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**MAORI BASED JUSTICE: AN ALTERNATIVE DISPUTE
RESOLUTION IN THE CRIMINAL JUSTICE SYSTEM**

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1. INTRODUCTION

Recent statistics show that although crimes generally throughout New Zealand have decreased¹ in the year ending 30th June 1994, violent crime has in fact increased.² In the Manukau District in South Auckland, for example, reported violent crime increased 30.3 5% in the year ending 30th June 1994.³

I have practised as a barrister in South Auckland for a number of years, specialising in the areas of criminal and family law. I have also worked as a Youth Advocate and have therefore represented young persons charged with serious offending. About 90% of the people I represent are Maori or Pacific Islander, and of these nearly all are men.

¹From the National Reported Crime Statistical Summary for the Year Ended 30 June 1994, provided by the Media Department, New Zealand Police, Regional One Headquarters (Auckland). Reported crime (excluding traffic offences), for the year ending 30th June 1994, decreased by 3.2%. This compares with increases of 7.2% and 2.3% for the years ending 30th June 1992 and 1993, respectively.

²Ibid. Reported violence for the year ending 30th June 1994, increased nationally by 26.4% to 41,830 reported offences.

³Manukau District Reported Crime by Class and Group figures for the Year Ending 30th June 1994, provided by the Media Department, New Zealand Police, Regional One Headquarters (Auckland). Reported violence, including murder, kidnapping, robbery, assaults and intimidation, rose from 2102 reports (between 1st July 1992 and 30th June 1993) to 3018 reports (between 1st July 1993 and 30th June 1994). See also Appendix 1.

I believe there is a common dissatisfaction among both offenders and victims alike with the present Pakeha system of justice. Specifically, in regard to Maori and Pacific Islander perceptions of the criminal justice system, the current criminal justice system lacks cultural sensitivity and many of the system's philosophies are diametrically opposed to Maori and Pacific Islander notions of justice.

The NZ criminal justice system, as an example of the adversarial system is, by nature, antithetical to the traditional approach as practised in the Marae. It is my opinion that the maintenance of law and order generally may be better achieved by adopting a system based on Maori and Pacific Islander principles of conflict resolution which welcomes and provides for a greater sense of community involvement and responsibility in the justice process.

In my paper, I will firstly discuss the NZ criminal justice system in general terms and pose the question whether it achieves justice for both Maori and Pacific Islander. I will then touch upon principles of the Treaty of Waitangi as a preliminary to discussing Marae justice and perceptions of criminal conduct. Finally I will try to draw the threads together and make some suggestions as to possible reforms which may make the present criminal justice system more harmonious with the values and aspirations of Maori.

2. THE PRESENT CRIMINAL JUSTICE SYSTEM: ONE LAW FOR ALL?

The criminal justice system adopts a uniform concept of "one law for all". The system focusses upon the responsibility of the individual offender, specifically rejecting the notion of collective or community responsibility for criminal activity. Such a system lacks any recognition of specific Maori ideals or forms of social control. Prior to the mid-1980's in New Zealand it would be fair to say that Pakeha attitudes permeated the justice system in New Zealand, despite the fact that a significant percentage of the population was Maori or Pacific Islander. Moana Jackson makes the following observation:

Maori people clearly believe that the processes of the present criminal justice system are often unfair, and that the end results are consequently unjust. That belief is shaped by the reality of their experience within a system whose attitudes and processes were developed in a non-Maori cultural setting. The powers which are exercised to determine arrest and charge, the laws which actually define the crimes, and the procedures which individuate the offence and isolate the offender, are products of an English tradition frequently inconsistent with that of the Maori.⁴

In regard to the criminal justice process itself, Moana Jackson adds:

[That] [e]ach of the steps in the criminal justice process, from the enforcement role of the police through prosecution, legal representation, jury deliberation, probation reporting, judicial determination, and departmental oversight, are moulded by the same values and needs. The values are Pakeha, and the needs are the maintenance of a system which upholds Pakeha traditions and concepts of justice.⁵

By the mid-1980's, enormous concern was expressed about the statistically high number of young Maori men who were being convicted and imprisoned.⁶ This concern gave rise to research and surveys within the Department of Justice to determine whether the Maori people saw, or believed, criminal justice was being done for them:

It is clear from the recorded experiences and observations of Maori people that this viewpoint [of the criminal justice system] results in instances of unfairness and prejudice against Maori offenders. If the cycle of confinement in which the Maori community exists has established the correlates of criminal offending, the operations of the criminal justice system exaggerate (sic?) the rate of that offending.⁷

⁴The Maori and the Criminal Justice System a New Perspective: He Whaipaanga Hou, Part 2, at p. 262.

⁵Ibid. at p. 154.

⁶Ibid. at pp. 24, 25, 31 and particularly at p. 248.

⁷Ibid. at p. 154.

It is therefore being said the system is not working, this Judge-and-Court imposed system. This is not to criticise Judges. However common sense would indicate that where a solution is imposed on a person without any input (by that person) into the decision-making process, then any responsibility for that outcome is unlikely to be accepted. Or, put another way, an offender will be less likely to recognise the causes for offending or to desist from further crime if they are not given a voice in the justice process.

The criminal justice system has, as with other areas of law, begun to recognise the need for change. The benefits of alternatives to the individual based justice system in the area of youth offending has been recently affirmed.⁸ In terms of Maori offending:

...[T]here must be a starting point for any remedying of the behaviour of our rangatahi and. ..like all things it must be the Treaty and the richness of our own heritage.⁹

3. THE TREATY OF WAITANGI

The Treaty of Waitangi is regarded as the cornerstone for Pakeha-Maori relations. It envisaged an equal partnership in which both Pakeha and Maori respected the other's values and integrity. Although not all tribes signed the Treaty:

[it] has come to be accepted by Maori people as a covenanted precedent defining behaviour and establishing a framework for relations with the Crown.¹⁰

For the Maori, the Treaty also has both a spiritual and material significance, representing: "... an affirmation of rangatiratanga and hence a confirmation of the authority implicit in that term to act

⁸ See, for example, the author's paper entitled Sentencing of Children in New Zealand: A new Direction, presented at the 5th International Criminal Law Congress in Sydney, 25-30 September 1994 and the references contained therein.

⁹ Quotation included by Moana Jackson in The Maori and the Criminal Justice System a New Perspective: He Whainaanga Hou, Part 2, at p. 157

¹⁰ Jackson, Ibid., p. 168.

on behalf of the iwi and to bind them in their future conduct."¹¹ The Maori believed that the Treaty had guaranteed their special status with "...certain ideals of title, of rights, and of law."¹² Moana Jackson states that: "... [There was no doubt in Maori minds that their mana (the closest Maori equivalent to sovereignty) was preserved and that their rangatiratanga or authority (over their own affairs] was expressly maintained under Article 2 To the Maori then, their sovereign power and all that implied was intact...." ¹³

4. JUSTICE IN THE MARAE

(a) General Philosophy

It was been observed that pre-European Maori society shared four features of conflict resolution with other small-scale societies:

First, the emphasis was on reaching consensus and involving the whole community; second, the desired outcome was reconciliation and a settlement acceptable to all parties rather than the isolation and punishment of the offender; third, the concern was not to apportion blame but to examine the wider reasons for the wrong (an implicit assumption was that there was often wrong on both sides); and fourth, there was less concern with whether or not there has actually been a breach of the law and more concern with the restoration of harmony.¹⁴

Tapu, for the Maori, is the spiritual essence of all things, and is addressed through justice, integrity and love. Any violation of tapu has to be redressed through these three principles. To violate tapu therefore is not solely an individual matter but is one which affects the whanau (family) and the iwi (tribe). The process of encounter between the wrongdoer and the wronged-against is carried out - through the iwi or whanau - and is considered both

¹¹ Ibid.

¹² Ibid., p. 170

¹³ Ibid., p. 171

¹⁴ Olsen, Maxwell and Morris. From the text of a paper entitled Maori and Youth Justice in New Zealand, presented to the New Zealand Law Conference in Wellington, March 1993, at p. 3

central and essential for healing and reconciliation, without which injustice cannot even be truly resolved. The community's involvement in individual sentencing means the community has input into the resolution of crime and the maintenance of law and order.

In a similar vein, Judge McElrea observes that the new approach of the restorative model of youth justice in New Zealand is similar to the principles of reconciliation, reparation and community involvement that were applied in a number of ancient societies, the pre-European Maori being one. The Ministerial Advisory Committee on a Maori perspective contrasts traditional justice with pakeha justice in the following way:

Maori law observance depended on the maintenance of the mores of a communal society, but the authority of community sanction was supplanted by the remote institutions of Western Law Courts and Police forces. Imprisonment typified the Western response - the equation of individuals with animals distanced from their communities but later to be inflicted back on them.

It is not suggested that the old Maori ways should now be restored, but that ought not inhibit the search for a greater sense of family and community involvement and responsibility in the maintenance of law and order. At present there is little room for a community input into individual sentencing, no chance for an offender's family to express censure or support, no opportunity for a reconciliation between the wrongdoer and the aggrieved, no search for a community solution to a social problem. The right and responsibility of a community to care for its own is again taken away and shifted to the comparatively anonymous institutions of Western law.¹⁵

Central to Maoridom is the right and the responsibility of a community to care for its own, and to seek and find solutions to its social problems.

¹⁵From Puao-te-ata-tu (day break), the Report of the Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare (September 1988) p. 74, as cited in the text of a paper presented by Judge FWM McElrea at the Youth Justice Conference of the New Zealand Youth Court Association (Auckland) Inc in February 1994, at pp. 9-10.

(c) The Justice Process

It is a fundamental principle of Maori law that the rights of the individual and those of the community are necessarily interrelated. Maori identity is characterised by a common sharing of values, and in turn concepts of justice are centred upon unity and cultural awareness.

The aims of justice include a balancing of interests - on the one side, the anger and hurt of the victim and his or her family, on the other, the shame of a wrongdoer and his or her whanau. The concept of justice and its underlying processes are therefore based on a different cultural orientation than the Western model. For example, Maori justice recognises the traditional concept of muru, by which reparation is made by the offender's whanau to the victim. Although muru has some similarity with reparation under the Criminal Justice Act 1985, the latter has a narrower focus, involving payment from one individual to another. Jackson argues that:

Where both the offender and victim are Maori and there is no dispute as to guilt, there seems little obstacle to the imposition of a mutually mediated muru. The use of a muru, and the incorporation of ideas of group responsibility to an aggrieved victim rather than a distant symbol of the State, helps heal the hurt in a way not often possible in the existing adversarial system.¹⁶

(d) An Explanation of Offending

There are many factors which contribute to the rate of Maori offending. In the past, theories have been advanced from a Pakeha perspective and accordingly have suggested the need to promote racial harmony or improve the socio-economic lot of the Maori community. However, these have been criticised for implying that Maori are a sub-class or an under-class. It has been observed

¹⁶Jackson, *supra* note 8 at 217.

that the Maori perspective is quite different: "[b]ecause it relates the causes' of offending to the inter-relationship between the cultural and socio-economic deprivation that creates and maintains the cycle of Maori confinement, it sees the starting point for remedial initiatives as being that inter-relationship, rather than its purely economic consequences. [If the Maoris' special status under the Treaty of Waitangi is recognised, problems such as the high incidence of offending]....can be addressed within a specific cultural and constitutional framework...."[emphasis added] ¹⁷

(e) Achieving Balance in Reform

There are a number of difficulties to achieving a balance between the Maori place in the scheme of things and the criminal justice process. According to Moana Jackson the following problems must be recognised:¹⁸

1. Despite the wealth of emotional resources at hand, the Maori community lacks sufficient financial resources to implement initiatives.
2. In the past it has been assumed that Pakeha ideas of reform are applicable to Maori. Thus Maori have tended to rely upon adaptation of Pakeha models rather than developing strategies of their own.
3. The Crown has been fragmented into different departments with different mandates and areas of responsibility. This has led to the perception that the holistic Maori approach is rendered ineffective by an overly bureaucratic division of responsibility. Thus Maori offenders may be treated as a cross-departmental issue and the end result may reflect this unco-ordinated response.

¹⁷ Jackson, *Ibid.* at p. 162

¹⁸*Ibid.*, at pp.163-165

4. Time is needed to develop the appropriate initiatives and support programmes that will sustain long-term change. Specifically, strategies directed toward prevention or rehabilitation of offenders will need to be specifically developed and supported within the Maori community.
5. Inter-tribal ties must be re-established in order to strengthen Maori society. In so doing, resources and ideas can be shared and a support network can be developed.

(f) An Alternative Justice System?

It has been observed that:

If you ask why we've got all those Maori in jail you've got to ask either are all these Maori born criminal or has something made them criminal...and when you ask what contributed to that, you must ask have the police and the courts, the system, played a part in it all.¹⁹

The Maori and Pacific Island peoples are seeking an alternative justice system. Support for this search is growing within the traditional system. It has been expressed by lawyers, judges, corrections officers, police and community organisations. Participants in the criminal justice system need to critically examine the system within which they work and bring about constructive change where possible. There is good reason for doing so.

In New Zealand, Maori and Pacific Island peoples must have their cultural concepts included in the criminal law. They must be given the opportunity for meaningful participation in its development and implementation. Otherwise two undesirable situations will arise: (i) Maori and Pacific Islanders in New Zealand will be excluded from the processes of authority which operate within the wider New Zealand society, of which they are a significant part, and (ii) more specifically, the existing legal institutions will not be assisted or respected. These institutions will therefore become

¹⁹Quotation included by Jackson, *Ibid.* at p. 105

ineffective in maintaining law and order. The community as a whole can only be the loser.

5. A PARALLEL CRIMINAL JUSTICE SYSTEM: SOME THOUGHTS

(a) A Cultural Defence?

Of interest in New Zealand is the possibility that there could be affirmative defences based on different cultural perspectives. One judge sitting in South Auckland, John Hall, now deceased, recognised the validity of the idea of "utu" (revenge), at least as mitigation. While such concepts may not be appropriate today as a specific defence (such as insanity) nevertheless effect could be given to cultural defences in the same way as, for example, provocation, which may operate to reduce the gravity of particular charges. Naturally, as with provocation, there would need to be statutory limits imposed, such as a clear definition of the particular concepts to be invoked as cultural defences. Again, the cultural awareness of the accused in any given case would be a relevant consideration. Guidelines would also be needed as to when the defence would be appropriate.

(b) Cultural Remedies

1. Continuing efforts ought to be made to educate lawyers, judges and Corrections Department Officers to improve their understanding of, and increased sensitivity to, Maori cultural values.
2. The Courts can use the physical environment of the courthouse to involve the whanau of the offender and the victim. For example, there could be a greeting in Maori with the judges inviting the Whanau to stand as a group in the courtroom close to the offender. The same reception could be given to the victim and victim's whanau, where present.
3. Iwi authorities and Maatua Whangai are to be encouraged and supported to develop their roles within the justice system.

The Department of Justice and the Law Society should consult more widely with these two organisations.

4. Lawyers and Judges should ensure that due consideration is given to cultural matters considered before sentencing. This right is pursuant to s16 of the Criminal Justice Act 1985 which states:

s16(1) Where any offender appears before any court for sentence, the offender may request the court to hear any person called by the offender to speak to any of the matters specified in subsection (2) of this section; and the court shall hear that person unless it is satisfied that, because the penalty that may be imposed is fixed by law or for any other special reason, it would not be of assistance to hear that person.

(2) The matters to which a person may be called to speak under subsection (1) of this section are, broadly, the ethnic or cultural background of the offender, the way in which that background may relate to the commission of the offence, and the positive effects that background may have in helping to avoid further offending.

5. The use of Diversionary Schemes may often be appropriately based on the Marae. The objective of diversion is to divert offenders from the court system into a community based programme, thereby involving the whanau and iwi in the disposition and treatment of offenders. The "sentences" imposed are based on concepts of separation, community service and supervision, all of which are suitable cultural remedies to Maori offending.

6. CONCLUSION

The argument against developing separate or alternative cultural perspectives within the criminal justice system in New Zealand is based on the maxim that there can only be "one law for all" in any society and that there is no justification for the development form of separate justice. This, however, is to confuse "justice" with "procedures for achieving Justice." It is possible and indeed desirable to promote different procedures which reflect the various traditions and cultural precepts of New Zealand's multicultural society. On such a model it is still possible to achieve the common ideal of justice. The concept of one justice for all is not the same thing as one process for justice.

One major benefit for New Zealand society would be a reduction in the number of Maori offenders coming before the Courts and being imprisoned as a result. What does prison achieve as a way of reducing further offending? If one looks at what prisons do, then the answer has to be nothing at all, except to further alienate the Maori offender from the community and its idea of justice. Justice not only has to be seen to be done, but be done. For the Maori, particularly young Maori offenders, the law is not a principle of oneness and equality but the system applied by the police and the Courts.

As a final word:

...[W]e have always looked at ways to make the pakeha court work better but...perhaps this is the time to look at our Maori alternatives and see how they can work. ..see how the Maori way can work today.²⁰

²⁰ Quotation included by Jackson, *Ibid.*, at p. 158

Appendices

Appendix 1

Appendix 2

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