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Insofar as it relates to offenders, does New Zealand's current criminal justice system respect Te Tiriti? How could it do so better?

Introduction

Nearly forty years have passed since the late Moana Jackson's *He Whaipaanga Hou* report and yet there is still serious concern for the state of New Zealand's criminal justice system (CJS), particularly for Māori.[1] Moana Jackson's 1987 report voiced the despair and anger Māori felt towards the CJS and proposed a transformational approach to justice in this country.[2] While all these years on the CJS has arguably changed for the better, Moana Jackson's vision of a system that honours Te Tiriti and respects the rights and interests of Māori is yet to be realised.

This essay has two intentions. The first is to set out how and why the current CJS fails to respect Te Tiriti. Part I reflects on the blanket imposition of a Eurocentric system which fails to honour the Crown's commitments to tangata whenua. Part II explores the implications of this imposition and the multi-generational social harm it has created, and continues to create, within Māori communities.

The second intention of this essay is to consider what change might look like. *He Whaipaanga Hou* is just one of many powerful calls for fundamental change. There is little that could be said in this essay that has not already been said regarding how transformational change should come about. Should the Government choose to listen, they have a bounty of resources at their fingertips. The purpose of Part III, therefore, is not to regurgitate the profound work that has previously been done. Rather, it is to explore a concept called The Circle of Mana as a transitional option. Part III is not a dismissal of the many calls for transformational change but the examination of a stepping stone in the journey towards the fundamental reform that is inevitably needed. The Circle of Mana, in this essay, is introduced

[1] Moana Jackson *He Whaipaanga Hou: The Māori and the Criminal Justice System, A New Perspective* (Department of Justice, Study Series 18, February 1987).
[2] Te Uepū Hāpai i Te Ora *Turuki! Turuki! Move Together! Transforming our Criminal Justice System* (Ministry of Justice, 2019).

as a model of practice that could act as a first chapter in the complete renovation of the criminal justice system. Its implementation would begin to transition our system's understanding of justice away from the punitive and towards the restorative and the rehabilitative.

Finally, it must be said that the CJS has been widely criticised for failing to deliver positive outcomes for offenders, victims, whānau and the wider community.[3] It is outside the scope of this essay to discuss how the CJS's failure to honour Te Tiriti impacts each of these groups. The focus here will be on offenders only. Similarly, the CJS is a mesh of different services and institutions. When specificity is needed, certain institutions will be highlighted but, in general, when this essay discusses the CJS as a singular unit, it is collectively referring to the police, the judiciary and Corrections.

Part I – the status quo as a breach of Te Tiriti

Following the signing of the treaties in 1840, British law began to be imported into New Zealand. While this started right away with Hobson's declaration of British sovereignty over the country in May 1840 and the NSW Continuance Act 1840, the next decade and a half saw an ad hoc legal system which often blended colonial law and tikanga when disputes involved Māori. This all changed with the passing of the English Laws Act 1858 which retrospectively enforced all English law in New Zealand as of January 1840.

Alongside legislation, there has been consistent judicial prioritisation of the British common law at the expense of Māori legal processes and institutions.[4] The end result has been a legal system and a CJS that is culturally biased, reflecting the interests of the settler State.[5] The focus of Part I is to explore how the imposition of the CJS, and the subjugation of Māori under this system, fails to respect the Crown's commitments under Te Tiriti.

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[3] Juan Tauri "Indigenous perspectives and experiences: Māori and the criminal justice system" in Reece Walters and Trevor Bradley (eds) *Introduction to Criminological Thought* (Pearson, Australia, 2005).
[4] Moana Jackson "Criminality and the Exclusion of Māori" (1990) 20 VUWLR 23.
[5] Sam McMullan "Māori Self-Determination and the Pākehā Criminal Justice Process: The Missing Link" (2011) 10 Indigenous Law Journal 73 at 74.

Failure to recognise tino rangatiratanga over social control

Article II of Te Tiriti confirms and protects Māori authority over their lands and people, including the traditional institutions used for social control.[6] While the Crown were to provide control over Pākehā, they were never transferred the right to social control or coercion over Māori.[7] The subsuming of Māori into the CJS seems to go beyond the scope of the Crown's powers set out in Te Tiriti.[8] Even if the argument were to be made that, in signing Te Tiriti, rangatira were ceding their right to social control, the Crown's claim to a monopoly on dispute resolution processes or coercive power over Māori is still unworkable. Sam McMullan, drawing on the work of Khylee Quince, argues that rangatira did not necessarily hold any relevant coercive power, per se, over others in their hapū or iwi.[9] Within tikanga Māori, dispute resolution is done through consensus. It follows that even under the English version of the Treaty, where the Māori signatories transferred "all the rights and powers of sovereignty which the said Confederation of Individual Chiefs respectively exercise or possess"[10], any absolute right to coercive power or a monopoly of dispute resolution processes could never have been transferred.[11] A "residual sovereignty" survives in the hands of the Māori collective to maintain social control and resolve disputes.[12] At the most it was a "territorial sovereignty" that was transferred to the Crown rather than a monopoly on coercive power.[13]

When the legitimacy of the Crown's claim to a monopoly on coercive power and dispute resolution is analysed, it seems clear that the current state of affairs concerning the CJS is deeply problematic. The current system fails to recognise the legitimate claim Māori have to continue to use traditional systems of resolution over and above the colonial system that has been imposed upon them. Clearly there has been a failure to respect this right that was protected, or at least withheld from the Crown, in Te Tiriti. Instead, the Treaty has been

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[6] Tauri, above n 3.
[7] Jackson, above n 4.
[8] McMullan, above n 5.
[9] McMullan, above n 5; Kyhlee Quince "Māori Disputes and Their Resolution" in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Melbourne, 2007) 256.
[10] Treaty of Waitangi, Article I.
[11] McMullan, above n 5.
[12] McMullan, above n 5, at 87.
[13] Sian Elias "The Treaty of Waitangi and Separation of Powers in New Zealand" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 206 at 213.

weaponised to deny Māori participation in the development of the CJS to the exclusion of Māori values.[14] Clearly in this country, "one law for all means one Pākeha law for all."[15]

Failure to recognise Māori conflict resolution processes as taonga

Article II of Te Tiriti confirmed and secured the Māori signatories tino rangatiratanga over taonga katoa. Māori are guaranteed a form of self-determination over taonga.[16] Taonga is a broad term but can include cultural practices. The Treaty imposes upon the Crown an obligation to protect taonga if they are in a vulnerable state.[17] In the case of *New Zealand Māori Council v Attorney-General,* Lord Woolf for the Privy Council advised that when taonga, in this case it was Te Reo Māori, are in a vulnerable state, the Crown is required to take steps to protect them.[18]

Traditional Māori practices for social control and dispute resolution derive both from tikanga Māori and matauranga Māori.[19] Both of these sources are well established taonga, both in Te Ao Māori and the common law.[20] In turn, it can be inferred that these traditional practices are taonga that, if vulnerable, the Crown are obligated to protect. As Moana Jackson points out, the cultural traditions and philosophies that give rise to New Zealand's CJS consistently reject Māori participation in defining what the law is and entirely dismiss the idea that Māori law could meaningfully contribute to the system.[21] In other words, Māori justice practices and institutions are, no doubt, in a vulnerable state. The CJS refuses to recognise them in any meaningful way, heedless of the fact such recognition is required under Te Tiriti.[22] Not only have these taonga been constitutionally neglected but Māori themselves have essentially been barred from utilising them unless they wish to be "dually accountable".[23] The imposition of British law has completely displaced Māori justice practices to the point where they exist only in localised and unofficial spaces. The Crown has not only allowed this to happen but would accept no other alternative under the guise of the rule of law. A distinct Māori normative system is arguably guaranteed under Te Tiriti which is widely understood as a

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[14] Jackson, above n 4.
[15] Jackson, above n 4, at 26
[16] McMullan, above n 5.
[17] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (NZPC).
[18] *New Zealand Māori Council v Attorney-General*, above n 17.
[19] McMullan, above n 5.
[20] Waitangi Tribunal *The Reo Māori Report* (Wai 11, 1986).
[21] Jackson, above n 4.
[22] Jackson, above n 4.
[23] McMullan, above n 5, at 80.

constitutional document. In spite of this, NZ's constitutional understandings have been developed in such a way that any alternative system must be rejected on the basis of it being unconstitutional. Again, this demonstrates how the current legal system in general, particularly the CJS, fails to respect Te Tiriti.

Following Lord Woolf's obiter, it seems the Crown has an obligation to protect Māori practices of social control and dispute resolution. It is not just that the Crown cannot act in ways which discriminate against these practices, but that the Crown has a duty of active protection. The Crown is under an obligation to sit down with Māori and create a framework to honour, protect and expand the practice of these taonga.

Part II – the consequences

It is clear that, at least at a theoretical level, the imposition of the CJS on Māori is a breach of Te Tiriti. It would be to the detriment of any analysis of this issue to solely focus on theory though. Te Tiriti breaches have real life consequences for whānau, hapū and iwi, and wider society more generally. Few breaches have created the kind of intergenerational social harm and trauma that the imposition of the CJS on Māori has.

The statistics surrounding the disproportionate rates of Māori involvement in the CJS are well known. Well over half of prisoners are Māori despite making up only 16% of the population.[24] The male prison population is around 50% Māori while Māori women make up nearly 60% of the female prison population.[25] Māori are much more likely to be reconvicted and reimprisoned than the general population.[26] Māori fare worse in their interactions with Police, with the courts and Corrections than the general population.[27] In isolation, however, the statistics fail to recognise the deep harm that is being produced and perpetuated by the system. What the numbers do not to demonstrate is how the Crown's failure to recognise

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[24] Department of Corrections "Prison facts and statistics – June 2023" (30 June 2023) https://www.corrections.govt.nz/resources/statistics/quarterly_prison_statistics/prison_stats_june_2023.
[25] Department of Corrections "Inmate Ethnicity by Institution" (2023) https://www.corrections.govt.nz/resources/statistics/corrections-volumes-report/past-census-of-prison-inmates-and-home-detainees/census-of-prison-inmates-and-home-detainees-2003/2-inmate-numbers-by-institution/2.4-inmate-ethnicity-by-institution.
[26] Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017).
[27] Khylee Quince "Māori and the Criminal Justice System in New Zealand" in Julie Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Auckland, 2007)

Māori justice practices and their imposition of an alien system onto Māori does more than just land more Māori behind bars.

Central to Māori understandings of justice and conflict resolution is the prioritisation of addressing the social harm connected with the wrongdoing.[28] The concept of restoring balance through utu is central to these processes.[29] The focus is on repairing relationships while also holding accountable those deemed guilty of the hara; not on the punishment itself but on the reparation.[30] Although these processes are by no means dead and gone, they have certainly been displaced by the CJS. A system where punishment is an end in and of itself. The State assumes the place of the victim because reparation is not the goal, deterrence and punishment are. This system does nothing for a people who prioritise reconciliation. Offenders are isolated from their communities in the name of public safety with very little regard for their rehabilitative needs.[31] Opportunity for the restoration of relationships between the offender and their whānau and the offender and victim/whānau in a timely manner is scarce. There is no doubt the CJS' ignorance of Māori understandings of justice and the need for reconciliation has contributed to the disproportionately high rates of Māori reoffending and reincarceration. The harm created by the CJS is not isolated to the offender, it has intergenerational consequences for whānau and wider communities.[32] This harm is a contributing factor in the perpetuation of criminality within these whānau and communities.

There have been developments to introduce justice practices that emulate, or at least try to emulate, Māori dispute resolution processes such as family group conferences and restorative justice meetings. However, these developments have been criticised for being ineffective and for co-opting tikanga Māori, perpetuating the colonising effect of the CJS on Māori.[33] In yet another breach of Te Tiriti, there has been little consultation with Māori despite this issue being an absolute priority for Māori for the last 60 years or more.[34]

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[28] Quince, above n 26.
[29] Quince, above n 26.
[30] Quince, above n 26.
[31] Kim McGregor *Te Tangi o te Manawanui: Recommendations for Reform* (Chief Victims Advisor to Government, September 2019).
[32] Te Uepū Hāpai i Te Ora, above n 2.
[33] Tauri, above n 3.
[34] McMullan, above n 5.

Part III – A way forward

It is clear that transformative change is needed in the criminal justice space. Inter alia it fails to align with the Crown's Te Tiriti commitments to tangata whenua. Moana Jackson's seminal work gave voice to these concerns nearly 40 years ago but, despite *Whaipaanga Hou* alongside a raft of other landmark reports and reviews, we persist with a broken system and expect different outcomes.[35] All of these reports have essentially called for the same thing: preventing harm, restoring individuals and communities, and tackling the underlying causes of criminality.[36] *Turuki! Turuki! Move together!* calls for a "long-term commitment to transformation throughout the justice system", which will require "a new vision [and] stronger values".[37] Clearly, part of this reform must be the Crown honouring its commitment of tino rangatiratanga for Māori, restoring authority over justice services back to Māori communities.[38] This path is a long and complex one though, it requires long-term commitments and a strong vision for the future. One question, then, is what can be done in the meantime?

The Circle of Mana was developed by a Youth Work educator called Praxis in collaboration with local Māori.[39] It was borrowed from a Canadian youth development model called The Circle of Courage which combines Indigenous child-rearing philosophy with contemporary resilience research.[40] This model encapsulates four universal growth needs: belonging, mastery, independence and generosity.[41] A striking feature of this model is how closely it embodies the principles and recommendations set out in the *Turuki! Turuki!* report, where providing dignity and healing, and restoring mana are envisaged as being the defining features of an effective CJS. A key criticism of the current system is its Eurocentric nature which refuses to recognise Māori concepts of justice and diminishes the mana and dignity of those caught up in it.[42] This essay proposes that The Circle of Mana be utilised to guide justice practices and decision-making processes as the initial step towards fundamental

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[35] Te Uepū Hāpai i Te Ora, above n 2.
[36] Te Uepū Hāpai i Te Ora, above n 2.
[37] At 5.
[38] Te Uepū Hāpai i Te Ora, above n 2.
[39] Youth Development Champions Project "Circle of Mana" (5 September 2022) <https://www.championsproject.nz/ideas-in-action/circle-of-mana>.
[40] Larry Brendtro, Martin Brokenleg and Steve Van Bockern Reclaiming Youth at Risk: Our Hope for the Future (2nd ed, Solution Tree [formerly National Education Service], Canada, 2002).
[41] Youth Development Champions Project, above n 38.
[42] Te Uepū Hāpai i Te Ora, above n 2.

transformation. While this model has applications throughout the CJS in its entirety, it would be most effective when applied in the Courts and, even more so, at Corrections. Once convicted, if the Court's focus was to restore someone's mana, rather than just impose the relevant penalty, it would begin to transform how justice is doled out in this country. Likewise, if Corrections saw its primary role as nurturing and restoring mana, and based its practice off this new understanding, prisons would look radically different. If people were to finish their sentence with meaningful experiences of belonging, mastery, independence and generosity, the path forward to success and contribution to society would be much clearer. This has nothing to do with being softer on offenders. It has everything to do with understanding that we cannot keep making small changes to our broken CJS and expect transformed results. What is required is creative thinking, significant amounts of investment and learning from places that do it better than us. If these changes are seen as being soft on crime then so be it.

As a framework to guide good practice, The Circle sees human flourishing as experiencing the four elements. The remainder of this essay will discuss the respective elements and how they can contribute to winding back the destructive consequences of the current system, particularly for Māori.

Belonging

The Circle recognises that it is within a community that one's sense of significance and identity is established and maintained. Prison removes people from their community, colonising their sense of belonging and significance. This is particularly destructive for Māori where whakapapa and whanaunatanga are so important. A more effective CJS is one that reinforces an offender's sense of belonging rather than subtracts from it.

Many Māori offenders have limited or severed connections to their hapū and iwi. If Corrections were to use The Circle of Mana as a guiding model to inform their justice practices, reconnecting offenders with people of standing within their whānau and hapū would be prioritised. While Corrections has begun to recognise the need to connect Māori inmates with their culture, generally through tikanga and whakapapa workshops, these processes are often generalised, minimal in scope and unavailable to remand prisoners. If restoring a sense of belonging was central to how NZ does criminal justice, then far more importance would be placed on these services. Their design would be ramped up to enable

individual inmates to not only understand what it is to be Māori, but what it is to belong to their hapū and iwi.

Mastery

Central to one's own sense of mana and dignity is experiences of success. The CJS minimises opportunities to such experiences. Not only that but it colonises an offender's future by undermining self-confidence and limiting future employability.[43] While for many there are opportunities in prison to learn new skills, no one would say that facilitating experiences of mastery and success is a priority for Corrections. A key issue in prisons is that inmates have little, or feel that they have little, to contribute to society. Prison does nothing to address this. If anything, it makes things worse.

The notion of mastery has, for a long time, been central to Norway's rehabilitative approach to incarceration.[44] Formal education, work courses, vocational training and even tertiary courses are available to those inside.[45] Norway sees these services as being central to ensuring a successful return to society. There is an understanding that providing opportunities for mastery is beneficial not only to the individual inmates but to their families and wider society. A sign of a successful CJS, then, is one where offenders can look to the future and say, "I am capable of success."[46]

Independence and responsibility

The Circle sees experiencing autonomy and understanding responsibility as central to one's own sense of dignity. Through its reliance on prisons, the denial of independence and autonomy is quintessential of the CJS. Experiencing punishment is essentially the only expression of responsibility the system knows. The fact that our recidivism rates are so high is surely evidence that this mentality does not work. One of the key problems at the moment is the clunkiness of the transition out of incarceration where inmates go from 0%

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[43] Jarrod Gilbert, Ben Elley and Trevor Best Second Chances: A report on employing offenders in Canterbury (UC Research Repository, 2019).
[44] Christin Tønseth and Ragnhild Bergsland "Prison education in Norway – The importance for work and life after release" (2019) 6 Cogent Education.
[45] Tønseth and Ragnhild, above n 44.
[46] Manitoba Education "Circle of Courage" – reproduced from Reclaiming Youth Network "The Circle of Courage Philosophy" (13 July 2007); Martin Brokenleg "First Nations Principles of Learning" presented at the Truth and Reconciliation Commission hearings (17 May 2013).

responsibility and autonomy inside to 100% post-release. Although it is slowly improving, someone can still leave prison without a bank account or a driver's license or any kind of plan going forward.

On top of this, two thirds of inmates are parents.[47] The idea that some of these parents are expected to come out of prison, where they have not needed to be responsible for anyone else, and return to being full time carers of their children with little to no support is unreasonable. The expectation that most people can deal with that kind of stress and pressure is unrealistic.

Prison, then, should not be a place where responsibility and autonomy are removed as some kind of punishment. That mentality only creates more harm and further offending. Were the Circle of Mana to play a central role in understanding the needs of offenders, it would be a priority for the courts and Corrections to find ways to support and enhance an offender's capacity for autonomy and responsibility.

Generosity

The final element in The Circle is the ability to give back to one's own community. This element not only demonstrates the flourishing of the other elements but also answers the question of why they are so important. Currently, experiences of the CJS only reinforce the public rhetoric of offenders being a burden to society and that we would be better off without them. Offenders are further isolated, their chances of successful reintegration diminished. Applying the Circle of Mana, it should be a priority of the CJS to understand what individual offenders can offer their communities and how they can be supported towards fulfilling these contributions. It is an understanding that one can positively contribute to their community which gives life purpose and value. The CJS cannot hope to reform offenders without strengthening an offender's belief that they have something to offer.

Conclusions

[47] Social Policy Evaluation and Research Unit "Improving outcomes for children with a parent in prison" (June 2015) <https://thehub.swa.govt.nz/assets/Uploads/What-Works-Children-of-Prisoners-190615- WEB.pdf>

For nearly two centuries' Māori have challenged different aspects of New Zealand's legal system as failing to recognise the Crown's commitments under Te Tiriti.[48] The CJS has been at the heart of many of these challenges. Although positive changes have been made over time, the failure to recognise Māori self-determination concerning justice matters means these criticisms are as valid today as the day there were first voiced. This essay has argued that the current CJS, insofar as it pertains to offenders, fails to respect Te Tiriti. It has demonstrated that these failures have had a profoundly negative effect on Māori, one that will leave scars for generations.

This essay also considered what can be done to address these concerns. Instead of revising what has already been said, this essay introduced The Circle of Mana as a guiding model which might act as a stepping stone in the journey towards transformative change. This model encapsulates how mana and dignity, which is lacking in the current system, can be recognised and reinforced. Alone, the introduction of The Circle as a model to guide justice practices at every level would drastically improve the efficacy and humanity of the system. However, combined with the rich body of work that has been calling for change for decades, it could help bring about the reimagining of the CJS that so desperately needs to occur.

[48] Jackson, above n 4.