NICOLA M. DRAYTON GLESTI

THE RE-EMERGENCE OF SEPARATIST IDEAS IN AOTEAROA-NEW ZEALAND

LLM RESEARCH PAPER
INDIGENOUS PEOPLES AND THE LAW (LAWS 541)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

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ABSTRACT

The purpose of this paper is to examine separatism within the NZ context. The main focus is on examples of separate institutions for Maori, re-emerging at present. Originally the research paper was to concentrate solely on a separate criminal justice system (CJS) for Maori. As the study progressed, it became apparent that other NZ organisations had also been targeted by Maori with the view of establishing parts of them as Maori organisation's. My point of departure remains a separate CJS, because it is the most law related notion in the entire discussion and it allows the paper to look into other jurisdictions, where alternative justice systems are in place. After that, the paper turns to the other alternative structures for Maori, namely in politics, education, health, and examines their justification and their achievement. The research will finally consider possible consequences of alternative Maori institutions in the future. My research really concerns Maori and Pakeha balance of power and how Maori are endeavouring to reassert control over their own lives in the form of separate institutions from the Pakeha structures.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 14,000 words.

CHAPTER I – AN IMBALANCE: THE MAORI IN THE CRIMINAL JUSTICE SYSTEM

I INTRODUCTION

Separatism has been a prominent theme in world history. Empires broke up, nations asserted independence and millions have died in the quest for a separate identity status. The twentieth century has made no exception. Some notable examples of countries separated along racial, cultural or religious borders are Ireland, former Yugoslavia, former Czechoslovakia and the former Soviet Union. Normally, when a nation or an empire separated, the consequences for the population were catastrophic. Poverty, war and death often precede and follow a nation's division and history shows that when a country splits, it is usually not peaceful.[1]

If two (or more) different ethnic, cultural or religious groups live together within the same national borders, but they differ on how the country should be governed and how other vital public structures (eg. the legal, education and health systems) be organised and no agreement can be found, separatism can emerge. Could different institutions for different ethnic groups within the same nation constitute the first step towards separate states or are they an absolute necessity to accommodate the needs of all citizens, thereby holding the country together?

In New Zealand, some separate institutions for Maori such as a Maori Parliament and Native schools had been created last century, before the politics of the day began to force Maori towards full integration.[2] Today there are some signs of a growing trend towards different structures for Maori and Pakeha. Their effect on NZ needs to be studied and taken into account as NZ heads towards the year 2000 and in view of ambiguous global developments (with more separations than reunifications).

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[1] Czechoslovakia is one recent exception. On 1 January 1992, it was peacefully divided into the Czech Republic and Slovakia.

[2] Much has been written on Maori history since the Europeans arrived. Two authors that give a good analysis of the history and the corresponding politics are **Ranginui Walker** and **Alan Ward**.

A *Aim of the Research Paper*

The purpose of this paper is to examine separatism within the NZ context. The main focus is on examples of separate institutions for Maori, re-emerging at present.[3] Originally the research paper was to concentrate solely on a separate criminal justice system (CJS) for Maori. As the study progressed, it became apparent that other NZ organisations had also been targeted by Maori with the view of establishing parts of them as Maori organisation's. My point of departure remains a separate CJS, because it is the most law related notion in the entire discussion and it allows the paper to look into other jurisdictions, where alternative justice systems are in place. After that, the paper turns to the other alternative structures for Maori, namely in politics, education, health, and examines their justification and their achievement. The research will finally consider possible consequences of alternative Maori institutions in the future. My research really concerns Maori and Pakeha balance of power and how Maori are endeavouring to reassert control over their own lives in the form of separate institutions from the Pakeha structures.

B *Arrangement of the Research Material*

The remainder of Chapter I offers an overview of the present CJS in relation to Maori today. Relevant statistics showing the representation of Maori in the CJS and demonstrating the problems with the collection of data by the Police and the Department of Justice will be presented and discussed. Two explanatory models for the high figures of Maori offending are given and the Chapter concludes outlining how the current CJS could be improved to accommodate Maori and their culture and values. Chapter II analyses the proposal for an alternative CJS. Some Maori believe a Maori CJS could prevent a further increase in offending rates. Philosophical differences between Maori and Pakeha culture and allegations of bias against Maori within the current legal system are the basis for the proposal. Its main criticism will be discussed. Suggestions of a pilot Maori Court for Children and an example of Marae justice will be considered.

Chapter III will go beyond NZ to examine examples of separate CJS in other jurisdictions. The UK provides an extraordinary illustration of a potential separate CJS, pro-

[3] Re-emerging, because most of these concepts actually originate from last century.

voked by the Islamic community; the US have an Indian tribal court system and in Australia we find some Aboriginal Courts and comparable tribal law cases.

Chapter IV looks at the re-emergence of other separatist ideas in NZ. Over the years, Maori politics has been evident in the different Maori political parties, in the assertions for a Maori Parliament and in bodies such as the Maori Congress. Developments in education and health are considered, especially initiatives like Kohanga Reo and the Maori Health Authority.

The final Chapter ponders the effect of separate Maori institutions on NZ society and evaluates the research.

The Appendix will contain statistics relating to Maori representation in the CJS, including the main criminal offence categories, actual convictions, and the ethnicity of sentenced inmates in NZ prisons. Statistics regarding the enrolment of children in Kohanga Reo and Maori Medium Education also form part of the Appendix.

II STATISTICS

In Appendix I full details are shown of selected statistics compiled by the NZ Police (Figures 1 and 2) and by the Department of Justice (Figures 3, 4, 5).

Figure 1 displays the number of people apprehended by the Police in 1992 and 1993, divided into six ethnic groups and distributed in seven offence categories. Of the total arrests in 1992 and 1993, 37% concerned Maori and 55% Pakeha (Caucasian). Figure 2 shows a diagram of the total distribution of the arrested for each ethnic group. Maori are highly overrepresented among the arrests.

Figures 3 and 4 show the range of convicted cases of Maori and Non-Maori from 1983 to 1992. The number of Maori convictions increased by 18.2%, whereas the Non-Maori conviction rate went up 4.3%. The data for Figure 3 and 4 are case-based and come from the Case Monitoring Subsystem of the Wanganui Computer. They do not include any charges handled by the Children and Young Persons Court or Youth Court nor traffic offences.[4]

Figure 5 shows the ethnic origin of prison inmates as at 18 November 1993.[5] The

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[4] **Kelly-Anne Atkinson** and **Barb Lash** *Trends in Maori Offending: A Brief Commentary* (Department of Justice, Wellington, 1993).

[5] **Pamela Southey** *Census of Prison Inmates 1993: Ethnicity of Sentenced Inmates* (Policy and Research Division, Department of Justice, Wellington, 1994).

graph also displays a breakdown between male and female prisoners and the NZ Maori category is clearly the highest for each group (42.1 and 50.5 percent respectively).[6]

The Justice Department and Police statistics clearly show an imbalance of Maori in the CJS, concerning arrests, convictions and imprisonment. It has even been suggested that Maori are nine times as likely to be arrested and charged in Court, nine times as likely to be sent to prison and ten times as likely to actually be in prison as Non-Maori.[7]

However, in order to get an accurate and complete picture, statistics needed to be composed in a careful and precise way. Some voices in the academic community have criticised the Police and Justice Department's statistics as biased and misleading:[8]

> ...There appears to be inconsistencies between the methods of ethnic identification used by the Police, the Justice Department, and the census... the police determine an offender's ethnicity by asking the offender ...but this is not always done; rather a judgment is made about...ethnicity...based on...appearance and name. It follows that statistics... relate to perceived rather than actual ethnicity.

It remains questionable if Police and Justice Department statistics give an adequate picture of Maori representation in the CJS. The Police statistics are recent (published at the beginning of April 1994) and they categorise according to ethnicity and talk of offenders. The letter accompanying the Police data stated that the term offenders described people who had been apprehended by the Police, but were not convicted. Consequently, the figures might include many innocent people. Calling a suspect an offender is unjust, incorrect and distorts the statistics, in particular in relation to Maori. The offender statistics by the Police disrespects the entrenched principle that a person is innocent until proven guilty and gives a misleading picture of Maori criminal rates.

Department of Justice statistics are unfortunately also misleading. The Justice Department's categorisation in Maori and Non-Maori conviction rates, is obviously not sufficient and my inquiries lead me to the assumption that their category Maori includes

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[6] Above N5.

[7] **Greg Newbold** *Crime and Deviance: Critical Issues in New Zealand Society* (Oxford University Press, Auckland, 1992) 137-138.

[8] Ministerial Committee of Inquiry into Violence *The Roper Report* in **Moana Jackson** *The Maori and the Criminal Justice System He Whaipaanga Hou–A New Perspective, Part II, Study Series 18* (Policy and Research Division, Department of Justice, Wellington, 1988) 18.

also Pacific Islanders and other ethnic groups. Overall the statistics give an inaccurate picture of Maori in the CJS, even though it is commonly accepted that there is an imbalance of Maori in the existing legal structure.

III CRIMINOLOGICAL EXPLANATIONS

Besides the criticism pointing out the imprecision in the statistics produced by the Police and Justice Department, other explanatory models for the high figures of Maori offending exist. Different theories have been elaborated of why ethnic minorities all over the world figure so prominently in crime statistics. One important example is the labelling or symbolic interaction theory, defined by David Becker in 1963, "Deviant is one whom that label has been successfully applied, deviant behaviour is behaviour that people so label." Here in NZ, two main perspectives have been offered as explanations for high Maori offending.

A *The Social-Economic Perspective*

The social-economic school of thought considers the influence of social-economic factors on Maori and Non-Maori offending rates. It sees rapid Maori urbanisation since 1950 resulting in a loss of confidence and self-esteem and having a disruptive influence on the family and community structures, leading consequently to an increase in criminal offending.[9]

The theory analyses how the migrating Maori often loose their cultural identity and find new identification within peer groups, often in the cities' subcultural gangs. While employment difficulties would prevent them from growing into a legitimately respected economic position, identification with the lifestyle of the gangs could offer them a respected position of illegitimacy.[10] Members of gangs currently constitute 25% of the prison population.[11]

Often Maori face difficulties with court proceedings. They are more likely to be represented by legal aid practitioners than Pakeha, because of financial restraints.

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[9] **M Norris and S MacPherson** "Trends in Imprisonment" in *Justice Statistics 1990* (Department of Statistics, Wellington, 1991) 23.

[10] **Moana Jackson** *The Maori and the Criminal Justice System He Whaipaanga Hou–A New Perspective, Part II, Study Series 18* (Policy and Research Division, Department of Justice, Wellington, 1988) 102.

[11] Above N7, 138.

Legal aid recipients receive convictions twice as much as those represented by private counsel.[12]

The most recent example of a study confirming the social-economic theory has been completed in 1993. Data about 1,265 children, born in Christchurch, were collected first at birth, after four months, at their first birthday, and then in annual intervals up to the age of 14. The study aimed at determining the association between ethnicity, social disadvantage, and offending rates, and came to an initial conclusion of Maori being more likely to offend than Pakeha. When adjusting the evaluation according to differences in family backgrounds (eg age and education of mother, number of siblings, families' living standards, parents' employment, housing and early mother-child interaction), offending rates for Maori were not significantly higher than for Pakeha and social-economic factors were identified as the main reason for Maori offending.[13]

Although the social-economic theory does not answer all questions, it has a prominent role among the explanatory approaches.

B *The Maori Perspective*

The actual CJS has come under attack. It has been accused of being racially biased and causing offending itself. Moana Jackson described the CJS in 1988 as institutionally racist, advancing Pakeha view points and procedures to the exclusion of all others. He characterised the Police as a racist body composed mainly of Pakeha, and he claimed it was routine for them to abuse and harass Maori. He portrayed the English criminal court system model as a direct attack on the authority structure of Maori society. He criticised lawyers for having little knowledge or training in Maori issues and dismissed juries as mainly Pakeha and therefore claimed, Maori were denied the right to be judged by their peers: "Being judged by your peers doesn't mean a Maori being judged by a Pakeha–a Maori peer is another Maori, someone who brings Maori ideas of right and justice, not Pakeha prejudices..."[14]

For Jackson, judges and probation officers were reflections of solely their own heri-

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[12] Above N7, 138.

[13] **D M Fergusson, L J Horwood and M T Lynskey** "Ethnicity, Social Background and Young Offending: a 14-year Longitudinal Study" (1993) 26, 2 ANZJC 155.

[14] Above N10, 139.

tage, with little knowledge about Maori issues and even less Maori input. He denounced court administrators for mispronouncing Maori names and complained about the Justice Department overseeing the entire CJS only out of its own values and norms of Pakeha culture. He believed all these factors contributed in creating a situation to prosecute, arrest and sentence Maori on the basis of cultural and racial perceptions rather than criminal reality. He concluded that the monocultural and institutionally racist nature of the CJS influenced the number of Maori defined as criminals and the rate of Maori offending.[15]

Paul McHugh agreed with Moana Jackson that the NZ CJS was monocultural and based exclusively on the Pakeha conception of justice. McHugh described Maori dealing with problems collectively within their own community, reflecting a philosophy of collective responsibility, while Pakeha would hold the individual members responsible for their own conduct on the basis of a judeo-christian outlook.[16]

If the CJS is to serve Pakeha and Maori, one nation of two communities with different life and justice conceptions, then it must ensure that sufficient input is available from both cultures. Many reasons for the over-representation of Maori in the CJS have been given, they are complex and not easy to address. One solution could be to improve the current legal structure to ensure that the needs of Maori are met within the NZ CJS.

IV IMPROVING THE CURRENT SYSTEM

Some attempts to improve the situation for Maori have already been undertaken. Under the Criminal Justice Act 1985, Section 16 provides:

> **16. Offender may call witness as to cultural and family background**—(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.

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[15] Above N10, 115-155.

[16] **Paul McHugh** *The Maori Magna Carta–New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 287.

Recent case law made it clear that anyone called under section 16 of the Act can speak from the body of the court and no oath is required.[17] Smellie J justified his ruling:[18]

> There is, today, a growing (and some would say long overdue) recognition that the Court system in this country based as it is on the Anglo-Saxon traditions of the common law is not always flexible enough to ensure fair and appropriate treatment for all New Zealanders.

Moana Jackson, however, has criticised Section 16 of the Criminal Justice Act 1985, because in subsection (1) it limits the right to speak. He thought the restrictions were unclear, an unnecessary barrier, and wanted them removed. He further claimed that many Maori were not aware of the provision in section 16 and that it should be more widely publicised.[19]

Other attempts have been made to accommodate Maori. Section 4 of the Maori Language Act 1987 allows Maori the right to speak their own language in legal proceedings. As long as the individual provides the presiding officer with enough notice to find a competent interpreter, Maori can officially use their own language within the CJS.

Under the Children, Young Persons and their Families Act 1989, the Maori philosophy of collective responsibility is reflected in the use of the Family Group Conferences.[20] The Act represents a substantial move away from the Pakeha concept of individual responsibility by allowing the offender's family to be involved in the decision making judicial process, and to take collective responsibility for the act committed by the young person.

Diversion programmes for offenders is another example of incorporated Maori concepts:[21]

> The essential aim of each scheme is to divert an offender, or a person vulnerable to offending, from the formal processes of the criminal justice system into a community-based programme of support, sanction or rehabilitation.

Diversion into the community complies with the Maori principles of restitution and

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[17] *Wells v Police* [1987] 2 NZLR 560.

[18] Above N17, 570.

[19] Above N10, 244-245.

[20] See the Children, Young Persons and their Families Act 1989, Part IV Youth Justice. In particular section 208 (c) and (f).

[21] Above N10, 238-239.

restoration of balance. Diversion provides support and rehabilitation for the offender. The offender compensates the victim and the entire community receives a benefit, either in the form of community work done by the offender or through education programmes which might reduce the likelihood of perpetrators reoffending. The Maatua Whangai policy recently developed jointly by the Departments of Justice, Social Welfare and Maori Affairs together, enables the diversion of Maori offenders away from the CJS into the care of the tribal group.[22]

The Men Against Violence and Runanga Tane programme is a diversion scheme for first time perpetrators of domestic violence. If the victim receives a protection order (eg. Non-violence or Non-molestation), the offender is automatically referred to a 13-week education programme for men, where the offender's progress is monitored.[23] Men can also participate on a volunteer basis.

V CONCLUSION

Further reaching proposals to improve the current CJS have been expressed. Moana Jackson saw the need for Marae based Maori Legal Services, to deal with the every-day legal requirements of Maori and to educate his people about the Criminal Law and their rights under it, and he postulated a Maori Law Commission to develop the traditional concepts of Maori Law and submit proposals for law reform. The Maori viewpoint should become an accepted part of all Police training modules, but especially those concerning the power to question, arrest, charge and detain. Jackson has further recommended an independent Prosecution Service, separate from the Police, and that lawyers, judges and court administrators should have special training in Maori culture. The Justice Department was asked to change its recruitment policy, to employ more Maori staff, to require from all personnel understanding and awareness for Maori issues and include at least one Maori person in all job interview panels.[24]

In spite of changes integrating more Maori values in recent years, the current CJS has

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[22] Above N16, 287.

[23] **New Zealand Law Society Seminar** "Domestic Violence" (Wellington, 1993) 18. The Wellington Violence Intervention Programmes (VIP), offer a 16 week "Living without violence" programme with ongoing monitoring.

[24] Above N10, 218-259.

still a long way to go to meet Maori criticism and expectations. For some Maori activists like Moana Jackson, superficial or mild changes to the existing legal structures were simply not enough and the call for a separate Maori Criminal Justice System followed. Chapter II will consider the philosophy behind the proposals of a separate CJS and will then look into the main proposals presented thus far.

CHAPTER II – A SEPARATE CRIMINAL JUSTICE SYSTEM FOR MAORI

I INTRODUCTION

The call for an alternative legal structure for Maori was first heard in 1988.[25] The proposals were based on the premises that the needs of Maoridom were not adequately catered for in the current CJS, that the Pakeha structure was institutionally racist,[26] that cultural differences acknowledged by the Treaty of Waitangi were ignored, and on a general feeling that a Maori CJS with Maori input would be more beneficial for Maori, just as the Pakeha legal structure suited Pakeha best:[27]

> ...[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.

The view was that when the Europeans had arrived last century, more effort had been made to accommodate Maori, whereas in the present structure only minor cultural Maori input was available. The Resident Magistrates Act 1867 had created special provisions for Maori. The Act allowed Maori Assessors to assist the bench in any case involving Maori. The Magistrates Court Act 1893 repealed the 1867 Act and removed all cultural court assistance for the Maori people. Since then Maori have been subject to Pakeha ordinary legal machinery with little regard to philosophical differences between the cultures.[28]

A fundamental difference between traditional Maori and Pakeha lies in the perception of responsibility for breaking the law. In general, Pakeha view the individual as the perpetrator and ultimately accountable for a crime, whereas Maori tradition emphasises the communal liability and the sharing of responsibility amongst the whanau, based on the Maori philosophy of collective responsibility.

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[25] Moana Jackson is the most forceful example, see above N10. H K Hingston J proposed a pilot court for Maori children in the same year.

[26] As outlined in the previous chapter.

[27] From a research hui, in Above N10, 158.

[28] **Alan Ward** *A Show of Justice: Racial Amalgamation in 19th century New Zealand* (ANU Press, Canberra, 1974) 303.

II COLLECTIVE RESPONSIBILITY

A *Definition*

The definitive source of Maori collective responsibility comes from kinship with the whanau including ancestors and future descendants, as the main unit of kinship. The most important responsibility of all is the willingness to sacrifice personal and individual interests for the whanau's sake. Its members are expected to show aroha (love and sympathy) to each other and act in the benefit of other members, even if this may harm the acting individual. The theme of communal responsibility is reflected in myths, legends and tribal history.[29]

In direct contrast to collective responsibility stands the Pakeha norm of actions motivated by self-interest:[30]

> To many Pakeha it seems straightforwardly irrational to act out of any motive that is not one of self-interest. If no egoistical motive is obvious, an unconscious or otherwise hidden one is postulated. To the Maori this is nonsense. It makes perfectly good sense to act for the sake of others, so long as they are kin. In Maori terms it is rational and often obligatory to act in ways that harm oneself and benefit others.

We know that not all Maori act in a collective manner in today's world, but collective responsibility has remained a very important part of contemporary Maori society.

B *UTU*

A clear example of collective responsibility is found in the practice of Utu. An important function for Maori is the defence and enhancement of the tribal mana. Any opportunity that occurs to increase the mana of the tribe should be used to its full advantage and any action that might reduce the tribal mana must be opposed. If a tribe gains extra mana by either an injury, insult or an act of friendship and hospitality at the expense of another tribe's mana, the latter must restore its lost mana. The process of redressing the balance is known as utu.[31]

Of direct relevance here, is how utu relates to the Pakeha concept of punishment. Both punishment and utu are deliberate responses to actions or injury and both aim to reach compensation or retribution. In the existing CJS punishment can be optional,

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[29] **John Patterson** "A Maori Concept of Collective Responsibility" in **Graham Oddie and Roy Perrett** (eds) *Justice Ethics and New Zealand Society* (Oxford University Press. Auckland. 1992) 18-20.

[30] Above N29, 20.

[31] **John Patterson** *Exploring Maori Values* (The Dunmore Press Ltd. Palmerston North. 1992) 116.

depending on circumstances and facts regarding the offence. For Maori utu is an inescapable duty. Some academics argue that the word forgiveness does not exist in classical Maori language and that forgiveness is no option when utu has to be performed.[32]

A punishment for Pakeha is always unpleasant, aiming to deter the offender from further offences, while utu can also be a friendly action. Punishment is only meant for offenders found guilty of intentional offences, but utu can as well be performed on people who have caused no harm. When a member from one whanau or tribe insults an individual from another one, then not only the individual but the entire whanau is offended. Any or all members of the group can respond to the insult and utu can be executed against any member of the offending whanau. The whole offended family group is responsible for performing utu, as the offender's entire whanau is liable for the insulting behaviour. The individual represents the entire group and no member is exempt.[33]

The aims of Pakeha punishment seem rather indirect and complex (eg. retribution, deterrence, prevention, rehabilitation), while the result of utu is more straightforward (restoration of the lost mana).[34]

C *Collective Responsibility and the Criminal Justice System*

The Treaty of Waitangi itself is often described by Maori as an agreement between two collectives, the Crown as a collective entity and the Maori people represented by signatories identified with the tribal collectives.[35]

According to Moana Jackson, the NZ CJS pushes responsibility for offending on the individual rather than the community. He considers this practice to be harmful for Maori offenders and their communities, stresses the advantages of collective responsibility and weighs the benefit the introduction and incorporation of the Maori ideas of mediation and restoration would have against the Pakeha adversarial system.[36]

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[32] Above N31, 125.

[33] Above N31, 130.

[34] Above N31, 135.

[35] **Roy W Perrett** "Individualism, Justice, and the Maori View of the Self" in **Graham Oddie and Roy Perrett** (eds) *Justice Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) 37-38.

[36] Above N10, 159.

Jackson has given some hints of how a Maori CJS would operate. He points out how the defendant in a NZ trial is forced to stand alone, apart from the family behind a physical barrier and therefore feels isolated and even more stressed. The family is prevented by the physical separation from fulfilling its customary support role. Jackson promotes as an alternative the removal of all restraints, so that defendants and their families could share collective responsibility.[37] He questions the use of a single judge and finds it inappropriate for Maori offenders. He argues that a group rather than an individual judge should decide matters to reinforce the idea of community responsibility. Jackson appears to neglect the function of the jury but he has an interesting rationale to justify his suggestions. He ponders that when an offender breaks the criminal law, the afflicted party is not the only victim but the entire community suffers and he concludes, that the community is better represented by a group, because the group is more representative than the individual and therefore more sensitive to the cultural beliefs and practices of Maori.[38]

John Patterson also argued that Maori concepts should be included in the law:[39]

> Offenders are alienated from the victims of their crimes and from the criminal justice authorities; families and other communities are prevented from sharing the responsibility for criminal offences committed by their members; and perhaps worst of all, offenders are unlikely to feel the appropriate sense of shame, are unlikely to have a positive attitude towards putting matters right between themselves, their victims, and the authorities, and are likely to develop an entirely inappropriate sense of worthlessness. The remedy is radical, but simple: a concept of individual responsibility should give way to a concept of collective responsibility.

The key behind the call for a separate CJS for Maori is the philosophy of collective responsibility. It requires a totally different approach to criminal justice. It may not be possible to fully incorporate the Maori philosophy into the Pakeha CJS. This realisation combined with the current overrepresentation of Maori in offender statistics fuels the call for an alternative CJS today. The second part of this Chapter outlines the different elements of the proposal.

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[37] Above N10, 236.

[38] Above N10, 277.

[39] Above N29, 24.

III AN ALTERNATIVE CRIMINAL JUSTICE SYSTEM

A *Pilot Court for Maori Children*

The ideas for a pilot court for Maori children were presented by H K Hingston J. The proposal foresaw the pilot court having the same powers as the High Court, with respect to Maori children in criminal, adoption, guardianship and other matters, and being able to involve the extended family and the wider Maori community. The court could sit at any place chosen by the judge and the judge would have the power to co-opt persons from the Maori community to assist as paid assessors. The court was meant to find remedies instead of punishment for children and it could have refused at anytime to hear a specific case and refer it to the general courts. Judicial review should have been available from either the Chief Judge, the Maori Appellate Court or the Privy Council.[40]

Background for this proposal provided again the philosophy of collective responsibility, considering children's problems a matter for the whole family and the entire community. The proposal was never implemented.

B *Moana Jackson*

The most radical alternative has been outlined by Moana Jackson, in 1988. He advocated the creation of a separate CJS, which would handle charges against Maori offenders in a distinctive Maori way.

In Jackson's view, introducing an alternative Maori CJS would mean that in accordance with the Treaty of Waitangi, which recognised equal rights of Maori and Pakeha, Maori rights would no longer be ignored and Maori institutions and procedures would be accepted as equivalent to Pakeha structures and procedures. The aim of a Maori system would be to develop a structural framework that reflected Maori law and was more than just a copy of a Pakeha organisation. The basic principles of Maori law would be mediation, balance and sanction. Jackson did not give many practical details about how an alternative CJS would operate but he specified that offenders and victims would appear before a panel, which had to determine the case and mediate to everyone's satisfaction instead of sentencing and punishing, seeking

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[40] **H K Hingston J** "Maori Children and the Courts" in Royal Commission on Social Policy *The April Report Future Directions Associated Papers Volume 3 Part I* (Wellington, 1988) 275.

restitution and compensation rather than retribution. Tradition alone would determine the method and type of sanction. If the victim was a non-Maori or an institution, Jackson suggested that the victim could decide to have the case heard either within the Maori system or in the Pakeha courts. The main cultural and philosophical justification for a separate CJS is according to Jackson, that it would allow Maori to assert their own rights and restitute them the control over the consequences of wrong doing by members of their own community.[41]

1 *Criticism*

Ever since Moana Jackson has published the concept of a separate CJS for Maori in his research report *The Maori and the Criminal Justice System* in 1988, much criticism has been directed at his proposal. The very first one appeared in the foreword of his report:[42]

> The Minister has made it clear that while he supports the need to make the legal system sensitive to Maori values and needs, he believes it is essential that New Zealand retains one legal system in which everyone is equal under the law.

From the beginning Jackson's suggestion was received with hostility and rejection. John Pratt anticipated enormous administrative difficulties for an introduction of a separate CJS. He thought it could not be implemented. He analysed in depth the reasons, why any such proposal would always encounter massive disapproval:[43]

> Any acknowledgment, any deliberate reintroduction of Maori justice, would pose a challenge to the hegemony of European practices and thought; and at the same time it might help to undermine that predominant sense of identity with Britain and the West, the roots of which go back to the beginning of formal colonisation itself.

According to Paul McHugh a separate Maori CJS is usually rejected, because of its discriminatory quality and its incompatibility with the 'rule of law'. However, he does point out the existence of US tribal courts, which operate successfully beside the main US Criminal Justice System.[44]

The most recent criticism of Jackson's report comes from the current Justice Minister Doug Graham. In response to the argument that cultural differences between Maori

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[41] Above N10, 261-279.

[42] Secretary for Justice in Above N10, 3.

[43] **John Pratt** *Punishment in a Perfect Society–The New Zealand Penal System 1840-1939* (Victoria University Press, Wellington, 1992) 252.

[44] Above N16, 288-289.

and Pakeha should be recognised by the courts, in relation to defences against criminal charges, Mr Graham replied: "So long as I am the Minister of Justice there will be one law in New Zealand for all New Zealanders."[45] He further considered it a waste of time for the Justice Department to introduce in the courts what he felt were separatist ideals. He therefore excluded Government backing for proposals of an alternative CJS and rejected stronger cultural input in the present system.

It leaves the Maori activists no other way than to pursue their postulate on their own.

C *Marae Justice*

A recent example substantiating the functioning of a separate Maori legal structure is the Marae based sexual abuse campaign, initiated and organised by Aroha Terry from Hamilton. It allows victims of sexual abuse and respective offenders to have their cases heard in a Marae court. The Marae as the centre of Maori culture is chosen to facilitate healing for the victim and the victim's whanau, expose the abuse and attempt to heal the offender. Victims of sexual abuse receive counselling and can choose which Marae should hear the case. The whanau plays an important role. Not only must the extended family summon the offender to appear but also support the victim. No lawyers, judges or police are involved in the Marae hearing, just the victim, the offender, the whanau, and the counsellor to facilitate the meeting. Proceedings are very candid; the offences are read to the perpetrator who is called to plead and both sides have their say. The hearing aims at giving the perpetrator the opportunity to ask the victim for forgiveness and finally the appropriate sanction must be decided. Possible punishment can be that the offenders have to face the whanau and publicly admit guilt, they must also go to counselling, which is monitored. The counselling includes teaching others that sexual abuse is unacceptable. Many of the abusers were shown to be tribal elders. For them the punishment can mean to be branded for life as sexual abusers, to loose their speaking rights and to suffer eternal shame.

The initiator of Marae Justice outlined the fundamental difference. The existing CJS might send Maori sexual offenders to prison. When released, they can give the whanau any reason why they had been imprisoned. The whanau need never know that the

[45] See "Graham pledges one law for all" *The Dominion*, Wellington, New Zealand, 12 September 1994, 1.

Pakeha punishment was for sexual abuse, thus the extended family and the community remain at risk and far less protected than had a Marae hearing dealt with the case. Terry finds the Pakeha system primarily shielding society and only for the time the offender is in prison. She claims the victims do not have enough say and continue to be exposed to further abuse. She accuses the CJS of neglecting the victims.[46]

IV CONCLUSION

The difference in philosophy between Maori and Pakeha, cultural differences as recognised by the Treaty of Waitangi but often not considered by the courts, and the widespread Maori perception of being treated incorrectly by the current CJS have all nurtured the suggestion of a separate CJS for Maori. However, Pakeha consistently reject Maori concepts about organising their own Maori legal structure.

There is no doubt that Maori activists will pursue their attempts to create a Maori justice structure. The given example of Marae Justice could become a real alternative to the unsuccessful way the existing CJS handles sexual abuse cases and it fuels Maori hopes that other crimes or disputes could be dealt with within their own justice structure.

It has been neglected in the whole debate that NZ is no longer just a bicultural society. Immigrants from the Pacific Islands, Asia and Europe, who have in considerable number become NZ citizens over the years, make NZ a truly multicultural society. In which CJS would they fit, had NZ different Maori and Pakeha justice structures? Could Pacific Islanders for example, also insist on their own legal structure? Could Maori still have their cases heard in the Pakeha system and could Pakeha request Marae justice if they anticipated a more lenient punishment?

Those issues and many others need to be addressed by Maori who wish to create an alternative CJS. Other jurisdictions with multiracial and indigenous populations have faced similar demands concerning separate legal structures, three examples will be outlined in the next Chapter.

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[46] Source **Inside New Zealand: Marae Justice** (TV3, 31 August 1994, 8.30pm).

CHAPTER III – EXAMPLES OF SEPARATE CJS IN OTHER JURISDICTIONS

I INTRODUCTION

The United Kingdom, the United States along with Canada, and Australia are also confronted with demands from their indigenous populations (or in the case of the UK immigrant population), concerning separate justice systems. Chapter III considers why the British Islamic community, the US and Canadian Indians and the Australian Aboriginals have requested an alternative legal structure and how they tried to achieve it. Overseas examples can widen our understanding of Maori claims and show us ways to handle the call for separate justice structures.

II UNITED KINGDOM

A *The Fatwa against Salman Rushdie*

In 1989 an extraordinary incident occurred, which led the Islamic community in the UK to some far reaching decisions about their future. Although the British Muslims are not an indigenous group in the UK, by virtue of their population (two million people) and the extreme action they undertook, they represent the most extraordinary example of a separate CJS.

A British citizen, descendant of an Indian Muslim family, published a book called *The Satanic Verses*. The novel presented a portrait of Islam and the Prophet Mohammed in a postmodern satirical style. The book was banned in nearly all Muslim countries and was widely thought of as blasphemous and insulting for the Islamic community. *The Satanic Verses* was seen as a deliberate distortion of Islamic history–an attempt to show that Mohammed's message was Mohammed's own creation rather than the recitation of God's word."[47] The title *The Satanic Verses* had been translated into Arabic as *Al-Ayat ash-Shaytaniya*, which can be interpreted as *the Koran written by Satan* or *Satan's Koran*. The Muslims were outraged about Rushdie

[47] **M. M. Slaughter** "The Salmon Rushdie Affair: Apostasy, Honour, and Freedom of Speech" (1993) 79 Virginia Law Review 170.

suggesting that the Koran's source was not God through the Prophet Mohammed, but Satan.[48]

Huge demonstrations erupted with the worst examples in Iran and Britain.[49] Eventually the Ayatollah Khomeini, the religious leader of Iran at the time, decided to take most extraordinary action. He declared the author Salmon Rushdie, guilty of apostasy (religious sedition) and held that Rushdie and anyone else associated with the book, had to be punished with death (Fatwa). The Fatwa issued by the late Ayatollah Khomeini reads:[50]

> I inform all zealous Muslims of the world that the author of the book entitled *The Satanic Verses*–which has been compiled, printed, and published in opposition to Islam, the Prophet, and the Qur'an–and all those involved in its publication who were aware of its content, are sentenced to death.
> I call on all zealous Muslims to execute them quickly, wherever they may be found, so that no one else will dare to insult the Muslim sanctities. God willing, whoever is killed on this path is a martyr.

Khomeini's death sentence has hounded Rushdie ever since and he has been forced to live in hiding in a series of safe-houses, under armed protection by the British Police. Many Muslim fundamentalists swore to kill him.[51]

In 1990, Rushdie and Penguin Books were the subjects of a British court case to decide whether or not they were guilty of blasphemy in the UK.[52] The Divisional Court reviewed the arguments carefully and concluded that the British law protected only Christianity. This highly criticised judgment further upset the Islamic population in the UK to such an extent that they decided to implement drastic measures.

B *The Islamic Parliament*

A pro-Iranian Muslim group announced the foundation of an Islamic Parliament in London. The Parliament would be part of a network of organisations and install an Islamic Law Commission, whose main function would be to create a Muslim legal framework to decide cases that might later become recognised as valid in British law

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[48] Above N47, 164.

[49] I observed personally one such demonstration in London in 1989. Thousands of Muslim men ran through the streets of London in the direction of the House of Commons chanting, "Kill Rushdie, Kill Rushdie."

[50] Above N47, 159.

[51] Above N47, 159. The publishers, Penguin Books, have also been targeted. Between 1989 and 1991 several bombs were found in their London headquarters and Iranian Shiites took responsibility.

[52] ***R v Bow Street Magistrate ex partie Choudhury 1990.***

and ensure that British Muslims had the right to practise their religion and protect it from blasphemy. A Muslim Education Commission to monitor the National Curriculum was also planned and laws to protect the right to halal food and to dress in the proper Islamic manner. The initiators declared their support for the Fatwa against Rushdie.[53]

The leader of the group, Dr Kalim Siddiqui, justified the extreme reaction by emphasising the Islamic Community's right to provoke changes in order to protect the Muslims from hatred and abuse: "If Muslims did not put a stop to Mr Rushdie's nonsense every Tom, Dick and Harry would feel free to write filth about us."[54]

The Islamic Parliament was to be composed of an upper house of businessmen and professionals, who pay an annual membership fee. The lower house with its 200 members would act as a representative body. The Islamic Parliament intended as well to create manifesto groups in all towns, cities and suburbs in the UK, where Muslims had settled in large numbers.[55]

In January 1992, the unelected Islamic Parliament met for their first session in West London's Kensington Town Hall. The meeting provoked a storm of protest, after Dr Siddiqui had urged all Muslims to disobey lays, they considered unacceptable.[56] Only a day later, Dr Siddiqui retracted his statement in reaction to media pressure and criticism,[57] but he has remained very active in the struggle for Muslim rights and ideals in the UK. The Islamic Parliament meets three to four times a year to promote Muslim rights and separate structures like the Law Commission, an education system, and to help integrate Muslims in Britain and create wealth within the Islamic Community.[58]

The British Muslim Community has given an extreme and unprecedented example of the promotion of separatist structures on the basis of different cultural and ideo-

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[53] See "Muslim Group to set up Islamic Parliament" *The Times*, London, United Kingdom, 21 June 1990, 6 (Reuter Textline).

[54] See "British Muslims intend to Pursue their Campaign against Salmon Rushdie" *The Independent*, London, United Kingdom, 7 August 1990, 12 (Reuter Textline).

[55] See "Wealthy Muslims back formation of Separate Islamic Parliament" *The Daily Telegraph*, London, United Kingdom, 4 September 1990, 2 (Reuter Textline).

[56] See "British Moslem Parliament rejects Criticism" *Reuter News Service*, London, United Kingdom, 5 January 1992.

[57] See "Islamic Leader denies he told British Moslems to break law" *Reuter News Service*, London, United Kingdom, 6 January 1992.

[58] Above N56.

logical conceptions. It is interesting that this happened in the UK and that it was triggered off by a British Muslim, who published a novel criticising his own religion. The Islamic Community felt so upset and obviously threatened that they turned to separatist reactions. The British used to conquer and colonise other countries, establishing and leaving behind British organisations and customs. Today, they must learn themselves to live with and accommodate in their own country a substantial number of immigrants, many from the Islamic faith and ideology, unwilling to accept British institutions and not afraid to create their own separate structures.

III UNITED STATES AND CANADA

Since 1934 the Indian Reorganization Act (IRA) has allowed American Indian tribes to develop their own constitutions and provide for their own court systems. Tribal courts have now been established in over sixty reservations with most of them originating from the IRA. Among the rest some are governed by the Code of Federal Regulations, others are known as traditional courts because their jurisdiction is based on unwritten and customary law, while the Navajo people have established a court structure based on the laws of the Anglo-American tradition.[59]

The relationship between the tribal courts and the federal institutions of the US is intricate. The courts are mainly funded by the Federal Government[60] and since 1832,[61] federal recognition of the tribal courts has resulted from the federal recognition of tribal sovereignty.[62] Consequently, tribal court decisions can not be reviewed by the federal courts because of the tribes' sovereignty. One federal decision concluded: "[T]he tribal courts are not lower courts in the federal system but 'courts of a foreign jurisdiction'."[63]

The function of the US tribal courts has been defined as preserving "the sovereignty

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[59] **Fredric Brandfon** "Tradition and Judicial Review in the American Indian Tribal Court System" (1991) 38 UCLA Law Review 998-999.

[60] **Wayne C Eagleson** *A Parallel Criminal Justice System for New Zealand: Reform in the Public Interest?* LLM Research Paper, Indigenous Peoples and the Law (Wellington, 1990) 61.

[61] ***Worcester v Georgia*** 31 U.S. 515 (1832). The Chief Justice Marshall had recognised the sovereignty of the Cherokee tribe, in relation to their occupation of land.

[62] Above N59, 999.

[63] Above N59, 1001.

and identity of the Indian tribes."[64] Theoretically the tribal courts have wide jurisdiction, including all civil disputes that occur on the reservation and all criminal offences, except murder, manslaughter, rape and other violent crimes. But in practice the tribal courts are mostly concerned with misdemeanours. Tribal court judges are elected by the members of the reservation and there is no requirement to hold a legal qualification. When the tribal judges decide that a civil dispute demands special legal expertise, they can refer the case to the state courts, and indeed most civil disputes are not dealt with in the tribal justice system.[65]

Critics have pointed out that tribal courts are usually dependent on tribal governments. The concept of a separation of powers appears to be alien to the American Indian society. Although tribal constitutions establish both legislatures and judiciaries, few tribal constitutions provide for a separation of powers. This has important implications, as tribal courts are not able to judicially review tribal council legislation, because the councils consider themselves immune from any form of review. One observer has pointed out, that the adoption of the doctrine of the separation of powers and judicial review would strengthen the independence of the tribal judiciary and some of the power would shift from the councils to the tribal courts.[66]

Tribal courts have also been accused of ignoring Indian traditions in their decisions "and for going about their work as if the Indian justice system was a replica of the state and federal systems."[67] Although some particular areas of tribal competence, such as family matters, rely heavily on traditional Indian social custom, and attempts have been made to incorporate tradition in the tribal court procedures,[68] some commentators have concluded that the traditional law has not been sufficiently developed. A complete reconceptualisation of the relationship between tribal justice and the American justice system was suggested as one solution.[69]

Nonetheless the tribal courts and councils do operate alongside the US CJS and political structures. In some aspects the Indian tribal court system could be a role

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[64] Above N59, 1000.

[65] Above N60, 61-63.

[66] Above N59, 1006-1009.

[67] Above N59, 1009.

[68] For example displaying tribal symbols during a court session and organising the court room seating in a circle. Above N59, 1010.

[69] Above N59, 1011.

model for a separate Maori CJS.

Calls for an indigenous justice system in Canada have gone unheeded, in contrast to the US. The only adjustments to the Indians' requirements in the Canadian CJS, are the appointment of Indian Justices of the Peace and the specific employment of Indian Police Constables in the Northwest Territories.[70]

IV AUSTRALIA

Some Australian states have attempted to create special courts for Aborigines, courts not based on the Aboriginal authority structures but instead being a variation of the general court system, making some special concessions for Aborigines.[71]

The following gives a brief overview of Aboriginal legal structures in Australia.

A *Queensland*

At least 12 Aboriginal trust areas in Queensland[72] operate Aboriginal courts. The courts have been constituted on the basis of the Community Services (Aborigines) Act (CSAA) 1984. Each court consists of two justices of the peace, including a local Aboriginal resident with the necessary suitability or failing that, the local members of the Aboriginal Council.[73] Queensland Aboriginal Courts have the jurisdiction to hear and determine local disputes involving no breach of the general law and breaches of the local by-laws. The four main offences dealt with by the courts are alcohol offences, disorderly behaviour, assault and gambling. They attract a penalty of up to $500 or a few days in the local goal.[74] Affected residents can appeal against Aboriginal court decisions as if the judgment came from a Magistrates court, thus the normal channels of appeal are available.[75]

Critics refer to the perception of the courts as second class institutions, with no real

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[70] Above N60, 63.

[71] **Australian Law Reform Commission** *The Recognition of Aboriginal Customary Law Volume II–No 33* (Australian Government Publishing Service, Canberra, 1986) 30.

[72] Cherbourg, Woorabinda, Yarrabah, Palm Island, Hope Vale, Wujal Wujal, Lockhart River, Northern Peninsula Area, Weipa South, Edward River, Kowanyama, Doomadgee. Above N71, 36.

[73] Above N71, 32.

[74] Above N71, 36-37.

[75] Above N71, 32.

Aboriginal influence or control and failing to take into account local customs and tradition. Aboriginal justices have been described as badly trained, Aboriginal Councils as having only few powers and the courts as, administering laws not based on the local customs.[76]

B *Western Australia*

The Aboriginal courts in Western Australia are an extension of the general court system into the local community. The main concession is the appointment of Aboriginal justices of the peace and court staff.[77] This scheme has been instigated by the Aboriginal Communities Act (ACA) 1979 and is functioning in at least six different Aboriginal communities in Western Australia.[78] Although the courts are meant to hear cases of by-law breaches such as littering, damage to the local flora and the regulation of vehicles, most of the offences heard are either directly or indirectly related to alcohol.[79] Penalties include fines up to $100 and imprisonment for a maximum of three months.[80]

The problems with the Aboriginal Courts in Western Australia are similar to those found in Queensland. The training of the Aboriginal justices is of concern and they appear to have little control over their own law and order problems.[81] The scheme has also failed to incorporate local customary laws.[82] The actual position of Aboriginal tribal law in the general Western Australian courts has been indicated by a recent case. Neville Gable, an Aborigine, was charged with the stabbing murder of his wife. Gable's punishment according to his own culture's justice rules would have been a spearing below the belt. Gable requested bail so that his wife's relatives could carry out tribal justice. His lawyer argued that the murdered wife's angry relatives would otherwise spear Gable's brother and that the police could escort Gable to the village and then back to jail. The District Court Judge denied Gable bail, claiming that the

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[76] Above N71, 39-41.

[77] Above N71, 43, 47.

[78] Bidyadanga, La Grange, Bardi, Lombadina, Beagle Bay and Balgo Hills. Above N71, 42.

[79] Above N71, 43, 47.

[80] Above N71, 43.

[81] Above N71, 44-46.

[82] Above N71, 46.

spearing would just constitute another crime. Gable's disappointed lawyer had hoped, granting bail would set a precedent and effectively recognise the validity of tribal law.[83]

C *Northern Territory and South Australia*

No special Aboriginal courts are available either in the Northern Territory nor in South Australia,[84] but some recognition of Aboriginal values has nonetheless been incorporated into the court system.

In the Northern Territory, the Local Government Act (LGA) 1978 allows the election of Aboriginal Community Government Councils whose powers include commercial development, education and welfare. In addition, they have the authority to make by-laws eg regarding the purchase of alcohol and the sale of firearms.[85] Some of the Northern Territory courts have made attempts to gain greater Aboriginal involvement at a local level.[86]

> Basically the court is run under ordinary rules but with flexibility to allow local views to be taken into account in sentencing. A group of clan elders sit with the magistrate in order to give their views on the seriousness of the offence and an appropriate sentence. The family of the accused and other community members may also attend court to give their views on the accused's behaviour and appropriate sentence.

The only real provision for Aboriginals in South Australia is the Minister of Aboriginal Affair's power to appoint a tribal assessor to hear appeals on disputes, mainly related to the use of Aboriginal land. Until 1986, no person had been appointed as a tribal assessor.[87]

V CONCLUSION

In all the overseas examples, recognition of indigenous peoples and their identity and status is at the centre of their quest for separate justice structures. The already existing separate structures have been established on the basis of different cultural concep-

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[83] See "Aborigine Denied Bail to face Tribal Spearing" *Reuter News Service*, Perth, Australia, 3 September 1993.

[84] Above N71, 48, 51.

[85] Above N71, 48.

[86] Above N71, 49.

[87] Above N71, 51-52.

tions between a minority of the indigenous and the majority populations. In the US and Australia a slight recognition of the Indians' and Aboriginals' different traditions and special place in the respective societies can be observed. The Islamic community in the UK wanted a separate legal structure because of what they perceived as inadequate protection of their religion by the established British courts. The Muslims also instigated a Parliament and Education Commission. The American Indians have their own constitutions and the Australian Aboriginals have Tribal Councils to administer their affairs.

The Indian and Aboriginal tribal courts have further aspects in common. They were set up by the respective Governments' enacting the appropriate legislation and are almost entirely funded by the same source in each country. The tribal structures in both countries appear to have a wide jurisdiction but in reality they only hear trivial offences, in particular alcohol related misdemeanours. The criticism of both examples describes similar aspects: the Tribal Court Officers' incomplete training, tribal justice systems being only an extension of the general law, and the lack of traditional customary law in the court framework. In contrast the American Indians appear to have more control than the Australian Aboriginals over their own law and order. The Aboriginals can appeal decisions from their tribal courts to the local Magistrates courts unlike the American Indians whose tribal courts are regarded as courts of a foreign jurisdiction and not part of the federal system.

The Islamic legal and political structures in Britain are rather different. The British Muslims are not an indigenous population, their alternative Commissions were not set up by the British government and the Muslims have been encouraged to ignore British laws if these were incompatible with Muslim culture. The Islamic example is far more radical with a potential to become dangerous, unlike the tribal systems set up by the governments of Australia and the US. The Australian Government in particular, prefers adjusting the general law to make it more acceptable for their indigenous population rather than introduce special laws for the Aboriginals.[88]

For Maori some interesting and controversial examples of separate justice systems in other jurisdictions give hints and ideas of how a separate CJS could work in NZ. The examples show clearly that a separate court structure usually needs other alternative systems. Separate political, health and education structures are therefore also to be

[88] **Australian Law Reform Commission** *Multiculturalism and the Law–No 57* (Sydney, Australia, 1992) 11.

considered in the NZ context. Chapter IV will look closer into these other separatist ideas, outriders for Maori autonomy.

CHAPTER IV - OTHER SEPARATIST IDEAS

I INTRODUCTION

The suggested separate CJS is not the only proposal for distinct Maori institutions in New Zealand. Separate structures were also promoted to cater for Maori political, educational and health needs. This chapter looks into those three areas as they help to present a balanced picture of the struggle for Maori autonomy, and show that separate structures for Maori and Pakeha represent an undeniable trend in NZ at the end of the 20th century. The section starts with an overview of Maori politics including some recent developments.

II POLITICS

A *The New Zealand Maori Council*

During the Second World War Maori had formed tribal committees under the banner of the Maori War Effort Organisation. The organisation's tasks included military recruitment, domestic labour needs and social welfare.[89] As a consequence of Maori tribal committees proving so successful and effective during the war, the Maori Social and Economic Advancement Act 1945 granted statutory recognition to the committees. In due course the original tribal committees formed district councils and later the Dominion Council which became known as the NZ Maori Council. The twelve district councils[90] send delegates to the NZ Maori Council in the hope that "Maori would have a real say in who would establish and implement Maori policy."[91] At a national level the NZ Maori Council has been quite successful in influencing legislation and government policy.[92] They also brought a series of State-Owned Enterprise cases before the courts, resulting in changes in Maori fishing rights and

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[89] **Lindsay Cox** *Kotahitanga: The search for Maori Political Unity* (Oxford University Press, Auckland, 1993) 102.

[90] Taitokerau, Auckland, Waikato, Maniapoto, Tauranga Moana, Hauraki, Waiariki, Tairawhiti, Takitimu, Raukawa, Wellington, Te Wai Pounamu. See Above N89, 106.

[91] Above N89, 102.

[92] Above N89, 108.

broadcasting frequencies.[93] However commentators criticise that at a local and regional level many Maori are practically excluded from the committee process and therefore not involved in the selection or election of representatives. The perceived links between the Council and mainstream political manoeuvres may have limited the Council's appeal as a rallying point for all Maori.[94]

B *National Maori Congress*

The Congress was founded at Turangawaewae Marae on 14 July 1990. In a climate of arising competition and unrest among some tribes about new legislation which would allow the registration of Authorised Voices of Iwi, "[t]he establishment of an iwi-based and iwi-driven forum such as a Congress would be required to strengthen the Maori position, particularly in its relationship with the State."[95] The nationally structured Congress should be representative and equipped with the necessary skills to develop policy for Maori. To facilitate the policy making, eight goals were identified in 1991 as priority areas of attention.

1. ***A Policy for Maori Employment*** – to develop strategies for full Maori employment. An Employment Committee has been established to work towards this goal.
2. ***A Maori Education Policy*** – to consider the possibility of a Maori Education Authority to link education with positive Maori development, language revitalisation, and tino rangatiratanga. A Congress Education Committee is considering this issue.
3. ***Iwi Development Banks*** – to explore the establishment of Iwi Development Banks including a Reserve Bank within the financial infra-structure of New Zealand. The Finance Committee of Congress have taken some positive steps towards the creation of Iwi Development Corporations.
4. ***An International Maori Identity*** – to ensure that Maori can be represented internationally, as distinct from the NZ Government. The International Committee suggested the Congress should have an official international status and Congress

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[93] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, [1989] 2 NZLR 142, [1992] 2 NZLR 576. *Attorney-General v New Zealand Maori Council* [1991] 2NZLR 129.

[94] Above N89, 107-108.

[95] Above N89, 142.

delegates should attend international conferences such as the Earth Summit and the United Nations Year of the World's Indigenous Peoples Conference, both in 1992.

5. ***Constitutional Rearrangements*** – to promote constitutional changes which adequately recognise the position of Maori. A taskforce from the Justice and the Constitution committee was established to look further into constitutional reform. In 1993 the notion of a separate Maori Parliament has re-emerged and been discussed at the Ngati Porou Indigenous Peoples Conference.
6. ***Increased Congress Membership*** – a taskforce was instituted to ensure contact between Congress and Iwi who had not yet joined the Congress structure, and to establish negotiations with other Maori organisations over their possible participation in Congress ventures. The Congress, Maori Women's Welfare League and the New Zealand Maori Council are currently working together in housing, electricity and health.
7. ***A Congress Secretariat*** – the need for a full-time secretariat with a permanent office arose from the increasing administrative workload. The Operations Committee was assigned to examine the options.
8. ***A National Identity For Congress*** – to ensure that all iwi were accurately informed about Congress, its activities and intentions, and to inform other groups, eg State-Owned Enterprise, senior government and private corporation executives.[96]

C Maori Parliament

In 1892 a Maori Parliament was created and held a first meeting to devise laws regarding their own lands, guardianship of children, goldfields, fisheries and the Appeal Court. The Parliament consisted of ninety-six members representing eight districts (six in the North Island and two in the South). Section 71 of the Constitution Act 1852 was used as its legal basis, because the section entitled Maori to govern their own native districts if their laws did not conflict with laws governing the lives of Europeans. In 1894, the Maori Parliament introduced a Native Rights Bill seeking devolution of power. But the bill was rejected at least twice by the Pakeha Parliament, before it was set aside.[97] Eventually the Maori Parliament was disbanded

[96] Above N89, 173-179.

[97] **Ranginui Walker** *Ka Whawhai Tonu Matou: Struggle without End* (Penguin, Auckland, 1990) 165-168.

with the intention of resurrecting it at a more appropriate time.

As noted above, the National Maori Congress has discussed the notion of a separate Maori Parliament as recently as 1993. One newspaper mentioned in November 1994 that some Maori "believe nothing but a separate Maori parliament can satisfy Maori political needs."[98] There is clearly an interest in a separate parliament for Maori and one wonders if its time has come.

D *Self-Government for Maori*

While the concept of a Maori Parliament is still in debate, interest has also been expressed in Maori self-government to give the Maori people self-determination. Observers have pointed out that in Australia, Aboriginals in northern Queensland and the Northern Territories are working towards self-government and the Inuit people of northern Canada have already achieved independence in most aspects of their lives.[99] The American Indians have attained self-government on the reservations and the Islamic community in the UK are struggling for similar structures.

NZ has encouraged the Chatham Islands to form their own government for years, although the Chatham Islanders themselves did not feel they had enough revenue to be successful. Special problems such as finances would inevitably arise if Maori demanded and received self-government. Nevertheless some observers believe that as with the Maori Parliament it is only a question of time before Maori tribes begin to organise claims for independence.[100]

E *Maori Electoral Roll*

The Maori Representation Act 1867 introduced Maori representation in New Zealand Parliament. The Act limited the number of Maori Members of Parliament to four, even though Maori would have been entitled to twenty seats, had the seats been allocated on the basis of population figures. Furthermore, Maori representation was excluded from the provisions for revision under the Electoral Representation Commission. While in a European electorate, a new seat was to be created for each

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[98] See **Hugh Barlow** "Choice and confusion" *The Dominion*, Wellington, New Zealand, 22 November 1994, 11.

[99] See **Oliver Riddell** "Self-determination major issue" *The Press*, Christchurch, 2 March 1993, 12, (INNZ).

[100] Above N99, 12.

increment of 30,000 people, Maori representation was not entrenched with population figures.[101]

As a result of the new voting procedure (MMP, 1993), Maori are now entitled to their own electoral roll. During February and March 1994, they were given the option to choose which electoral roll they wished to be placed on. Whether Maori choose the General or Maori electoral option has determined the number of Maori seats out of the total of parliamentary seats. If all eligible Maori were on the Maori electoral roll, an additional eight Maori seats would be created taking the total number of Maori Members of Parliament to twelve.[102] The Maori electoral option under MMP gave Maori for the first time since 1867 the chance to increase their representation and their influence within the New Zealand parliamentary system.[103]

The outcome of the electoral option campaign has not been encouraging. The existing Maori roll increased from 104,414 to 136,708, which represents a 30.93% rise. While the increase has created one extra seat, there are still only five Maori seats in Parliament.[104] Some Maori had expected seven or eight extra seats and they were rather unhappy that relatively few Maori had taken the opportunity to increase Maori parliamentary representation. Much criticism was directed at Justice Minister Doug Graham's handling of the advertising campaign for the option. Mr Graham had relied primarily on posting information out to registered Maori voters. This was described as "a Pakeha method of communication to convey an important message to an exclusively Maori audience."[105] Appropriate methods to submit information on the electoral option to Maori should have included radio and television advertisements and most importantly the traditional Maori face to face communication known as kanohi ki te kanohi.[106] Maori alleged that because the campaign had been so poorly organised and financed, few Maori knew and understood the importance of the Maori electoral roll. The New Zealand Maori Council, Maori Congress and the Maori Women's Welfare

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[101] Above N97, 144-145.

[102] See "Getting on the Maori Roll– What's in it for us?" (Kia Mohio Kia Marama Trust–Tamaki-Makau-Rau) *Kahungunu Iwi Newspaper*, Issue 2, 1994, 7.

[103] See "Maori on a roll campaign" *Kia Hiwa Ra National Maori Newspaper*, January/February 1994, 5.

[104] See "Five seats likely in 1994 Maori option" *Kia Hiwa Ra National Maori Newspaper*, May 1994, 8.

[105] See "Graham criticised over Maori option" *The Dominion*, 31 August 1994, 7.

[106] **Clare Sinnott** *The Maori Electoral Option Report* LLB (Hons) Seminar Paper II, Indigenous Peoples and the Law (Wellington, 1994) 7-9.

League collectively challenged the result in the High Court and requested that the results be quashed and the electoral option be run again.[107] Justice McGechan ruled on 4 October that the Justice Minister's conduct had been legal but wrong. He declined to quash the results although accepting that the Government had provided insufficient funds and information to make the Maori electoral option a success. The Justice Minister in consultation with the Solicitor-General (John McGrath), will decide in the near future whether or not to hold the option again.[108] In the meantime the Maori Congress, Council and Women's Welfare League have appealed the decision from Justice McGechan to the Court of Appeal. A final judicial decision is forthcoming.[109]

If Maori do not achieve fair and sufficient representation in Parliament, the chances of a Maori Parliament eventuating increase, especially if more Maori give up the hope of a meaningful sharing of power between Pakeha and Maori.

F *Maori Political Party*

In the late 1970s the Mana Motuhake (MM) Party was formed by Amster Reedy and Matiu Rata. The Party whose name can be translated as distinct and discrete power, was committed to the philosophy of Maori political, social and economic autonomy. The party tried hard to actively pursue within the existing political system Maori issues, such as the recognition of Te Reo Maori and an increase in Maori land ownership. Also included in the party manifesto was the pledge that it would work towards an increase in the number of Maori seats and that the representation for Maori would be decided on a tribal basis.[110] By all accounts, the MM party is no longer politically active and one of the two leaders, Matiu Rata, is now the Maori affairs spokesperson for the Alliance.[111]

Instead, a new party is about to be launched. The Aotearoa Maori (AM) Party, headed by Manu Paul (Ngati Awa) and Sir Graham Latimer, is expected to be introduced

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[107] Above N105, 7.

[108] See "Maori-roll issue to go back to Cabinet" *The Dominion*, Wellington, 5 October 1994, 1,3.

[109] The judges retired on Monday 22 November. The bench consisted of Sir Robin Cooke, Sir Ivor Richardson, Sir Maurice Casey, Justices Hardie Boys, Gault, McKay and they were joined by former member of the Court of Appeal, Sir Gordon Bisson. Above N98, 11.

[110] Above N89, 134-135.

[111] See "Decentralisation essential, says Rata" *The Dominion*, Wellington, 20 July 1994, 2.

by the end of 1994. Other Maori who have been approached include Whetu Tirakate ne-Sullivan (Southern Maori MP), she wants to remain with the Labour Party,[112] and Donna Awatere Huata (Maori activist) who chose to join Roger Douglas's Association of Consumers and Taxpayers.[113]

One main theme seems to permeate Maori politics: it is the attempt to achieve greater representation for Maori and Maori issues. A separate Maori Parliament, Maori political parties, Maori electoral roll and separate Maori institutions, such as the Maori Congress, are all seen as ways of facilitating better Maori representation than the one offered by the current political structure. Most importantly: "A critical number of Maori MPs from all parties was needed to push for constitutional change which would give Maori more control of their affairs."[114]

III EDUCATION

A *History*

Originally, mission or native schools for Maori were run by the Anglican, Catholic and Wesleyan churches and the teaching was mainly in Maori.[115] The mission's boarding schools separated the Maori children from their families to train the children in the English ways and then send them back home to their communities to teach their tribes the settlers' ways. The policy failed and the schools were criticised and generally regarded as unsatisfactory:[116]

> The [missions'] boarding schools had often proved shoddy, ill-managed, epidemic-ridden institutions, and even when very well-managed, had not proved popular with Maori parents, who disliked the long separation from their children and considered such features of the system as corporal punishment degrading. Moreover, when a boarder returned home, he [or she] seemed to resume the mores of his [or her] community, not to change them.

Eventually, in 1867, the Native Schools Act was passed. It left the administration of Maori schools to the Department of Native Affairs and later to the Education Depart-

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[112] See **Karyn Scherer** "Maori MP not interested in new political party" *The Evening Post*, Wellington, 11 June 1994.

[113] See **John King** "Maori activist hopes to be ACT Member of Parliament" *The Evening Post*, Wellington, 23 July 1994, 9.

[114] **Donna Awatere Huata** Above N113, 9.

[115] Above N97, 146.

[116] Above N28, 211.

ment. As a result some fundamental changes occurred. Teachers were instructed to tutor in English, the schools were opened up to accommodate settlers' children and the erosion of the Maori language started. Children were first encouraged to speak exclusively in English at school; later it became a rule and the penalty for disobedience was corporal punishment. This regime has been a linguistic disaster and has been responsible for the suppression of the Maori language and identity:[117]

> In 1900 over 90 per cent of new entrants at primary school spoke Maori as their first language. By 1960 white dominance and the policy of suppression had taken their toll: only 26 per cent of young children spoke Maori. By 1979 the Maori language had retreated to the point where it was thought it would die out unless something was done to save it.

B *Kohanga Reo–Early Childhood Education*

One important answer was the Kohanga Reo movement. Kohanga Reo (language nest) concept was developed by the elders of the Hui Whakatauira in 1981, as a model language-recovery programme. The programme centres around pre-schools, which are conducted entirely in the Maori language[118] with the aim to make every Maori child bilingual by the age of five years. At the same time many Maori parents also strive to learn Te Reo to assist their children at home, and to help raise finances for better facilities for the Kohanga Reo's operation. In some respects the Kohanga Reo movement has been as much a political as an educational movement.[119]

In 1982 the first Kohanga Reo was opened in Wainuiomata and within one year, 107 more centres were established. By 1991 NZ had 630 Kohanga Reo in operation catering for 22% of all Maori children aged two to four years and 44% of all Maori children in early childhood education.[120]

C *Kura Kaupapa Maori - Primary and Secondary Education*

A consecutive problem was Maori language education at primary and secondary level. The concern within the Maori community was that children would forget Te

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[117] Above N97, 147-148.

[118] A recent study has shown that not all Kohanga Reo use the Maori language exclusively. See "Only some Kohangas all-Maori" *The Dominion*, Wellington, 29 June 1994, 6.

[119] Above N97, 238-239.

[120] **Lisa Davies and Kirsten Nicholl** *Te Maori i roto i nga Mahi Whakaakoranga–Maori in Education: a statistical Profile of the position of Maori across the New Zealand Education System* (Learning Media, Ministry of Education, Wellington, 1993) 27.

Reo learned at Kohanga Reo if they were only taught in English at primary and secondary schools. In addition, many Maori children heard solely the English language at home, thus there was a real danger that the Maori language would still be suppressed. Motivated by this knowledge, a group of committed parents launched Kura Kaupapa Maori schools,[121] where Te Reo Maori is the principal language of instruction and the entire curriculum is based on Maori philosophy, values, principles and practices. The 1980s saw as well the expansion of Maori Medium Education, a programme in which Maori is promoted as a medium for education. The programme includes Kura Kaupapa Maori, bilingual schools, mainstream schools with immersion classes and schools with bilingual classes. It has been estimated that 15% of all primary school students receive some form of Maori Medium Education.[122] 28 Kura Kaupapa Maori schools currently exist and the last budget in June 1994 foresaw $3.7 million to establish five more Maori schools in the North Island.[123]

In spite of these encouraging developments, some Maori have hinted that much more should be done to assist the Maori language to flourish. Eastern Maori MP and the current Speaker of the House, Peter Tapsell, has recently suggested that all children in NZ (whether Maori or Pakeha) should have compulsory Maori lessons. The immediate response from Education Minister Lockwood Smith was to declare that Maori lessons should be encouraged on a voluntary basis only. He further admitted that a major problem was the severe lack of trained Maori language teachers.[124] The Te Hurahi report, released in August, stated that only 10 Maori language teachers a year graduate, and that unless remedied the shortage could threaten the survival of Kohanga Reo, Kura Kaupapa Maori, bilingual and immersion education.[125]

The Maori education programmes have come some way in restoring positive identity and pride in Maori culture. Despite financial problems and teacher shortages, the Maori community held it necessary to create their own educational structure to meet their needs. Notwithstanding that bilingualism in the state education system is now more common, separate Maori schools have been created by Maori for Maori because

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[121] Above N97, 239-240.

[122] Above N120, 40-41.

[123] See **Sarah Catherall** "Five new Maori schools for North Island" *The Dominion*, Wellington, 27 July 1994, 18.

[124] **Peter Tapsell and Lockwood Smith** on National News TV1, 6 September 1994, 6.00pm.

[125] See **Sarah Catherall** "Call for culturally safe schools" *The Dominion*, Wellington, 24 August 1994, 6.

they believed that the Pakeha education system had failed them.[126]

> [T]he existing system of education had failed Maori people and co-operating with it to introduce modifications had not helped the situation. For this reason Maori people were exhorted to take over the education of their own children by establishing alternative schools modelled on the principles underlying [K]ohanga [R]eo.

Maori education has gone a full circle from Native schools to state education and back to separate schools for Maori.

IV HEALTH

A Maori Health Authority (MHA), known as Te Waka Hauora o Aotearoa, was formally launched in Wellington in February 1993. It was thought that a MHA "could provide a national focus for Maori input into health policies and their implementation."[127]

The aims of a MHA were identified as "the advancement of Maori health, the formulation of Maori health policies, the provision of a national focus, and the provision of assistance for iwi health programmes."[128] Evidence has since been presented demonstrating the necessity of a separate health authority for Maori and the failure of the Pakeha health structure regarding Maori:[129]

> Maori hospitalisation rates for all ages higher than non-Maori; Maori males twice as likely to be affected by heart disease, pneumonia and influenza, chronic respiratory disease as non-Maori; Psychiatric admission rates for Maori 66 percent higher across the Midland area health region than those for non-Maori; Infant hospitalisation rates higher for Maori than non-Maori.

There is further evidence of the existence of preventable diseases such as rheumatic fever occurring in Maori (and Pacific Island) but not in Pakeha children.[130] Clearly Maori health is significantly poorer than Pakeha health and the Maori community have attributed this to two main factors. The first concerns Maori poverty including inferior housing and high unemployment rates. The connection between poor health and unemployment was described as "Unemployment is probably our greatest occupa-

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[126] Above N97, 243.

[127] Above N89, 181.

[128] Above N89, 181.

[129] See **Colleen Foley** "Work ahead on Maori health" *The Evening Post*, Wellington, 8 April 1994, 23.

[130] *Frontline* (TV1, 11 September 1994, 6.30pm).

tional health hazard."[131] The second is the perceived lack of a Maori perspective in the existing health system.

Since the MHA has been set up, some progress has been made to give Maori limited autonomy over their own health care. In Rotorua, a Maori primary health care project similar to Plunket concentrates on Maori caregivers and their children, and there are four Tainui Health clinics in the Hamilton-Huntly area catering for 4800 clients. 23 percent of the clients are non-Maori.[132]

V CONCLUSION

Health, education and politics along with the justice system, are areas where separatism is emerging. A separate Maori Parliament, and other political structures, distinct educational institutions and parallel health organisations are one major way how Maori are asserting independence from the Pakeha structures. The reasons underlying the promotion of separate structures are always the same: the Pakeha system is said to fail Maori needs and lack Maori input. Maoridom appears to be at the end of their tether with Pakeha structures and that must have favoured the re-emergence of separatist ideas and structures in the last ten years.

The final chapter contains an evaluation of the research on separatism in Aotearoa-New Zealand.

[131] Above N129, 23.

[132] Above N129, 23.

CHAPTER V – CONCLUDING THOUGHTS

I EVALUATION

This research paper started with the assumption that separate institutions for Maori and Pakeha are re-emerging in Aotearoa-New Zealand. The paper presented the evidence to justify this premise. Although separate Maori institutions have an historic background, more often their re-emergence seems to be a Maori response to Maori frustration and anger about the perceived failure of Pakeha institutions with regard to Maori needs, and to the Pakeha unwillingness to share power in fairness and partnership.

- Two separate Maori structures, originating from last century, stand out. A Maori Parliament had first been suggested in 1892 and, as shown in Chapter IV, is still contemplated in 1994. Special schools for Maori were originally set up after the first Europeans had arrived in NZ, in the 1840s. The policy later changed to forced integration of Maori with settler children and more recently separate schools for Maori have again become desirable.
- Not the entire Maori community are interested in either separatist ideas or separate institutions for Maori. It has even been suggested that some Maori are indifferent about this issue. Donna Awatere Huata thought recently:[133]

  > Maori had become too apathetic about politics, [...] Maori activists like myself have been so cynical about Parliament and the Crown. I think this cynicism has influenced another generation of Maori. The degree of apathy was shown in the recent low response to the Maori roll option.

  The Maori electoral option may not be the only separate structure that has not attracted all Maori's attention. Maori opinion is obviously divided on establishing and using separate systems.[134]
- The legal structure and in particular the Criminal Justice System has been targeted as an obvious example where a gross over-representation of Maori has been substantiated, and attributed to economic factors and to a bias against Maori, because of different philosophical approaches. There are three possible options: retain the

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[133] Above N113, 9.

[134] Eg the controversy surrounding the One-Tree-Hill incident and the offender's request to be tried before a Maori authority.

status quo, change the existing system to make the CJS more acceptable for Maori or Maori creating their own legal structure based on Maori values. Examples of indigenous populations in other jurisdictions were cited to demonstrate how separate legal structures can operate. In NZ, the call for an independent CJS for Maori has been heard since 1988 but was always largely rejected by the establishment. However, the Marae Justice model, cited in Chapter II, makes some promising steps in dealing with sexual abuse cases and sets a precedent for other separate legal structures. As long as Maori are more the objects than the subjects in a CJS which reflects little of their values and has insufficient Maori input, further separate legal concepts for Maori are likely to appear.

- Maori politics is another important area. Separatist tendencies are imminent in institutions such as the Maori Congress, Maori political parties and constant assertions for a Maori Parliament. The Maori electoral option shows a significant outcome. It appears that some Pakeha, having in mind the reduction of the number of seats in Parliament under MMP, do not want any more Maori seats to be created and they undertook therefore, little effort to conduct the campaign for the Maori electoral option in a fair way. It was certainly no example for the meaningful sharing of power between Pakeha and Maori, stipulated in the Treaty of Waitangi.
- Kohanga Reo and Kura Kaupapa Maori were instigated as a consequence and response to Pakeha educational concepts suppressing the Maori language and culture. Without Maori taking the initiative and notwithstanding Maori medium education, which is now available in some state schools, Te Reo Maori and with it a very important part of Maori culture could have been lost forever.
- A separate Maori Health Authority has been installed to protect and monitor Maori health. The established Pakeha health organisations have clearly failed Maori. Statistics show significant differences between Pakeha and Maori health. The MHA is a concept organised and tailored for the benefit of Maori, to improve health care for the Maori community.
- The reasons behind Maori urging for separate systems are important. Social-Economic factors were influential in the call for a separate CJS and the initiative for a separate Maori Health Authority. A Maori CJS would be based on a different philosophy and be a reaction to the realisation that the Pakeha legal system is still

monocultural and does not adequately provide for Maori needs. The Maori Council was formed to give Maori a say in Maori policy, the Maori Congress aims to strengthen the position of Maori, a Maori Parliament would make laws for Maori, a separate Maori Electoral Roll should help increase Maori representation, Maori political parties help to create Maori autonomy and separate schools for Maori are instrumental in protecting the Maori language. All these factors have one common origin; the Pakeha structures may cater well for Pakeha but they do not for Maori. They are essentially based on Pakeha ideas formulated from a Pakeha point of view with little Maori input.

- Most of the separatist concepts come from Maori, including the Health Authority, special schools, the NZ Maori Council, Congress, Parliament, political parties, and Marae Justice as an example of an alternative CJS. The only significant Government initiative to promote the welfare of Maori was the recent Maori Electoral Roll option, which according to many Maori had been incompetently organised and substantially underfunded.
- In two areas the Government was prepared to provide some funding to assist Maori; namely for the schools and the Maori Electoral Roll. Kohanga Reo and Kura Kaupapa Maori have clearly been assisted, but the funding could not ensure that sufficient trained Maori language teachers were available for the instruction of Maori children. The lack of funding for the Electoral Option is well documented.
- Some separate Maori organisations allow Pakeha and other racial groups to use their services. Two examples are the Kohanga Reo early childhood centres and the four Tainui Health clinics in the Hamilton area. Other separate Maori structures are exclusively for Maori eg Marae Justice, the Maori electoral roll, and the Maori Congress.
- While Maori have already built up some separate systems and work to obtain more, other ethnic groups of a substantial size may also wish for better representation in the legal, political, educational and health spheres. Pacific Islanders and Asians constitute large groups of NZ residents or citizens and the fact that they are not indigenous populations could prove immaterial, as with the Islamic community in the UK. The Pacific Islanders in particular may feel more comfortable within Maori rather than Pakeha structures. The call for modified separate

structures for the Pacific Island and Asian communities might be heard in the future, reflecting the multicultural status of NZ society.

- Further assertions of Maori independence can be noted. Two Maori women in Northland are currently circulating a petition, which calls for the birthday of the Maori Queen, Dame Te Ata-i-Rangikaahu to be recognised as a public holiday, replacing the British Queen Elizabeth's birthday.[135] Phil Amos, a former Labour cabinet minister, is campaigning for NZ to be renamed Aotearoa because "it was time for New Zealand's name to reflect its Pacific nationhood and bicultural status."[136] He considered the name Aotearoa a legal alternative to New Zealand and could not see any practical difficulties in introducing the name change.[137]
- The re-emergence of separatist Maori ideas in NZ has received a mixed reaction. Pakeha criticism comes from all different corners, indicating widespread fear and often revealing a lack of information. But some Pakeha are deeply concerned about separate institutions for Maori:[138]

> In a multiracial society ... all races ... must enjoy on equal terms all benefits - protection by the law, health, education, welfare ... But all races must give the same allegiance accepting that all are one before the law and no one race can have special privileges.

The MP for Matakana, Graeme Lee has recently introduced a Private Members Bill to protect the existing NZ flag and the national anthem. He now wishes to amend the Bill to also protect the name New Zealand, in reaction to the Phil Amos suggestion to change it to Aotearoa.[139] Some Pakeha will try hard to prevent any change that may be in the interest of Maori.

II FINAL CONCLUSIONS

However, the background of Maori claiming separate institutions is essential. Before Pakeha colonisation, Maori had their own legal, educational, health and political structures. Pakeha imposed British concepts on Maori, with the consequence of a

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[135] See "Maori Queen holiday urged" *The Evening Post*, 16 June 1994, 5.

[136] See "Amos pushes for name change to Aotearoa" *The Dominion*, 14 September 1994, 2.

[137] Above N136, 2.

[138] **Andrew Sharp** *Justice and the Maori: Maori claims in New Zealand Political Argument in the 1980s* (Oxford University Press, Auckland, 1990) 201-202.

[139] Above N136, 2.

legal structure and, as part of it, a Criminal Justice System that is totally alien to Maori culture, an education policy that almost bereaved Maori people of their language and identity, health services that helplessly overlooked how Maori became more and more sick, and a political organisation that conceded only token representation to Maori.

Separate Maori institutions may not be an attractive option for some New Zealanders (as feminist and women-only groups have upset a lot of men), but they might teach Pakeha to reshape existing fundamental institutions of society in consultation and partnership with Maori, so that they serve adequately the entire population and specifically this country's indigenous people. The historical and actual examination of separate Maori institutions shows clearly that separatist tendencies are broadly based on the frustration with the stubborn Pakeha refusal to share power with Maori and have not a consistent ideological basis. The separate structures for Maori identified in this paper can as well be regarded as products of separatism in the sense of devolution[140] as they could constitute the first step towards the creation of a separate Maori state.

If over one hundred and fifty years of Maori and Pakeha living together had only produced isolation and alienation between the two cultures, it would be very sad.

If Pakeha do not give up token gestures and succeed in time to revise all existing customs under the objective of cultural partnership and sharing of power, we might neglect or deliberately accept the risk of Aotearoa-New Zealand splitting up into different societies with separate institutions and eventually becoming two separate nations.

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[140] **William Safire** *Safire's Political Dictionary–An Enlarged, Up-to-Date Edition of the New Language of Politics* (Random House, New York, 1978) 169: **DEVOLUTION** transfer of power from a central government to a region or locality; sometimes used as a euphemism for secession or separation. In a general sense, *devolution* is a synonym for power sharing [...].

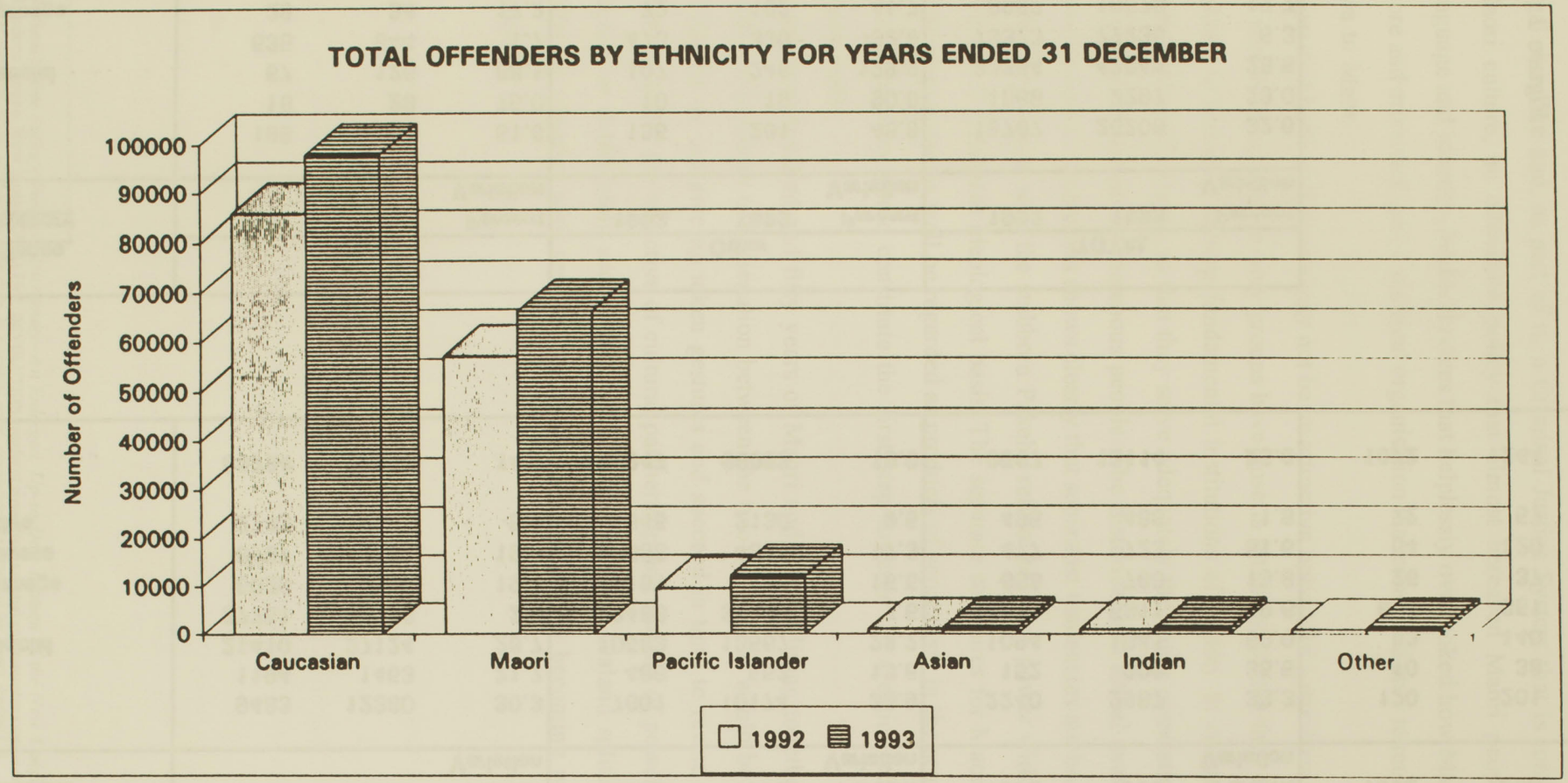
THE SEVEN MAIN OFFENCE CATEGORIES BY OFFENDERS' ETHNICITY FOR THE YEARS ENDED 31 DECEMBER 1992 AND 1993

Offence Category	Caucasian			Maori			Pacific Islander			Asian		
	1992	1993	Percent Variation	1992	1993	Percent Variation	1992	1993	Percent Variation	1992	1993	Percent Variation
Violence	9483	12360	30.3	7601	10174	33.9	2240	2987	33.3	120	201	67.5
Sexual	1194	1453	21.7	486	553	13.8	152	206	35.5	10	38	280.0
Drugs/Antisocial	21410	27124	26.7	10583	13567	28.2	1094	1641	50.0	93	140	50.5
Dishonesty	37751	38726	2.6	29483	31684	7.5	4441	5311	19.6	687	651	-5.2
Property Damage	5026	5987	19.1	3161	3650	15.5	668	760	13.8	26	37	42.3
Property Abuses	8187	9781	19.5	3688	4325	17.3	477	723	51.6	64	120	87.5
Administrative	2743	2583	-5.8	1945	2130	9.5	495	486	-1.8	72	57	-20.8
TOTAL	85794	98014	14.2	56947	66083	16.0	9567	12114	26.6	1072	1244	16.0

Offence Category	Indian			Other			TOTAL		
	1992	1993	Percent Variation	1992	1993	Percent Variation	1992	1993	Percent Variation
Violence	188	285	51.6	135	201	48.9	19767	26208	32.6
Sexual	16	28	75.0	10	19	90.0	1868	2297	23.0
Drugs/Antisocial	67	126	88.1	107	246	129.9	33354	42844	28.5
Dishonesty	535	544	1.7	476	320	-32.8	73373	77236	5.3
Property Damage	29	34	17.2	72	102	41.7	8982	10570	17.7
Property Abuses	65	126	93.8	69	205	197.1	12550	15280	21.8
Administrative	87	55	-36.8	80	64	-20.0	5422	5375	-0.9
TOTAL	987	1198	21.4	949	1157	21.9	155316	179810	15.8

APPENDIX I

Figure 2



APPENDIX I

Figure 3

Table 2: Convicted Cases, Type of Offence for Maori Offenders

1983 to 1992

Offence Type	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	Overall % Change
Violent	2,235	2,482	2,611	2,786	3,006	2,880	2,857	2,496	2,758	3,116	+39.4
Other Against Persons	540	575	673	770	762	554	477	372	350	408	-24.4
Property	8,148	8,272	8,331	8,820	8,748	8,341	8,048	7,724	8,453	8,887	+9.1
Involving Drugs	1,576	2,181	2,674	2,942	3,022	2,857	2,479	2,295	2,472	2,239	+42.1
Against Justice	1,082	1,126	1,123	1,249	1,329	1,635	1,985	1,858	1,996	2,000	+84.8
Good Order	1,692	1,982	2,233	2,546	2,259	2,040	1,853	1,402	1,420	1,404	-17.0
Total	15,273	16,618	17,645	19,113	19,126	18,307	17,699	16,147	17,449	18,054	+18.2

Table 3: Convicted Cases, Type of Offence for Non-Maori Offenders

1983 to 1992

Offence Type	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	Overall % Change
Violent	3,005	3,266	3,273	3,328	3,731	3,954	3,886	3,506	3,749	4,081	+35.8
Other Against Persons	870	964	950	1,130	1,113	982	850	682	695	696	-20.0
Property	12,000	11,977	11,949	12,453	12,717	12,828	12,124	10,852	11,849	11,952	+0.4
Involving Drugs	4,105	4,929	5,289	5,575	5,663	5,448	4,744	4,437	4,402	4,314	+5.1
Against Justice	1,276	1,311	1,303	1,299	1,454	1,672	2,075	2,265	2,342	2,410	+88.9
Good Order	3,263	3,339	3,329	3,508	3,490	3,161	2,758	2,154	2,359	2,129	-34.8
Total	24,519	25,786	26,093	27,293	28,168	28,045	26,437	23,896	25,396	25,582	+4.3

APPENDIX I *Figure 5*

Census of Prison Inmates 1993: Ethnicity of Sentenced Inmates

There were 3716 sentenced inmates in custody on the day of the prison census. Data on ethnic origin were obtained by personal interview with every inmate. Inmates were given a copy of the appropriate census form and asked to identify which ethnic origin group(s) they belonged to. Inmates could choose not to respond when approached. Six (5%) females and 658 (18%) males were either not interviewed or chose not to respond.

The proportion of male inmates who chose not to reply to this question was much higher than previously. This may be a reflection of the increase in the number and type of questions asked of each inmate. The question on ethnicity appeared at the end of the census form which asked questions about where inmates were living before they were imprisoned, how many children they had, who was looking after their children while they were in prison, their employment status, occupation and qualifications. The form used in the previous prison census included questions only on ethnicity, and the number of dependent children.

Table 13 presents the ethnic origin(s) identified by the remaining 111 female and 2986 male inmates. Almost all inmates identified only one ethnic origin.

Table 13: Ethnic Origin of Inmates as at 18.11.93

Ethnic Origin	Female		Male	
	Number	Percent	Number	Percent
NZ European	40	36.0	1134	38.0
NZ European/NZ Maori	2	1.8	83	2.8
NZ European/NZ Maori/Pacific Island	0	0.0	2	0.1
NZ European/Pacific Island	0	0.0	10	0.3
NZ European/Other	1	0.9	12	0.4
NZ European/NZ Maori/Other	0	0.0	5	0.2
NZ Maori	56	50.5	1258	42.1
NZ Maori/Pacific Island	1	0.9	13	0.4
NZ Maori/Pacific Island/Other	0	0.0	2	0.1
NZ Maori/Other	0	0.0	18	0.6
Pacific Island	6	5.4	283	9.5
Pacific Island/Other	0	0.0	7	0.2
Other	5	4.5	150	5.0
New Zealander/Kiwi	0	0.0	9	0.3
Total	111	100.0	2986	100.0

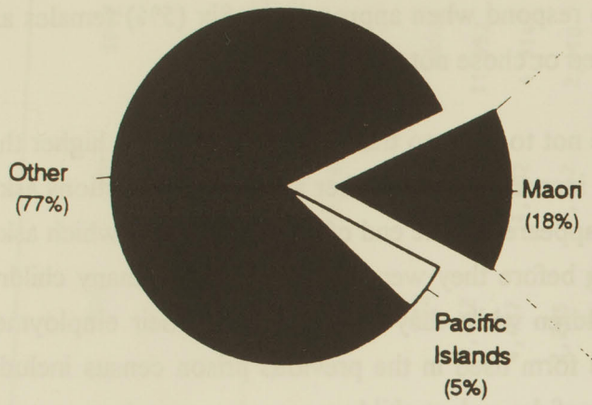
Pamela Southey
Research Officer
Department of Justice

November 1994

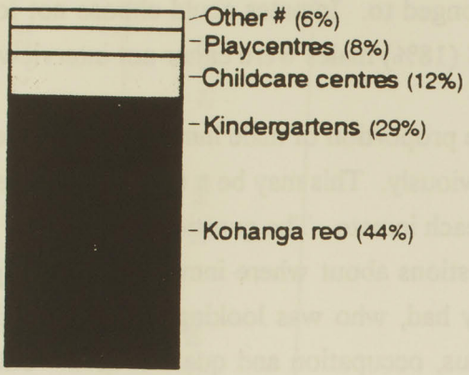
APPENDIX I *Figure 6*

Figure 2.3 **Maori enrolments in early childhood education, 1991**

(a) Maori children as a percentage of all children



(b) Distribution of Maori children across services



Includes: ECDU-funded playgroups (3.7%), pre-school classes at primary (1.6%), Correspondence School (0.2%) and Pacific Islands language groups (0.1%)

Kōhanga reo enrolments vary according to region, with areas with large Maori populations (Kahungunu, Tamaki Makaurau and Taitokerau) having the largest enrolments (Table 2.4).

Table 2.4 Te Kōhanga Reo enrolments by Te Kōhanga Reo district, 1991

Te Kōhanga Reo district	Number of Maori enrolments
Taitokerau	1164
Tamaki Makaurau	1201
Tainui	719
Waiariki	637
Tuwharetoa	237
Mataatua	617
Tauranga	270
Tairawhiti	772
Aotea	997
Kahungunu	1451
Te Ikaroa	815
Te Waipounamu	735
Total	9615

Source: National Kōhanga Reo Trust, 1991

Trends throughout the past decade suggest that the kōhanga reo movement will continue to grow anc expand.

APPENDIX I *Figure 7*

Table 2.7 Percentage of Maori children enrolled in selected early childhood education institutions by Ministry of Education district, 1991*

	Te Kōhanga Reo	Kindergarten	Playcentres	Childcare centres	ECDU-funded playgroups	Total percentage	Total numb
Northland	53.0	16.2	13.2	4.0	6.6	100.0	2197
Auckland	31.4	31.1	7.4	23.9	5.6	100.0	3821
Waikato	33.3	42.4	9.5	7.0	5.4	100.0	2158
Bay of Plenty	56.5	20.0	6.1	10.1	4.0	100.0	3115
Manawatu/Taranaki	43.5	34.6	6.8	11.4	2.2	100.0	2290
Hawkes Bay	62.1	21.7	4.3	7.3	1.8	100.0	3577
Wellington	36.5	36.9	7.6	15.3	0.9	100.0	2233
North Island	*45.8*	*28.2*	*7.5*	*12.0*	*3.8*	*100.0*	*19391*
Marlborough/ Nelson/Westland	-	39.4	19.9	22.9	17.4	100.0	236
Canterbury	-	55.9	10.5	31.1	1.3	100.0	774
Otago	-	40.9	20.2	17.9	10.7	100.0	252
Southland	-	78.5	14.7	1.9	..	100.0	265
South Island	*32.5*	*37.0*	*9.6*	*15.3*	*3.4*	*100.0*	*2262*
Total New Zealand	*44.3*	*29.1*	*7.7*	*12.3*	*3.7*	*100.0*	*21653*
Total enrolments	9615	6314	1664	2679	811	100.0	21705

Note:

* Due to different classification systems, regional boundaries defined by Te Kōhanga Reo Trust and the Early Childhood Development Unit may not be directly comparable with those defined by the Ministry of Education. The classification system used for the purpose of this analysis is set out in Appendix 3.

\- Not available. Note percentages have been calculated excluding kōhanga reo enrolments for these regions.

.. Otago and Southland data have been amalgamated.

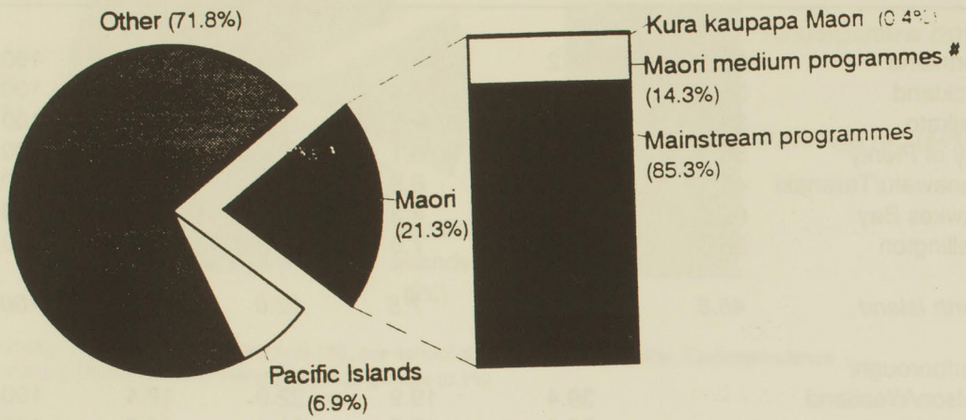
In the South Island, kindergartens were the single largest providers of early childhood services, catering for 37% of all Maori children. One third (33%) of all Maori children enrolled in early childhood education in the South Island were in kōhanga reo (kōhanga figures are not available for individual South Island districts). Childcare centres were the third-largest providers of early childhood education to Maori children in the South Island (15%), followed by playcentres (10%), and ECDU funded playgroups (3%).

APPENDIX I *Figure 8*

Figure 3.6 **Percentage of Maori primary school students enrolled in Maori medium programmes, 1991**

a) Maori children as a percentage of all primary school pupils

b) Distribution of Maori primary pupils across Maori medium and mainstream education programmes



Includes: Enrolments in bilingual schools and immersion and bilingual classes in mainstream schools

Maori medium education is less prevalent at the secondary school level. In total, almost 2,500 Maori teenagers were enrolled in bilingual units in secondary schools, representing some 7% of all Maori secondary school students.

Table 3.5 shows that in 1991, 251 primary schools offered a total of 515 classes in the Maori medium. In 104 of these classes, Maori was spoken as the language of instruction for more than 80% of the class time. In both primary and secondary classes, the most common degree of immersion was somewhere between 31% and 50% (Figure 3.7).

Table 3.5 Maori medium education in primary and secondary schools, 1991

	Number of classes	Number of schools	Number of students	Percentage of all schools
Primary	515	251	12,570	10.5
Secondary	106	54	2,467	13.7

APPENDIX II

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