RE-CREATING LEGAL SPACE FOR THE FIRST LAW OF AOTEAROA-NEW ZEALAND

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The British Government seems to colonize in a very empirical way: there is no investigation of the laws, usages, and customs of the natives - no attempt made to suit any laws to their particular conditions: how they can expect to succeed is to me marvelous. — Octavius Hadfield, 1847.[1]

I. INTRODUCTION

Prior to signing the Treaty of Waitangi in 1840, law and order operated within the legal system of Aotearoa through tikanga Māori with Māori world views, values and customary laws and institutions prevailing. In this respect, Māori customary law or tikanga Māori is correctly referred to as the 'first law' of Aotearoa-New Zealand.[2] Following the Treaty, the legal system continued to acknowledge and accommodate for Māori customary laws and institutions in quite significant ways. Early statutory and case law examples acknowledged Māori customary laws and institutions in pragmatic ways so that there appears to have been some genuine attempts to reconcile two different world views and laws within the same geo-political space.

This article will discuss some of the historic and contemporary statutory and case law examples of a hybrid Māori-British common law legal system in Aotearoa-New Zealand that significantly acknowledges the first law – tikanga Māori customary law.[3] The article teases out how the current legal system is encouraging the integration and reconciliation of Māori customary and English common law highlighting some of the significant challenges of this hybrid polyphyletic jurisprudence. The article highlights the importance of customary law generally and tikanga Māori customary law specifically then discusses some of the significant personal, professional and institutional challenges of incorporating tikanga Māori customary law into the legal system. The author concludes with a proposed pragmatic solution to assist the Judiciary when deciding on cases involving tikanga Māori customary law.

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1 Hadfield MSS, Hadfield/Vennh, 18 May 1847. Cited in K Sinclair, *The Origin of the Māori Wars* (1957) 107.

2 Ani Mikaere referred to tikanga Māori as the 'First Law' of Aotearoa/New Zealand in A Mikaere 'The Treaty of Waitangi and Recognition of Tikanga Māori' in M Belgrave, M Kawharu and D Williams, *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2005) 330.

3 The phrases Māori customary laws and institutions, tikanga Māori, tikanga Māori customary law, Māori values, Māori usages, and a Māori world view are used interchangeably throughout this article.

II. Historic Legal Authority for Recognising Māori Customary Law

A. Doctrine of Aboriginal Rights

One of the non-Māori legal authorities for acknowledging tikanga Māori customary law within the legal system of Aotearoa-New Zealand is the common law doctrine of Aboriginal rights. English common law presumes and recognises some continuity of the local Aboriginal law subsequent to British annexation.[4] The elements of Aboriginal rights maintained were those that were not repugnant to common law and which did not interfere with or challenge the new sovereign.[5] Specific rules of Aboriginal title under the ambit of Aboriginal rights provide for the continuity of tribal property rights which are common law rules establishing a type of legal pluralism.[6] The continuity of tribal title is defined by Māori customary laws thereby acknowledging that Māori Rangatira (leaders) retained a certain amount of legally recognised de jure power.

De facto, such authority was exercised by the Rangatira after British sovereignty until the Crown was practically able to exercise what it had claimed as a matter of law.[7] The situation meant that some, if not most Māori communities, remained subject to their traditional values, customary laws, usages, norms and institutions after the Treaty. The notion that some tribes should have remained subject to their de jure customary laws and institutions however, was firmly rejected following the 1860s New Zealand War period. De facto, many Māori continued to live within their tribal rohe (regions) where the Queen's writ remained marginal and tikanga Māori continued to apply unabated perhaps even as late as World War II.

Given that the doctrine of Aboriginal rights is defined by customary laws, it would appear that the 'Indigenisation' of the Aotearoa-New Zealand legal system to some extent can occur and has occurred triggered by the judiciary. Still, the New Zealand judiciary has not always reacted favourably to Māori and the extent to which Māori custom can be recognised remains to be argued.[8]

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4 *The Case of Tanistry* (1608) Davies 28 (K B); *Memorandum* (1722) 2 P Wms 75 (P.C); *Campbell v Hall* (1774) 1 Cowp 204 (K.B).

5 P McHugh, 'The Aboriginal Rights of the New Zealand Māori at Common Law' (Unpublished PhD. Thesis, Sydney Sussex College, Cambridge, 1987), 150.

6 Ibid 51.

7 The first Attorney-General William Swainson tried to argue that the Crown did not have sovereignty over those tribes who had not signed the Treaty of Waitangi or had done so with the imperfect knowledge of its consequences. Swainson / Shortland, 27 December 1842, CO 209/16: 487; *Opinion* of 13 July 1843, enclosure in Shortland / Stanley (No. 2), 13 July 1843, CO 209/22: 245, 285-93.

8 The judiciary later rejected claims to common law Aboriginal title and the Treaty of Waitangi in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur. (N.S) S.C 79. The Court upheld the *Wi Parata* finding in *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655, which policy shifted in 1986 when the judiciary consented to recognise claims to common law Aboriginal title such as tribal mana (authority) over sea fisheries according to their customary laws in *Te Weehi v Regional Officer* (1986) 6 NZAR 114 (H.C).

B. Treaty of Waitangi 1840

In 1840, the Crown developed a Charter[9] for the Colony of New Zealand with accompanying Royal Instructions[10] that reiterated the main features of the Charter and included direction that no law passed by the Legislative Council should diminish the prerogative powers of the Crown.[11] Governor Hobson was instructed not to propose or assent to any Ordinance that would result in Māori being treated less favourably than Europeans. McHugh noted that the promise of te tino rangatiratanga (self-governance) in Article II of the Treaty of Waitangi included the continued viability of customary law where Māori 'offenders' were concerned.[12] 'The chiefs thought simply that they were to retain their customary authority over and amongst their own people,' he added.[13]

The Treaty of Waitangi moreover, affirmed Māori customary law as the first law of Aotearoa-New Zealand in the terms of Article II: '... te tino Rangatiratanga ... o ratou *taonga katoa*' [emphasis added]. The English text translates this term as 'the full exclusive and undisturbed possession of their .... *other properties*'[14] [emphasis added]. In 1860, Governor Gore Brown defined taonga as 'all other possessions.'[15] However in 1986, the Waitangi Tribunal defined taonga katoa more broadly to include 'all [Māori] valued customs and possessions.'[16] The Tribunal added that taonga in a metaphorical sense covers a variety of possibilities rather than itemised specifics consistent with the Māori language,[17] and as more than objects of tangible value that regulated daily life.[18]

Under these juristic definitions and applying a ejusdem generis approach, taonga katoa in the Treaty should be construed to include the first law, Māori customary law. Māori custom was treasured by the ancestors, and was an intangible object of immense value. It still is for many Māori today. Jackson confirmed that the undertaking to preserve 'other properties' (taonga katoa) in Article II included 'all things highly prized as their own *customs* and culture'[19] [emphasis added]. William Colenso also described an incident prior to signing the Treaty where Governor Hobson agreed to protect Māori custom in the alleged fourth Article of the Treaty (albeit an oral article).[20] To avert suspicion of the Treaty then, Governor Hobson issued a circular to the Rangatira (Chiefs)

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9 Charter for Erecting the Colony of New Zealand, and for Creating and Establishing a Legislative Council and an Executive Council, and for Granting Certain Powers and Authorities to the Governor for the time being of the said Colony, *G.B.P.P* (I.U.P. Shannon, Ireland) [1835-1842] Vol 3, 153.

10 *Royal Instructions* 5 Dec. 1840, G.B.P.P. (I.U.P Shannon, Ireland) [1835-1842] Vol 3, 156.

11 Ibid 156, 158, [13].

12 P McHugh, *The Māori Magna Carta* (1991) 287.

13 Ibid.

14 I H Kawharu, *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (1989) 317.

15 *Māori Messenger* (10 July and 26 July, 1860).

16 Waitangi Tribunal *Report Findings of the Waitangi Tribunal. Relating to Te Reo Māori* (Wai-11, Wellington, 29 April 1986) [4.2.4] [4.2.8] [4.2.3] 20.

17 Waitangi Tribunal, *Report Findings and Recommendations of the Waitangi Tribunal ... in Relation to Fishing Grounds in the Waitara District* (Te Atiawa Report) (Wai-6, Wellington, 1983) [10.2a].

18 Above n 16 (Waitangi Tribunal) [4.2.4] [4.2.8].

19 M Jackson, *He Whaipaanga Hou - A New Perspective - Māori and the Criminal Justice System* (Dept. of Justice, Wellington, 1988), 49. See also the proto-compendium discussion of taonga page 94.

20 W Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (1890) 31-32. The alleged fourth Article orally stated: '*E mea ana te Kawana ko nga whakapono katoa o Ingarani, o nga Weteriana, o Roma, me te ritenga Māori hoki e tiakina ngatahitia e ia* – The Governor says that the several faiths (beliefs) of England, of the Wesleyans, of Rome, and also Māori *custom* shall alike be protected by him.' Refer to C Orange, *The Treaty of Waitangi* (1987) 53.

assuring them that 'their native customs would not be infringed, except in cases that are opposed to the principles of humanity and morals.'[21] Furthermore, when subsequently asked about the significance of the Treaty of Waitangi in the House of Commons in 1848, Lord Gladstone replied: 'As far as this country was concerned, there was not a more strictly and rigorously binding Treaty in existence.'[22]

In summary, the common law doctrine of Aboriginal rights and the partnership provisions and inclusion of taonga katoa within the Treaty of Waitangi affirm that first law, Māori customary law, was not only to be officially recognised within the legal system of Aotearoa-New Zealand, but to be preserved and protected by the Imperial, Colonial and subsequent Governments of Aotearoa-New Zealand. Māori customary laws and institutions should have been entrenched in the legal system following the Treaty. The Treaty and Māori custom carried with them an acknowledgment of the laws and institutions that had developed over the centuries to maintain law and order in Māori society. The Treaty sought to encourage the integration and reconciliation of Māori customary and English common law.

C. Early Statutory Examples Recognising Māori Custom as Law

It is not surprising then that in 1840 Governor Hobson issued orders to Shortland, police magistrate of Kororareka, that 'a rigid application of British law to the Māori should be avoided in favour of some sort of compromise.'[23] Official instructions were forwarded from London directing the Governor to respect and uphold Māori customary law within the legal system. In 1842, Lord Stanley suggested that certain Māori institutions such as tapu (restriction laws)[24] be incorporated into the legal system.[25] Stanley also directed that legislation be framed in some measure to meet Māori practices including punishment for desecrating wāhi tapu (sacred places).[26] One statutory example was the Native Exemption Ordinance 1844[27] which provided that in crimes between Māori, non-Māori interference depended on Māori request. In 'mixed culture' cases, Māori convicted of theft could pay up to four times the value of goods stolen in lieu of other punishment

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21 GBPP, 1844, 556, Appendix, 349. Some exceptions were mentioned by Lord Russell who distinguished those Māori customs that should be eliminated such as human sacrifice, polygamy and infanticide. Russell / Hobson, 9 Dec 1840, C.O. 209/8:480, 486-7.

22 *Hansard* (UK), Vol 86 (1848), 327-342. Governor Grey asked the same question earlier to Lord Stanley in the Colonial Office in 1845. Stanley replied: 'In the name of the Queen … you will honourably and scrupulously fulfil the conditions of the Treaty of Waitangi.' Stanley/Grey, 12 March 1845, C.O No. 1, G.1, 13. Cited in W D McIntyre & W J Gardiner, (eds) *Speeches and Documents on New Zealand History* (1971), 120.

23 Cited in P Adams, *Fatal Necessity: British Intervention in New Zealand 1830 - 1847* (1977), 211, 286.

24 Tapu is a condition affecting persons, places and things and entitles that person, place or thing to be treated with respect. It can also be described as a prohibition, but essentially its function is that of a protective device. Waddy defined tapu as a 'Code of Law' far above and transcending all human laws, forming a Table of Māori Commandments, owing its authority partly to superstition and partly to fear, but based primarily upon political motives and common sense. Early Māori was ruled by the law of tapu. See P Waddy, 'Tapu: A Code of Law: Criticism of Sir James Frazer's Views' in P Waddy, 'Early Law and Customs of the Maoris' (MA Thesis, University of Victoria, Wellington, 1927).

25 Lord Stanley, Secretary of State for the Colonies, *Memorandum*, 23 August 1842.

26 Stanley Minute, 23 August 1842, Colonial Office Records 209/14, 202.

27 'An Ordinance to exempt in certain cases the Aboriginal Native Population of the Colony from the ordinary process and operation of the law.' Legislative Council, Ordinances, Session III, No. XVIII, 16 July 1844.

which could be used to compensate the victim of theft and was an obvious adaptation of the Māori customary institution of muru.[28]

Perhaps arguably the most important yet overlooked constitutional provision that acknowledged Māori customary laws and institutions was section 71 of the New Zealand Constitution Act 1852 which stated:

> 71. And whereas it may be expedient that the laws, customs, and usages of the Aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed:
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> It shall be lawful for her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from time to time to make provision for the purposes aforesaid, any repugnancy of any such native laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.

The section provided for the establishment of native districts where the first law, tikanga Māori customary law, would prevail between Māori inter se. Section 71 was neglected and later forgotten however, and was not repealed until the Constitution Act 1986.

A further early statutory example acknowledging the first law of Aotearoa was the Resident Magistrates Courts Ordinance 1846. The Resident Magistrates Courts Ordinance provided that with disputes involving only Māori, a Resident Magistrate was to sit with two Māori rangatira (chiefs) appointed as Native Assessors and the case was determined according to equity and good conscience without being constrained by 'strictly legal evidence' pursuant to sections 7, 10, 13, 19 and 20. The decision in each case was to be made by the two Assessors with intervention by the Magistrate only in cases of disagreement. According to section 22, no judgment was to be carried into effect unless all three members of the Court unanimously agreed. Māori rangatira were to control their own people delivering to the European magistrate those individuals guilty of serious offences against settlers and to report regularly on the state of their districts. Payment of the Assessors was conditional on the successful execution of the judgment pursuant to section 24 of the Ordinance.

For its time, the Resident Magistrates system with Māori Assessors was perceived as a successful initiative. The critical factor contributing its success was direct involvement of local Māori leadership, adequate consultation with the local people about what laws would apply, and what role the chiefs should play in their enforcement.

In summary, the Treaty of Waitangi 1840, Official Charters, Royal Instructions, the Resident Magistrates Courts Ordinance 1846, and section 71 of the New Zealand Constitution Act 1852 all envisaged a polyphyletic system of hybrid laws for the new Colony whereby the settlers would govern settlers and Māori would govern themselves according to their customary laws and institu-

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28 *Ordinances of New Zealand*, sess. III, no. XVII. Muru was a ritualised compensatory institution where an offended party was allowed to take possessions owned by the offender party. The institution was an effective method for avoiding violent confrontations. See *Te Karere o Niu Tireni* (Auckland, 1 February, 1842), 6; 'A Taranaki Veteran, The Great Muru' in *Journal of the Polynesian Society* (Vol 28 , 1919), 97-102; 'Ko te Muru Whakanui (Stripping to Exalt)' in *Te Manukura-Māori Recorder* (Auckland, February 1917), 13-14; and Rora, 'Te Utu Hara' in *Te Ao Hou* (No 16, October 1956), 22.

tions. The explicit establishment of geo-political and bi-jural space was envisaged within the new legal system of Aotearoa-New Zealand regulated according to Māori customary laws for Māori.[29]

D. Māori Translation of British Law – Simplified Approach to a Complex Reality

The difficulty Māori had in comprehending and accepting an externally sourced and imposed monocultural code of laws foreign to their world view, values and customary laws was undoubtedly a source of future trouble.[30] From the signing of the Treaty of Waitangi in 1840, there was ambiguity on how far English Law could apply in Aotearoa-New Zealand. Governor Gore Browne commented:

> ...to this may be added causes of dissatisfaction beyond our control, consequent upon the operation of laws suited to European civilisation, but not comprehended by a people who expect and desire an equitable and summary award.[31]

The Colonial Government believed that ensuring the Māori knew what the British law was would assist the problem of Māori acquiescing to British law. To assist the process, Chief Justice Martin wrote *Ko Nga Tikanga A Te Pākehā*[32] which was published by the Church Mission Press in 1845. This is more a philosophical piece about the basic approaches of English Law rather than a digest of laws. Martin described it as a 'Letter to you to explain the Rules of the Pākehā for the administration of justice in various cases, and for several other things.'[33] These were 'good rules for the people who desire to live quietly.'[34] When Martin returned to England due to ill health, the document was republished in *The Māori Messenger* in March 1856. A review of British law was subsequently translated into the Māori language in 1858.[35] That year, Governor Gore Browne noted:

> To confirm the reliance of the Natives on the wisdom and justice of our institutions it is important that the principles and to some extent the details also of our civil and criminal law should be made known amongst them in a familiar shape. With this view I have directed the compilation in the Native language of a summary of English law.[36]

At the same time the Government published in a number of Māori newspapers brief accounts of the British mode of administering justice in the Courts of law and on the conduct of proceedings to assist Māori to understand and grasp the new system.[37] However, these initiatives were inadequate measures for dealing with a complex area. Translating English law into Māori and writing a brief summary of the legal system would not solve Māori juvenile delinquency for example, anymore

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29 New Zealand Constitution Act 1986, Long Title and s 26(1)(a). It has been a challenge for the researcher to locate historic de jure examples where s 71 was applied successfully. There were plenty of de facto examples by Māori. For an analysis of the development and demise of s 71 of the Constitution Act 1852, see R Joseph, *The Government of Themselves: Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852,* (2002).

30 *GBPP* 1860, 194. Gore Browne / Labouchere, 15 April 1856.

31 Ibid.

32 *Ko Nga Tikanga A Te Pakeha*, (Church Mission Press, Auckland, 1845). For a version of this, see *The Māori Messenger* (March 31, 1856), 4-10.

33 Ibid.

34 Ibid.

35 *The Laws of England; compiled and translated into the Māori Language* (By direction of His Excellency Colonel Thomas Gore Browne¸ CB Governor of New Zealand, Auckland, 1858).

36 *NZPD* 1856-1858, 372.

37 'Nga Ture Pākehā' in *Te Karere o Poneke*, (Vol 1, No 10, 26 November 1857); and 'The English System' in *Te Manuhiri and Maori Intelligencer*, (15 July 1861).

than giving a lecture on the legal system and handing out the Crimes Act 1961 to burglars would prevent burglaries!

E. Judicial Denial of Māori Custom

After the Constitution Act 1852, the learned Judges evaded the obligation to continue the application of Māori customary law and usage until customary title was extinguished. In *Re The Lundon and Whitaker Claims Act 1871*[38] the Court of Appeal reasserted that 'the Crown was bound, both by the common law of England and by its solemn engagements (the Treaty of Waitangi), to a full recognition of native proprietary right.'[39] The Court stated 'whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it.'[40] This was the strongest judicial recognition of Māori Aboriginal or customary title at the time. In contrast, in the 1877 case of *Wi Parata v Bishop of Wellington,*[41] Prendergast CJ held that Māori custom and usage did not exist. The Chief Justice reasoned:

> Had any body or custom, capable of being understood and administered by the Courts of a civilized country, been known to exist, the British Government would surely have provided for its recognition, since nothing could exceed the anxiety displayed to infringe no just right of the aborigines. …
>
> Whatever may be meant by the phrase "the persons or property, whatever real or personal, of the Māori people," the next following words, "and touching the title," can only signify that the Court is enabled and required to entertain and determine questions of native title. The [Native rights Act 1865] speaks further on of the "Ancient Custom and Usage of the Māori people" as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being. As we have shown, the proceedings of the British Government and the legislation of the colony have at all times been practically based on the contrary supposition that no such body of law existed; and herein have been in entire accordance with good sense and indubitable facts. …
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> … If therefore, the contention of the plaintiff in the present case be correct, the Native Land Acts, guided only by "The Ancient Custom and Usage of the Māori people, so far as the same can be ascertained," is constituted the sole and unappealable judge of the validity of every title in the country.
>
> Fortunately we are bound to affirm so startling a conclusion. The Crown, not being named in the statute, is clearly not bound by it; as the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when native title has been duly extinguished.[42]

Interestingly, Chief Justice Prendergast reinforced this finding in *Rira Peti v Ngaraihi Te Paku*[43] when he held that native districts where Māori custom was the law, pursuant to section 10 of the New Zealand Government Act 1846,[44] were never appointed because Māori were British subjects governed by the laws of the land and not by their customary usages.[45]

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38 (1871) 2 NZ (CA) 41.

39 Ibid.

40 *Re 'The Lundon and Whitaker Claims Act 1871* (1871) 2 NZ (CA) 41, 49.

41 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur. (N.S) S.C 79.

42 Ibid 77-78 and 79, 80.

43 (1889) 7 NZLR 235.

44 The New Zealand Government Act 1846 was the forerunner to the New Zealand Constitution Act 1852. Governor Grey managed to have the former Act suspended and subsequently over-ridden by the latter. S 10 was the equivalent to s 71 native districts in the former statute.

45 *Rira Peti v Ngaraihi Te Paku* (1889) 7 NZLR 235, 238-9.

The Law Commission commented on a number of factors that combined to ensure that the second legal system of introduced laws and settler policies were geared towards the eclipse of the first legal system, Māori customary law, which included:

a) The belief that English institutions and culture were innately superior, and it was in the best interests of Māori to assimilate;
b) The desire to create an ideal English society in New Zealand;
c) The introduction of English laws and internalizing colonial values; and
d) The settlers desire for land resulting in land alienation from Māori.[46]

Māori rights under the Treaty of Waitangi and many of their values, customary laws and institutions were marginalised and lay legally dormant following *Wi Parata* until the Treaty of Waitangi Act 1975 and the establishment of the Waitangi Tribunal – almost 100 years! The Tribunal resurrected the first law, Māori customary law, significantly within the legal system of Aotearoa-New Zealand.

III. Contemporary Legal Authority for Recognising Māori Customary Law

Two relevant truisms in British law are that Acts of Parliament are a source of law as is the common law as declared by the Courts. The common law of a country is a source of law. The common law in New Zealand however, is not the same as British common law because of differing local circumstances. Although some would argue the common law does not go far enough, it does still acknowledge Māori values and customary laws in some contexts which make it different to other British common law jurisdictions. The unique legal system of Aotearoa-New Zealand has to acknowledge its history. This includes Māori customary laws and usages which have been recognised more recently by both Parliament and the Courts. By Parliament in section 18 of the Oaths and Declarations Act 1957 which states:

> **18** Judicial Oath
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> I swear that I will well and truly serve Her Majesty, Her heirs and successors, according to law, in the office of; and I will do right to all manner of people after the *laws and usages* of New Zealand without fear or favour, affection or ill will. So help me God [emphasis added].[47]

The oath requires a Judge to do right to all people 'after the laws and usages of New Zealand.' It is inherent in the oath that the Judge will treat Māori, Pākehā and other ethnic groups equally, applying both laws and 'usages' of New Zealand. Māori customary laws and usages are the first law of Aotearoa-New Zealand law.

Similarly, section 3 of the Supreme Court Act 2003 states:

> **3** Purpose
>
> The purpose of this Act is—
>
> (a) to establish within New Zealand a new court of final appeal comprising New Zealand Judges—
>
> (i) to recognise that New Zealand is an independent nation with its own *history and traditions*; and

46 New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001), 22 [97].

47 The Judicial Oath, in this form, was first taken in New Zealand in 1873 in accordance with s 4 of the Promissory Oaths Act 1873.

(ii) to enable important legal matters, including legal matters relating to the *Treaty of Waitangi*, to be resolved with an understanding of New Zealand conditions, *history, and traditions*; and
(iii) to improve access to justice ... [emphasis added].

When one reads these sections together, both sections refer to New Zealand common law acknowledging New Zealand history and traditions, the Treaty of Waitangi, and New Zealand laws and usages, which infer recognition, inter alia, of Māori customary laws and 'usages'.

Chief Justice Elias reaffirmed this proposition in the 2003 case of *Attorney-General v Ngāti Apa*,[48] more commonly referred to as the 'Foreshore and Seabed case', 'But from the beginning of the common law of New Zealand as applied in the Courts, differed from the common law of England because it reflected local circumstances.'[49]

Chief Justice Elias continued:

> Any prerogative of the Crown as to property in the foreshore or seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Māori custom and usage recognising property in the foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law unless such property interests have been lawfully extinguished. The existence and extent of any such property interest is determined by application of tikanga.[50]

The above legal authorities confirm that the common law of Aotearoa-New Zealand is not the same as the common law of England or Australia or Canada, because it reflects local circumstances. One such local circumstance that makes the Aotearoa-New Zealand legal system distinct is the acknowledgement of its first law, Māori customary laws and usages.

In determining whether it is permissible to apply Māori custom in any given setting, the Judges must consider whether it is a 'usage' properly to be applied as part of the law of Aotearoa/ New Zealand. It is also important to try to understand the Māori world view that provides the foundation for Māori customary laws, usages and institutions.

IV. First and Second Law Contrast

In terms of contrasting British newcomer law and Māori customary law, Durie highlighted the former as being rules-based Western law (literate) while the latter is governed by values to which the community generally subscribed (non-literate and performative).[51] While Western culture tends to make a clear separation between morality and the law, the Māori legal system sees values, practices and rules as being very much interrelated. Metge noted however, that 'Western laws are also values-based, the values concerned being interpreted by the law makers.'[52] Mulgan added:

> All law, Pākehā as well as Māori, arises out of social norms and the need to enforce these norms within society. The ultimate source of Pākehā law is not the courts or statutes but the social values reflected by Parliament in statutes and by Judges in their decisions.[53]

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48 [2003] 3 NZLR 577.

49 Ibid 652, [17].

50 Ibid 660, [49].

51 E Durie, 'Māori Custom Law' (Unpublished Paper, Wellington, 1994), 3.

52 J Metge, 'Commentary on Judge Durie's Custom Law' (Unpublished Custom Law Guidelines Project Paper, 1997), 5.

53 R Mulgan, 'Commentary on Chief Judge Durie's Custom Law Paper from the Perspective of a Pakeha Political Scientist' (Unpublished Paper, Law Commission, 1997), 2.

Metge concluded that the main difference between Western law and Māori customary law or tikanga Māori originates in their respective sources and in the contrast between oral and written modes of communication:

> Tikanga arise out of on-going community debate and practice and are communicated orally; as a result they are adapted to changing circumstances easily, quickly and without most people being consciously aware of the shift. Western laws are formulated and codified by a formal law-making body and are published in print; their amendment, while possible, is a complex and lengthy process. As a result laws often lag behind community opinion and practice; at times, however, they can be ahead and formative of it.[54]

Although Māori values, customs and norms were largely idealised, they were 'law' in a jurisprudence context and they constituted a legal system, given that the application or neglect of customs and norms would have provoked a predictable response. Most anthropologists nowadays accept that all human societies have law, whether or not they have formal laws and law courts. Metge commented:

Except in times of exceptional crisis, all human societies pursue as key aims the maintenance of order, the reinforcement of accepted values and the punishment of breaches. Large-scale, complex state societies codified into a system courts and Judges. Small-scale societies with simpler political structures use means which are mainly informal, implicit and serve other purposes as well.[55]

In some circles the study of customary law has been described as legal anthropology[56] which Rouland points out is the study of law in society.[57] It begins from the premise that all societies have law. Rouland identified that there are over 10,000 distinct known legal systems operating in the world today. A study of those systems indicates the following generalisations can be made:

- Law emerges with the beginning of social existence;
- The complexity of law in a society will depend on the complexity or simplicity of that society; e.g. How many stratas in that society, the nature of its economy etc;
- All societies possess political power that relies to some degree on the coercive power of law, while the modern state is only present in some of these societies;
- Where the state exists, customs and ritual may have been codified or reduced to judgment by the instruments of the state e.g. the common law imported into New Zealand from Britain in 1840;
- In all societies law represents certain values and fulfils certain functions; however, the common principles of law are:
  - the search for justice; and
  - the preservation of social order and collective security;
- Law is obeyed in different societies because individuals are socialised to obey, they believe in the just nature of the law, they seek the protection of the law, or they fear sanctions associated with non-observance.[58]

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54 Metge, above n 52, 5.

55 Ibid 2.

56 C Wickliffe, K Maranui & P Meredith, 'Access to Customary Law' (Visible Justice: Evolving Access to Law, Wellington, 12 September 1999), 1-2.

57 See generally N Rouland, *Legal Anthropology* (1994) and the discussion by Boast in R Boast, 'Maori Customary Law and Land Tenure' in R Boast, A Erueti, D McPhail and N Smith, *Maori Land Law* (1999), 2.

58 Ibid.

On this approach, laws are nothing more than societal rules which have to be practically sanctioned in the here-and-now. Legal anthropology sets itself the objective of understanding these rules of human behavior,[59] which must be designed to address wrongdoing and, inter-alia, be capable of being socially and practically enforced in the interests of the community. Only then will they be considered part of the legal domain of a society.[60]

V. General Customary Law

A definition of 'customary law' is defined as 'both a body of rules backed by sanctions and a set of dispute resolution mechanisms.[61] At a more informal level it was also a 'series of accepted behaviours which allowed daily social life to proceed; the stuff of interpersonal relationships, the self-regulating patterns of interaction.'[62] In terms of Māori law and a Māori legal system being based on custom, the *Oxford English Dictionary* records two distinct meanings of 'Custom':

1. A habitual or usual practice; common way of acting; usage, fashion, habit, (either of an individual or of a community); and

2. Law. An established usage which by long continuance has acquired the force of a law or right.[63]

The distinction needs to be made between custom that is mere habit (or fashion) – usual but nevertheless optional – and custom that gives rise to obligation and right. The 1608 *Case of Tanistry* affirmed the potency of custom as a source of law in this way:

> ... custom, in the understanding of the law, is such usage as has acquired the force of law and is respected as a binding law in a particular place ... Because when the people find any rule to be good and beneficial, suitable and agreeable to their nature and disposition, they use and practice it from time to time; and it happens through frequent repetition and multiplication of the rule, Custom is created: and having been followed for as long as people can remember, acquires the force of law.... In brief, custom is a reasonable rule, followed consistently and continuously by the people from time immemorial.[64]

Sir John Salmond makes a similar distinction between mere habit and customary law when, in setting out the requirements for the reception of custom as law, he includes the following:

> The third requisite of the operation of a custom as a source of law is that it must have been observed as of right. A merely voluntary practice, not conceived as based on any rule of right or obligation, does not amount to a legal custom… A legal custom must be the embodiment in inveterate practice of the conviction of the community as to the rights and obligations of its members towards one another.[65]

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59 Ibid.

60 Above n 56 (Wickliffe et al), 2.

61 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (2 Vols, Canberra, Australia, 1986) [37], Vol 1.

62 Ibid.

63 *The Oxford English Dictionary*, 2nd ed (Vol IV, 1989). This section draws heavily from the work of the Te Mātāhauariki Research Institute, School of Law, at the University of Waikato. The author draws from a number of Te Mātāhauariki references the most relevant being 'Te Matapunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law: Proto-Compendium' (Unpublished, Te Mātāhauariki Institute, University of Waikato, June 2007 Draft Version), 3-8. The author was a Senior Research Fellow for Te Mātāhauariki.

64 *Case of Tanistry*, 80 Eng. Rep. 516 (1608), quoted in E K Braybrooke, 'Custom as a Source of English Law' in *Michigan Law Review* (Vol 50, 1951) 71, 73. For more detailed discussion, see A Frame, *Grey and Iwikau: A Journey into Custom*, (2002), 29.

65 Sir John Salmond, *Jurisprudence*, (7th ed) (1924), 219.

But what will suffice to add the 'obligatory' aspect, which turns custom into 'customary law'? Will organised and systematic social pressure, in the absence of formally constituted judicial and enforcing authorities, allow us to find 'customary law'? The American theorist, Hoebel, asserted:

> A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognised privilege of so acting.[66]

Hoebel's definition is considerably wider than that of the school of Western jurisprudence, which saw the predominant characteristic of 'law properly so-called' as a 'command' within a unitary political system, backed by force. The American jurist Lon Fuller has criticised this tendency to assume 'that law must be regarded as a one-way projection of authority, instead of being conceived as a collaborative enterprise.'[67] Whatever may have been the contemporary political reasons for the adoption of such a restrictive view by British theorists such as Hobbes, Bentham and Austin, the criticism of Sir Carleton Allen in his Introduction to Sir Henry Maine's *Ancient Law* seems well aimed:

> Its exclusion of historical considerations from the province of jurisprudence led it into the radical fallacy of regarding all systems of law as being typified by Western European monarchical states.[68]

Although Hoebel's definition is open to objection for clinging to a central position for 'force' as the identifier of 'law',[69] the definition is helpful, given that collective social recognition and reinforcement of 'supernatural' consequences constitutes a degree of social pressure, which is functionally equivalent to more direct applications of physical force. Fuller had raised, but left unanswered, this very question in relation to Hoebel's definition:

> Just what is meant by force when it is taken as the identifying mark of law? If in a theocratic society the threat of hell-fire suffices to secure obedience to its law, is this 'a threat of force'? [70]

Fuller preferred to state simply that:

> A legal system, to be properly called such, has to achieve some minimum efficacy in practical affairs, whatever the basis of that efficacy – a proposition both unobjectionable and quite unexciting.[71]

The approach which discounts centrally administered force as the defining characteristic of 'law' has antecedents in the work of writers such as von Gierke, Ehrlich, Weber and Pospisil who deny that there is any practical reason to confine the meaning of 'law' to situations in which coercion is guaranteed by the political authority.[72] Max Weber has pointed out that:

> Law, convention, and custom belong to the same continuum with imperceptible transitions leading from one to the other … It is entirely a question of terminology and convenience at which point of this continuum we shall assume the existence of the subjective conception of a 'legal obligation.'[73]

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66 E A Hoebel, *The Law of Primitive Man: A Study of Comparative Legal Dynamics,* (1954), 28.

67 L Fuller, *The Morality of Law,* (first published in 1964, revised edition 1969), 227.

68 Sir Henry Maine, *Ancient Law,* (first published 1861, with Introduction by Sir Carleton Allen, The World's Classics, 1959), xiii.

69 Fuller, for example, states that 'the notion that its authorization to use physical force can serve to identify law… has done great harm to clarity of thought about the functions performed by law,' above n 67 (Fuller), 108.

70 Above n 67 (Fuller), 109.

71 Ibid, 109-110. Interestingly, the Māori and Polynesian concept of mana is often explained as requiring, among other things, effectiveness in social affairs.

72 See L Pospisil, 'Legal Levels and Multiplicity of Legal Systems in Human Societies,' *The Journal of Conflict Resolution*, (Vol XI, No.1, March 1967), 2-26.

73 M Weber, *Economy and Society: An Outline of Interpretive Sociology,* (ed G Roth and C Wittich, transl. E Fischoff, Vol 1, (1978), 319-321.

We must be conscious also of drawing too firm a distinction between 'obligatory' and 'persuasive' norms, a point recently made by Professor Bruno Saura in Tahiti:

> The very idea of distinguishing between obligatory customs, because they are of a legal nature, and customs which are more or less arbitrary stems from a Western perspective in which Judges – rather than priests, sorcerers or divine forces – are in charge of issuing punishments for breaches of matters that the community deems crucial to respect.[74]

Malinowski, in his introduction to Hogbin's *Law and Order in Polynesia,* made some pertinent observations on the 'law-not-law' debate concerning custom:

> Those rules, the working of which are essential for the maintenance of such primitive institutions as the family, the village community, forms of organized economic co-operation, chieftainship or religious institutions, are entirely compatible with our rules of law. They are really obligatory, they are enforced.
>
> Our own law is nothing but intrinsically valid custom, custom safeguarding the smooth working of our institutions, custom obeyed not so much through the fear of penalties but for much deeper reasons which the sociologist and psychologist have to discover.
>
> Co-operation always implies a body of people united by some fundamental constitution, that is, body of rules, which regulates their mutual behaviour.[75]

Custom then has historically been a basis of law for all people. The common law reflects society's common customs and values as Fitzgerald noted in *Salmond on Jurisprudence*:

> It was long the received theory of English law that whatever was not the product of legislation had its sources in custom. Law was either the written statute law, or the unwritten, common, or customary law. Judicial precedent was not conceived as being itself a legal source of law at all, for it was held to operate only as evidence of those customs from which the common law proceeded. … Even now custom has not wholly lost its law-creating efficacy. It is still to be accounted one of the legal sources of the law of England, along with legislation and precedent, but far below them in importance.[76]

The co-operative and reciprocal elements in customary law systems seem to require explicit recognition in any definition which aims to comprehend the social foundation of law. Hence, the following adaptation of Hoebel's definition of Indigenous customary law:

> A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of force or the imposition of serious social disadvantage by an individual, group, or agency possessing the socially recognized privilege of so acting. [77]

The idea that social norms found in traditional performance cultures were either not law at all or, at best, only 'primitive law' has been a persistent error in European jurisprudence. It is often found coupled with analyses that propose an 'evolutionary scale' for law in which fully-fledged law only emerges as societies struggle into the light of written law, administered in a centralised way by specialist Courts. Maclaurin provided a contribution to the 'evolutionary scale' view of legal development in which some Indigenous systems were termed 'primitive.'[78] It would seem to be neither a necessary nor a desirable step to derive from such analysis any classificatory or definitional 'scale' of law as more or less 'primitive.' Concepts, institutions and procedures may be

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74 B Saura, 'Chapter 4,' in P de Deckker and J-Y Faberon, (eds), *Custom and the Law*, (2001), 81.

75 B Malinowski, 'Introduction' in H I Hogbin, *Law and Order in Polynesia,* (first published 1934) (1972). The three quoted excerpts are from pages xxix, xxx and xxxii of the Introduction.

76 P Fitzgerald, *Salmond on Jurisprudence* (12th ed) (1966), 189-190.

77 E A Hoebel, *The Law of Primitive Man: A Study of Comparative Legal Dynamics,* (1954), 28.

78 R C Maclaurin, 'Title to Realty' in R C Maclaurin, *On the Nature and Evidence of Title to Realty*, (1901), 3-5.

judged to work, or not, in a particular social context but that does not seem to provide a basis for describing law as 'primitive' or 'advanced,' any more than a particular language could intelligibly be characterised in that way. The author agrees with the view expressed by Professor Rouland of the University of Aix in this regard:

> We believe, following Levi-Strauss, that there is not a pensee des sauvages (thinking of the savages) and a pensee des civilises (thinking of the civilised). Rather the pensee sauvage and the pensee civilise exist, in different degrees, in all forms of humanity – rationality is not our privileged domain, any more than custom belongs exclusively to exotic societies, it can be as 'modern' as the law.[79]

The traditional legal system and first law of Aotearoa-New Zealand was tikanga Māori customary law.

A. Tikanga Māori Customary Law

The traditional Māori legal system was not primitive but was based on tikanga Māori customary law and kawa (rituals) which were generated by performative social practice and acceptance as distinct from 'institutional law', which is generated from the organs of a super-ordinate authority.[80] The principles of tikanga Māori customary law provided the jural order which embodies core values and principles that reflect doing what is right, correct or appropriate. Tikanga Māori comprises a spectrum with values at one end and rules at the other, but with values informing the whole range. It includes the values themselves and does not differentiate between sanction-backed laws and advice concerning non-sanctioned customs. People were taught from a young age what was tika (right, correct) and they, in effect, governed and regulated themselves.

The Māori legal system based on tikanga Māori customary law was used to make decisions regarding, inter alia:

- leadership and governance concerning all matters including Māori land;[81]
- intra and inter-relationships with whānau (extended families) hapū (sub-tribes), iwi (tribes/nations);[82]
- relationships with Europeans;[83]
- determining rights to land based on take tupuna (discovery), take tukua (gift), take raupatu (confiscation) and ahi kaa (occupation);[84]
- the exercise of kaitiakitanga (stewardship) practises including the imposition of rahui (bans on the taking of resources or the entering into zones within a territory) and other similar customs;[85]
- regulating use rights for hunting, fishing and gathering and sanctioning those who transgressed Māori tikanga or Māori rights (or both) in land and other resources;[86]

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79 R Norbert, 'Chapter 1,' in P de Deckker and J-Y Faberon, (eds) *Custom and the Law* (2001), 14.

80 Above n 51 (Durie), 4.

81 Above n 56 (Wickliffe et al) and above n 57 (Boast et al), 30-37.

82 Ibid (Boast et al), 33-37, 38-41.

83 Ibid 28-30.

84 A Erueti, 'Maori Customary Law and Land Tenure' in ibid, 42-45; G Asher & D Naulls, *Maori Land* (New Zealand Planning Council, Wellington, 1987), 5-6; and H Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (1977), 55-56.

85 Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, Government Printer, Wellington, 1988), 181.

86 Ibid 58-61.

- regulating Māori citizenship rights to land and resources.[87]

Specific Māori customary laws and values which seemed to underpin the totality of tikanga Māori customary law include:

- Whānaungatanga – kin relationships between people and the rights and obligations that follow from the individuals place in the collective group;
- Wairuatanga – spirituality, acknowledging the metaphysical world;
- Mana – encompasses political influence as well as intrinsic authority, honour, status, control, and prestige of an individual and group;
- Tapu – generally seen as part of a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places and objects and traditional values; restriction laws;
- Noa – free from tapu or any other restriction;
- Utu – concept of reciprocity in order to maintain balanced relationships between people and the Gods;
- Rangatiratanga – effective leadership; and
- Manaakitanga – sharing, hospitality to the fullest extent that honour could require;
- Aroha – charity, generosity;
- Kaitiakitanga – stewardship and protection, often used in relation to natural resources.

There are many tikanga Māori values and customs, as described above, but no complete list has been agreed. Associated with these values are certain other characteristics. For example, custom tends to favour community autonomy, rather than some large, centralised control, and puts group rights ahead of those of the individual. Furthermore, each iwi (tribe) and hapū (sub-tribe) had its own variation of the values and customs listed – some will have slightly different ideas as to the values which inform the first law of Aotearoa-New Zealand.

Leaving aside ritual, the main regulators of conduct appear to be these broad tikanga values and customs above rather than prescriptive rules. For example, the Māori value 'whānaungatanga' describes an aspiration of supporting the family, clan or relatives to the fullest extent that honour could require. Some specific practices provide sound or compelling advice on what constitutes good conduct in this respect, but as in most Māori values, the focus is on the best that a person might strive for rather than the minimum required to comply. That definition invites reference to the values, principles and norms accepted by the Māori communities as establishing standards for appropriate conduct and to processes acceptable to those communities for determining the appropriate course of action in a particular case.

Durie noted an important difference between tikanga and kawa:

> Tikanga described Māori law, and kawa described ritual and procedure … ritual and ceremony themselves were described by kawa … [which] referred also to process and procedure of which 'karakia' (the rites of incantation) formed part.[88]

Karetu added a number of the significant traditional kawa or performative rituals and their perpetuation within the Māori legal system:

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87 Above n 84 (Kawharu) 39, above n 84 (Erueti), 33-35, above n 84 (Asher and Naulls), 7; and above n 51 (Durie), 5.

88 Above n 51 (Durie), 3. For a further good and recent reference on tikanga Māori customary law, see N Tomas, 'Key Concepts of Tikanga Māori (Māori Custom Law) in Tai Tokerau: Past and Present' (PhD Thesis Dissertation, University of Auckland, New Zealand, 2006).

> Before the coming of the Pākehā [European] to New Zealand… all literature in Māori was oral. Its transmission to succeeding generations was also oral and a great body of literature, which includes haka [dance], waiata [song], tauparapara [chant], karanga [chant], poroporoaki [farewell], paki waitara [stories], whakapapa [genealogy], whakatauki [proverbs] and pepeha [tribal sayings], was retained and learnt by each new generation.[89]

Given the differences in legal systems, tikanga Māori customary law is not easily reconciled within the existing legal framework of New Zealand. The former comprises a plethora of norms which enables participants to call upon those which best fit the moment while the latter centers upon single rules which are of general application and are more fluid.

B. Contemporary Scope and Use of Tikanga within the Legal System

Despite the major societal transformation Māori communities have undergone, Bennion believes the changes to tikanga Māori customary law rarely produced changes to the 'fundamental value system.'[90] Although tikanga Māori customary law may be considered as unofficial rules not subject to legal sanctions in the current legal system, they are still regularly adhered to by many Māori. Tikanga Māori customary law can be seen in its most overt form on the various Marae (Māori meeting houses). Māori communities do not always expect detailed legal rules such as trust orders made by the Māori Land Court to be followed closely[91] because legal rules are more referred to as guidelines.[92] Māori communities may however, apply Māori custom, consciously or unconsciously, in the everyday management of community and family affairs. Today, they may also apply custom consciously, for example, as a result of provisions they have made for the resolution of disputes in the charters of Māori governance entities that they have established for the administration of their tribe's affairs.[93] To this end, tikanga Māori customary references can be found in the constitutional documents of a number of Māori legal entities such as Te Kauhanganui o Waikato,[94] Te Rūnanga a Iwi o Ngapuhi,[95] and Wakatu Incorporation.[96]

New Zealand's positivist legal system tends to ignore the first law of Aotearoa-New Zealand unless they have been captured in legislation or in the common law. There are now a number

89 T Karetu, 'Language and Protocol of the Marae', in M King, (ed) *Te Ao Hurihuri: The World Moves On* (3rd ed) (1981).

90 T Bennion, *The Māori Law Review* (March 2001), available at http://www.bennion.co.nz/mlr/2001/mar.html.> (last accessed September 2009).

91 For a comprehensive discussion on Māori custom on the Marae, see H Tauroa and P Tauroa, *Te Marae: A Guide to Customs and Protocol* (The New Zealand Museum, Wellington, 1986). For a comprehensive discussion of the Marae, its origin, functions and protocol, see A Salmond, *Hui: A Study of Māori Ceremonial Gatherings* (Reed Publishers, Auckland, 1975).

92 J Williams, 'The Māori Land Court – a Separate Legal System?' (Paper presented at the Victoria University of Wellington Public Law Seminar Series Address, Victoria University of Wellington Law School, Wellington, 10 July 2001).

93 Above n 51 (Durie), 7.

94 Te Kauhanganui o Waikato-Tainui Inc, Rule 3 Objects include supporting the Kiingitanga and fostering the principles of whakaiti (humility), rangimaarie (peacefulness) and kia tuupato (being careful).

95 Clauses 3.2 (a) (c) and (e), *Te Rūnanga-Ā-Iwi-O-Ngāpuhi Charitable Trust Deed* (Ratified 10 September 2005) state that Te Rūnanga-Ā-Iwi-O-Ngāpuhi Trust shall 'pursue the vision Kia tū tika ai Te Whare Tapu o Ngāpuhi (stand firm on the sanctity of Ngāpuhi); kaitiakitanga (stewardship) and ahi kā (occupation); and will make decisions consistent with the tikanga of Ngāpuhi.'

96 'A business of land and sea – he taonga tuku iho – for profit, social and cultural growth through professionalism, honesty and diligence and embracing our tikanga.' Available at http://www.wakatu.org.nz (Last accessed July 2009).

of civil law statutes that recognise tikanga Māori custom including the Treaty of Waitangi Act 1975,[97] the Resource Management Act 1991,[98] Te Ture Whenua Māori Act 1993,[99] the Māori Fisheries Act 2004[100] and the Foreshore and Seabed Act 2004[101] to name just five. Then there are an array of statutes that refer to the Treaty of Waitangi.[102] These statutes by implication include tikanga Māori customary law.

In terms of criminal law, there are a number of processes based on Māori custom which do not pose a threat to the adversarial criminal justice system. The ability to address the Court in te reo Māori (the Māori language),[103] of Kaumātua (Elders) to address the Court in a pre-trial proceeding,[104] and the wider acceptance of Māori protocol in Court proceedings have no substantive impact on the adversarial contest. The availability of Māori focused restorative justice programmes demonstrates an acknowledgement of Māori custom in the legal system. Section 10 of the Sentencing Act 2002 provides a direct legislative pathway for the Māori customary institution of muru (ritualised compensation ceremony) and the Samoan institution of ifoga (formal apology ceremony) to be accorded judicial recognition by permitting the Court to take offers of amends into account at sentencing.

Furthermore, the Māori Community Development Act 1962 permits Māori committees to impose penalties on Māori for certain conduct falling within the Summary Offences Act 1981. The Children Young Persons and Their Families Act 1989 provides for family group conferences to address youth offending which can be held at Marae (Māori meeting houses) with Māori facilitators and Kaumātua (Elders) present.[105]

Although the Courts apply Māori custom where statutes so allow, the Judges have been prepared more recently to apply Māori custom even without a statutory reference where custom is a relevant fact or the Treaty of Waitangi is a relevant consideration.[106] In addition, Māori customary law can provide the basis for title in land,[107] forms the basis for fishing rights,[108] and can assist in the definition of a statutory concept.[109]

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97 Treaty of Waitangi Act 1975, Schedule 1.

98 Resource Management Act 1991, ss 2, 14, 39, 42, 146, 199 and 269.

99 Te Ture Whenua Māori Act 1993, ss 4, 7, 26, 32, 36, 61, 62, 106, 114, 129, 132, 150 and 338.

100 Māori Fisheries Act 2004, ss 4, 44, 88, 101, and Schedule 7.

101 Foreshore and Seabed Act 2004, ss 5, 35, 50, 53, 64, 65 and Schedule 1.

102 For example, the Treaty of Waitangi Act 1975, ss 1 and 2; Resource Management Act 1991, ss 8, 45 and 141B; Te Ture Whenua Māori Act 1993, ss 7, 18 and 339; the Māori Fisheries Act 2004, ss 4, 5, 19, 15, 31, 32, 34, 45, and 188-211; Foreshore and Seabed Act 2004, ss 10, 34, 49, 73 and 101; the Waikato-Tainui Raupatu Claims Settlement Act 1995, ss 6, 8, 10, 14, 26, 30, 38 and Schedule 1; the Ngāi Tahu Claims Settlement Act 1998, ss 10, 34, 35, 48, 103, 274, 304 and 305; Te Rūnanga o Ngāti Awa Act 2005, ss 3 and 11; and the Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, s 3.

103 S 4, Maori Language Act 1987.

104 *Police v Taurua* [2002] DCR 306 (DC).

105 P Heath, 'One law for All – Problems in Applying Maori Custom Law in a Unitary State' in (Te Mātāhauariki Research Institute, Tuhonohono Symposium: Custom & State, Hopuhopu 22-24 June 2007), 12.

106 For example, *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

107 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

108 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

109 For example, the meaning of kaitiakitanga (stewardship) under s 7, Resource Management Act 1991.

VI. Scope for Māori Custom in Court

In seeking to determine 'the Māori law' on a matter, early Judges do not appear to have appreciated that Māori did not determine law in the same way as they did. Māori gave more weight to mediated outcomes or they sought the justice of the case according to the whole context and without a comparable search for a single governing rule.

Moreover, the distinction between custom as understood by Māori, and custom as recognised by the Courts, is important because of the extraordinary modification of custom law for example, customary land tenure from the 1800s following decisions of the Native Land Court that purported to apply Māori custom to determine the ownership and devolution of interests in Māori land. This process was acknowledged as problematic by Chief Judge Robert Stout in a newspaper in 1905:

> What his Honour presumed the Native Land Court had to do, was to incorporate English law and Māori custom together, and from this conglomerated law find succession, and call it according to Māori custom. It seemed to his Honour that the time had come when there should be some authoritative definition of what Māori custom or usage was. It should not be left to the Native Land Court Judges to declare what they think Native custom is.[110]

To some extent the same problem has surfaced more recently in the adoption of processes based on tikanga Māori custom by other Courts.

A. Institutional Challenges to Māori Custom

Institutional acceptance of tikanga Māori custom law does have its limits. While the Courts have been willing to treat a concluded hui (meeting) at which a full apology was proffered[111] and an accepted ifoga[112] as a mitigating factor at sentencing, they have rejected both as representing a complete punishment. Furthermore, various tikanga Māori customary laws have been debated in Court in terms of meaning and scope which has, with respect, perplexed the Judges.

Māori custom is generally not recognised as a freestanding source of law in its own right. A critical challenge facing the Judiciary in applying substantive Māori customary law then lies in their lack of understanding of te reo Māori (language), mātauranga Māori (world views, knowledge base) and general tikanga Māori customary law. One facet of this misunderstanding is the fact that Judges do not understand the relevant concept in its philosophical and cultural base and world view to maintain its integrity.[113]

In determining whether it is permissible to apply Māori custom in any given setting, the Judges must consider whether it is a custom or 'usage' properly to be applied as part of the law of New Zealand. In determining this question, it is important to remember that there is as much a 'Māori law' as there is a 'Māori language.'[114] It is also important to try to understand the Māori world view that provides the platform for Māori customary laws, usages and institutions.

As a result, questions of custom fall to be determined as questions of fact, leaving the Court heavily reliant on the expert witnesses produced by the parties. A thorough knowledge of tikanga Māori, te reo Māori (the Māori language) and Māori culture provide the basis against which to

110 'On Maori Customs Being Codified' in *New Zealand Times* (30 August 1905), 6.

111 *R v P* (HC Auckland CRI 2005-063-1213 9 August 2006 Priestly J).

112 *R v Maposua* (CA 131/04 3 September 2004); and *R v Talataina* (1991) 7 CRNZ 33 (CA).

113 Above n 105 (Heath), 18-19. A recent controversial example is the High Court case of *Clarke v Takamore* (HC Christchurch CIV 2007-409-001971, July 2009 Fogarty J).

114 E Durie, 'Will the Settlers Settle? Cultural Conciliation and Law' in *Otago Law Review* (1996) 449, 451.

test the evidence of those who purport to be experts in a particular Māori customary law. This is particularly so where there are two competing accounts of tikanga Māori customary law.

The use of Māori words and tikanga concepts in a statute or other official texts increases the possibility of ambiguity, which can be deliberately exploited in the Courts. Key examples of this include the 'iwi' (tribe)[115] and 'wāhi tapu' (sacred places)[116] debates in Court. An example of the latter was the Court of Appeal's approach in *Watercare Services v Minhinnick*[117] where the lower Court was asked what is a wāhi tapu and to support the notion that, when considering whether the piping of sewerage over wāhi tapu was 'offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment,' the appropriate test was what the ordinary Māori person would find objectionable. The Court of Appeal rejected that view finding that the relevant test was that of the community at large – presumably no matter how ignorant that community might be of Māori values and customs, or, more importantly, its own hidden assumptions and prejudices.

As a result of these and other cases, it is often considered critical to the maintenance of tikanga Māori custom, that the applicable custom should be determined by persons with the necessary customary knowledge and skills. The critical question then is not 'what is the custom?' but 'who decides, in what context, and by what process?' In terms of deciding questions of tikanga Māori customary law, the High Court is neither the appropriate forum nor is litigation the appropriate process for making such decisions.

B. Testing the Evidence – Te Matapunenga Project

When trying to define tikanga Māori customary law, Metge wisely cautioned on this point:

> To come to grips with Māori custom law, it is necessary to recognise that Māori concepts hardly ever correspond exactly with those Western concepts which they appear, on the surface, to resemble. While there is a degree of overlap, there are usually divergences as well. Even if the denotation – the direct reference – is substantially the same, the connotations are significantly different.[118]

Hence those qualified to articulate the values and practices inherent in tikanga Māori are Māori schooled in tikanga Māori through a life experience of tikanga, especially respected Kaumātua (Elders). But what happens when Kaumātua slightly or even diametrically disagree over what constitutes 'authentic' tikanga or the details and scope of a group's tikanga and customary laws? Judges have resorted to dictionaries and documentary sources to prove or disprove the existence,

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115 The word 'Iwi' is included in the Treaty of Waitangi (Fisheries Settlement) Act 1992, s 3; and the Māori Fisheries Act 1989, s 6, and was subsequently exploited through High Court and Privy Council litigation in, among other cases, *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 (HC & CA); and *Manukau Urban Authority v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17 (PC).

116 For an analysis of the use of the tikanga Māori custom 'wāhi tapu' (sacred places) in a Resource Management Act 1991 context, see R Joseph, and T Bennion, 'Challenges of Incorporating Māori Values and Tikanga under the Resource Management Act 1991 and the Local Government Bill – Possible Ways Forward' in *Yearbook of New Zealand Jurisprudence* (Vol 6, No.1, 2002-2003), 9. A number of key cases litigating wāhi tapu include, inter alia, *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC); *Watercare Services Ltd v Minhinnick* [1998] NZRMA 113; *Te Runanga o Ati Awa ki Whakarongotai Inc & Takamore Trustees v New Zealand Historic Places Trust* (W23/2002, 4 July 2002, Wellington); and *Winstone Aggregates Ltd & Heartbeat Charitable Trust v Franklin District Council* (A80/02, 17 April 2002, Auckland, HC).

117 [1998] NZRMA 113.

118 Above n 52 (Metge), 3.

extent and scope of tikanga Māori customary law in a particular area which tends towards the academic and away from the determinative Māori spiritual and cultural context.[119]

The work of Te Mātāhauariki Research Institute in the School of Law at the University of Waikato may be of some assistance here.[120] One of the key projects of Te Mātāhauariki was the assembling of a collection of references to the concepts and institutions of Māori customary law to explore ways in which the legal system of Aotearoa-New Zealand could better reflect the best of the values and principles of both major component cultures. The first Director of the Institute, Judge Michael Brown, in consultation with the Institute's Advisory Panel, accordingly initiated 'Te Matapunenga'[121] which is an attempt to traverse the existing historical materials with a view to bringing together such references to tikanga Māori customary concepts and institutions as appeared to come from an influential or authoritative source and to exhibit explanatory insight.

A commentary on tikanga Māori custom, such as Te Matapunenga, could be incredibly valuable because it explains the roots and values of a custom, and shows how it has been applied and adapted over time. Tikanga Māori customary law concepts can only be properly ascertained and applied by considering their historical context and evolution within a particular hapū (sub-tribe) or iwi (tribe) from ancient times through to the present. The challenge is to uncover and demonstrate that evolution. Accordingly, the researchers did not set out to determine what is or is not 'true custom', or authentic tikanga Māori customary law but rather to record what has at various times and in various circumstances been claimed to be tikanga Māori customary laws and institutions.

Te Mātāhauariki researchers started with a list of tikanga Māori terms, concepts, and institutions found to be in use in historical and contemporary Māori discourse selected with the assistance of Kaumātua (Elders). The researchers searched a wide range of records for entries which are listed in chronological order under each title. Each entry consists of a sourced statement or explanation relevant to a particular title together with an explanatory preface intended to supply a context for the statement or explanation. The purpose of the context is to enable the reader to understand the circumstances in which the statement or explanation arose, and to judge its credibility and authority as highlighted by the late Lord Cooke of Thorndon: 'In law, context is everything.'[122] To this end, the brief Te Matapunenga entry on 'taonga' discussed earlier looks like this:

> Taonga:
>
> A socially or culturally valuable technique, object, phenomenon or idea. In the phrase *taonga tuku iho*, taonga generally denotes tangible and, especially, intangible valuables (such as values, traditions and customs) handed down from antiquity. From Proto-Polynesian *taonga*, 'treasured possession, especially a garment'. The application of the term to intangibles seems to have developed in Eastern Polynesia; for example, in Hawaiian the cognate word *kaona* denotes a hidden meaning, or an ambiguous word or phrase containing a concealed reference to a person or thing and whose use may have either a good or bad effect.

The Ngāti Porou lament 'He Tangi Mo Taneuarangi' contains a reference to 'Te Kura a Mahina', and Sir Apirana Ngata's collection 'Nga Moteatea' explains the allusion, showing one way in which rights to taonga could be lost and gained, in this way:

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119 Above n 116 cases.

120 See the Te Mātāhauariki Institute website available at http://www.lianz.waikato.ac.nz at November 2009.

121 R Benton, A Frame and P Meredith, 'Te Matapunenga: A Compendium of References to the Concepts and Institutions of Maori Customary Law' (Unpublished CD Version, Te Mātāhauariki Research Institute, University of Waikato, 2007). It is anticipated that an updated version of Te Matapunenga will be published in 2010.

122 *McGuire v Hastings District Council* [2001] NZRMA 557, 1 November 2001, per Lord Cooke, 561.

> Te Kura a Mahina – nō te ūnga mai o te Arawa i Hawaiki ka tae ki Ratanui, kei te takiwā o Tikirau, ka kitea atu te puāwai o te rata i uta, ka makaia ngá kura ki te moana; nga kura nei ko Tuhaepo, ko Tuhaeao. Ka pahemo te waka, ka kitea e Mahina i muri. Koia te whakataukī mō te mea kite: 'He kura pae nā Mahina kāore e hoki atu tō taonga ki a koe'. [Translation in original source] The Plume of Mahina – On arrival from Hawaiki of the Arawa canoe at Ratanui, in the vicinity of Tikirau, the bloom of the Rata on shore was observed by the crew, and they thereupon threw their head plumes into the sea; the plumes were named Tuhaepo and Tuhaeao. After the canoes had moved on the plumes were discovered by Mahina. This gave rise to the proverbial saying about articles of value that are found: 'A plume washed ashore for Mahina is a treasured thing which will not be returned to you'. Ngata & Jones 2004, pp 144-5, fn 19.

John White's 1887 five-volume study of Māori traditions related the account of Tainui's crew throwing away their kura, or red ornaments, when they saw the plentiful red blossoms of the rata as they approached New Zealand. An important proverb, in effect the Māori version of 'finders keepers, losers weepers', derives from this tradition:

> When the crew landed, Taininihi went to obtain some of the rata–blossom to wear as a head-dress in place of the kura he had brought from Hawaiki…He put the rata-blossoms as a plume on his head; but he had not thus worn them long when they began to fade. Then he was sorry for his Hawaiki kura which he had thrown into the sea, and he went in search of it along the sea-beach, but did not find it, as Mahia (or Mahina) had been there before him and found and taken it. When he heard that Mahia had found his kura he went to him to obtain it, but Mahia would not part with it. Taininihi asked again for it. Mahia answered, 'I will not give the kura to you, as it is a kura which has been floating in the sea, and was cast on the beach and found by me'. This is now a custom in regard to anything found, such as greenstone or any other thing. Translation in original. John White, The Ancient History of the Māori, (Government Printer, Wellington, 1887, Vol IV) p 32.

The missionary, Thomas Buddle came to New Zealand in May 1840. He was first stationed at Whaingaroa (Raglan). He was later directed to open a new mission on the Waipa River. Buddle recorded in his diary a journey through the Waipa district and his interest in the area around Kakepuku as a suitable site for a mission station. Buddle noted that the local Māori were anxious to have a missionary. He explained:

> But we have reason to suppose that their anxiety for a mission arises more from a desire to get trade or as they term it 'taonga'. 'Buddle, Thomas 1812-1883, Transcript of Diary, (13 Jun-ca 29 Dec 1840', Entry for 30 October 1840. ATL Ref.MS-0343).

Professor Bruce Biggs has taken a language-oriented approach in his discussion of the meaning of taonga and other indigenous words used in the Māori text of the Treaty of Waitangi.

> The basic meaning of the Māori word taonga is 'valuable material possession'. Its Polynesian cognates tend to confine their meanings to specific types of highly valued woven garments, and a recent article [Weiner] has suggested that basically the Māori word referred to 'inalienable' wealth, such as weapons and ornaments of greenstone and fine woven cloaks, which, even though they passed from one person to another, remained, in some sense, the property of the original owner. However that may be, the word taonga was used to refer to a wide range of valuable possessions and attributes, concrete or abstract…I have drawn thirty or so examples from early nineteenth century scriptural texts and found as referents to taonga, in addition to greenstone and woven articles, such other material assets as weapons and pieces of land; social and cultural features such as carving, dance, and (interestingly) warfare; personal attributes such as attractive eyebrows. ... There can be no doubt that 'o ratou taonga katoa' can be taken, in strict accordance with language usage, to include all material and cultural possessions; the phrase in fact includes everything subsumed under the English 'forests fisheries and other properties' and more.' 'Humpty Dumpty and the Treaty of Waitangi' in Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi, I Hugh Kawharu (ed), (Oxford University Press, Auckland, 1989) p 308.

Annette B. Weiner shows how politically compelling inalienable possessions are, summarizing the underlying principles as follows:

> Whatever the local cultural circumstances, constructing, guarding, altering and expanding social identities into forms of rank and hierarchy are dependent upon the success of institutionalizing difference through exchanges that demonstrate one's ability to keep-while-giving. The ahistoric essentialism behind the traditional concept of the norm of reciprocity conceals the particular cultural configurations in and through which inalienable possessions are empowered to act as the source of difference and hierarchy.

She then turns to Māori texts, following three main threads:

> First, by pursuing Mauss's interest in the hau, I trace the way the hau is embedded in a special class of valuables called *taonga* that are ranked according to their historical and cosmological antecedents. Second, by reinterpreting classic Māori ethnographic texts on the semantic meanings and spatial and historical movements of taonga, I expose the economic and political significance of flax and feather cloaks that, historically, are the oldest kinds of taonga…Third, since women are the producers of these cloaks, my ethnographic analysis of the hau and taonga brings women's production as well as human and cultural reproduction into prominence. Inalienable Possessions: The Paradox of Keeping-While-Giving, (University of California Press, Berkeley, 1992) pp 47-49.

Annette B Weiner has stimulated anthropologists to take an interest in a reinterpretation of the ethnographic data used in support of the norm of reciprocity by introducing the paradox of 'keeping-while-giving' as a framework of analysis, thereby adding another dimension to the researchers' understanding of hau, taonga and other important concepts:

> Finally to return to the hau, we see that Ranapiri's text is not enigmatic, nor is Mauss's interpretation of the hau mystical. The hau as a life force embedded in the person is transmitted to the person's possessions. The ethnography shows that the hau must be given following birth and is lost through antisocial means or at death. The hau is permeable in that it must be replaced in people and things, instilling people with a creative force that creates a bond between them. However, the taonga and the hau are not identical because a taonga, as an inalienable possession carries the force of history and tradition. The hau of each owner enters the taonga, but the taonga's value is based much less on personal identity than on the cumulative social and cosmological identities of past owners. Therefore, although the taonga is the vehicle of both the hau and history, these meanings are separable…The taonga given to someone should return because it is inalienable, but the hau can be detached from an object so that another taonga may carry the original 'semblance' of the person. When Ranapiri explains that when a taonga is given to another person, it will be repaid with another taonga, this is a replacement for the original. But when an exceptionally fine taonga is given, there is no replacement possible. Each high-ranking cloak or nephrite possession subjectively defines an exclusive set of social and cosmological relationships. To give away a taonga to someone else is to make that person an intimate part of these relationships. To claim another person's taonga is more than a personal victory; it is to assume another's rank, name, and history.' *Inalienable Possessions: The Paradox of Keeping-While-Giving,* (Berkeley, University of California Press, 1992) pp 64-65.

VII. Some Formative Conclusions

Given the regrettable fact that Māori represent a significant proportion of those involved in the criminal justice system, the case for greater Māori input into the legal system is compelling. This article has highlighted a number of considerable advantages with acknowledging legal processes based on the first law of Aotearoa-New Zealand. It would give Māori a legal system with which they are more likely to identify, accords with the Treaty principles of participation and partnership, complies with Articles II and IV of the Māori version of the Treaty, and contributes to a

genuine sense of cultural identity and social inclusion.[123] The Treaty sought to encourage the integration and appropriate reconciliation of Māori and English law, hence the partnership and the fiduciary duty established by the Treaty were and continue to be the lynch pins for constructing a polyphyletic future in the controversial relationship between affinity and difference in which both Māori and Pākehā have parity of respect within the legal system of Aotearoa-New Zealand.

While tikanga Māori customary law has now re-entered the legal system, there is evidence that the system may not yet have the tools, capacity, or to have developed a sufficiently informed approach to dealing appropriately with those customary laws. This article has briefly highlighted some of the complexities that the Courts are facing when attempting to incorporate tikanga Māori customary law and to define the extent and scope of tikanga from legislation through case law.

A number of possibilities are available to Judges when deciding on the scope and extent of tikanga Māori customary law including embracing te reo Māori (language), mātauranga Māori (world view, knowledge base) and tikanga Māori themselves; the appropriate use of Kaumātua (Elders) as expert witnesses, and referring to authoritative and well audited works such as Te Matapunenga – a compendium of references to the concepts and institutions of Māori customary law, which provides vital context to te reo Māori, mātauranga Māori and tikanga Māori. There still appears to be a potential for the values and laws of the dominant society to be regularly applied in the assessment of proposals without a thought as to their origin but tikanga Māori customary law is now restored as a part of the fabric of the legal system of Aotearoa-New Zealand.

The future of Aotearoa-New Zealand must lie in a single legal system which nevertheless recognises and respects the world views, values, customary laws and institutions of the two great founding cultures of this country, Māori and British, as well as 'others' where appropriate. The existing legal framework must be modified thereby permitting the first law of this country, tikanga Māori customary law, to operate effectively. Inaction is an expensive mistake. Education on the part of Māori and Pākehā, as well as institutional flexibility, are key allies in the challenge to apply tikanga Māori customary law. Greater understanding is likely to breed confidence. With education, understanding, competence in both worlds, and confidence on the part of all participants, it may be possible to re-create and re-locate a significant space for the first law of Aotearoa-New Zealand within the legal system. But it will be a significant challenge to do so. Notwithstanding the challenge, Māori, Pākehā and the legal system can rise to the occasion if political will, confidence and competence from all involved exists.

Te rongonui o te taniko kei roto i te whiriwhiri noa māu tonu tōna ātaahua
– The beauty of taniko (the embroided border of a fine woven cloak) is that there is more than one pattern.

123 Law Commission, *Justice: The Experiences of Maori Women* (NZLC R53, Wellington, 1999), 8.

Acronyms

AJHR	Appendices to the Journals of the House of Representatives, New Zealand.
APS	Aborigines Protection Society.
BPP	British Parliamentary Papers.
CN/O	Church Missionary Society, Letters and Journals.
CO	Colonial Office Papers, Public Record Office, London.
Col. Sec.	Colonial Secretary in New Zealand, Secretary of State for the Colonies in England.
GBPD	Great Britain Parliamentary Debates (Hansard, Third Series).
GBPP	Great Britain Parliamentary Papers.
JPS	Journal of the Polynesian Society.
MA	Archives of the Māori Affairs Department.
NO	Native Office, correspondence of the Native Department.
NZLJ	New Zealand Law Journal.
NZLR	New Zealand Law Reports.
NZPD	New Zealand Parliamentary Debates.

Glossary

Hapū	Descent group with local base on a Marae, section of a tribe.
Hui	Meeting.
Iwi	Tribe or people.
Karakia	Rights of incantation, prayer ritual.
Kaumātua	Respected elder.
Kawa	The protocol of the marae, rituals.
Kuia	Elderly woman.
Mana	Ascribed and achieved authority, prestige, spiritually endowed and maintained.
Marae	Meeting place, village courtyard, spiritual symbolic centre of Māori community affairs.
Muru	To take compensation in a formalised raid; to forgive.
Pākehā	New Zealander of non-Māori descent.
Rāhui	Customary embargo, restriction placed on resources often for conservation purposes.
Rangatira	Chief – male and female, effective leader.
Rangatiratanga	Chieftainship, authority.
Taniko	Embroidered border, braid, tapestry of a precious cloak.
Taonga katoa	All treasured possessions – precious objects, cultural norms, customs, values, institutions.
Tapu	Sacred, forbidden, under spiritual or ceremonial restriction.
Tikanga	'Right ways', custom, from tika (adj.) straight, right, correct, fair, just.
Tohunga	Expert.
Ture	Law, authorised by Government, passed by formal legislature.
Utu	Reciprocity, compensation, balance.
Wāhi tapu	Sacred places.
Whānau	Extended family, usually four generations.