatahi

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu - te Kawanatanga katoa o o ratou wenua.

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu - ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua - ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini - Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

[signed] W. Hobson Consul & Lieutenant Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu. Ka tangohia ka wakaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Note: This treaty text was signed at Waitangi, 6 February 1840, and thereafter in the north and at Auckland. It is reproduced as it was written, except for the heading above the chiefs' names: ko nga Rangatira o te Wakaminenga.

The Treaty of Waitangi (English text)

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and secure to them the enjoyment of Peace and Good Order has deemed necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the first

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over the respective Territories as the sole sovereigns thereof.

Article the second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[signed] W. Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate

and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

Note: This English text was signed at Waikato Heads in March or April 1840 and at Manukau on 26 April by thirty-nine chiefs only. The text became the "official" version.

Author's Note: Most Maori signed the Maori text of Te Tiriti which retains "tino rangatiratanga" or "absolute authority" to Maori hapu. The English text, however, cedes "sovereignty" absolutely, to the Crown of England. The debate about how the two fit together in a constitutional democracy is ongoing and the relationship between Maori and the Crown is constantly being reviewed. Although not legally recognised, the Treaty/te Tiriti remains the hallmark by which many New Zealanders, Maori and Pakeha alike, evaluate the justice of Crown actions.

Glossary of Terms

Hapu	Sub-tribe (economic, social and political group consisting of extended families or whanau who are related by blood and shared customary practices).
Hui	Meeting, gathering of people to discuss issues of importance
Iwi	Tribe (larger economic, social and political group related by blood and share customary practices)
Kaumatua	Elder/s
Kohanga Reo	Language nest, preschool where Maori is the language spoken.
Kura kaupapa	Primary and secondary schools where Maori language and culture are the principal modes of instruction.
Mana	Power, prestige and personal status. Institutional and collective authority.
Maori	Native of Aotearoa, descendant of pre-European occupants of Aotearoa New Zealand.
Marae	Meeting place. Collection of land and buildings that includes the meeting house, dining areas and ablution blocks. The marae is usually located on ancestral land belonging to whanau, hapu and iwi groups and serve as a focal meeting point.
Mauri	Life force, animation, vitality of people and things, identity.
Ngati	Prefix meaning “belonging to” before a hapu or iwi name.
Pakeha	Person of European (usually British) descent; white non-Maori.
Papatuanuku	Primordial female ancestor of the Maori; earthmother.
Rangatira	Chief, a person of authority within a group.
Raupatu	Confiscation without justification.
Tangata Whenua	People of the land; Maori; prior occupants of Aotearoa.
Tapu	Sacred, of value, restricted from ordinary use.
Te Reo	Maori language.
Tino Rangatiratanga	Maori authority or sovereignty - generally used in association with Article 2 of the Tiriti o Waitangi, 1840.

Whakapapa	Ancestral connections.
Whanau	Extended family.
Whanaungatanga	The principle of being connected

Tino Rangatiratanga and Sustainable Development: Principles For Developing a Just and Effective System of Environmental Law in Aotearoa

CARWYN JONES*

I INTRODUCTION

It is now uncontroversial to say that there was once a time when iwi and hapu exercised complete authority over all the lands and natural resources of Aotearoa. But today, many of those lands and resources have been completely removed from any Maori authority. Even those natural resources that remain in the ownership of Maori communities are now subject to an imposed legal system. This is not consistent with the guarantees set out in the Treaty of Waitangi, nor, I argue, is it conducive to producing good environmental outcomes.

This paper is concerned with the development of a just and effective environmental law regime in Aotearoa/New Zealand. In using the term 'just', I am envisaging a regime that would provide for the recognition of the rights and obligations agreed to in the Treaty of Waitangi. A just regime would be a system of environmental laws that are based on the partnership established by the Treaty and deliver on the guarantees in the Treaty, particularly as those guarantees relate to tino rangatiratanga and the recognition of Maori environmental law and practice. An 'effective' environmental law regime, on the other hand, would not only be effective at delivering that Treaty justice, but also effective at delivering good environmental outcomes, specifically the objectives of sustainable development. This paper adopts an interdisciplinary perspective to outline an approach to high-level reform of our system of environmental law. The paper draws on Treaty of Waitangi law and practice, Maori law and practice, and environmental law and practice to suggest a set of principles which could lead to a just and effective system of environmental law.

Part I of this paper considers, in general terms, the basic requirements of a just and effective system of environmental law. This part of the paper sets out the basic requirements of such a system in terms of the Treaty relationship, Maori environmental law, and in terms of sustainable development objectives.

After identifying the basic requirements in Part I, the paper progresses to consider, in Part II, a set of principles to guide the development of environmental law in a way which will meet those requirements. The principles are described at a high level to encompass a wide range of specific legal mechanisms which might be applied in order to give effect to those principles. These principles are, again, drawn from each of the three key areas of law and practice - the Treaty relationship, Maori environmental law and practice, and sustainable development - in which a system of environmental management must deliver if it is to provide a just and effective legal regime. The purpose of this paper is to propose guidelines that could give effect to an envisioned just and effective legal regime. Such a regime could be developed from our existing law and policy arrangements but, at the same time, our aspirations for a

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just and effective regime should not be constrained by the existing arrangements. This paper is, therefore, less concerned with the existing system of environmental law and policy than it is with identifying guidelines that direct us towards a more just and effective system.

II PART I: BASIC REQUIREMENTS OF A JUST AND EFFECTIVE SYSTEM OF ENVIRONMENTAL LAW

Requirements from the Treaty of Waitangi and Tino rangatiratanga

A discussion of management of Maori resources should begin by acknowledging the continuing public discussion surrounding Maori autonomy and self-determination, or tino rangatiratanga. Tino rangatiratanga is at the heart of the relationship between Maori and the Crown and issues of environmental governance cannot be discussed without reference to it. Management and development of natural resources must ultimately be seen as a function of indigenous governance.¹ Maori self-determination has always been a contentious issue and the political and legal arguments for the recognition of tino rangatiratanga have previously been articulated by many eminent scholars.² A brief overview of tino rangatiratanga is included here in order to suggest the basic characteristics of an environmental law regime that are required by the Treaty of Waitangi.

Maori claims to self-determination have historically been predominantly based on the Treaty of Waitangi, although there are many potential sources of Maori rights and claims to self-determination. For example, reliance on the earlier Declaration of Independence (a document signed in 1835 in which a confederation of chiefs declared their independence, protected by the British Crown) is perhaps a more powerful position for Maori to argue from.³ There is also a growing field of international human rights law that could prove useful.⁴ However, it is broadly accepted that it is the Treaty of Waitangi (although perhaps interpreted with reference to the declaration of Independence, international and common law) that sets out the relationship between Maori and the Crown.⁵ It is for this reason that it has been the focus of Maori claims in the past, and will continue to be that focus for the foreseeable future.

As is widely known today, the Treaty of Waitangi has both an English text and a Maori text and the use of two different languages has, from 1840 onwards, resulted in differing expectations as to sovereignty and autonomy.⁶ Today, the Waitangi Tribunal is directed by the Treaty of Waitangi Act 1975 to assess claims made under

¹ Andrea Tunks “Rangatiratanga, Partnership and Protection” in Merata Kawharu (ed) *Whenua: Managing Our Resources* (Reed Books, Auckland, 2002) 322, 323.

² See, for example, Moana Jackson “Where Does Sovereignty Lie?” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 196; Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Maori” in Michael Belgrave, Merata Kawharu, and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (OUP, Melbourne, 2005) 330; Joe Williams “Not Ceded But Redistributed” in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 190.

³ Mason Durie *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination* (OUP, Auckland, 1998), 209.

⁴ See Claire Charters “Indigenous Peoples and International Law and Policy” in Benjamin J Richardson, Shin Imai, and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oxford, 2009) 161.

⁵ Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3rd edition, Brookers, Wellington, 2007), 47; Matthew S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

⁶ Palmer, above n 5, 85.

the Treaty with reference to both texts.⁷ This is an approach that the New Zealand courts have also adopted through the development of Treaty principles.⁸

For Maori, it is the guarantee of tino rangatiratanga that is the central concept of the Treaty.⁹ Often translated as 'chieftainship'¹⁰ or simply 'authority',¹¹ people may take different views as to exactly what tino rangatiratanga involves and how best it is to be achieved, but it is this part of the Treaty that Maori rely on most heavily in dealings with the Crown. Various Waitangi Tribunal reports have explored the concept of tino rangatiratanga and found it calls for a level of Maori autonomy.¹² Numerous Maori thinkers such as Moana Jackson,¹³ Ranginui Walker,¹⁴ Joe Williams,¹⁵ and Sir Hugh Kawharu¹⁶ have argued for a level of Maori autonomy on legal, moral, and political bases. Mason Durie has suggested that, when the arguments from these different bases are considered, "it is difficult not to conclude that the Treaty of Waitangi was about the establishment of a single nation state and provision for a degree of Maori autonomy".¹⁷ There are of course contrary views,¹⁸ but what has been outlined here is the orthodox position of Treaty scholarship. This position is well established and supported and does not require any additional arguments to be added in this paper.

Therefore, if a just resource management regime is to be developed, by which I mean a regime that is consistent with the guarantees set out in the Treaty, then the development of such a regime must acknowledge tino rangatiratanga and take place according to modes of interaction that reflect the guarantees in the Treaty. Principles to achieve this are suggested below in Part II. I suggest that these principles must also be consistent with the requirements of Maori environmental law and practice, and sustainable development, which this paper now turns to consider.

III REQUIREMENTS FROM MAORI ENVIRONMENTAL LAW AND PRACTICE

The basis of Maori environmental law and practice is the concept of kaitiakitanga. Kaitiakitanga has been the subject of considerable analysis¹⁹ and is often described as the Maori ethic of stewardship, and taking responsibility for looking after one's own.²⁰ It is inherently connected to tino rangatiratanga and the requirements that

⁷ Treaty of Waitangi Act 1975, s 5(2).

⁸ *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641 (HC and CA).

⁹ See Hineahi Melbourne (ed) *Maori Sovereignty: The Maori Perspective* (Hodder Moa Beckett, Auckland, 1995).

¹⁰ See I H Kawharu's translation reproduced in Michael Belgrave, Merata Kawharu, and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (OUP, Melbourne, 2005) 391.

¹¹ E T J Durie "The Treaty in Maori History" in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 156.

¹² See, for example, Waitangi Tribunal Ngai Tahu Report: Wai 27 (Brooker & Friend Ltd, Wellington, 1991).

¹³ Moana Jackson "The Colonization of Maori Philosophy" in Graham Oddie and Roy Perrett (eds) *Justice, Ethics, and New Zealand Society* (OUP, Auckland, 1992) 1.

¹⁴ Ranginui Walker "The Treaty of Waitangi: As the Focus of Maori Protest" in I H Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (OUP, Auckland, 1989) 263.

¹⁵ Williams, above n 2.

¹⁶ I H Kawharu "Mana and the Crown: A Marae at Orakei" in I H Kawharu (ed) *Waitangi: Māori and Pakeha Perspectives of the Treaty of Waitangi* (OUP, Auckland, 1989) 211.

¹⁷ Durie, above n 3, 209.

¹⁸ See for example Richard Epstein "Property Rights Claims of Indigenous Populations: The View from the Common Law" (1999-2000) 31 U Tol L Rev 1, 12-14.

¹⁹ See, for example, M Roberts, W Norman, N Minhinnick, D Wihongi and K Kirkwood "Kaitiakitanga: Maori Perspectives on Conservation" (1995) 2 Pacific Conservation Biology 7.

²⁰ See New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 40. John Patterson *People of the Land: A Pacific Philosophy* (Dunmore Press, Palmerston North, 2000) 123.

kaitiakitanga place on an environmental law regime come from within the framework of the Maori legal system, which is itself derived from the system of tikanga Maori.

Within such a framework it is the basic balance in the spiritual, emotional, physical or social well-being of the individual or whanau that needs to be maintained, with reference to fundamental values such as whanaungatanga, mana, utu, tapu and noa. Tikanga directs that the way to maintain this balance is through acknowledging the links between all forces and all conduct in a community. For example, in the context of criminal law, this means that the wider kin-group accepts responsibility for the individual's actions and looks to its own dynamics to remove the underlying imbalance because the rights of the individual cannot be separated from the rights of the wider kin-group.²¹ This tikanga, or way of behaving, is equally applicable to environmental authority and kaitiakitanga. Kaitiakitanga is not simply about identifying ourselves as having close connections with the natural environment, but identifying as part of the natural environment. Decisions about environmental matters are therefore decisions about the entire community. Consequences of environmental decisions are consequences that directly affect the community (the people and all other parts of the natural world).²²

According to Maori, the natural and spiritual worlds are both inherently connected to the world of humankind and to each other. At the very centre of Maori identity is the concept of the relationship to the land and the Earth-mother, Papatuanuku.²³

Furthermore, people are seen very much as agents in the Maori world-view, even as agents of natural phenomena. From this perspective it follows that people must take responsibility for the environment, or at least that everyone's actions have environmental consequences.²⁴

In the Maori world, authority does not exist only in human beings. The various atua (supernatural beings/gods) exercise authority over most matters, either through people or through the natural world. Tikanga, or the correct way of behaving in any given situation, is determined by reference to those aspects of the world which link communities to their land and to their ancestors.²⁵ It is true that these decisions might be made by individuals or groups of individuals as councils or assemblies, but the effective force of these decisions is based on connections with the ancestors.²⁶

In the context of environmental law, resource management and sustainable development this means that every action must be environmentally justified. Everything in the natural world, be it a tree, a river, or the land itself, has an intrinsic value. To use these resources changes their intrinsic value, and if the change does not increase their value as part of the natural world, then the change is not justified.²⁷ Clearly, this does not mean natural resources can never be used. However, it does require that serious consideration be given to any environmental effects, and if the action is to be justified, the benefits must outweigh the damage. This balancing test is not simply an economic cost-benefit analysis, as any change to the natural world automatically involves a high cost. It is more than just sustainable development, but

²¹ Moana Jackson *The Maori and the Criminal Justice System: A New Perspective – He Whaipanga Hou* (Department of Justice, Wellington, 1988) 39.

²² Maori Marsden *The Natural World and Natural Resources: Maori Value Systems and Perspectives* (prepared for the Resource Management Law Reform Core Group, Ministry for the Environment, Wellington, 1988).

²³ Patterson, above n 19, 14.

²⁴ *Ibid.*, 63-75.

²⁵ Jackson, above n 21, 42.

²⁶ *Ibid.*

²⁷ Marsden, above n 22.

restricts development, or use of natural resources, to those measures that actively reinforce the natural environment.

These fundamental aspects of Maori environmental philosophy, and the important differences between this philosophy and what might be generally termed a Pakeha environmental philosophy, must be identified and recognized, because it is only through this recognition that sustainable development systems can be developed which allow these environmental philosophies to co-exist and interact. This would be an important aspect of any regime that could support a just and effective system of environmental law for indigenous and non-indigenous communities in New Zealand. Principles based on Maori law and a Maori environmental philosophy that could help to achieve this recognition in the development of an appropriate resource management regime are identified in Part II. These principles must be consistent with the Treaty relationship, as described above. In order to achieve good environmental outcomes they must also be supportive of sustainable development. This paper now considers the basic requirements that sustainable development objectives place on a system of environmental law and policy.

IV REQUIREMENTS FROM SUSTAINABLE DEVELOPMENT

The language of sustainable development permeates the resource management and environmental law discourse. Much has been written about sustainable development, and yet there is no real agreement as to exactly what the concept entails. It is partly for this reason that I have chosen to use sustainable development as a focus of this paper. It is a concept which is demonstrably culturally dependent. One person's perspective of what is sustainable, and indeed what can be considered development, can be different from another's.²⁸ Some have argued that this renders the concept 'sustainable development' all but useless.²⁹ However, this paper proceeds from the position that sustainable development can be usefully applied. It is its very flexibility that enables it to be applied in various cultural and economic contexts.

Probably the most commonly cited definition of sustainable development is that proposed in the Brundtland report: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."³⁰ Brundtland's definition is further elaborated and divided into four key aspects: the elimination of poverty; cementing this elimination of poverty through conserving resources and fostering resource growth; including social and cultural growth, as well as the economic aspect, within the concept of development; and the incorporation of both economics and ecology in decision-making.³¹ This elaboration indicates that, if sustainable development policies are to achieve their goals, they must incorporate both economic and ecological concerns. The integration of economic and environmental decision-making is perhaps the area of most common agreement in the sustainable development discourse.³²

²⁸ See Desta Mebratu "Sustainability and Sustainable Development: Historical and Conceptual Review" (1998) 18 *Environmental Impact Assessment Review* 493.

²⁹ Scott Campbell "Green cities, growing cities, just cities?: Urban planning and the Contradictions of Sustainable Development" (1996) 62 *Journal of the American Planning Association* 296.

³⁰ World Commission on Environment and Development *Our Common Future: Report of the World Commission on Environment and Development* (OUP, New York, 1987) [WCED *Our Common Future*] 43.

³¹ *Ibid.*

³² Robert Prescott-Allen *The Wellbeing of Nations: A Country by Country Index of Quality of Life and the Environment* (Island Press, Washington D.C., 2001). Stephen Knight "Agenda 21 in New Zealand: Not Dead, Just Resting" (2000) 7 *Australian Journal of Environmental Management* 213; Parliamentary Commissioner for the

However, the integration of decision-making processes may not achieve the desired results if sustainable development is viewed merely as a process for setting limits. Drummond and Marsden argue that the concept of sustainable development is sound, and indeed laudable, but better practical use can be made of the concept than current prevailing definitions allow.³³ At present, Drummond and Marsden argue, the discussion around sustainable development is focused on determining appropriate sustainable limits. The sorts of questions that tend to be asked are “Is x amount of economic activity within sustainable ecological constraints? Is the limit of pollution that must not be exceeded set at y? If this generation operates at level z, will all future generations be able to do the same?” These sorts of questions will always be open to debate, and the attention they receive has proved to be ineffective and little more than a diversion from any significant moves toward actual sustainable communities. “The real problem lies in the fact that asking where, precisely, the line should be drawn is the wrong approach. What should be explored is why and how the line will tend to be crossed wherever it is drawn”.³⁴

These concerns are also reflected in the comprehensive report on sustainable development released by New Zealand’s parliamentary commissioner for the environment in 2002:³⁵

Sustainable development is an evolving process intended to improve the well-being of society for the benefit of current and future generations. . . . Decisions need to reflect an understanding of social, cultural, ethical, economic and environmental interests of the society, and the interactions and tensions that occur among these interests. Decision makers must take responsibility for actions that might affect future generations who are unable to participate in the decision-making process.

In order to address these issues, this paper adopts a realist perspective of sustainable development. A realist perspective recognises that sustainability is dependent on multiple and interconnected factors.³⁶ This approach will allow the system to be explored as a whole, consistent with a Maori holistic world-view. In this sense sustainable development is more of an ethic or an ideal than a fixed limit. Realistically, the relationships between all the various environmental and ecological factors in any given situation cannot be perfectly and predictably determined. Therefore, the best that those responsible for the environment can do is to continually reduce damaging interference with the complete system. This still inflicts limited changes on the environment and so makes it impossible for future generations to enjoy exactly the same natural environment as we do today. However, striving for perfect sustainability is arguably a much more effective process to engage in than trying to determine the limits of what the environment can bear. The aim of a realist approach is not simply to address the more visible ecological problems, but to look at all the contributing factors, with the view to making the system as sustainable as

Environment *Creating Our Future: Sustainable Development for New Zealand* (Parliamentary Commissioner for the Environment, Wellington, 2002) [PCE *Creating Our Future*].

³³ Ian Drummond and Terry Marsden *The Condition of Sustainability* (Routledge, London, 1999).

³⁴ *Ibid*, 21.

³⁵ PCE *Creating Our Future*, above n 32, 38.

³⁶ I Drummond and T K Marsden “Regulating Sustainable Development” (1995) 5 *Global Environmental Change* 51.

possible. I suggest that a realist theory and a systems-based approach to sustainable development are particularly necessary within the New Zealand context where Maori communities will be involved.

Sustainable development is not a Maori concept. However, Maori have always had a strong ethic of sustaining land and resources as part of sustaining the community. Maori society has also always been willing to encourage development that supports the community as a whole (including the natural environment).³⁷ Sustainable development can, therefore, make sense in the Maori world, but only if it is applied in a way that allows Maori conceptualisations of sustainability and development to form the basis of a holistic, systems-based ethic. As the Parliamentary Commissioner for the Environment has noted:³⁸

Any definition of sustainable development needs to reflect the values of the society or culture concerned. Within New Zealand that includes the values and ethical concerns of tangata whenua. Some values and ethics of Pakeha New Zealanders may be similar to those of tangata whenua, even though there are differing underlying cultural values.

The necessity of a fully integrated approach to sustainable development is a major theme of the Parliamentary Commissioner for the Environment's *Creating Our Future* report.³⁹ This paper will use sustainable development in the same way that report does.

V PART II: PRINCIPLES OF A JUST AND EFFECTIVE SYSTEM

Part I of this paper identified three key areas from which the basic requirements of a just and effective system of environmental law should be drawn. Part II considers a number of principles drawn from these three key areas to guide the development of our environmental law in a way that could meet the basic requirements of a just and effective system of environmental law as outlined in Part I.

A. PRINCIPLES FROM THE TREATY OF WAITANGI AND TINO RANGATIRATANGA

As demonstrated in the recent Waikato River Settlement, the Treaty of Waitangi relationship provides extraordinary scope to develop resource management law in a way that better reflects tino rangatiratanga.⁴⁰ This section examines a number of principles drawn from the Treaty of Waitangi relationship which could be applied to the development of resource management law to provide Maori with effective stewardship of their natural environment.

³⁷ Patterson, above n 20, 65-68.

³⁸ PCE *Creating Our Future*, above n 32, 43.

³⁹ PCE *Creating Our Future*, above n 32.

⁴⁰ Deed of Settlement in Relation to the Waikato River (22 August 2008). While it is still too early to assess the effectiveness of this agreement, the terms of the agreement are significant in that the provisions of this Deed are designed to implement mechanisms for the restoration and protection of the health of the Waikato River, based on the commitment by the Crown and Waikato-Tainui to enter into a "new era of co-management" in relation to the Waikato River.

These principles should not be confused with the Treaty principles that have been developed by the New Zealand courts and the Waitangi Tribunal,⁴¹ nor the Crown negotiating principles that the Office of Treaty Settlements has produced.⁴² The guidelines that follow are rather based upon the Treaty guarantees, Maori experiences within the settlement process, and what those experiences suggest is necessary to construct a model of interaction based on the Treaty relationship. They do not necessarily reflect the adversarial bargaining that is often evident in the Treaty settlement process. In many ways, they aim to directly address problematic aspects of that process. The guidelines suggested here are: 'Tino Rangatiratanga' (respecting the guarantees of the Treaty of Waitangi); 'Negotiated Relationships' (developing cooperative ways of working together); and 'Tangata Whenua' (look to indigenous ways of organising).

i. 'Tino rangatiratanga' as a principle of environmental law reform

Tino rangatiratanga is the primary guarantee made to Maori within the Treaty of Waitangi. As such, it has been a central component of many Waitangi Tribunal inquiries.⁴³ As has been outlined, there are many aspects of tino rangatiratanga, though all related. In the context of the environment and resource management, tino rangatiratanga encompasses the concept of effective Maori authority over Maori resources. The exercise of kaitiakitanga as a function of effective governance and self-determination is definitely included.⁴⁴

The guarantee of tino rangatiratanga in the Treaty is provided in exchange for the cession of kawanatanga. Kawanatanga should also fall within the resource management law reform principle of tino rangatiratanga. Kawanatanga and tino rangatiratanga, together, represent the framework of the Crown-Maori relationship. In the development of environmental law, this framework should be one of the most basic considerations.

The Waitangi Tribunal has determined that among the principles of the Treaty of Waitangi is a principle of mutual benefit and development.⁴⁵ It is not difficult to perceive that the Treaty relationship would have initially been entered into for reasons of mutual benefit and development. Tino Rangatiratanga, as applied as a principle of environmental law reform, should include the aim of the mutual benefit and development of Maori communities and the broader New Zealand society.

ii. 'Negotiated relationships' as a principle of environmental law reform

The implementation of the current Treaty settlement process contains many lessons that relate to the development of legal regimes which affect relationships between Maori and the Crown. One of the most important lessons to be learnt from the Treaty settlement process is the importance of fair negotiation at all stages of the process.⁴⁶ After all, the Treaty of Waitangi itself demands that the parties deal with each other

⁴¹ See Te Puni Kokiri *He Tirohanga o Kawa ki te Tiriti o Waitangi* (Te Puni Kokiri, Wellington, 2001).

⁴² Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future* (2 ed, Office of Treaty Settlements, Wellington, 2002) [OTS *Ka Tika a Muri, Ka Tika a Mua*] 30.

⁴³ See Palmer, above n 5, 116-117.

⁴⁴ Waitangi Tribunal *Whanganui River Report: Wai 167* (Legislation Direct, Wellington, 1999) 263-264.

⁴⁵ Waitangi Tribunal *Te Whanau o te Waipereira Report: Wai 414* (GP Publications, Wellington, 1998) xviii.

⁴⁶ See Crown Forestry Rental Trust *Maori Experiences of the Direct Negotiation Process* (Crown Forestry Rental Trust, Wellington, 2003) 14.

fairly.⁴⁷ Any group that is developing environmental law in Aotearoa should be sure to negotiate the process of development itself with Maori communities.

If the development of the law was negotiated fairly in such a way as to include a Maori world-view (for how could fair negotiation exclude this perspective?), then this could provide a foundation for a bijuridical legal regime, that is, one that draws on both Maori and state environmental laws and objectives.

It is not just within the development of a new legal regime that negotiating the Crown-Maori relationship is necessary. The operation and application of the subsequent law must also be subject to negotiation between Maori and the Crown. If Maori are to exercise tino rangatiratanga in a meaningful way, then Maori communities must be free to make their own decisions as regards the management of their natural resources.⁴⁸ However, the Crown must also be able to make decisions in fulfilment of their kawanatanga responsibilities.⁴⁹ Both parties must be free from the command of the other, and yet both must be subject to the relationship set out in the Treaty of Waitangi. Any new resource management regime must allow for the operation and application of the law to be the subject of continual negotiation between Maori and the Crown as equal partners.

iii. 'Tangata whenua' as a principle of environmental law reform

One important aspect of the contemporary application of tino rangatiratanga is an emphasis on local control.⁵⁰ This can also be seen in the Treaty of Waitangi settlements. Provisions are included for local input into environmental decision-making.⁵¹ The development of environmental law should also reflect the importance of local authority. This will no doubt be encouraged if other principles outlined in this paper are applied. For instance, processes, such as those discussed below, which encourage community input also encourage local authority. A principle of mana is also addressed below. Enhancing the mana of those involved encourages local authority. Nevertheless, the 'tangata whenua' principles is considered here as a separate principle so that local control is promoted to the greatest possible extent and as an end in itself.

The basic requirements set out in Part I also suggest the need to develop appropriate Maori structures. The need to work with indigenous, rather than externally imposed, governance structures and processes is gaining increased attention, particularly with regard to Treaty settlements.⁵² The development of Maori structures will be a major factor in the incorporation of Maori values within any new legal regime. The creation of a truly bijuridical regime, the operation of which would be designed around both Maori and state laws, would also necessitate the participation of truly Maori institutions. The establishment of Maori structures would help to

⁴⁷ *New Zealand Maori Council v Attorney-General* [1987] 2 NZLR 641 (CA). Waitangi Tribunal *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa claims: Wai 814* (Legislation Direct, Wellington, 2004) 120.

⁴⁸ Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim: Wai 6* (Department of Justice, Wellington, 1983) 51-52.

⁴⁹ *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517 Lord Woolf. *New Zealand Maori Council v Attorney-General*, above n 47.

⁵⁰ See, for example, *Te Awanui: Tauranga Harbour Iwi Management Plan* (Te Runanga o Ngai Te Rangi, Tauranga, 2008) 16-17.

⁵¹ See *Otska Tika a Muri, Ka Tika a Mua*, above n 42, 96-123.

⁵² See, for example, New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, Wellington, 2006).

engage Maori communities in resource management processes and contribute to the development of legitimate local authority.

B PRINCIPLES FROM MAORI ENVIRONMENTAL LAW AND PRACTICE

The next category of principles that this paper examines is comprised of those principles that are part of a Maori environmental philosophy and comprise key aspects of Maori environmental law and practice. If Maori are to exercise effective authority over their natural resources, a Maori environmental philosophy must necessarily provide the basis for that authority. This section identifies a number of principles drawn from tikanga Maori that could be usefully applied to the development of resource management law which might lead to more effective Maori control over their natural resources and a better expression of tino rangatiratanga. These principles are: 'Whanaungatanga' (recognising the way kinship relationships work and using these structures appropriately); 'Mana' (affirming the authority of the tangata whenua); 'Kaitiakitanga' (respecting relationships with the natural environment).

i. 'Whanaungatanga' as a principle of environmental law reform

Even amongst the other fundamental values that underlie tikanga Maori, whanaungatanga can be seen as a central organising concept.⁵³ Whanaungatanga must be a fundamental consideration in any project involving Maori, from Waitangi Tribunal hearings to research with Maori communities to provision of public services to Maori. Developing appropriate legal responses to concerns about resource management in Aotearoa is no exception. This section of the paper then considers how whanaungatanga might be used as a principle of resource management law reform. Using whanaungatanga as a principle of resource management law reform would mean that any legal regime that is developed must recognise four key aspects of the application of whanaungatanga: Maori communities must be engaged at various appropriate levels; whanaungatanga will be the primary guide for determining appropriate action; whakapapa is, and must remain, flexible; and, basic responsibilities resides with the collective.⁵⁴

The concept of whanaungatanga should provide the framework for the appropriate engagement of Maori communities in any process. Environmental law and resource management processes are no exceptions. As noted above, whanaungatanga is seen as the central value underlying the Maori legal system. Maori society operates through a system of kinship networks and obligations and responsibilities are developed through the recognition of these relationships.⁵⁵ A new construction of resource management laws must recognise this aspect of Maori social organisation. The system of environmental law should look to provide opportunities for rights and obligations to be developed between Maori communities and other communities of interest in a way that acknowledges and respects the values of whanaungatanga.

⁵³ Joe Williams, Chief Judge of the Maori Land Court "He Aha te Tikanga?" (Paper presented at Mai i te Ata Hapara conference, Te Wananga o Raukawa, Otaki, 11-13 August 2000).

⁵⁴ Hirini Moko Mead *Tikanga Maori: Living by Māori Values* (Huia Publishers, Wellington, 2003) 59-62, 215.

⁵⁵ Mead, above n 54.

Whanaungatanga also guides decision-making. Rights and obligations are determined by reference to genealogy. To give appropriate recognition to whanaungatanga, the system of environmental law must allow Maori to continue to make decisions according to whakapapa. The legal regime should respect and promote whakapapa and whanaungatanga as central parts of the Maori decision-making process.⁵⁶

One of the most important characteristics of traditional Maori social organisation is the flexibility of whakapapa. The manipulation of genealogy provides for dynamic social communities. This may be a relatively difficult concept to translate into a different legal system. However, within the environmental law regime, this flexibility will need to be recognised, and furthermore it will need to be incorporated into that system, if Maori are to engage actively and effectively with the regime.

As is illustrated above, Maori society is based around relationships. Interactions between Maori communities begin with acknowledgements of the various relationships that are important in the context of those interactions. This can be seen in every-day activities or social forms such as the components of the powhiri.⁵⁷ Therefore, the emphasis on whakapapa in sustainable development must focus on making connections and must not become about isolating genealogical lines into fixed and separate positions.

Collective responsibility may be another aspect of whanaungatanga that will be difficult to apply within a state legal system that owes so much to the rights of the individual. But, as with the flexibility principle, this is something that must be considered in the construction of a new regime if Maori are to engage with the system and see their values reflected in the operation of that system. Collective responsibility could be usefully applied to many areas of the law, but in relation to environmental law it could be particularly useful because it is a concept that is appropriate to Maori and which also promotes an ethical outlook that is extremely compatible with the movement towards sustainable development.⁵⁸

ii. 'Mana' as a principle of environmental law reform

Mana is also an important conceptual regulator within tikanga Maori. Mana is the primary concept that underlies Maori leadership. It is therefore a vital consideration in the development of environmental and resource management laws that more effectively express Maori authority over their natural resources. There are two parts to the concept of applying mana as a principle of environmental law reform. The first part of the concept is that the law should be developed in a way that affirms the mana of the tangata whenua within the development process itself. The second part of the concept is that the substance of the legal regime should reflect the mana of the tangata whenua.

The mana of Maori and the various hapu and iwi must be respected and promoted in the development of a new system of environmental law. Mana is a fundamental motivating factor amongst Maori. If the process of constructing a new legal regime is a process which enhances the mana of those involved, then it is likely that Maori will actively participate. However, if the mana of the participants is degraded, then Maori, like anyone else, will not want to be a part of the process. This

⁵⁶ Compare Waitangi Tribunal *Tamaki Makaurau Settlement Process Report: Wai 1362* (Legislation Direct, Wellington, 2007).

⁵⁷ Mead, above n 54, 117-132.

⁵⁸ Patterson, above n 20, 43-48.

means that Maori should be involved at every step of the process. Good consultation would appear to be one obvious way in which contributions from those who choose to participate are respected, and again, this would apply to non-Maori as well as Maori. The more that Maori are involved in the process of developing the law, the greater the likelihood that the law will reflect Maori values and concerns. Ultimately, the aim is of course to develop a legal regime in this area that is effective and encourages participation from all sectors of the community. One way to achieve this is to ensure that, from the very beginning of the law-making process, the mana of those involved is enhanced by their participation. The Diceyan/Hobbesian approach that reinforces the authority of a centralised institution, and is the orthodox framework through which the New Zealand constitution is viewed, is quite unhelpful in this context.⁵⁹

Ideally mana will also be enhanced by engaging with the legal regime that results. If the law is to be effective in addressing Maori concerns in relation to the environment, then the legal regime must recognise the mana of Maori communities in every aspect of its operation. This recognition will probably need to come through a variety of mechanisms, and consequently a variety of models of legal interaction. Some examples of how the mana of Maori communities can be enhanced within an environmental regime are provided by the Auckland iwi of Ngati Whatua ki Orakei.⁶⁰ This community has taken responsibility for naming streets according to Ngati Whatua tradition, and is also buying back traditional land. Other iwi have created specific forms of property title to place additional protections on the iwi's land assets.⁶¹ These measures provide an important indication of the aspirations of Maori to manage their natural resources in a way that reflects their own environmental philosophy, laws, and practices. This could be taken further under an environmental regime that justly and effectively reflects the mana of Maori communities. Land transfers could be subject only to Maori custom and disputes over the natural environment could be resolved with Maori dispute resolution processes.⁶² This would support iwi to maintain their connections with the natural world, and, by doing so, ensure Maori cultural investment in sound environmental stewardship.

iii. 'Kaitiakitanga' as a principle of environmental law reform

The suggestion to include the concept of kaitiakitanga as a principle of resource management law reform is perhaps one of the more obvious suggestions, as kaitiakitanga relates directly to interaction with the natural world.⁶³ Kaitiakitanga relates to many of the ideas that underlie sustainable development, particularly the idea of managing resources with future generations in mind. The central concept of whanaungatanga is closely connected to kaitiakitanga.⁶⁴

The special relationship between tangata whenua and the natural environment has been noted in numerous Waitangi Tribunal reports.⁶⁵ It also finds expression in

⁵⁹ Andrew Sharp *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s* (2 ed, OUP, Auckland, 1997).

⁶⁰ Precious Clark "Te Mana Whenua o Ngati Whatua o Orakei" (2001) 9 Auck U LR 562.

⁶¹ See, for example, Ngati Awa Claims Settlement Act 2005, Part 6.

⁶² For an overview of the fundamental aspects of Maori dispute resolution processes, see

⁶³ Khylee Quince "Māori Disputes and their Resolution" in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2 ed, OUP, Melbourne, 2007) 256.

⁶⁴ Patterson, above n 20.

⁶⁵ See Nicola R When and Jacinta Ruru "The Environmental Reports" in Janine Hayward and Nicola R When (eds) *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Books, Wellington, 2004) 97.

the current Resource Management Act 1991,⁶⁶ and provides the basis of iwi resource management plans.⁶⁷ The recognition of the fundamental importance of these relationships must be at the heart of any legal structures that deal with resource management issues in Aotearoa.

Kaitiakitanga refers to the responsibilities and obligations of the local people as guardians and stewards of the natural environment. It is entirely consistent with the inter-generational equality embedded within sustainable development. For the effective exercise of kaitiakitanga, for local communities to effectively take on the responsibilities and obligations kaitiakitanga entails, kaitiakitanga must be seen as a function of indigenous and environmental governance. Effective and legitimate authority in this area must stem from the recognition of kaitiakitanga as an expression of tino rangatiratanga.⁶⁸

C PRINCIPLES FROM SUSTAINABLE DEVELOPMENT

Sustainable development may be a rather nebulous concept, but it is nevertheless very useful. It is a concept that, quite appropriately, underlies the current resource management regime in Aotearoa. As a concept, it has not always been helpful to indigenous peoples. Indigenous practices have often been criticized for being unsustainable by conservationists.⁶⁹ On the other hand, some sectors have argued that too great a protection of indigenous interests establishes intolerable impediments to development.⁷⁰ There is arguably an approach to sustainable development that is not only consistent with what might broadly be termed indigenous interests, but can actually provide a means of achieving greater indigenous input into how natural resources are used. This section identifies a number of sustainable development principles that could be applied to this end. These principles are: the 'Integrated/Systems approach'; 'Community input'; and the 'Primacy of Process'.

i. 'Integrated/Systems approach' as a principle of environmental law reform

The very concept of sustainable development is based on the recognition that economic and ecological considerations should not be separated from each other. Integrating decision-making is a fundamental component of sustainable development.⁷¹ One way of encouraging integrated decision-making is to apply a 'systems' approach to problem-solving. The interactions and links between the environmental, economic, and social factors would be analysed under this approach, rather than isolating each of the individual components. A systems approach to sustainable development issues is advocated because, as noted in *Creating Our Future*: "Decision makers can be faced with a wide range of biological, social,

⁶⁶ Resource Management Act 1991, s 7(a).

⁶⁷ See, for example, *Te Awanui: Tauranga Harbour Iwi Management Plan*, above n 50, 16-17.

⁶⁸ See also Murray Hemi "Local Government and the Waitangi Tribunal" in Janine Hayward (ed) *Local Government and the Treaty of Waitangi* (OUP, Melbourne, 2003) 55.

⁶⁹ See, for example, L M Shields "Are Conservation Goals and Aboriginal Rights Incompatible?" (2000) 10 *Journal of Environmental Law and Practice* 187.

⁷⁰ See, for example, Don Brash, Leader of the National Party "Nationhood" (Speech to the Orewa Rotary Club, 27 January 2004).

⁷¹ *PCE Creating Our Future*, above n 32.

cultural, physical, ethical, and economic considerations. No one component on its own determines whether the system is functioning in a sustainable way.”⁷²

A systems approach is also consistent with a Maori environmental philosophy. One of the most striking characteristics of the Maori world-view is its holistic nature, recognizing the inter-connectedness of all things.⁷³ This world-view shapes responses to a range of social problems, and especially environmental issues.⁷⁴ Adopting a systems approach could therefore also be useful in giving effect to a Maori environmental philosophy within a resource management regime.

The compatibility of the systems approach and a Maori environmental philosophy might even suggest that this might be an appropriate area of the legal regime to apply a bijuridical model of legal interaction. By definition, the holistic nature of both approaches necessitates decision-makers have some form of jurisdictional overview of the entire system. To incorporate a Maori holistic approach and a non-Maori systems approach in a way in which each retains this system overview becomes more difficult the more separated one approach is from the other. Therefore it is suggested that a bijuridical system of laws be co-developed in this area. The development of a bijuridical system is never a simple process, but the compatibility of the philosophies that underlie the approaches to this specific aspect of a legal regime relating to the management of the environment and natural resources means that the development of such a system should not prove impossible.

ii. ‘Community input’ as a principle of environmental law reform

Another common feature of both Maori social organisation and the New Zealand state’s liberal-democratic values is the ideal of accountability of leaders and decision-makers to the wider community. It is of course also true to say that these two systems of accountability tend to operate in different ways. Nevertheless, a key aspect of both systems of authority is that of public participation. Public participation is as necessary for modern Western liberal democracies⁷⁵ as it is for the continued health and well-being of hapu and iwi.⁷⁶ Public participation is particularly important in environmental decision-making and resource management processes.⁷⁷ One of the main aims of the Resource Management Act 1991 was to increase public participation, and it is generally accepted that resource management processes are now more accessible to the general public than prior to the enactment of this legislation.⁷⁸ However, it should also be noted that there are many people who consider that the rhetoric of public participation is not satisfactorily fulfilled in community decision-making in Aotearoa.⁷⁹

Many of the difficulties that have arisen from the current resource management processes and the Treaty of Waitangi settlement negotiations relate to

⁷² PCE *Creating Our Future*, above n 32, 37.

⁷³ Marsden, above n 22.

⁷⁴ Patterson, above n 20, 63-75.

⁷⁵ Julia Abelson, Pierre-Gerlier Forest, John Eyles, Patricia Smith, Elisabeth Martin, Francois-Pierre Gauvin “Deliberations About Deliberative Methods: Issues in the Design and Evaluation of Public Participation Processes” (2003) 57 *Social Science and Medicine* 239.

⁷⁶ Jackson, above n 21, 39-40.

⁷⁷ Anne E Simon “Valuing Public Participation” (1998-1999) 25 *Ecology Law Quarterly* 757.

⁷⁸ M Southgate “Sustainable Planning in Practice?” (1998) 67 *Town and Country Planning* 372.

⁷⁹ Julie Frieder *Approaching Sustainability: Integrated Environmental Management and New Zealand’s Resource Management Act* (Ian Axford (New Zealand) Fellowships in Public Policy, Wellington, 1997).

the capacity of Maori communities to engage effectively in these processes.⁸⁰ Part of the reason that the Resource Management Act does not fulfil its participatory aims is because of a lack of capacity among those who have, for various reasons, historically been excluded from the decision-making process.⁸¹ Among such communities are many Maori communities. Maori are often asked to participate in processes that they did not create. Effective participation requires the skills and financial resources that are necessary to operate within these processes. One approach to these issues would of course be to include Maori in the development of the processes, so that the processes include a Maori way of doing things. It does not make sense to expect that communities who have been deprived of effective control of their resources should suddenly be prepared to participate in processes that not only require particular skills and significant financial resources, but are also alien to their own systems of environmental philosophy and practice.

The reason why public participation is considered necessary in environmental processes is not simply a matter of making people feel included. Public participation is considered to be a contributing factor of robust public decision-making.⁸² Part of this is indeed about making people feel included in the process; the thinking being that if a wide cross-section of the community can see its values represented in decisions taken by community leaders, then the various communities of interest will be more likely to support and engage with the legal regime that has been established and to respect decisions that are made.⁸³

There is another pragmatic aspect to the aim of broad public involvement in decision-making. This is that better decisions will result from consideration of a wide range of views.⁸⁴ It should not be forgotten that although developing good processes is vitally important, we must be careful to ensure that these lead to robust environmental outcomes.

iii. Primacy of process as a principle of environmental law reform

Of course the consistency of robust results often depends on good processes. The involvement of a wide cross-section of the community definitely depends on good processes being in place. This is why the recent developments in resource management law have often focused on the development of procedural safe-guards.⁸⁵

Tikanga Maori can be seen to be very process-based.⁸⁶ The conceptual regulators that underlie the system of tikanga, such as whanaungatanga, mana, and kaitiakitanga, can each be understood as process guides. Focusing on process may make the task of inter-twining Maori and state systems of environmental law slightly less complex. Though there would still be many complicated aspects to such a project, a focus on process might assist in creating, or at least identifying, larger areas of compatibility between the legal systems.

⁸⁰ Tikitu Tutua-Nathan "Kaitiakitanga: A Commentary on the Resource Management Act 1991" in Janine Hayward (ed) *Local Government and the Treaty of Waitangi* (OUP, Melbourne, 2003) 39, 42.

⁸¹ Janet Stephenson "Recognising Rangatiratanga in Resource Management for Maori Land: A Need for a New Set of Arrangements?" (2001) 5 NZJEL 159.

⁸² Abelson, et al., above n 75.

⁸³ Manley A Begay and Stephen Cornell "What Is Cultural Match and Why Is it So Important?" (Paper presented at the Indigenous Governance Conference, Jabiru, Northern Territory, 5-6 November 2003).

⁸⁴ Abelson, et al, above n 75.

⁸⁵ See also Richard Boast "The Treaty and Local Government: Emerging Jurisprudence" in Janine Hayward (ed) *Local Government and the Treaty of Waitangi* (OUP, Melbourne, 2003) 157.

⁸⁶ Mead, above n 54.

VI CONCLUSION

This paper suggests that there are a number of factors that should guide the development of a system of environmental law that reflects Maori values and the guarantees of the Treaty of Waitangi whilst fostering sustainable development.

As explored in Part I of this paper, the development of a just and effective system of environmental law should be informed by factors that are derived from law and practice relating to the Treaty of Waitangi, Maori environmental law and practice, and sustainable development objectives and policy. Each of these three fields sets some fundamental, basic requirements that must be met by a system of environmental law and policy, here in Aotearoa, that aspires to be both just and effective. These basic requirements are discussed in Part I.

When brought together, these basic requirements suggest a number of core principles for the development of a just and effective system of environmental law. By adopting an interdisciplinary perspective, some high-level principles can be identified that direct the development of law and policy towards a more just and effective system, and which are also compatible with, and complementary of, each other. Part II of this paper identifies a set of such principles, following the basic requirements set out in Part I, and drawing on the three key areas of Treaty law and practice, Maori environmental law, and sustainable development objectives.

It is suggested that these principles should guide the development of new legal structures relating to management of natural resources in Aotearoa. These principles are stated at a high level and in relatively general terms because it is recognised that there will be a range of specific legal and policy mechanisms which could be applied to implement these principles and, as such, meet the basic requirements of a just and effective system of environmental law. The purpose of using these principles to guide the development of law and policy in this area is not to dictate any particular reforms or measures. Rather, the purpose is to provide a set of guidelines for the development of a system of environmental law and policy that better reflects the Maori-Crown relationship and the protection of tino rangatiratanga set out in the Treaty of Waitangi, and which, at the same time, recognises that a regime that respects Maori laws, values, and authority, is more likely to encourage sustainable development amongst Maori communities. The overriding concern is, therefore, not the specific legal and policy instruments, but instead the more general concern of moving towards a system of environmental law that is truly just and effective.

Me He Korokoro Tui: Searching for Legal Maori Language and the Rights to Use It

MAMARI STEPHENS*

I INTRODUCTION

Merely to use the Maori language in any context can be a powerfully political, even transformative act. Speaking Maori publicly in New Zealand, a primarily monolingual English-speaking country, can transform the simple act of pushing a child on a swing at the park, or getting the groceries, into a conscious or unconscious statement that the Maori language has somehow survived against all the odds stacked against it. Using the Maori language in such humdrum situations can perform, even if only fleetingly, a type of transformative magic that reclaims a public space for Maori thinking and Maori ways of being. A large part of the battle for revitalisation of endangered indigenous languages (which Maori surely remains) is to fight for more such ground and more freedom for that transformative magic to occur. One part of that battle is to claim back the use of the Maori language not only in the domestic sphere, but also within the civic culture of the New Zealand state. "Civic culture" in this context refers to the crucial areas of administration, politics, the economy and (civic, as opposed to traditional) law.¹ While Maori was (albeit inconsistently) one of the two languages of administration and civic law in 19th century New Zealand, it largely lost that civic status in the 20th century.² Our work at the Legal Maori Project in particular is aimed at assisting in the restoration and enhancement of Maori as a language of law, in particular, of *Western* concepts of law. This paper will set out the background and aims of the Project, but it will also sound a warning: despite the high intentions of the Project and the resources being produced, we contend the rights framework within which the Maori language of law is to be revitalised is insufficient for the task. The recognition of rights that led to the enactment of the Maori Language Act ("Act") requires progressive implementation. Instead, the Act reflects a mere snapshot of a limited entitlement and has been outstripped by other initiatives in other areas concerned with the revitalisation of te reo Maori. In short the Act should be amended to ensure that the language rights that have developed over time in Aotearoa New Zealand are no longer frozen and keep pace with the developments of the language itself.

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¹ Stephen May "Misconceiving minority language rights" in *Language Rights and Political Theory* Kymlicka, W and A Patten (Eds) (New York: Oxford University Press, 2003) 127.

² For useful discussion on the presence and use of the Māori language in government and Parliament see Phil Parkinson "Strangers in the House": The Maori Language in Government and the Maori Language in Parliament 1840-1900 - [2001] *V.U.W.L.Rev* 45; (2001) 32 *V.U.W.L.R* 865.

II THE LEGAL MAORI PROJECT – A BACKGROUND

The Legal Maori Project, funded by the Foundation for Research, Science and Technology was established in 2008 at the Victoria University of Wellington, in the Law Faculty. It currently operates within the disciplines of law and applied linguistics in order to achieve two primary aims:

- to normalise the Maori language in the enactment, use and communication of Western legal ideas; and
- to provide bilingual Maori speakers with a legal language environment in which they can effectively *choose* to use Maori rather than English to express such ideas.

Assisting bilinguals to make the choice to use Maori as a *normal* language of civic culture, including Western law is critically important. Research suggests successful Maori language revitalisation requires that bilinguals must have a net preference for carrying out at least some of their activities in Maori. Revitalisation of the use of Maori in legal contexts therefore needs to be aimed at making such a net preference both desirable and feasible.³

In order to achieve these aims the Project will produce, by the end of 2011, a dictionary of legal Maori terms. This dictionary will be based on a specialised legal terminology (“lexicon”) derived an extensive collection of texts (a “corpus”) gathered from the 1830s until the present day.

The design of the Project is influenced strongly by the framework outlined by Joshua Fishman in his important work on reversing language shift (RSL).⁴ However this Project is also influenced by commentators offering subsequent theoretical analysis of the RSL model, such as Benton (2001) and Spolsky (2004) who emphasise enhancing the functionality of the Maori language. This analysis recognises that linguistic management measures for reversing language shift cannot be effective alone, but also require concomitant socio-political developments in the Maori community such as increasing wealth, political power and the increasing visibility of Māori language speakers in the education system and political life.⁵

In accordance with the notion that civic culture is one area of functionality the Maori language worth fostering, and reclaiming, the Project accordingly seeks to prove or otherwise the following hypothesis:

The Maori language has developed a terminology or a Language for Special Purposes (LSP) used to communicate and transmit information about Western legal concepts.

³See Grin, F. and Vaillancourt, F (1998) *Language Revitalisation Policy: An Analytical Survey. Theoretical Framework, Policy Experience and Application to Te Reo Maori*. New Zealand Treasury Working Paper 98/06 Wellington, New Zealand/Aotearoa. Available at http://www.Maorilanguage.info/mao_lang_abib.html (last accessed 25 August 2010).

⁴ Fishman, Joshua A. (1991) *Reversing Language Shift; Theoretical and Empirical Foundations of Assistance to Threatened languages*. Clevedon: Multilingual Matters. See also Fishman, Joshua A., ed. *Can Threatened Languages Be Saved? Reversing Language Shift, Revisited: A 21st Century Perspective*. (Multilingual Matters Ltd: 2000), xi, 503 pp.

⁵ See for example Crystal in Bernard Spolsky *Language Policy* (Cambridge University Press, 2004) pp 215-216.

We contend that this legal Maori LSP has been developing since at least the middle of the 19th century, arguably from as early as 1820 when the Lord's Prayer (with its legal ideas of "kingdom", "covenant" and "trespasses") was translated and disseminated in Maori along with the first written Maori grammar.⁶ The development of the legal Maori LSP obviously relied heavily on traditional Maori law, which of course had developed its own specialised legal terminology. As Paterson identifies, Maori engagement with Christianity, its missionaries and its texts reflected a sympathetic resonance between a highly developed regulatory system of tikanga and many Christian legal ideas.⁷ Much early Maori writing (and writing aimed at Maori) also reflected these often syncretic legal ideas. In order to demonstrate our hypothesis, therefore, we need to look closely at the Maori language texts from the 19th century up until the present that will grant us insights into the engagement between the Maori language and Western legal ideas. Those texts will enable us to define and explore a legal Maori LSP.

Indeed, there are several thousand pages of publicly available, printed, Maori language documents discussing, applying, translating, critiquing and interpreting Western legal concepts. The vocabulary captured in those documents is likely to include such a terminology because the documents are fairly specialised and include:

- dozens of Acts and Bills that were translated into Maori in the 19th century in whole or in part;
- many Crown-Maori agreements, including land deeds;⁸
- *Nga Korero Paremete*, the collected Maori translations of the speeches of Maori members of Parliament;
- The Maori Kotahitanga Parliament proceedings of the 1890s;
- *Te Kahiti o Niu Tirenī*: the official government organ to communicate with Maori from 1865; and
- Anglican Synod proceedings, from the Waiapu Diocese that provide examples of legal language from Canon law.

In addition to the 19th century texts, there are also significant 20th and 21st century texts, including transcripts of Maori language proceedings of the Maori Land Court. Within all those texts, we think, resides an extensive legal Maori terminology that is yet to be extracted and examined. The Project therefore involves gathering a representative body, or corpus, of electronically available texts in the Maori language, including such sources as these that are most likely to contain that legal Maori terminology. Criteria for including texts in the Legal Maori Corpus are that such texts must be:

⁶ In Thomas Kendall Samuel Lee *A Grammar and Vocabulary of the Language of New Zealand* (London: London Missionary Society, 1820). Text available at <http://www.nzetc.org/tm/scholarly/tei-KenGramm.html>.

⁷ Lachy Paterson Maori "Conversion" to the Rule of Law and Nineteenth-Century Imperial Loyalties *Journal of Religious History* Vol. 32, No. 2, June 2008 216-233, 217.

⁸ Large collections of land deeds are publicly available such as those published by Turton and McKay, but other agreements also exist outside of those publications, that reside in archive repositories. See RP Boast "Recognising Multi-Textualism: Rethinking New Zealand's Legal History" (2006) 37 *V.U.W.L.R.* 547-582.

- printed in Maori, between the years of 1830-2009;
- printed *to be read or distributed* to 3 or more Maori speakers; and
- with the *communicative function* of explaining, clarifying and challenging and using Western legal concepts.

These criteria are necessarily restrictive largely on the basis of the prohibitive cost of digitising handwritten sources in order to analyse the vocabulary in those texts. We hope it may become possible to use those sources, as well as (eventually) transcribed oral sources, thereby making the Corpus more representative of all legal Maori language.⁹

One happy result of the digital collation of the types of texts mentioned above has been the establishment of He Pataka Kupu Ture (the Legal Maori Archive), created in collaboration with the New Zealand Electronic Text Centre as the first output of the Legal Maori Project and hosted by the NZETC at <http://www.nzetc.org/tm/scholarly/tei-corpus-legalMaori.html>. Whereas the paper-based texts have all been publicly available, until now they have been effectively sequestered in a wide range of repositories. To have them available in one place in an online archive will, we hope be a spur for further research on the Maori language and New Zealand legal history.

The Corpus was 'closed' at the end of 2009, after which no further texts were admitted. The aggregate text from the Corpus was then analysed in early 2010 in order to extract and examine the legal Maori terminology. That terminology will then form the basis of a dictionary of 2,500 legal Maori terms defined by their usage in language, offering examples and alternative meanings where necessary. By examining a large and representative body of documents and collating the various appearances and use of a given term or concept, we expect there can be a high level of user confidence regarding the accuracy of the entries that will comprise the dictionary.

Hopes are high then, that we can produce over the next two years a useful resource base for Maori speakers that will encourage the revitalisation of Maori as a language of civic culture, including of Western law. Presuming this is the case, what are the implications for this revitalisation in the existing language rights framework? While we seek to argue a legal Maori LSP exists, the rights to use this language register effectively are limited and these limitations threaten its ongoing viability and development.

III MAORI LANGUAGE RIGHTS IN NEW ZEALAND

It is important to consider the rights context within which the use of legal terminology in Maori will often take place. The claim to a right to language, as well as the collation of substantial linguistic evidence that such a terminology exists are both necessary tools in rehabilitating Maori to its status as a viable legal language, and enhancing the efficiency of that language. Rights to language exist in a number of international instruments, but we will only look at one domestic instrument in particular detail.¹⁰ Further, this paper examines the extent to which the right to

⁹ Phil Parkinson and Penny Griffith's annotated bibliography of *Books in Maori 1815-1900* proved an invaluable reference during the project for information on the provenance and location of various texts.

¹⁰ Article 1(3) of the Charter of the United Nations states that human rights and fundamental freedoms should be encouraged and promoted without distinction as to race, sex, language, or religion. Article 2 of the International Covenant on Economic, Social and Cultural Rights states that: 'the state parties to the present covenant undertake to guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind

language in New Zealand can facilitate the use of te reo Maori in legal contexts. In fact the right to use the Maori language in legal contexts exists but is simply too narrowly cast to make the *choice* to use Maori in such contexts a viable and realistic one. The outputs of the Legal Maori Project may assist in delineating and disseminating a legal Maori vocabulary, but this lexicographical waka may yet founder on the rocks of a rights framework that is not only insufficient in scope but simply incompatible with the obligation on the Crown to uphold progressively the specific right to the Maori language under the Treaty of Waitangi.

A THE TREATY RIGHT

In Aotearoa New Zealand there is a special layer of protection of the right to use the Maori language that arises out of a duty to uphold the language. The Treaty of Waitangi, Article 2 states:

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangitira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otia ko nga Rangitira o te wakaminenga me nga Rangitira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua – ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Her Majesty the Queen of England **confirms** and **guarantees** to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and **other properties which they may collectively or individually possess** so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf. [emphasis added]

This Treaty-based right to the Maori language has been recognised by the Waitangi Tribunal, Parliament, and the courts of New Zealand, all of which have affirmed that the Maori language is, and was, a taonga for the purposes of Article 2, and therefore subject to the guarantee of tino rangatiratanga in the Maori language version of the Treaty, as well as to the guarantee of full exclusive and undisturbed possession, as set out in the English version of the Treaty. That particular acceptance only came after a combination of events in the 1960s, 1970s and 1980s brought the plight of the language to the foreground of public attention. Such events included the Maori Language Petition of 1972, signed by 30,000 people, which requested that Maori language be offered in all schools, and the Land March of 1975. Other political actions were carried out by activist groups such as Nga Tamatoa, and

as to... language...'. Article 2 of the International Covenant on Civil and Political Rights states: "each State party to this recent covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as... language...".

societies for the protection of the language such as the Te Reo Maori Society, and the Wellington Māori Language Board, Nga Kaiwhakapumau i te Reo. In 1984 Nga Kaiwhakapumau i te Reo lodged a claim (Wai 11) before the Waitangi Tribunal. The Waitangi Tribunal subsequently found the language to be a taonga for the purposes of the Treaty of Waitangi. As such, the Crown was bound by certain obligations, as a Treaty partner:¹¹

The evidence and argument has made it clear to us that by the Treaty the Crown did promise to recognise and protect the language and that that promise has not been kept. The 'guarantee' in the Treaty requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence and certainly not a right to deny its use in any place. It is, after all, the first language of the country, the language of the original inhabitants and the language in which the first signed copy of the Treaty was written.

This obligation as viewed by the Waitangi Tribunal is a proactive one to protect and sustain the language that imports with it a correlating right that accrues not only to individual Maori but to Maori collectives.¹² At the heart of some of the most influential submissions before the Tribunal was the notion that the recognition of te reo Maori should be progressively realised. At para 4.2.7 of the Report the Tribunal placed significant weight on the submissions of the New Zealand Section of the International Commission of Jurists as presented by the late Martin Dawson in regard to the interpretation of the word “guarantee” within the Treaty text:

...the point was made that the word denotes an active executive sense rather than a passive permissive sense, or in a phrase "affirmative action". To quote from the submission: "By these definitions therefore, the word (guarantee) means more than merely leaving the Maori people unhindered in their enjoyment of their language and culture. It requires active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture..."

Also in evidence before the Waitangi Tribunal, Secretary for Justice, Stanley Callaghan appears to acknowledge that the rights were to be progressively realised and should not be frozen when exercised specifically within the courts:¹³

"... the Department accepts that it would be practicable and not prohibitively expensive to proceed along the lines of the Welsh Language Act provided that the right given is limited for **the time being** to a right to address the Court or give evidence in Maori. This would exclude an obligation to provide for transcripts and court documents in Maori as a consequence ... The time has come for change and we look forward to these developments as **representing an important forward step** in recognising the deep-seated wish of many

¹¹ Waitangi Tribunal *Te Reo Maori Report: Wai 11* (Government Printer, Wellington: 1986) 5.

¹² Hohfeld in Joseph William Singer "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" [1982] *Wis L Rev* 975, 986. See also, Ed Willis, *Statutory Incorporation of Rights Derived from the Treaty of Waitangi*, LL.M unpublished dissertation 2008 6-21.

¹³ See above n 11 para 8.2.4

Maori people for their language and culture to flourish through its daily use in New Zealand ..." [emphasis added]

The Maori Affairs Select Committee further developed this notion of progressive realisation in considering the *Reo Maori Report* and submissions on the Maori Language Bill. They observed that "full recognition of Maori as an official language should be a progressive and gradual policy to be implemented systematically as resources and public acceptance allow".¹⁴ While this observation surely was intended to deflect criticism for the Bill's failure to adopt all recommendations of the Waitangi Tribunal in the *Reo Maori Report*, it is also important recognition that the measures comprising official recognition (including official recognition of te reo Maori in the legal system) should not remain in a frozen state.

Ultimately the Crown's obligations were to be reflected, in part at least, in the Maori Language Act 1987. While the Crown did not adopt all recommendations of the Tribunal, of the 5 recommendations issued by the Tribunal, the first was directly relevant to supporting and recognising the use of Maori in legal contexts:¹⁵

1. TO THE RIGHT HONOURABLE THE PRIME MINISTER that legislation be introduced enabling any person who wishes to do so to use the Maori language in all Courts of law and in any dealings with Government Departments, local authorities and other public bodies (refer para. 8.2.8).

As will be seen, the response to this recommendation has not, so far, provided effective recognition of the Maori language in legal contexts *or* implemented the progressive realisation of the right to use Maori in legal contexts.

The Maori Language Act 1987

Obviously the Act was enacted, in part, as the Crown's response to the findings of the Waitangi Tribunal and the Maori language claim (Wai 11), but it was also enacted in large part to address the findings in *Mihaka v. Police* [1980] 1 NZLR 462 that the Maori language had, at the time of that case, no real official status in New Zealand and therefore could not be a language used as of right in court proceedings.¹⁶

The preamble to the Act recognises a duty placed upon it, affirming the Tribunal's approach, in stating that "in the Treaty of Waitangi the Crown confirmed and guaranteed to the Maori people, among other things, all their taonga: and ... the Maori language is one such taonga". In particular the Act was a legislative response that only addressed the first two of the five recommendations of the Waitangi

¹⁴ (9 June 1987) 481 NZPD 9337. See Clare Tattersall "A Right to language: Two Acts" Unpublished LLB(Hons) Research Dissertation, 27.

¹⁵ See above n11, para 10.1

¹⁶ See *Pakitai Raharuhi v. New Zealand Police* AP 51/03 High Court Rotorua per Justice Baragwanath page 15 for the observation that the Maori Language Act 1987 was passed at least in part as a response to *Mihaka*. Te Ringa Mangu Mihaka, himself has often stated publicly that the case was "the straw that broke the camel's back" in achieving legal recognition of the right to speak Maori.

Tribunal's report.¹⁷ Interestingly, a second claim was lodged with the Waitangi Tribunal on the Crown's failure to await the release of the *Reo Maori Report* before submitting the Maori Language Bill to the House.¹⁸ The other major explicit legislative response to the recommendations of the Tribunal (and to subsequent case-law) in the *Reo Maori Report* is the passage of the Maori Television Service Act 2003, a direct response to Recommendation Four; that broadcasting legislation and policy have regard to the Tribunal's finding of the Crown obligation to recognise and protect the Maori language. While it is important to note the likely influence the *Reo Maori Report* may have had on other legislative developments, such as crucially important amendments to the Education and Broadcasting Acts of 1989, it is equally important to note the limited scope of the Act itself. The Act, including its preamble, must then be read just as one important element of the Crown's legislative recognition of that duty.

i. Section 3

Section 3 of the Act merely states "The Maori language is hereby declared to be an official language of New Zealand". There is little guidance in the Act or elsewhere as to what this status really means. Certainly, this status is a step up from the earlier "official recognition" afforded Maori under s77A of the Maori Affairs Act 1953, which was effectively ignored by the Court in the *Mihaka* case, which refused to countenance that such recognition might extend to a right to speak Māori before the courts.¹⁹ While denoting Maori as an official language was not one of the recommendations of the Waitangi Tribunal, applying this status appears to have been a response to some of the Waitangi Tribunal's concerns from the *Reo Maori Report*:²⁰

Official recognition must be seen to be real and significant which means that those who want to use our official language on any public occasion or when dealing with any public authority ought to be able to do so. To recognise Maori officially is one thing, to enable its use widely is another thing altogether. There must be more than just the right to use it in the Courts. There must also be the right to use it with any department or any local body if official recognition is to be real recognition, and not mere tokenism.

It is clear from the above extract that the Tribunal did not accept that "official language" status merely gave rise to a right to use Maori in the courts. This status was also important in other civic contexts to enable wide usage. However, the observations of the Secretary for Justice, Stanley Callaghan, before the Tribunal appeared to view official status in the context of legal proceedings, although he also viewed such status as an important aim to achieve as a question of rights, and not

¹⁷ The second recommendation was for the establishment of a supervisory body that came to be known as Te Taura Whiri i te Reo Maori.

¹⁸ Huirangi Waikerepuru *Second Claim to the Waitangi Tribunal regarding the failure of the government to await the Tribunal's decision on WAI 11* (submissions to the Maori Affairs Committee in Respect of the Maori Language Bill 1986), See Clare Tattersall "A right to language? Maori language and the law: two Acts", unpublished LLB (Hons) Research Paper, Victoria University of Wellington 2009, 27.

¹⁹ *Mihaka v Police* [1980] 1 NZLR 453, 462-463 (CA) Richardson J for the Court.

²⁰ Above, n 11, 8.2.8.

merely to enable native speakers to be understood:²¹

"... The present interpretative facilities when English is not understood and the various programmes which promote a much greater recognition and understanding of Maori culture do not of course meet the demands of the claimants that the Māori language be given some official status in our courts of law. While the present arrangements may provide for justice to be done in a strict, legalistic sense, a Maori may have an overwhelming sense of grievance and loss of dignity felt through being unable, because of fluency in English, to speak Maori in a court in his own land. That may give rise to such a deep-seated sense of injustice as to prejudice the standing of the courts in some Maori eyes. It seems to us that despite the strict logic of the present situation the time is now appropriate to consider change. Certainly the present situation is at odds with our bicultural foundation at Waitangi in 1840
..."

Indeed the Tribunal's concern to enable the wide use of Maori through effective official recognition is not fully recognised in the Act. No guidance is given to explain what "official status" might mean. Judicial determination of the implications of official status has also been limited. Justice Fisher discussed the importance of s3 in the case of *Ngāheue v MAF* and concluded that the official status of Maori was a 'relevant factor' to be taken into account when determining if the court would use its discretion to allow the submission of Maori language documents; a right not supported by the Act itself. His Honour said:²²

One [relevant factor to the exercise of the court's discretion] is the declaration in s 3 Maori Language Act that "the Maori language is hereby declared to be an official language of New Zealand" and the long title to the Act which, among other things, declares the Māori language to be an official language of New Zealand. That suggests that although there is no right to file a document expressed in Māori the Courts should be sympathetic to the idea if in the circumstances it would be sensible and practicable to do so.

In this case at least "official status" was considered a relevant consideration in determining use of the court's discretion. In the absence of further judicial determination of what this status actually means it may well be that the effect of official status of the Maori language will continue to be determined in the context of the courts. This limitation does not reflect the Tribunal's preference that "official status" be more broadly understood, as described above.

²¹ Ibid, para 8.2.3.

²² *Ngāheue v MAF* (1992) 5 PRNZ 201, 206.

ii. Section 4

Moving on from the official status denoted under Section 3, Section 4 of the Act creates a statutory right to speak Maori in certain legal proceedings.²³ It is important to know the exact legal circumstances in which this right can be enforced. “Legal proceedings” are defined in s2:

Legal proceedings means—

- (a) Proceedings before any court or tribunal named in Schedule 1 to this Act; and
- (b) Proceedings before any Coroner; and
- (c) Proceedings before—

(i) Any Commission of Inquiry under the Commissions of Inquiry Act 1908; or

(ii) Any tribunal or other body having, by or pursuant to any enactment, the powers or any of the powers of such a Commission of Inquiry,— that is required to inquire into and report upon any matter of particular interest to the Maori people or to any tribe or group of Maori people;

Schedule 1 of the Act sets out the relevant courts and tribunals in which the right can be enforced. All courts are included, but only a small number of tribunals are included. Schedule 1 currently provides for Maori to be used in the following tribunals:

- The Waitangi Tribunal
- The Employment Relations Authority
- The Equal Opportunities Tribunal [now replaced by the Human Rights Review Tribunal]
- The Tenancy Tribunal
- Planning Tribunals [now replaced by the Environment Court]
- Disputes Tribunals established under the Disputes Tribunals Act 1988

Given that the Ministry of Justice administers now 25 tribunals and statutory authorities through its tribunals unit (not including the Waitangi Tribunal as a permanent Commission of Inquiry) this list is small indeed.

“Legal proceedings” does not include proceedings in other legal contexts such as Parliament. Indeed developments of the use of te reo Maori within Parliamentary proceedings has developed without recourse to the Act, although probably influenced by it. In this instance Standing Order 104 provides that a member may address the Speaker in English or in Maori.²⁴ This Order replaces the original Order 150 that predated the passage of the Maori Language Act 1987. That Order was subject to a Speaker’s Ruling that when a Member chooses to speak in Maori he or she does so as

²³ This right is also provided in s24g of the New Zealand Bill of Rights Act 1990.

²⁴ Standing Order 104, Standing Orders of the House of Representatives as amended 2008.

of a right stemming from the Standing Order (as opposed to some other source such as the Act).²⁵

When a member speaks in Maori, that member does so as of right under the Standing Orders. Whatever time is allowed by the Standing Orders for that particular type of speech, the whole of that time may be used in Maori. The translation is for the benefit of the members who do not understand Maori and it is in addition to the time in which the member is entitled to speak on that particular Bill or whatever.

This right derives from the Standing Orders that govern the rules of procedure for the House and its committees. Therefore, it is narrowly applied and does not extend to other aspects of Parliamentary business, and certainly has no such protection from the Act itself.

The right to use Maori in legal proceedings as provided for in the Act may only be exercised in a narrow range of forums, and the content of the right itself is quite circumscribed:

- 4(1) In any legal proceedings the following persons may speak Maori, whether or not they are able to understand or communicate in English or any other language:
 - a. Any member of the court, tribunal, or other body before which the proceedings are being conducted
 - b. Any party or witness
 - c. Any counsel; and
 - d. Any other person with the leave of the presiding officer.
- (2) The right conferred by subsection 1 of the section to speak Maori does not
 - a. Entitle any person referred to in that subsection to insist on being addressed or answered in Maori; or
 - b. Entitle any such person other than the presiding officer to require that the proceedings or any part of them be recorded in Maori.
- (3) Where any person intends to speak Maori in any legal proceedings, the presiding officer shall ensure that a competent interpreter is available.
- (4) Where, in any proceedings, any question arises as to the accuracy of any interpreting from Maori into English or from English into Maori, the question shall be determined by the presiding officer in such manner as the presiding officers thinks fit.
- (5) Rules of court or other appropriate rules of procedure may be made requiring any person intending to speak Maori in any legal proceedings to give reasonable notice of that intention, and generally regulating the procedure to be followed where Maori is, or is to be spoken in such proceedings.

²⁵ 1997, Vol. 562, p. 3192. Kidd. Standing Order 104 (and previously Standing Order 150) has been in operation since 1985.

- (6) Any such rules of Court or other appropriate rules of procedure may make failure to give the required notice a relevant consideration in relation to an award costs, but no person shall be denied the right to speak Maori in any legal proceedings because of any such failure.

The right provided under s4 is a right to speak Maori only. It is not however limited only to the submission of oral evidence or the giving of testimony in the Maori language, as counsel may also use Maori pursuant to section 4.

There has been some judicial determination of the broad application of this right. Under s4(1) the right to speak Maori in the Court extends not only to those whose first language is Maori but also to any eligible person. In *R v Hohua* T13/90 (Rotorua High Court) at page 11 of the judgment Justice Fisher stated:

The significance of section 4 of the Maori Language Act was that it conferred an additional right to speak Maori. This new right did not spring from functional necessity. It was not designed to bring to bridge a gap in the understanding of English. That much is clear from the fact that the right is there "whether or not they are able to understand or communicate in English...". The long title to the Act commences by describing it as "an Act to declare the Maori language to be an official language of New Zealand..." I take it that the Act was designed to promote the use of Maori as an end in itself. 26

This and other cases subsequent to the passage of the Act, according to Summer Kupau show that the courts have been co-opted into acting in such a way to preserve the language, rather than only acting in respect of the needs of individual petitioners.²⁷ Nevertheless, the fact remains that the right preserved is only a right to speak, with no formal recognition of a right to submit written documentation in legal proceedings. Such submission may only take place as an exercise of judicial discretion. All the restrictions mentioned essentially undermine the Tribunal's original recommendation. Spoken Maori may only be used in the courts as of right, and only before a limited number of tribunals. Written Maori is not protected at all by the Act, and neither written nor spoken Maori is protected in dealings with Government departments, local authorities or other public bodies by this Act. These limitations have been in place and essentially unchanged since 1987.

New Zealand case law has shown, after the release of the *Te Reo Maori Report* and the passage of the Act, that the courts acknowledge the legally protected role and place of the Maori language as a taonga. Case law also acknowledges there must be some progressive realisation of the Treaty guarantee. Neither did the Crown challenge the notion that the obligation to protect the language was a progressive one in the Maori Council broadcasting cases before the Court of Appeal and the Privy Council, which challenged Crown proposals to transfer and then sell state broadcasting assets, and this approach was accepted by those Courts.²⁸

²⁶ See also *R v. Hillman* T 2/89 Tauranga DC. The Court there recognised the Act was intended to foster the language as a taonga.

²⁷ Summer Kupau "Judicial enforcement of "official" indigenous languages: Comparative analysis of the Maori and Hawaiian Struggles for cultural language rights" 26 U. Haw.L. Rev. 495 – 535, 519.

²⁸ See *New Zealand Maori Council v. Attorney General* (3 May 1991) HC WN CP 942-88 (HC).

Such progressive realisation requires a level of intervention to develop the language and the institutions of the State to ensure that Maori can be used in any official (including legal) capacity. Once that ground has been lost, it is very difficult indeed to reclaim.

It might be argued that the release of Te Rautaki Reo Maori, the Maori Language Strategy in 1995 and its revision in 2003 may be a manifestation of such a progressive realisation of the Treaty right. Indeed the Strategy is programmatic, aimed at achieving the following outcome by 2028:

By 2028, the Maori language will be widely spoken by Maori. In particular, the Māori language will be in common use within Maori whanau, homes and communities. All New Zealanders will appreciate the value of the Maori language to New Zealand society.

Nothing in the Strategy however provides for an enhanced legislative recognition of te reo Maori beyond what exists now in the Act. There are 6 lead agencies charged with certain responsibilities under the Strategy, TPK, Te Taura Whiri, Te Mangai Paho – the Maori Broadcasting Funding Agency, the Ministry for Culture and Heritage, the Ministry of Education, and the National Library of New Zealand. The Ministry of Justice is not included in this list. Plainly, by such absences, the Strategy is not aimed at providing for progressive realisation of the right to speak Maori in legal proceedings.

Similarly, other developments in Parliament under the Standing Orders are important, but also do not amount to progressive recognition of the right to use Maori in legal proceedings as defined under the Act. This observation is not intended to decry the progress made in the recognition of Maori in Parliamentary proceedings. Since 2007 funding has been made available for simultaneous interpretation within the House, matching the availability of such interpretation since 2000 in Maori Select Committee proceedings.²⁹ These developments are important and facilitate the use of te reo Maori in a vital legal environment, but are the result of the application of Standing Order 104 and Speaker's Rulings since 1985, rather than as a result of the implementation of the Act. Significant progress has been made in enhancing the availability and efficacy of te reo Maori, but not by virtue of the Act. Simply put, the Act is now outdated and requires amendment to reflect the developments of the last 22 years. Protection of the Maori language in the courts has not been progressively realised, and indeed, developments elsewhere have largely outstripped the protections set up for the Maori language by virtue of the Act.

²⁹ Maori Party Press release www.scoop.co.nz/stories/PA0705/S00388.htm (accessed 20 September 2010)

V CONCLUSION

As mentioned in the introduction, Maori retained significant official utility, at least to some degree, for parts of the 19th century, at least during periods when relative peace existed between Maori and the Settler governments. Standing Orders in the late 1860s and the introduction of Maori representation in Parliament retained a place for the Maori language as seen in the dissemination (albeit sporadic) of Acts and Bills in the Maori language, and the use of Maori in Government communications to Maori communities.³⁰ By the end of the century however, Maori all but disappeared from the legal and official landscape. Only in the last few years has Maori begun to return as a language of official government usage, and even then, the re-emergence is relatively small, including measures such as the limited use, since 2007, of simultaneous interpretation services in parliamentary debates as well the limited translation or Maori language summaries of some Select Committee proceedings and reports.³¹ In addition some government and government agency website information is provided in Maori.³²

In the New Zealand domestic legal context and internationally, the right to speak Maori in a legal forum such as the Courts is protected. However, speakers of Maori who wish to take up this right are given little assistance. If, for example, a Maori speaker knows little or no legal Maori terminology, exercising a right to use Maori in a court may be laudable as a political statement, yet ill-advised as a means of effective communication for either the speaker or the hearer. Developing and disseminating such a terminology may render the choice to use Maori in such a setting less risky, and can assist in the normalisation of the language in such settings. Both lexical development and progressive legislative recognition of the right to use Maori in legal contexts are necessary to assist in the restoration of Maori as a language of Western law. While lexical development is underway, legislative protection of the right remains frozen and needs to be revisited in view of the developments elsewhere in public recognition of te reo Maori as a valid language of civil discourse.

³⁰ See generally, Phil Parkinson, *Maori Language in Government* (2001) V.U.W.L.R Monograph.

³¹ The Office of the Clerk of the House of Representatives is responsible for the provision of Maori language translation and interpretation and these services are provided by the Te Reo Maori Language Services unit. For further details see the *Annual Report for the year Ending 30th of June 2008* page 18 available at http://www.parliament.nz/NR/rdonlyres/7DCCB0EF-8497-4AE4-BAD4-7A9A58103687/93685/OOCAnnualReport2008_1.pdf (date of last access 30 January 2010)

³² See for example Land Information New Zealand (responsible to the Minister for Land Information) provides Maori language translation of terms, information and procedures pertaining to Māori land <http://www.linz.govt.nz/survey-titles/maori-records/what-is-maori-land/index.aspx> (date of last access 30 January 2010)

Indigenous Peoples and Foreign Policy: The New Zealand Experience

DR MARIA BARGH^{*1}

I INTRODUCTION

The predominant forms of foreign policy discussed these days are underpinned by an assumption of Crown sovereignty in Aotearoa New Zealand. However, the first diplomatic relations and foreign policy in this country were conducted by hapu and iwi Maori. Prior to the 1800s, Maori had a long history of interaction in the Pacific and Aotearoa with other nations. Such interactions were governed by specific legal and political practices and institutions. A number of the concepts upon which these practices and institutions were based included whakapapa, utu, mana and koha.²

When discussing Maori participation in foreign policy therefore (and what level of participation there should be) it is hard not to return to the issue of sovereignty and how power is shared between Maori and the Crown as per Te Tiriti o Waitangi 1840. Foreign policy is unavoidably about how 'we' deal with 'them'. Hence definitions of 'we' and 'they' are vitally important. In Aotearoa New Zealand, the Crown has assumed the right to define the 'we'. They have also assumed the right to define by whom and on what terms others are dealt with. In short the Crown assumes total and indivisible control over foreign policy. Maori are only involved/consulted as a token measure, and often only those Maori groups the Crown perceives as non-threatening.

In this paper I will argue that the levels and forms of Maori participation in Crown foreign policy, formulation and implementation, are inadequate. Why? Because the current framework is based on flawed Crown assumptions about Te Tiriti o Waitangi, tino rangatiratanga and Indigenous rights, and the Crown is resistant to acknowledging its own limitations. I suggest that there should be far greater levels and different forms of Maori participation as per the rights reaffirmed for hapu in Te Tiriti o Waitangi, ongoing tino rangatiratanga, and the nature of evolving Indigenous rights under international law. In the final part of the paper I explore how there can be greater levels of participation. In the short term – as a very temporary and interim measure and as a first step towards participation in foreign policy, I suggest the powers of the Waitangi Tribunal should be fully utilised and extended. In the long term – the issue is really one about Crown recognition of tino rangatiratanga and that requires constitutional change. One model to consider could be the Tikanga House model utilised by the Anglican Church.

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I would like to thank Edwina Hughes for comments on an earlier draft of this paper.

² For further explanation of these concepts see Durie, E. T. (1995) "Will the Settlers Settle?" *Otago Law Review*, Vol. 8, No. 3.

II LEVELS OF MAORI PARTICIPATION IN CROWN FOREIGN POLICY CURRENTLY INADEQUATE

The predominant manner in which Maori are currently involved with foreign policy, that the Crown is engaged with, is determined by Crown agencies and is based on a number of assumptions, most significantly that Maori ceded sovereignty in Te Tiriti, that the Crown in the course of governing has the sole right to formulate foreign policy, and that while there are many interest groups in a liberal democracy, some with views and opinions regarding foreign policy, Maori are simply one interest group amongst many.

Government agencies involved with particular treaties or other foreign policy matters determine “whether there is a need for engagement”³ with Maori. If it is determined by the agency that Maori involvement is required, then they further determine the nature and extent that engagement should take, tempered by considerations of the “most efficient use of resources”⁴. ‘Engagement’ can then range from “raising awareness” to “consultation”. In developing the government’s position on international treaties Ministry of Foreign Affairs and Trade (MFAT) indicates that “other interested parties as well as Maori will need to continue to be engaged with and have their interests considered”.⁵ Maori participation rests therefore on the assumption that they are simply one interest group amongst many, rather than parties to Te Tiriti with tino rangatiratanga, who therefore must be dealt with as sovereign nations.

The recent case of China-New Zealand “Free” Trade Agreement provides a useful illustration where Maori interests are deemed to be narrowly ‘cultural’ and the manner in which consultation took place was selective and minimal. These practices are reminiscent of Crown conduct in previous trade agreements and Closer Economic Partnerships.⁶

In the National Interest Analysis of the China-New Zealand ‘Free’ Trade Agreement, reference to Maori interests falls under the ‘cultural effects’ section.⁷ Cultural interests are then argued to be protected under the exceptions to the Agreement (as per Article XX of GATT 1994 and Article XIV of GATS) which cover “measures necessary for the protection of public morals and those imposed for the protection of national treasures of artistic, historic or archaeological value”.⁸ This compartmentalizing of Maori interests does not adequately reflect the full extent of potential Maori concerns with an Agreement of this nature.

Somewhat incongruously, those Maori groups that MFAT consulted regarding the agreement were not those with ‘cultural interests’ but rather as, MFAT states, those with “trade and economic interests, including Federation of Maori Authorities and Maori exporters including Ngai Tahu Seafoods”.⁹ Wakatu Incorporation and

³ Available at MFAT website, accessed 9 December 2010, <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/Engagement-with-Maori.php>

⁴ Available at MFAT website, accessed 9 December 2010, <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/Engagement-with-Maori.php>

⁵ Available at MFAT website, accessed 9 December 2010, <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/Engagement-with-Maori.php>

⁶ For further analysis on these Agreements see M. Bargh (ed) *Resistance and Indigenous Response to Neoliberalism*, Wellington: Huia, 2007.

⁷ Ministry of Foreign Affairs and Trade, *New Zealand-China Free Trade Agreement: National Interest Analysis*, p. 61.

⁸ Ibid.

⁹ Ibid, 70.

Tohu Wines are also listed as having been consulted.¹⁰ No detail has been provided of their views and it is unclear whether they supported or opposed the Agreement. Their concerns may have centered on intellectual and cultural property rights given the difficulties some Maori companies have had with breaches of copyright and the theft of Maori designs. Also counted by MFAT as part of the consultation programme is the publication and distribution of an International Treaties List which they argue is “distributed to iwi, and provided contact details for feedback from iwi”.¹¹ It is unclear which iwi are being referred to or how providing iwi a list of treaties falls within the definition of consultation.

The second case which demonstrates limitations of the current framework, has been the lack of Crown engagement with Maori over formulating a position on the Declaration on the Rights of Indigenous Peoples 2007. Over the years of the Draft text’s negotiation, Maori requested on numerous occasions for consultation to be held, particularly as the New Zealand government’s stance on the Draft continued to clash with the position of Maori.¹² In the last couple of years the Aotearoa Indigenous Rights Trust, a Maori organisation that has been closely following the Declaration’s passage through the United Nations, made several formal requests to have input, and for consultation between Maori and the Crown, but were rebuffed or ignored by the Minister and Ministry of Foreign Affairs and Trade.¹³

The Crown currently has very clear obligations and responsibilities relating to consultation domestically and internationally. Domestically, first and foremost the Crown has obligations and responsibilities stemming from Te Tiriti which clearly have not been met. This has been evident in a number of cases and Waitangi Tribunal Reports have subsequently outlined standards such as engaging with Maori prior to any decisions being made, being open to change the proposed policy or plan, and conducting consultation in good faith.¹⁴ Internationally the Crown also has clear commitments for example under the Convention on the Elimination of Racial Discrimination (CERD) as well as the Declaration on the Rights of Indigenous Peoples (which I will return to shortly) regarding upholding free, prior and informed consent.

The issue of free, prior and informed consent illuminates some of the shortcomings of the Crown’s current approach to engaging with Maori. Peace Movement Aotearoa coordinator Edwina Hughes argues that:

One of the explicit obligations in General Recommendation XXIII [CERD] is that states are to ensure that no decisions directly relating to the rights and interests of Indigenous peoples are to be taken without their informed consent - a right that is generally referred to these days as the right to “free, prior and informed consent”. Free, prior and informed consent is an obligation which has four elements - ‘free’, that is, without coercion or any

¹⁰ Ibid.

¹¹ Ibid, 69.

¹² Claire Charters, “Maori and the United Nations” in M. Bargh (ed) *Resistance: An Indigenous Response to Neoliberalism*, Wellington: Huia, 2007.

¹³ See Aotearoa Indigenous Rights Trust website, accessed 1 June 2010, available at <http://www.pcpd.org.nz/ddrip/air.html> For letters and petitions to the Ministry of Foreign Affairs and Trade requesting them to engage with Maori see Aotearoa Indigenous Rights Trust documents on the Pacific Centre for Participatory Democracy website accessed 10 December 2010, available at <http://www.pcpd.org.nz/ddrip/>

¹⁴ See for example Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Te Tau Ihu Customary Rights in the Statutory Ngai Tahu Takiwa* Wellington: Waitangi Tribunal, 2007 available from their website, <http://waitangitribunal.govt.nz/reports/downloadpdf.asp?reportid=84272A68-DF3F-4A4F-BCAD-2E66AEE09DD9.pdf> accessed 10 December 2010.

other form of pressure being brought to bear; 'prior' meaning in advance of any decision; 'informed' meaning that sufficient information is available to make a decision; and 'consent', which is generally understood to mean agreement.Free, prior and informed consent can be regarded as an absolute minimum requirement for states in their dealings with indigenous peoples, but it is a standard that the New Zealand government has yet to meet.¹⁵

III LEVELS OF PARTICIPATION SHOULD BE GREATER AND IN DIFFERENT FORMS

i. as per Te Tiriti

I do not intend here to rehearse the Articles of Te Tiriti, suffice to reiterate that Article Two guaranteed the continuance of tino rangatiratanga. Arguably this may be limited by the kawanatanga of the Crown - but so too is kawanatanga limited by tino rangatiratanga. The extent of these limitations has been disputed by iwi and the Crown since 1840. The results of the Waitangi Tribunal claim WAI262 may give some indication of a way forward. Claimants in that case argue that the Crown has breached tino rangatiratanga since 1840 including by signing international agreements such as the General Agreement on Tariffs and Trade.¹⁶ As Moana Jackson has argued, just because the Crown claims de facto sovereignty and rejects other sovereignty claims "can neither justify an imposed power, nor render meaningless the rights of those who have been subjected".¹⁷

ii. Ongoing iwi tino rangatiratanga

A second reason for the need for greater levels and different forms of Maori participation results from ongoing tino rangatiratanga expressed in iwi involvement in diplomatic relations, with other Indigenous nations.

Iwi have long been engaged in diplomatic relations with others, mainly other Indigenous nations. Most recently Ngati Awa and the Mataatua Assembly have assisted in the formation of the United League of Indigenous Nations to foster relations, including trade, amongst Indigenous nations in the US, Canada, Australia and Aotearoa. This alliance may be extended in the future.¹⁸

The finalisation of the Treaty of the United League of Indigenous Nations in August 2007 between representatives of at least eleven Indigenous nations, aims to foster greater self-determination for Indigenous peoples through direct political, economic and social links amongst Indigenous nations.¹⁹ The iwi of Ngati Awa is one of the signatories to this Treaty and has had representatives involved in its negotiation and other iwi may follow. The Treaty creates the mechanisms by which a United League of Indigenous Nations can be established that all Indigenous nations can be invited to join. Although still in the early stages of development, the League presents

¹⁵ Hughes, E. (2008) speech to UNANZ 2008 National Conference 'Our Common Future', 1 June 2008.

¹⁶ See Solomon, M. "A Long Wait for Justice" in Bargh, M. *Resistance: An Indigenous Response to Neoliberalism*, Wellington: Huia, 2007.

¹⁷ Jackson, M. (1992) "The Treaty and the Word: The Colonisation of Maori Philosophy" in Oddie, G. and Perett, R (eds) *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, p. 6.

¹⁸ See their website United League of Indigenous Nations (2007) website accessed 1 December 2010; <http://www.indigenounationstreaty.org/>, <http://www.indigenounationstreaty.org/home.html>

¹⁹ United League of Indigenous Nations (2007) website accessed; 1 December 2010; <http://www.indigenounationstreaty.org/>

an alternative forum for Indigenous peoples to link directly with each other without being encumbered by the presence of state representatives. There are numerous other examples over the years of iwi diplomatic relations which I do not have time to explore but would include the Kingitanga links with other Pacific royalty, and as one example the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples 1993.²⁰

iii. Evolving Indigenous rights under international law

The third issue, which suggests the need for a reconsideration of current arrangements, is the clarifying of Indigenous rights under international law. The Declaration on the Rights of Indigenous peoples was finally adopted in September 2007 and “recognises the rights of indigenous people on a wide range of issues and provides a universal framework for the international community and States”. Despite the New Zealand government being one of only four countries in the world to vote *against* the adoption of the Declaration by the UN General Assembly, the Declaration sets out what are now the internationally accepted minimum standards relating to Indigenous rights and a framework for dialogue between Indigenous peoples and States. Since its adoption, the government in Australia and the parliament in Canada have stated that they are now prepared to accept the Declaration leaving New Zealand solely in the company of the United States in its rejection of the Declaration, although Prime Minister John Key has suggested he may consider reversing this position.^{21*} A number of nations and UN agencies are moving towards incorporating the norms and standards that the Declaration establishes. The UN Development Group has formulated Guidelines to assist those within the UN system to integrate “indigenous peoples’ issues in processes for operational activities and programmes at the country level”.²²

Perhaps the most significant right, which the Declaration reaffirms, is the right of Indigenous peoples to self-determination. “By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.²³ In light of Indigenous peoples right to self determination, one of the important frameworks that the Declaration establishes to enable dialogue between Indigenous peoples and States, and which could be instructive for assisting the expansion of Maori participation in foreign policy, is respect for free, prior and informed consent which I have mentioned above.

²⁰ For further exploration of Indigenous - Indigenous links see M. Bargh “Tino Rangatiratanga: Water Under the Bridge” *He Pukenga Korero*, Vol. 8, No. 2. 2007.

²¹ Radio New Zealand National, “NZ May Endorse UN Indigenous Rights Declaration” 17 May 2009. Available on the RNZ website, accessed 2 June 2009, <http://www.radionz.co.nz/news/stories/2009/05/17/1245b0225af1>; *Editor’s note: Since this article was written, the New Zealand Government has announced its support for the Declaration (see <http://www.beehive.govt.nz/release/national-govt-support-un-rights-declaration>, last accessed 10 December 2010) although this support has been moderated by the National Government’s view that the Declaration is non-binding, aspirational and “...will not compromise the fundamentals of this Government’s approach to resolving Treaty claims, and its work with Maori and all New Zealanders on the many challenges we face.” See John Key at <http://www.beehive.govt.nz/release/national-govt-support-un-rights-declaration>, last accessed 10 December 2010).

²² UN Development Group, *Guidelines on Indigenous Peoples’ Issues*, February 2008, p. 3.

²³ Article 3, Declaration on the Rights of Indigenous Peoples, 2007. This article is based on Article One, International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights.

IV HOW?

The third issue therefore is how to create greater levels and different forms of participation.

i. In the short term

In the short term and only as an interim measure and only to enable participation in foreign policy, one avenue may be to fully utilise and extend the powers of the Waitangi Tribunal.

As is well documented, the Waitangi Tribunal was established by the 1975 Treaty of Waitangi Act as “a permanent Commission of Inquiry charged with making recommendations on claims brought by Maori relating to actions or omissions of the Crown, which breach the promises made in the Treaty of Waitangi”.²⁴ It also includes the power of

inquiring into and making recommendations upon any claim properly submitted to the Tribunal, examining and reporting on any proposed legislation referred to the Tribunal by the House of Representatives or a Minister of the Crown, and making recommendations or determinations in respect of certain Crown forest land, railways land, State-owned enterprise land, and land transferred to educational institutions.²⁵

There is a mechanism here therefore, which already exists and which could be utilised and that could ensure that new breaches of Te Tiriti are not committed by the Crown. However, it is problematic. It is difficult to imagine the government voluntarily referring legislation, to the Tribunal to inquire into and make possibly negative recommendations about. Despite the likely flaws in this process, including the now common occurrence of the Crown blatantly dismissing and ignoring Tribunal recommendations, most significantly perhaps in recent years in the foreshore and seabed case, it is the only kind of process and mechanism of this nature currently available within the NZ political apparatus.²⁶

A plan to utilise the Tribunal resonates with the 2006 *UN Report of the Special Rapporteur on The Situation of Human Rights And Fundamental Freedoms of Indigenous Peoples*, where Rodolfo Stavenhagen recommended that:

The Waitangi Tribunal should be granted legally binding and enforceable powers to adjudicate Treaty matters with the force of law...The Waitangi Tribunal should be allocated more resources to enable it to carry out its work more efficiently and complete its inquiries within a foreseeable time frame.²⁷

²⁴ Waitangi Tribunal website, accessed 10 December 2010, available at <http://www.waitangi-tribunal.govt.nz/about/about.asp>

²⁵ Waitangi Tribunal website, accessed 10 December 2010, available at <http://www.waitangi-tribunal.govt.nz/about/about.asp>

²⁶ For the Waitangi Tribunal's Report see their website, accessed 1 December 2010, available at <http://www.waitangi-tribunal.govt.nz/reports/generic/>

²⁷ UN Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen Mission to NZ”, March 2006, p. 20, Available at <http://www.converge.org.nz/pma/srnmz06.pdf>

In *The Treaty of Waitangi in New Zealand's Law and Constitution* Matthew Palmer presents a similar kind of idea but one which reduces the role of the Tribunal and creates a Treaty of Waitangi Court. In his book Palmer argues there is a great deal of uncertainty around the Treaty, particularly regarding who is responsible for clarifying issues relating to the Treaty. He argues that the Treaty could be stabilised in law by being clear whose job it is to determine what the Treaty means in times of dispute and in specific contexts. Palmer canvases a range of options and proposes the creation of a Treaty of Waitangi Court which would assess whether the actions of the Crown and Maori are consistent with the Treaty. Palmer's plan for a Treaty of Waitangi Court could be an extension, or subsequent development of the short-term measure for the Tribunal proposed above.

ii. In the long term

In the long term the issue is really one about a change in the Crown's basic assumptions and therefore Crown recognition of tino rangatiratanga and that requires constitutional change. Stavenhagen commented on constitutional change in his 2006 report stating that:

Building upon continuing debates concerning constitutional issues, a convention should be convened to design a constitutional reform in order to clearly regulate the relationship between the Government and the Maori people on the basis of the Treaty of Waitangi and the internationally recognized right of all peoples to self-determination...²⁸

Stavenhagen suggested that

The Treaty of Waitangi should be entrenched constitutionally in a form that respects the pluralism of New Zealand society, creating positive recognition and meaningful provision for Maori as a distinct people, possessing an alternative system of knowledge, philosophy and law.²⁹

I will not cover the issue of entrenchment here but the idea of constitutional change, including parallel political systems has long been investigated and implemented by iwi. There is a long history of ongoing Maori political activities beyond the Crown-iwi binary.³⁰ The Maori parliaments of the 1800s would be one example.³¹

One of the models for constitutional change that has been proposed by Maori on a number of occasions for use in a national context, and which requires a much more detailed analysis, is one currently used by the New Zealand Anglican Church

²⁸ UN Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen Mission to NZ" March 2006, p. 20, Available at <http://www.converge.org.nz/pma/srnzmarch06.pdf>.

²⁹ Ibid.

³⁰ Bargh, M. (2007) "Tino Rangatiratanga: Water Under the Bridge?" *He Pukenga Korero*.

³¹ L. Cox, *Kotahitanga*, Oxford: Oxford University Press, 1993.

and elaborated upon by Whatarangi Winiata.³² The New Zealand Anglican Church considered the “Tikanga House model” for many years before its adoption as part of the Church Constitution in 1992. For the church the model establishes 13 different diocese, which are essentially different electorates; Maori, Pakeha and Pasefika - Polynesia. Different church officials and Bishops operate in these 13 different areas. The Maori and Pakeha areas geographically map upon one another in much the same way that the Maori and general electorates do in New Zealand national elections. The Pasefika – Polynesia diocese encompasses Fiji, Tonga, Samoa and the Cook Islands.³³ Bishops from each of the Tikanga Houses meet and make decisions with representatives from their diocese (or Hui Amorangi for Te Pihopatanga o Aotearoa) at their own synods utilising and maintaining their own tikanga. Decisions from each synod of the Tikanga Houses are then discussed and debated at a General Synod/Te Hinota Whanui.³⁴

The Tikanga House model presents a potential alternative and one which might be possible, with further analysis of its feasibility, to propose for the New Zealand parliament. The current structure of the electoral system already provides for separate representation from broadly Maori and non-Maori electorates (although many Maori are also enrolled on the general roll and Pasefika communities do not have their own electorate). From a practical view the establishment of meetings involving only the MPs from Maori electorates who would then report their decisions to the rest of parliament/the ‘Pakeha’ House is not unimaginable, as a first step. Winiata argues that the current activities of the Maori Party are indeed already those of a Tikanga Maori House within parliament. In 2007 he argued that:

The Caucus of the Tikanga Maori House meets on Tuesday mornings when Parliament is in session. In attendance are our four Members of Parliament, three senior staff members and the President; the Caucus is convened by the Whip. In the last twelve months during three periods in which Parliament was in recess, our four members have carried out coordinated visits to the three Māori electorates not held by the Māori Party as well as spending time in their own rohe.³⁵

Winiata argued further that with an increased share of the party vote (to the Maori Party), and therefore a greater number of seats in parliament the Tikanga Maori House could more adequately reconcile the kawanatanga of the Crown and tino rangatiratanga of iwi Maori.³⁶

While a Tikanga House may present some improvement on the status quo, such a model in many respects continues to accept an overriding Crown sovereignty within which a lesser form of tino rangatiratanga must operate.

Hapu and iwi continue to be hindered by these presently inadequate constitutional arrangements. Hapu and iwi must continually struggle to maintain their positions of tino rangatiratanga and to explain their position and political realities

³² See Winiata, W. (2007) “The Tikanga Māori House: The Influential Independent Māori Voice”, President’s Address, Māori Party Annual General Meeting, Hastings. Winiata, Whatarangi (2005) “The Reconciliation of Kawanatanga and Tino Rangatiratanga” Rua Rautau Lecture Rangiata Church Otaki.

³³ Anglican Church of New Zealand (undated) website accessed 1 December 2010; <http://www.anglican.org.nz/>

³⁴ Winiata 2005

³⁵ Winiata 2007.

³⁶ Winiata 2007.

both to the Crown and other New Zealanders.³⁷ And this includes struggling to have some participation in foreign policy formation.

Moana Jackson has recently argued that Aotearoa requires the de-constitution-alising of current power structures to envisage a Maori constitutional system.³⁸ There is no reason why de-constitution-alising New Zealand's current arrangements could not suit the needs and human rights of all peoples within Aotearoa.

³⁷ Bargh, M. (2006) "Changing the Game Plan", *Kotuitui: New Zealand Journal of Social Sciences Online*, Vol. 1, No.1.

³⁸ Jackson, M. 2008 presentation at the Maori Association of Social Scientists conference, Victoria University of Wellington.

The Bottom of the Heap?

Why Maori Women are Over-Criminalised in New Zealand

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I INTRODUCTION

The fastest growing demographic in New Zealand's burgeoning prison system is Maori women. The female prison population overall has exploded in the past decade, for a number of complex and inter-related reasons. These include a general climate of punitiveness resulting in harsher sentencing trends, new legislative guidelines in sentencing, and the abolition of the suspended sentence.¹ While female offenders and inmates are often deemed invisible due to their low raw numbers compared to their male counterparts, the position for Maori women is even more dire.

In this article I will set out the historical and contemporary factors and experiences that place Maori women at higher risk of offending, and imprisonment. While other research has looked at Maori offending generally, in my view, the context of Maori female offending sets them apart from both Maori men and other women. The lack of specific data on Maori women's offending and incarceration is one of the reasons that the increasing gap between ratios of Maori men and women in offender and prison populations has occurred under the radar. It is crucial for government agencies and providers to consider Maori women as a group in order to effectively and appropriately provide for their rehabilitative and reintegrative needs.

In the first part I set out the 'problem' of Maori female offending and how it has been conceived. I do this by arguing:

- (i) That an intersectional analysis to criminal justice data is essential;
- (ii) That Maori women are a significant constituency in the criminal justice framework; and
- (iii) That their socio-economic and offending profiles define Maori women as a unique demographic.

I set out statistical profiles of offending in New Zealand by gender and race, as they are typically presented, to illustrate that it is difficult to identify clearly Maori women from within these sub-populations, as their experiences are not typical of either. I propose that it is essential to *start* with the experiences of Maori women, rather than

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¹ See J Tolmie, "Women and the Criminal Justice System" in J Tolmie and W Brookbanks (eds) *The New Zealand Criminal Justice System* (Lexis Nexis, Auckland, 2007) 295-297.

analyse them from either a gendered or ethnic perspective, and I briefly review the literature of theorists who support such an intersectional approach to dealing with the needs of minority women.

In the next section I explain the unique experiences of Maori women, and how they are over-criminalised both by our rates of offending and the response of the criminal justice system – compared with both non-Maori women and Maori men. I outline how tikanga Maori and the process of colonisation have specifically shaped the position of the Maori female, making her unique in this country. The principles and practices of Maori tradition provide for different life paths, roles and responsibilities for women compared with men. In addition, the overarching regulating principles of mana and tapu provide for a culturally specific framework that co-exists with gender constructs in Maori society.

This discussion of the process of colonisation demonstrates how the double whammy of both racism and sexism suffered by Maori women places us in a different position from both Pakeha women and Maori men. Ultimately, this process produces a unique combination of variables that influences the position of Maori women today – a population that is over-represented in all negative socio-economic indices relating to health, housing, education, poverty and offending.

The Problem of Maori Female Offending: Why it is Essential to Start With the Experiences of Maori Women

The problem of criminal offending in New Zealand is usually presented and analysed in terms of gender and race. In most instances these are presented as totally separate variables – so that where gender and race intersect, as they necessarily do for Maori female offenders, there is no separate statistical record of what makes that population unique from either of the statistical datasets for Maori offenders or female offenders generally. In this section I first will set out and interpret the statistical data relating to both Maori and women's offending in New Zealand, to demonstrate that Maori women have a unique offending profile that is often rendered invisible within the current system of data collation because gender and race are analysed as separate categories.

Secondly, I will introduce theories of intersectionality that aim to explain why we need to contextualise the lives of women of colour if their involvement in criminal offending and social harm is to be adequately and appropriately dealt with. Intersectional theory has developed from the experiences of women of colour in many jurisdictions, experiences that mirror the difficulties Maori women face when their lives are fragmented by race and gender.

Thirdly, I will provide a more qualitative analysis of the experiences of Maori women, in order to illustrate how the colonisation of Aotearoa has impacted uniquely upon Maori women in ways that are significant in shaping their patterns of offending and their treatment by the criminal justice system. The process of colonisation not only devastated and reconstructed Maori society and collective family support structures, but it also imported Western notions of gender, including misogyny and sexism, that fundamentally affected the perception and treatment of Maori women by both Maori men and Pakeha men and women.

Fourthly, I will discuss the treatment of women in the criminal justice system, including theories asserting the gender regulation of women, which frequently manifests

in a form of a paternalistic display of “chivalry” granted to those women who meet predetermined notions of gender expectations, in other words women who are seen to be “gender regulated”. I assert that Maori women are unable to meet these gender role expectations due to various cultural and practical barriers, with the result that, unlike non-Maori women, they are filtered in rather than out of, the criminal justice system at every stage of progress through it.

Statistical Profiles of Offending in New Zealand

In this part I will set out the typical presentation of criminal justice offending data in New Zealand. I look at the data on gender and the data on Maori before concluding that Maori women are atypical of either of those populations. It will be evident that there are significant gaps in what we know about Maori women as offenders, due to the manner in which criminal justice data is collated, within a generally single-axis framework. This means that nearly 60% of the female prison inmates in New Zealand is for all intents and purposes an invisible population within the Corrections sector insofar as our knowledge of their offence patterns and personal histories.

Data relating to offending in New Zealand is collated by several different agencies, including the Ministry of Justice, the New Zealand Police and the Department of Corrections.

i. Statistics by Gender

Theorists have long commented on what has been termed the “gender ratio” problem of crime – that most reported crime is committed by men. This phenomenon is confirmed by the data on offending in New Zealand, where in 2005, only 19% of Police apprehensions for crime were for female offenders.² Of those apprehended women, only 55.39% were prosecuted, compared with 66.91% of apprehended men.³ Of all people convicted in 2005, women were responsible for only 19% of traffic offences, 24% of property offences, 12% of violent offences, 17% of drug related offences, 18% of offences against justice, and 12% of offences against good order.⁴ Women accounted for only 17% of all convictions and 4% of those sentenced to a custodial sentence.⁵

Aside from the *quantitative* differences in the scale of male compared with female offending, there is also a stark *qualitative* difference in relation to patterns of offending. Traffic offences are the most common offences committed by both men and women, accounting for 43.23% of women’s offences and 40.55% of men’s offences for 2005.⁶ When traffic offences are removed from the equation, women’s offence categories in 2005 can be disaggregated as follows, as compared with men: 9.47% of women were convicted of good order offences (cf 14.69% of men), 8.18% drug offences (8.24% of men), 6.9% miscellaneous (8.7% of men) and 2.37% for other offences against the person

² *Statistics New Zealand, Focusing on Women 2005* (Statistics New Zealand, Wellington, 2005) 117. See J Tolmie, “Women and the Criminal Justice System” in J Tolmie and W Brookbanks (eds) *The New Zealand Criminal Justice System* (Lexis Nexis, Auckland, 2007) 297.

³ Above n1, 297.

⁴ *Ibid*, 299.

⁵ *Ibid*, 297.

⁶ *Ibid*, 298.

(2.93% of men).⁷ But, in proportional terms, women commit more property offences (39.84% of women's crimes compared with 26.98% of men's) and fewer violent offences than men (12.25% of women's crimes compared with 18.8% of men's).⁸

ii. Statistics by Ethnicity

Statistical profiles of offending in New Zealand in modern times reflect a trend of serious habitual offending by Maori, vastly disproportionate to our 15% of the population.⁹

Maori are 3.3 times more likely to be apprehended for a criminal offence than non-Maori.¹⁰ Maori men and women are more likely to be prosecuted than non-Maori.¹¹ Ministry of Justice figures from 1999 reported a prosecution rate for young Maori people aged 10-16 at 76.2 per 1000 population compared with 16.95 per 1000 population for young non-Maori.¹² Maori adults were 3.8 times more likely to be prosecuted than non-Maori and 3.9 times more likely to be convicted of an offence.¹³ Nine times as many Maori than non-Maori are remanded in custody awaiting trial.¹⁴ Of all the cases that resulted in conviction in 2005 where the ethnic identity of the offender was known, 43% involved Maori, compared with 45% for Caucasians.¹⁵

In relation to young people, the youth justice scheme in New Zealand was overhauled in 1989, with a new emphasis on keeping young offenders (those aged 10-17) out of institutions. Despite these changes, in 2004, 54% of the 6,269 young people prosecuted for offending were Maori.¹⁶

In terms of the type of offence committed by ethnicity, in 2004, Maori accounted for 47% of all convictions for violent offences (compared with 38% for NZ Europeans), 48% of all convictions for property offences (42% for NZ Europeans), 40% of all drug offences (54% for NZ Europeans), and 32% of all traffic offences (40% for NZ Europeans).¹⁷ These statistics are not broken down by gender which, as Julia Tolmie states, results in the experience of Maori women disappearing into the separate categories of 'women' and 'Maori', although their experiences "are unlikely to be typical of either."¹⁸

⁷ Ibid.

⁸ Ibid.

⁹ Maori constitute 14.6% of the overall population of New Zealand - Statistics New Zealand, *Census of Population and Dwellings 2006*.

¹⁰ P Doone, *Hei Whakarururanga Mo Te Ao* (Crime Prevention Unit, Wellington, 2000) ch 4.

¹¹ Ministry of Women's Affairs, *Maori Women: Mapping Inequalities and Pointing Ways Forward* (Wellington, 2001) 117.

¹² Ibid, 116, Table F4.

¹³ Ibid, 117.

¹⁴ M Burton, "The Effective Interventions Initiatives and the High Number of Maori in the Criminal Justice System" (speech given at Ngakia Kia Puawai, New Zealand Police Management Development Conference, 28 November 2006) Paper last accessed 12 November 2010 at www.labour.org.nz/MarkBurton/speeches_and_releases/policecollege281106/index.html.

¹⁵ N Soboleva, N Kazakova and J Chong, *Conviction and Sentencing of Offenders in New Zealand: 1996-2005* (Ministry of Justice, Wellington, 2006) Executive Summary.

¹⁶ Ibid, Table 7.11a.

¹⁷ Ibid, 2.14.

¹⁸ Above n1, 303.

iii. Offending Rates For Maori Women

A comparison between male and female statistical profiles and their treatment in the pre-prison process does not address general disparities between Maori and non-Maori embedded in those statistics or more particularly between Maori and non-Maori female profiles. For example, in 1999 prosecution rates for young Maori women aged 10-16 were six times the rate for young non-Maori women.¹⁹ Within the adult population the prosecution rate in 1999 for Maori women was over five and a half times that of non-Maori females.²⁰ Non-Maori females had the lowest rate of criminal prosecution, at 1.1%.²¹ Conviction rates illustrate similar disparities, with 54.4% of all women convicted identifying as Maori, at a time when Maori made up 12.7% of the adult female population.²² At sentencing Maori women received custodial sentences in 6.2% of cases, compared with 4.3% of cases involving non-Maori female offenders.²³

In 2005, 45.83% of women apprehended were Maori, and Maori women represented 50.52% of women prosecuted, compared with 43.07% of apprehensions identifying as Caucasian women, who made up 40.1% of women prosecuted.²⁴ Non-Maori women are therefore filtered out of the system in greater proportion to Maori women at the point of apprehension, often by way of a Police warning or caution.²⁵

The comparisons between non-Maori and Maori females cited above illustrate that the gap between ethnic groups is wider than that which exists between the genders. Ethnic disparities in the risk of imprisonment for women are evident from statistical studies conducted in the United States, England and Wales, Canada and Australia. In each of these jurisdictions, black and Aboriginal women are imprisoned at far greater rates than white women; and in England and Canada, as in New Zealand, the over-representation of these minority women within the female prison population is greater than that for minority men within the male population.²⁶ In other words, the experience of racism and race modifies the effects of gender for women in a striking fashion in all jurisdictions in which such data is recorded.

The general profile of Maori offending also fails to show the significant differences between male and female Maori offenders. The scale and type of offending, as well as the likely outcome in sentencing, all differ significantly between Maori men and women. For example, the youth prosecution rate which shows that Maori youth are prosecuted at rates almost four and a half times that of non-Maori, fails to demonstrate

¹⁹ Above n1, 116.

²⁰ Ibid, 117.

²¹ Ibid, 118.

²² Ibid.

²³ Ibid, 119.

²⁴ Above n1, 302-303.

²⁵ Ibid, 302-303.

²⁶ In the United States, black women are imprisoned at six times the rate of white women, and Hispanic and Indian women at double the rate of white women: Bureau of Justice Statistics, *Correctional Populations in the U.S. NCJ-177613* (U.S Department of Justice, Washington D.C., 2000). In England and Wales, black women are ten times more likely than white women to be imprisoned: Home Office, *Total Monthly Prison Population by Sex (Offenders and Corrections Unit, London, 2001)*. Aboriginal women in Canada make up 23% of inmates and only 2% of the general population: A Finn, S Trevehan, G Carriere and M Kowalski, "Female Inmates, Aboriginal Inmates, and Inmates Serving their Life Sentences" (1999) *Juristat* 19. A similar disparity exists for Aboriginal women in Australia: B Hampton, *Prisons and Women* (University of New South Wales Press, Sydney, 1993).

that young male Maori are prosecuted at five times the rate of their Maori female counterparts.²⁷ Data also shows that property offences accounted for almost half (48.1%) of Maori female offending, and only a third of Maori male offending. 22% of Maori male offending involved violence.²⁸ There are no statistics kept in relation to violent offending by Maori females, although of the women in prison in 2004, approximately 60% of those convicted for violent offences identified as Maori.²⁹

Although we have already established that men are more likely than women to receive a prison sentence, and Maori women more likely than non-Maori women, Maori men are two and a half times more likely than Maori women to be incarcerated.³⁰ What this demonstrates is that, although over-represented in the female offending and prison populations compared to Maori men in the male population, they are still numerically a significantly smaller population within the justice system than Maori men. What this means is that the effects of gender are operational in Maori women's lives (as they are in Maori men's), even if they are mediated by ethnicity in ways not experienced by Pakeha women (or men).

Although some data does exist, it is not consistent and frequently it is, in fact, difficult to extrapolate data in relation to Maori women's offending, as separate from both Maori men and non-Maori women. Given the huge over-representation of Maori women in offending and imprisonment statistics, it is therefore imperative to take an approach to data collation that allows the relevant authorities to understand the unique positioning of Maori women, to allow for a more nuanced approach to their incarceration and rehabilitation.

In the following section I will set out some of the key tenets of intersectional theory, arguing that this is the appropriate approach to take in respect of a population as important as Maori women are in the criminal justice system.

The Intersection Between Gender and Ethnicity

i. Intersectional Feminism in the International Context

The fact that we feel our Aboriginality more strongly than our gender is a reflection that the repercussions of racism in Australia are often greater than those of sexism. Aboriginal women and non-Aboriginal women in Australia do not have a shared experience. This is due to a potent combination of racism and sexism in the lives of black women.³¹

The above quote from Aboriginal legal academic Larissa Berendt, illustrates the difficulties faced by women of colour, and the dilemma of what has been termed the

²⁷ The rate of Maori female prosecutions is 25.4 per 1000 population compared with 127 per 1000 for young Maori males: see above n11, 116.

²⁸ Above n 11, 118.

²⁹ Department of Corrections, Risk Assessment of Recidivism of Violent Sexual Female Offenders (Wellington, 2005) 3.

³⁰ Above n 11, 119.

³¹ L. Behrendt, "Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourses" (1993) 1 Australian Feminist Law Journal 27.

“oppression sweepstakes.”³² This term refers to the competition amongst variables such as race or gender in the lives of women of colour as to which attracts more discrimination and oppression, with many women feeling that they must choose one part of themselves to identify with in their political or legal struggle against inequality. This is the first criticism of feminist theory – that it does not account for difference amongst women. Black/Latino scholar Trino Grillo speaks of the dilemma:³³

[I] understand a little better the anti-essentialist lesson which says I should not permit myself to be pressed, to be made to choose which part of myself is most important to me. The lessons of anti-essentialism and intersectionality are that the oppressions cannot be dismantled separately because they mutually reinforce each other. Racism uses sexism as its enforcer.

Much modern criminological and penological theory has tended to focus on women as a distinct class to male offenders. Alternatively, the classification and theories relating to criminality offenders focus on another variable, such as race or ethnicity. The theory of intersectionality, and aspects of Critical Race Theory in the Realist tradition of jurisprudence, assert that these differentiations fail to account for the effect of *intersecting* variables, such as the “potent combination” of race and gender.³⁴

The development of feminist theory in the mid-20th century initially presented the experience of women as a monolithic construct. This approach was soon criticised for essentialising women, and ignoring the foundational influence of other factors such as race, ethnicity, religion, sexual orientation or class. As the influential black female theorist, Kimberle Crenshaw, claimed:³⁵

The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite – that it frequently conflates or ignores intragroup differences.

The second major criticism of early forms of feminism, particularly liberal feminism, was the reliance on equality theory, in which the goal was the attainment of

³² R Austin, “Sapphire Bound” [1989] Wis.L.Rev. 539, 546.

³³ T Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (1995) Berkeley Women’s Law Journal 16, 19.

³⁴ The extensive literature on intersectional theory, which largely derives from the United States includes: K Crenshaw, “Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” in D K Weisberg (ed) *Feminist Legal Theory: Foundations* (Temple, Philadelphia, 1993); A Harris, “Race and Essentialism in Feminist Theory” (1990) 42 Stanford L Rev 581; E V Spelman, *Inessential Woman* (Beacon Press, Boston, 1998); M Kline, “Race, Racism and Feminist Legal Theory” (1989) 12 Harvard Women’s Law Journal 115; J Scales-Trent, “Black Women and the Constitution: Finding Our Place, Asserting Our Rights” (1989) 24 Harvard Civil Rights/Civil Liberties Law Review 9. There is some research deriving from the United Kingdom, including: S Fredman and E Szyszczak, “The Interaction of Race and Gender” in B Hepple and E Szyszczak (eds), *Discrimination: The Limits of the Law* (Mansell, London, 1992) 214; D Ashiagbor, “The Intersection Between Gender and Race in the Labour Market” in S Sheldon (ed) *Feminist Perspectives on Employment Law* (Cavendish, London, 1998) 139.

³⁵ K Crenshaw, “Women of Color at the Center: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 Stan. L. Rev. 1241, 1242.

similar treatment for women and men. The goal of equal treatment with men was problematic when applied to women of colour. Which men were they talking about? Women of colour and of the working class began to deconstruct the values and standards implicit in this vision of equality as white, male and middle class. For example, the assumption that women wanted access to work and the professions ignored the history of working class women who had always worked, with no chance of entering the professions. In other words, the “equal treatment” theory seemed to be appropriate for white middle class women, striving to be treated the same as white middle class men. The goal of equal treatment between genders does not transfer to indigenous or minority women. Given their shared history of colonisation, oppression and disadvantage, no aboriginal or minority woman would aspire to be in the place of an aboriginal man, who will have also suffered discrimination. To women of colour therefore, liberal feminism replicated the racial hierarchy through “the unarticulated presumption of white race”.³⁶

Parallel criticisms were made with respect to the influence of race and ethnicity (and the non-consideration of other identities) in Critical Race Theory. Critical Race Theory grew out of the Critical Legal Studies movement of the late twentieth century, which deconstructs the notion of neutral, positivist law. Whereas Critical Legal Studies scholars asserted that the law reflects the privileged class subjectivity of those in power, Critical Race Theorists went further in insisting that race was more important than previously thought by examining the relationship between race, racism and power.³⁷ Just as feminists criticise the gendered nature of law and its application, Critical Race Theorists argue that law preserves the cultural and ethnic mores of the people who shape, influence and apply its content. Overlapping some of the feminist critiques of liberalism, Critical Race Theorists, such as Richard Delgado, argue against essentialism, promoting subjective positioning instead. The idea is to debunk liberal claims to objectivity, and expose the law for perpetuating the dominance of white racial and ethnic superiority.³⁸

There are a number of key tenets of Critical Race Theory, as argued by Richard Delgado and others.³⁹ The first is that “racism is ordinary”, in that it is so embedded in society and in our legal and political structures as to be almost invisible. Racism serves both material and psychic interests. For white people with power, racism is materially advantageous, while for white people of lower or working class, there is at least a psychic advantage to promoting whiteness over non-whiteness.⁴⁰ The second tenet was put forward by one of the founding fathers of Critical Race Theory, Derrick Bell, who argues that the interests of blacks were only advanced by white people when their interests coincided – this is the notion of “interest convergence”. Bell’s analysis puts a different spin on the litigation of the American civil rights era – in that he claims the interests of blacks were only advanced when they did not threaten the real social and hegemonic status of whites.⁴¹ The third key tenet of Critical Race Theory is that the notion of race is purely a social construction, not tied to any fixed biological or genetic reality.⁴² At

³⁶ J Stubbs and J Tolmie, “Race and the Battered Woman Syndrome: An Australia Case Study” in (1995) 8 Canadian Journal of Women and the Law 122, 127.

³⁷ R Delgado and J Stefanic, *Critical Race Theory: An Introduction* (New York University Press, New York, 2001) chapter 1.

³⁸ R Delgado, *Critical Race Theory: The Cutting Edge* (Temple University Press, Philadelphia, 1995)

³⁹ Above n37.

⁴⁰ *Ibid.*

⁴¹ R Delgado and J Stefanic (eds) *The Derrick Bell Reader* (New York University Press, New York, 2005) chapter 1.

⁴² Above n37.

different times, depending on need or social circumstances, the law may racialise certain groups for particular purposes, such as immigration or the needs of the labour market.

For early Critical Race Theorists, being 'of colour' was the primary consideration in their analysis of the construction and application of the law and legal system, with general assumptions that the legal subject was also male and heterosexual. In early Critical Race Theory, it was the female aspect that was invisible, subverted by the figure of "the oppressed black man". Women from minority groups were discouraged, for example, from raising concerns about domestic violence on the basis that such concerns would feed into criticism and negative stereotypes in the broader community and result in a backlash against the group.⁴³

While both feminism and Critical Race Theory provided valuable scholarship in and of themselves, they were criticised as essentialising *either* race or gender as the primary indicator of identity and experience – effectively establishing binaries of black/white and male/female. Differences between the individuals of a particular gender or race were deemed invisible. Richard Delgado reports that the movement came to realise that "no person has a single, easily stated, unitary identity" and that "everyone has potentially conflicting, overlapping identities, loyalties and allegiances."⁴⁴ As Crenshaw states:⁴⁵

Feminist efforts to politicise experiences of women and antiracist efforts to politicise experiences of people of colour have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains.

The result was that women of colour, in particular, were at the "intersection" of several systems of oppression and fell into the gaps in both bodies of knowledge and politics because each theorised only one system of oppression. Intersectional theory developed to account for and explain the overlap between the two theories. Mohawk scholar Patricia Monture-Angus describes the phenomenon from the perspective of an indigenous woman:⁴⁶

Aboriginal womens' experience is both gendered and racialised. Often these two grounds of discrimination cannot be distinguished in the examination of specific acts, policies or programmes. Race (including colonialism) and gender are not discrete categories but overlapping and independent experiences.

The key tenet of intersectional theory is that people are made up of a combination of *indivisible* biological, social, and cultural characteristics, and that it is unrealistic to

⁴³ See for example the discussion on "political intersectionality" in Part II of K Crenshaw, "Women of Color at the Center: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 *Stan. L. Rev.* 1241, 1251-1282.

⁴⁴ *Ibid.*, 1251-1282.

⁴⁵ *Ibid.*, 1241.

⁴⁶ P Monture-Angus, "The Lived Experience of Discrimination: Aboriginal Women Who Are Federally Sentenced" (unpublished paper, submission to the Elizabeth Fry Society of Canada, 2002). Found at www.elizabethfry.ca/submissn/aborigin/1.htm, 8, last accessed 12 November 2010.

place these characteristics in a hierarchy. In terms of the application of laws, it is asserted that subjects such as women of colour are discriminated against as a result of a particular combination of their race and their gender.

Furthermore, the unique circumstances of ethnic minority women cannot be quantified by reducing their membership of two different groups to a mathematical equation for discrimination. The experience of discrimination by ethnic minority women is a specific *combination of*, rather than addition, to the various disadvantages suffered by women and the ethnic minority in question. The issue is clarified by Crenshaw:⁴⁷

Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet they often experience double [or additive] discrimination – the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes they experience [intersectional] discrimination as Black women – not the sum of race and sex discrimination, but as Black women.

Angela Harris criticises the theory that an individual's social characteristics can be quantified and separately addressed, asserting that this produces a distorted essentialism.⁴⁸

The result of essentialism is to reduce the lives of people who experience multiple forms of oppression to additional problems: "racism + sexism = straight black women's experience", or "racism + sexism + homophobia = black lesbian experience". Thus, in an essentialist world, black women's experience will always be forcibly fragmented before being subjected to analysis.

Similarly, Carol Alyward describes the difficulties the law has had in addressing multiple sources of discrimination in a distorted as opposed to fragmented fashion.⁴⁹

The inclination has been to address multiple grounds of discrimination in an additive or cumulative way. Rather experiences of multiple sources of discrimination are most often interdependent, overlapping and intersectional. The challenge is to approach these issues by addressing the way gender is racialised or race is gendered, as this is the way it often feels to those subjected to multiple forms of discrimination.

⁴⁷ K Crenshaw, "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" in D K Weisberg (ed) *Feminist Legal Theory: Foundations* (Temple, Philadelphia, 1993) 385.

⁴⁸ A Harris, "Race and Essentialism in Feminist Theory" (1990) 42 *Stan. L Rev.* 581, 588.

⁴⁹ C Alyward, *Canadian Critical Race Theory: Racism and the Law* (Fernwood Publishing, Halifax, 1999) 5.

Intersectional analysis identifies qualitatively and quantitatively different experiences as a result of the combination of an individual's or group's experiences of multiple oppressions. The aim of intersectionalism therefore, is to stop the fragmentation of social characteristics, so that none of them is considered in isolation from the other when attempting to redress inequality.

Kimberle Crenshaw explains the operation of experiences of intersectionality through a three-part framework.⁵⁰ The first stage is "structural intersectionality", referring to the socio-economic or structural factors that result in minority women having quantitatively and qualitatively different life experiences than either minority men or non-minority women.

The second stage in Crenshaw's framework is "political intersectionality", where she discusses how belonging to at least two subordinated groups can result in torn loyalties where minority women have to choose between the sometimes conflicting political agendas of feminism versus anti-racism.

In a criminal law context, political intersectionality is demonstrated by Maori women not speaking out about domestic violence by Maori men, for fear of attracting a racist response to claims from the broader community. This issue was raised in a Ministry of Justice evaluation of the use of domestic violence legislation in 2000, with 13 of the lawyers surveyed claiming their Maori female clients were under cultural or family pressure not to pursue protection orders against their (generally Maori) partners.⁵¹

The final stage of Crenshaw's framework refers to "representational intersectionality", where women of colour are marginalised by particular constructions or imagery of themselves in popular culture and mass media. As Julia Tolmie observes in the New Zealand context:⁵²

Western constructions of femininity include not just female gender roles, but qualities that it is appropriate for women to possess, such as vulnerability, dependency and emotionality. Accordingly, it is argued that female offenders are also responded to positively within the criminal justice system according to the degree to which they can be constructed as vulnerable and victimised.

This insight provides a possible explanation as to why Maori women do not get the same lenient treatment in the criminal justice system [as non-Maori women].

Tolmie is alluding to the popular imagery of Maori women as strong, stropic and vocal – characteristics that defy the vulnerable, victimised construction of women. Traditional artistic representations of Maori women have portrayed them as overly sexualised, fallen women, of dubious morals, and some argue that these historical images contribute to the perpetuation of racist and sexist stereotypes of Maori women today.⁵³ As

⁵⁰ She sets out this framework in K Crenshaw, "Women of Color at the Center: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 Stan. L. Rev. 1241.

⁵¹ H Barwick, A Gray, R Macky, *Domestic Violence Act 1995: Process Evaluation* (Ministry of Justice, Wellington, 2000) 4.7

⁵² Above n1, 305-6.

⁵³ J Sutton Beets, "Images of Maori Women in New Zealand Postcards After 1900", in A Jones, P Herda and T Suaalii (eds) *Bitter Sweet: Indigenous Women in the Pacific* (University of Otago Press, Dunedin, 2000) 31; M Sheffield, "Film – Images of the Indigene: the Exotic Other in the South Pacific" in (2000) 6 Deep South, 1-8.

a result, Maori women are filtered into the criminal justice system rather than out, as most women are, and they are seen as *belonging* in the justice system in ways that Pakeha women are not. This is a clear example of race modifying the effects of gender. The use of discretion and notions of chivalry granted by male decision makers to women are not bestowed on Maori women in the way that they are for Pakeha. Maori legal academic Stephanie Milroy isolates this issue in the context of the courtroom:⁵⁴

Most lawyers and judges are white middle class males and females. They cannot help but have stereotypes of Maori women in their minds and it is difficult for even the most sensitive person not to apply inadvertently those stereotypes (and there are always those who are deliberately offensive).

Intersectional Theory in the New Zealand Context

Intersectional and Critical Race Theory have been adopted and developed to some extent in New Zealand through the Maori feminist, or mana wahine movement. Mana wahine is necessarily intersectional as it intertwines issues of race and gender as present in the lives of Maori women. Maori women such as Donna Awatere in the 1970s and 1980s took up feminist theory to challenge the dominant discourse of Pakeha feminism in New Zealand, arguing that reclamation of our sovereignty, not the elimination of patriarchy, was the primary concern for Maori women, and that this meant their allegiance was first and foremost to being Maori.⁵⁵ She was severely critical of Pakeha women, who she says are allied with Pakeha men in their denial of tino rangatiratanga for Maori, and use their race, power, privilege and status to suppress Maori aspirations:⁵⁶

The oppression of women *does not* exist in a vacuum: economic and racial privileges cannot be separated from sexual power.

This dynamic fits within what Crenshaw would later term “political intersectionality” – the dilemma faced by minority women in having to choose to side either with fellow non-minority women, or alongside minority men.⁵⁷ Notwithstanding her claims in relation to Maori women and tino rangatiratanga, Awatere is cognisant of some common ground with Pakeha women, and the need to eliminate oppression on the grounds of gender, as well as class and race.⁵⁸ Maori educationalist Professor Linda Smith is similarly torn – asserting on the one hand that the feminist struggle is relevant for all women of Aotearoa/New Zealand, and on the other that “[o]ur rage as an

⁵⁴ S Milroy, “Maori Women and Domestic Violence: The Methodology of Research and the Maori Perspective” (1996) 4 Waikato Law Review 9.

⁵⁵ D Awatere, *Maori Sovereignty* (Broadsheet Publications, Auckland, 1984) 42.

⁵⁶ Ibid.

⁵⁷ K Crenshaw, “Women of Color at the Center: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 Stan. L. Rev. 1241. L Behrendt, “Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourses” (1993) 1 Australian Feminist Law Journal 27.

⁵⁸ Above n55, 44.

oppressed group is directed at dominant white structures which sit over us, and so encompasses white women as much as white men.”⁵⁹ Legal academic Leah Whiu is also forthright in her scepticism of allegiances with non-Maori women: “What affinity can we share with white women if they refuse to acknowledge and take responsibility for their colonialism?”⁶⁰

Nearly twenty years later, Maori criminologist Tracey McIntosh more clearly asserts the need for intersectional approaches.⁶¹

Race, gender, sexuality and class are interlocking: each of these factors impacts on the way the other is experienced... There is a tendency to privilege cultural discourses that stress the differences between Maori and Pakeha cultural values and to ignore the way that oppressive relationships are inflected by gender and class... Maori women continue to bear the greatest burden of social, political and economic oppression.

In the past two decades many more Maori feminists have explored the relationships between Maori and non-Maori feminists.⁶² The complex dynamics involved are identified in a nutshell by Johnston and Pihama:⁶³

As women we have been defined in terms of our differences to men, as Maori we have been defined in regard to our difference to the coloniser. As Maori women we have been defined in terms of our differences to Maori men, Pakeha men and Pakeha women.

Legal academic Ani Mikaere concludes however, that there is a role for Pakeha feminists in the struggle for recognition of Mana Wahine.⁶⁴

So long as they resist the temptation to define Maori culture and practices in terms of their own culture-specific understandings and accept their responsibilities as a relatively privileged group (relative to Maori women that is) to promote changes

⁵⁹ L Smith, “Maori Women: Discourse, Projects and Mana Wahine” in S Middleton and A Jones (eds) *Women and Education in Aotearoa 2* (Bridget Williams Books, Wellington, 1992) 34, 47.

⁶⁰ L Whiu, “A Maori Woman’s Experience of Feminist Legal Education in Aotearoa” (1994) 2 *Waikato Law Review* 161, 164.

⁶¹ T McIntosh, “Contested Realities: Race, Gender and Public Policy in Aotearoa/New Zealand”, a paper prepared for the United Nations Research Institute for Social Development Conference on Racism and Public Policy, September 2001, 9-10.

⁶² See for example N Te Awakotuku, *Mana Wahine Maori* (New Women’s Press, Auckland, 1991); M Szasy, “Maori Women in Pakeha Society” in C MacDonald (ed) *The Vote, the Pill and the Demon Drink* (Bridget Williams Books, Wellington, 1993); K Irwin, “Towards Theories of Maori Feminisms” in R Du Plessis (ed), *Feminist Voices* (Oxford University Press, Auckland, 1991) 2; CTK Hoskins, “In the Interests of Maori Women? Discourses of Reclamation” in A Jones, P Herda and T Suaalii (eds) *Bitter Sweet: Indigenous Women in the Pacific* (University of Otago Press, Dunedin, 2000); L T Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (University of Otago Press, Dunedin, 1999); P Johnston and L Pihama, “The Marginalisation of Maori Women” (1994) 20 *Hecate* 2.

⁶³ P Johnston and L Pihama, “The Marginalisation of Maori Women” (1994) 20 *Hecate* 2.

⁶⁴ A Mikaere, “Maori Women: Caught in the Contradictions of a Colonised Reality” (1994) 2 *Waikato Law Review* 125, 147.

sought by Maori women, their insights into the workings of white patriarchy may well be of use to Maori women. This commonality of interest should not, however, disguise our differences in experience. Maori women's interests are, in the end, our own.

Aside from differences from Pakeha women, there are also issues between Maori men and Maori women. Clea Te Kawehau Hoskins is critical of the role that Maori men have played in the process of disempowerment of Maori women, so that Maori men are now viewed as the “legitimated keepers, interpreters and promoters of what is considered authentic, traditional tikanga and kaupapa Maori”, with the result that it is men who are articulating the social, economic and cultural goals for Maori.⁶⁵ Kathie Irwin also observed the cross-cultural alliance formed between Maori men and Pakeha men in the process of colonisation as “the evolution of strange new cultural practices in which men are bonding to each other, through patriarchy, to give each other participatory rights across Maori and Pakeha culture, in ways which exclude Maori women.”⁶⁶ The primary historical example of such a phenomenon in Aotearoa was the British Crown's inability to recognise Maori women as leaders capable of negotiating and signing the Treaty of Waitangi on behalf of their hapu.⁶⁷ Mikaere challenges Maori men to confront their collaboration with Pakeha men to oppress Maori women, as part of our collective struggle against colonisation.⁶⁸

McIntosh articulates the tensions identified by the various Maori feminists for Maori women vis a vis Maori men:⁶⁹

Maori women continue to want to be linked to and stand by Maori men. We recognise that to achieve our aims and to maintain our own cultural values, continued solidarity is essential; we must however continue to strive for equal positions of power and responsibility... An emphasis on cultural solidarity obscures the very real difference of social class and social relations in Maori society in the same way that it obscures the inequalities between men and women.

The key to an intersectional analysis is to ground subjective experiences to contextually allow for a more nuanced understanding of the subject/s in question. In this next section therefore, I will set out the cultural and historical experiences of Maori women deriving from tikanga Maori, and will follow through to the process of colonisation that, in my view, establishes the structural framework in which Maori women are forced to operate today. This analysis fits into the structural aspect of Crenshaw's intersectional schema – illustrating the qualitatively different experiences of Maori women throughout the pre and post-contact period of New Zealand history.

⁶⁵ CTK Hoskins, “In the Interests of Maori Women? Discourses of Reclamation” in A Jones, P Herda and T Suaalii (eds) *Bitter Sweet: Indigenous Women in the Pacific* (University of Otago Press, Dunedin, 2000) 39.

⁶⁶ K Irwin, “Towards Theories of Maori Feminisms” in R Du Plessis (ed), *Feminist Voices* (Oxford University Press, Auckland, 1991) 2, 18.

⁶⁷ A Mikaere, “Collective Rights and Gender Issues” in N Tomas (ed) *Collective Human Rights of Pacific Peoples* (International Research Unit for Maori and Indigenous Education, Auckland, 1998) 96.

⁶⁸ *Ibid.*, 97.

⁶⁹ Above n61, 14-15.

Tikanga Maori and the Process of Colonisation

I will not set out here a detailed description and analysis of the key concepts and processes underlying the normative framework of tikanga Maori that existed prior to contact with Pakeha. I will only briefly allude to this system, that was irreparably damaged upon contact and colonisation.⁷⁰ Tikanga Maori was and is underpinned by inter-related principles of tapu, mana and utu, and an ethic of whanaungatanga that saw people strive to maximise the collective health and wellbeing of their communities. Maori women were valued members of this pre-contact society, where one's status in terms of tapu and mana were more determinative of one's standing than gender, unlike Western society. There is however a place for gender, so that for Maori, the interplay between men and women reflects a complementary relationship, mirroring the overall desired norm of balance in the Maori worldview. Women had particular gender roles and responsibilities and were valued as wives, mothers, leaders and the glue that held the fabric of their whanau and kainga together.

The process of colonisation impacted upon Maori women in ways that were different in kind to the experiences of Maori men. It will be evident that the process described fits within Kimberle Crenshaw's intersectionality framework, in that these historical and cultural factors and processes set Maori women up to be over-represented as offenders, victims and inmates in the contemporary criminal justice system in New Zealand. In other words, it is asserted that the current positioning of Maori women as offenders and inmates is the result of a complex interaction of factors, that are unique to them as a sector of the New Zealand population.

The Breakdown of Tikanga Maori

Numerous factors are relevant in a discussion as to why the experience of the criminal justice system is different for Maori than non-Maori in New Zealand. At a philosophical level, the legal system of New Zealand is far removed from the tikanga based system of Maori law. Pakeha law emphasises individual responsibility, neutral or third party adjudication and an adversarial process. Punishment is meted out to individuals and options to be considered include imprisonment, an alien concept to Maori.

In contrast, a Maori system of punishment is largely forward looking – aimed at repairing relationships, whilst also accounting for past wrongs. The emphasis on the future however, prioritises a desire to reintegrate offenders, heal victims and maintain a balance between punishment and moving on. There was no traditional concept of imprisonment, as this would defeat both collective responsibility by isolating an individual offender, and also the desire for integration and healing. A traditional Maori system of dispute resolution is also reliant upon community cooperation and secure, healthy, cultural, family and economic identities and lifestyles.

Although this Maori world view and its principles and processes of dispute resolution are generally not accommodated or provided for in Pakeha law, cognisance

⁷⁰ For a more detailed analysis of the tikanga of offending, see K Quince, "Maori and the Criminal Justice System in New Zealand in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (2007, LexisNexis, Wellington) 336-341.

and recognition of tikanga Maori is necessary both due to legal and ethical obligations pursuant to international and domestic law, and also in order to effectively treat Maori offenders. Currently, Maori are forced to operate within a system that is culturally alien to our psyche, which does not allow for imperatives within tikanga to operate, such as reintegration of offenders within their communities.

The journey from the early days of Pakeha colonisation to the contemporary situation in relation to the position of Maori in the criminal justice system has been, for Maori, a painful one. Maori initially played a minor role in the law and administration systems established by the colonisers. For the most part in the initial decades of colonial settlement, Maori remained rural peoples, and the traditional systems of social organisation and living continued.

As colonial expansion took hold, more intrusive policies of assimilation and dispossession began to affect the every day lives of Maori. Large scale land alienations and colonisation had a monumental impact on Maori communities. Land holdings were alienated as a result of dubious dealings, confiscation or debts incurred during the Native Land Court's title investigation process. Generations of Maori knowledge and philosophies were either discarded or reframed to fit within Christian doctrine and oral history narratives were distorted and recorded in the Native Land Court.

The education of Maori children was regulated and controlled by the native schooling system, which proscribed both racialised and gendered education. The effect of racial segregation saw Maori as a whole deemed incapable of academic study, so they were schooled in manual trades, with little possibility or expectation of tertiary education. Within the segregated Native Schools there was further separation by gender, with Maori boys tagged as agricultural workers, and Maori girls set on the path to domestic servitude for Pakeha households, or as Maori farmers' wives. The purpose built Native Schools also allowed for the blocking of cultural transmission of Maori language, ideas and philosophies. Maori children were punished for speaking their native tongue, and inculcated in the virtues of learning the English language and Pakeha values.⁷¹ Anthropologist Michael Goldsmith has referred to the result of these policies as a "vertical holocaust", meaning a holocaust of identity, so that Maori could not pass on knowledge of their language and traditions to younger generations.⁷²

Although some commentators, both historical and contemporary, have argued that the treatment of Maori was the high watermark in terms of treatment of indigenous peoples by a colonial power, these policies and practices had a devastating effect on Maori society. Whilst Maori were relatively well-viewed and treated in comparison with the first peoples of North America and Australia, displacement from traditional lands and resources was intended, even if methodical extermination was not.

Many commentators have analysed the destructive effects of colonisation on Maori life.⁷³ The effects on Maori women were compounded by their being reduced to

⁷¹ See J Simon and L Tuhiwai Smith (eds) *A Civilising Mission? Perceptions and Representations of the New Zealand Native Schools System* (Auckland University Press, Auckland, 2001).

⁷² M Goldsmith, "Maori Assertions of Indigeneity, Post-Colonial Traumatic Stress Disorder, and Holocaust Denial" in E Kolig and H Muckler (eds) *Politics of Indigeneity in the South Pacific* (Transaction Publishers, Hamburg, 2002) 85, 90.

⁷³ See for example A Mikaere, *The Balance Destroyed: The Consequences for Maori Women of the Colonisation of Tikanga Maori* (M Jur Thesis, University of Waikato, 1995) 142-3; N Te Awekotuku, *Mana Wahine Maori* (New Women's Press, Auckland, 1991)

the level of their European counterparts - in a patriarchal legal system that denoted women as the property of their fathers or husbands. Maori women lost their legal personality under the common law doctrine of coverture, and with it the ability they had in tikanga to own and manage property, and engage in contractual relationships.⁷⁴ In particular, the legal status and position of Maori women, their roles and responsibilities in collective histories and whakapapa were eroded by Christian sensibilities and Western laws. Christian notions of legitimate marriage and child bearing also affected rights of succession and social organisation ideologies.⁷⁵

Within the New Zealand context, the treatment of Maori women often left them last in line behind Pakeha men, Maori men, and Pakeha women. The colonisation experience was therefore *qualitatively* different for Maori women when compared with Maori men. As Maori legal academic Ani Mikaere argues, for Maori women, the impact of colonisation was that the balance between men and women proscribed in tikanga was destroyed. This was due to the imposition of new laws and values, but also because of the internalisation of these values by Maori men.⁷⁶ Within Maori society for example, the previously balanced gender roles on the marae was upset by the men of numerous iwi deciding that women could no longer speak in formal settings.⁷⁷

Despite racist policies and practices that prescribed different treatment for Maori compared with non-Maori, there did exist a patriarchal bonding across cultures that resulted in different experiences for Maori, based on gender. While Maori men were not deemed the equal of their Pakeha counter-parts, they were not subjected to the erosion of their roles and status in the same manner or to the same extent as Maori women. As Maori lawyer Annette Sykes has argued, this process effectively devalued Maori women and denied them their place in helping to determine the future of their whanau, hapu and iwi.⁷⁸

In day-to-day life, the social structure of Maori communities underwent significant transformation, with clear distinctions between the public and private domain, and the reconstructed nuclear family headed by the husband becoming the norm. The deconstruction of collectivism was most evident in laws aimed at individualising title to land, but also affected family ideologies.⁷⁹ The acceptance or imposition of the dichotomy of a private and public domain had significant implications for all women. According to Pakeha values, the natural place for women was in the private, domestic sphere, sheltered from the male public domain of politics, power and influence. For Maori women, who came from a society where whakapapa and mana were more influential in determining role and status than gender, this was a real diminishment of status.

The private and isolated nature of the nuclear household was in complete contrast to the open and collective nature of whanau and hapu living. This new dynamic may have contributed to a lack of protection for Maori women against domestic violence, which is not recorded as common in any historical records. Further, in this new normative scheme,

74 Above n64, 130-132.

75 Ibid.

76 Above n73.

77 See K Johnston, "Maori Women Confront Discrimination" *Indigenous Law Journal* 4 (2005) 21 at 31-33.

78 Annette Sykes' submission to the Waitangi Tribunal for the Mana Wahine Claim, cited in L Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (University of Otago press, Dunedin, 1999) 156.

79 Above n64, 133.

Maori women became increasingly vulnerable - economically reliant upon their husbands as sole breadwinners, and now sole caregivers of children under Christian values.⁸⁰

Within a century of the signing of the Treaty of Waitangi, Maori society had suffered irreparable damage. Most important in this process was the non-recognition of tino rangatiratanga or sovereignty over our own affairs, people and assets, despite the Crown assurances in the Tiriti o Waitangi.

The breakdown of the traditional legal system resulted in the disappearance of traditional familial structures, recognised leadership and physical wealth through land and resource holdings and the traditional economic base. These factors, initially the result of policies and practices aimed at land alienation, were compounded with the mass migration of Maori from rural to urban areas after World War Two. In 1945 75% of Maori lived in rural areas. By 1991 only 18% remained outside of the cities and urban settlements.⁸¹

Migration occurred for a multitude of factors – some Maori were forced off uneconomic land holdings, while others wanted to partake in modern urban society with all of its trappings. Regardless of the reasons, moving away from traditional tribal communities weakened Maori ties to traditional lands, support networks, and systems of social organisation. Urbanisation and the undermining of Maori social structures effectively led to widespread cultural alienation within two generations. As historian Bronwyn Labrum observes:⁸²

Urban opportunities were a double-edged sword as Maori attempted to adapt to the Pakeha urban lifestyle of permanent employment and a total cash economy and cultural pressures to leave certain customs and practices behind them. Newly available comparisons in urban setting accentuated the (unfavourable) differences between Maori and Pakeha to the Pakeha majority...With greater visibility came a greater perception of Maori as a problematic population.

Changes in patterns of employment, household structure and child raising saw the nuclear family supplant the whanau as the core social unit for many urban Maori.⁸³ These effects often increased the hardship for Maori women, isolated from traditional support and family.⁸⁴

One outcome of the impact of these historical factors is the high rate of socio-economic disadvantage Maori have experienced and continue to experience. The Native Schooling system churned out Maori who were reliant upon unskilled jobs, once they moved away from the rural agricultural sector.⁸⁵ This established a pattern where Maori did not seek tertiary education and the skilled occupations that come with further study. This was not a huge problem until economic downturns led to the downsizing of the

⁸⁰ Ibid, 134.

⁸¹ R Walker, *Ka Whawhai Tonu Matou* (Second Edition, Penguin Books, Auckland, 2004) 197.

⁸² B Labrum, "Developing 'The Essentials of Good Citizenship and Responsibilities' in Maori Women: Family Life, Social Change and the State in New Zealand, 1944-70" *Journal of Family History* [1994] 448.

⁸³ Ibid, 452; Above n81, 197-9.

⁸⁴ Above n70, 348-350.

⁸⁵ See J Simon and L Tuhiwai Smith (eds) *A Civilising Mission? Perceptions and Representations of the New Zealand Native Schools System* (Auckland University Press, Auckland, 2001).

public service and employment in the industrial sector. Once these phenomena occurred, often the hardest hit demographic was unskilled Maori.

Maori continue to feature on the negative side of the ledger in almost all indicators involving health, wealth, education and employment. Connected with these indicators is a high dependency on the State and its agencies. The combination of this myriad of factors may partially explain the statistical gulf between Maori and non-Maori in criminal justice data in New Zealand. Commentator Mason Durie refers to the complex interaction between the historical identity factors and socio-economic profiles and offending as the result of “trapped lifestyles”.⁸⁶ He asserts that trapped lifestyles have three key characteristics:⁸⁷

[F]irst they involve risk; second they are likely to lead to marginalisation, poor health and offending; and third ... for many people there is no escape.

Lifestyle risk factors associated with offending and imprisonment include alcohol and gambling addictions, drug use, injury and domestic violence and abuse.⁸⁸ Maori are over-represented on every measure for these factors.⁸⁹ Sociologist Helene Connor agrees with Durie, and argues further that the loss of language and identity for Maori manifests itself in destructive behaviour such as substance abuse, violence and crime.⁹⁰

Low Maori participation in certain functions of society, such as the economy, education, and lawmaking, reinforces our marginalisation and maintains barriers in terms of access to justice. Maori passivity may be the result of insecure cultural identities and a lack of control over resources. One of the key difficulties for young, often second or third generation urban Maori, is their limited ability to participate in a Maori identity.

The mana and tapu of Maori people has been damaged by the process of colonisation that has destroyed the fabric of Maori society and the resources upon which it relied for survival. This process is in itself a hara in that it has trampled upon the collective wairua of Maori as a people. The trauma of colonisation has inflicted incalculable harm on Maori people. Maori lawyer and criminologist Moana Jackson has referred to colonisation as the “attack on the Maori soul”, while Maori politician Tariana Turia has similarly talked about the phenomenon of Post-Colonial Traumatic Stress Disorder, in which the effects of colonisation have been culturally integrated into the soul and psyche of Maori.⁹¹

This process has had particularly devastating consequences for Maori women – bereft of the support and resources of whanau and whenua, and the prescription laid out in tikanga and ancestral precedent for the balancing of the male and female principles.

⁸⁶ M Durie, *Nga Kahui Pou: Launching Maori Futures* (Huia Publishers, Wellington, 2003) 62.

⁸⁷ Ibid.

⁸⁸ Ibid, 65.

⁸⁹ Ibid, 65-66.

⁹⁰ DH Connor, “Reclamation of Cultural Identity for Maori Women” in A Jones, P Herda and T Suaali (eds) *Bittersweet Indigenous Women of the Pacific* (Otago University Press, Dunedin, 2000) 110.

⁹¹ M Jackson, “The Colonisation of Maori Philosophy” in G Oddie and R Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) 84, 86; M Goldsmith, “Maori Assertions of Indigeneity, Post-Colonial Traumatic Stress Disorder, and Holocaust Denial” in E Kolig and H Muckler (eds) *Politics of Indigeneity in the South Pacific* (Transaction Publishers, Hamburg, 2002) 85, 86-88.

Instead, the sexism of Pakeha culture presenting them as inferior and weak, and severely curtailing their life opportunities and public roles, combined with the racism of Pakeha culture means that Maori women are at the bottom of the heap in New Zealand society.

What Factors Set Maori Women up For Over-Criminalisation?

There are a myriad of interconnecting factors to explain the over-criminalisation of Maori women in New Zealand. Some of these factors might be attributed to “structural intersectionality”, which is the term used by Kimberle Crenshaw to explain the interplay of ethnicity and gender in relation to the position and experiences of minority women in the community. For example, the burdens of gender and class oppression might be visible in terms of Maori women’s poverty, lack of job skills and child and family responsibilities. These factors are then compounded by the racism of policies and practices relating to employment, health and housing.⁹²

In the previous section I argued that the process of colonisation had a devastating impact upon Maori communities, and on Maori women in particular. The loss of legal and political status for Maori women resulted in a loss of lands and resources that did not occur in the same fashion for Maori men.

In this section I will set out data relating to the contemporary position of Maori women. In my view many of these factors are heavily influenced by the historical processes I have described previously – that is, that the stripping of economic power, legal standing and the provision of racist gendered education continues to affect modern Maori women. The data will show that Maori women fare worse than both Maori men and non-Maori women on all key social indicators linked to criminalisation and victimisation. Many of these indicators are, I would argue, linked with ethnicity (that is, with being Maori), while the effect of gender results in Maori women committing crimes that are both numerically fewer and less serious than those committed by Maori men. The specific effects of gender on criminal offending and treatment in the criminal justice system are addressed in the next section.

In my view, a schooling system that tagged Maori women for domestic servitude and unskilled labour established a continuing cycle of underachievement and poverty.⁹³ The position of Maori women today is testament to this combination of socio-economic and historical factors. Maori women are therefore often not only alienated from Maori society, but also from society as a whole. They are marginalised from Maori culture by their lack of *reo* and *tikanga*. They are outside of mainstream society due to their poverty, lack of education and invisibility in the public domain.

While the gaps between Maori and non-Maori have closed considerably over the past 40 years, Maori women continue to feature at the lower end of all indicators of socio-economic deprivation in New Zealand. They are over-represented in their exposure to most of the multiple risk factors associated with criminal activity - such as poverty, income and employment disparities, mental and community health problems, family violence, and lack of community support/facilities.

⁹² K Crenshaw, “Women of Color at the Center: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 *Stan. L. Rev.* 1241, 1250.

⁹³ J Simon and L Tuhiwai Smith (eds) *A Civilising Mission? Perceptions and Representations of the New Zealand Native Schools System* (Auckland University Press, Auckland, 2001).

The adoption of Pakeha values, the process of modernisation, and the effects of Native Schooling all contributed to the high rate of socio-economic disadvantage suffered by Maori. However, as already noted, Maori women tend to fare even worse than Maori men in social indicators, in that they have lower incomes, poorer health and are more likely to have the sole charge of dependent children. For example, data in the 2006 Census shows that New Zealanders overall have a median income of \$24,400 per annum, while for Maori, the median is \$20,900.⁹⁴ A gendered breakdown shows that the median income for men is \$31,500, compared with \$19,100 for women.⁹⁵ A breakdown by gender and ethnicity shows that the median income for Maori men is \$25,900 compared with \$17,800 for Maori women.⁹⁶ In this instance therefore, there is both a gap between Maori and non-Maori, and a gap between genders, and Maori women fare worse than BOTH the median Maori and the median woman. The household and personal incomes of Maori women are lower, with 50% of all Maori women aged over 15 receiving a government welfare benefit in 1996, compared with 20% of non-Maori women. The 2001 Census found that Maori women were over-represented in the very lowest income bracket and under-represented in the very highest.⁹⁷ Forty one percent of all Maori children live in households earning less than \$20,000 per annum. Half of all Maori women aged over 15 are reliant on a government benefit as their major source of income, with an unemployment rate of 19% compared with 7% for non-Maori women.⁹⁸ These are clear examples of the effects of intersectionality in action.

Only 30% of Maori own their own homes, compared with 59% of Pakeha. Nearly 40% of Maori leave school with no formal qualifications, with slightly more Maori men than Maori women in this category (43.5% of men, 36.7% of women).⁹⁹ In the 1996 Census, 16% of Maori women reported they did not have a telephone, and 19% did not have a car.¹⁰⁰ These factors, combined with the geographical spread of Maori women – who are more likely to live in rural areas than non-Maori, means that accessing social and legal services can be prohibitive.¹⁰¹

The 1996 New Zealand Health Survey and the 1997 National Nutrition Survey confirm persisting health inequalities between Maori and non-Maori New Zealanders, largely linked to socio-economic deprivation.¹⁰² The surveys specifically identified poor housing, low levels of education, poor diet, alcohol consumption and smoking as health-affecting behaviours. As a result of Maori being over-represented in each of these indicators, there are corresponding outcomes in terms of lower life expectancy, high blood pressure, iron deficiency, rates of injury and hospitalisation, rates of affliction of diabetes, heart and liver disease and asthma.¹⁰³ In comparison to non-Maori women, the life expectancy of Maori women remains lower (73 compared with 79 years). Other

⁹⁴ Statistics New Zealand, *Quickstats National Highlights 2006 Census*, (Statistics New Zealand, Wellington, 2007).

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Statistics New Zealand, *Census of Population and Dwellings 2001* (Statistics New Zealand, Wellington, 2002). The median income for Maori women was \$13,200, compared with \$15,100 for European women and an overall median income for all women of \$14,500. The median income for all men in the same period was \$24,900.

⁹⁸ Ministry of Women's Affairs, *Maori Women: Mapping Inequalities and Pointing Ways Forward* (Wellington, 2001).

⁹⁹ Statistics New Zealand, *Census 2006 Quickstats About Maori*, (Statistics New Zealand, Wellington, 2007).

¹⁰⁰ Te Puni Kokiri and the Ministry of Women's Affairs, *Maori Women in Focus* (Te Puni Kōkiri, Wellington, 1999)

¹⁰¹ Law Commission Report 53, *Justice: The Experiences of Maori Women* (Law Commission, Wellington, 1999) 47.

¹⁰² Te Puni Kokiri, "Tikanga Oranga Hauora" (2000) 4 Whakapakari 2.

¹⁰³ *Ibid.*, 2-5.

research also demonstrates that Maori women were more likely than non-Maori women to have alcohol and substance abuse problems.¹⁰⁴ Maori women are three times more likely to be hazardous drinkers than non-Maori women.¹⁰⁵

Interestingly, despite the proclaimed links between deprivation and life expectancy, where low Maori life expectancy tends to correlate to living in deprived areas (56% of Maori live in high deprivation areas, compared with 24% of non-Maori), there is still a big gap overall between Maori and non-Maori. Pakeha living in the *most* deprived areas still live significantly longer than Maori living in the *least* deprived areas.¹⁰⁶ This demonstrates that there remain some entrenched disparities between Maori and non-Maori across the socio-economic spectrum.

Research also establishes a link between deprivation and victimisation. The 2006 New Zealand Crime and Safety Survey explored the experience of crime victimisation of 5416 randomly selected New Zealanders. Overall, the bulk of crime and repeat victimisation was likely to be experienced by people who were young, Maori, solo parents, reliant on social welfare benefits, and those living in rental accommodation.¹⁰⁷ In other words, the risk of victimisation is concentrated amongst those who are less socially and economically placed. Maori women are overrepresented in each of these categories of variables, resulting in rates of victimisation that place them ahead of *all* other demographic groups, including both Maori men and non-Maori women. Aside from an increased risk of victimisation, the survey also reported an uneven distribution of the total number of victimisations. Sixty percent of those surveyed reported no victimisations at all for 2005, but 6% of respondents reported five or more for the same period.¹⁰⁸ This echoes research that asserts that past victimisation is the best predictor of future victimisation.¹⁰⁹

Maori women face four times the risk of the average woman of being subject to confrontational offences committed by their partners, and are twice as likely as the average person to be victimised by others.¹¹⁰ There was no difference reported in the proportion of men and women who had experienced offences committed by their partners, but women experienced more offences than men did.¹¹¹ Therefore, gender is less of a significant factor in the prevalence of victimisation than ethnicity, but is important with regards to the recurrence of violence. Ethnicity is significant for both measures, so being Maori is related to both the prevalence *and* incidence of victimisation – whether it happens, and how often it happens. Maori women then suffer intersectional oppression on both counts.

Older data from the National Collective of Women's Refuges supports the conclusions of the New Zealand Crime and Safety Survey. For example, in the ten

¹⁰⁴ C Page, An Evaluation of the Pilot (NSAD) Alcohol and Drug Treatment Unit at Arohata Women's Prison: A Report Commissioned by the Department of Corrections (Department of Corrections, Wellington, 1999).

¹⁰⁵ Above n102, 2, 5.

¹⁰⁶ Te Puni Kokiri, "Tikanga Oranga Hauora" (2000) 4 Whakapakari 2-5.

¹⁰⁷ Ministry of Justice, New Zealand Crime and Safety Survey 2006, Executive Summary. These conclusions echo those in A Morris and J Reilly, The 2001 New Zealand National Survey of Crime Victims (Ministry of Justice, Wellington, 2003) chap 2.5.

¹⁰⁸ *Ibid.*

¹⁰⁹ K Pease, Repeat Victimisation: Taking Stock (Home Office, London, 1998).

¹¹⁰ Ministry of Justice, New Zealand Crime and Safety Survey 2006, Tables 3.7, 3.8, 3.9.

¹¹¹ *Ibid.*, Chapter 3.3.

months to April 1997, 45.2% of their 5,783 new clients were Maori. Maori men were the abusers in 40.5% of these cases.¹¹²

One could speculate that the high rate of victimisation of Maori women might occur more readily in a society defined by the nuclear household – and that Maori men would traditionally have been reigned in by the open nature of the whanau and the lack of a public/private divide in Maori society. However, even casting such theories aside, there is little doubt that the contemporary experience of domestic and family violence for Maori women renders them less visible and more vulnerable than they would have been in a functioning traditional Maori social system.

The contemporary demographic context for Maori women illustrates that they are a uniquely positioned subset of the general New Zealand population. The combination of their ethnicity, gender, and socio-economic positioning affects, amongst other things, their employment prospects, housing choices, and health outcomes. In relation to the criminal justice system, these factors filter Maori women *into* the system, ultimately influencing rates of criminal offending. For example, as a result of economic deprivation, Maori women come into regular contact with associated social services, such as social welfare, housing and health agencies. This type of contact and surveillance may increase the likelihood of being subject to criminal proceedings, not necessarily because of increased criminality, but because relevant authorities exchange information about clientele and any offending is more likely to be discovered than offending committed by persons in the general community.

Once filtered into the criminal justice system, as offenders or victims, the particular characteristics of many Maori women affect their access to justice, in terms of affordability of counsel, access to services because of childcare, communication and transport difficulties, and perceived cultural and class barriers between clients and justice officials or service providers.¹¹³

The effect of this combination of factors is that Maori women are less likely than other demographic groups to report crime, access social services or justice sector agencies, or fully participate in or access initiatives that should cater to their needs. These practical barriers are coupled with perceptions that services do not take account of the life experiences of Maori women.

The Effect of Gender

Although as noted in the previous section, Maori women fare worse than Maori men in almost all social indicators, many of which are demonstrably linked with criminal offending, they do not offend in anywhere near the same numbers as Maori men do. This reflects the role of gender – that in all jurisdictions women do not offend as much as men. In this section I will explore some of the theories that seek to explain why women conform more to social norms, resulting in gender disparity in offending statistics.

Feminist perspectives as to the causes of female offending did not take off until the late 1960s - early 1970s. At that time, criminologist Carol Smart noted some of the ironies of the approach to women's criminality – on the one hand there was not much interest in the subject of female criminality, and on the other there were stubborn

¹¹² Law Commission Report 53, *Justice and Maori Women* (Law Commission, Wellington, 1999), 47.

¹¹³ *Ibid*, 32 – 37.

attitudes towards the stereotyped female offender that prevented new ideas in their treatment from developing.¹¹⁴ Smart argued that the low profile of women's offending was a result of it not being viewed as a major social problem.¹¹⁵ Frances Heidensohn and Marie Andree Bertrand made similar claims, that women were relatively invisible in criminological theory, and when they were mentioned, their offending was invariably discussed in a sexualised manner, rather than applying any rationalised analysis.¹¹⁶ Psychologist Phyllis Chesler picked up on Smart's thesis, by contending that the treatment of women in the criminal justice system is influenced by society's expectations of gender appropriate behaviour. Different reactions to the same behaviour may cause a male to be jailed, and a woman to be committed to a mental institution.¹¹⁷

Early theorists in feminist criminology sought to address two main issues – the “gender ratio” problem and the “generalisability” problem.¹¹⁸ The gender ratio problem asks why women are less likely than men to commit crime and the generalisability problem addresses the difficulties in adding women to theories of male criminality and its associated research. These issues converge in that the former means that the latter does not adequately explain female offending.

One of the strands of feminist criminology that emerged during the 1970s promoted the “liberation thesis” – that is, that as women were liberated from the home, and generally moved from the private domestic sphere into the public sphere of work, power and politics, rates of offending would rise in tandem, to match those of men. For example, Freda Adler claimed that the gender ratio problem was a result of lack of opportunity for women to offend, and that as women forced their way into the corporate world, they would also force their way into white collar crime.¹¹⁹ This did not prove to be the case, so that emancipation may have brought more freedom to women, but there was no empirical evidence to prove a change in the pattern or rates of female offending.¹²⁰ Furthermore, the theory did not apply to or take account of the experiences of working class women, who had always been in the public sphere of employment – and who still engaged in far less crime than their male counterparts. Critics also argued that Adler's female criminal was essentially masculine – meaning that her theory merely placed biological females into traditional mainstream “male” explanations of crime.¹²¹

Although feminist and critical scholarship investigating women and the criminal justice system began to emerge in the 1970s, it was really in the 1980s that a significant interest in academic study and empirical research in this area began to occur.¹²² The

¹¹⁴ C Smart, *Women, Crime and Criminology* (Routledge & Kegan Paul, London, 1977) Chapter 5.

¹¹⁵ *Ibid.*

¹¹⁶ F Heidensohn, “Gender and Crime” in M Macguire, R Morgan and R Reiner (eds) *The Oxford Handbook of Criminology* (Oxford University Press, Oxford, 1994) 997, 1012.

¹¹⁷ P Chesler, *Women and Madness* (Four Walls Eight Windows, Chicago, 1972).

¹¹⁸ K Daly and M Chesney-Lind, “Feminism and Criminology” *Justice Quarterly* 5/4, 498, 508.

¹¹⁹ F Adler, *Sisters in Crime* (McGraw-Hill, New York, 1975) 3

¹²⁰ M Chesney-Lind and L Pasko, *The Female Offender: Girls, Women and Crime* (Sage Publications, Thousand Oaks, 2004).

¹²¹ D Christina and P Carlen, *Criminal Women* (Polity Press, Cambridge, 1985).

¹²² See for example, N Rafter, *Partial Justice: Women, Prison and Social Control* (2nd ed, Transaction, New Brunswick, 1990); A Worrall, *Offending Women: Female Lawbreakers and the Criminal Justice System* (Routledge, London, 1990); A Adelberg and C Currie (eds) *In Conflict With the Law: Women and the Canadian Justice System* (Press Gang, Vancouver, 1993); M Chesney-Lind, “Rethinking Women's Imprisonment: A Critical Examination of Trends in Female Incarceration” in B R Price and N J Sokoloff (eds) *The Criminal Justice System and Women: Offenders, Victims and Workers* (2nd ed, McGraw-Hill, New York, 1995); M Shaw, “Is There a Feminist Future For Women's Prisons?” in R Matthews and P Francis (eds) *Prisons 2000: An International Perspective on the Current*

timing of this expansion of the academic discipline coincides with the rapid increase in the numbers of imprisoned women.¹²³

Loucks and Zamble noted in 1999 that:¹²⁴

Until the past decade, research concerning the origins and continuance of criminal behaviour in females has been virtually absent from social science literature, so that the development of theories of female offending has occurred in an empirical vacuum.

The development of feminist criminology, and equality theory and jurisprudence paralleled the movements in wider feminist scholarship, which shifted from the early premise that the experience of women cut across all other variables. Researchers began to question this “essentialist” doctrine – that “one size fits all”, and to consider the impact and influence of other factors such as class, sexuality, religion, and most notably, race.

Attached to the move against essentialism, was the promotion of subjective narrative, as researchers began to postulate that women’s criminality was inseparable from the response of the justice system to them. For example, Pat Carlen spearheaded a major strand of criticism levelled at some of the early feminist criminologists – that their theories were ignorant of the political realities of the lives of women.¹²⁵ Rather than start with grand theory about the assumed experiences of *all* women, it was argued that we should look to empirical studies of *particular* women and listen to what they have to say about themselves. A significant feature of this wave of feminist theory therefore, was to move from the essentialising top-down model of theory, to researching at the ground level, by interacting with specific women.

One of the seminal pieces of research in the renaissance of women and criminal justice studies was a prominent study by Carlen in the 1980s, in which she adapted the “Strain” and “Control” theories of criminology to explain female criminal offending. The Control Theory is based on the assumption that people conform to the law while they feel it is materially and psychologically worth their while to do so. The subjective decision to conform might include consideration of the likelihood of being apprehended, potential penalties upon conviction and whether you have anything to lose by offending. Carlen’s argues that, from her analysis of interviews conducted with offending women, they felt neither compelled nor induced to be law abiding. Often their material circumstances were such that they were unable to stay out of trouble with the law.¹²⁶

As a result of interviewing a group of female offenders with significant criminal histories, Carlen identified three key areas that feminist criminologies had thus far failed to explain. These were the fact that female offenders tended to be of the lower classes,

State and Future of Imprisonment (St Martin’s, London, 1996); M A Bertrand, “Incarceration as a Gendering Strategy” *Canadian Journal of Law and Society* (1999) 14; H Hannah-Moffat and M Shaw (eds) *An Ideal Prison? Critical Essays on Women’s Imprisonment in Canada* (Fernwood, Halifax, 2000)

¹²³ This also coincided with the entry of significant numbers of women into the realms of academic and policy making.

¹²⁴ A Loucks and E Zamble, “Predictors of Recidivism in Serious Female Offenders” (1999) *Corrections Today*, February, 26-28.

¹²⁵ P Carlen, “Criminal Women and Criminal Justice: The Limits to and Potential of, Feminist and Left Realist Perspectives” in R Matthews and J Young, *Issues in Realist Criminology* (Sage Publishing, London, 1992) 184

¹²⁶ P Carlen, “Out of Care, Into Custody” in P Carlen and A Worrall (eds) *Gender, Crime and Justice* (Open University Press, Milton Keynes, 1987) 126, 129-130.

that minority ethnic groups were over-represented as female offenders, and that these groups comprised the majority of women in prison.¹²⁷

Carlen asserted that, unlike men, women had two sites of social control. The major place of social control for men is the workplace, whereas for working women, both the workplace and the home are material and ideological sites of social control. She stated:¹²⁸

[W]omen who break the law have, like all other Western women, been born into material and ideological conditions structured by two major sets of relationships: the class relationships of a capitalist mode of production and the gender relationships of a patriarchal system of social reproduction. Additionally, black women (and black men) in Britain will have had both their life-chances and their experiences of the criminal justice and penal systems, shaped by racism.

Working class women are therefore expected to aspire to and achieve both a class and a gender ideal, of “respectable working-class motherhood”, placing them in a double bind.¹²⁹ The theory therefore, is that women do not offend in the same numbers as men because they are doubly controlled by expectations placed upon them in the domestic sphere as well as in the workplace.

According to Carlen, most working class women conform to the class and gender deals because normative femininity and heterosexuality are celebrated and promoted in places such as the mass media. Working class women who have a good work ethic are materially rewarded for the fruits of their labours, and those with a commitment to domesticity may also have a supportive male partner to seal the deal.¹³⁰ Regulated women will likely be mothers operating within the structure of a nuclear family, supervised by the machinations of the welfare state – through welfare professionals – such as doctors and social workers.¹³¹

Carlen argues that, in her sample population, offending women are those for whom the ideology of the nuclear family has broken down, thus leaving them “gender unregulated.” She asserts that girls in welfare care, single women living alone and other “women without men” fit within this category of gender unregulated women.¹³² Female offenders are therefore women without family, sociability, femininity and adulthood.¹³³ Such women are different from the majority of female criminals, who, despite occasional offending, do not make a career out of it, and still maintain commitment to the family ideal. Those women are still viewed as “gender compliant”, meaning that they place value in, and strive to achieve, the gender ideal promoted by wider society and its institutions.

Carlen goes on to show, from her studies of offenders, that even gender unregulated women buy into consumerism, as they believe this is the only hope of moving forward in their lives. She claims that the women she studied were restrained

¹²⁷ Ibid.

¹²⁸ Ibid, Introduction.

¹²⁹ P Carlen, *Women, Crime and Poverty* (Open University Press, Milton Keynes, 1988) 12-14.

¹³⁰ P Carlen and A Worrall (eds) *Gender, Crime and Justice* (Open University Press, Milton Keynes, 1987) 3.

¹³¹ Ibid, 3-4.

¹³² Ibid, 13.

¹³³ Ibid, 119.

from achieving material success by legitimate means due to their class status, so adopted illegitimate means instead.¹³⁴

[C]ertain combinations of gender and class factors are also strategic in determining the extent to which some women will 'see through' the controlling occlusions of the 'gender deal' and consequently decide to go it alone - even if it means in order to 'have what everybody else takes for granted' they have to break the law.

Further, Carlen states that when gender unregulated women come into contact with the criminal justice system they are often stropky and impolite, thus further defying accepted models of femininity.¹³⁵ In other words, the fact they are gender unregulated filters them into the justice system, and once there, they are judged according to norms of femininity they do not value or comply with. Once this happens, the women come face to face with justice system officials and fail to meet appropriate constructions of femininity including a predilection for "vulnerability, dependency and emotionality".¹³⁶ This of course worsens the situation, and the attitude of unregulated women and their social characteristics are then predictors of the type and length of sentences imposed on them. It is now broadly known that women commit a very small share of crime, and this has significant implications and consequences for women who do offend.

Once in the system, young women are further marginalised from society, and thus move further and further away from the possibility of ever making either the class or gender ideal. At this stage, with little likelihood of overcoming economic deprivation, any perceived ideological attachment to notions of family and legitimate success all but evaporate. This leaves imprisoned women with nothing to lose, thus fuelling a cycle of law-breaking.

One of the ironies of Carlen's theory is that women who conform to accepted and expected notions of femininity are often better treated by the criminal justice system than those who do not, regardless of the seriousness of their offending. Carlen and earlier theorists, such as Otto Pollack, postulate that gender compliant women are dealt with in a chivalrous manner by the predominantly white middle class male establishment. Women offenders are therefore not dealt with on a par with equivalent male offenders, but are assessed according to the extent of their gender regulation.¹³⁷ So, serious offenders who are deemed to be good conforming wives and mothers may be dealt with compassionately and funnelled out of the system. On the other hand, less serious offenders who do not conform to good female stereotypes are more harshly treated. Worrall states that:¹³⁸

¹³⁴ Ibid, 9-10.

¹³⁵ Ibid, 9-10.

¹³⁶ Above n1, 305.

¹³⁷ See for example the study conducted by Dr Samantha Jeffries, "Gender Differentiation in Criminal Court Outcomes" available at crime.co.nz (accessed 17 June 2007). Dr Jeffries analysed sentencing and remand outcomes for 388 offenders from the Christchurch District and High Court, and argues that men and women were sentenced according to their gender roles. Responsibility for children was a primary consideration for judges sentencing women, while employment factors were key to sentencing male offenders.

¹³⁸ P Carlen and A Worrall, *Analysing Women's Imprisonment* (Willan Publishing, United Kingdom, 2004) 123.

The female lawbreaker is routinely offered the opportunity to neutralise the effects of her lawbreaking activity by implicitly entering into a contract whereby she permits her life to be represented in terms of its domestic, sexual and pathological dimensions. The effect of this 'gender contract' is to strip her lawbreaking of its social, economic and ideological dimensions in order to minimise its punitive consequences.

The common thread in modern research involving women and penology is the conclusion that the position of women in the justice and penal systems reflects their place in society as a whole. Further, the control of women as criminals is merely an extension of the control of women in general. The history of female deviance is defined by women who failed to fulfil their socially designated roles as good wives and mothers. Female criminals were immoral "fallen women", such as prostitutes and petty thieves who 'are punished for breaching not only the criminal law but also sex role expectations.'¹³⁹ The result of such attitudes is that the female offender will be dealt with according to the extent to which her crime deviates from these stereotypical norms of acceptable female conduct, a process that is not applied equally to her male counterparts.

In my view, Carlen therefore correctly appreciated that an analysis defined purely by gender is too simplistic - that we need to take account of other variables, such as class, to gain a better insight into offending patterns and treatment of offenders in the criminal justice system. There is much in her arguments that translates to the experiences of Maori women in New Zealand. This is particularly so given the socio-economic positioning of Maori women, as set out in the previous section. Julia Tolmie makes this point, in arguing that, vis-à-vis non-Maori women, Maori women's positioning 'provides a possible insight as to why Maori women do not get the same lenient treatment in the criminal justice system.'¹⁴⁰ This then is what intersectional theorists such as Krenshaw and Harris are referring to when documenting the way in which 'race can modify the effects of gender for women of colour'.¹⁴¹

The lethal combination of race, gender, socio-economic deprivation and the gendered experience of cultural breakdown as a result of the process of colonisation, result in Maori women collectively and individually being 'gender unregulated' according to Carlen's theory.¹⁴² Further, the constructs of tikanga Maori as described in the previous section, illustrate that Western notions of gender and femininity are not philosophies or practices that Maori women subscribe or aspire to.¹⁴³

What Carlen's theory cannot account for is the relevance of indigeneity and the Treaty relationship between the Crown and Maori in the New Zealand context. Whilst she is cognisant of the effects of racism as a possible factor to consider in assessing the

¹³⁹ A Morris, "Sex and Sentencing" [1988] Crim.L.R. 163.

¹⁴⁰ Above n1, 306.

¹⁴¹ A Harris, "Race and Essentialism in Feminist Theory" (1990) 42 Stanford L Rev 581; K Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour" (1991) 43 Stanford Law Review 1241.

¹⁴² Above n1, 306.

¹⁴³ A Mikaere, "Maori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Waikato Law Review 125; C Te Kawehau Hoskins, "In the Interests of Maori Women? Discourses of Reclamation" (1997) 13 Women's Studies Journal 25; K Quince "Maori and the Criminal Justice System" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand*, (Lexis Nexis, Wellington, 2007).

experiences of minority working class women, the fact of being indigenous adds a further dimension to the power and relationship dynamics at play in assessing the construction, application and reaction of the criminal justice system to such defendants. For example, although the available collated data does not lend itself to such a comparison, I would expect that when comparing working class Maori women to working class non-Maori women, there would still be a gap in offending statistics. In other words, even accounting for other sites of oppression, such as gender, class and being an ethnic minority, there is still an over-representation of Maori women compared with non-Maori women. We have seen that this is the case with health statistics in the previous section. I believe the added dimension of being a colonised people, as opposed to one of a number of ethnic minorities discriminated against in a variety of other ways, has a significant effect on the long-term psyche of Maori. The racism perpetuated against us has occurred on our own territories, not as transplanted minorities, whether as a result of voluntary or forced migration.

Conclusion

In this article I have set out the historical and contemporary experiences of Maori women that over-expose them to the risk factors related to social harms, resulting in them being “filtered in” to the criminal justice system. The effects of colonisation by Pakeha eroded the status and diminished the roles of Maori women in our whanau, hapu and iwi. While some of the experiences of colonisation were common to Maori men and women as *Maori*, many circumstances and outcomes were either directed at or impacted upon Maori women because of our gender. These seemingly historical happenstances so greatly affected the social, cultural and political organisation of Maori society, that they continue to resonate in our contemporary lives. The effect of the qualitative differences in the experience of colonisation for Maori women, compared with Maori men, is that as a demographic group, these structural inequalities set Maori women up for over-representation in the criminal justice system.

We know that Maori women are more likely than non-Maori women to be convicted and imprisoned for criminal offending, but we cannot clearly state why that is the case. The statistics clearly show that they are not “filtered out” in the way that the majority of non-Maori women are at this stage. Feminist theorists such as Pat Carlen assert that non-gender regulated women do not receive the benefit of “chivalrous” decisions that would result in their exit from the system, and I argue that this could apply to Maori women.

I have not assessed the treatment Maori women receive in their journey through the criminal justice system following offending and apprehension. There may be logical reasons for increased rates of imprisonment, including higher numbers of previous convictions compared with non-Maori female offenders, or an inability to pay fiscal penalties – thereby reducing a sentencing judge’s options. However, there remains scope for a much larger empirical project assessing the *responses* of the criminal justice system to Maori women as offenders. This could include survey and analysis of use of discretion and decision-making by law enforcement officers, Crown prosecutors and judges.

What is essential in this next stage of analysis is the isolation of data relating to Maori women, given their unique positioning. An intersectional strategy aims to remedy

the mischief of minority women who experience multiple discriminations falling through the cracks of a narrow focus on either racism or misogyny. We cannot hope to address the causes of social harm if we do not contextualise the experiences of the specific peoples involved in offending.

Are Parole Boards Working?
or
Is It Time for an Indigenous Re Entry Court?

VALMAINE TOKI*

I INTRODUCTION

Statistics indicate that the current criminal justice system, including parole, is not working for Maori¹ and every second offender that appears before the New Zealand Parole Board [NZPB] will be Maori. Jurisdictions, such as Canada, have established a specialized indigenous forum to act as an advisory group to address cultural issues that inform Canada's National Parole Board. However, in achieving the purpose of the Parole Act, there is no clear direction within the policies of the NZPB on how the obligation of the Treaty of Waitangi² impacts on the decision making process of the NZPB. Similarly, there are no policy guidelines for cultural consideration. This raises concerns for Maori, both procedural and substantive, in terms of how culture is considered in the decision making by the NZPB.

Disenchantment with the NZPB has led to calls to overhaul the New Zealand parole system³ to exclude parole for some offenders.⁴ Continuing offending whilst on parole has encouraged the public to perceive parole as the soft option with calls for tougher sentencing as the answer.

Parole Boards like the NZPB have long been the jurisdiction of the Executive. A shift back to the Judiciary in the form of a Re Entry Court will provide transparency and accountability both to the offender and society. Specialist Courts such as Re Entry Courts are underpinned by therapeutic jurisprudence. Therapeutic jurisprudence shares commonalities with tikanga Maori, an indigenous legal system.

Against this background of public disenchantment and disproportionate statistics the first part of this paper will traverse the current parole system in New Zealand, highlight some

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¹ See B Morrison, N Soboleva and J Chong "Conviction and Sentencing Offenders in New Zealand: 1997 – 2006" Ministry of Justice April 2008 p 118.

² See discussion in M Durie "*Nga Tai Matau – Tides of Maori Endurance*" (Oxford University Press, Australia, 2005) p 146 for discussion on increasing government consciousness of Treaty obligations.

³ "Parole system under scrutiny" One News/Newstalk ZB Sunday January 7, 2007. Available also <http://tvnz.co.nz/content/953573> last accessed 10 December 2010. "Need to abolish parole highlighted" December 6, 2008. Available also <http://tvnz.co.nz/national-news/need-abolish-parole-highlighted-2360814> last accessed 10 December 2010.

⁴ "National demands parole overhaul" Newstalk ZB Sunday 7, 2007. Available also <http://tvnz.co.nz/content/953313> last accessed 14 December 2010. See also "Burton considers parole changes" One News/Newstalk ZB Monday January 29, 2007. Available also <http://tvnz.co.nz/content/972253> last accessed 14 December 2010.

problems and analyse comparable jurisdictions such as the Canadian parole system. To address these problems the second part of this paper suggests a Re entry Court.

Indigenous Re Entry Courts originate from indigenous legal codes. In conclusion, to address the lack of procedural and substantive cultural consideration, the final part identifies the similarities between therapeutic jurisprudence and tikanga Maori and suggests that an Indigenous Reentry Court as a possible vehicle that may provide a way forward.

II PART A

i. Background

Maori are today disproportionately represented in New Zealand prisons.⁵ Although there are subsisting methodological difficulties⁶ associated with gathering of statistics, such as; the classification of how a “Maori” is determined, who is a “Maori,” the circumstances under which the statistics were gathered, the interpretation of the statistics; it must be acknowledged these statistics⁷ suggest 50 per cent of the New Zealand prison population⁸ is Maori. It has been said that the high rate of imprisonment in New Zealand is attributable to an almost US-like level of incarceration for Maori.⁹ Pratt remarks that:¹⁰

50 percent of the prison population are indigenous Maori, even though they make up only 15 per cent of the population – in 1950 they constituted 18 per cent of the prison population. The Maori rate of imprisonment is 350 per 100,000 of the population; that for Europeans is 100 per 100,000.

In 2006, these statistics remain the same with just over 50 percent of all cases resulting in a custodial sentence being Maori.¹¹ Maori also have a higher offending rate and recidivism rate than non-Maori.¹² In 2000, Maori comprised 42 per cent of all convictions, 46 per cent of convictions for violence and 56 per cent of proved cases in the

⁵ See B Morrison, N Soboleva and J Chong “Conviction and Sentencing Offenders in New Zealand: 1997 – 2006” Ministry of Justice April 2008 p 118, See also M Rich “*Census of Prison Inmates 1999*” (Department of Corrections SAS Policy Development, Wellington, December, 2000), 43. Available also <<http://www.corrections.govt.nz>>.

⁶ See for discussion on problems including self identification or justice system identification J M Tauri “*Indigenous Justice or Popular Justice Issues in the Development of a Maori Criminal Justice System.*” in P Spoonley, D Pearson and C McPherson (eds) “*Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand*” (Palmerston North, Dunmore Press, 1996), 214.

⁷ Morrison et al above n 2. See also B Baybrook and R O’Neill “*A Census of Prison Inmates*” (Justice Department, Wellington, New Zealand, 1988). See also Rich above n 5.

⁸ Rich, *ibid*, identifies 54 per cent inmates as Maori. See also Department of Corrections “*About Us, Facts and Statistics, Prison Statistics*” (2003), which identifies 50 per cent of male inmates as Maori available <<http://www.corrections.govt.nz>>. See also Morrison et al above n 1.

⁹ S Collins “*Locked into Days of Idleness*” Weekend Herald 25 February 2005 p B6.

¹⁰ J Pratt “*The Dark Side of Paradise: Explaining New Zealand’s History of High Imprisonment*” (2006) 46 (4) British Journal of Criminology, 541 at 542.

¹¹ B Morrison, N Soboleva and J Chong “Conviction and Sentencing Offenders in New Zealand: 1997 – 2006” Ministry of Justice April 2008 p 118.

¹² J Lux “*Kia Mauritu*” published in D Biles and J Vernon (ed), “*Private Sector and Community Involvement in the Criminal Justice System: proceedings of a conference held 30 November 1992, Wellington, New Zealand*” (Canberra, Australian Institute of Criminology, 1994) ISSN 1034-5086, available <<http://www.aic.gov.au>>

Youth Court.¹³ More troubling perhaps, are the statistics from the Department of Corrections¹⁴ that forecast Maori offending rates will not only remain high but will continue to surpass non-Maori offending rates. Whilst the percentage of Caucasian apprehended offenders has decreased slightly from 50.33 per cent in 1996 to 45.15 per cent in 2005 the percentage of Maori increased from 39.6 per cent in 1996 to 42.45 per cent in 2005.¹⁵

Although the Annual NZPB Reports do not provide an ethnic breakdown, if Maori comprise 50 percent of custodial sentences then it is reasonable to assume that, in the minimum, at least, half of the offenders that come before the Parole Board will be Maori. The Treaty of Waitangi guaranteed to Maori the full, exclusive and undisturbed possession of their lands, estates and other treasures. This has been taken to include the Crown's obligation to maintain Maori health and social standards including the NZPB policy on release. Despite these statistics there is no clear direction within the policies of the NZPB on how the obligation of the Treaty of Waitangi impacts on the decision making process of the NZPB. Similarly, there are no policy guidelines for cultural consideration.

ii. Parole Board

New Zealand's first parole legislation was introduced by the Crimes Amendment Act 1910 but only for indefinite sentences. The Statute Law Amendment Act 1917 provided that inmates serving finite sentences of two years or more could be released on probation after serving half their sentence. This was extended to all finite sentences, by the Crimes Amendment Act 1920, offering eligibility after the longer of either six months or half their sentence served. The Criminal Justice Act 1985 provided for a structure that included a Parole Board and 17 District Prison Boards. Section 108 of the Parole Act 2002 establishes the New Zealand Parole Board, an independent statutory body, replacing the former fragmented system. Despite this raft of legislation there is no referral to Maori issues or the Crown's Treaty obligations to Maori.

iii. Parole - Today

Parole¹⁶ is the discretionary release of offenders by the NZPB from prison to serve the remainder their sentences in the community under conditions laid down by law.¹⁷ The NZPB is currently comprised of 20 Judges, 17 non judicial members and chaired by Judge David Carruthers.

The NZPB operates in panels of at least three members, with each parole hearing requiring the participation of a convenor and two non judicial representatives. Panel decisions are by a majority.

¹³ Refer Ministerial Briefings 2002, *Justice, Maori and Pacific crime and victimisation*, 2.3.6, (2002) available www.beehive.govt.nz.

¹⁴ Ibid.

¹⁵ See <<http://www.stats.govt.nz/products-and-services/table-builder/crime-tables/default.htm>> accessed 23 January 2008.

¹⁶ The purpose of the Parole Act in section 3 is to reform the law relating to the release from detention of offenders serving sentences of imprisonment.

¹⁷ Hall G 'Sentencing' in Brookbanks and Tolmie (ed) "*Criminal Justice in New Zealand*" (Lexis Nexis, Wellington, 2007) p 274.

The paramount consideration for the NZPB is ensuring the safety of the community.¹⁸ Irrespective of how heinous the crime or traumatized the victim,¹⁹ if the offender is no longer a risk, the NZPB must not deny parole. Factors of general deterrence or a community desire for retribution are irrelevant.²⁰

Other principles that must guide the Board's decision are,²¹

Offenders must not be detained any longer, or be subject to release conditions or detention conditions that are more onerous, or last longer than is consistent with the safety of the community (sections 7, 8, 35)²²

Offenders must be provided with information about, and be advised of, how they may participate in decision making that directly concerns them

Decisions must be made on the basis of all relevant information that is available to the Board at the time (sections 13AA – 13AE) and

The rights of the victims must be upheld, and victims' submissions and any restorative justice outcomes must be given weight.

Parole hearings increased from 3971 in 2006/07 to 4261 in 2007/08, an increase of 7.3 percent.²³ Of those heard 29.4 per cent were approved, similar to the previous year of 28.3 per cent approval.

Upon release a parolee is required to report to a probation officer who then has the responsibility to monitor progress and adherence to the conditions including residential restrictions.²⁴ This is related to, but different to, the legislative amendment that requires an offender to come back before the Board for a Compliance Hearing for the Board to monitor the offender's progress in complying with their conditions of release.²⁵ The NZPB Annual Report does not contain the statistics on parole breaches. However during 2007/08 there were 272 recalled²⁶ applications for offenders on parole. Of these 188 or 69.1 per cent were approved.²⁷

The amendments to the Parole Act²⁸ now require offenders to serve a greater proportion of their sentence before being eligible for parole. For instance, offenders serving long term sentences are now required to serve two thirds of their sentence or 12 months, whichever is longer, before becoming eligible for parole. This doubles the threshold currently required.

¹⁸ Section 7 (1) Parole Act 2002.

¹⁹ See *Smither v The New Zealand Parole Board* [2008] NZAR 368 per Hansen J HC Christchurch para [15] – to give the victim primacy is to effectively give them the power of veto.

²⁰ *A v The New Zealand Parole Board* [2008] NZAR 703 per Simon France J HC Wellington para 43. See also *Reid & Anor v New Zealand Parole Board* (2006) 22 CRNZ 743 at Judgment of the Court para A.

²¹ Hall above n 19, p 276.

²² See also *Reid v New Zealand Parole Board* (2006) 22 CRNZ 743.

²³ Parole Board Annual Report 2007/08 p 16. Available also <http://www.paroleboard.govt.nz/media-and-publications/publications/annual_reports.html> last accessed 23 March 2010.

²⁴ Sections 14 – 16, 29 –29B of the Parole Act 2002. See also discussion in Hall G 'Sentencing' in J Tolmie and W Brookbanks "Criminal Justice in New Zealand" (Lexis Nexis, Wellington, 2007) p 274 – 275.

²⁵ See Section 29A and 29B Parole Act 2002 – Board may monitor compliance with conditions.

²⁶ Under sections 59 – 61 Parole Act 2002, the Department of Corrections may apply to the Board to have an offender recalled to continue serving a sentence in prison.

²⁷ NZPB Annual Report 2007/08 p 28. Available also <http://www.paroleboard.govt.nz/media-and-publications/publications/annual_reports.html> last accessed 23 March 2010.

²⁸ See Section 48 Parole Act 2002 "Non Parole periods".

iv. Parole Board and Maori

Maori are over represented within the criminal justice system. Yet, the recognition of indigenous law/tikanga Maori within the justice system varies from recognition of Maori customs and values²⁹ to rejecting claims based on lack of jurisdiction.³⁰ Within the criminal justice system this is further limited to incorporation into programmes by the Corrections Department.³¹

The current policy framework of the NZPB acknowledges that the Treaty of Waitangi gives rise to certain rights and obligations.³² This policy framework indicates that the NZPB will always operate in a way that is sensitive to iwi and hapu, whanau and Maori communities. The NZPB will also ensure that Maori cultural concepts, values and practices will be respected and safeguarded.

However, there is no clear direction within the policy documents to determine how this is to be achieved and, if it has not been achieved, if any redress may be available. By default it is assumed that this obligation lies with the decision maker to satisfy. There is no specific allocation of Maori representation at the decision making stage despite the disproportionate statistics for Maori.

The functions of the NZPB contained within the Parole Act³³ require the development of policies on how to discharge these functions. The NZPB is currently reviewing all its policies. As part of an effort to improve the decision making process the NZPB engaged Professor Jim Ogloff to develop a straight forward, comprehensive and user friendly evidence based methodology for structured decision making on New Zealand conditions and reflecting New Zealand concerns.³⁴ It is unclear whether this methodology will provide for cultural considerations on decision making.

v. Parole - Canada

The National Parole Board is a Canadian government agency that operates under the auspices of Public Safety Canada. Created in 1959 under the Parole Act, the Board primarily deals with the Corrections and Conditional Release Act, Criminal Records Act and the Criminal Code of Canada.

It is an independent administrative tribunal that has the exclusive authority under the Corrections and Conditional Release Act to grant, deny, cancel, terminate or revoke day parole and full parole.³⁵ The Corrections and Conditional Release Act and Regulations is the prescriptive legislative framework which guides NPB policies, operations, training and parole decision making. The National Parole Board is also

²⁹ *Ngati Hokopu ki Hokowhitu v Whakatane District Council* Maori Law Review July 2003 p 2 – 8.

³⁰ *R v Toia* CRI 2005 005 000027 Williams JHC Whangerei 9 August 2006.

³¹ For example Te Whanau Awhina. See also domestic violence programmes at <http://www.justice.govt.nz/pubs/reports/2002/maori-domestic-violence/chapter-4.html>

³² NZPB “*Framework policy covering the development of the Board’s Policies*” Policy 1, Introduction – however all policies are now under review.

³³ Section 109 of the Parole Act 2002.

³⁴ Personal communication.

³⁵ In addition, the Board is also responsible for making decisions to grant, deny and revoke pardons under the Criminal Records Act and the Criminal Code of Canada.

guided in its mandate by the Letters Patent, and the Privacy and Access to Information Acts.

The National Parole Board in Canada makes parole decisions for all federal offenders and for provincial offenders in provinces that do not have their own parole board. It is part of the criminal justice system and works with key partners to develop and support an effective criminal system that is focused on a common objective of protecting the community and promoting respect for the law.

Each hearing panel is comprised of two Board members who consider a range of issues. These include the offence, criminal history, social problems, psychiatric reports, performance on earlier release, opinions from judges, Elders, or other professionals, information from victims and other information that would indicate whether the release would present an undue risk to the community. Positive changes are also examined including behaviour and benefits from any programme while incarcerated and the offender's personal plan for living within the community upon release.

Although parole board members engage in continuous training and learning to promote cultural awareness, First Nations, Inuit and Metis offenders have access to Elder and Community assisted Hearings. These hearing are designed to provide a culturally sensitive process for Aboriginal offenders and may incorporate traditions such as "a cleansing smudge", opening the room to a circle and conducting traditional teachings in preparation for a hearing. The Elders act as an Advisor to the Board during deliberation stage of the hearing.³⁶

vi. Parole – Comparison Canada and New Zealand

Neither Parole Boards are immune from the criticism of parolees committing further offences whilst on parole.³⁷ The National Parole Board of Canada defends its record, noting that between April 1994 and March 2006, 70 per cent of 14,792 offenders who had a full parole supervision period, completed their sentence successfully.³⁸ A little over 17 per cent had their parole revoked for breach of conditions while almost 13 per cent had their parole revoked as a result of committing a new offence. In the same period, the Board granted 32,236 day parole releases. Nearly 82 per cent were completed successfully. Revocations for breach of conditions amounted to slightly less than 13 per cent while 5.8 per cent were revoked for committing new offences. In New Zealand legislative amendments that require offenders to serve a larger proportion of their sentence before becoming eligible for parole and the power to monitor release on parole are viewed as steps to reducing offending while on parole.³⁹

³⁶ National Parole Board "From confinement to Community: The National Parole Board and Aboriginal Offenders". Available also <<http://www.npb-cnrc.gc.ca/infoctrn/ftct-eng.shtml>> last accessed 16 March 2010.

³⁷ "Family wonders how killer got multiple paroles" CTV ca News Staff, 21 December 2003. Available also <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1071888288460_67297488/?hub=TopStories> last accessed 16 March 2010. See also "'Balaclava Rapist' broke parole conditions" CTV ca News Staff, 18 January 2005. Available also <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1106017647438_28?s_name=&no_ads> last accessed 16 March 2010.

³⁸ "Reports and Publications – Parole Decision Making Myths and Realities". Available also <http://www.npb-cnrc.gc.ca/infoctrn/myths_reality-eng.shtml> last accessed 16 March 2010.

³⁹ See Parole Act 2002 Sections 29B – "Board may monitor compliance with conditions" and 48 – "Non-parole periods"

Although the similarities between the NPB and the NZPB are primarily due to the fact that the NZPB model has been designed on the Canadian parole system there are some major differences.

The ability for kaumatua (Maori elders) to participate during deliberations is not available for New Zealand offenders despite the high proportion of Maori offenders appearing before the Parole Board. New Zealand does not employ half way houses to allow for a “better test of freedom in the community” in a safe way.⁴⁰

According to Judge Carruthers:⁴¹

managed release on parole was at least twice as successful in preventing re offending as automatic release at the end of sentence.

Also quite significantly, unlike New Zealand, in Canada all parole hearings are open to the public.⁴²

Does the Parole Board have a Treaty Obligation to Maori?

The two different texts of the Treaty of Waitangi have caused much debate.⁴³ Nevertheless, it is commonly accepted that Article 2 confirms and guarantees to Maori the full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other treasures. Although this may seem to be restricted to forests and fisheries, in 1988 the Royal Commission on Social Policy concluded that the Treaty’s relevance is wide and has implications for health and social policies.⁴⁴ This extension of the Crown’s obligation to Maori to maintain health and social standards would include the NZPB policy on release. Consistent with this the Maori text, which contained the most signatories and which at law is to be preferred, protects “taonga”, a more inclusive term referring to all things treasured, both tangible and intangible.

The Principles of the Treaty of Waitangi

Initially viewed as a simple nullity,⁴⁵ the orthodox view, on the legal effect of the Treaty of Waitangi, is that unless it has been adopted or implemented by statute, it is not part of our domestic law and creates no rights enforceable in Court. It is the “Principles of the

⁴⁰ D Carruthers “*Chairpersons Report*” New Zealand Parole Board Annual Report 2007/08, p 5. Available also <http://www.paroleboard.govt.nz/media-and-publications/publications/annual_reports.html> last accessed 23 March 2010.

⁴¹ “Halfway houses could make communities safer” NZPA 5 December 2008. Available also <<http://www.3news.co.nz/News/Prison/Halfway-houses-could-make-communities-safer/tabid/423/articleID/83067/cat/357/Default.aspx>> last accessed 16 March 2010.

⁴² A Spierling “*Manager’s Report – The Year in Review*” New Zealand Parole Board Annual Report 2007/08 p 9. Available also <http://www.paroleboard.govt.nz/media-and-publications/publications/annual_reports.html> last accessed 23 March 2010.

⁴³ See for example discussion M Solomon “The Wai 262 Claim” in M Belgrave, M Kawharu and D Williams (ed) “*Waitangi Revisited*” (Oxford University Press, Australia, 2005) pp 216 - 217

⁴⁴ Royal Commission on Social Policy (1988) *The April Report Vol II: Future Directions*, Royal Commission on Social Policy, Wellington p 27 – 80.

⁴⁵ *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) 72 at 78 per Prendergast CJ.

Treaty” that are referred to in legislation⁴⁶ and policy documents⁴⁷ rather than the text of the Treaty itself.

When appropriate, legislation and policy requires decision makers to take into account the Principles of the Treaty.⁴⁸ For instance, when assessing an application for resource consent the decision maker is required by the Resource Management Act 1991⁴⁹ to take into consideration the Principles of the Treaty.⁵⁰ Also the Ministry of Health strategies in *Moving Forward: the National Mental Health Plan for More and Better Services* identified the Treaty of Waitangi as its fourth principle to satisfy.⁵¹ It would follow that, when necessary, the NZPB, as a decision maker, should take into account, as one of the considerations on whether or not to grant an application for release, the Principles of the Treaty.

What is *Tikanga* Maori – An Indigenous Legal System?

The legal system for Maori originates from *Te Ao Maori*, the Maori world view. *Te Ao Maori* encompasses cosmology and the creation stories that determine their relationship to each other, the environment and the spiritual world. This establishes the Maori social charter for our understanding and behaviour in the same sense as legal precedent. *Tikanga*⁵² is developed through these stories and ancestral precedents⁵³; it is the practice that gives effect to *kaupapa*⁵⁴, which means “first principles”. Together they set the parameters within which the concepts are given effect; *tikanga* is the law giving effect to basic principles or ground rule. Within this system key concepts, such as *mana* (charisma) and *tapu* (sacred), act as regulators.

The overall aim of *tikanga* Maori remains the restoration of *mana* through *utu*, to achieve balance, a balance of all considerations and to achieve a consensus;⁵⁵ it is not an adversarial process. When there has been a dispute that has affected the spirit and *mauri*, the question is how to bring it back into balance. Regardless of what level or who is involved the same fundamental principle is involved, the principle of *whakahoki mauri* or restoring the balance. Apparent here is the parallel notion of “healing” with therapeutic jurisprudence.⁵⁶

⁴⁶ For example Section 4 Conservation Act; Section 9 State Owned Enterprises Act.

⁴⁷ For example see the policy for the Office for Disability Issues where the Treaty underpins the development of their Strategy and is consistent with the relevant principles of the Treaty. Available at <<http://www.odgi.govt.nz/publications/nzds/discussion-document/tow.html>>

⁴⁸ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, (CA).

⁴⁹ Section 8 Resource Management Act 1991.

⁵⁰ For general discussion see M Durie “Nga Tai Matatu” (Oxford University Press, Victoria, 2005) pp 197 – 204.

⁵¹ M Durie “Mauri Ora, The Dynamics of Maori Health” (Oxford University Press, Victoria, 2005) p 258 – 259.

⁵² “Tika” means correct, true, just, while “nga” is a nominal suffix for plural. So “tikanga” means the collection of correct practices, a normative system meaning it tells us what is considered normal and right.

⁵³ See Mikaere A ‘The Treaty of Waitangi and Recognition of Tikanga Maori’ in M Belgrave, M Kawharu and D Williams “*Waitangi Revisited Perspectives on the Treaty of Waitangi*” (Oxford University Press, Victoria, 2005) pp 331 - 332.

⁵⁴ *Kaupapa* derives from *kau* which means to appear for the first time or be disclosed, while *papa* is a reference to the Earth or Papatuanuku, So together *kaupapa* means ground rules or first principles.

⁵⁵ See J Paterson “*Exploring Maori Values*” (Thomson Dunmore Press, Australia, 2005) ppl 16 – 135.

⁵⁶ D. Wexler and B. Winick (ed) “*Judging Law in a Therapeutic Key Therapeutic Jurisprudence and the Courts*” (Carolina Academic Press 1996).

Current Policy of the NZPB

The primary purpose of the NZPB is to assess whether an offender poses an undue risk to the safety of the community.⁵⁷ There is no clear direction within the policies of the NZPB on how the Treaty of Waitangi impacts on the decision making process of the NZPB to achieve this purpose. There is also no clear direction on how the decision maker, in satisfying the purpose of the Parole Act, must take into account the principles of the Treaty of Waitangi. It is clear, however, that the NZPB must adequately accommodate Maori cultural concepts, values and practices within its general process, including hearings.

Whether it is the text of the Treaty or the Principles of the Treaty the NZPB, as a decision maker, is required to articulate these obligations within their policy. The current policy is unclear as to how this may be achieved.

Parole - Conclusion

If the NZPB adopted a framework for considering specific cultural factors that may offer a structured way in which the board may consider culture, in its deliberations, this may help address the lack of cultural consideration in the decision making process. Although there would be no input at the decision making table, such a framework may offer inmates an opportunity to identify and participate in programmes and interventions that may both make a difference in reducing the chance of recidivism as well as be seen as positive by the board during its decision making. However, this has not occurred.

Parole Boards like the NZPB have long been the jurisdiction of the Executive, most recently under the Department of Corrections. The increase in offending whilst on parole has decreased public confidence in the ability, process and policies adopted by the NZPB and Department of Corrections. The public perceiving parole as the soft option with calls for tougher sentencing as an answer.⁵⁸ To address these concerns legislative amendments have been implemented.⁵⁹ The effectiveness of these amendments are yet to be gauged.

Despite the statistics indicating half of the offenders appearing before the NZPB will be Maori, there is still no clear direction on how the obligations under the Treaty of Waitangi impact on decision making and no policy guidelines for cultural consideration.

A shift from the Executive to the Judiciary in the form of a Re Entry Court will provide transparency and accountability both to the offender and society. A shift to an Indigenous Re Entry Court that is based on tikanga Maori will provide cultural consideration and fulfill the obligations under the Treaty of Waitangi.

⁵⁷ Section 7, Parole Act 2002.

⁵⁸ G Mc Vicar "Pathetic legislation blamed for violent attack" 26 May 2004 Sensible Sentencing Trust Available also <<http://www.safe-nz.org.nz/Press/2004pathetic.htm>> last accessed 20 March 2009.

⁵⁹ However, further amendments to include the "three strikes" have drawn criticism for breach of human rights. See "Foreign Officials concerned at tough sentencing plan" 20 March 2009. Available also <<http://www.3news.co.nz/Foreign-Affairs-officials-concerned-at-tough-sentencing-plan/tabid/209/articleID/96268/cat/525/Default.aspx>> last accessed 20 March 2009.

III PART B – RE ENTRY COURTS

Re Entry Courts are designed to assist offenders released from prison. These Courts aim to ease offenders through a judicially supervised conditional release process back into society. They are a specialist court with a purpose to help reduce recidivism and improve public safety.

Specialist Courts such as Re Entry Courts are underpinned by therapeutic jurisprudence. Therapeutic jurisprudence shares commonalities with tikanga Maori, an indigenous legal system. Indigenous Re Entry Courts originate from appropriate indigenous legal codes.

Re entry Courts and Therapeutic Jurisprudence

Ideally a re entry court would employ the following therapeutic jurisprudential principles.⁶⁰

Relationship ethic - the judge client relationship can spark motivation⁶¹ to, for example, adhere to conditions of parole;

Problem solving skills - Courts can engage offenders in relapse prevention planning and the development of problem solving skills,⁶² for example by contributing to the conditions of parole programme;

Risk management - Courts can manage risk and, at the same time, promote rehabilitation⁶³ to reduce rates of recidivism;

Compliance - Courts can enhance offender compliance with conditions of release⁶⁴; and

Abstaining from crime - Courts can help build on offender strengths and how they can reward and help maintain offender desistance from crime.⁶⁵

Therapeutic Jurisprudence - What is it?

Therapeutic jurisprudence developed out of the mental health system. American Professors Bruce Winick and David Wexler, both mental health law academics are pioneers of this movement. During their practice within the American health system, they conceived the idea that the operation of law and its accompanying legal processes can have a direct psychological impact on all the players including lawyers, judges and the offender. This impact could be both therapeutic or anti therapeutic. Hence, a system that is designed to help people recover or achieve mental health often backfires and has the opposite effect. For instance a decision to release an offender on parole will often have the opposite effect particularly if the program is not suitable for the offender.

⁶⁰ D Wexler “Spain’s JVP (*Juez de Vigilancia Penitenciaria*) Legal Structure as a potential model for a re entry court” *Contemporary Issues in Law* [2003/2004] 1, 2.

⁶¹ B Winick and D Wexler (ed) “Judging in a Therapeutic Key – Therapeutic Jurisprudence and the Courts” (Carolina Academic Press, North Carolina, 2003), 181.

⁶² *Ibid*, 189.

⁶³ *Ibid*, 201.

⁶⁴ *Ibid*, 213.

⁶⁵ *Ibid*, 249, 255.

Therapeutic jurisprudence is a perspective that regards the law as a social force that produces behaviours and consequences. Sometimes these consequences fall within the realm of what we call therapeutic; other times anti-therapeutic consequences are produced. Therapeutic jurisprudence raises our attention to this and encourages us to see whether the law can be made or applied in a more therapeutic way so long as other values such as justice can be fully respected.⁶⁶ It does not trump other considerations or override important societal values such as due process or freedom of speech and press.⁶⁷ Therefore therapeutic jurisprudence is the study of therapeutic and non therapeutic consequences of the law.

Therapeutic jurisprudence is thus described as the “study of the role of law as a therapeutic agent”.⁶⁸ One author offers the following definition, capturing the essence of therapeutic jurisprudence:

the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well being of the people it affects.⁶⁹

In this sense therapeutic jurisprudence is more a descriptive and instrumental tool than an analytical theory.⁷⁰ It focuses on the law’s impact on emotional life and psychological well being.⁷¹ Therapeutic jurisprudence can be thought of as a lens through which regulations and laws may be viewed, as well as the roles and behaviour of legal actors: the legislators, lawyers, judges, and administrators.⁷² It is through this lens or window that an indigenous legal system and indigenous principles such as *tikanga* Maori can be implemented.

In a recent article⁷³, Judge Arthur Christean has outlined a number of criticisms that are also echoed by David Wexler.⁷⁴ These include issues of due process and constitutional infringements. I acknowledge the validity of these criticisms and therapeutic jurisprudence advocates are currently addressing them.⁷⁵ Nonetheless, one should not lose sight of the aim and must bear in mind that the law does not exist in a vacuum and is ever changing. If therapeutic jurisprudence has the desired healing effect this would result in less offending. The flow on from this will be a lighter case load and a lessening strain on resources and arguably one justification against these criticisms.

While there has been enthusiastic support for therapeutic jurisprudence, a common response is that therapeutic jurisprudence is a rebranding of previous models or a soft approach to crime. In a scathing critique Hoffman criticizes therapeutic

⁶⁶ Wexler and Winick above note 61.

⁶⁷ W. Schma “*Judging for the New Millenium*” Spring 2000 Special Issue Overview Court Review.

⁶⁸ Wexler and Winick above note 61.

⁶⁹ C. Slobogin, *Therapeutic Jurisprudence: Five dilemmas to Ponder*, Psychol., Pol and Law 193, 196 (1995).

⁷⁰ W. Brookbanks W. “*Therapeutic jurisprudence: Implications for judging*” Paper delivered at the District Court Judge’s Triennial Conference, Rotorua, 1 April 2003.

⁷¹ Wexler and Winick above n 61.

⁷² Brookbanks above n 74.

⁷³ A.G. Christean “*Therapeutic Jurisprudence: Embracing a Tainted Ideal*” (January 2002), available at <<http://www.sutherlandinstitute.org>>.

⁷⁴ Wexler and Winick above n 61, p 80.

⁷⁵ Wexler and Winick *ibid*.

jurisprudence as possessing a ‘New Age pedigree’ and for being both anti-intellectual and wholly ineffective.⁷⁶

These criticisms should not reduce the possibility that therapeutic jurisprudence may assist in successful re integration of Maori into society and reduce recidivism rates. The commonalities between the philosophy behind therapeutic jurisprudence and the Maori World View demonstrate that therapeutic jurisprudence should not be dismissed as an irrelevant.

From a practical point of view, a significant advantage of therapeutic jurisprudence is that it co-exists with the current legal system. This factor supports the political arguments against a separate system for Maori. Additionally, therapeutic jurisprudence simultaneously allows for the incorporation of *tikanga* Maori. The inclusion of *tikanga* can occur, prima facie, at all levels of the criminal justice process including parole via a Re Entry Court.

Collectivity is a central tenet to Maori and therapeutic jurisprudence is asserted as being a relationally based method.⁷⁷ The Maori World View, like therapeutic jurisprudence, shares the idea of communitarianism or collectiveness and the notion of *whanaungatanga* or relatedness⁷⁸. This principle based approach, different from a rule based approach, is consistent with Maori *tikanga*. So, from a conceptual point of view, therapeutic jurisprudence represents a movement away from the heavily rule based approach of legal processes to a more collective, relational and principle based approach.⁷⁹

Therapeutic jurisprudence allows and acknowledges different conceptual frameworks. The Maori conceptual framework is at odds with the existing mono cultural system in New Zealand. Some central Maori issues, such as reciprocity⁸⁰ and taking responsibility have no equal in the State system. So we see the different approaches and administration of justice between the Maori and State systems. For instance for Maori balance is the ultimate goal and responsibility must be taken irrespective of guilt. For non Maori, under the Westminster system in New Zealand, the offender is innocent until proven guilty and responsibility is not a requirement. Critics⁸¹ widely voice their concern that the current system does not allow Maori to administer justice to Maori.

Therapeutic jurisprudence, like *tikanga* Maori, is a forward looking doctrine. The Criminal Justice system in comparison looks back, punishing the past actions and focusing on the penalty. *Tikanga* Maori like therapeutic jurisprudence is not primarily penalty orientated. It looks for the “right way” or the *tika* way, ultimately resulting in a healing for the participants.

Two important issues can be drawn from this. The first is that the commonalities between therapeutic jurisprudence and *tikanga* Maori allow them to work in tandem. This provides a window to introduce *tikanga* within the Parole hearing process as well as the conditions for parole, including the need to take responsibility for the conditions as a

⁷⁶ Morris B. Hoffman *Therapeutic Jurisprudence, Neorehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous* Fordham Urb. L.J., 2063 (2002).

⁷⁷ Warren Brookbanks *Therapeutic Jurisprudence: Conceiving an Ethical Framework* 8 J. MED. & L.328 – 341 (2001).

⁷⁸ See also H Mead “*Tikanga Maori – Living by Maori Values*” (Huia Publishers, Wellington, 2003) pp 28 -29.

⁷⁹ For discussion on “collective responsibility” see Paterson above n 58, pp 136 – 154.

⁸⁰ For discussion see Mead above n 78, p 27.

⁸¹ Audio tape: Radio New Zealand National Programme Morning Report Interview by Linda Clark with Annette Sykes (July 18, 2003).

collective rather than an individual. The focus is on indigenous law as a basis to reach a balance, a balance within the individual and a balance within the community.

The second issue is that the theory of therapeutic jurisprudence allows the administration of justice in the existing legal system to promote the well being of communities, thereby allowing Maori to look after Maori.⁸² The challenge will be the production, implementation and practicality of therapeutic jurisprudence in a suitable Court forum.

Maori society is often described as “principle based” as opposed to “rule based.” There is less emphasis on the rule but more emphasis on the principle. The central *tikanga* tenets, of collectivity and equality, dispel the idea that the defendant perceives the judge as his equal providing objective and impartial criticism. Therapeutic jurisprudence, like *tikanga* Maori, is a relational ethic.

Therapeutic jurisprudence thinking has encouraged people to think creatively about how to bring promising developments into the legal system. Using the tools of the social sciences to promote psychological and physical well being opens the door to *tikanga* Maori. In doing so, therapeutic jurisprudence may be able to offer a vehicle to ultimately decrease Maori recidivism and re offending rates.

The incorporation of therapeutic jurisprudence principles and processes would allow the NZPB to develop and maintain a relationship ethic with the offender. From an offender’s perspective it will encourage the offender to recognise when they are at risk and how they propose to counter this through a proposed programme. Therapeutic jurisprudence will also assist the understanding, recognition and importance of the collective structures, such as the whanau, within the NZPB process.

Re Entry Courts - Background

Re Entry Courts are modeled from the same principle that underpins Drug Courts. Hon Richard Gebelein has stated.⁸³

...drug courts have succeeded because, unlike previous failed rehabilitative efforts, the drug court movement has been able to provide a narrative of what is causing the criminal behaviour of the drug court clients and what they need to get better.

For Maruna and LeBel the critical question from the point of Re Entry Courts becomes⁸⁴, *is there a similar narrative for how and why reentry should work?*

Re entry Courts are designed to assist offenders released from prison to a form of judicially supervised parole to effect a successful integration into the community.⁸⁵ They are specialized courts that help reduce recidivism and improve public safety through the

⁸² Ibid.

⁸³ S Maruna and T LeBel “Welcome Home? Examining the ‘Reentry Court’ Concept from a Strengths based perspective” *Western Criminology Review* 4 (2) 91 – 107 (2003), 92.

⁸⁴ Ibid.

⁸⁵ Saunders T ‘Re Entry Court’ in B J Winick and D Wexler (ed) “*Judging in a Therapeutic Key*” (Carolina Academic Press, North Carolina, 2003) p 67

use of judicial oversight. The responsibilities generally assigned to re entry courts include,⁸⁶

Review offenders' reentry progress and problems

- Order offenders to participate in various treatment and reintegration programs
- Use drug and alcohol testing and other checks to monitor compliance
- Apply graduated sanctions to offenders who do not comply with treatment requirements and
- Provide modest incentive rewards for sustained clean drug tests and other positive behaviour.

The judiciary conventionally has no role past sentencing where responsibility for the offender ends and, in New Zealand, the Executive in the form of the Department of Corrections takes responsibility. Despite more prisoners being incarcerated and serving longer sentences before becoming eligible for parole⁸⁷ the availability of treatment programmes in prisons is questionable and program participation among prisoners has been declining over the past decade.⁸⁸

Countries like the USA, have shown that Re Entry Courts can assist released offenders to deal with a variety of problems that, if left unresolved, could significantly interfere with their successful reintegration into the community.⁸⁹ The long term benefits of successful re entry into the community are seen to outweigh the costs associated with establishing and operating a Re Entry Court.

The goal of Re Entry Courts is to reduce recidivism⁹⁰ and the costs of incarceration and community disrepair, building a safer community in the process. The supervision of offenders on parole has been poor.⁹¹ These factors have given rise to a new form of jurisprudence and approach to court management in which judges actively become involved in supervising the transition of the offender.

This is not novel. Specialised courts such as the Drug Court and Domestic Violence Courts operate in this fashion. A key component in this type of court is that the court holds the judicial authority to which offenders respond positively.⁹² In addition, frequent appearances before the court with the offer of assistance, coupled with the knowledge of predictable and prudent consequences for failure, assist the offender in the reentry process.

⁸⁶ "Office of Justice JD Programs, Model Programs Guide" Available also http://www.dsgonline.com/mpg_non_flash/reentry_court.html last accessed 14 March 2010.

⁸⁷ Parole Act amendments now require the offenders to serve a greater proportion of their sentence before being eligible for parole. For instance, offenders serving long term sentences are now required to serve two thirds of their sentence or 12 months, whichever is longer, before becoming eligible for parole. This doubles the threshold currently required.

⁸⁸ J Lynch and W Sabol, "Prisoner reentry in perspective." Crime Policy Report. Vol. 3. (2001). Washington, DC: The Urban Institute.

⁸⁹ See for example discussion by Judge Terry Sanders on the Harlem Reentry Court in Wexler and Winick above n 89, pp 67 – 72.

⁹⁰ This is consistent with New Zealand. See *Reid v Parole Board* (CA 247/05, 29 June 2006) where the Court of Appeal held that the Parole Board's sole focus should be the recidivism risk of the individual offender.

⁹¹ See "Report finds failure in parole management" February 17, 2009. Available also <http://tvnz.co.nz/national-news/report-finds-parole-failings-2491225> Last accessed 14 March 2010. .

⁹² OJJDP Model Programs Guide "Re Entry Court". Available also http://www.dsgonline.com/mpg_non_flash/reentry_court.htm last accessed 23 March 2010.

A reentry court can take various forms. A “case defined” court provides for the judge to retain jurisdiction over a case during the entire life of the sentence.⁹³ A “stand alone” court allows the court to maintain exclusive jurisdiction of reentry cases.⁹⁴ Another type involves parole boards working with the judiciary to develop quasi courts through the use of an administrative law judge. This is similar to the situation in New Zealand where the Parole Board consists of members of the Judiciary as well as community members to consider offenders for parole. All forms offer a unified and comprehensive approach to managing offenders from court to incarceration and back into the community, exploring a new approach to improving offender reintegration into the community.

The goal is to establish a seamless system of offender accountability and support services throughout the reentry process. Important core elements of a reentry court include the assessment of offender needs and planning for release, active judicial oversight of offenders during the period of supervised release including the use of graduated and parsimonious sanctions for violation of release conditions; broad array of supportive services with community involvement and positive judicial reinforcement of successful completion of reentry court goals.⁹⁵

Procedure – an example

In February 2000, the Office of Justice Programs in the USA launched a Re entry Court initiative to explore a new approach to improving offender reintegration into the community. One of the Delaware Superior Court reentry pilots is the New Castle County reentry court program where case managers work with offenders while they are in custody to create reentry court plans. The probation officer works closely with the community police officers to enhance offender monitoring.

This reentry court incorporates three tiers of supervision.

- (a) Phase I – participants meet weekly with the judge and probation officer
- (b) Phase II – they meet biweekly for three months and if necessary with more status conferences with the probation officer
- (c) Phase III – monthly status conferences are held at 30 day intervals

Case managers act as a service broker and report directly to the reentry judge about appropriate services and treatment for participating offenders.

The Re Entry Courts are situated in the heart of the community, close to where parolees live, receive services and work. This provides convenience and a familiar setting for the parolees. The time post release has been identified as a critical time for parolees, providing a quick and smooth transition is vital.

⁹³ OJJP *ibid.*

⁹⁴ OJJP *Ibid.*

⁹⁵ “Delaware State Courts – Re Entry Courts”. Available also
<http://courts.delaware.gov/Courts/Superior%20Court/?reentry.htm> last accessed 14 March 2010.

Current (Indigenous) Re Entry Models

Juez de Vigilancia Penitenciaria - JVP

The JVP law was created to provide judicial watchfulness over prisoner rights and liberties and is given oversight authority to monitor the prisoner's progress through an active treatment programme, with the prisoner's active participation in the planning and execution of such programme.⁹⁶ David Wexler proposes that the legal structure of Spain's JVP⁹⁷ could be used as the foundation for a reentry court. The JVP may impose relevant conditions on release such as prohibiting contact with the victim, participations in particular programmes and periodic appearances before the JVP.⁹⁸

The role of the JVP begins upon incarceration, conditional release is not automatic once an offender serves a certain portion of the sentence, nor does release lie in the unfettered discretion of the JVP. Conditional release authority resides in a single judge rather than a multi member board.

In contrast, the role of the NZPB begins not upon incarceration but when the offender applies for release. Although legislative amendments provide for the NZPB to monitor and recall, if necessary, forming a relationship of sorts between the offender and the panel, hearings are before a panel not a single judge. This reduces the benefits that a powerful motivating one on one relationship with the offender produces.⁹⁹ Although this is somewhat underdeveloped according to David Wexler.¹⁰⁰

the enviable JVP legal structure deserves to be studied seriously by those in the United States and in other Anglo American legal systems contemplating reform of the reentry process.

Tohono O'odham Nation

The Tohono O'odham Nation has a Law and Order Code and retains jurisdiction over many criminal offences. The re entry of these offenders is community concern. This Law and Order Code¹⁰¹ allow a tribal court to "parole" offenders after successfully serving a portion (typically one half) of the imposed sentence.¹⁰² Upon parole application a tribal judge would typically grant or deny parole. Recently the Tohono O'odham judiciary has been contemplating using the (tribal) Law and Order Code parole provision as a legal

⁹⁶ Wexler above n 60, 3.

⁹⁷ See Art 76, Organic Law of Spain 1/1979.

⁹⁸ Wexler above n 60, 3.

⁹⁹ For instance the success of drug treatment courts has been attributed to this one on one relationship.

¹⁰⁰ Wexler above n 60, 7.

¹⁰¹ Tohono O'odham Law and Order Code 1.15 (5) (1994) "a person convicted of an offence and sentenced to jail may be paroled after he or she has served at least half of the particular sentence with good behaviour.

¹⁰² Winick B J and Wexler D 'Practice Settings and Clinical Opportunities' in D Wexler (ed) *Rehabilitating Lawyers Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, North Carolina, 2008) p 313.

cornerstone to facilitate and create a Re Entry Court where the judges would play an active role.¹⁰³

There are obvious issues that flow from such a proposition. These include which kind of cases a re entry court may best begin with, the nature of a judicial parole hearing, the type of preparation an offender should engage in, the kind of parole conditions that may be imposed, the role of the community and the follow up process between the offender and the judge.¹⁰⁴

Reentry Courts – Conclusion

According to Retired Judge Peggy Hora.¹⁰⁵

In the US one in everyone 31 citizens is under community corrections supervision. This makes it difficult for Parole/probation officers to do a good job. Recidivism rates are 70 percent within three years for offenders with alcohol or other drug problems and Reentry courts do work.

Petersilia¹⁰⁶ has recently recognized, whether or not an offender has had a problem with substance abuse, a prisoner about to be released into the community could certainly benefit from a carefully planned, gradual re-integration into society, and there is a powerful argument that an additional type of problem solving court could be a general re entry court. This is not a novel idea.¹⁰⁷

To stem the reoffending rates suggestions of managed release, half way houses, longer non parole periods, and the ability to monitor and require offenders on parole to attend a hearing have all been implemented. Nonetheless there is still no recognition of cultural considerations within the decision making process for Maori offenders despite the fact that half of the offenders before the New Zealand Parole Board will be Maori.

A movement from the Executive to the Judiciary will promote transparency and accountability. Re Entry Courts are underpinned by therapeutic jurisprudence. The commonalities between therapeutic jurisprudence and tikanga Maori provide a window for tikanga Maori within the Parole system.

IV PART C: AN INDIGENOUS RE ENTRY COURT FOR MAORI?

Indigenous Reentry Courts are based on indigenous legal systems.

Half of all offenders before the NZPB will be Maori. The question now becomes - *Will an Indigenous Reentry Court for Maori underpinned by tikanga Maori assist Maori to re enter the community successfully and reduce recidivism?*

¹⁰³ Ibid, 314.

¹⁰⁴ See Wexler and Winick *ibid* pp 313 – 316 for discussion.

¹⁰⁵ Personal communication email 20 March 2009.

¹⁰⁶ J Petersilia, *When Prisoners come Home* (Oxford University Press, New York, 2003), 204.

¹⁰⁷ See S Maruna and T Lebel “Welcome Home? Examining the “Reentry Court” Concept from a Strengths based perspective” *Western Criminology Review* 4 (2) 91-107 (2003). See also J Travis “But they all come back: Rethinking Prisoner Reentry” US Dept of Justice, National Institute of Justice, Washington.

Proposed Model

Upon incarceration a kaumatua/judge coordinates, monitors and motivates the offender's progress in the correctional facility. This will include requiring the offender to participate in various tikanga programmes within the correctional facility such as the Maori Focus Units¹⁰⁸ to concentrate on identified areas of rehabilitation like drug treatment. Like the JVP programme through periodic review hearings the kaumatua/judge can, from the beginning, help instill in the offender a vision of eventual release,¹⁰⁹ a healing process.

Ideally this model would involve all offending but in the early stages limited to less serious offenders. The kaumatua/judge would be different to the sentencing judge who may be viewed by the offender in a negative light, whereas the monitoring judge would be perceived to "care" or maintain an ethic of "care" about the prisoner's rights.

Upon entry into the programme the offender would sign a behavioural contract¹¹⁰ agreeing to comply with the programme agenda. The offender could also be encouraged to participate to develop the programme and the ability to set release conditions. The release conditions would require the taking of responsibility as a collective (whanau). Like the JVP, this ability to set release conditions allows for the possibility of dialogue between the court and offender, and allows for conditional release to be conceptualized more as a bilateral behavioural contract than as a unilateral judicial fiat; such a conceptualization is likely to promote an offender's sense of fairness and participation, and should enhance the offender's compliance with the release conditions.

So, this programme could be tailored to suit the problem or offence relevant to the offender, and could be specific to include tikanga programmes within the correctional institute that focus on anger management.

The offender's genuine involvement in correctional programmes will have a bearing on the prisoner's progress through the levels and on the prospect of eventual release.¹¹¹

The kaumatua/judge would take a more active role with the offender by using the court processes aimed at promoting the rehabilitation or crime prevention process. These processes will seek to facilitate an offender's participation in a programme, to maintain the dignity of the offender and to promote the offender's trust.

Part of the programme would include regular court appearances for review that decline as progress is made. Participants would be actively involved in the process and could provide input into the programme for changes. The judge would interact with the offender expressing interest in their life and praising any progress that has been made. This is an endeavour to establish the 'tika' or correct approach.

This philosophy is based on the ethic of care and the central tenet of therapeutic jurisprudence, of it being a 'relational-based' construct. The ethic of care recognizes, and is capable of offering, such an alternative approach to legal problem-solving which is more overtly relational and deliberately less adversarial.

A similar model in operation in Geraldton in Western Australia has integrated therapeutic jurisprudence into its sentencing regime and has already shown promising

¹⁰⁸ See Maori Focus Units. Available also <http://www.corrections.govt.nz/about-us/fact-sheets/managing-offenders/maori-focus-units.html> last accessed 20 March 2010.

¹⁰⁹ Wexler above n 60, 4.

¹¹⁰ See also D B Wexler 'Robes and Rehabilitation: How Judges can Help Offenders Make Good' (2001). Available also www.law.arizona.edu/depts/upr-inti/robes.pdf last accessed 23 March 2010.

¹¹¹ Wexler above n 60, 6.

results.¹¹² This is comparable to the drug courts that uses therapeutic jurisprudence to import holistic concepts such as transcendental meditation.

If parole is granted and the conditions are breached, a similar process of deferred revocation as suggested by David Wexler could be adopted.¹¹³ This envisages a clinic approach where the burden lies on the offender to defer revocation of parole based on a rehabilitative plan that the offender, with support and help of the collective (whanau), would be responsible for. Assistance for hearing preparation would be provided for by a clinic composing of possibly law students where advocacy would be enhanced by a therapeutic spin.¹¹⁴

Conclusion

Half of all offenders before the New Zealand Parole Board are Maori. Comparative jurisdictions such as Canada have implemented an “Elder Assisted Hearing” to advise the Board during deliberations. There is no direction within the Parole Act to take into consideration the principles of the Treaty during decision making, nor is there any policy articulation of cultural considerations for Maori within this process. This raises procedural and substantive concerns for Maori.

Arguably the public disenchantment with offending while on parole is a result of the lack of transparency and a fault within the decision making process of the New Zealand Parole Board. The current review of all policies by the New Zealand Parole Board are perhaps a reflection of this.

In seeking a solution for these issues this paper has suggested a shift back to the Judiciary in the form of a Re Entry Court. There are commonalities between therapeutic jurisprudence, which underpins Re Entry Courts, and tikanga Maori. This paper concludes with the recommendation of an Indigenous Re Entry Court as a possible way forward. It is recognized that there are pitfalls ahead however other jurisdictions with similar ethnic offending rates have adopted elements of re entry that have started off as pilot programmes are now successfully implemented state wide. According to David Wexler.¹¹⁵

Do you recall the discussion in the book chapter regarding juvenile deferred parole revocation? It was then a pilot program in one small area but it is now a statewide program throughout Arizona.

Although New Zealand is not Arizona, the principles that underpin this initiative, therapeutic jurisprudence, has important commonalities with tikanga Maori and this could be a pathway forward for Maori.

¹¹² M King, ‘Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush’ 26 Criminal L J 260. (2002).

¹¹³ D Wexler and B Winick *“Rehabilitating Lawyers Principles of Therapeutic Jurisprudence for Criminal Law Practice”* (Carolina Academic Press, North Carolina, 2008) p 312.

¹¹⁴ *Ibid.*

¹¹⁵ Personal Email Communication 22 March 2009.