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INDIGENOUS PEOPLES' ACCESS TO JUSTICE, INCLUDING TRUTH AND RECONCILIATION PROCESSES

INSTITUTE FOR THE STUDY OF HUMAN RIGHTS
COLUMBIA UNIVERSITY

Wilton Littlechild and Elsa Stamatopoulou (Eds.)

INDIGENOUS PEOPLES' ACCESS TO JUSTICE, INCLUDING TRUTH AND RECONCILIATION PROCESSES

Institute for the Study of Human Rights

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INDIGENOUS CHILDREN AND YOUTH: THE CASE OF MARAE[1] COURTS IN AOTEAROA/NEW ZEALAND

Valmaine Toki

Background

Marae[2]-based Courts are an initiative of the Judiciary that builds on existing programmes for offenders such as Te Whanau Awhina, and informed by the Koori Courts in Australia.[3] This is the first time that a New Zealand court has conducted criminal cases on a Marae within the jurisdiction of the Youth Court. Most offenders referred to the programme are Maori[4] and the process incorporates Maori tikanga (Maori customs).

The Judges of Nga Kooti Rangatahi[5] consider that 'rangatahi (youth) offending is related to lack of self-esteem, a confused sense of self identity and a strong sense of resentment which in turn leads to anger and ultimately leads to offending'.[6]

To modify the behavior of an offender one needs to understand how they feel. Emotions such as resentment, anger, greed, confusion and hate often drive youth offending.[7] The most effective way to encourage this change is to place the offender in a community of People who understand and recognise his or her feelings, and who also have the

1 This article builds on text already published in the Commonwealth Law Bulletin, *Tikanga Maori – a Constitutional Right: A Case Study*, December 2013. See glossary of terms at the end of the article.
2 Although the term Marae, in contemporary times, is the term for the traditional meeting house, the term more appropriately refers to the area in front of the whare nui, big house or traditional meeting house.
3 Evaluation of the early outcomes of Nga Kooti Rangatahi. Submitted to the Ministry of Justice 17 December 2012, p 8. Available also http://www.justice.govt.nz/publications/global-publications/r/rangatahi-court-evaluation-of-the-early-outcomes-of-te-kooti-rangatahi/publication/at_download/file.
4 Maori are the Indigenous Peoples of Aotearoa/New Zealand.
5 The term Nga Kooti Rangatahi refers to the Youth Court process that is held on the Marae.
6 Report above n 3, 8–9.
7 See comments by Judge Bidois as cited in Report above n 3, 25.

power and respect to alter those feelings.[8] According to Judge Bidois, 'there needs to be inclusion rather than exclusion to effect change. This process can be achieved on a Marae.'

The ability to reconnect the offender with their identity and whanau (extended family) is seen to contribute positively to the success of the process. The ultimate outcome for the Judge is 'for the rangatahi (youth) to be empowered to achieve their potential'.[9] Challenges including adequate resourcing and continuing support by the whanau (extended family) and wider community will, however, influence the outcome.

It is acknowledged that the support of the community is paramount. Organisations such as the 'Courts, Ministry of Justice, Child Youth and Family, Police Youth Services, Iwi (tribe) Liaison Officers, Iwi (tribe) Social Services, Programme Providers, Youth Advocates and Lay Advocates are all critical to this initiative materializing to provide our rangatahi (youth) and their whanau (extended family) the opportunity to have cases heard in a more appropriate way and with the opportunity for greater rangatahi (youth), whanau (extended family) and community engagement and involvement'.[10]

Process[11]

The Marae process is open to all, providing a possibility that non-Maori can also seek to be heard in this process. Although Nga Kooti Rangatahi is specifically to support tikanga Maori (Maori customs) Nga Kooti Rangatahi is available to any young person, not limited to Maori. There is no mandatory requirement for young People to be dealt with on the Marae. If this option is not sought, the normal Youth Court process applies.

Prior to transfer to the Marae, the process adheres to the normal Youth Court procedures. Upon appearance at the Youth Court, the rangatahi (youth) is assigned an advocate and the case is remanded. The charge is usually not denied or admitted in the normal manner in the Youth Court. If the charge is admitted a lay advocate is still appointed.

8 *Ibid.*
9 Report above n 3, 9.
10 Report above n 3, 74.
11 I am grateful for the advice of Judge Heemi Taumaunu in writing this section.

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A Family Group Conference ("FGC") is convened and held in the normal manner where the young person who has offended and their family, victim, agencies, social worker and advocate discuss and approve a FGC plan. The aim of the plan is to encourage the young person to take accountability for his/her actions, find practical ways to rectify the situation, ascertain why he/she offended and how amends can be reached.[12] The Marae hearings are designed to monitor the young person's performance of the FGC plan and also to sentence the young person on completion of the FGC plan. If the victim disagrees with the rangatahi (youth) referral to Nga Kooti Rangatahi, the rangatahi (youth) will not be referred. The presiding Judge after considering the FGC plan will make the final decision on the eligibility of the rangatahi (youth) to have the case monitored by Nga Kooti Rangatahi. If the referral is accepted the rangatahi (youth) is remanded until the next sitting date. Whilst on remand the rangatahi (youth) is encouraged to learn their whakapapa (genealogy) and pepeha (oral speech denoting your genealogy) to inform the Judge when they appear.[13]

In accordance with Maori protocol, the Marae hearings begin with a powhiri (a formal Maori welcome) that is initiated on the morning of the court sitting. A kuia (respected Maori female elder) stands outside the whare nui (traditional meeting house) and calls the judge, court staff, lawyers, social workers, lay advocates, respected elders, young People appearing and their families, onto the Marae. The powhiri (a formal Maori welcome) is supported by the tangata whenua (local People).

A kuia (respected Maori female elder) from the visitor group will respond to the call of welcome. All those present then move inside the whare nui (traditional meeting house) where formal speeches are conducted. Once the formalities are completed, everyone proceeds to the dining hall for a cup of tea.

The court then convenes and the proceedings commence inside the whare nui (traditional meeting house). The kaumatua (respected Maori elder) who also assists in the court process then recites a karakia (a prayer). When each case is called, the kaumatua (respected Maori elder),

12 Report above n 3, p 21.
13 *Ibid.*

who sits next to the judge, will give a specific speech of welcome to the young person and his/her family.

The young person is encouraged to respond to the welcome by saying a mihi (a Maori speech). This is aimed at re-establishing the young person in their identity as a Maori. The young person and his or her family are invited to participate fully in the hearing, as are all of the professionals. Together with the whanau (extended family), hapu (sub-tribes) and iwi (tribes), solutions are actively sought with the co-operation of agencies.

Additional applicable principles include holding the young person accountable, ensuring the victim's issues and interests are recognised, and addressing the underlying causes of the offending behaviour. The ultimate goal is to keep communities safer by reducing recidivism.

The Judge will then sum up the proceeding noting, after consultation, the next date for appearance of the rangatahi (youth). At the completion of the hearing whanau (extended family) members are invited to address the rangatahi (youth).

The hearing concludes with the kaumatua (respected Maori elder) and judge participating in a hongi (a pressing of noses) with the young person and their families and finally a karakia (prayer). This is in accordance with Maori protocol.

Positioning the process in the whare nui (traditional meeting house) on the Marae is a positive step; it provides an environment that seeks to reconnect the offender with his/her culture and community. The implementation of the Maori language, tikanga Maori (Maori customs) into the court process further consolidates this reconnection. Encouraging the offender to be accountable and addressing the underlying reasons for offending also contribute to the positive nature of Marae based courts. The environment of the Marae has engendered an ability for rangatahi (youth) to engage, one rangatahi (youth) notes:[14]

"It's easier to stand up in court [be]cause you feel like everyone is your family. You're able to let it out. Go hard—let it out. Youth Court is a cold court. The judges and lawyers—everyone is more subdued and long faced. We all share kai (food) here. It makes a huge difference to how you feel. A far better process. When we hongi (a pressing of noses) we are connecting our mana (power or prestige) to one another. It's less

14 Report above n 3, 36.

tense. Obviously we are willing to speak a bit freer, more comfortable. (Male rangatahi/youth)."

It should be applauded that the Criminal Justice System is seeking a creative path to assist Maori youth offending. However tikanga Maori (Maori customs) and the realm of Te Ao Maori (Maori world) is more complex than this process currently adopted.

For Maori, the legal system is sourced from Te Ao Maori, the Maori World,[15] which is a complex three dimensional philosophy. Cosmology and the creation accounts are intrinsic to Te Ao Maori. Cosmology establishes the relationships, or whakapapa (genealogy), between People, the environment and the spiritual world. The dynamic between these elements underpins a mechanism similar to that of a social constitution. Translating these concepts into a non-Maori criminal justice system is problematic.

To retain the integrity of tikanga Maori (Maori customs) and Te Ao Maori, these should not be subject to codification or interpretation by the legal profession. First, there is the danger of translation, which invariably results in some redefinition of the original concept or term. In general, the incorporation of tikanga (Maori customs) into Pakeha law implies a degree of acceptance and understanding of the tikanga (Maori customs), which may not always be the case.

Second, the isolation of one concept or term from tikanga (Maori customs) is an unnatural separation of the concept from its tikanga (Maori customs) roots, its philosophical underpinnings and cultural constructs. Third, the codification or placement of tikanga (Maori customs) within mainstream legislation is one consideration, amongst many, that is also unnatural and degrading to tikanga (Maori customs).

Case Study[16]

"Tagger has to learn his mihi (speech of greeting).

A 14-YEAR-OLD who has admitted a charge of graffiti crime stands before Judge Heemi Taumaunu.

15 Although Te Ao Maori is often referred to as the Maori worldview, Te Ao Maori more correctly is the Maori World.

16 Marty Sharp, *Rangatahi Courts: A quiet revolution in teen justice.* (Newswire, New Zealand, October 2011). http://newswirenz.wordpress.com.

"Have you got your mihi (speech of greeting) ready to go today?" the judge asks.

"No."

"I'm sure we can help your maunga (mountain)?"

"My what?"

"Your maunga (mountain)."

"Not too sure."

"You knew it last time. Have you forgotten it?", the judge says, referring to the boy's previous appearance on the same charge in May.

"Yep."

"What's the name of your marae?"

"I dunno."

"Have you ever been to it?"

"Nah."

Kaumatua (respected Maori elder) Denis Hansen, who sits alongside the judge, stands and recites the entire mihi (speech of greeting), naming the boy's mountain, river, marae, iwi (tribe) and hapu (sub-tribe).

Then he tells the boy: "Lunch is at one o'clock. Don't go away after that. You're going to have a bit of whakapapa (genealogy) education."

"Matua will teach you your mihi (speech of greeting)," the judge says. "After that you can go away. We're going to see a lot of improvement next time. We expect that from you. I expect you to be able to say the mihi (speech of greeting), the kaumatua (respected Maori elder) just said to you," the judge says.

He says that the boy, who is Ngati Kahu, needs more monitoring.

The boy's advocate, Steve Trent, says he has improved attendance of his alternative education course, turning up 80 per cent of the time.

This boy had virtually zero attendance a few months ago. The judge says he expects 100 per cent attendance and asks why this is not happening. The boy says he has lost his bus pass.

When the boy first appeared he was sentenced to 80 hours of community work, and was ordered to attend courses on life skills as well as alternative education. He was also put under a 24-hour curfew.

It transpired that he had not been completing his community work.

After a brief conversation involving elders, a social worker, and the judge, a kaumatua (respected Maori elder) volunteers to collect the boy

from his home each weekend to bring him to the marae where he can carry out his community work. The kaumatua (respected Maori elder) says this will also provide an opportunity for him to teach the boy his mihi (speech of greeting).

Judge Taumaunu is pleased with that and adds that it has been three months since the boy last offended. He remands him on bail to reappear on October 6."

Marae-Based Courts—Evaluation

Offences before the Marae Based Court are confined to those perpetrated by youth. While the Rangatahi Court process is focused on young Maori, both Maori and non-Maori are eligible. This is an attempt to overcome the perception that separate courts, separate procedures or special treatment have been instituted.

A recent Evaluation Report of Nga Kooti Rangatahi noted the positive outcomes rangatahi (youth) were experiencing as a result of engaging and attending Nga Kooti Rangatahi.[17] These positive experiences were also echoed by the youth justice professionals and manifest in the high level of attendance by the rangatahi (youth) and support whanau (extended family) who felt welcomed and respected.[18] The ability for the rangatahi (youth) to deliver their pepeha (oral speech denoting your genealogy) and feel connected to their culture imbued a sense of pride and achievement. The flow on effect was that the rangatahi (youth) understood the court process showing improved behavior and positive attitude, taking responsibility for their offending and its impact.

Notwithstanding the recognition of tikanga (Maori customs), the underlying principle that applies to this approach is not tikanga (Maori customs), but legislative, to honour and apply the objects and principles in the *Children and Young Persons Act*. Although this project represents an attempt to incorporate Maori tikanga (Maori customs) with the law, it is not designed to abandon the law and start a tikanga-based Court. That is beyond the jurisdiction of the Court.

17 Report above n. 3, 9.
18 Report above n. 3, 10.

The implementation of tikanga (Maori customs), under the auspices of legislation, questions the robust nature of any tikanga-based outcome. Further, this will question the degree of respect any offender or whanau (extended family) will have for such an outcome if the kawa (protocol) of tikanga (Maori customs) is not one to which they adhere. At this stage it is not clear whether this has been addressed.

It is difficult to overlay two different worldviews, that of Te Ao Maori over Te Ao Pakeha (Pakeha world). There are inherent problems, such as that of the urban Maori, who do not identify with tikanga (Maori customs) or the notion of the collective and the question of where they fit.[19] Other questions arising are: "Which kawa (protocol) is to be adopted during the Marae Court Process? What if the kawa (protocol) of the offender does not align with the kawa (protocol) of the Marae Court Process? If the process is to be a Marae process then surely a kaumatua (respected Maori elder) rather than a Judge should lead this process? For a person, who does not affiliate with the Marae or the offender, to lead the process is a slight on the mana (power or prestige) of the kaumatua (respected Maori elder) and the whanau (extended family)"

The kaumatua (respected Maori elder) is connected to the offender through whakapapa (genealogy). Ultimately it is the kaumatua (respected Maori elder) who holds the responsibility for the offender. It is difficult to reconcile how, in a Marae Court, the Judge can be bestowed the same status as a kaumatua (respected Maori elder), at times usurping that role, when there is no whakapapa (genealogy) connection or same sense of responsibility.

In small communities, this is even more pronounced. Kuia (respected Maori female elder) and kaumatua (respected Maori elder) are often intimately linked to the offender and a Judge is effectively viewed as an outsider attracting a lesser standing. In this instance, it is difficult for the offender to respect the Judge since the offender perceives their kuia (respected Maori female elder) or kaumatua (respected Maori elder) as having the mana (power or prestige), not the Judge. Furthermore, the offender perceives that the Marae is the elders' turangawaewae (place to

19 See discussion J Tauri *Reforming Justice the Potential of Maori processes* in E McLaughlin, R Ferguson, G Hughes and L Westmarland (eds), Restorative Justice Critical Issues. (Sage Publications, London, 2003).

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stand) and not that of the Judge. According to academic and kaumatua (respected Maori elder) Matiu Dickson:[20]

> "…Judges are doing the kaumatua's job and thus taking away the last bastion of Maori ownership of the process. On a marae all decisions are made by People who are affiliated to the marae, but the final decision rests with the kaumatua (respected Maori elder) who hold the mana (power or prestige). The marae community should have the right to decide how low-risk young offenders are dealt with."

Although available research indicates some level of success for Marae Courts, and this initiative should be applauded, the concerns still exist. Matiu Dickson stipulates two issues that are required to be satisfied prior to the establishment of a Marae Court:[21]

1. To retain mana (power or prestige) and authority for decisions made concerning the young offender and
2. To ensure that the young offender be connected by whakapapa (genealogy) to his/her Marae.

Arguably, Marae Courts, are a justice initiative that builds on the Koori Courts and does not tackle the root problems of indigenous offending such as the legacy of government oppression and effect of colonization.[22] This is a view shared by Marchetti and Daly, who state:[23]

> "Any effort to address the over-representation of Indigenous People in the criminal justice system must also confront a legacy of government policies and practices over the past two centuries, which systematically disadvantaged and oppressed Indigenous People."

20 Radio NZ, *Judges doing kaumatua's job in youth courts* 13 October 2011. http://www.radionz.co.nz.
21 M Dickson, *The Rangatahi Court* [2011] W Law Rev 85 – 107.
22 See discussion in Tauri, J. M., Webb, R. (2012). *A Critical Appraisal of Responses to Māori Offending*. The International Indigenous Policy Journal. 3(4). Retrieved from: http://ir.lib.uwo.ca/iipj/vol3/iss4/5.
23 E Marchetti and K Daly, *Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model*, (2007) Sydney Law Review 443.

Also, these courts may place further strain on Indigenous communities who are already affected by economic marginalisation and have few social services/resources. Often kuia (respected Maori female elder) and kaumatua (respected Maori elder) voluntarily contribute their time and efforts to this process, thus compounding the economic strain on small indigenous communities. Unlike the Koori Courts where Elderly Respected Persons are statutorily appointed and are paid a sitting fee, the kuia (respected Maori female elder) and kaumatua (respected Maori elder) from the Marae-based Courts are not.

Having regard to the growing success of these courts and the subsequent increase in numbers of both offenders accessing this court and the increase of courts; the economic impact this will have on small regional communities becomes exacerbated. Although the Evaluation Report provides positive outcomes for the participants, the Report lacks hard statistical data on recidivism rates. Notwithstanding this absence of statistics Judith Collins, Minister of Justice, announced that the Government's Drivers of Crime programmes' progress report indicated that the offending rates for Maori youth between 2008 and 2012 were down 32 per cent.[24]

Irrespective of the critique, if a Marae-based Court led by a kaumatua, (respected Maori elder) who was linked by whakapapa (genealogy) to the offender, within a tikanga (Maori customs) paradigm, can assist to reduce the offending and recidivism rates for Maori, this recognition would contribute to confronting the legacy of government policies and practices that have systemically disadvantaged Indigenous People. Further if they are successful, these Courts should attract funding in order to alleviate the strain on Indigenous communities.

It has been acknowledged that Nga Kooti Rangatahi is a significant step and there is much interest from international jurisdictions.[25] However, these Courts are not a separate youth justice system neither are they a sentencing Court, but it is a Court that helps empower and galvanise a community based response to the young person's offending; it supports

24 Judith Collins, Pita Sharples, *Youth Maori Offending down 32 per cent*. Available also at http://www.beehive.govt.nz/release/young-m%C4%81ori-offending-down-32-cent

25 The Rangatahi Newsletter Special Edition Rangatahi Courts' Hui, p 2 Available also at http://www.justice.govt.nz/courts/youth/publications-and-media/principal-youth-court-newsletter/rangatahi-courts-newsletter-vol-3

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and monitors all the components of the family group conference plan formulated in response to the young person's offending.[26]

It may be the case that these Courts will achieve a transformation of the law in a way that reduces disproportionately negative outcomes for Maori. Only time will tell.[27]

Glossary of Terms

Hongi	To press noses in greeting
Iwi	Tribe, extended kinship, nation, People
Kai	Food
Karakia	Prayer
Kaumatua	Maori elderly man or woman
Kawa	Customs and protocol
Kuia	Maori elderly woman, grandmother
Mana	Power, prestige
Marae	Courtyard, area in front of the whare nui
Maunga	Mountain
Mihi	Maori speech of greeting
Pepeha	Oral speech usually denoting your genealogy
Powhiri	Maori welcome
Rangatahi	Youth
Tangata Whenua	People of the Land, local People
Turangawaewae	Place to stand, rights of residence

26 *Ibid.*
27 Ministry of Justice has just called for expressions of interest to conduct a qualitative evaluation of Te Kooti Rangatahi.

Tikanga	Correct procedure, custom, habit,
Whakapapa	Genealogy, lineage, descent
Whanau	Extended family, family group
Whare Nui	Traditional meeting house, large hui