PRESENTATION BY JUDGE GREG DAVIS

FROM THE DISTRICT COURT

OF NEW ZEALAND

TO AN ISRCL WEBINAR

CANADA

MAY 2020

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Te Whare Tapu o Ngāpuhi

(The sacred house of Ngāpuhi)

He mea hanga tōku whare,	When my sacred ancestral house was created
ko Papatuānuku te paparahi.	Our mother the Earth was its floor
Ko nga maunga nga poupou	The mountains its pillars; and
ko Ranginui e titiro iho nei, te tuanui.	The sky, our father, its ceiling
Manaia titiro ki Tūtāmoe.	Maniaia the mountain looks toward Tūtāmoe
Tūtāmoe titiro ki Maunganui.	Tūtāmoe looks toward Maunganui
Maunganui titiro ki Pūhanga-tohora	Maunganui looks toward Pūhanga-tohora
Pūhangatohorā titiro ki Te Ramaroa	Pūhangatohorā look toward Te Ramaroa
e whakakurupae ake ra i te Hauāuru.	The mountain range that stands in the west
Te Ramaroa titiro ki Whīria	Te Ramaroas look toward Whiria
te Paiaka o te riri, te kawa o Rāhiri.	the source of strife for the offspring of Rahiri
Whīria titiro ki Panguru, ki Papata,	Whiria looks to Panguru and to Papata
ki te rākau e tū papata ki te tai Hauāuru;	to the windswept trees of the west coast
Panguru, Papata titiro ki Maungataniwha.	Panguru and Papata look to Maungataniwha
Maungataniwha titiro ki Tokerau.	Maungataniwha looks toward Tokerau
Tokerau titiro ki Rākaumangamanga.	Tokerau looks toward Rakaumangamanga
Rākaumangamanga titiro ki Manaia,	Rākaumangamanga looks toward Manaia
e tu kohatu mai ra i te akau.	that stands steadfast on the coastal shore
Ehara ōku maunga i te maunga nekeneke,	My mountains do not move
he maunga tū tonu,	They remain steadfast
tū te Ao, tū te Po.	Standing day and night
Ko te Whare Tapu o Ngāpuhi tēnēi	This is the ancestral house of Ngāpuhi
Ka mimiti te puna i Hokianga	When the tide recedes in Hokianga
Ka tōtō te puna i Taumarere	It surges in Taumarere
Ka mimiti te puna i Taumarere	When the tide recedes in Taumarere
Ka tōtō te puna i Hokianga	It surges in Hokianga
Ko Ngātokimatawhaorua	Ngātokimatawhaorua
Ko Mataatua	Mataatua
Ko Mamari	Mamari
Ko Mahuhu-ki-te-Rangi	Mahuhu-ki-te-Rangi
E ōku tūakana, e ōku tūahine taketake o te Aō	To my indigenous brothers and sisters
Nā ēnēi pēpēha i whakataukītia	By these ancient recitations immortalised
ē ō mātou mātua tīpuna,	by our ancestors
ka mihi, ka tangi,	we greet you, and
ka mihi, ka tangi	we remember those who have gone before us
Nā mātou maunga koutou e mihi	Our ancestral mountains send their greetings
Nā mātou awa koutou e mihi	Our sacred rivers and waters greet you
Nā mātou waka koutou e mihi	Our ancient canoes send their greetings
Ā kouotu reo, ā mātou reo	Your voices and our voices
Kia pūtikitiki kotahitia	United together
Māku hoki koutou e mihi	I too humbly greet you

1. The most significant contribution that I can make to the role and significance of an indigenous Court is not what I am about to say, but rather what I have just said.

2. To know the significance of the ancient recitations that I have begun this discussion with is to know me. To understand the true significance of the ancient recitations is to begin to understand our people and our history. Our past has shaped our present. Equally, it will shape our future

3. The indigenous people of Aotearoa are the Māori people. We make up about 16% of the entire population of Aotearoa. My tribe is Ngāpuhi from the northern part of Aotearoa

4. The first recitation creates a metaphor to explain the geographical heartland of our Ngāpuhi people. The metaphor is that of an ancestral house. The floor of the ancestral house is the earth or Papatuānuku. The roof of the ancestral house is the sky, Ranginui. The walls or the pillars are the many mountains that encircle the ancestral heartland of the Ngāpuhi people. Sitting atop Manaia one can look, in this case, to the west toward Tutāmoe and then north to Maunganui and so on until eventually one completes a complete circle capturing the heartland of Ngāpuhi.

5. The recitation brings the listener (or the reader) in touch with the very creation of the world as Māori see it today. It reminds the listener that we are but a small link in the vast continuum of time. The reference to Ranginui and to Papatuānuku reminds the Māori ear of a time long gone when there was no such thing as day or night – it was all one. The world was surrounded by the darkness of the lovers embrace of Ranginui our father the sky, and Papatuānuku our mother, the earth. Longing for freedom and space some of Ranginui and Papatuānuku's children resolved to separate their parents from their embrace. This was not agreed by all the children and turmoil followed.

6. Eventually, the separation was completed and the children of Ranginui and Papatuānuku are the gods that Māori speak of today. Tane Mahuta the god of the forest and its creatures, Tangaroa the god of the sea and its creatures, Tawhirimatea, the god of the winds, rain and other elements are to name a few.

7. The second recitation refers to the ebbing and the flowing of the tides. The Ngāpuhi heartland is bounded to the east and to the west by the ocean. To the east lies the Te Moananui a Kiwa, the Pacific Ocean, and to the west Te Tai-o-Rehua, the Tasman Sea. The ancient recitations speak about the tide ebbing in Hokianga in the west, but it flowing in Taumārere in the east and conversely when it ebbs in Taumārere it flows in Hokianga.

8. The ebbing and flowing of the tide is another metaphor for the inter-connectedness of the Ngāpuhi people. To understand that recitation is to understand the whakapapa or genealogical ties that stretch back from me, 19 generations, to Rahiri the eponymous ancestor of Ngāpuhi.

9. It enables the listener (or the reader) to recall the creation of the two sides of Ngāpuhi, the *taha tai tamatane* and the *taha tai tamawahine.* It revives and strengthens the historical narrative that lead to the creation of the present day Bay of Islands and present day Hokianga through the quarrelling of Rahiri's sons Uenuku and Kaharau. The reference to the *tai tamawahine* is a reference to Uenuku being raised without a father. He was raised by Rahiri's first wife Ahuaiti. The *taha tai tamawahine* in turn being a metaphorical reference to Ahuaiti and the gentle nurturing of the female hand - typical also of the eastern coastline of Ngāpuhi where the sea gently caresses the eastern shoreline as the waves on the sheltered beaches and inlets.

10. The *taha taitamatane* in contrast is a reference to Kaharau being raised by his father. It is also a metaphorical reference to Rahiri, the warrior and the rugged nurturing of the male hand – typical of the western coastline of Ngāpuhi which see the waves of Te Tai-o-Rehua crash into the exposed western coastline.

11. The third recitation lists some of the ancient waka or canoes that traversed the Pacific Ocean to arrive in Aotearoa or New Zealand.

12. The final contribution is not a recitation, as such, but what is commonly a simple greeting. As is proper according to our *tikanga* or customs, our mountains, our rivers and oceans, and our people acknowledge your mountains, your rivers, your oceans, your sky, your language, your beliefs and in doing so we acknowledge you, our indigenous brothers and sisters of the World. We mourn those who have gone before us, and humbly, I greet you also.

13. Most significantly, each of the recitations and the greeting acknowledge the geographic markers set out in the recitations. They acknowledge that our place in the present world is inherently connected to the environment. Our identity is intrinsically linked to the geographic markers that I have recited and without those geographic markers our identity is lost.

14. The greeting acknowledges that our place in the world is temporary. However, the ancestral markers, the mountains and the rivers, will remain forever.

15. The greeting also acknowledges the many ancestors that have gone before us. Without them we could not be. Inherent in those acknowledgements is an understanding that our time on earth is short. In time we will be spoken about and remembered in the same way that we are presently acknowledging those that have gone before us.

16. To truly understand the significance of this imagery is to begin to understand Māori people. Māori were, in the ancient times, brought up with an innate understanding of the world that they lived in. They understood the interconnectedness between their acts and the environment.

The Ngāpuhi references

17. The numerous references to Ngāpuhi will immediately attune the Māori ear to the geographical location and the genealogical identification of the Ngāpuhi people. Those who

are familiar with the history of New Zealand, or Aotearoa, will know that history records the Polynesian voyages arriving and settling in New Zealand around 950 AD. It is said that Aotearoa was discovered by legendary Polynesian navigator Kupe. Aotearoa derives its name from what is thought to be the first sighting of the landmass. It is said that Kupe's wife, Kuramarotini observed on the distant horizon a cloud formation that she did not recognise. It was inconsistent with what she knew of cloud formations in a vast landless ocean. The old traditions say that Kuramarotini called out, "He ao, he ao, he Aotearoa" or, "A cloud, a cloud, a long white cloud." Within the Māori world Aotearoa was named.

18. Those familiar with New Zealand history will know that over the next 500 years or so there was a series of migrations to and from Aotearoa. Those migrations include the ocean voyage in waka Ngātokimatawhaorua, Mataatua, Mamari, and Mahuhu-ki-te-Rangi. Each of those ocean voyaging Waka made landfall within the Ngāpuhi territory. Ngātokimatawhaorua is said to have been made from Kupe's original ocean voyaging waka Matawhaorua. Kupe upon his return to Hawaiki is said to have submerged his waka in a freshwater river as was the custom. It was dug up by his descendant Nukutawhiti re–adzed and he renamed Matawhaorua, Ngātokimatawhaorua, or the re-adzing of Matawhaorua. The attuned Māori ear will be aware that Nukutawhiti was the ancestor of Rahiri. The attuned Māori ear will understand Rahiri to be the eponymous ancestor of Ngāpuhi.

19. For many centuries following the Māori arrival in Aotearoa Ngāpuhi lived within its tribal boundaries and territories. Drawing from the general discussions of the Waitangi Tribunal,[1] the Waitangi Tribunal went on to describe in the introduction to their report: "… Māori systems of authority and social organisation, discussing how Hapu and other groups interacted (both in competition and alliance) and how rangatira played a leadership role in which they embodied the mana of their people. As we seek to understand their systems of law and authority, we also explore some aspects of the claimants' history…. The interaction, integration and coexistence with the spiritual world, the physical world, and its people continued unabated until the arrival of the European settlers."

20. Following the second wave of migration from Polynesia to Aotearoa came another wave of migration in the period post-1769. It is said that Aotearoa was found by Abel Tasman in 1769. Colonial history has recorded the voyages of Abel Tasman and subsequently Captain James Cook and recorded how they have found New Zealand. Interesting again to the Māori ear, it came as somewhat of a surprise that Aotearoa had been "found" because Māori did not realise it had been lost. However, that is another story. Those familiar with the history of Aotearoa will know that in a short time Aotearoa was renamed New Zealand.

21. As the years and centuries passed, those familiar with Māori societies will recognise that Maori society organised itself in a clearly defined social structure. At its heart was the whānau or family unit. Unlike the Pākeha or western family unit, a Māori whānau comprised Grand-parents, parents, children, grandchidren and cousins and those more distantly related. The Māori word for cousin (of the same sex) is either tuakana if the cousin is senior in genealogical rank, or teina if they are not. Likewise, the Māori word for brother to a

[1] Te Papa Rahi o Te Raki, page 20

female, or a male cousin to a female, is tungane. The words for a sister to a male, or female cousin to a male, is tuahine. In other words, the words for brother and cousin, or sister and cousin, are the same.

22. A number of whānau would join together as a collective unit. Often this would be for security reasons. That collection of whānau is a hapu. A hapu is often looked upon as a sub-tribe.

23. Hapu joining together, again along genealogical lines would form an iwi or a tribe.

24. The pre-dominant social structure in Ngāpuhi is the hapu. Today hapu remain fiercely independent in intra-tribal debates, but regularly unite when tribal matters are raised with other tribes throughout Aotearoa.

25. Māori in the North, and in particular Ngāpuhi, declared their independence to the world in 1835[2], and in 1840 the Treaty of Waitangi[3] was signed in the North. The Treaty of Waitangi has been the source of much dispute as to what was meant by it. For the Pākehā colonisers it formed the basis of sovereignty being ceded by Māori. For Māori it confirmed what they already knew – they were a sovereign nation, or series of nations. Unfortunately, over the years it has been the Pākehā version of what occurred at Waitangi that has prevailed. The North, or the territory of Ngāpuhi, was the first part of the country to be settled by Pākeha. The thriving Māori agricultural economy and the abundant natural resources from the forests were quickly targeted. Land was acquired in vast chunks and the Waitangi Tribunal has found many of those acquisitioned by the Government on behalf of the colonists, and by colonists themselves, were unlawful. However, that has not meant that land has been returned to Ngāpuhi.

26. Ngāpuhi quickly became landless, or were left with insufficient land to sustain an economic base capable of sustaining traditional kinship structures.

27. After World War II New Zealand, like many other countries, set about rebuilding its economic base. Māori who had traditionally lived in rural areas migrated en-masse to the cities in search of work. Māori provided the bulk of the labour force for a growing city and economy but many of the jobs that Māori undertook were unskilled manual jobs.

28. The social consequences of the moves to the city have been catastrophic. Generations quickly became divorced from the traditional tribal bases. The language of our people became lost to many of the younger generations. Our parents and grandparents were subjected to corporal punishment for speaking Māori at school. The knowledge of the spiritual and environmental matters that I have spoken of earlier also became lost. The traditional family structures in many instances were replaced by modern constructs such as gangs. Alcohol, drugs and violence has often been prevalent. The result is many of the statistics that I am about to discuss in the next section.

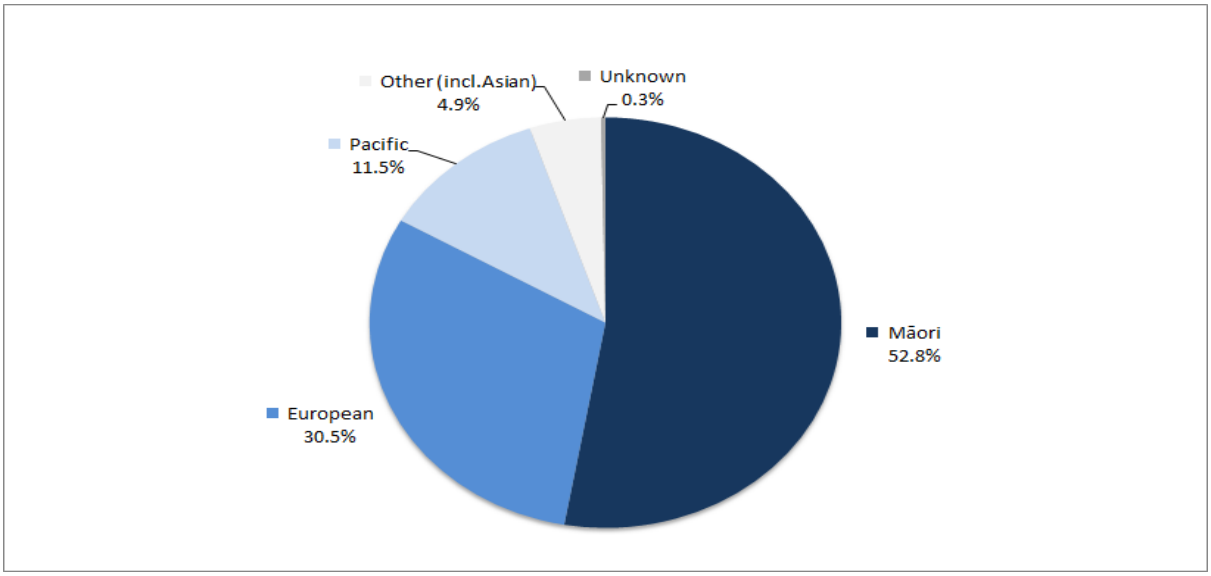
[2] He Wakaputanga o te Tino Rangatiratanga o Niu Tireni signed 28 October 1835

[3] Signed 6 February 1840 in Waitangi, and then transported to other locations around Aotearoa.

Ngāpuhi demographics

29. Māori make up about 16% of a population of 5 million. Of that Māori, Ngāpuhi make up approximately 25% of the Māori population comprising 150,000 Ngapuhi, or thereabouts.

30. Māori dominate all the negative health, education and justice statistics. While making up 16% of the general population, Māori men comprise over 50% of the male prison population. Māori women over 60% of the female prison population. Ngāpuhi make up approximately 25% of the total prison population. Ngāpuhi are, therefore, the most imprisoned ethnic group in New Zealand society.



Prison population by ethnicity- March 2020

Source: Te Ara Poutama: Ministry of Corrections: https://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_march_2020

31. Sixty percent of all males born in 1978 received a conviction by the age of 38, namely 2016. The statistics in a general sense are alarming, in a Māori-specific sense very alarming, and in a Ngāpuhi-specific sense are more alarming still.

Proportion of 1978 cohort convicted by age 38[4]

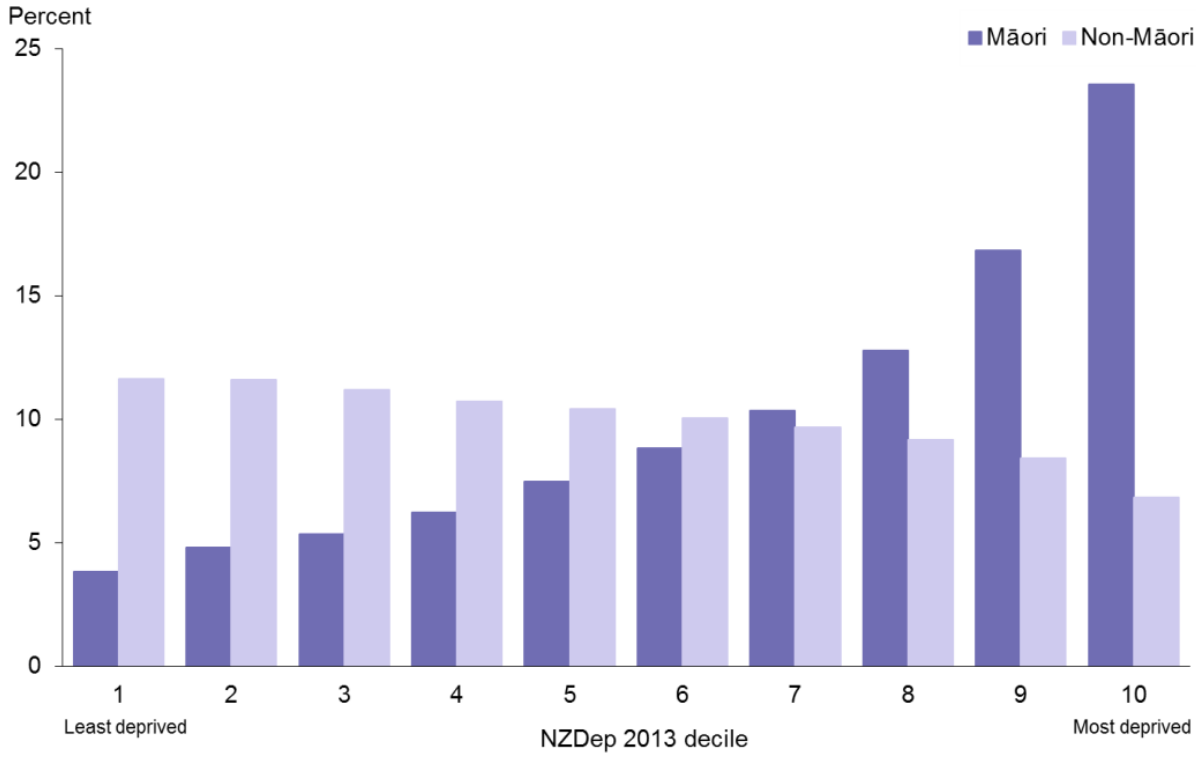
	Women	Men	Women and men
Māori	31%	60%	46%
Pacific	19%	47%	33%
Asian	3%	22%	12%
European & other	11%	33%	22%
All ethnic groups	**15%**	**37%**	**26%**

[4] https://www.justice.govt.nz/assets/Documents/Publications/Factsheet-proportion-ever-convicted.pdf

32. As far as general social indicators go, Māori again figure poorly in most categories. The following table compares key depravation indicators across communities in the following manner:[5]

> "NZDep2013 is a small-area-based index providing a measure of neighbourhood deprivation, by looking at the comparative socioeconomic positions of small areas and assigning them decile numbers from 1 (least deprived) to 10 (most deprived). The index is based on 9 socioeconomic variables from the 2013 Census. It describes the general socioeconomic deprivation of an area. An area's decile score does not necessarily mean all individuals living in that area experience an equivalent level of deprivation. Table 4 presents Māori and non-Māori populations in 2013 by deprivation decile."

Neighbourhood deprivation distribution (NZDep 2013), Māori and non-Māori, 2013



33. The table shows that Maori are more likely to live in the areas of high depravation. Nearly one quarter of all Maori live in the most deprived areas in Aotearoa, while less than five percent live in the least deprived areas.[6]

34. By contrast non-Māori were more advantaged than Māori across all socioeconomic indicators presented. Māori adults had lower rates of school completion and much higher rates of unemployment. More Māori adults had personal income less than $10,000, and

[5] https://www.health.govt.nz/our-work/populations/maori-health/tatau-kahukura-maori-health-statistics/nga-awe-o-te-hauora-socioeconomic-determinants-health/neighbourhood-deprivation

[6] Ibid note 3. In 2013, 23.5% of Māori lived in decile 10 areas (compared with 6.8% of non-Māori), while only 3.8% lived in decile 1 areas (compared with 11.6% of non-Māori).

more Māori adults received income support. Māori were more likely to live in households without any telecommunications (including internet access) and without motor vehicle access. More Māori lived in rented accommodation and lived in crowded households.[7]

Socioeconomic indicators, by gender, Māori and non-Māori, 2013

	Māori			Non-Māori		
Indicator	Males	Females	**Total**	Males	Females	**Total**
School completion (Level 2 Certificate or higher), 15+ years, percent, 2013	42.1	47.8	**45.1**	65.2	63.4	**64.3**
Unemployed, 15+ years, percent, 2013	9.8	10.9	**10.4**	3.9	4.1	**4.0**
Total personal income less than $10,000, 15+ years, percent, 2013	23.0	25.0	**24.1**	14.8	21.7	**18.4**
Receiving income support, 15+ years, percent, 2013	23.1	36.7	**30.4**	10.9	16.4	**13.8**
Living in household without any telecommunications, all age groups, percent, 2013	3.1	2.9	**3.0**	1.0	0.8	**0.9**
Living in household with internet access, all age groups, percent, 2013	69.4	68.6	**69.0**	84.3	83.2	**83.8**
Living in household without motor vehicle access, all age groups, percent, 2013	8.1	9.3	**8.7**	3.7	5.0	**4.4**
Living in rented accommodation, all age groups, percent, 2013	48.3	50.5	**49.5**	27.7	27.3	**27.5**
Household crowding, all age groups, percent, 2013	18.3	18.8	**18.6**	7.8	7.6	**7.7**

35. While this paper has focused on my own people, Ngāpuhi, similar stories by other tribal groups exist around the country.

[7] https://www.health.govt.nz/our-work/populations/maori-health/tatau-kahukura-maori-health-statistics/nga-awe-o-te-hauora-socioeconomic-determinants-health/socioeconomic-indicators

The sentencing process

36. The sentencing process in New Zealand is a three-stage process. It applies to all offenders, regardless of ethnicity. However, as the statistics tend to show, the result is a disproportionate punitive effect on Maori.

37. The following Table[8] shows prosecutions by ethnicity in 2004 as a percentage of all prosecutions. While the nature and extent off the offences committed by non-Māori and Māori differ, on its face, it cannot explain the disproportionate rate of Māori incarceration.

Prosecutions undertaken in 2004 by offence class and ethnicity (% of all prosecutions)

	Violence	Sex	Drugs, antisocial	Dishonesty	Property	Admin
European	38	48	48	43	47	38
Māori	45	31	35	46	42	50

38. The Sentencing Act 2002 provides a framework for the Courts to structure any sentence.[9] It requires a sentencing Judge to look firstly at the offence. The Judge must assess the gravity of the offending having regard to the particular circumstances of the case. In doing so, the Court must have in mind specific purposes set out in s 7 of the Sentencing Act. These include:

    - holding an offender accountable for the harm done to the victim and the community by their offending; or
    - promoting in an offender a sense of responsibility for, and an acknowledgment of, that harm; or
    - to provide for the interests of the victim of the offence; or
    - to provide reparation for harm done by the offending; or
    - to denounce the conduct in which the offender was involved; or
    - to deter the offender or other persons from committing the same or a similar offence; or

[8] Prosecutions undertaken in 2004 by offence class and ethnicity as a percentage of all prosecutions. Source: https://www.corrections.govt.nz/resources/research_and_statistics/over-representation-of-maori-in-the-criminal-justice-system/2.0-criminal-justice-system-bias-and-amplification/2.2-prosecutions-and-convictions

[9] Sentencing Act 2002: http://www.legislation.govt.nz/act/public/2002/0009/latest/DLM135342.html

- to protect the community from the offender; or
- to assist in the offender's rehabilitation and reintegration; or
- a combination of 2 or more of the purposes above.

39. Specific aggravating and mitigating features the court must weigh up are set out in s 8 of the Sentencing Act 2002[10]. These include taking into account:
    - the gravity of the offending in the particular case, including the degree of culpability of the offender; and
    - the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
    - must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
    - the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
    - any information provided to the court concerning the effect of the offending on the victim; and
    - must impose the least restrictive outcome that is appropriate in the circumstances [in accordance with the hierarchy of sentences and orders set out in section 10A]; and
    - any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
    - the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
    - any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).
40. What weight the Judges gives to each factor is a matter of specific evaluation.
41. Section 9 of the Sentencing Act sets out a number of aggravating and mitigating factors the Court must take into account including:

[10] S 8 Sentencing Act 2002: http://www.legislation.govt.nz/act/public/2002/0009/latest/DLM135342.html

- that the offence involved actual or threatened violence or the actual or threatened use of a weapon:
- that the offence involved unlawful entry into, or unlawful presence in, a dwelling place:
- that the offence was committed while the offender was on bail or still subject to a sentence:
- that the offence was a family violence offence (as defined in section 123A) committed—
    - (i) while the offender was subject to a protection order (as defined in section 8 of the Family Violence Act 2018, or that was made under section 123B of this Act); and
    - (ii) against a person who, in relation to the protection order, was a protected person (as so defined):
- the extent of any loss, damage, or harm resulting from the offence:
- particular cruelty in the commission of the offence:
- that the offender was abusing a position of trust or authority in relation to the victim:
- that the victim was a constable, or a prison officer, acting in the course of his or her duty:
- that the victim was an emergency health or fire services provider acting in the course of his or her duty at the scene of an emergency:
- that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender:
- that the offender committed the offence partly or wholly because of hostility towards a group of persons who
- have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
    - (i) the hostility is because of the common characteristic; and
    - (ii) the offender believed that the victim has that characteristic:
- that the offence was committed as part of, or involves, a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002):
- the nature and extent of any connection between the offending and the offender's—

(i) participation in an organised criminal group (within the meaning of section 98A of the Crimes Act 1961); or

(ii) involvement in any other form of organised criminal association:]

- premeditation on the part of the offender and, if so, the level of premeditation involved:
- the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time.
- any failure by the offender personally (or failure by the offender's lawyer arising out of the offender's instructions to, or failure or refusal to co-operate with, his or her lawyer) to comply with a procedural requirement that, in the court's opinion, has done either or both of the following:

(i) caused a delay in the disposition of the proceedings:

(ii) had an adverse effect on a victim or witness.

42. In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

- the age of the offender:
- whether and when the offender pleaded guilty:
- the conduct of the victim:
- that there was a limited involvement in the offence on the offender's part:
- that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:
- any remorse shown by the offender, or anything as described in section 10:
- that the offender has taken steps during the proceedings (other than steps to comply with procedural requirements) to shorten the proceedings or reduce their cost:
- any adverse effects on the offender of a delay in the disposition of the proceedings caused by a failure by the prosecutor to comply with a procedural requirement:
- any evidence of the offender's previous good character:
- that the offender spent time on bail with an EM condition as defined in section 3 of the Bail Act 2000.

43. The court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).

44. Having considered the gravity of the offending the Judge must then set the appropriate starting point for any sentence that may include a term of imprisonment. However, the Sentencing Act does not create a presumption in favour of imprisonment.

45. Having considered the starting point by reference to the gravity of the offending the Judge must then look to the second stage of the sentencing exercise, namely the personal features of the offender, him or herself. The aggravating features of the offender generally are limited to the offender's previous criminal history, if any. The mitigating features include a number of factors. They include factors such as remorse, offers to make reparation, offers to attend restorative justice meetings.

What place does this have in an indigenous court?

46. Many of those who appear in the Courts in New Zealand are Māori.

47. The disproportionate rate of imprisonment of Māori offenders has long been recognised. In the Parliamentary debates leading to the passage of the Criminal Justice Act 1985 the following was said by Dr Michael Cullen to the Statutes Review Committee[11]:

> First, there is a better recognition of Maori cultural patterns by changes to the interpretation clause, clause 2, as to the kinds of programme on which people may be placed. There is particular recognition of programmes such as Maatua Whangai; a recognition of the importance to the appropriate ethnic group such as the tribe, the iwi; the sub-tribe, hapu; the extended family, whanau or marae; and a recognition of the possibility of peoples entrustment to the care of elders the Kaumatua. The Select Committee made a conscious attempt to recognise in particular the importance of trying to meet the needs of Maori offenders and more particularly young Maori offenders who form such a disproportionately large element within the prison population and the population coming before the Courts, to the shame of us all.

48. At the second reading of the Bill, the then Justice Minister, the Honourable Geoffrey Palmer said:

> Clause 14A is a new important provision. It allows offenders appearing before a Court for sentence to call a person to speak to the Court about the offender's ethnic or cultural background and on the way in which that background relates to the offence or may assist in the prevention of re-offending by the offender. The Court is obliged to hear any person called by the offender, unless it is satisfied that for some special reason it would not be of assistance to hear that person. The purpose of the new provision is to secure the co-operation of ethnic minorities that at present experience high rates of imprisonment in seeking ways of finding alternatives to imprisonment. Clause 14A has been framed to apply generally to persons of all races to avoid any argument that it favours some racial groups at the expense of others.

[11] (12 June 1985) 463 NZPD 4759

49. In 2002 the Sentencing Act replaced the Criminal Justice Act 1985. Sections 25 and 27 were enacted. Section 25 of the Sentencing Act provides:

25 Power of adjournment for inquiries as to suitable punishment

(1) A court may adjourn the proceedings in respect of any offence after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with for any 1 or more of the following purposes:

(a) to enable inquiries to be made or to determine the most suitable method of dealing with the case:

(b) to enable a restorative justice process to occur, or to be completed:

(c) to enable a restorative justice agreement to be fulfilled:

(d) to enable a rehabilitation programme or course of action to be undertaken:

(da) to determine whether to impose an instrument forfeiture order and, if so, the terms of that order:

(e) to enable the court to take account of the offender's response to any process, agreement, programme, or course of action referred to in paragraph (b), (c), or (d).

(2) If proceedings are adjourned under this section or under section 10(4) or 24A, a Judge or Justice or Community Magistrate having jurisdiction to deal with offences of the same kind (whether or not the same Judge or Justice or Community Magistrate before whom the case was heard) may, after inquiry into the circumstances of the case, sentence or otherwise deal with the offender for the offence to which the adjournment relates.

50. While s 27 Sentencing Act provides:

27 Offender may request court to hear person on personal, family, whanau, community, and cultural background of offender

(1) If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—

(a) the personal, family, whanau, community, and cultural background of the offender:

(b) the way in which that background may have related to the commission of the offence:

(c) any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whanau, or community and the victim or victims of the offence:

(d) how support from the family, whanau, or community may be available to help prevent further offending by the offender:

(e) how the offender's background, or family, whanau, or community support may be relevant in respect of possible sentences.

(2) The court must hear a person or persons called by the offender under this section on any of the matters specified in subsection (1) unless the court is satisfied that there is some special reason that makes this unnecessary or inappropriate.

(3) If the court declines to hear a person called by the offender under this section, the court must give reasons for doing so.

(4) Without limiting any other powers of a court to adjourn, the court may adjourn the proceedings to enable arrangements to be made to hear a person or persons under this section.

(5) If an offender does not make a request under this section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subsection (1).

51. I posit that s 27, and before it s 16 of the Criminal Justice Act 1985, is Aotearoa's equivalent of Canada's Criminal Code, R.S.C., 1985, c. C-46, s. 718.2 (e). Sadly, and despite being on the Statute books for 35 years, little or no thought has been given to the potential of either s 25 or s 27 of the Sentencing Act 2002, until quite recently.[12] A full discussion on history of s 27 cases would require another session on its own.

52. However, increasingly, the Court is being invited to consider the factors set out in s 27 Sentencing Act. The Court is often then tasked with considering an offender's "background". The personal, family, whānau, community and cultural background of the offender. In addition to that the Court may be invited to hear about, "The way in which the background offending may have related to the commission of the offence."

53. Here, factors such as the history of the hapu or an iwi, such as Ngāpuhi, and the disconnection from the traditional cultural teachings, language, land, and historical guidance from elders becomes important. It translates from there to the migration to the cities, the loss of the language and cultural identity, and the association often to drinking, drugs and violence. Further to that is that statistics show Māori are most likely to live in the most economically deprived areas. They are most likely to have the lowest paid jobs, be the most uneducated, have the least income, live in the most deprived areas in overcrowded housing, without access to the Internet, motor vehicles or, in general, telecommunications. They are most likely to be earning less than $10,000, are most likely to be unemployed and are most likely to be reliant on welfare or benefits. Each of these factors translates to a higher likelihood of contacts with the criminal justice system and ultimately contributes directly to a disproportionately high rate of imprisonment.

54. Reports are often completed by professional report writers, which would be broadly equivalent to a GLADUE report in the Canadian jurisdictions. However, the Act also allows the Court to hear from any person that an offender may ask to speak for them personally. That may include kaumatua or kuia, or male or female elders of the tribe. It is common in my Court to hear oral presentations directly from whānau in Court.

[12] See *R v Heta* [2018] NZHC 2453; *Carroll v R* [2019] NZCA 172; *Felise v R* [2020] NZCA 60

The New Zealand response

55. If Revelation 21:21[13] described streets being paved in gold, for Māori the pathway to imprisonment is paved with stories of depravation and poverty, violence, alcohol and drug use, homelessness, hopelessness, land loss, colonisation and unemployment. For most Māori that will be no great revelation!

56. The New Zealand response was to set up an indigenous Court in the Kaikohe region of the North. The court was named the Matariki Court. Matariki in our language may mean two things. It may mean Mata-ariki or the eyes of God. That is in my view a lofty title. The title I prefer is Matariki which is the Pleiades star cluster which appears above the horizon in June and signifies the traditional start of the planting year or what we would loosely describe in Māori terms as "The Māori New Year". It is generally any time from June onwards and contrasts with the Western concept of New Year on 31 December. In Japanese culture it is the Subaru star cluster.

57. The establishment of the Matariki Court was a Judge-led initiative to try and address the alarming rate of Māori imprisonment. The general principle is that when an offender pleads guilty to an offence they may be sent to have an assessment completed by a group **Te Mana o Ngāpuhi Kowhao Rau**. An **offender specific plan** to identify and address the underlying causes of offending is developed by Te Mana o Ngāpuhi Kowhao Rau and presented to the Court for consideration. Sometimes it is rejected by the Court, but more often than not it is accepted.

58. Te Mana o Ngāpuhi Kowhao Rau draw on their own resources to develop and implement rehabilitation plans, but also draw on the resources and services of other NGOs in the community.

59. Te Mana o Ngāpuhi Kowhao Rau are a non-governmental organisation who are not aligned to the Court. Their function is to undertake a comprehensive assessment of an individual's needs. It is often begun by the presentation of the criminal offending. In other words, if the charge was one of assault it may well outwardly present as an anger management issue. However, the experience of the Matariki Court is that, invariably, the in-Court presentation by an offender is only the symptom of a broader series of underlying physical, mental, drug and alcohol, socio-economic, housing, educational issues of which the in-Court presentation is the tip of the iceberg. Often the in-Court presentation of a person hides the out-of-Court chaos with which many of our Māori offenders live their lives. Homelessness or poor quality housing, low income and joblessness, alcohol use dependency, violence and most concerning a paucity of hope are often the true issues that need to be addressed. It is there that the Te Mana o Ngāpuhi Kowhao Rau weave their magic. They are the Matariki Court.

60. What often comes out of the early engagement between an offender and Te Mana o Ngāpuhi Kowhao Rau is a realisation that often not only is offender's life in chaos, so too is

[13] King James Bible: Revelation 21:21

their whanau, or family's, lives. It is common for programs to be developed that look at an offender's specific issues, but also the wider whanau issues.

61. A wholistic approach incorporating the *taha tinana,* or physical health, *taha wairua* or spiritual health, *taha hinengaro* or mental health and *taha whanau* or family health is followed by Te Mana o Ngāpuhi Kowharau.[14]

62. An offender is a person long before they are an offender. They are someone's child, invariably someone's parent, someone's spouse. They have weaknesses, but equally they have strengths. Whānau is a strength. Resilience is a strength.

Court sittings

63. Court sittings begin with a traditional welcome ceremony, adapted to suit the modern day Court setting. Speeches of welcome are given by elders and the Court and traditional *waiata*, or songs, sung. Speeches and waiata in reply are also made before a *hariru* and *hongi* process is completed. All participants in the Matariki Court are expected to participate. That includes the offender and their whanau, prosecutors, lawyers, Community Corrections staff, Te Mana o Ngāpuhi Kowharau, any visitors, observers from other Government Departments and most importantly, court staff and **the judge**. If these traditions are to be seen as having weight in a sentencing court, the court and the judge must demonstrate that. Lip-service is not enough.

64. Rather than sitting in a traditional Court like sitting with the Judge on the bench, we all sit around a table with the offender often sitting next to the Judge. Counsel and family members are all invited into the body of the Court. Discussions are free-flowing between the Judge and the offender and their whanau. Sitting with the Court are prosecutors, NGOs and elders of the tribe. For an offender to lie to a Judge might be relatively straightforward, but to lie to the elders is a task that most people would find difficult. Most people that come to the Matariki Court understand that they need help. Whether they are prepared to engage in the hard work is often a trickier issue.

65. What flows from the reports, both oral and written, is information about the offender, their personal, family, whanau, community, and cultural background, and the way in which that background may have related to the commission of the offence.[15]

66. Work programs specifically targeting their individualised needs are developed by Te Mana o Ngāpuhi Kowhao Rau. The work Te Mana o Ngāpuhi Kowhao Rau does with an offender is monitored on a regular basis by the Court. The most important aspect in my view of Te Mana o Ngāpuhi Kowhao Rau's work is the work that they do to reconnect a person to their culture, to their family, to their language and to their traditional ancestral roots. This work is often about the restoration of an offender's self-esteem, or as we call it *mana*. That is where the magic of our indigenous Court works. It also, in my view, gives substance to the history, the intergenerational violence, depravation and poverty, alcohol and drug use,

[14] Developed from the Te Whare Tapa Whā model by Sir Mason Durie

[15] As required by Section 27(1)(a) Sentencing Act 2002

homelessness, hopelessness, land loss, colonisation and unemployment; it provides a context to a person's offending without seeking to condone that offending or without seeking to justify it.[16]

67. Critical to the success of Te Mana o Ngāpuhi Kowhao Rau is the point that they are not part of the Justice System as such. They are an NGO working with whanau and offenders. They have an important role to play in Court, but they are not part of the Court or the Government. Wide-spread systemic mistrust by Māori must be overcome before engagement can begin.

68. Māori have a long and unpleasant history of engagement with the "system". They have a longer history of engagement with whānau. Te Mana o Ngāpuhi Kowhao Rau are seen as whānau by offenders.

69. Te Mana o Ngāpuhi Kowhao Rau are free, and are encouraged, to work with a wide ranging brief to address issues for an offender and their whanau. They are the key to an indigenous Court – not the Court itself.

The challenge – a conclusion

70. The challenge, if one is to address the rate of imprisonment of Māori offenders, is to reconfigure the 'system" to address all the needs of an offender. Those involved in the system need to be educated to understand a colonial history – colonisation - has had many flow-on effects. Landlessness, homelessness, poverty, depravation, drug and alcohol abuse, violence, poor physical health, poor mental health, low income, poor education and high suicide rates amongst Māori are not a coincidence. They are a product of a history of colonisation – a systematic response by one nation to acquire the territory of another. A systematic response to the substitution of one set of cultural norms with another. The loss of land, language, culture and identity is looked upon as a regrettable by-product of the indisputable benefits of the new dominant culture. But to be landless in your own land, and language-less amongst your own language, is not a coincidence. And to have lost much of your cultural identity is also not a coincidence.

71. Lawyers and Judges alike will need consider these factors carefully, but to do so requires a lawyer **and then** a Judge to understand the issues and to give them appropriate consideration and weight. Historically, Judges and lawyers have been slow to recognise a cultural issue may even exist or be relevant, let alone understand how that should be presented to the court as evidence. But, to add to the problem, placing that evidence in the context of the Sentencing Act requires legal skill that is not historically apparent.

72. The systematic legal education of Judges and lawyers may be required.

73. Dramatic changes are underway in New Zealand. More Māori judges have recently been appointed than ever before. That is a start, but it will not address the issues arising from Māori being investigated, charged and prosecuted in record numbers.

[16] As required by section 27(1)(c)-(e) of the Sentencing Act 2002

74. It may not address the issue of Māori children being placed in state care in record numbers.

75. It most certainly will not address landlessness, homelessness, poverty, depravation, drug and alcohol abuse, violence, poor physical health, poor mental health, low income, poor education and high suicide rates amongst Māori.

76. The Institute of Judicial Studies runs continuing education programs for Judges and runs a number of courses and seminars to educate judges on these issues. However, exposure of judges to these issues is required at the coal face every day. Well-reasoned, well-presented evidence of the offender-specific deficits will be required on a case by case basis. In my view it is not enough to say, "*my client is Māori – give them a sentencing discount"*. The Sentencing Act requires evidence of a causative link between an offender's background and the offending.

Heoi anō,	Therefore,
hei korero whakamutunga māku	In concluding my remarks
e ōku tuākana, e ōku tuāhine taketake	my indigenous brothers and sisters
ka hoki whakamuri au	I return to the point from where I began
Ki ōku maunga whakahī	To my sacred mountains
Tu te Ao, tu te po	That stand steadfastly day and night
Ki ngā puna waiora	To the life giving waters
o ngā tupuna	of the ancestors
e mimiti haere ana	That ebb
e totō haere ana	That flow
pēnei i a mātou roimata	like our tears
e waipuke ana	that flow like a waterfall
mō rātou kua wheturangihia	for those who have left us
Ānei anō mātou ka mihi	Again, I greet you all
Ka tangi	We weep with you for your departed
Ka poroporoaki	We say farewell as we depart
Mauri Tu, Mauri Ora	