KO NGĀ TAKE TURE MĀORI

Interweaving the Status and Minority Rights of Māori Within Criminal Justice

DAVID GREEN*

The overrepresentation of Māori in the criminal justice system must be addressed. Important work has been done in this area to better recognise the positive role a Māori perspective can play. But the problem has not disappeared. To address the issue from a new angle, this article examines the various ways in which Māori rights can be articulated and, without disregarding work done before, suggests that advocacy based solely on the status of Māori as indigenous peoples tends to be rejected by the legislature and the courts. On that basis an alternative approach, minority rights, is advanced as a way to improve the Māori experience of the criminal justice system alongside the more familiar status approach.

I INTRODUCTION

Māori rights are articulated in a variety of ways in the legal system of Aotearoa New Zealand. Claims to self-determination, indigeneity, sovereignty, human rights and minority rights are all distinct. Each conceptual form is slightly different from the next, although all represent what might be termed a "right" that Māori can advance. The suggestion at the heart of this article is that Māori people, te tangata whenua o Aotearoa, will best thrive if these various conceptions of rights are advanced *together*.

The interplay between the various approaches to Māori rights is easily demonstrated in the criminal law. The enduring forces of colonisation mean that criminal justice is an area where Māori are highly visible — but not in a positive sense. Many issues arise as a consequence of this visibility, two of which are explored in this article.

First, while Māori are a significant minority, Māori values are generally excluded from notions of "society" or "community" in the criminal law. This curious exclusion of Māori from "society" has been one factor leading to the expression of legal rights in terms of indigenous status. As a

* Ngāti Kahungunu ki te Wairoa, Ngāti Tūwharetoa. Solicitor, Chapman Tripp. The author would like to thank Khylee Quince for her guidance in the preparation of this article.

consequence of oppressive colonisation, such an approach is understandable and encouraged. It is a difficult, but not insurmountable, task for that which is currently homogeneous to include heterogeneous worldviews.

From that state of affairs arises the second issue: does the coherent articulation of Māori rights *necessarily* require arguments based on indigenous status? It is argued that it does not. Minority rights discourse can also lead to meaningful Māori discourse, particularly in criminal justice. Māori are a significant minority, so minority rights may be used as a vehicle for Māori difference and form part of a possible solution to the disproportionately negative experience Māori endure in the criminal justice system.

Part II of this article describes how Māori concepts are currently considered in the criminal law. While there have been steps in the right direction, such as Ngā Kooti Rangatahi (Māori youth courts) and the current exercise of judicial discretion in sentencing, a wider analysis shows that Māori are still overwhelmingly excluded from notions of "community" and "society". Part III describes the various conceptual approaches that may underpin Māori rights. Part IV sets out the approaches grounded in indigenous status that have so far been favoured over the minority rights approach, and offers some criticisms of this situation. Finally, Part V examines how minority rights discourse could reinvigorate Māori rights claims. It suggests that it could both encourage legislative reconsideration of the values the criminal law should reflect and recalibrate the interpretative and discretionary functions of the judiciary.

II CRIMINAL JUSTICE AND THE MĀORI WORLDVIEW

Cultural plurality and criminal law do not mix well. That is because the law, particularly criminal law, must by its very nature be consistently applied. An ordinary approach to legal virtues advocates determinacy, predictability and rationality.

After some necessary background, this section illustrates issues with the judicial use of "society" and "community" in criminal law, examined through two case studies: *R v Mason* and *R v Rawiri*.[1] Those cases demonstrate how the Māori perspective is marginalised in constructing notions of society and community.

Setting the Scene

Māori involvement in the criminal justice system is a topic frequently discussed, often beginning with statistics indicative of real issues within the legal system. In 2012, 53.9 per cent of those imprisoned were Māori while

1 *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695 [*Mason* ruling]; and *R v Rawiri* HC Wellington CRI-2007-032-5294, 14 August 2009.

32.1 per cent were New Zealand European.[2] 59.2 per cent of women imprisoned were Māori. As a whole, the Māori experience in the criminal justice system is overwhelmingly negative. These statistics have remained relatively unchanged.[3] When one considers how disproportionate the statistics are, there is a clear case for a different approach to criminal justice: only about one in seven people in New Zealand are of Māori descent.[4]

Law and Identity

Fundamentally, the criminal law delimits what conduct is wrong and provides a process to be followed to ascertain guilt. In theory, what is right and wrong is judged against a set of values that the community holds as a whole. There must be a clear social justification for something to attract criminal sanction.[5] If not, the labelling of an act (or person) as criminal would attach no disapproval from society.[6] The law, as commonly put, would be an ass.

Consider the crime of murder. Almost everyone would agree murder is wrong and that murderers deserve punishment. Some people, however, think the killing of animals is also a form of murder but we do not attach criminal sanction to the meat industry (the mistreatment and wanton killing of animals is a different story).[7] On that approach, the views of some vegetarians are outside the moral community because their beliefs are not reflected in the criminal law. The criminal law is therefore majoritarian: if Aotearoa New Zealand consisted of a majority vegetarian population, the law might to some extent criminalise the meat industry.

The law, then, is a product of identity. It reproduces the values that society holds. But it also produces identity, by marking out what is acceptable and what is unacceptable conduct in society.[8] The criminal law in Aotearoa New Zealand is markedly different to that in some other countries. For example, homosexual acts were once a crime but such acts were decriminalised in 1986.[9] Elsewhere they are still punishable by death.[10]

Yet beyond substantive content, it is not generally considered that the processes of the law reflect a particular normative approach. The presumption is that the law is neutral and free from the influences of the views of a particular group. Rather than constructed by social values, the law is perceived as applying to all peoples equally. But this is not really the case. Indigenous peoples are isolated and excluded by the criminal justice system

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2 These statistics are drawn from Statistics New Zealand "NZ.Stat" (18 February 2014) <www.stats.govt.nz>.

3 Khylee Quince "Māori and the criminal justice system in New Zealand" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 333–334. See also Bronwyn Morrison, Nataliya Soboleva and Jin Chong *Conviction and Sentencing of Offenders in New Zealand: 1997 to 2006* (Ministry of Justice, April 2008).

4 Statistics New Zealand *2013 Census Quick Stats About Māori* (December 2013) at 5.

5 AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at 768.

6 At 5.

7 Animal Welfare Act 1999.

8 Warwick Tie *Legal Pluralism: Toward a multicultural conception of law* (Ashgate, Aldershot (UK), 1999) at 3.

9 Homosexual Law Reform Act 1986.

10 See, for example, Islamic Penal Code of the Islamic Republic of Iran, art 110.

because its procedures do not reflect indigenous values. Māori suffer injustice because a critical mass of people holding the same values — a number sufficiently large to effect a change in legal norms — does not exist.

The Pragmatic Incorporation of the Māori Perspective

While at a wider level the criminal justice system excludes Māori values, there have been some practical developments in advancing the Māori perspective. Yet the whakapapa, or genealogy, of each practical development reveals an underdeveloped appreciation of the theoretical rationale for providing distinct consideration for Māori. As explained in this Part, the majority of practical reform is founded on a simple "number eight wire" approach to addressing nuanced issues.

Several current measures are addressing Māori over-representation in the criminal law but this section focuses on two key examples: first, discretion in sentencing arising by virtue of the provisions of the Sentencing Act 2002 and, secondly, the use of Ngā Kooti Rangatahi in youth justice.

1 Discretion in Sentencing

Legislation explicitly sets the boundaries of the criminal law. As a starting point, it is clear that Māori and Māori concepts, predominantly tikanga, are referred to in legislation generally.[11] However, no specific criminal justice legislation refers directly to "Māori" or to "tikanga", although there are references to "whānau, hapū and iwi" in the Children, Young Persons and Their Families Act 1989.[12] That reference suggests that Māori concepts are relevant in the implementation of that Act.

One area where legislation allows Māori perspectives to be taken into account is sentencing. Since sentencing is a discretionary exercise, there is ample opportunity for judges to be guided towards a culturally appropriate outcome in imposing punishment. Section 27 of the Sentencing Act, a key provision, relevantly states:

> 27 Offender may request court to hear person on personal, family, whanau, community, and cultural background of offender
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> (1) If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—
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> (a) the personal, family, whanau, community, and cultural background of the offender:

11 For a useful analysis of legislation that refers to "tikanga Māori" and in what contexts see Fiona Wright "Law, Religion and Tikanga Māori" (2007) 5 NZJPIL 261 at 275–277. There is an important caveat to be addressed with the use of Māori concepts in a Western legal system but that concern is beyond the scope of this article: see Arnu Turvey "Te ao Māori in a 'Sympathetic' Legal Regime: the Use of Māori Concepts in Legislation" (2009) 40 VUWLR 531.

12 The Children, Young Persons and Their Families Act 1989 provides a specific way to deal with young people who offend.

> (b) the way in which that background may have related to the commission of the offence:
> (c) any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whanau, or community and the victim or victims of the offence:
> (d) how support from the family, whanau, or community may be available to help prevent further offending by the offender:
> (e) how the offender's background, or family, whanau, or community support may be relevant in respect of possible sentences.
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> (2) The court must hear a person or persons called by the offender under this section on any of the matters specified in subsection (1) unless the court is satisfied that there is some special reason that makes this unnecessary or inappropriate.
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> ...
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> (5) If an offender does not make a request under this section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subsection (1).

This section provides an opportunity for people to speak directly to the court about the particular circumstances of an offender. It also provides a chance to describe substantive tikanga processes that may have been used prior to sentencing in seeking resolution,[13] such as rehabilitative hui (meetings) or the articulation of remorse made in a culturally responsive environment.

As it stands, this provision imposes a presumptive right to be heard on cultural matters, thereby allowing a court to recognise the valuable contribution a different community or cultural perspective has in sentencing.[14] Yet Māori offenders have seldom used s 27.[15] As District Court Judge Stephen O'Driscoll describes, s 27 is "a potentially powerful tool in a defence counsel's arsenal, yet experience shows that it is one of the most under-utilised and unknown provisions in the Sentencing Act".[16] The provision has been more often invoked in relation to Pacific Island or pan-Asian offenders.[17]

Beyond reference to "whānau", s 27 is culturally neutral. This is a curious outcome since the provision, as originally included in legislation,[18] was catalysed by the *Puao-Te-Ata-Tu* Report, a detailed inquiry into racism

13 Sentencing Act 2002, s 27(1)(c).
14 *R v Bhaskaran* CA333/02, 25 November 2002 at [13].
15 For two examples where s 27 has been used see *R v Huata* DC Auckland CRI-2003-041-5606, 30 September 2005; and *R v Rewiri* DC Kaikohe CRI-2011-027-1264, 23 July 2012.
16 Stephen O'Driscoll "A powerful mitigating tool?" [2012] NZLJ 358 at 358.
17 See, for example, *R v Talataina* (1991) 7 CRNZ 33 (CA) at 36, where the Samoan restorative practice of ifoga was seen to contribute to the offender's rehabilitation.
18 Criminal Justice Act 1985, s 16.

in Aotearoa New Zealand and, particularly, within the Department of Social Welfare.[19] The absence of a focus on Māori may be explained because, as Smellie J noted in *Wells v Police*, a Western legal system does not always provide the best outcome for different peoples.[20] That judgment notes a clear intent, backed by support in Hansard,[21] for s 27 to address the needs of Māori offenders.[22] The fact that s 27 is instead culturally neutral is indicative of the habit of intending to provide for Māori without conceptual or theoretical understanding.[23] That perspective is explored in Parts III and IV below.

2 Ngā Kooti Rangatahi

A better, but by no means superb, example of pragmatic incorporation of the Māori perspective is the development of Ngā Kooti Rangatahi, the specialist youth courts applying tikanga Māori principles. These courts were established to reduce the number of young Māori reoffenders.[24] Part of the Youth Court process, the Family Group Conference (FGC), is located on the marae in a culturally responsive environment — this is Ngā Kooti Rangatahi. This possibility arose as a quirk of the District Courts Act 1947, which provides that a judge may direct that a court sit elsewhere if it is deemed "convenient".[25]

In exercising that discretion in favour of the marae, and in contrast to the thrust of s 27 of the Sentencing Act, an important procedural concession is made recognising the value that location can have on improving outcomes.[26]

Ngā Kooti Rangatahi have gained praise for their innovation and integration of te reo Māori and tikanga.[27] These courts go some way to realising the aspirations of Moana Jackson's seminal report that suggested a parallel justice system for engaging with Māori.[28]

However, there have also been dissenting voices, particularly around the long term negative effect that state institutions might have on indigenous practices.[29] Of note is that the court system behind Ngā Kooti Rangatahi is

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19 Maori Perspective Advisory Committee *Puao-Te-Ata-Tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988).

20 *Wells v Police* [1987] 2 NZLR 560 (HC) at 570.

21 (12 June 1985) 463 NZPD 4759.

22 *Wells*, above n 20, at 570.

23 That does not mean it is wrong to provide an opportunity for all cultures to be recognised in the sentencing process. The criticism is that the Māori genesis of the provision is not sufficiently reflected in s 27 as it is currently used.

24 Kaipuke *Evaluation of the Early Outcomes of Ngā Kooti Rangatahi* (Ministry of Justice, 17 December 2012) at 14.

25 District Courts Act 1947, s 4(4).

26 Kaipuke, above n 24, at 14.

27 Heemi Taumaunu "Rangatahi Courts of New Zealand: Kua Takotote Mānuka, Auē Tū Ake Rā!" in Veronica MH Tawhai and Katarina Gray-Sharp (eds) *'Always Speaking': The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011) 245 at 246; and Kaipuke, above n 24, at 27.

28 Moana Jackson *The Māori and the Criminal Justice System: He Whaipaanga Hou — A New Perspective – Part 2* (Department of Justice, Wellington, 1988).

29 Matiu Dickson "The Rangatahi Court" (2011) 19(2) Wai L Rev 86 at 86. See also Juan Tauri and Allison Morris "Re-forming Justice: The Potential of Maori Processes" in Eugene McLaughlin and others (eds) *Restorative Justice: Critical Issues* (Sage, London, 2003) 44; and Turvey, above n 11.

one that accommodates a different approach only to the extent acceptable to the sentencing judge who later evaluates the outcomes of the marae-based FGC hearing.[30] The processes of Ngā Kooti Rangatahi may seem like indigenous "window-dressing" rather than a true reflection of Jackson's aspirations in 1988.[31]

Therefore, both the legislative discretion in the Sentencing Act and judicial discretion in developing Ngā Kooti Rangatahi can be criticised. Both seek favourable outcomes for Māori peoples without considering the conceptual and substantive structures that underpin the operation of the legal system to the exclusion of the indigenous world view.

Community, Society and Judges

Reconciling the role Māori play in society with the operation of the Māori perspective in the law is a difficult task. The criminal law's notions of community and society were illustrated in the decision of Heath J in *Mason*.[32] Tamati Mason was charged with the attempted murder of his former partner Kate Brown and the murder of her mother. He applied to the High Court to be tried and sentenced in accordance with a separate Māori criminal justice system based on tikanga Māori. Heath J held that Mr Mason could not avail himself of such a system.[33] Mr Mason then pleaded guilty and was sentenced to life imprisonment with a minimum term of 17 years.[34]

Contrary to many who contest the applicability of the criminal law, the argument advanced by Annette Sykes for Mr Mason accepted the ability to legislate to exclude customary law explicitly or by necessary implication.[35] The essential issues in the case were: first, whether a customary system of criminal justice existed at the time of the Declaration of Independence and the Treaty of Waitangi; and secondly, whether, if so, that system continued to exist as a parallel system of justice.[36] The Judge accepted the first proposition, that there was a customary system to address criminal offending.[37] However, in rejecting the second proposition, Heath J found that the combined effect of ss 5 and 9 of the Crimes Act 1961 excluded the operation of this system.[38] Section 5 states that the Crimes Act applies to all offences committed in New Zealand and s 9 states that offences are only punishable under New Zealand legislation.

This background is important because it sets the scene for the Judge's starting point: "nothing should be done to move away from a core

30 See Dickson, above n 29, at 89.
31 Quince, above n 3, at 352.
32 *Mason* ruling, above n 1. An appeal against this decision was dismissed: see *Mason v R* [2013] NZCA 310, (2013) 26 CRNZ 464 [*Mason* (CA)]. The argument was advanced on jurisdiction grounds that are less relevant for the purposes of this article.
33 *Mason* ruling, above n 1.
34 *R v Mason* [2012] NZHC 1849 [*Mason* sentencing notes].
35 See *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [34] per Elias CJ and [185] per Tipping J.
36 *Mason* ruling, above n 1, at [10].
37 At [28].
38 At [31]–[37]. Of note, one commentator has disputed the logic of this conclusion on the effect of ss 5 and 9: see Max Harris "More on Mason: Cultural factors in sentencing" (2013) February Maori LR 21.

criminal justice system that is applicable to all New Zealanders."[39] Such a view is consistent with the unified theory of criminal law described above. This view was reiterated in Heath J's reference to the Court of Appeal case of *R v Talataina*, where Hardie Boys J stated that, "the law of New Zealand must be administered in the interests of our society as a whole."[40]

1 "In the Interests of Our Society"

As shown above, the purpose of the criminal law is to condemn certain acts and treat those who break society's norms in a coherent way. The views of society are referred to as justification for imposing penalties.[41]

Justice Heath's understanding of "society" in his first *Mason* judgment separates Māori, and those who would adhere to principles of tikanga, from society. The Judge states:[42]

> [39] While there is little opportunity to apply custom during the criminal trial process, once an offender has pleaded guilty or has been found guilty of a crime, sentencing procedures are much more amenable to the use of customary processes and principles. Indeed, where both offender and victim are Maori and there is no issue as to guilt, such processes may be more appropriate to address the needs of those directly involved in the offending, leaving to one side *the distinct interest of the community* in the imposition of a sentence that adequately marks the offending.

The concession that customary processes may be more relevant at the sentencing stage is genuine. It may be that in referring to the interest of the community the Judge is merely saying that there is an interest in punishment that transcends the immediate parties. Yet this passage could also indicate the Judge considers that tikanga Māori is not part of the "distinct interest" of the community. If that is the case, it does not match with the fact that Māori are a significant and growing proportion of the population. On that second basis there is a disjuncture between what the Judge considers is in the interest of the community and what in fact is — at least in part — in the community's interest.

When Heath J later completed the sentencing exercise, similar sentiments were expressed. The judge did not recognise the role kaupapa Māori could play in sentencing,[43] although his Honour found that the seriousness of the crime meant that cultural considerations carried little weight.[44]

In considering the role that Māori concepts could play in sentencing, Heath J went on to say:[45]

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39 *Mason* ruling, above n 1, at [46].
40 *Talataina*, above n 17, at 36.
41 See *R v Iti* [2012] NZHC 1130 at [47].
42 *Mason* ruling, above n 1 (emphasis added and footnotes omitted).
43 *Mason* sentencing notes, above n 34, at [6].
44 At [7].
45 At [40] (emphasis added).

> ... there are problems in taking the tikanga approach too far, particularly in cases of serious crime. Tikanga Maori emphasises notions of reconciliation and reciprocity. Such matters are relevant to the sentencing process but they cannot drive it. *The community, as a whole, also has an interest* in seeing that the Courts respond appropriately and consistently to the offending of people who commit similar offences.

The Judge pointed out that no debate has occurred on the legislative presumption of life imprisonment for murder,[46] among Māori or otherwise.[47] Thus perhaps one reason the Judge was so limited in this case was because of the legislative framework for murder. Mr Mason's offending may have particularly affected the outcome of this case; the crime was serious and the victims were not Māori.

Yet beyond those factors, the reluctance to apply tikanga Māori in the criminal context appears to be based on the idea that its use would not appropriately reflect the more orthodox rationales for punishment such as retribution, denunciation and deterrence. Such concerns may be overstated, however, as tikanga Māori in no way guarantees a more "merciful" outcome.[48]

2 Tikanga Values Are Not Perceived as Values of the Community

Heath J's judgment represents a positive step because it has reignited discussion around theories of sentencing and tikanga Māori.[49] Nevertheless, some of the assumptions underlying the Judge's analysis highlight that the prevailing judicial conception of "community" require further consideration.

The judgment may be read as placing great importance on there being one criminal law representative of the community's view, without considering that differences may exist within this apparently homogeneous group. In doing so, discursively at least, it could be said that tikanga Māori is positioned as opposed to the values of the "community".

An argument that can be extracted from the judgment is that:

(a) The view of "society" is expressed in the criminal justice system;
(b) The tenets of punishment in the criminal law exclude a reconciliatory tikanga approach, at least in circumstances of murder; and
(c) Exclusion of a Māori perspective is justified because "society" does not view such a response as legitimate.

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46 Sentencing Act, s 102.

47 *Mason* ruling, above n 1, at [41].

48 Harris, above n 38, at 24. Note also there is an epistemological incommensurability regarding the impact of punishment on individuals. What is judged in one culture as a "light" punishment may be of more severe consequence in another.

49 See the examination of *Mika v R* near the end of this article: *Mika v R* [2013] NZCA 648.

There are a number of issues with such an argument. First, consistent with the thesis of this article, propositions (a) and (c) have been interpreted inaccurately if one accepts that the significant number of Māori peoples as key stakeholders deserve inclusion in the notion of "society". Secondly, and as a consequence of the first inaccuracy, proposition (b) arises because the current conceptual landscape of Māori rights is predicated on the basis of Māori status rights, which can be set to one side as incommensurable with the criminal law. The influence of these rights is considered in Part IV.

The issue in *Mason* is that Heath J does not sufficiently consider whether or not the "community" excludes Māori values. Although the Judge alludes to there never having been debate on particular legislative provisions, a more careful analysis would have recognised that at least part of the community hold tikanga to be important values. Further, others may hold values similar to that approach, such as those of therapeutic jurisprudence.[50]

Of course, not all who have Māori whakapapa identify with Māori tikanga.[51] It should also be noted that there was no homogeneous Māori identity prior to colonisation and, as a corollary, the tikanga of various iwi and hapū differs. Nevertheless, there are sufficient similarities to conclude that the tikanga of the various groups share base values.[52] If anything, *Mason* highlights that it is increasingly important to consider the values that a judge advances when relying on the views of "society".

3 Offending in Culturally Justified Circumstances

The circumstances of the crime in *Mason* may have been a determinative factor in the cultural considerations not carrying significant weight. In circumstances of serious crime where the victim and the offender do not have the same cultural values, it is a challenge to provide culturally nuanced outcomes. For example, the justification Mr Mason provided for his offending — a sense of shame and embarrassment (in Māori, whakamā) — was an excuse readily disregarded. However, Heath J's approach still appears where offending may have a more explicit cultural explanation.

In *Rawiri*, five Māori were sentenced for the manslaughter of their niece Janet Moses. The whānau believed their niece was afflicted with a makutu or Māori curse. Using what they understood to be the healing power of water they poured it over Ms Moses' eyes and down her throat to cleanse her of demons.[53] She resisted but that was seen as a sign the demons were fighting back. She died by way of drowning.

Simon France J in sentencing said the following:[54]

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50 See, for example, David B Wexler *Rehabilitating Criminal Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, Durham (NC), 2008); and Warren Brookbanks "Rehabilitating criminal lawyers" [2010] NZLJ 125.

51 See *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

52 Quince, above n 3, at 336–337.

53 *Rawiri*, above n 1, at [30].

54 (Emphasis added).

> [86] The situation that is being dealt with today, at least as I see it, presents some unique dilemmas. The primary dilemma is the starting point from which one critiques or assesses what happened. Does one stand in the shoes of the accused, armed as it were with their deeply held beliefs and convictions, and their fears for Ms Moses' life? Or does one stand in the shoes of *the public who are no doubt amazed and horrified that such things can still happen today*. The end result of the sentencing process varies markedly based on where one starts.

The passage is of interest because it shows how Simon France J characterises what "community" is. Of note is that the "public" as a whole are apparently amazed and horrified that such things still happen today. This public is the public referred to above, that anonymous amoeba of shared values to which all citizens except those on the outside belong. This comment, that those who are different or have deeply held (if misguided) beliefs are not part of the cultural milieu, indicates the exclusion of Māori from the community.

The Judge also comments on culture:

> [91] On a related topic, I want to comment on the topic of culture. Whilst the offenders' culture provided a context, it would equally be wrong to over emphasise it, and equally wrong for the [offenders] to hide behind it and see all that has happened as an attack on that culture. That would also be far too easy and simplistic.
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> [92] Culture played a role in that it led Ms Moses' family to believe she had been afflicted by makutu. I am sure that Ms Moses herself also believed she was cursed. Probably her mental health contributed to that belief,[55] but the reality is that had it been another family member afflicted, she like the others would have accepted makutu as the reason.
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> [93] However what happened ... was not the acting out of any cultural or religious practice. Expert witnesses were clear they have never heard of such actions and their evidence was compelling.

There are two further issues within this judgment. First, there is no critical discussion regarding whether or not the experts were rightly placed to comment on the validity of the particular practice. To the extent that this led Simon France J to conclude that the practice was made-up and not reflected in any religion or culture, some criticism can be drawn.[56] Secondly, the Judge sentenced the majority of the defendants to varying degrees of

55 It should be noted here that the notion of "mental health" is itself a Western concept so Simon France J is making a cultural judgment. Conceptions of "mental health" and "mental illness" are different across cultures.

56 At [97(c)].

community detention and supervision and, curiously, included tikanga Māori courses in the sentences.[57] The Judge effectively pronounced on the lack of cultural knowledge of the people involved. Rawinia Higgins commented at the time that Māori were sentenced to learning about their own culture through a course.[58]

These two factors suggest that judges, as actors in a Western legal system, only recognise essentialised or widely acceptable manifestations of Māori culture. This outcome has the debilitating consequence of suggesting that diversity in the tikanga practices of different Māori groups is not valued within the legal system. As already seen above, a similar criticism is levelled at the operation of Ngā Kooti Rangatahi.

Articulating "Society"

The over-representation of Māori is a reality of criminal justice in Aotearoa New Zealand. There are many explanations for the statistics, all tied to an enduring history of colonial oppression evidenced in poor socioeconomic indicators. However, while Māori are clients of criminal justice, they are not decision makers. This is a key failing of the system. Māori and Māori concepts are excluded not only from constructing the substance and processes of criminal law but also from notions of "community" or "society" when those concepts are considered. This exclusion does nothing to address, at a foundational discursive level, prevailing issues.

As the Court of Appeal has stated, changes to sentencing policy ought to arise from the legislature.[59] But it is suggested that the two cases considered illustrate an unwillingness to depart from a unified view of the criminal law that undermines a more nuanced experience of judicial discretion in sentencing. This result raises questions about how judges approach their task, which is a topic addressed near the end of this article. However, at this stage it is suggested that judicial perception of the community's interest deserves greater attention.

III UNDERSTANDING MĀORI RIGHTS

The remainder of this article aims to give conceptual clarity to the various ways in which Māori rights can be advanced. It is not the case that "Māori rights" is an inseparable claim; rather, it entails a series of propositions. To address complex situations, such as the relationship between Māori and the criminal law, theory is unavoidable.[60] A greater theoretical understanding of

57 At [101]–[102].

58 Newstalk ZB "Exorcism death reflects lack of cultural understanding, says expert" *The New Zealand Herald* (online ed, New Zealand, 15 August 2009).

59 *Mika*, above n 49, at [9].

60 Benedict Kingsbury "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law" (2002) 52 UTLJ 101 at 102.

Māori rights is advocated to help understand and articulate difference within the criminal law.

Competing Conceptual Approaches

To incorporate indigenous difference within the criminal law is an important objective. Such an argument advocates for Māori rights; the suggestion is that because someone is Māori, it is just for them to make claims to better treatment within the law. Yet it is important to outline the various ways that Māori rights claims can be advanced. A greater understanding of the conceptual rationale for these rights makes it more difficult for those rights to be critiqued. As examined below in relation to minority rights, it is also possible that underused arguments could reignite Māori rights advocacy that does not align with the apparently settled legal position. Five "competing conceptual approaches", to use Benedict Kingsbury's words,[61] are described. These different approaches to Māori rights are all used in the criminal justice system to varying degrees of success.

The five approaches are: historical sovereignty, human rights and non-discrimination, self-determination, indigeneity, and minority rights.[62] Depending on the context of the claims advanced, different approaches carry different weight. If one particular approach is used it may mean that other positions appear incompatible.[63] For example, a claim based on historical sovereignty is notionally incompatible with a human rights claim rooted in the challenged system's legislation because a key tenet of sovereignty claims is rejecting the imposed legal system.

In other cases, the claims made under different conceptual approaches can overlap. For instance, there are key links between rights to indigeneity and self-determination.[64] Kingsbury notes that none of the conceptual approaches is systematically prioritised.[65] However, while that may explicitly be the case, it appears some are favoured over others depending on context. For example, as is distilled below, sovereignty claims tend not to be well received by the legal system.

The different conceptual approaches are evident in the rights of indigenous peoples generally and also, in New Zealand, some relevant documents. Those documents are the Treaty of Waitangi/te Tiriti o Waitangi, the Declaration of Independence/He Whakaputanga, and more recently the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[66] The Treaty has assumed a predominant role in this discussion, not only because of its constitutionalising influence, but also because of its

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61 At 101.

62 At 101.

63 At 101.

64 The two approaches are conflated in the *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007), art 3 [UNDRIP]. See Kiri Rangi Toki "Ko Ngā Take Ture Māori: What a Difference a 'Drip' Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples" (2010) 16 Auckland U L Rev 243.

65 Kingsbury, above n 60, at 102.

66 The interplay between these different documents is clearly relevant but in-depth discussion is beyond the scope of this article. For greater detail see Toki, above n 64.

unique jurisprudence.[67] Kingsbury suggests that the harmonising force of the Treaty may be misleading because the Treaty can be used to support various conceptual approaches in different ways.[68]

1 Sovereignty

Within Kingsbury's thesis, the central tenet of the sovereignty approach is that prior to colonisation Māori exercised complete sovereignty over the lands of Aotearoa New Zealand and colonisers exercised their power illegitimately to remove it.[69] The historical sovereignty claim is a strong one and does not recognise the authority or jurisdiction of Parliament to enact laws. Nevertheless, it is almost always rejected and has not found favour with the Supreme Court.[70]

2 Human Rights

Another of Kingsbury's conceptual limbs is that of human rights and non-discrimination. The orthodox view of human rights is concerned with each person's inalienable right to be treated with dignity and respect.[71] The concept of human rights is one well canvassed in the context of Māori. Indeed, there is one school of thought that suggests indigenous rights issues can be advanced by effectively addressing the State's historical discrimination.[72]

A human rights approach to Māori rights is a claim easily understood within the modern nation because it does not challenge the underlying assumptions and hegemonic orderings of the State.[73] Solutions like legislative discretion in sentencing and Ngā Kooti Rangatahi are good examples of the human rights framework in action because they provide change without affecting the underlying legal system. A further example is s 73 of the Human Rights Act 1993, which provides that affirmative action measures are not discriminatory.

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67 See Paul Havemann "'What's in the Treaty?': Constitutionalizing Maori rights in Aotearoa/New Zealand 1975–1993" in Kayleen M Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy: Indigenous experiences of justice in Canada, Australia, and New Zealand* (Avebury, Aldershot (England), 1995) 73 at 73.

68 Kingsbury, above n 60, at 102.

69 At 118. For the purposes of Kingsbury's thesis, "sovereignty" claims based on the Treaty are discussed under self-determination. Within the context of this section, sovereignty refers to the notion of historical sovereignty.

70 *Wallace v R* [2011] NZSC 10 at [1]–[2]. See also *Berkett v Tauranga District Court* [1992] 3 NZLR 206 (HC); *Phillips v Police* [2013] NZHC 644; *Tai v Police* [2013] NZHC 45; and *Miru v Police* [2013] NZHC 599.

71 *Universal Declaration of Human Rights* GA Res 217 A, A/RES/3/217 A (1948), at Preamble.

72 Benedict Kingsbury "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34 NYU J Intl L & Pol 189 at 193.

73 At 193–194.

3 Self-determination

Self-determination emphasises devolving control over decision-making to indigenous peoples. Self-determination is not a new word in academic discourse and it is increasingly gaining traction in light of the UNDRIP.[74]

At a conceptual level, self-determination has had limited traction in criminal law. It is a somewhat political claim aimed at defining the relationship between Māori and the Crown at a nation-to-nation level. Indeed, as Kingsbury identifies, some of the difficulty with the concept is that for Māori, a group comprised of many separate iwi, hapū and whānau, it is a challenge to identify the "self" to the extent that it can be true for all Māori.[75] Nevertheless, there is room to explore this concept further in the context of criminal justice.[76]

4 Indigeneity

As with self-determination, the concept of indigeneity could gain further traction in Māori rights discourse.[77] It is a word that connects the struggle of Māori in Aotearoa New Zealand to that of other indigenous peoples the world over. There is a degree of discursive overlap between the concepts of indigeneity and self-determination. However, it should be noted that self-determination is somewhat broader than indigeneity: a group need not be indigenous to be self-determining.

Within Aotearoa New Zealand, indigeneity is often used to define the identity of those able to claim different treatment on the basis of settlement prior to descendants of colonial powers. It is a claim distinct from self-determination and historical sovereignty, originally made in order to avoid a simple adoption of these older concepts.[78] Arguably it can provide a better framework for issues relating to Māori than human rights or self-determination because it is a claim exclusive to indigenous peoples.[79]

5 Minority Rights

The final conceptual approach is the most important for the purposes of this article. This claim rests on the right of minority peoples to be protected in diverse societies. It is, to a greater extent, a human right to accommodation of diversity. One obvious difficulty with the minority rights argument is that it cannot be uniquely advanced by Māori and so may be perceived as a lesser claim. From the perspective of an indigenous person, it is reasonable to say

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74 See UNDRIP, above n 64, art 3.

75 Kingsbury, above n 60, at 113.

76 Substantive analysis of self-determination is beyond the scope of this article: see Toki, above n 64, at 251 and following. For a case where counsel advanced the right to self-determination in the criminal law see *Mason* (CA), above n 32, at [18].

77 See Roger Maaka and Augie Fleras *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (University of Otago Press, Dunedin, 2005).

78 Kingsbury, above n 72, at 237.

79 See Mason Durie *Ngā Tai Matatū: Tides of Māori Endurance* (Oxford University Press, Oxford, 2005) at 205.

that the most important claim is one of status (as it applies only to indigenous peoples) and the logic of that claim appears to exclude considering the minority paradigm. Indeed, the former Chairperson of the United Nations Working Group on Indigenous Peoples has said that a "strict distinction must be made between 'indigenous rights' and 'minority rights'. Indigenous peoples are indeed peoples and not minorities or ethnic groups."[80]

Within the law of Aotearoa New Zealand, the minority rights claim has legislative backing in the New Zealand Bill of Rights Act 1990, s 20 of which states:

> 20 Rights of minorities
>
> A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

Clearly, the right contained in s 20 applies to Māori alongside other ethnic groups. Yet some have stated the process of describing indigenous peoples as minorities is belittling because, in advancing a minority claim, no reference to indigenous distinctiveness is required.[81] That concern is addressed later in this article.

Reconciling the Conceptual Claims

While it is difficult to set out the five conceptual claims in simple terms, in the context of this article two broad categories can be distilled. Claims relating to sovereignty, self-determination and indigeneity all rely on the proposition that Māori should be treated differently because of status. Claims based on human rights or minority rights are not predicated on that status. Generally, legal advocates of Māori rights prefer "status"-based claims as they set Māori apart from other groups in Aotearoa New Zealand. They are also historically commensurable since they are seen not to undermine the prevailing Treaty analysis. Even so, it is an ongoing struggle for these rights to be recognised. For example, as mentioned, the courts find sovereignty claims unpersuasive and the Prime Minister has discursively sidelined the UNDRIP as an "aspirational" document.[82]

The criminal law is a particularly difficult area for such status-based rights to gain traction. That is an unfortunate anachronism of the history of Māori rights — indigeneity and self-determination claims have related

80 Erica-Irene A Daes *Working Paper on the Concept of "Indigenous People"* E/CN.4/Sub.2/AC.4/1996/2 (1996) at [47] as cited in Miriam J Aukerman "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context" (2000) 22 HRQ 1011 at 1019.

81 Kingsbury, above n 72, at 204.

82 (20 April 2010) 662 NZPD 10238.

predominantly to concepts inherent in the Treaty, such as access and management of resources and other taonga.[83]

A criminal law that is unified and perceived as static cannot readily incorporate these status claims, as such claims hold the criminal justice system to be inherently inappropriate for Māori. Those are meaningful arguments that ought to be pursued to challenge the existing legal system.[84] But they are not pursued here. The rest of this article focuses on the development of two remaining concepts: human rights and minority rights. The minority rights argument is of particular relevance because it encourages altering the discourse of criminal justice as it relates to Māori. Note that the point is not that status arguments are unhelpful but rather that minority rights should also be a part of the discussion.

IV CHALLENGING THE STATUS QUO

This Part suggests it is important to challenge the current status-based approach so that it is not seen as inalienable and inherently strong enough to justify a change in discourse. The point of this article is to respectfully suggest that the minority rights framework may be advanced alongside competing conceptual approaches to justify the provision of Māori rights. In turn, those arguments can encourage the discourse change in the legislature and judiciary considered in Part V.

In a common law system, the way in which legal argument is constructed does not support a creative approach. Those advocating change in the law rely on precedent or change in circumstances. Over time, this process becomes so familiar that the reasons for following a particular course of action are no longer analysed, since each person within the system follows the current state of affairs out of habit. By way of example, Māori have consistently argued for differentiated rights based on status as Māori. That has particularly been the case in relation to the Treaty. Indeed, it is suggested that this approach has become so dominant in Māori rights jurisprudence that it has been internalised by those who operate in the legal system. Therefore both those *within* the system and the system *itself* encourage articulating rights in ways that support a differentiated status for Māori. Claims that do not depend on that analysis are overlooked because they do not match prevailing legal norms. They appear less cogent when judged against a body of jurisprudence pointing in another direction.

Such an instinctive approach can be critiqued within the context of this article as it does not include the minority rights approach. Case law suggests that some Māori rely on arguments that the law as it stands should not apply to them. As mentioned above, some of these claims rest on classic sovereignty grounds. However, litigants have advanced creative claims

83 There is no reason a Māori system of criminal law is not a taonga or ought not to be given protection pursuant to the rights and obligations in the Treaty. That analysis is not pursued further here.

84 Not least as they are advocated in the report published by Jackson, above n 28.

relying on the Treaty or the Declaration, demonstrating the ability for indigenous or self-determination claims to gain traction.

One such case concerns an individual who argued he did not have the requisite mens rea for intent to defraud because he was acting with mana under the Treaty and honestly thought he was entitled to take funds from his employer.[85] For evidential reasons, the Court of Appeal quickly dispatched that approach. In another, a juror was discharged because a deep commitment to the Treaty meant that he could not decide whether the accused was "guilty" or "not guilty" without the opportunity to ask questions himself.[86] He instead wanted to return a verdict of "not proven". The Judge discharged him of his duties.

In a further example, an accused Māori man requested that his father, who did not have legal qualifications, represent him, consistent with Māori custom according to art 2 of the Treaty and the Declaration.[87] The Judge rejected this request but advanced the possibility of the father being a McKenzie friend.[88] Finally, in *R v Miru*, a Māori man argued that his trial pursuant to the Misuse of Drugs Act 1975 should be conducted on a marae, citing Te Ture Whenua Māori Act 1993 and art 2 of the Treaty.[89] This argument was given short shrift with the Court of Appeal holding that the legislation leaves no room for such a process to be followed. The Court stated that any change to the criminal justice system must come from the legislature, not the judiciary.[90]

These examples illustrate the view that the rights expressed rely upon unique status and therefore merit a separate approach. Such arguments, relying on the interpretive function of the Treaty, have gained some traction in New Zealand law.[91] Newer approaches, such as that discussed above in relation to *Mason*, also continue to rely on the status argument without arguing for rights along minority lines. Certainly, the focus on *rights* is interpreted as being *status* rather than minority rights.

The reasons why such an approach is adopted are understandable, particularly in the context of the Treaty. It is an important founding document and encourages rights to be conceptualised under its umbrella because it is the dominant framework in Māori rights jurisprudence. Further, the rights arising tend to discourage the use of minority rights language because the Treaty negotiates political and legal power in terms of a partnership between two groups. Partnership begets status. To the extent that this partnership has been breached, the enduring legacy of the Treaty is that it encourages the framing of Māori rights in opposition to the State.[92] This is not a spurious undertaking. But it should be noted, as has been shown, that

85 *R v Rikys* CA428/01, 3 July 2002 at [4].
86 *R v C* HC New Plymouth T3/99, 11 May 1999.
87 *R v Pairama* (1995) 13 CRNZ 496 (HC) at 498.
88 At 501.
89 *R v Miru* CA65/01, 26 July 2001 at [3]–[4].
90 At [10].
91 See *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.
92 See Jeff Corntassel "Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse" (2008) 33 Alternatives 105 at 115.

such arguments are not well received in the criminal law. In a country where the Government has admitted and continues to admit breaches of the Treaty, it is not surprising that disenfranchisement with the status quo is a regular theme in criminal justice.

The recognition of the Treaty cements the ongoing importance of status rights in the discussion of Māori rights more generally. Yet this predominant framework of rights should not preclude recognition of Māori rights as minority rights. The challenge for minority rights discourse is to relocate the Māori rights debate away from status. Doing so is a challenging task because it requires awareness of the instinct of pointing to the Treaty or other status documents as evidence of rights. Minority rights are not unique claims. The instinct of those articulating indigenous rights within Aotearoa New Zealand is to rely on the status claim when — arguably — so much more is open to Māori.

V MINORITY RIGHTS AS A VEHICLE FOR MĀORI RIGHTS

The lack of consideration of Māori rights as minority rights is at odds with the disproportionate representation of Māori peoples in the criminal justice system. Māori are not only a significant minority in Aotearoa New Zealand but also a majority of participants in the criminal justice system. Such a state of affairs justifies special consideration. That is not an unusual proposition. If targeting a particular group will improve its outcomes, then such a course of action is frequently taken.[93] This already occurs for Māori in health and education, alongside other minority groups such as Pasifika peoples. Developments such as Te Tirohanga — a national programme based on a Māori approach to prisoner rehabilitation — are recent evidence of some progress in criminal justice.[94]

Māori will always be different because Maori hold unique status as Aotearoa New Zealand's indigenous people. Even if Māori *were* proportionately represented in statistics, there should still be recognition of the Māori worldview. Nevertheless, the status approach by itself is not a sufficient answer to the real problems facing Māori in Aotearoa New Zealand. Such an approach does not explicitly advocate addressing need. There is a disconnect between an awareness of the negative statistics that typify Māori experiences of the criminal justice system and the strategy employed to advocate for better outcomes.

93 There are also disproportionate numbers of people from low socioeconomic backgrounds in the criminal justice system. Many Māori offenders may share that background. The interplay between socioeconomic status, ethnicity and the criminal justice system is relevant but not explored here. It is worth noting, however, that poor outcomes for Māori are not just a function of class: see, for example, Quince, above n 3, at 343.

94 Department of Corrections "Launch of Te Tirohanga programme at Te Whare Whaanui" (press release, 22 April 2014).

Addressing Need

In several policy areas, if a particular group requires special consideration, initiatives are put in place to improve outcomes. The criminal justice system has shown some reluctance to adopt such frameworks. For the reasons espoused in Part II of this article, the unified approach to considering the questions "what is criminal?" and "what ought to be punished?" does not, for the most part, make reference to Māori plurality. There is some tinkering at the margins of the system — what Juan Tauri might call indigenous window-dressing — but the processes provided to answer the questions above do not call for a Māori perspective.[95]

That state of affairs is contrary to other policy areas. Consider health and education. Māori health policy is constructed using the Whare Tapa Wha model. As a holistic model, health is addressed through four areas: taha tinana (physical health), taha hinengaro (mental health), taha whānau (family health) and taha wairua (spiritual health).[96] Hauora (wellbeing) cannot be achieved unless each of these four sides is in balance. The rationale for using this model stems from Māori being far more likely than Pākehā to suffer poor health outcomes, including lower life expectancy and a greater likelihood of disease.[97]

The Whare Tapa Wha model is premised on a tikanga framework, so the policies it produces are inherently Māori in their application. Yet if examined closely, it is curiously not premised on status rights. While the Treaty is referred to in the most prominent policy document *Māori Health Strategy: He Korowai Oranga*,[98] the Whare Tapa Wha model identified in He Korowai Oranga is not grounded in the Treaty relationship. Instead, it arises from a hui of Māori health workers in 1982.[99] The model was developed to improve the health outcomes of Māori — in other words, to address need.

A similar approach is seen in education. Māori educational achievement is generally lower than that of New Zealand European students.[100] Again, the most relevant Māori education policy document, *Ka Hikitia – Accelerating Success 2013–2017*, refers to the Treaty.[101] However, the document focuses primarily on practical ways to improve Māori education, largely without reference to status rights. For example, an emphasis is placed on the use of te reo Māori and engaging whānau in the education process.

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95 Juan Tauri "Indigenous Justice or Popular Justice?" in P Spoonley, D Pearson and C Macpherson (eds) *Ngai Patai — Racism and Ethnic Relations in Aotearoa/New Zealand* (Dunmore Press, Palmerston North, 1996) 202 at 207 as cited in Quince, above n 3, at 352.

96 Tim Rochford "Whare Tapa Wha: A Māori Model of a Unified Theory of Health" (2004) 25 Journal of Primary Prevention 41 at 47.

97 At 42–43.

98 Annette King and Tariana Turia *He Korowai Oranga: Māori Health Strategy* (Ministry of Health, November 2002).

99 Rochford, above n 96, at 47.

100 Russell Bishop and others "Te Kotahitanga: Addressing educational disparities facing Māori students in New Zealand" (2009) 25 Teaching and Teacher Education 734 at 734–735.

101 *Ka Hikitia – Accelerating Success 2013–2017* (Ministry of Education) at 14.

These two examples show that where a specific group has identifiable needs, developing tailored responses benefits that specific minority group. For that reason, it is important to note that in both education and health there are similar Pasifika initiatives.[102] If the solution to ongoing issues arrives by way of addressing the needs of a particular minority group, and that solution is effective, then it should be encouraged.

1 Minority Initiatives in Criminal Justice

It is clear that policy frameworks currently address prevailing socioeconomic problems for Māori as a minority group. There is a wide-ranging impetus in both health and education to do so. This has not occurred to the same extent in the criminal law. Arguably the criminal law is different because of the reasons set out in Part II. But the better view is that the nexus between crime and cultural marginalisation is not well articulated. For that reason it is difficult to develop coherent structural policy like that included in the wide-ranging policy documents noted above. In other words, while in health and education it is deemed important to consider how cultural frameworks might better address the needs of Māori, within criminal justice Māori have been discursively positioned as a problem rather than as a group requiring greater assistance.[103] It has been recently noted that the Department of Corrections allowed its Māori Strategic Plan to lapse without any consultation with Māori: this in part precipitated a claim to the Waitangi Tribunal that the Crown had failed to reduce the number of Māori in prison, as well as high reoffending rates.[104]

That state of affairs may explain, in part, why policy developments in the criminal justice system tend to be ad hoc. There has been no recent call from government seeking feedback on such issues, as there has been with Māori education initiatives.[105] The ad hoc work has resulted in some benefits, as already mentioned in relation to Ngā Kooti Rangatahi and Te Tirohanga. Other initiatives include focus units in prisons such as Whare Oranga Ake, aimed at reducing recidivism,[106] and bicultural therapy and restorative justice programmes such as Te Whānau Awhina.[107] There are similar programmes for Pasifika offenders.[108]

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102 Minister of Health and Minister of Pacific Island Affairs *'Ala Mo'ui: Pathways to Pacific Health and Wellbeing 2010–2014* (Ministry of Health, January 2010); and *Pasifika Education Plan 2013–2017* (Ministry of Education).

103 Juan Marcellus Tauri and Robert Webb "A Critical Appraisal of Responses to Māori Offending" (2012) 3(4) IIPJ 1 at 1.

104 Phoebe Monk "Tribunal Claim: Too Many Māori in Prison and Reoffending" (press release, 31 August 2015).

105 Other groups have considered these issues including JustSpeak and the well-established Rethinking Crime and Punishment project. See Kim Workman *Māori Over-representation in the Criminal Justice System — Does Structural Discrimination Have Anything to Do with It?* (Rethinking Crime and Punishment, 8 November 2011).

106 New Zealand Government "Whare Oranga Ake will help cut reoffending" (press release, 20 May 2010).

107 Tauri and Webb, above n 103, at 4–6. See also Hoani Waititi Marae "Te Whānau Awhina" (21 February 2013) <www.naumaiplace.com>.

108 There are Pasifika Youth Courts run similarly to Ngā Kooti Rangatahi, as well as Vaka Fa'aola, the Pacific Focus Unit at Spring Hill Corrections Facility.

These ad hoc innovations could be better reconciled with the minority rights framework. This would have two benefits. First, it would hopefully avoid what Tauri and Webb describe as accepting "governmental interpretation of Indigenous knowledge and cultural practice".[109] Better outcomes might arise if Māori were engaged at the policy direction level in an attempt to address need. An example of that would be better consultation between Māori and the Government on criminal justice issues. The current development of criminal justice initiatives in a piecemeal fashion means that the body of Western institutional knowledge already at hand is grafted onto putatively Māori innovation. As noted above, that is the most common criticism of Ngā Kooti Rangatahi.

Second, the minority rights framework can be a vehicle for providing for Māori rights. As is shown above, Māori rights in the criminal law are navigated primarily in relation to status. But arguments relying on status are not justified on the basis of addressing need — they are arguments of constitutional import that, as has been illustrated, are not well recognised. If the notion of minority rights is used as a justification for a new approach, both status-based and numbers-based arguments can work together. That is, Māori should be afforded better treatment because it is (a) deserved and (b) required.

The Possibility of Change for Māori in Criminal Justice

The growing Māori population, together with those who support the values underpinning Māori difference, will expect the criminal justice system to respond effectively to ongoing issues. Minority rights discourse is a cogent way to approach such a task because it is consistent with addressing the need of Māori as a disadvantaged group. Such a conception of Māori rights can be given content by the status approach. That is, a minority rights approach can be advocated on the basis that Māori are indigenous to Aotearoa New Zealand and should be self-determining. This section addresses two areas in which such an approach could effectively challenge the status quo. First, at the legislative level, criminal laws and policy could be altered to provide substantive consideration of the Māori perspective. Secondly, the judiciary naturally would be influenced by such legislative change. However, beyond that substantive change, the interpretive and discretionary functions of judges could better address heterogeneity in society. That is, a reconsideration of what "society" is could be advocated.

1 The Legislature

A discussion framed in terms of minority Māori rights may better catalyse legislative change in the criminal law than one framed in terms of status rights, which are more readily sidelined. Against the background of overwhelmingly negative statistics and a strong minority voice, changes

109 Tauri and Webb, above n 103, at 8 (emphasis removed).

could be advanced. The specific nature of such changes is best left for another article. However, in relation to that examined above, it would be possible to more strongly direct judges to consider the particular circumstances of indigenous peoples in judging whether actions are criminal. Similarly, there could be directions to judges concerning the extent to which being Māori is a relevant factor in sentencing. Very little guidance is currently given to judges on how to reconcile cultural difference with the notion that the criminal law should apply to all people equally.

To illustrate the point, consider ss 8(i) and 27 of the Sentencing Act. These could be made mandatory considerations in circumstances where it is suggested offending may be a corollary to cultural deprivation. Currently judges rely on counsel to make submissions under those sections.[110]

This kind of legislation is enacted in Canada. Section 718.2(e) of the Canadian Criminal Code states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."[111] This provision has been interpreted by the Supreme Court of Canada in *R v Ipeelee* as a direction for Canadian judges to examine the reasons behind the problem of indigenous over-representation in the criminal justice system as well as to remedy that problem to the extent possible in sentencing.[112] At least one writer in Aotearoa New Zealand considers these developments to be of primary importance.[113]

2 The Judiciary

If such legislative changes were forthcoming, it would then be necessary for judges to interpret how those changes should operate. *Ipeelee* demonstrates the possibilities of an expansive interpretation. It suggests there are no meaningful barriers preventing sentencing judges from exercising their interpretive function or discretion in ways more favourable to indigenous peoples. Indeed, it should be noted that it is the judiciary that has led the way in the development of indigenous rights.[114] In that sense, it is important to recognise that the minority rights framework is an important tool for advocates that can be given content through the special consideration of Māori status rights.

To connect all that has been set out above, it is useful to return to the illustrative comments made in *Mason* and *Rawiri* relating to the role that "society" plays in constructing crime. It is clear from both those cases that the Judges (Heath and Simon France JJ) were alive to the importance of tikanga and deeply held Māori beliefs. However, in both cases the Judges were constrained by the perception that the community, or society, would be disapproving of actions acceptable under tikanga.

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110 O'Driscoll, above n 16, at 360. See, for example, *Mika*, above n 49.
111 Criminal Code RS C 1985 c 46.
112 *R v Ipeelee* 2012 SCC 13, [2012] 1 SCR 433 at [58].
113 Harris, above n 38.
114 ET Durie "The Rule of Law, Biculturalism and Multiculturalism" (2005) 13 Wai L Rev 41 at 43.

The minority rights argument can be used to challenge this judicial position. This argument challenges the role of the question "what would society think?" in the exercise of judicial discretion. Reflecting the views of the community is an integral aspect of sentencing and it is provided for in legislation.[115] But where arguments are based solely on status, judges can easily reject them without reference to the fact that Māori are a significant minority in Aotearoa New Zealand. In contrast, submissions grounded on minority rights challenging judicial notions of "society" would not rely on such status and would arguably not be so quickly rejected.

The prevailing homogenous view of "society" may appear to be a proper application of ss 8(i) and 27 of the Sentencing Act. However, those provisions are relevant to the circumstances of each case and submissions are made to the court based on the individual circumstances of each case. The way the provisions are constructed does not anticipate a challenge to the way judges view what "society" is. Therefore, there is a space open for those advocating Māori rights to suggest a particular judge's view of what "society" believes is misconstrued. To the extent the role of the judge is to reflect the conscience of society, there is nothing to stop a judge being guided on society's perspective of criminal wrongdoing. That may be an even more powerful proposition in circumstances such as *Rawiri*, where all those involved are of Māori descent. Indeed, the Court of Appeal has recognised that where there is a nexus between cultural background and offending, that background can be taken into account.[116]

It is not solely the role of advocates to appreciate this subtlety. In appropriate cases, judges can suggest that an offender call someone to speak in respect of the offender's cultural background.[117] The Court of Appeal in *Mika v R* observed that s 27 of the Sentencing Act is an appropriate tool to advance arguments on an offender's whānau and cultural background.[118] While *Mika* demonstrates that a requirement to consider ethnicity in sentencing ought to be changed by legislation,[119] it does indicate that judges are cognisant of this as an issue,[120] and that this issue can be addressed in appropriate circumstances.[121]

Next Steps

Advocating a minority rights framework does not mean arguments relying on status should be abandoned. If the number of Māori offenders broadly mirrored the Māori population, it would still be important to provide a right to indigeneity or self-determination, both in deciding what is criminal and in dealing with offenders. But the minority rights framework is fundamentally different. It turns the focus of the law, and the focus of those who operate

115 Sentencing Act, ss 7(1)(a) and 7(1)(e).
116 *Mika*, above n 49, at [11]; and see *RS (CA21/2014) v R* [2014] NZCA 484 at [18].
117 Sentencing Act, s 27(5).
118 *Mika*, above n 49, at [14]; and see *RS (CA21/2014)*, above n 116, at [17].
119 *Mika*, above n 49, at [9].
120 At [12].
121 At [11]; and see *Nishikata v Police* HC Wellington AP126-8/99, 22 July 1999.

within the legal system, away from justifying special consideration through status. It proceeds instead from a desire to address the needs of Māori through a minority rights approach, and then explains and justifies purported solutions through the status rights framework.

This inversion of these two broad conceptual approaches to rights means that minority rights become a vehicle for those rights that have been consistently rejected or apparently settled in the law: the rights of Māori peoples. As with education and health policy, an outcome-driven approach, given depth and tikanga through the more traditional status rights, is a cohesive way forward that prevents the Māori rights claim, as a whole, from floundering.

The reassessment of rights frameworks cannot be completed in the course of one article. In the meantime, there is nothing to stop those advocating for Māori within the current system, with all its flaws and frailties, from challenging the way judges articulate their reasons. In respectfully suggesting, in sentencing or otherwise, that judges might be mistaken in their assumptions about society, the path trodden by Māori in the law could be better evaluated.

VI CONCLUSION

The inalienable position of Māori as tangata whenua — and deserved of rights derived from that status — cannot be ignored. And it should not be.

Yet so much has been taken from Māori. Imposed foreign law, predicated on a unified moral vision of the aims of criminal justice, has difficulty comprehending Māori difference. The discursive marginalisation of Māori and Māori concepts from constructions of "society" or "community" is a key example of such difficulty. The curious positioning of tikanga as against society's interests in sentencing offenders is an erroneous endeavour. It mistakes difference as leniency.

Addressing this current state of affairs is a difficult task. So much energy has been expended, properly, on the right of Māori to be self-determining indigenous peoples. These are foundational and important claims. However, this article has argued that in the criminal law the favouring of a status approach to Māori rights does not effectively address current issues. As shown by the marginalisation of Māori discourse in the criminal law, it is difficult for status rights to gain traction.

In reframing that discourse through the minority rights lens, a new approach is advanced. This approach suggests that given severe over-representation in criminal justice, the necessity of a Māori way of addressing these issues becomes self-evident. The trick is to encourage that approach in a way that the prevailing system can understand. The minority rights framework, as has been shown in other policy areas, can be an effective path towards better outcomes for Māori.

There are some famous words of Sir Apirana Ngata, often quoted as a lesson for Māori youth:[122]

> E tipu e rea mō ngā rā o tō ao
> Ko tō ringa ki ngā rākau a te Pākehā
> Hei ora mō te tinana
> Ko tō ngākau ki ngā tāonga a ō tīpuna Māori
> Hei tikitiki mō tō māhuna Ko tō wairua ki tō atua, Nānā nei ngā mea katoa.

Being Māori is something that does not disappear. To be self-determining indigenous peoples is a claim that should not disappear. Those are important rights that must be treasured. Their recognition seems a struggle without end.[123] To articulate Māori rights as minority rights is a different framework. But minority rights together with the more familiar status rights could provide a more complete answer to the question of how to help the people thrive. Encouraging the use of the tools of Pākehā law to address the needs of the people is a step towards proportionate representation in criminal justice.

122 Thrive in the days destined for you, your hand to the tools of the Pākehā to provide physical sustenance, your heart to the treasures of your ancestors to adorn your head, your soul to God to whom all things belong.

123 See Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (revised ed, Penguin Books, Auckland, 2004).