

MĀORI EDUCATION AS JUSTICE AND RECKONING

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I. INTRODUCTION

A fine sentiment, Cephalus, but, speaking of this very thing itself, namely justice, are we to say unconditionally that it is speaking the truth and paying whatever debts one has incurred? Or is doing these things sometimes just, sometimes unjust?¹

Hypothetical musings on what constitutes *justice* have been taking place at least since the ancient Greek philosopher Plato recorded the above debate between Socrates and Cephalus in *Republic* circa 380 BCE. Modern philosophical notions of justice have also often been heady stuff relying on heuristic “device[s] of representation”², “thick and thin”³ theories and other abstract conceptions to untangle real-world inequalities. In comparison, current questions of access to justice are earthy, grunty and real. Increasingly vociferous access to justice claims cite the actual injustice-laden histories of particular groups, speak in terms of harm already inflicted and call for reparative, restorative or healing justice. Indigenous peoples, African-Americans and other disenfranchised, excluded and oppressed groups quote dates, casualty numbers and the legislative section or treaty responsible. For many indigenous people, any single incident is always just one among many in the collective memory; there are always more dates, cases,⁴ facts and figures in the “litany of

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Plato *Republic* (c 380 BC) translated by GMA Grube, revised by CDC Reeve (Hackett Publishing Company, Indianapolis & Cambridge, 1992) Book I, 331c, at 5.

2 John Rawls *A Theory of Justice* (Oxford University Press, Oxford, 1971) at 24.

3 As Michael Walzer attempts to do in *Spheres of Justice* (Basic Books, New York, 1983).

4 See, for instance, the detailed rap sheet of harms against Native Americans provided by William Bradford in “Beyond Reparations: An American Indian Theory of Justice” (2005) 66 Ohio State LJ 1 at 3.

injustices”⁵ which evidence denial of justice. Gritty statistics in one area of well-being flow into another and over generations. This is justice in the trenches, a place where numbers and statistics are what they are.

More than the heady or hypothetical, access claims are characterised by honest and actual numbers and evoke a sense of debts to be paid and wrongs to be righted. This paper recognises that such considerations rest on a simpler kind of justice, or *reckoning*. The term reckoning is currently utilised in various arenas and certainly in justice discussions.⁶ I will use this term to describe a straightforward accounting in terms of access to justice for indigenous peoples which is inherently historically aware, balances actual wrongs and rights, and requires a certain degree of self-determination. The Māori experience in education will be used to illustrate both the denial of justice and a real-time reckoning. The discussion will end with a commentary on the reckoning concerns raised by the Education Act 1989 and its recent revamp, the Education (Update) Amendment Act 2017, particularly in terms of self-determination.

II. RECKONING

According to the Oxford Dictionary, *reckoning* means “[t]he action or process of calculating or estimating something”.⁷ Synonyms also include “appraisal, appraisement, assessment, estimation, evaluation [and] estimate”. In this sense, the word might refer to how much something costs or will cost in future. It can also mean “a settling of accounts” – that is, “paying up”, or being otherwise accountable in terms of a debt. Similarly, it can be defined as “a summing up”,⁸ a term implying a kind of stocktake where one asks what one’s financial position is or even “what the damage is”. Settling and summing up both seemingly require a historical assessment of some kind: historic debt or deficit, value or gain at some point in time is compared and measured against present debt or deficit, value or gain. The exercise of reckoning, then, fundamentally compares, tracks and measures numbers, percentages and other mathematical values across time.

5 Dalee Sambo Dorough “Indigenous Peoples’ Right to Self-Determination and Other Rights related to Access to Justice: A Normative Framework” in Wilton Littlechild and Elsa Stamatopoulou (eds) *Indigenous Peoples Access to Justice, including Truth and Reconciliation Processes* (Institute for the Study of Human Rights, Columbia University, New York, 2014) at 3.

6 My original thoughts on this paper were inspired by the theme of the ninth Melbourne Law School Doctoral Forum on Legal Theory, “Reckoning: in place, in person, in practice” held 23-24 November 2016 which I had hoped, but was unable, to attend last year. This is just one of many recent conferences, colloquiums, symposiums, books, articles and other fora where reckoning is the theme.

7 Definition of “reckoning” at <en.oxforddictionaries.com>.

8 Definition of “reckoning” at <merriam-webster.com>.

Reckoning may also refer to “the avenging or punishing of past mistakes or misdeeds”.⁹ Closely associated with this definition is the phrase *day of reckoning*, meaning a moment of accountability, perhaps long anticipated, when debts are collected and accountability is demanded – or “mistakes or misdeeds are felt”.¹⁰ In this sense, reckoning evokes the notion of a “balancing of the books”, when numbers “do not lie”, and debts can no longer be avoided and must be reconciled. Thus, reckoning is inescapably actual and current while also acutely historical.

Perhaps no group¹¹ of human beings better illustrates this kind of actuality and historicity than indigenous peoples. In the wake of European colonisation, various communities, tribes, nations and peoples around the world were constructed as “savages”, “barbarians”, “backward” and “inferior and uncivilized” by the colonizers, who used such constructs to subjugate, dominate and exploit indigenous peoples and their lands, territories and resources.¹²

Historically, these racist narratives justified the denial of “indigenous peoples’ human rights”¹³ including rights of self-determination, language, culture and education. Today, the same peoples historically impacted by colonisation appear to share a common identity of compounded and multiplied discrimination and disparities. In various cultures and circumstances indigenous peoples are usually the poorest and nearly always disadvantaged relative to their non-indigenous counterparts. Their material standard of living is lower; their risk of disease and early death is higher. Their educational opportunities are more limited, their political participation and voice more constrained, and the lifestyles and livelihoods they would choose are very often out of reach.¹⁴ In fact, global educational statistics on the indigenous child consistently reveal a “critical”¹⁵ “gap” in educational achievement between indigenous children and other students, including other minorities.¹⁶ The United Nations Permanent

9 Definition of “reckoning”, above n 7.

10 Definition of “day of reckoning”, above n 8.

11 The term “group” is used liberally here for ease of discussion as indigenous peoples represent thousands of languages, cultures and communities in varied climates, geography and political situations.

12 United Nations Permanent Forum of Indigenous Issues (UNPFII) *Report of the Eleventh Session*, E/C.19/2012/13 (2012) at [4].

13 Ibid.

14 Robin Eversole and John-Andrew McNeish “Introduction: indigenous peoples and poverty”, in Robin Eversole, John-Andrew McNeish and Alberto Cimadore (eds) *Indigenous Peoples & Poverty: An International Perspective* (Zed Books, London, 2005) 1 at 2.

15 Ibid.

16 United Nations Permanent Forum on Indigenous Issues *State of the World's Indigenous Peoples: Vol 1* ST/ESA/328 (United Nations, New York, 2009) at 132.

Forum on Indigenous Issues (PFII) has stated that indigenous learners are often excluded in “the form of poor access, low funding, culturally and linguistically inadequate education and ill-equipped instructors”.¹⁷ The global indigenous child is less likely to be enrolled in school, stay in school and be literate.¹⁸ Such disparities in the classroom flow into other areas of human well-being:

...Deprivation of access to quality education is a major factor contributing to social marginalization, poverty and dispossession of indigenous peoples. The content and objective of education to indigenous peoples in some instances contributes to the assimilation of indigenous peoples into mainstream society and the eradication of their cultures, languages and ways of life.¹⁹

The causal connection between historic law and policy aimed at the civilisation, assimilation and integration of indigenous populations into settler populations – indigenous language prohibitions, for instance – and present disparities in education and other areas of human well-being is recognised internationally. The United Nations Declaration on the Rights of Indigenous Peoples, endorsed by a majority of the world’s nations in 2007, is a frank response to human wrongs, assimilative and “racist” “doctrines, policies and practices”²⁰ and other “historic injustices” arising from “colonization”²¹ and recognises the “urgent need to respect and promote” human rights²² and to “bring an end to all forms of discrimination and oppression wherever they occur”.²³ Settler governments, such as the United States, have acknowledged their roles in these tragedies.²⁴

17 Ibid.

18 Above n 16, at 133.

19 United Nations Human Rights Council *Human Rights Bodies and Mechanisms: Study on Lessons Learned and challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education, Report of the Expert Mechanism on the Rights of Indigenous Peoples A/HRC/12/33* (2009) at 2.

20 United Nations *Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/61/L.67 (2007), Preamble at [4].

21 At [6].

22 At [7] and [8].

23 At [9].

24 See, for instance, acknowledgment by all branches of the US government in terms of Native Hawaiian people: The Clinton Apology, Joint Resolution of the 103rd United States Congress, Pub L 103–150, 107 Stat 1510, S J Res 19, enacted November 23, 1993. “To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii;” Native Hawaiian Education Act of 2002 s 7202 (8-12) and (14-19); and *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 441 F3d 1029 (9th Cir 2006) 470 F3d 827 (9th Cir 2006) (en banc) at 830, 833, 843 and 845.

Other sources recognise that in many places such injustices continue to occur.²⁵ The global nature of this phenomenon across generations and geography creates logarithmic wrongs which seemingly demand justice and reckoning.

III. ACTUAL WRONGS AND DEEP HARMS

The following scholars have recognised that the reconciliation of present disparities between indigenous peoples and other groups requires deeper awareness of the enduring and actual nature of historical wrongs and the recognition of self-determination rights.

In the multigenerational trauma and otherwise complex discrimination and disparities experienced by indigenous peoples since colonisation, Jeff Spinner-Halev sees “enduring injustices” or “injustices that have roots in the past, and continue to the present day”. Such injustices require examination rather than ignorance of history “to understand why some injustices endure”.²⁶ These *ongoing* injustices may reveal the lasting effect of significant breaks in the “collective memory” of “intergenerational groups” – that is, indigenous peoples’ own legal and cultural narratives about who they are – that must be addressed if present ongoing disparities are to be remedied.²⁷

Other scholars also recognise that past denial of self-determination and subsequent assimilation, discrimination and other practices constitute actual rather than abstract wrongs. Douglas Sanderson has argued that rather than “abstract wrongs committed against abstracted persons”, the history reveals how “settler people committed actual wrongs against actual persons” and how such injustices are ongoing and even deliberate. Importantly, “even where those wrongs occurred a long time ago, they continue to affect that is they continue as wrongs against – present-day persons”.²⁸ Thus, Mark Bennett argues not for “special” rights for indigenous peoples but for the operation of a simpler justice responding to a straightforward wrong.²⁹

25 Among other forms of discrimination, indigenous children were often denied the right to speak, and punished for speaking their own language. Indigenous children continue to be denied education, abused and indoctrinated for speaking indigenous languages: Tove Skutnabb-Kangas and Robert Dunbar “Indigenous Children’s Education as Linguistic Genocide and a Crime against Humanity? A Global View” (2010) (1) *Gáldu Čála: Journal of Indigenous Peoples Rights* 53.

26 Jeff Spinner-Halev “From Historical to Enduring Injustice” (2005) 35 *Political Theory* 547 at 574.

27 At 579 and 583.

28 Douglas Sanderson “Redressing the Right Wrong: The Argument for Corrective Justice” (2012) 62 *Univ Tor LJ* 93 at 102.

29 Mark Bennett “Indigeneity as Self-Determination” (2005) 4 *Indigenous LJ* 71 at 87.

The perpetuation of ongoing wrongs is particularly associated with educational institutions. For Sanderson, the “single greatest wrong committed against indigenous peoples” has been the “historical and ongoing suppression of institutions” – such as educational systems – “in indigenous communities that positively affirm indigenous values, cultures and identities”.³⁰ This conclusion is consistent with the emphasis increasingly placed on education as a multiplier of both negative and positive outcomes in various areas of human well-being.³¹ Additional scholarship, such as that of Linda Tuhiwai Smith, acknowledges the use of education as a tool to “civilize” and control indigenous populations.³² The embeddedness of these wrongs within institutions such as schools and education systems reveals what Eric Yamamoto and Ashley Obrey, from the perspective of restorative justice, have called “deep harms”. These are wrongs embedded in the psyche and social experience of indigenous peoples which are actual and pervasive, even “comprehensive”, encompassing resources, culture, and governance; “sustained” over generations; “systemwide,” implicating national and local governments, businesses, and citizens.³³ The comprehensiveness of deep harms is also apparent as disparities in one area of human well-being flow over into others, a phenomenon which creates what medical professionals have referred to as a higher “allostatic load” – or “the sum total of stresses encountered over the life of an individual” – which in turn contribute to “chronic stress” for indigenous people.³⁴

These embedded and comprehensive wrongs are also further compounded and distorted in a temporal sense. These are wrongs which have been perpetuated over generations – that is, they originate in

30 Sanderson, n 28, at 124.

31 For just a few examples, see: United Nations Committee on Economic Social and Cultural Rights *General Comment No 13: The Right to Education* (Art 13 of the Covenant) E/C12/1999/10 (1999) at [1]; Craig Scott “The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights” 27(4) *Osgoode Hall Law Journal* 769; and Katarina Tomasevski *Education Denied: Costs and Remedies* (Zed Books, London, 2003) at 172.

32 Linda Tuhiwai Smith has written that “the major agency for imposing...positional superiority over knowledge, language and culture was colonial education...Numerous accounts across nations now attest to the critical role played by schools in assimilating colonised peoples, and the systematic, frequently brutal, forms of denial of indigenous languages, knowledges and cultures” Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Zed Books, London, 2012) at 67.

33 Describing the situation of Native Hawaiians, Eric K Yamamoto and Ashley Kaiao Obrey “Reframing Redress: A ‘Social Healing Through Justice’ Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives” (2009) 16(1) *Asian Am LJ* 5 at 36.

34 In terms of Native Hawaiians, David Liu and Christian Alameda “Social Determinants of Health for Native Hawaiian Children and Adolescents” (2011) 70 *Hawai’i J* 9 at 9.

historical law and policy but are identifiable in the present in the form of stark, alarming disparities between indigenous peoples and other groups and pernicious structural discrimination.³⁵ In an incredibly visceral sense, researchers have shown that historical trauma manifests itself within our very DNA as it triggers epigenetic changes which are passed down from generation to generation.³⁶ Epigenetics can now trace Post-Traumatic Stress Disorder, Type 2 Diabetes, depression and other illnesses which present-day Native Americans suffer from in disproportionate numbers back to “colonization and its aftermath”,³⁷ for example, the tragic boarding school experience of previous generations.³⁸ In both a figurative and genetic sense, historical wrongs accumulate and are recycled in present wrongs. Both logically predict future wrongs and disparities. In this sense, the harms then committed by settler governments have created once-and-future wrongs which are both historical and actual but also incredibly current, ongoing and actual.

Self-determination – including the recapture of institutions – appears to be crucial to the reckoning of this particular species of wrong. Given the depth and scope of these wrongs, the simple calculus of justice would seemingly call for a positive and proportional remedy to this almost overwhelming kind of inequality and injustice. According to Yamamoto and Obrey, “The remedies must be tailored to the harm. That is, when the injuries are long-term and systemic, so must be the response.”³⁹ James Anaya, former UN Special Rapporteur on the Rights of Indigenous Peoples, has written that self-determination is especially crucial “as a remedy for past and ongoing wrongs” where current legal and political arrangements have not “remed[ie]d the historical injustices suffered by” indigenous peoples nor provided “the accommodations necessary to exercise and

35 See discussion on disparities between Māori and other groups below in section 3 of this article.

36 See Janell Ross “Epigenetics: The Controversial Science Behind Racial and Ethnic Health Disparities” *The Atlantic* 20/03/2014 and Mary Annette Pember *Intergenerational Trauma: Understanding Natives’ Inherited Pain* (Special Report, *Indian Country Today*, 2016) at 3. Basically, epigenes are switches which can turn on or off genes, including stress genes which, when triggered, put an individual into a “fight-or-flight” mode. Researchers have been able to show that individuals who experience trauma over prolonged periods during their lifetime have this gene turned on all the time, creating a form of chronic stress. This genetic condition is then passed down to succeeding generations creating “memories of trauma experienced by our ancestors” within our DNA.

37 *Ibid.*

38 Les Whitbeck, Gary Adams, Dan Hoyt, and Xiaojin Chen “Conceptualizing and Measuring Historical Trauma among American Indian People” (2004) 33(3/4) *American Journal of Community Psychology* 119.

39 Yamamoto and Obrey, above n 33, at 39.

freely develop their culture, including religious practices and traditional governance, or allows them to exercise their fair share of political power”.⁴⁰ Similarly, Sanderson would argue that where wrongs have been institutionalised the situation can only be remedied by a restoration of “identity-affirming Indigenous institutions” – that is, the return of control over education, for instance, to the indigenous community from which it was hijacked or suppressed. For Sanderson, this type of recaptured school will look as it might have if it had developed freely under the prior self-determination of the indigenous community without external interference,⁴¹ a model that does not preclude pedagogic or technological progress but does require a certain degree of self-determination.

In terms of reckoning, this historically-responsive justice reorients the site of self-determination with the indigenous people who originally possessed and exercised – but were unjustly denied – the right. The recapture of educational institutions which were hijacked or suppressed previously is proportionate but also logical and reconciliatory, a sort of gentler eye-for-an-eye return of what was stolen from indigenous peoples which may, potentially, have a logarithmic impact on educational outcomes for generations just as the colonisation of the same institutions has negatively affected generations. Ultimately, self-determination and recapture potentially provide a very straightforward justice or accounting at work where the site of historic and ongoing wrong might be transformed into a present and future site of remedy.

IV. EDUCATION LAW AND POLICY AS ANTITHESIS OF RECKONING

For generations after the British settled New Zealand, the history of Māori education looked nothing like a reckoning project. Rather, it featured actual, ongoing wrongs, the horrors of “civilisation”, assimilation, and discrimination, and denial of human rights spanning centuries. Discriminatory law and policy, cause and effect, produced deep harms which were significantly embedded in the educational system and pervasive in other areas of human well-being.

Prior to the signing of the Treaty of Waitangi in 1840, Western-style education was largely provided by mission schools with a Christianising mission. Early observers recognised the Māori’s “great thirst for knowledge, intense desire to acquire literacy skills, and quick...

40 Speaking specifically about the Native Hawaiian people in S James Anaya “The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs” (1994) 28 Ga L Rev 309, at 335; More recently, see S James Anaya and Robert A Williams Jr *Study on the International Law and Policy relating to the Situation of the Native Hawaiian People* (Indigenous Peoples Law and Policy Program, University of Arizona, James E Rogers College of Law, June 2015).

41 Sanderson, above n 28, at 124.

intelligence...and the value that Māori placed on books and writing paper.”⁴² Consistent with the high value which Māori traditionally placed on knowledge, indigenously run schools were also established during this period.⁴³ The Crown provided the same education to Māori and non-Māori children. Proximity to home and family was considered conducive to positive education outcomes.⁴⁴

This Treaty-friendly approach changed after “a settler government ruled New Zealand”.⁴⁵ Legislation such as the Native Schools Act of 1858, subsidised boarding schools for Māori intended to separate indigenous learners from family and home, “acculturate them in the ways of the Pākehā and hasten the assimilation process”.⁴⁶ The Native Schools Act 1867 (1867 Act)⁴⁷ was seen as an assimilative alternative “to marginalis[ing] the natives”.⁴⁸ New Zealand also had its own version of “separate but equal”,⁴⁹ a separate education system for Māori designed to civilise them. Māori children who spoke Māori and practiced tikanga were regarded as the “bad child” versus the “good” Māori child who had been Europeanised.⁵⁰ As the “Other”, Māori children were to be separated from non-Māori children and from their own families⁵¹ and bombarded with cultural and identity denigration.⁵² In the classroom,

42 Māori children were “very adept” at acquiring English, possessed “great natural intelligence” and “quickness of perception”: various sources quoted in Hillary Mitchell and John Mitchell *Te Tau Ihu o te Waka: A History of Māori of Nelson and Marlborough, Volume II: Te Ara Hou—The New Society* (Huia and Wakatu Incorporation, Wellington, 2007) at 329.

43 Though usually in conjunction with mission boarding schools: Peter Caccioppoli and Rhys Cullen *Māori Education* (Kotahi Media, Papkura NZ, 2006) at 59.

44 Ibid, including “religious education, industrial training, and instruction in the English language.”

45 Ibid, at 60.

46 Huia Tomlins-Jahnke and Te Rina Warren “Full, exclusive and undisturbed possession: Māori education and the Treaty” in Veronica MH Tawhai and Katarina Gray-Sharp (eds) “*Always Speaking: The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011) 21 at 22.

47 An Act to Regulate and Provide Subsidies for Māori Schools, 10 October 1867. It was cemented in the Native Schools Code 1879.

48 J M Barrington *Separate but Equal? Māori Schools and the Crown 1867-1969* (Victoria University Press, Wellington, 2008) at 20.

49 At 15, Barrington recognises that a few non-Māori children attended the Native Schools but notes that that number never rose above 10 per cent and that such children were often, for instance, the children of the teacher.

50 Authorities sometimes even used blood quantum to decide which school children would attend: Judith A Simon and Linda Tuhiwai Smith *The Native Schools System 1867-1969: Ngā Kura Māori* (Auckland University Press, Auckland, 1998) at 259.

51 Maxine Stephenson “Closing the Doors on the Māori Schools in New Zealand” (2006) 9(3) *Race Ethnicity and Education* 307 at 309.

structure, curriculum and pedagogy reflected theories of “inherited and immutable biological inferiority and biological superiority”.⁵³

Despite this aggressive approach to civilisation, however, the 1867 Act provided only limited annual funding for these separate schools⁵⁴ and required Māori communities to pay costs and to leap over bureaucratic hurdles which communities in the mainstream system did not.⁵⁵ The infamous *Wi Parata v Bishop of Wellington*⁵⁶ case actually concerned land donated by the iwi Ngati Toa for one of these schools which never eventuated. Instead, the Crown granted the land to the Bishop of Wellington. As a result of this “self-help” approach⁵⁷, “few new schools” were built during the early years of the 1867 Act in poorer Māori communities.⁵⁸ When they were, they were “underfunded and under-resourced”.⁵⁹

Later law and policy further targeted Māori culture, language and identity. The 1880 Native Schools Code required teachers to discourage “Māori beliefs and practices” among Māori children and to replace them with European “belief systems and manners”. The Tohunga Suppression Act 1908 actually made the expression of cultural and spiritual beliefs at school criminal and prohibited the speaking of te reo Māori.⁶⁰ To receive government funding, schools had to teach in English.⁶¹ The use of te reo

52 For instance, textbooks and other materials bore the urgent message that the Māori’s health, happiness and prosperity, if not their very survival, depended on forsaking traditional practices for European ones: Colin McGeorge “James Pope’s textbooks for New Zealand native schools” <http://faculty.education.illinois.edu/westbury/paradigm/mcgeorge.pdf>, dated 6/5/14.

53 Barrington, above n 48, at 21.

54 Ibid. Established “for the education of “children of the aboriginal race and of half-castes being orphans or being the children of indigent persons.” Interestingly, non-Māori children “of indigent persons” – is, poor children – were included in this group and also needed to be separated from the Pakeha children.

55 The Act required Māori communities to donate at least one acre of land to the Crown to establish a school as well as donate to the teacher’s salary, their accommodation, building and repair costs, books, and other supplies Caccioppoli and Cullen, above n 43, at 60. In the case of several schools in the Nelson-Marlborough area, the government portion of the funding actually failed to materialise at all causing local Māori communities to have to fund building and running costs over decades from the already meagre and inconsistent South Island Tenths Benefit Fund which was also meant to fund crucial medical services, pensioner income and other government costs: See Mitchell and Mitchell, above n 42, at 457.

56 *Wi Parata v Bishop of Wellington* [1877] 3 NZ Jur (NS) 72.

57 Barrington, above n 48, at 15.

58 Caccioppoli and Cullen, above n 43, at 60.

59 Barrington, above n 48, at 21.

60 Barrington, above n 48, at 116.

Māori at school or failure to learn English also often resulted in corporal punishment.⁶²

This de jure and de facto discrimination had “long-term and intergenerational” effects.⁶³ Language loss, for instance, is known to lead to greater “capability deprivation”.⁶⁴ In 1930, 96 per cent of Māori children spoke only te reo Māori at home, but only 26 per cent spoke it in 1960. Its “death” was predicted in 1979.⁶⁵ Rather than the integration promoted by government policy of the time, loss of language resulted in “Māori educational underachievement for decades to come”⁶⁶ as well as “culture murder” as Māori language remains “the only appropriate means of transmitting Māori cultural knowledge”.⁶⁷ Cultural loss also led to children “los[ing] touch” with their *turangawaewae* – or ancestral places.⁶⁸

Today, education remains a site of ongoing harm. Resiliency and population growth⁶⁹ have not been enough to overcome complex discrimination and disparities. A Human Rights Commission (HRC)

61 Caccioppoli and Cullen, above n 43, at 60. Despite some concession for younger children, funding depended on English proficiency until the 1950s: Barrington, above n 48, at 20.

62 “[S]evere disciplinary measures including ‘cuts’, straps and caning occurred for offenses as minor as not being able to pronounce an English word”: see Barrington, above n 48, at 118.

63 Tomlins-Jahnke and Warren, above n 46, at 23.

64 Tove Skutnabb-Kangas has said that “Linguistic capital is convertible to other types of capital and resources including formal education and life chances. Capability deprivation...leads to poverty”: Tove Skutnabb-Kangas “Series Editor’s Note” in Vaughan Rapatahana and Pauline Bunce (eds) *English Language as Hydra: Its Impacts on Non-English Cultures* (Multilingual Matters, Bristol, 2012) xv at xv.

65 See Richard Benton *The Legal Status of the Māori Language, Current Reality and Future Prospects* Report to Minister of Māori Affairs TWM Working Paper No 4 (New Zealand Council for Education Research, Wellington, 1979); Richard Benton *The Māori Language: Dying or Reviving? A Working Paper Prepared for the East-West Center Alumni-in-Residence Working Paper Series* (New Zealand Council for Educational Research, Wellington, 1997).

66 Tomlins-Jahnke and Warren, above n 46, at 23.

67 Despite many initiatives, language loss continues. Interestingly, speakers of Māori language have dropped since the 2006 census in every age group except those over 65. Te reo speakers currently represent only 21.3 per cent of Māori, a figure not much higher than the 20 per cent who could speak it in 1960: Statistics New Zealand 2013 *Census 2013 QuikStats About Culture and Identity* (Statistics New Zealand, April 2014) at 23. Also see Tove Skutnabb-Kangas and Robert Dunbar “Indigenous Children’s Education as Linguistic Genocide and a Crime against Humanity? A Global View” (2010) (1) *Gáldu Cála: Journal of Indigenous Peoples Rights* 53.

68 Graham Hingangaroa Smith and Vaughn Rapatahana “English language as Nemesis for Māori” in Rapatahana and Bunce, above n 64, 76 at 83 and 86.

69 From a onetime low of 42,000 representing 5 per cent of the population to present figures representing an almost 40 per cent increase in the last 22 years alone.

discussion paper published in 2012 recognised the continued existence of “structural discrimination, systemic discrimination or institutional racism”⁷⁰ against Māori in education. The same paper recognised significant “gaps in the educational achievement between Māori” and other ethnic groups in mainstream education correlating with socio-economic factors including poverty.⁷¹ Recent Ministry of Education figures show that Māori are half as likely to qualify for university entrance, a third less likely to leave school with National Certificate Educational Achievement (NCEA) Level 2 or above, a third less likely to stay for Year 13, and more than three times more likely to be truant.⁷² Māori are also three times more likely to be suspended.⁷³

These statistics are widely accepted to be the result of historic law, policy and practice aimed at Māori in education. The history of Māori education reveals *de jure* and *de facto* discrimination, capability deprivation which multiplied wrongs over generations and current, measurable statistics which not only stand as inescapable links with the past but evidence of present, ongoing and actual wrongs. In their endurance and pervasiveness – the stark contrast between Māori and other groups – these facts suggest deep harms. These actual wrongs, rooted in the past and crucial now, are long in the making, mistakes or misdeeds felt, numbers which do not lie, and debts which can no longer be avoided. In terms of a simpler justice, these numbers seemingly demand accountability and reckoning.

70 Human Rights Commission *A fair go for all? Rite tahi tātou katoa? Addressing structural discrimination in public services* (Human Rights Commission Discussion Paper, July 2012) at 2.

71 *Ibid.*, at 50.

72 Sec Ministry of Education “Progress against Māori Education Plan Targets: Ka Hikitia—Managing for Success” Ministry of Education < Tables 2, 4, 5.

73 Human Rights Commission, above n 70, at 50, 53 and 54. Māori learners aged 15-19 illustrate this. In terms of participation in education, Māori youth have a 96.3 per cent rate at age 15, 73.7 per cent rate at age 16, a 50.6 per cent rate at age 17 and a 10.6 per cent rate at age 19 compared with non-Māori figures of 98.5 per cent, 91.8 per cent, 75.4 per cent, and 17.9 per cent for the same ages. In regards to qualifications, Māori learners “lag behind” in Level 3 NCEA achievement, only 20 per cent of Māori School leavers achieve University Entrance compared with more than two-fifths of non-Māori, and Māori have a higher rate of learners leaving with no qualification at all (13 per cent) compared with Non-Māori (5 per cent): Te Puni Kokiri “Ko Nga Rungatahi Māori i te Rangai Matauranga me te Whiwhi Mahi: Māori Youth in Education and Employment” (2012) Te Puni Kokiri/Ministry of Māori Development <tpk.govt.nz> at 6. In other words, Māori tend to stay in mainstream education for a shorter time than their non-Māori counterparts and achieve fewer qualifications. This underachievement tends to spill over into under-participation in and under-qualification for tertiary education.

V. SELF-DETERMINATION, RECAPTURE AND RECKONING IN FACT

While present disparities are causally linked back to historic actual wrongs and reveal deep harms, recent decades have also demonstrated the apparent commencement of a de facto reckoning project. This simpler form of justice has been effected by the victims of the wrongs themselves. It has been hard-won, the result of prolonged struggle, sustained activism and pressure on the government by Māori to have their Treaty of Waitangi rights recognised, as well as rights to sovereignty which were not ceded in the Treaty.⁷⁴ Crucially, it has been characterised by the recapture of educational institutions and real-time exercise of self-determination by Māori.

From the beginning, Māori efforts were consciously aware of the history and ongoing harm. Māori shifted from, as Graham Hingangaroa Smith has described, “waiting for things to be done to them, to doing things for themselves” in terms of educational outcomes.⁷⁵ In response to the predictions of language death, Māori autonomously established *kōhanga reo* – or preschool “language nests” – as a self-generated remedy to cultural and identity loss.⁷⁶ As these learners grew older, Māori established a variety of Māori-medium schools whose approach to education – or *kaupapa* – was Māori⁷⁷ so that they could “maintain the Māori language and *tikanga* of their children” and “extend the Māori learning of their *kohanga reo* offspring”.⁷⁸ In contrast to previously imposed models of structure, curriculum and pedagogy, these institutions were designed to provide education “for Māori by Māori” which enabled them to “live as Māori”. One example is *Te Aho Matua*, the holistic and culturally appropriate guiding principles written by Te Runanga Nui o Nga Kura Kaupapa Māori o Aotearoa (RKKM) in te reo Māori.⁷⁹ Māori later

74 See Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (Wai 1040, 2014).

75 Graham Hingarora Smith (2003) “Indigenous Struggle for the Transformation of Education and Schooling” Keynote Address to the Alaskan Federation of Natives (AFN) Convention, Anchorage, Alaska, October 2003, at [1].

76 Chapter 2: “He Kupu Onamata mō te Kōhanga Reo: The History of the Kōhanga Reo Movement”, in Waitangi Tribunal Report 2013, *Matua Rautia: The Report on the Kōhanga Reo Claim* (WAI 2336). The Kohanga Reo movement was, of course, part of a wider movement by Māori beginning in the 1970s to reclaim Treaty rights amidst growing awareness of complex discrimination and disparities.

77 Māori philosophy schools, as described in Human Rights Commission, “Human Rights and the Treaty of Waitangi” found at <hrc.co.nz> at 248.

78 Kimai Tocker “The Origins of Kura Kaupapa Māori” (2015) 50 NZ J Educ Stud 23, at 25.

79 Kimai Tocker “Hei oranga Māori i te ao hurihuri nei: Living as Māori in the world today An outcome of kura kaupapa Māori” (2012) 1(1) MAI Journal 15. RKKM is the governing body of Kura Kaupapa Māori.

established Te Wānanga o Aotearoa at the tertiary level.⁸⁰ Importantly, these self-remedies were Māori-driven, constituting, in many cases, extended struggles over decades requiring patience, sacrifice, “dogged persistence and a well-organised political campaign”.⁸¹ Ultimately, they also represent real-time exercises of self-determination and recapture.

These Māori-driven initiatives have been remarkably successful in terms of educational outcomes. Two local examples are Te Wharekura o Rakaumangamanga (“Te Rakaumangamanga”) in Huntly and Ngā Tāiātea Wharekura (“Ngā Tāiātea”) in Hamilton. Te Rakaumangamanga is a Māori immersion composite school teaching students ranging in age from approximately 5-18 (Years 0-13)⁸². Ngā Tāiātea is a “Kaupapa Māori Wharekura” for Years 9-13⁸³. Both schools have been classified as “Māori medium”, “character” and “State schools” by the Ministry of Education.⁸⁴ The children who attend these schools may represent those most at-risk. Demographically, these schools serve families and “students from areas of greatest socio-economic disadvantage” – that is, they are schools currently assigned a decile 1 or 2 rating by the Ministry of Education for the purposes of funding.⁸⁵ While socio-economic disadvantage is usually predictive of educational disparities between Māori and other groups, these schools “buck the trend”.⁸⁶

Both Te Rakaumangamanga and Ngā Tāiātea were recognized in 2011 for excelling in NCEA achievement when most Waikato schools, including mainstream and some private schools, lagged behind the rest of the country. While Ngā Tāiātea students achieved NCEA at 83.3 per cent at Level 1, 97 per cent at Level 2 and 93.1 per cent at Level 3, Te Rakaumangamanga achieved 83.3, 100 and 94.1 per cent

80 Waitangi Tribunal *Report on the Aotearoa Institute Claim concerning Te Wananga o Aotearoa* (WAI 1298, 2005) at 1.

81 Tocker, above n 78.

82 See *Education Review Report: Te Wharekura o Rakaumangamanga – 2009* (Education Review Office, 12/02/2009), and *Education Review Report: Te Wharekura o Rakaumangamanga – 2013* (Education Review Office, 01/06/2013).

83 *Education Review Report: Nga Taiatea Wharekura – 2009* (Education Review Office, 15/06/2009), and *Education Review Report: Nga Taiatea Wharekura – 2013* (Education Review Office, 01/06/2013).

84 Ministry of Education “Māori Medium schools” found at .

85 Ministry of Education decile ratings found at <tki.org.nz>. The Ministry has explained: “Decile 1 schools are the 10% of schools with the highest proportion of students from low socio-economic communities, whereas decile 10 schools are the 10% of schools with the lowest proportion of these students”, at <<http://www.minedu.govt.nz/NZEducation/EducationPolicies/Schools/SchoolOperations/Resourcing/OperationalFunding/Deciles/HowTheDecilIsCalculated.aspx>>, dated 12/7/14.

86 Rob Kidd “Student passes below the average” *Waikato Times* 16/04/2011.

respectively. Both schools far exceeded the national averages of 75, 80 and 74.3 per cent respectively, as well as the Waikato average.⁸⁷ In 2012, Nga Taiatea students achieved at 88.1, 97.7 and 96.7.⁸⁸ While 2013 figures slipped a little for both schools at Levels 1 and 2, both achieved higher than the year before at Level 3, with Te Rakaumangamanga achieving 100 per cent at level 3.⁸⁹

The wider effect of schools like Ngā Tāiatea and Te Rakaumangamanga is readily apparent in national figures. In 2012, Te Puni Kokiri noted that:

Māori students in bilingual and immersion schools in 2010 were twice as likely to leave school with University Entrance compared to all Māori school leavers and just as likely as non-Māori students in English medium schools to do so.⁹⁰

Similarly, in 2013, the achievement of Māori learners at the primary level in reading, mathematics and writing in mainstream education was respectively 68.2, 63.6 and 60.2 per cent while Māori students in primary-level kura and other Māori-medium education, assessed according to the Ngā Whanaketanga Rumaki Māori counterparts of those standards, scored 75.6, 60 and 69.6 per cent respectively – they were also assessed in “korero”.⁹¹ Current figures for NCEA reveal that eight kura actually achieved the almost impossible 100 per cent at levels 1, 2 and 3, 16 achieved 100 per cent in two levels and 18 achieved 100 per cent at one level. To put these numbers into perspective, the respected and relatively expensive St Peters School in Cambridge achieved 98.3, 98.5 and 94.6 per cent respectively, while St Paul’s Collegiate here in Hamilton achieved 98.6, 96.1 and 95.8 per cent respectively.⁹²

Education by Māori and for Māori has, in fact, made a measurable difference to real-time Māori outcomes. Kura are actually known for innovation in education.⁹³ Their successes indicate a simpler justice at

87 Ibid.

88 See Jonathan Carson “Māori school’s stellar marks shake up the system: New approach works for Māori students” *Waikato Times*, 13/04/2013.

89 Harkanwai Singh “NCEA: How your school rates: North Island” *NZ Herald* 13/04/2014.

90 “Māori Youth in Education and Employment” Fact Sheet 022-2012 (Te Puni Kokiri, November 2012) at 7.

91 *Education Report 2013: Investing in Education to Raise Achievement* (Ministry of Education, 2013) at 2.

92 Patrice Dougan “NCEA results: How did your school rate?” *New Zealand Herald* 10/04/2016.

93 Nga Taiatea’s programmes, for instance, have been described as “innovative” on several occasions: see Education Review Office *Nga Taiatea Wharekura* 15/06/2009; and Education Review Office *Nga Taiatea Wharekura* 01/06/2013. Among other initiatives, the school day is divided into three 100-minute classes with two lunch breaks and extra classes are run after school and on weekends: Carson, above n 88.

work in which the real-time exercise of self-determination by Māori is actually remedying deep harms.

VI. RECKONING IN LAW

These “groundswell”⁹⁴ developments are consistent with agency rather than passivism and Treaty rights to self-determination. They are also now publicly funded and legally recognised.

The Education Act 1989 requires all school boards “to acknowledge the principles of the Treaty of Waitangi” in carrying out their duties,⁹⁵ and provides for the funding of *kōhanga reo*⁹⁶ and the establishment of various Māori-medium schools including the formerly grassroots *kura kaupapa Māori*,⁹⁷ after consultation with Te Runanga Nui o Nga Kura Kaupapa Māori o Aotearoa (RKKM), the governing body of *Kura Kaupapa Māori*. The Act further requires such *kura* to operate according to a Māori “approach to teaching and learning”, even the Māori-created *Te Aho Matua*.⁹⁸ Law and curricula also allow for various Māori-curriculum settings including bilingual and full-immersion education, Māori curriculum units and classrooms within mainstream schools and state-sponsored Māori medium schools, and parallel education systems⁹⁹ covering a wide range of age groups from *kōhanga reo* to tertiary

94 See Waitangi Tribunal, above n 76, at 14.

95 Education Act 1989, s 181.

96 Literally “language nests” or Māori-medium preschools. Funding provided for in s 84.

97 See s 155 of the Education Standards Act 2001. However, also see Education (Early Childhood Centres) Regulations 1998 ss 15 and 36A and Education (Early Childhood Services) Regulations 2008 s 44, where *kōhanga reo* are set apart in terms of certain standards and governance remains with the National *Kōhanga Reo* Trust, the grassroots Māori organisation which started the *kōhanga reo* movement.

98 Section 155A. See ss 11H, 61, 78T, 154A, 155, 155A, 155B, 155C and 155E. According to the Ministry of Education “Te Aho Matua is the foundation document and driving force for *Kura Kaupapa Māori*. It lays down the principles by which *Kura Kaupapa Māori* identify themselves as a unified group committed to a unique schooling system which they regard as being vital to the education of their children...As the founding document for *Kura Kaupapa Māori*, Te Aho Matua describes a Māori world view... of education, teaching and learning”; “Te Piko o te Māhuri: The key attributes of successful *Kura Kaupapa Māori*” Ministry of Education <educationcounts.govt.nz>.

99 The *Kōhanga Reo* Trust, *Kura Kaupapa Māori* and tribally affiliated schools governed by tribal values—for instance, Waikato-Tainui affiliated Te Kura of Bernard Fergusson and Te Raukaumangamanga—arguably constitute not just schools but education systems which cover various ages, groups and geography.

institutions.¹⁰⁰ The prioritisation of Māori identity in such programmes and schools is straightforward and stands in sharp contrast to historically discriminatory policy driven by assimilation. Crucially, the law was drafted to catch up with the real-time, groundswell gains made by Māori in education.

Early education gains coincided with the establishment of the Waitangi Tribunal in 1975. It has interpreted the Treaty in terms of education on several occasions since and recognised various, specifically Māori, rights in education deriving from the Treaty. These include: Article II rangatiratanga over taonga including te reo Māori (Māori language) and mātauranga (indigenous knowledge); government duties of active promotion and protection of such taonga, consultation and participation;¹⁰¹ partnership; kāwanatanga (governance), rangatiratanga (self-determination) and kaitiakitanga (guardianship), options and equity.¹⁰² In several claims, the Tribunal has determined that the Crown: failed in its positive duties when it closed a bilingual rural school serving Māori learners and failed to provide proper support for such a school;¹⁰³ did not provide sufficient funding, strategic policy or targeted measures to address disparities;¹⁰⁴ failed to develop indicators to measure implementation and progress of Māori students; and failed to provide an identity-specific and culturally appropriate policy framework for Māori-curriculum early childhood education.¹⁰⁵ In their *Report on the Aotearoa Institute Claim Concerning Te Wānanga o Aotearoa*¹⁰⁶, the Tribunal recognised the right of a wānanga to self-determination in matters such as admission.

The Tribunal's interpretation of Māori education rights is robust and substantive in expectation. Throughout its reports on Māori education, the Tribunal's connection between historic wrongs and present disparities, the closing of historic distance as it were, is unmistakable. In terms of

100 Wānanga have been recognized as tertiary institutions alongside universities and polytechnics since the Education (Tertiary Reform) Amendment Act 2002 (2002, No 50) went into effect on 1 January 2003: see current Education Act 1989 ss 159, 162(2) and (4), 166 and 253C.

101 See Waitangi Tribunal Report *The Mokai School Report* (Wai 789, 2003) at 137.

102 See extensive recent discussion on Treaty principles in terms of education in Waitangi Tribunal, *Matua Rautia*, above n 76, at 55.

103 Waitangi Tribunal, *Mokai School Report*, above n 101.

104 Waitangi Tribunal *Report on the Aotearoa Institute Claim Concerning Te Wānanga o Aotearoa* (Wai 1298, 2005).

105 Waitangi Tribunal, *Matua Rautia*, above n 76.

106 Waitangi Tribunal, *Aotearoa Institute*, above n 104. One of the issues raised by the Crown was the admission of non-Māori to the wānanga. The Tribunal found that the question of whether the wānanga could admit non-Māori was not as important as whether the wānanga had the right to make that decision.

legal narratives about Māori education, these reports represent the most thorough and unambiguous legal statements on Māori education rights. Importantly, these Treaty rights, which pre-date the modern New Zealand legal system, are also deliberate remedies for historic wrongs. The claims process which generated these reports itself appears to be a reckoning project and the potential vehicle of a simpler justice.

These educational and legal developments have provided a measurable amount of de jure and de facto reckoning – albeit one driven by the victims of the wrongs. The grassroots establishment of Māori educational institutions represent a recapturing of educational institutions by Māori as recommended by Sanderson.¹⁰⁷ Māori control over such institutions is consistent with self-determination and an apparently proportionate self-remedy to historic wrong. Legislation such as the Education Act 1989 and government funding approve such remedies, including crucial rights to self-determination. The Waitangi Tribunal, the Crown body charged with interpreting Treaty rights, has not only acknowledged self-determination in education as a Treaty right but has, as Anaya would also,¹⁰⁸ attributed positive obligations of protection and promotion in terms of those rights to the Crown. Positive statistics and the actual day-to-day operation of recaptured educational institutions represent a much needed departure from a history burdened with discrimination and other wrongs and the possibility of very different future outcomes for the Māori learner.

VII. THE VULNERABILITY OF THE RECKONING PROJECT

Given this de facto reckoning, Māori education is held up globally as a success story. Māori medium schools such as Te Rakaumangamanga have been studied for some time¹⁰⁹ as models of achievement – and rightly so. *Te Whariki* the early childhood curriculum which incorporates various “strands” of kaupapa Māori has been recognised as “leading a wave of early childhood innovation”.¹¹⁰ Legal developments in terms of Māori education are also rightly studied as potential models on which to pattern law in other settler jurisdictions such as the United States where federal

107 Sanderson, discussed above n 28.

108 Anaya, discussed above n 40.

109 At least since Barbara Harrison “Te Wharekura o Rakaumangamanga: The Development of an Indigenous Language Immersion School” (1998) 22(2-1) *Bilingual Research Journal* 297. For current research see Richard Hill and Stephen May “Exploring Bilingual Literacy in Māori-Medium Education: An Ethnographic Perspective” in Teresa L McCarty (ed) *Ethnography and Language Policy* (Routledge, New York, 2011).

110 Peter Moss quoted in Sarah Te One “Chapter 1 Te Whariki: Historical accounts and contemporary influences 1990-2012” in Joce Nuttall *Weaving Te Whariki – Aotearoa New Zealand’s Early Childhood Curriculum Document in Theory and Practice* (2nd ed, New Zealand Council for Educational Research Press, Wellington, 2013) at 24.

law appears to lack legal narratives which can adequately account for the idea of self-determination as a proportionate remedy to ongoing harm.¹¹¹ Despite such success, however, certain legislative realities appear to threaten the reckoning project.

Although the Education Act 1989 makes significant provision for Māori education, it reserves several crucial powers for the Minister of Education. Designated character schools, including kura kaupapa Māori, are state schools. Section 154 gives the Minister the power to close any state school after consultation with the school's board.¹¹² This section does not require consultation with or the approval of RKKM. Nor is there any requirement to consult Māori generally. Similarly, s 156A(1) allows the Minister to merge "1 or more" state schools – including kura kaupapa Māori and any other designated character schools – without consulting RKKM although the Minister is required to consult with boards affected by merger or closure.¹¹³

The strongest restrictions on the Minister's power to merge schools are which schools may be merged. Under s 156B(1), kura established under s 155 after 1999 can be merged with kura which "operate in accordance with Te Aho Matua; and...use te reo Māori as the principal language of instruction". Under s 156B(2), kura established before that time can be merged with another school "only if both schools use te reo Māori as the principal language of instruction and have the same aims, purposes and objectives."¹¹⁴ Under the same section, character schools not specifically designated as kura kaupapa Māori, such as Te Rakaumangamanga and Ngā Tāiatea, can be merged with another designated character school which has "the same aims, purposes, and objectives".¹¹⁵

In recent years, a series of kura merges and closures have illustrated the large amount of leeway in these statutory powers and the dark side of legislative recognition and government funding. One of the most dramatic examples took place in 2012, when the Ministry of Education announced

111 Keakaokawai Varner Hemi *Everyone, No-One, Someone and the Native Hawaiian Learner: How Expanded Equality Narratives Might Account for Guarantee-Reality Gaps, Historico-Legal Context and an Admission Policy which Is Actually Levelling the Playing Field* (Thesis Submitted in Fulfilment of PhD, University of Waikato, 2016).

112 Education Act 1989, s 154(1)-(2).

113 Education Act 1989, s 157. In somewhat ambiguous language, the Act does require that "each board of a school concerned has made *reasonable* efforts to consult parents of students...about the proposed merger", that such consultation be "*adequate*" and that the "creation of a single school" be "appropriate", but there is no legislative requirement for the Minister themselves to consult with parents: s 156A.

114 Education Act 1989, s 156B(1)-(2).

115 Education Act 1998, s 156B(3).

that it would close 13 Canterbury schools and merge another 18 in the wake of the Canterbury earthquakes. Among those scheduled for closure or merger were seven out of ten Christchurch schools which offered Māori medium education. Schools with bilingual classes were to be merged with others without, endangering the future of those bilingual programmes.¹¹⁶ Christchurch's only two kura kaupapa Māori – Te Kura Kaupapa Māori o Te Whānau Tahī (“Te Whānau Tahī”) and the South Island's first kura kaupapa Māori, Te Kura Kaupapa Māori o Waitaha (“Waitaha”) – were to be merged. The Ministry's proposal document suggested that the new school would be designated as a charter¹¹⁷ rather than special character school – a category inconsistent with the Education Act's establishment of a kura kaupapa Māori.

The Ministry's proposal document cited low enrolments and earthquake damage for the changes.¹¹⁸ While Waitaha had experienced a brief decline in numbers post-quake, its numbers had rebounded and it had experienced only very minimal earthquake damage, while Te Whānau Tahī's numbers had remained stable with no earthquake damage. Representatives of Waitaha alleged that the only rationale for the merger was geographical proximity and that merging the schools amounted to “a new form of colonisation” as the “schools are being disenfranchised, forced to assimilate, to abandon [distinctive] cultural histories and gathering places”.¹¹⁹ A representative of Te Whānau Tahī similarly equated the Ministry's decision with “[r]emoving the natural right of our people to choose where they send our children”.¹²⁰ At the time, Te Whānau Tahī was actually being studied by academics at Canterbury University and overseas because of its success with an innovative learning programme¹²¹ and the future of Māori language revitalisation in Christchurch was in question should the two schools be merged.¹²² Media sources also reported

116 Charley Mann “Plan will ‘decimate’ Māori options” The Press 27/9/12 found at <stuff.co.nz>.

117 Kate Shuttleworth “Māori schools fight merger” NZ Herald 18/9/12 found at <nzherald.co.nz>.

118 Ministry of Education “Te Kura Kaupapa Māori o Te Whānau Tahī – Rationale for change” 12/10/12, at 2.

119 Principal Huata Martindale quoted in Shuttleworth, above n 117. Also see Simon Lambert *Impacts on Māori of the Oautahi/Christchurch earthquakes* Working Paper 2013-01 (Te Whanake, Faculty of Environment, Society, and Design, Lincoln University, 2013).

120 “Māori school merger will affect language growth” 17/09/2012 <newshub.com>.

121 Ashleigh Stewart “Kura kaupapa schools refuse to budge” The Press 22/3/2013.

122 See Rawiri Taonui “Dark cloud gathers over Māori-medium schools” The Press 08/02/2013.

concerns about inadequate consultation in the process,¹²³ a complaint echoed in other mergers and closures.¹²⁴

After significant resistance by both school communities and the lodging of a complaint with the Waitangi Tribunal,¹²⁵ the Ministry decided that both schools could remain open if one of them relocated to north Christchurch, away from the community in which they had been established and grown. The Minister of Education, Hon Hekia Parata, left the impossible decision up to the two kura, a situation described as “divisive and possibly unethical” in a submission by Te Whānau Tahī families.¹²⁶ Both schools “refused to budge”¹²⁷ and the Ministry eventually decided against the merger.¹²⁸ Nevertheless, the Minister’s powers to merge or close remain.

Those powers may be even more worrisome in light of the Education (Update) Amendment Act¹²⁹ which came into force on 19 May 2017. At its first reading, Hon Hekia Parata claimed that the Act would provide “a more flexible and innovative education system, a system that serves all our children and young people” and that it would be consistent with the “fundamental principles of self-management”.¹³⁰ Among other changes, however, the legislation has recognised that, rather than the mere “discretion”, the Minister now has “absolute discretion” to decide to merge or close a school.¹³¹ As in the previous sections on mergers and closures, there is no requirement in the amendments for consultation with Māori. Thus, these powers may be even more unilateral and the potential for future Christchurch scenarios even greater than before.

123 See Charley Mann “School delays tribunal action” (The Press 15/1/13) found at <stuff.co.nz> dated 19/1/17; and Rawiri Taonui “Dark cloud gathers over Māori-medium schools” The Press 8/2/13, A1 7.

124 See, for instance, Talisa Kupenga “Karikari community fight against school’s closure” Māori Television, 06/09/2016, found at <Maoritelevision.com>, and Laura Bootham “School closure consult ‘farce’ says principal” Māori Television 25/09/2015, found at <radionz.co.nz/news>.

125 Jane Luscombe “Kura Kaupapa schools dispute merge” Newshub 17/9/12 found at <newshub.co.nz>.

126 Te Kura Kaupapa Māori o Te Whānau Tahī *Kupu whakahoki i te Whakatau Whakaaro Nuku: Response to Ministry of Education Relocation Proposal*, 28/01/13.

127 Stewart, above n 121.

128 “Closure threat lifted from Christchurch kura” <waateanews.com> 30/5/13.

129 See current Education Act 1989 s 154(2B) and s 156A(1A) on closure and merger respectively.

130 Parliamentary Debates (Hansard) for Education (Update) Amendment Bill – First Reading (22 September 2016) 717 NZPD 13533, at 13533.

131 See Education (Update) Amendment Bill, Part I, cls 109 and 110 respectively.

132 Wilton Littlechild and Elsa Stamatopoulou (eds) *Indigenous Peoples Access to Justice, Including Truth and Reconciliation Processes* (Institute for the Study of Human Rights, Columbia University, New York, 2014) at xi.

Obvious questions are raised in terms of the reckoning project by these events. Such unilateral, top-down decisions inherently contradict the grassroots nature of Māori medium education including kura kaupapa Māori. Significant interference with kura is immediately at odds with the kind of self-determining institution which has developed as if historic wrongs had not occurred. The closure and even merger of kura which are proven and measurable remedies for historical and ongoing wrong fundamentally interrupts the de facto reckoning project.

VIII. CONCLUSION

Wilton Littlechild and Elsa Stamatopoulous have written that:

Access to justice is a demand that increasingly underlies the major debates of our time, whether in the area of economic, political and social development, peace, human rights or culture. The issue is a bridge between the past, the present and the future as it refers to the entrenched marginalization of and systemic discrimination against members or groups of society. Access to justice is the stepping stone to address or remedy injustice.¹³²

Beyond accounting terms, reckoning or *dead reckoning* refers to an ancient navigation technique by which a ship's current position could be calculated by reference to previous position and velocity.¹³³ The technique similarly allowed a navigator to use present position and speed to plan a future course. Thus, one's current and future position was inherently connected with certain moments in time and points in space, and, like the accounting practice, required looking back over temporal distances into the past to see how far one had come, assess where one was now and also ask where one was heading.

Like the course of a ship calculated according to a historic position, current concerns relative to self-determination are so closely linked to the past as to be inseparable. Historic capture of educational institutions, assimilation and discrimination in law and fact continues to drive present disparities, a line between two points. Over time and in the present, the reach of accompanying wrongs – discrimination, disparities and worrying statistics – is so pervasive across generations that historic wrongs predict future wrongs. Reckoning in terms of Māori education is a once-and-future assessment. Given this temporal pervasiveness, should the harms

133 According to the Encyclopaedia Britannica, dead reckoning is defined as “determination without the aid of celestial navigation of the position of a ship or aircraft from the record of the courses sailed or flown, the distance made (which can be estimated from velocity), the known starting point, and the known or estimated drift”, found at <<https://www.britannica.com/technology/dead-reckoning-navigation>>, dated 20/2/17.

which are currently being addressed in Māori education fail to be addressed – if Māori educational institutions, for instance, are recaptured or self-determination in education denied or diminished – we endanger the historical, hard-won access to justice which Māori have actually achieved in the present and the future. Present statistics give us hope but the Minister of Education’s statutory powers to close or merge threaten the reckoning project. Whether we will look back on this moment decades or centuries from now for the source of historical and actual wrongs and debts unpaid remains to be seen.