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LAW·COMMISSION  
TE·AKA·MATUA·O·TE·TURE

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*Study Paper 9*

MĀORI CUSTOM AND VALUES IN  
NEW ZEALAND LAW

*March 2001*  
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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E KORE E NGARO

HE KĀKANO I RUIA MAI I RANGIĀTEA

I WILL NEVER BE LOST

FOR I AM A SEED SOWN FROM RANGIĀTEA

*Rangiātea refers to the original homeland of Māori before they came to Aotearoa. In using this saying a speaker claims his or her identity as Māori, as one grown from that original homeland. The saying expresses pride in being Māori and confidence in the future for Māori.*

The Law Commission acknowledges the financial contribution from the New Zealand Law Foundation towards this project.

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# Preface

## TE AO MĀORI

**A** PRINCIPAL FUNCTION OF THE LAW COMMISSION is to make recommendations for the reform and development of the laws of New Zealand. In doing so the Commission shall, under the Law Commission Act 1985, section 5(2)(a):

take into account Te Ao Māori (the Māori Dimension) . . .

Since 1997 Māori values and principles have been discussed by the Law Commission in *Justice: The Experiences of Māori Women – Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pā ana ki tēnei* NZLC R53, *Coroners* NZLC R62, *Adoption and Its Alternatives: A Different Approach and a New Framework* NZLC R65, *Juries in Criminal Trials – Part One* NZLC PP32 and *Juries in Criminal Trials – Part Two* NZLC PP37, and *The Treaty Making Process: Reform and the Role of Parliament* NZLC R45. These reports suggest that some of our existing laws and institutions could learn with advantage from Māori cultural values and institutions. In *Evidence* NZLC R55 the Commission considered the basis upon which Māori custom is admitted in evidence; the definition of experts to include kaumātua, and matters relating to the questioning of kaumātua.<sup>1</sup>

The Commission also provides advice and assistance to any government department or organisation considering the review, reform or development of any aspect of the law of New Zealand.<sup>2</sup> In the advisory report to Te Puni Kōkiri on section 30 of Te Ture Whenua Māori Act 1993, issues of mandate and representation were considered having regard to:<sup>3</sup>

- Te Ture Whenua Māori Act 1993;
- the adjudicative and advisory jurisdictions of the Māori Land Court; and
- matters raising questions of tikanga.

## THE PROJECT

This project originally commenced in 1994 at the suggestion of the Honourable Justice Durie, who at that time was Chief Judge of the Māori Land Court. Justice Durie was of the view that some knowledge of Māori custom would greatly assist judges in carrying out their judicial functions.

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<sup>1</sup> New Zealand Law Commission *Evidence* NZLC R55 (Wellington, 1999) vol 2, paras C15, C323 and C401.

<sup>2</sup> Law Commission Act 1985, ss 5(1)(c) and 6(2)(d).

<sup>3</sup> This paper was presented to the Māori Affairs Select Committee recently considering Te Ture Whenua Māori Amendment Bill 2000. It is published as a companion paper to this paper: New Zealand Law Commission *Determining Representation Rights under Te Ture Whenua Māori Act 1993 – An Advisory Report for Te Puni Kōkiri* NZLC SP8 (Wellington 2001).

Justice Durie's view was:<sup>4</sup>

There is no text and study that casts our knowledge of Māori custom in jurisprudential terms.

...

Even for a Judge of the Māori Land Court it is not a simple task to introduce Māori Custom law. As a Judge of that Court for the last 20 years, I can say that in that time there has been no course of instructional training for the judges on customary tenure and ancestral law.

The general courts have assumed however that the judges of the Māori Court have a specialist knowledge of Māori custom. This is probably because there is statutory provision for the Courts to state a case to the Māori Appellate Court when a question of custom arises. In fact, however, the specialist knowledge that the Māori Land Court possesses is not a knowledge of custom but of the complex laws introduced to replace customary tenure. Some knowledge of customary preference inevitably rubs off through the Judges' long association with Māori people; but the experience so gained is anecdotal and not founded in scholarship.

Since 1994, there has been a great deal of scholarship shedding light on aspects of Māori custom law. A number of informative texts have been published.<sup>5</sup>

In 1996 major research examining tikanga Māori commenced at Waikato University.<sup>6</sup> The Laws and Institutions for Aotearoa/New Zealand project, based at the Te Mātāhauariki Research Institute at Waikato University, and directed by Adjunct Professor Judge Michael Brown (who is also a member of the Māori Committee to the Law Commission), has as a particular aim: "the establishment of socially inclusive laws and political and legal institutions in Aotearoa/New Zealand that actualise the partnership explicit and implicit in the Treaty of Waitangi". This project is undertaking the comprehensive examination of tikanga Māori that is critical in developing laws and institutions to suit the particular conditions in New Zealand. One of this project's particular strengths is its emphasis on a multi-disciplinary approach – as well as kaumātua, the project receives input from linguists, anthropologists, historians, lawyers and others.<sup>7</sup>

## ACKNOWLEDGEMENTS

In writing this paper, we have drawn extensively on the various writings of the Honourable Justice Durie, primarily his 1994 draft paper on Custom Law.

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<sup>4</sup> ET Durie "Custom Law: Address to the New Zealand Society for Legal & Social Philosophy" (1994) 24 VUWLR 325.

<sup>5</sup> See Richard Boast et al *Māori Land Law* (Butterworths, Wellington, 1999), (some of the contributors to this text are lecturers in Māori land law and custom law at Victoria University); David Williams *Te Kooti Tango Whenua: The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999).

<sup>6</sup> Other projects and groups have also been established as part of the ongoing and widespread exploration of aspects of tikanga. For example, a group consisting of Kaumātua and associated with Te Puni Kōkiri, "Te Roopu Whakataamau i te Whenua", was established as a result of eight regional wānanga culminating in a national wānanga which recommended that an expert advisory panel be established to further "review and develop Māori law concepts and principles underpinning a Māori land tenure system" (see CAB (99) M17/5 and STR (99) M21/9). Te Roopu Whakataamau i te Whenua has recently completed a report entitled *Ngā Tikanga e pā ana ki te Whenua* (6 September 2000).

<sup>7</sup> See our comments in Chapter 6 regarding the After Settlement Assets Project where we emphasise the value in taking a multi-disciplinary approach to that work.

We are grateful for the work and commentaries provided by:<sup>8</sup>

- Dame Joan Metge “Commentary on Judge Durie’s Custom Law”;
- Dr Michael Belgrave “Māori Customary Law: from Extinguishment to Enduring Recognition”;
- Dr Richard Mulgan “Commentary on Chief Judge Durie’s Custom Law Paper from the Perspective of a Pākehā Political Scientist”;
- Chief Judge Williams, “He Aha Te Tikanga Māori” (in draft);
- Whaimutu Dewes “Māori Custom Law: ‘He Kākano i Ruia Mai i Rangiātea, e Kore e Ngaro’” (in draft); and
- Dr David Williams “He Aha Te Tikanga Māori” (in draft).

Their contributions were funded by the New Zealand Law Foundation. We are extremely grateful for the Foundation’s assistance in this regard.

We are grateful for the support and guidance of the members of the Māori Committee to the Law Commission:

- Rt Reverend Bishop Manuhua Bennett ONZ CMG;
- Rt Honourable Justice Durie;
- Judge Michael JA Brown CNZM;
- Professor Mason Durie CNZM;
- Whetumarama Wereta; and
- Te Atawhai Tairaoa.

During their terms Professor Richard Sutton<sup>9</sup> and Denese Henare were Commissioners responsible for this project. Although the term of Denese Henare expired on 30 June 2000, the Commission engaged her services as a consultant to complete the study paper. The research and much of the writing was undertaken by Meika Foster.

Tēnei te mihi ki a koutou katoa mō ā koutou āwhina, tautoko, kaha ki te hiki tēnei kaupapa. Tēnā koutou katoa.<sup>10</sup>

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<sup>8</sup> Copies of the commentaries provided by Dame Joan Metge, Dr Michael Belgrave and Dr Richard Mulgan are available on request from the Law Commission. The remaining papers are not available for distribution since they are draft papers only. Dame Joan Metge has also published a number of other works that refer to some of the same themes as those in her commentary. For example, she discusses Māori Custom Law from a contemporary perspective in her books *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) and *In and Out of Touch: whakamaa in cross-cultural context* (Victoria University Press, Wellington, 1986). Dame Joan Metge has also provided a number of statements to assist various proceedings in the Fisheries litigation, see particularly: Affidavit of Alice Joan Metge in Support of the Plaintiffs, *Te Rūnanga o Muriwhenua v Treaty of Waitangi Fisheries Commission* (Matter No 1514/94) 27 September 1999.

<sup>9</sup> Professor Richard Sutton was also the Commissioner responsible for the Succession Law project. The material contained in Appendix B was drawn from Professor Sutton’s work.

<sup>10</sup> We gratefully acknowledge all of the guidance, support and strength provided to us in undertaking this project.

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# 1 Introduction

## PURPOSE OF THE PAPER

- 1 **T**HIS PAPER HAS TRAVELLED a long road from conception to publication. Originally, the Law Commission intended to publish a concise document for judges and decision-makers that answered the question “What is Māori Custom Law?”. As we progressed, however, the difficulties with such an approach became apparent. It is not possible to usefully formulate a concise answer to that question given that the ambit of Māori Custom Law is immense. Its foundation is “tikanga Māori” the body of rules and values developed by Māori to govern themselves – the Māori way of doing things.<sup>11</sup> But it also includes the rules developed by the courts and the legislature where matters of Māori custom have been in issue, and it is inextricably interwoven with the history, development and purpose of both the Waitangi Tribunal and the Māori Land Court.
- 2 This paper has two main purposes. One is to examine how Māori Custom and values impact on our current law. The second is to consider ideas for future law reform projects in the Law Commission to give effect to Māori values in the laws of New Zealand.

## TERMINOLOGY

- 3 Before embarking on an analysis of custom law, it is important to note a few matters of terminology. The phrase “custom law” is used in many different ways.
- 4 At the most basic level, the term “custom law” is used in a legalistic and narrow manner to refer to particular customs and laws derived from England, and indigenous or aboriginal laws and customs that have met particular legal tests and thus are enforceable in the courts.<sup>12</sup> In a broader sense, it is used to describe the body of rules developed by indigenous societies to govern themselves,<sup>13</sup> whether or not such rules can be said to constitute “custom law” in the former sense. There is some overlap between these categories. A careful reading of the context is often needed to determine the intended usage.
- 5 In New Zealand, the expression custom law in reference to Māori is called “Māori custom law”. The closest Māori equivalent to concepts of law and

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<sup>11</sup> Discussed further in Chapter 3. It is also important to note that the application of tikanga differs from group to group.

<sup>12</sup> Discussed in Chapter 2.

<sup>13</sup> Also commonly described as “indigenous custom law” or variant. Discussed in Chapter 3 as it relates to Māori.

custom is “tikanga”.<sup>14</sup> While not completely accurate,<sup>15</sup> writers often use the terms “Māori custom law” and “tikanga Māori” interchangeably. In this paper, particularly in chapter 3 where we most heavily rely on their work, we follow the preferences of the writers who have provided us with commentaries on custom law.<sup>16</sup>

- 6 So far as existing law is concerned,<sup>17</sup> tikanga Māori is of current practical relevance:<sup>18</sup>
- in relation to the exercise of discretions, as in sentencing or family protection claims;
  - where a statute expressly requires consideration of it, as does the Resource Management Act 1991; and
  - in situations where it can be said that custom law survives unaffected by any subsequent legislation.<sup>19</sup>

## MĀORI CUSTOM LAW IS DYNAMIC

- 7 There has long been a tendency to insist that “genuine” Māori thinking must be that of tikanga Māori prior to contact with Pākehā. Thus judges of the Native Appellate Court in 1906 complained that:<sup>20</sup>

In dealing with questions of Māori custom, the difficulty is becoming daily more pronounced of disentangling genuine custom from the incrustations which have grown round it under the influence of Pākehā ideas.

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<sup>14</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished draft paper for the Law Commission, 1998) 1. See Dame Joan Metge’s discussion of the Māori words tikanga, kawa, ture and ritenga in her *Commentary on Judge Durie’s Custom Law* (unpublished paper for the Law Commission, 1996).

<sup>15</sup> As Dame Joan Metge notes, “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. Commonly, several sentences of explanation are needed to deal adequately with the similarities and divergences”. *Commentary on Judge Durie’s Custom Law* (unpublished paper for the Law Commission, 1996) 2.

<sup>16</sup> These contributors are listed and acknowledged in the Preface.

<sup>17</sup> To what extent other matters of tikanga should be recognised as part of New Zealand law is an issue of law reform. See our discussion in Chapter 6.

<sup>18</sup> In addition to the three points noted here, it is arguable that the principle of legality should apply to Māori customs and fundamental values. In essence, the principle of legality holds that fundamental rights cannot be overridden by general or ambiguous words. See *R v Secretary of State for the Home Department, ex parte Simms* [2000] AC 115 and *Pierson v Secretary of State for the Home Department* [1998] AC 539. Such an approach was taken by Thomas J in the context of Māori fishing rights in his dissenting judgment in *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139, 158. Justice Thomas considered that “in order to extinguish or curtail a Māori fishing right or right protected by the Treaty, the legislature not only must direct its attention to the question of extinguishing or curtailing the right but also must deliberately determine that it should be extinguished or curtailed. The intention must be clearly manifested by unmistakable and unambiguous language”.

<sup>19</sup> Further research is required to consider the extent of these situations. The work being undertaken for the Waikato Project: Laws and Institutions for Aotearoa/New Zealand: Te Mātāhauariki (see the Preface) will assist in this regard.

<sup>20</sup> *Re Roera Rangi*, Native Appellate Court, New Plymouth, 28 October 1906 – quoted in *Customary Māori Land and Sea Tenure: Ngā Tikanga Tiaki Taonga o Neherā*, (Wellington, Manatu Māori, 1991) 2.

- 8 Yet judges in the ordinary courts have never sought to preserve English common law from “incrustations” derived from non-English sources such as Roman law, canon law, the law merchant, or international law. In this century, the genius of the common law is its dynamism coupled with its stability.<sup>21</sup>
- 9 There is no culture in the world that does not change. Change does not necessarily imply that a culture is “dying” or that it is now somehow inauthentic. Culture is always a living, changing thing.<sup>22</sup> A pungent essay by Grammond<sup>23</sup> and the forceful dissenting judgement of L’Heureux Dubé J in *R v Van der Peet*<sup>24</sup> which cites it, emphasise the need both to look at the actuality of indigenous practices and not to treat them as frozen in history.
- 10 Tikanga Māori should not be seen as fixed from time immemorial, but as based on a continuing review of fundamental principles in a dialogue between the past and the present.<sup>25</sup> Professor Hirini Mead explains:<sup>26</sup>

There are some citizens who go so far as to say that tikanga Māori should remain in the pre-Treaty era and stay there. To them tikanga Māori has no relevance in the lives of contemporary Māori. That body of knowledge belongs to the not so noble past of the Māori. Individuals who think this way really have no understanding of what tikanga are and the role tikanga have in our ceremonies and in our daily lives. It is true, however, that tikanga are linked to the past and that is one of the reasons why they are valued so highly by the people. They do link us to the ancestors, to their knowledge base and to their wisdom. What we have today is a rich heritage that requires nurturing, awakening sometimes, adapting to our world and developing further for the next generations.

- 11 The capacity of tikanga Māori to adapt to new circumstances is explained by Justice Durie. He states that:<sup>27</sup>

. . . adherence to principles, not rules, enabled change while maintaining cultural integrity, without the need for a superordinate authority to enact amendments. Custom does not, therefore, appear to have been lacking for vitality and flexibility. Inconvenient precedent could simply be treated as irrelevant, or unrelated to current needs, but precedent nonetheless was regularly drawn upon to determine appropriate action. Accordingly, while custom has usually been posited as finite law that has always existed, in reality customary policy was dynamic and receptive to change, but change was effected with adherence to those fundamental principles and beliefs that

<sup>21</sup> See Sir Robin Cooke’s comments in the Ninth Commonwealth Law Conference April 1990, “The Dynamics of the Common Law” [1990] NZLJ 261; and WD Baragwanath QC “F W Guest Memorial Lecture: The Dynamics of the Common Law” (1987) 6 Otago Law Review 355.

<sup>22</sup> Justice Gray, *Aboriginal and Native Title Issues*, edited transcript of a speech delivered at the Law Librarians’ Symposium on 2 October 1998, 7.

<sup>23</sup> “La protection constitutionnelle des droits ancestraux des peuples autochtone et l’arret Sparrow” (1991) 36 McGill LJ 1382.

<sup>24</sup> (1996) 137 DLR (4th) 289, 345–9.

<sup>25</sup> Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 51.

<sup>26</sup> Hirini Moko Mead *The Nature of Tikanga* (paper presented at Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Ōtaki, 11–13 August 2000) 16.

<sup>27</sup> ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 331.

Māori considered appropriate to govern the relationships between persons, peoples and the environment.

- 12 It is this ability of tikanga to change that accounts for its variations among tribes. While the practice of tikanga can differ depending on the circumstances of particular iwi, hapū or whānau, those changes are always guided by the fundamental values that underpin tikanga.
- 13 From the earliest post-colonial times Māori communities set about adapting societal structures to deal with the new experiences they were encountering. Such examples are the Māori parliaments, the Kīngitanga of the Waikato and the pan-Māori movements such as the Kotahitanga.<sup>28</sup>
- 14 Another illustration of the ability of tikanga to adapt to new circumstances can be seen in the continued existence of marae. Tikanga Māori still prevails on the marae. Joseph explains that:<sup>29</sup>

despite the corrosive impact of missionaries, official amalgamationist policies, and the considerable development and expansion of function that marae have undergone, as an institution they have persisted from pre-European Māori society into the modern era.

- 15 Further examples, in the context of language, are provided by Mead:<sup>30</sup>

In some instances old terms are combined in a new way in order to make a distinction from the traditional usage. An example is *murū-raupatu* a term used to distinguish Government and Pākehā initiated confiscation of Māori land from their Māori owners. Māori to Māori actions which occurred without any Pākehā involvement, especially the involvement of Government officials are covered by the term “*raupatu*”, that is taken by the blade of a patu, by force.

A few terms like “*kōhanga reo*” (language nest) are definitely modern but they sound traditional, are linked into the language system but refer to a contemporary activity. The idea, however, does have some links with the past and this, in part, accounts for its general acceptance by the people. In this instance old terms are being combined in novel ways to cover activities which appear new but which sound very familiar. Insights from the past have been utilised to solve problems of the present. And by giving the activity a significant Māori name the people are able to own it, participate in it with some enthusiasm, and take charge of it.

- 16 This is not to say that Māori live in a society where anything goes. The point is that tikanga Māori has been receptive to change while maintaining conformity with its basic beliefs.<sup>31</sup> Part of the problem today is that judges, through no fault of their own, are being called upon to assess the mores of a society still largely foreign to them.<sup>32</sup>

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<sup>28</sup> Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 10.

<sup>29</sup> RA Joseph *Historical Bicultural Developments – The Recognition and Denial of Māori Custom in the Colonial Legal System of Aotearoa/New Zealand* (paper prepared for Te Mātāhauariki Research Institute, University of Waikato FRST Project, 1999), 37.

<sup>30</sup> Hirini Moko Mead *The Nature of Tikanga* (paper presented at Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Ōtaki, 11–13 August 2000) 15.

<sup>31</sup> ET Durie *Ethics and Values* Te Oru Rangahau Māori Research and Development Conference, Massey University, 7–9 July 1998, 3.

<sup>32</sup> Difficulties can arise if judges draw conclusions based on their understanding of a Māori concept without full discussion of evidence describing the concept and its implications. See, for example, *Police v Dargaville* (DC Kaikohe, 14 May 1999, CRN 8027007676, Judge Everitt) re the concept of “mana”, and our discussion of *Re Wakarua* at para 243 and *Re Stubbing* at para 245.

- 17 Tikanga Māori is not synonymous with the personal point of view of individual Māori advocating a particular outcome for a dispute in court proceedings. A major reason for publishing this paper is to point to the underlying values and fundamental principles of Māori custom law so that idiosyncratic or perverse attempts to rely on Māori custom law may be detected. To identify custom there will also be a need for a continuing process of regular recourse to the wisdom and knowledge held within Māori communities.
- 18 Flexibility cannot be so great as to allow a proposition to be advanced as Māori custom law where it is in conflict with basic principles handed down from the ancestors. Certainty cannot be so paramount that past understandings of tikanga Māori should be adopted, along the lines of common law precedents, without continually being tested by the practical jurisprudence of Māori communal decision-making. So judges and decision-makers invited to give recognition to tikanga Māori should bear in mind that the vitality of custom law is being continuously replenished within the fora of te ao Māori. There is a need to be cautious – kia tūpato.
- 19 Thus, there is a continuing need to maintain and adapt tikanga in a dynamic process. There is value in looking to the past; but only to the extent that it sheds light upon the present and the future. Justice Durie’s advice is instructive in this regard:<sup>33</sup>
- Old custom is no more important than modern custom however. The former may govern the examination of claims, but the latter may need to apply in considering what must now be done.
- 20 It may then be found that cultures can undertake considerable change, voluntarily, without detriment to their basic underlying values. Durie invites us to consider:<sup>34</sup>
- the enormous changes in Māori society at a time when Māori reigned freely before the Treaty of Waitangi of 1840 and when there was only the moral influence of a small number of missionaries. During that time Māori totally or substantially jettisoned endemic practices of cannibalism, infanticide, sorcery, slavery and to a lesser extent, warfare. These were major reforms with economic consequences, at least with regard to slavery, but there was no lasting impact on the Māori value system.
- 21 The lesson here is that more than one distinct cultural group can be acknowledged and accommodated within a society. The recognition of distinct cultural communities does not preclude the existence of a collective national identity.
- 22 As Durie explains, although care must be taken to avoid the imposition on a culture of inappropriate norms, it is another matter to say that cultural difference invalidates the search for universal standards. He argues that there is a workable compromise between the two extremes of universalism and cultural relativity that could allow the development of a framework that recognises cultural diversity while encouraging a high level of human rights protection. This compromise

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<sup>33</sup> ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) para 107.

<sup>34</sup> ET Durie *Constitutionalising Māori* (paper presented at the Legal Research Foundation Conference, Liberty, Equality, Community: constitutional rights in conflict, Auckland, 20–21 August 1999) 10.

requires working within the underlying value system of each culture. In expanding on this point, Durie states:<sup>35</sup>

Thus one would think that the oppressively cruel treatment of an offender cannot be justified in today's world simply because that treatment is normal in that offender's society. Today's societies no longer exist in isolation but as part of a global community and, for personal fulfilment and world peace, it remains necessary to promote global standards that societies should aspire to. What needs to be held in check is the tendency, sometimes unwittingly, to impose foreign norms when that is not appropriate. The task is to ensure the judicious application of norms having regard to the circumstances of the case, a task requiring a sensitive approach rather than a strict bureaucracy.

- 23 In discussing equality, recent Canadian case law illustrates the point that new expressions or applications can be given to fundamental values without the underlying values themselves being compromised. In *Lovelace v Ontario*,<sup>36</sup> in giving expression to the right to equality under section 15(1) of the Canadian Constitution, the Supreme Court focused on the fundamental value of human dignity. It held that the exclusion of non-band aboriginal communities from a share in the proceeds from a casino project aimed at band communities was not discriminatory because their exclusion did not demean the human dignity of the non-band communities or their members. The project was aimed at supporting the aboriginal groups' journey towards empowerment, dignity and self-reliance. It was a targeted ameliorative program which took into account important differences between First Nations bands on the one hand and Metis communities and non-band First Nations on the other. Recognising differences among groups in a manner that respected their dignity was a legitimate and necessary consideration in ensuring substantive equality within Canadian law.

- 24 In *Law v Canada*, a case concerning age discrimination, the Court expanded on the role of human dignity within the context of Canadian equality jurisprudence:<sup>37</sup>

It may be said that the purpose of s 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration . . .

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society.

- 25 It is fitting to conclude this introduction with emphasis on the value of human dignity. What underlies the focus of this paper is the importance of developing a

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<sup>35</sup> ET Durie *Constitutionalising Māori* (paper presented at the Legal Research Foundation Conference, Liberty, Equality, Community: constitutional rights in conflict, Auckland, 20–21 August 1999) 10.

<sup>36</sup> (2000) 188 DLR (4th) 7.

<sup>37</sup> *Law v Canada* (1999) 170 DLR (4th) 1.

legal system that reflects New Zealand’s cultural heritage and of which all New Zealanders, not just the dominant majority, feel a part.

## STRUCTURE OF THE STUDY PAPER

- 26 Chapter 2 discusses the concept of “indigenous custom law”. This leads to a brief investigation of the doctrine of aboriginal rights.
  - 27 Chapter 3 looks first at definitions of Māori custom law, also referred to as tikanga Māori. It canvasses colonial and evolving judicial attitudes towards, and treatment of, Māori custom law. And, most importantly, it provides some explanations of the values underlying tikanga. Finally, it considers the treatment of tikanga by the courts and the legislature.
  - 28 Chapter 4 discusses the evolving role of the Māori Land Court. In this context, it refers to the Law Commission’s work in the Succession Project to demonstrate some of the difficulties faced by the Court in dealing with the complexities of Māori custom law.
  - 29 Chapter 5 discusses the Treaty of Waitangi, Treaty law that has developed, and some issues arising from references to the Treaty or its principles in legislation.
  - 30 Finally, in Chapter 6 we discuss some options for future work in the Law Commission in co-operation with others to move New Zealand closer to a system of law that is shaped by the best traditions and philosophies of both English law and tikanga Māori.
  - 31 Appendix A sets out the history of the Custom Law Project.
  - 32 Appendix B provides a history of the Succession Law Project and sets out some extracts from a draft preliminary paper on Succession.
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## 2

# Indigenous custom law and the doctrine of aboriginal rights

## INTRODUCTION

- 33 **T**HIS CHAPTER FOCUSES ON the Common Law's treatment of "indigenous customs", including a discussion of the evolving doctrine of aboriginal rights.

## INDIGENOUS CUSTOM<sup>38</sup>

- 34 As Boast explains in *Māori Land Law*, the nineteenth century British empire had somehow to deal with the reality that within the empire existed a vast array of "customary" laws, including:<sup>39</sup>

Islamic law found in Nigeria, the Indian empire and Malaya, the multifarious non-Islamic laws of India, written and unwritten, and the tribal laws of Africa, the Americas and the Pacific . . .

- 35 Those customary laws that were not repugnant to common law values (as were, for example, suttee and cannibalism) and had not been replaced by statute were recognised by the colonial courts and the Privy Council. In doing so, the approach was to treat indigenous customary laws as analogous to particular customs in England, or foreign law. That is:<sup>40</sup>

such law is not known to the Courts . . . but it is cognisable by the Courts if sufficiently proved and enforceable provided certain basic requirements have been met.

- 36 However, treating indigenous customary laws in this way is not as uncomplicated as it may seem. As Allot noted:<sup>41</sup>

The ascertainment of usage or custom which is to be administered by the courts presents problems in England; how much greater is the problem when the way of life, and even the language, of the people concerned are entirely alien to the judges and magistrates administering the customary law.

- 37 The difficulties experienced by a court in finding out and applying relevant customary laws flow partly from the multiplicity of different tribal laws (varying widely from tribe to tribe), partly from the uncertainty regarding the limits of the

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<sup>38</sup> Also commonly referred to as "aboriginal" or "native" custom.

<sup>39</sup> R Boast et al *Māori Land Law* (Butterworths, Wellington, 1999) 19.

<sup>40</sup> R Boast et al *Māori Land Law* (Butterworths, Wellington, 1999) 19.

<sup>41</sup> AN Allott "The Judicial Ascertainment of Customary Law in British Africa" (1957) 20 *Modern Law Review* 244.

operation of customary law in competition or conflict with English law, and partly from the fluid nature of customary law itself.<sup>42</sup>

- 38 In addition, when the courts are dealing with the customs of a different culture and of different religions:<sup>43</sup>

the tests of reasonableness, morality, and public policy must be looked at from an angle somewhat different from that which would be appropriate in the conditions of English society . . .

- 39 Further, some of the more artificial tests recognised in English law would be quite inappropriate in other surroundings. For example, one of the judicial tests that relates to the recognition of particular custom in England requires a custom to have been practised since “time immemorial”, interpreted as dating from the first year of the reign of Richard I.

- 40 While the recognition of indigenous customs in accordance with the presumption of continuity<sup>44</sup> is similar to the recognition in England of particular customs practised since time immemorial, it is not identical in that it allows indigenous customs to change as circumstances require. In discussing the recognition of indigenous customs, Walters states:<sup>45</sup>

In essence, the municipal particular-custom rule applied, but the normal requirement of immemorial usage was replaced by continuity of law from a preceding legal system . . . Since the custom derives legitimacy not from immemorial usage but from a preceding legal regime, it may be capable of alteration by the Native community within which it applies.

- 41 According to McHugh,<sup>46</sup> this distinction between Native custom and particular custom is illustrated by *Hineiti Rirerire Arani v Public Trustee of New Zealand*, in which Lord Philimore made the following statement as regards Māori adoption:<sup>47</sup>

The [Native] Appellate Court said [in a 1906 case]: “It is, however, abundantly clear that Native custom, and especially the Native custom of adoption, as applied to the title of lands derived through the Court, is not a fixed thing. It is based upon the old custom as it existed before the arrival of Europeans, but it has developed, and become adapted to the changing circumstances of the Māori race of today”.

It may well be that this is a sound view of the law, and that [Māori] as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the custom of such a race is not to be put on a level with the custom of an English borough or other local area which must stand as it always has stood, seeing that there is no quasi-legislative internal authority which can modify it.

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<sup>42</sup> AN Allott “The Judicial Ascertainment of Customary Law in British Africa” (1957) 20 *Modern Law Review*, 244.

<sup>43</sup> CK Allen *Law in the Making* (Oxford University Press; 6th edition; 1958) 154–155.

<sup>44</sup> This presumption is discussed further below, para 47 ff.

<sup>45</sup> MD Walters “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 *McGill Law Journal* 711, 719.

<sup>46</sup> P McHugh, *The Aboriginal Rights of the New Zealand Māori at Common Law* (PhD Thesis, Cambridge University, 1987) 179–180 (unpublished) – cited in MD Walters “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 *McGill Law Journal* 711.

<sup>47</sup> [1920] AC 198; (1919) NZPCC 1 (PC) 6.

42 In drawing comparisons between the common law’s treatment of indigenous custom and of foreign law, Allott notes that the analogy has a certain force:<sup>48</sup>

one may compare the rules that customary law must be specially pleaded by the party alleging or relying on it; that it must be proved by witnesses; that the effect of their evidence is for the judge and not the jury.

43 But Allott further notes that this analogy is also incomplete. There are other methods of ascertaining customary law; and the operation of the second branch of the rule in *Angu v Atta*<sup>49</sup> (stating that judicial notice can be taken of customs that have become notorious by frequent proof in the courts) may take a particular custom out of the realm of fact and into the realm of law.<sup>50</sup>

44 Despite the intricacies surrounding the recognition of indigenous customary law, it is the ability of the common law to be flexible that gives it the capability to manage the abstract concepts of distinctive cultures. An example can be found in an appeal to the Privy Council from a decision of the Indian High Court Appellate Division concerning the status of a Hindu idol, *Mullick v Mullick*, where it was stated that:<sup>51</sup>

A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the regulations thereof by Courts of law, a “juristic entity”. It has a juridical status with the power of suing and being sued. Its interests are attended by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir . . .

45 Another example springs from Samoa. According to Samoan custom, the traditional spokesman for the community were the *matai* or family heads, who are elected by their respective families and could only be removed by them. Lord Cooke, delivering the judgment of the Court of Appeal in *Le Tagaloa Pita et al v Attorney General*<sup>52</sup> said that the Samoan Constitution must be read by reference to its traditional setting, thus allowing the Court to cite extensively from *The Making of Modern Samoa*<sup>53</sup> so as to confirm the true nature of the matai system and in the process affirm the collective rights inherent therein.

46 The potential for the common law to be flexible in its treatment of indigenous customary laws is also highlighted by a number of other important common law principles that impact on this area. These include, in particular, the doctrine of aboriginal rights and the associated doctrine of aboriginal title, and, underlying both, the presumption of continuity. These principles have been developed and applied (not always consistently and with some overlap) by judges in diverse circumstances throughout the world in varying permutations and as regards numerous different peoples and places.

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<sup>48</sup> AN Allott “The Judicial Ascertainment of Customary Law in British Africa” (1957) 20 Modern Law Review 244, 246.

<sup>49</sup> (1916) Gold Coast Privy Council Judgments 1874–1928, 43, 44 (PC).

<sup>50</sup> AN Allott “The Judicial Ascertainment of Customary Law in British Africa” (1957) 20 Modern Law Review 244, 246.

<sup>51</sup> (1925) LR 52 Ind App, 245, 250; see also *Bumper Development Corp Ltd v Commissioner of Police* [1991] 4 All ER 638.

<sup>52</sup> (CA Western Samoa, Apia, CA 7/95, 18 December 1995, P Cooke, Bisson & J Keith).

<sup>53</sup> Meleisea *The Making of Modern Samoa* (Institute of Pacific Studies, USP, Suva, 1987) 5.

## THE DOCTRINE OF ABORIGINAL RIGHTS

- 47 The common law doctrine of aboriginal rights is based largely on the presumption of continuity,<sup>54</sup> namely that “customs, particularly long-standing and universally observed customs of a particular community or in relation to a particular piece of land, are granted the force of law under English domestic law and may be enforced in accordance with the remedies available at law and in equity”.<sup>55</sup> In the colonisation context, this means that aboriginal rights and titles are continued as a matter of law after a declaration of sovereignty and the imposition of English law throughout a particular territory.<sup>56</sup> The presumption applies regardless of whether the new territory was acquired by conquest, cession, or settlement.<sup>57</sup>
- 48 Many judges refused to accept that the laws and customs of indigenous peoples could be recognised and applied as English laws by the courts:<sup>58</sup>
- By the nineteenth century, it became increasingly common for judges to say that the customs of tribal peoples were “barbarous”, “savage”, or “uncivilised” and incapable of recognition at common law, and that therefore there was no common law Aboriginal right to lands, resources, or customs.<sup>59</sup>
- 49 Such rules of “discontinuity” are now regarded as a detour from proper common law principles.<sup>60</sup>
- 50 In *Van der Peet*, McLachlin J stated that the “Crown in Canada must be taken as having accepted existing native laws and customs”<sup>61</sup> and (barring extinguishment or treaty) an Aboriginal right will be established once “continuity” can be shown

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<sup>54</sup> The recognition of the presumption of continuity is generally attributed to Lord Mansfield’s judgment in *Campbell v Hall* (1774) 98 ER 848.

<sup>55</sup> Hon Mr Justice Douglas Lambert “Van Der Peet and Delgamuukw: Ten Unresolved Issues” (1998) 32 *University of British Columbia Law Review* 249, 261.

<sup>56</sup> Hon Mr Justice Douglas Lambert “Van Der Peet and Delgamuukw: Ten Unresolved Issues” (1998) 32 *University of British Columbia Law Review* 249, 262.

<sup>57</sup> Kent McNeil “Aboriginal Title and Aboriginal Rights: What’s the Connection?” (1997) 36 *Alberta Law Review* 193.

<sup>58</sup> MD Walters “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 *McGill Law Journal* 711, 721.

<sup>59</sup> See, for example, *Wi Parata v Bishop of Wellington* (1877) 3 N.Z. Jur. (NS) 72 (SC) 77; *Cooper v Stuart* (1889) 14 AC 286, 291, 58 LJPC 93 (PC); *Milirrpum v Nabalco Pty Ltd.* (1971) 17 FLR 141 (NTSC) 201, [1972–73] ALR 65; and *Coe v Commonwealth of Australia* (1979) 24 ALR 118, 129 (HC).

<sup>60</sup> MD Walters “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 *McGill Law Journal* 711, 721.

<sup>61</sup> *R v Van der Peet* [1996] 2 SCR 507, 547; 137 DLR (4th) 289. This case has been criticised on other grounds, because of the “integral to the distinctive culture” test applied by the majority. In addition to the dissenting judgments of L’Heureux-Dubé and McLachlin JJ in *Van der Peet*, this test has been criticized by: J Borrows, “The Trickster: Integral to a Distinctive Culture” (1997) 8 *Constitutional Forum* 27; L I Rotman, “Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in ‘Badger and Van der Peet’” (1997) 8 *Constitutional Forum* 40; K McNeil, “Reduction by Definition: The Supreme Court’s Treatment of Aboriginal Rights in 1996” (1997) 5 *Canada Watch* 60; J. Gray, “O Canada! – ‘Van der Peet’ as Guidance on the Construction of Native Title Rights” (1997) 2 *Australian Indigenous Law Reporter* 18.

between a modern practice and the Native laws that “held sway before superimposition of European laws and customs”.<sup>62</sup>

- 51 From the moment New Zealand became a British colony, the doctrine of aboriginal rights applied automatically to Māori. Professor Brian Slattery explains that:<sup>63</sup>

Although the doctrine was a species of unwritten British law, it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there. Rather the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English common law and governed its application in the colony.

- 52 In *Te Weehi v Regional Fisheries Officer*, Williamson J stated:<sup>64</sup>

The treatment of [the Crown’s] indigenous peoples under English common law had confirmed that the local laws and property rights of such peoples in ceded or settled colonies were not set aside by the establishment of British sovereignty.

- 53 A year later in *Huakina Development Trust v Waikato Valley Authority*, Chilwell J applied *Nireaha Tamaki* and *Public Trustee v Loasby* to hold that “customs and practices which include spiritual elements are cognisable in a Court of law provided they are properly established, usually by evidence”.<sup>65</sup>

- 54 The scope of aboriginal rights is decidedly broad. One aspect of the concept that has received much attention in the courts concerns aboriginal rights to land. The body of law developed to deal with aboriginal land rights is commonly referred to as the “doctrine of aboriginal title”.

- 55 Compatible with the broad principles concerning Aboriginal rights generally, the doctrine of aboriginal title rests upon the simple premise that a change of sovereignty does not legally displace pre-existing property rights.<sup>66</sup> Aboriginal (or native) title derives from two sources: the physical fact of prior occupation, and “the relationship between common law and pre-existing systems of aboriginal law”.<sup>67</sup> The content of Native title:<sup>68</sup>

in terms of the precise kinds of rights protected, the descent groups who can lay claim to such rights, the rules relating to succession and transfer by marriage and so on – can only be governed by indigenous customary law. This has been repeatedly recognised by the courts.

- 56 As early as 1847 in *R v Symonds*,<sup>69</sup> the Court asserted that whatever the strength of Native title, it is entitled to be respected by the courts.

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<sup>62</sup> *R v Van der Peet* [1996] 2 SCR 507, 634–35; 137 DLR (4th) 289, quoted in M D Walters “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 McGill Law Journal 711, 738.

<sup>63</sup> B Slattery “Understanding Aboriginal Rights” (1987) 66 Canadian Bar Review 727, 737.

<sup>64</sup> [1986] 1 NZLR 680; (1986) 6 NZAR 114, 121.

<sup>65</sup> [1987] 2 NZLR 188, 215.

<sup>66</sup> P McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 97.

<sup>67</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1082, 1095–96; 153 DLR (4th) 193.

<sup>68</sup> R Boast et al *Māori Land Law* (Butterworths, Wellington, 1999) 13.

<sup>69</sup> (1847) NZPCC 387.

- 57 Over the next thirty years, several New Zealand cases echoed the *Symonds* approach.<sup>70</sup> In *Re “The Landon and Whitaker Claims Act 1871”*, for example, the Court of Appeal held that the Crown was “bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right”.<sup>71</sup>
- 58 However, in *Wi Parata v The Bishop of Wellington*,<sup>72</sup> following the land wars, Chief Justice Prendergast took an exactly opposite approach to *Symonds* in holding that there is no customary law of the Māori of which the courts of law can take cognizance.
- 59 In discussing Prendergast CJ’s approach, Richard Boast describes it as “idiosyncratic” and states that it “cannot be used to typify the approach of the New Zealand legal system as a whole, or indeed of the time”.<sup>73</sup> Other Courts did not accept Prendergast CJ’s approach. In *Nireaha Tamaki v Baker*<sup>74</sup> the Law Lords opined that it was rather late in the day for New Zealand courts to be taking that approach in view of legislation that “plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence”.<sup>75</sup>
- 60 Most recently, in the interlocutory decision of *Te Runanganui o te Ika Whenua Inc Society v Attorney-General*, the Court of Appeal considered the concept of aboriginal title in the context of a proposed transfer of two dams to energy companies. Te Ika Whenua, representing certain Māori having interests in the relevant rivers, claimed that they had property rights in the rivers and alleged that the transfers would prejudice those rights, based on the doctrine of aboriginal title. The Court of Appeal (with reference to *R v Symonds*<sup>76</sup>) stated that:<sup>77</sup>
- Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights . . . It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes.
- 61 In speaking of the practice of extinguishing native titles by fair purchase, the Court of Appeal went on to observe that:<sup>78</sup>

<sup>70</sup> P McHugh *The Aboriginal Rights of the New Zealand Māori at Common Law* (a thesis submitted for the degree of Doctor of Philosophy in the University of Cambridge; Sidney Sussex College, Cambridge; 1987) 265–6.

<sup>71</sup> (1872) 2 NZCA 41, 49.

<sup>72</sup> (1877) 3 NZ Jur NS (SC) 72.

<sup>73</sup> R Boast et al *Māori Land Law* (Butterworths, Wellington, 1999) 16.

<sup>74</sup> [1901] AC 561 (PC); (1901) NZPCC 371.

<sup>75</sup> [1901] AC 561, 577.

<sup>76</sup> *R v Symonds* (1847) NZPCC 387.

<sup>77</sup> *Te Runanganui o te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 24.

<sup>78</sup> [1994] 2 NZLR 20, 24.

an extinguishment [of native title] by less than fair conduct or on less than fair terms would be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power.

62 Elsewhere, the concept of pre-existing and enforceable aboriginal title was clearly affirmed by the Canadian case of *Guerin v The Queen*, where the Canadian Supreme Court reaffirmed that “Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown”.<sup>79</sup> Six years later, the unique nature of the property right of aboriginal title was again affirmed in *R v Sparrow*.<sup>80</sup> And, at the end of 1997, the Supreme Court of Canada in *Delgamuukw*<sup>81</sup> emphasised that the precise content of aboriginal title is informed by the traditional property laws of the people concerned.

63 In the United States, a well known case to confirm the principle that aboriginal title survived colonisation is *Worcester v State of Georgia*.<sup>82</sup> In this case, the final in a trilogy of cases,<sup>83</sup> Marshall CJ stated that the principle agreed to by the colonial powers:<sup>84</sup>

. . . regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

64 In Australia, the High Court in *Mabo v Queensland* diverged from the judicial stance of the previous two hundred years in relation to Aboriginal entitlement to land rights in holding that native title survived British settlement of the continent.<sup>85</sup> This decision left room for an exposition of customary land rights by the indigenous people themselves:<sup>86</sup>

Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land.

65 Not long after *Mabo*, the case of *The Wik Peoples v Queensland; The Thayorre People v Queensland*<sup>87</sup> was also received as a decision that dramatically broadens the scope for recognition of native title.<sup>88</sup>

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<sup>79</sup> (1984) 13 DLR (4th) 321, 339.

<sup>80</sup> [1990] 4 WWR 410.

<sup>81</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

<sup>82</sup> 31 US (6 Pet) 515 (1832).

<sup>83</sup> *Johnson v McIntosh* 21 US (8 Wheat) 543 (1823); *Cherokee Nation v State of Georgia* 30 US (5 Pet) 1 (1831); *Worcester v State of Georgia* 31 US (6 Pet) 515 (1832).

<sup>84</sup> 31 US (6 Pet) 515 (1832) 544.

<sup>85</sup> H Amankwah *Post Mabo: The Prospect of the Recognition of a Regime of Customary (Indigenous) Law in Australia* (Australasian Law Teachers' Association Conference; School of Law, University of Canterbury, Christchurch; 30 September – 3 October 1993) 3.

<sup>86</sup> *Mabo v Queensland* (No 2) (1992) 175 CLR 1.

<sup>87</sup> (1996) 187 CLR 1.

<sup>88</sup> Some commentators, however, also point out that the *Wik* case “places a strong emphasis on coexistence and compromise between Aboriginal and non-Aboriginal interests” and may thus be seen “as marking the beginning of the development of a distinctly Australian approach to balancing Aboriginal rights with countervailing values”. For a discussion of this point, see A Lokan “From Recognition to Reconciliation: The Functions of Aboriginal Rights Law” [1999] 23 Melbourne University Law Review 6567.

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## 3

# Māori custom law

### INTRODUCTION

66 **I**N THIS CHAPTER, we discuss custom law as it relates to Māori. We begin by looking at definitions of Māori custom law, also referred to as tikanga Māori. We then canvass colonial attitudes towards and treatment of Māori custom law. Thirdly, and critically, we provide some explanation of the values underlying tikanga. Finally, we discuss and give examples of the treatment of tikanga by the legal system.<sup>89</sup>

### TERMINOLOGY

67 In a broad sense, the term “custom law” is used as a phrase to describe the body of rules developed by indigenous societies to govern themselves.<sup>90</sup>

68 In New Zealand, custom law as it refers to Māori is referred to as “Māori custom law”. In discussing Māori custom law, it is important to note that no Māori word or phrase accurately conveys either law or custom.<sup>91</sup> The closest Māori equivalent to these concepts is “tikanga”.<sup>92</sup> Metge identifies tikanga as of key importance in the context of custom law.<sup>93</sup> Writers often use the terms “Māori custom law” and “tikanga Māori” interchangeably. In this chapter, we follow the preferences of the writers who have provided us with commentaries on custom law.<sup>94</sup>

69 Justice Durie has referred to “Māori custom law” as:<sup>95</sup>

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<sup>89</sup> In this chapter, we draw extensively on the papers of all the contributors to the Custom Law Project. These papers are listed in the Preface and 3 of them are available from the Law Commission on request. The remaining papers are not available for distribution since they are draft papers only.

<sup>90</sup> See our discussion of terminology in Chapter 1.

<sup>91</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 1.

<sup>92</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 1.

<sup>93</sup> Dame Joan Metge distinguishes between tikanga and ture. Ture was developed in the contact period from the Hebrew word Torah. It was used initially to refer to the religious laws taught by the missionaries, then extended to include the laws promulgated by the Kāwanatanga (first the Governor and later Parliament): Metge *Commentary on Judge Durie’s Custom Law* (unpublished paper for the Law Commission, 1996) 3.

<sup>94</sup> Dame Joan Metge, Dr Michael Belgrave and Dr Richard Mulgan.

<sup>95</sup> ET Durie “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 *Otago Law Review* 449.

. . . [the] values, standards, principles or norms to which the Māori community generally subscribed for the determination of appropriate conduct . . .

70 Bishop Manuhua Bennett talks of the ethics of tikanga:<sup>96</sup>

Tikanga indicates the obligation to do things in the “right” way: doing the right thing for no other reason than because it is the right thing to do. Tikanga draws from many seeds; it has many shades and many applications.

71 Chief Judge Williams describes tikanga Māori as “essentially the Māori way of doing things – from the very mundane to the most sacred or important fields of human endeavour”.<sup>97</sup>

72 An expanded description is provided by Mead:<sup>98</sup>

Tikanga embodies a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do . . .

Tikanga are tools of thought and understanding. They are packages of ideas which help to organise behaviour and provide some predictability in how certain activities are carried out. They provide templates and frameworks to guide our actions and help steer us through some huge gatherings of people and some tense moments in our ceremonial life. They help us to differentiate between right and wrong and in this sense have built-in ethical rules that must be observed. Sometimes tikanga help us survive.

Tikanga differ in scale. Some are large, involve many participants and are very public . . . Other tikanga are small and are less public. Some of them might be carried out by individuals in isolation from the public, and at other times participation is limited to immediate family. There are thus great differences in the social, cultural and economic requirements of particular tikanga.

73 “Tikanga” derives from the adjective “tika” meaning “right (or correct) and just (or fair)”.<sup>99</sup> The addition of the suffix “nga” renders it a noun which, in this context, may be defined as “way(s) of doing and thinking held by Māori to be just and correct, the right Māori ways”.<sup>100</sup>

74 Tikanga includes measures to deal firmly with actions causing a serious disequilibrium within the community. It also includes approaches or ways of doing things which would be considered to be morally appropriate, courteous or advisable, but which are not rules that entail punitive sanctions when broken.<sup>101</sup>

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<sup>96</sup> Discussion with Bishop Bennett, 19 February 2001, Rotorua. The Bishop referred to the principles of restorative justice to emphasise this point.

<sup>97</sup> J Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 2.

<sup>98</sup> Hirini Moko Mead *The Nature of Tikanga* (paper presented at Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000) 3–4.

<sup>99</sup> H W Williams *Dictionary of the Māori Language* (Legislation Direct, Wellington, 7th Edition: 1971, rep 2000) 416.

<sup>100</sup> Dame Joan Metge adds that, in her view, “tikanga encompasses both ways of doing things and the underlying values, that is, practices and principles”: Joan Metge *Comments provided to the Law Commission on a draft “Māori Custom and Values in New Zealand Law”* 16 February 2001, 1.

<sup>101</sup> DV Williams *He Aha Te Tikanga Māori* (unpublished revised draft as at 10 November 1998 of J Williams) 8.

For example, it is tika to purify oneself through cleansing with fresh water following proximity to death, but if this is not done there is no law with a specified penal sanction for non-compliance. Although, as Metge notes, many Māori believe that failure to do what is tika may attract supernatural punishment if it involves a breach of tapu.<sup>102</sup>

- 75 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.<sup>103</sup> In tikanga Māori, the real challenge is to understand the values because it is these values which provide the primary guide to behaviour.<sup>104</sup> Aspects of tikanga may be subject to a particular interpretation according to certain circumstances but then reinterpreted in the light of other circumstances. Thus tikanga Māori as a social system was traditionally pragmatic and open-ended and it remains so today.<sup>105</sup> It is by understanding these underlying values that order may be discerned and tikanga may be appreciated. These values are discussed further below.

### **Māori custom law as “law”**

- 76 Durie reminds us that:<sup>106</sup>

There is as much a “Māori law” as there is a “Māori language”.

- 77 The debate about whether “law” exists in societies which do not have written laws, law courts and judges is an old one. Anthropologists now generally accept that all human societies have “law”, in the sense of principles and processes, whether or not it can be classified as “institutional law generated from the organisation of a superordinate authority”.<sup>107</sup> Metge explains:<sup>108</sup>

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 use formal means to achieve these ends: a law-making body, laws codified into a system, courts and judges. Small-scale

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<sup>102</sup> Joan Metge *Comments provided to the Law Commission on a draft “Māori Custom and Values in New Zealand Law”* 16 February 2001, 1–2.

<sup>103</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 8.

<sup>104</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 8.

<sup>105</sup> ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 4, 10. See also Richard Mulgan *Commentary on Chief Judge Durie’s Custom Law Paper From the Perspective of a Pākehā Political Scientist* (unpublished paper for the Law Commission, 1996) 5.

<sup>106</sup> ET Durie “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 *Otago Law Review* 449, 451.

<sup>107</sup> ET Durie “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 *Otago Law Review* 449.

<sup>108</sup> Joan Metge *Commentary on Judge Durie’s Custom Law* (unpublished paper for the Law Commission, 1996) 2.

societies with simpler political structures use means which are mainly informal, implicit and serve other purposes as well.

- 78 However, legal positivism, now the dominant jurisprudential tendency in the English legal system, sees “law” as linked with the state. It is therefore interesting that many early visitors to New Zealand had no difficulty at all in identifying the existence and coherence of Māori Custom as “law”.<sup>109</sup> For example, Edward Shortland, when referring to Ngāi Tahu rules relating to land tenure and methods of dispute resolution in the 1840s, quite unselfconsciously describes them as “legal”.<sup>110</sup>
- 79 In writing about Māori Custom Law, Durie concludes that Māori norms were sufficiently regular to constitute law.<sup>111</sup>

## COLONIAL TREATMENT OF MĀORI CUSTOM LAW

- 80 From the outset, the Colonial government struggled to decide whether English law should apply equally to everyone in New Zealand or whether exceptions should be made in favour of Māori and taking into account Māori customs.

### Recognition of Māori custom law

- 81 At the time of the signing of the Treaty of Waitangi, Māori very clearly made up the majority of New Zealand’s population and lived according to their own laws. In practical terms, as Joseph points out:<sup>112</sup>
- Imposing British law onto Māori hardly made sense given that the Māori did not speak English, did not understand the norms and values underlying British law, and to translate English laws into Māori would have been very difficult. Even if it was done the laws would be singularly inappropriate to the conditions in which nearly all Māori were living.
- 82 Pragmatism prevailed with official British policy initially recognising Māori custom. James Stephen, principal advisor to successive ministries around the time of the signing of the Treaty of Waitangi, considered that British authority in New Zealand should be exercised through “native laws and customs”.<sup>113</sup> In 1840, the British Minister instructed Governor Hobson that:<sup>114</sup>

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<sup>109</sup> R Boast et al *Māori Land Law* (Butterworths, Wellington, 1999) 2. Boast suggests that this may be partly because legal positivism was not yet established in England.

<sup>110</sup> Edward Shortland *The Southern Districts of New Zealand: A Journal* (London, 1851) 95. Referred to in *Māori Land Law* (Butterworths, Wellington, 1999) 2: see also the early official British policy on Māori custom law, below.

<sup>111</sup> ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 4.

<sup>112</sup> RA Joseph *Colonial Biculturalism? The Recognition & Denial of Māori Custom in the Colonial & Post-Colonial Legal System of Aotearoa/New Zealand* (paper prepared for Te Mātāhauariki Research Institute, University of Waikato FRST Project, 1998) 2.

<sup>113</sup> Alex Frame “Colonising Attitudes Towards Māori Custom” [1981] NZLJ 105, 105.

<sup>114</sup> Dispatch from Lord John Russell to Governor Hobson, 1840, *Parliamentary Papers, New Zealand, 1841*, 24, cited in A Frame, “Colonising Attitudes Towards Māori Custom” [1981] NZLJ 105, 106.

[The Māori people] have established by their own customs a division and appropriation of the soil . . . with usages having the character and authority of law . . . it will of course be the duty of the protectors to make themselves conversant with these native customs . . .

- 83 Following this pattern, the Secretary of State for the Colonies, Lord Stanley, advocated a justice system that was inclusive of Māori custom. In 1842, he advanced the suggestion that certain Māori institutions such as tapu<sup>115</sup> be incorporated into the English system.<sup>116</sup> He further suggested that legislation be framed in some measure to meet Māori “prejudices” including punishment for desecration of wāhi tapu (sacred places).
- 84 Tentative legislative recognition was accorded Māori custom law by way of, in particular, the Native Exemption Ordinance 1844, the Resident Magistrates Courts Ordinance 1846 and Resident Magistrates Act 1867 which used Māori assessors, and section 71 of the Constitution Act 1852.<sup>117</sup> These initiatives are now discussed in turn.

#### *Native Exemption Ordinance 1844*

- 85 The Native Exemption Ordinance incorporated a number of Māori perspectives, norms and values within the British justice system with active involvement of Māori leadership. Among other concessions, it provided that in crimes between Māori, British intervention was dependent on Māori request. It also allowed convicted Māori thieves to pay four times the value of goods stolen in lieu of other punishment. The money could be used to compensate the victim of the theft – an adaptation of the principle of muru.<sup>118</sup> Finally, the Ordinance provided that no Māori would be imprisoned for a civil offence such as debt or breach of contract.
- 86 Predictably, these measures caused negative backlash among the settlers over the perceived inequalities of the law.<sup>119</sup> In response to that backlash and on the advice of Lord Stanley, Governor Grey replaced the Ordinance with the Resident Magistrates Courts Ordinance 1846, confining concessions in the law to cases involving Māori only.

#### *Resident Magistrates Courts Ordinance 1846 and Resident Magistrates Act 1867*

- 87 The preamble to the Resident Magistrates Courts Ordinance stated that the aims of the legislation were “the more simple and speedy administration of justice” and

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<sup>115</sup> Discussed below paras 151–155.

<sup>116</sup> RA Joseph *Colonial Biculturalism? The Recognition & Denial of Māori Custom in the Colonial & Post-Colonial Legal System of Aotearoa/New Zealand* (paper prepared for Te Mātāhauariki Research Institute, University of Waikato FRST Project, 1998), 5 – refers to AH McLintock *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) 393 citing Lord Stanley’s memorandum of 23 August 1842.

<sup>117</sup> Another interesting example is the Fish Protection Act 1877, the first of a convoluted course of fisheries legislation, which recognised Māori fishing rights.

<sup>118</sup> This recognition of muru for injured parties was extended in 1845 from theft to assault cases after an amendment to the Fines for Assault Ordinance 1845.

<sup>119</sup> RA Joseph *Colonial Biculturalism? The Recognition & Denial of Māori Custom in the Colonial & Post-Colonial Legal System of Aotearoa/New Zealand* (paper written as part of the University of Waikato FRST Project, 17 December 1998) 8.

“the adaptation of law to the circumstances of both races”. The Ordinance provided Resident Magistrates with summary jurisdiction over disputes between Māori and non-Māori. In disputes involving only Māori, the Resident Magistrate was to be assisted by two Māori chiefs appointed as Native Assessors, with the case to be determined according to equity and good conscience without being constrained by “strictly legal evidence”. In addition, the decision in each case was to be made by the two Assessors, with intervention by the Magistrate only in cases of disagreement. Moreover, no judgment was to be carried into effect unless all three members of the Court unanimously agreed.

88 In addition, the Resident Magistrates Act 1867 provided that a Māori summarily convicted of theft or receiving might pay four times the value of the goods in lieu of sentence, thus maintaining official recognition of the Māori custom of muru.

89 In discussing the role of Māori Assessors, Joseph writes that:<sup>120</sup>

Māori assessors were critical to the success of the system. Their working with the Resident Magistrate helped identify [the Magistrate] as part of the local community, particularly where [Magistrates] involved themselves sympathetically with the people and treated the assessors as responsible lieutenants. This measure reinforced group cohesion by not appearing to the Māori as an appeal outside. Moreover, Māori assessors also frequently heard cases on their own . . . The critical factors contributing to the success of the Resident Magistrates system were adequate consultation with the people of a district about what laws would apply and what part the chiefs should play in their enforcement.

90 Thus, the Resident Magistrates system enabled some official recognition of Māori custom, norms and institutions. However, in 1893, the Magistrates Court Act repealed the Resident Magistrates Act 1867, abolishing the office of Resident Magistrate and, with it, Native Assessors. The office of Resident Magistrate was replaced with that of Stipendiary Magistrate who possessed strictly judicial functions.<sup>121</sup>

### *Section 71 of the New Zealand Constitution Act 1852*

91 The New Zealand Constitution Act document had been prepared and approved by the English Parliament in 1846, but was suspended on the urging of Governor Grey and finally brought into effect in 1852. Section 71 enabled the Queen by Order in Council to set apart districts in New Zealand in which the laws and customs of Māori were to be observed in governing the relations with Māori. The Māori laws and customs within Native Districts were not to be invalid merely for repugnancy to English law, as long as they did not conflict with the “principles of humanity”.<sup>122</sup> Section 71 reads as follows:

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<sup>120</sup> RA Joseph *Colonial Biculturalism? The Recognition & Denial of Māori Custom in the Colonial and Post-Colonial Legal System of Aotearoa/New Zealand* (paper prepared for Te Mātāhauariki Research Institute, University of Waikato FRST Project, 1998), 10

<sup>121</sup> There is no discussion in *Hansard* as to why these changes were originally proposed, although it records that three Members of Parliament, Kapa, Taipua and Parata, argued that Native Assessors should be retained. The House was divided on the point and the abolition was approved by a majority of 6 (2 October 1893), 910–912.

<sup>122</sup> Jim Cameron *Plural Justice, Equality and Sovereignty in New Zealand* (unpublished paper for the Law Commission, 22 October 1997) 48.

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:

It shall be lawful for Her Majesty . . . 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.

- 92 However, the section was never used.<sup>123</sup> No districts were “set apart” in terms of the Act, despite the efforts of various Māori groups including the Kīngitanga, Kauhanganui, and Kotahitanga movements, to have the provisions of section 71 implemented.<sup>124</sup>

### Recognition was temporary

- 93 As discussed above, in the early years of the colony imperial legislators and others displayed a preparedness to give some effect to Māori custom law. There is, however, no mistaking the fact that this early attitude generally envisaged recognition of Māori custom only as a temporary measure. As Stephen noted:<sup>125</sup>

. . . sovereignty and law were not convertible terms and it was perfectly possible for the Māori to be British subjects without being subject to British laws. There was no reason why the Māori should not live under their own customs (with the usual exceptions)<sup>126</sup> not only in matters between themselves but to “the utmost possible extent” in matters between themselves and the State, though English law should gradually supersede Māori custom.

- 94 Further, the preamble to the Native Exemption Ordinance 1844 plainly provided that:

Whereas it is greatly to be desired that the whole aboriginal native population of these Islands, in their relations and dealings amongst themselves, be brought to yield a ready obedience to the laws and customs of England: And whereas this end may more speedily and peaceably be attained by the gradual than by the immediate and indiscriminate enforcement of the said laws, so that in the course of time, the force of ancient usages being weakened and the nature and administration of our laws being

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<sup>123</sup> Section 71 was subsequently repealed by the Constitution Act 1986.

<sup>124</sup> RA Joseph *Colonial Biculturalism? The Recognition & Denial of Māori Custom in the Colonial & Post-Colonial Legal System of Aotearoa/New Zealand* (paper prepared for Te Mātāhauariki Research Institute, University of Waikato FRST Project, 1998), 2 (abstract).

<sup>125</sup> RA Joseph *Colonial Biculturalism? The Recognition & Denial of Māori Custom in the Colonial & Post-Colonial Legal System of Aotearoa/New Zealand* (paper prepared for Te Mātāhauariki Research Institute, University of Waikato FRST Project, 1998), 6 – citing Stephen, minutes to Hope, 19 May and 28 Dec, 1843, CO 209/16: 455 and 209/22:253–4.

<sup>126</sup> Some exceptions were mentioned by Lord Russell who distinguished those Māori customs that should be eliminated, such as cannibalism, human sacrifice, polygamy, and infanticide. R A Joseph *Colonial Biculturalism? The Recognition & Denial of Māori Custom in the Colonial & Post-Colonial Legal System of Aotearoa/New Zealand* (paper prepared for Te Mātāhauariki Research Institute, University of Waikato FRST Project, 1998), 6 – citing Russell/Hobson, 9 Dec. 1840, CO 209/8:480, 486–7.

understood, the native population may in all cases seek and willingly submit to the application of the same.

- 95 As Frame points out, the experiments with travelling Magistrates, Native Assessors, and the rūnanga system, are admitted by their authors to be aimed at the suppression of Māori custom with Māori consent. By way of example he notes that the leading Minister, Stafford, wrote to Governor Gore Browne in 1857 that:<sup>127</sup>

In this manner many objectionable customs might be got rid of, the good sense of the Native Meeting being guided by a British Magistrate. We advert particularly to such usages as those mentioned by your Excellency, of Taumau (or betrothal); of making Taua upon the innocent relatives of an offender; of punishing the imaginary crime of witchcraft; and of the Tapu. These need nothing to their abolition but the general consent of the Māori themselves – and, this once obtained, acts of violence attempted by individuals in pursuance of such customs might be repressed and punished.

- 96 Any concern that may have existed to ensure Māori society was not dislocated or harmed by settler incursion was clearly undermined by such preferences for amalgamation which soon came into prominence.

### **The eclipse of Māori custom law**

- 97 A number of factors combined to ensure that the systems of introduced laws and settler policies were geared towards the eclipse of Māori custom law. These 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 internalising colonial values; and
- d) the settlers' desire for land resulting in land alienation from Māori.

- 98 A process of denial, suppression, assimilation and co-option put Māori customs, values and practices under great stress.<sup>128</sup> Aspects of this process continue today. Dr Michael Belgrave argues persuasively that the acquisition of the resource base by the Crown was effected through a sustained attack on Māori custom law by the monocultural colonial and post colonial systems. In addition he observes that any recognition of Māori custom law has been quickly followed by extinguishment, and that Māori people have every right to be cautious about attempts to recognise custom law:<sup>129</sup>

to achieve a modern Māori consensus on the nature of customary law that is workable in the present, it is necessary to appreciate the extent that colonisation was more than

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<sup>127</sup> Alex Frame "Colonising Attitudes Towards Māori Custom" [1981] NZLJ 105, 108 – citing Stafford/Gore Browne, May 6 1857, *App JHR* 1858, E–5.

<sup>128</sup> D Durie-Hall and J Metge "Kua Tutu Te Puehu, Kia Mau Māori Aspirations and Family Law" in M Henaghan and WR Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Oxford, 1992) 79, see also New Zealand Law Commission *Justice: The Experiences of Māori Women Te Tikanga o te Ture Te Mātauranga o ngā Wāhine Māori e pā ana ki tēnei*: NZLC R53 (Wellington, 1999) para 61ff.

<sup>129</sup> Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 4.

simply a catalyst for the modification of customary law. That at different times Māori customary law was denied, acknowledged, defined, modified and extinguished according to non-Māori agenda casts a long shadow that cannot be ignored.

- 99 With reference to Belgrave's analysis, Dewes writes that the historical effects of colonisation provide examples of Māori custom law being dealt with by:<sup>130</sup>
- express denial that it exists;
  - overt suppression;
  - assimilation into the imported institutional law followed by express extinguishment;
  - assimilation by recognition followed by extinguishment through re-interpretation;
  - alteration to the social structures within which the social controls of Māori custom law are exercised; and
  - removal of the resources to which Māori custom law is applied.
- 100 Brief illustrations of each of these categories are given below.

*Express denial that Māori custom law exists*

- 101 The most obvious example of an attempt to deny the existence of Māori Custom Law is found in *Wi Parata v The Bishop of Wellington*.<sup>131</sup> In that judgment, Prendergast CJ observed:<sup>132</sup>
- Had any body of law or custom capable of being understood and administered by the Courts of a civilised country been known to exist, the British Government would surely have provided for its recognition . . .
- 102 Then, with reference to section 4 of the Native Rights Act 1865, Prendergast CJ stated:<sup>133</sup>
- The Act 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 . . . no such body of law existed.
- 103 The Chief Justice thus advanced the circular proposition that Māori custom does not exist because it is not recognised by statute whilst any statutory recognition can be disregarded because Māori custom does not exist.<sup>134</sup>
- 104 Subsequently in *Rira Peti v Ngaraihi Te Paku*,<sup>135</sup> Prendergast CJ refused to accept that marriage according to Māori customary law had any legal validity under New Zealand law.

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<sup>130</sup> Whaimutu Dewes *Māori Custom Law: He Kākanō i Ruia Mai i Rangiatea, e Kore e Ngaro* (unpublished draft paper written for the Law Commission).

<sup>131</sup> (1877) 3 Jur (NS) 72. This case is also discussed above as regards aboriginal title, and below in the context of the Treaty of Waitangi.

<sup>132</sup> (1877) 3 NZ Jur (NS) 72 (SC), 77–78.

<sup>133</sup> (1877) 3 NZ Jur (NS) 72 (SC), 79.

<sup>134</sup> Alex Frame "Colonising Attitudes Towards Māori Custom" [1981] NZLJ 105, 109.

<sup>135</sup> (1888) 7 NZLR 235.

- 105 Another example of the existence of Māori custom law being denied, is seen in the context of land purchases. Pressure brought to bear by the New Zealand Company created a problem for the early settler government: how to recognise Māori customary ownership in order to purchase land, without getting drawn into a never ending process of buying off everyone who had a claim and the difficulties of dealing with those with rights who refused to sell.
- 106 The Colonial Office's response, in accordance with the 1846 Royal Instructions, was to deny Māori customary rights to land beyond habitations and cultivations. The Colonial Secretary then argued that his instructions were not in conflict with the Treaty of Waitangi. Although the Treaty guaranteed rights to land, these rights did not extend to "waste" land.<sup>136</sup>

### *Overt suppression*

- 107 The Tohunga Suppression Act 1907<sup>137</sup> criminalised tohunga practises. It was particularly aimed at a "lower class" of tohunga<sup>138</sup> who were regarded by the press and educated Māori leaders like Buck and Pomare as "charlatans or pseudo priests".<sup>139</sup>
- 108 While the "problem" of tohunga was considered by European authorities as prevalent, this legislation failed to suppress the institution of tohunga. Voyce explains that this was due to the inherent difficulty such legislation faces when it attempts to suppress a deeply held indigenous belief. He goes on to state that:<sup>140</sup>

The failure was accurately predicted in the debates where several MP's expressed the concern that the Tohunga Suppression Bill was not an appropriate measure to deal with tohunga. Finlay conceded that "Māori belief in the mystic and tohungaism is too deep to be checked in this way". Scotland observed that "superstition is to be found all over the world, and you can no more put a stop to it in New Zealand by this bill, than you can make men prudent or virtuous by an act of Parliament".

- 109 Tohunga still practise today and are sought by Māori to offer a wide range of medical and psychological assistance. Mainstream medical practitioners no longer regard the value of traditional remedies with such disdain.

<sup>136</sup> Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 31.

<sup>137</sup> The Tohunga Suppression Act 1907 was repealed by s44 of the Māori Community Development Act 1962.

<sup>138</sup> As mentioned earlier, Dame Joan Metge explains that the word tohunga is formed from "tohu", meaning "sign", so that tohunga can be interpreted as "one who is or has been marked out by signs". The word is used to refer to "specialists in a field or branch of knowledge and practice". A distinction can be made between those specialists who are primarily concerned with the practice of craft specialities (for example tattooing, carving, weaving, kumara growing) and those who were specialists in specifically religious or esoteric knowledge and ritual. J Metge *Commentary on Judge Durie's Custom Law* (unpublished paper for the Law Commission, 1996) 5.

<sup>139</sup> Malcolm Voyce "Māori Healers in New Zealand: The Tohunga Suppression Act 1907" (1989) 60 *Oceania* 99, 101.

<sup>140</sup> Malcolm Voyce "Māori Healers in New Zealand: The Tohunga Suppression Act 1907" (1989) 60 *Oceania* 99, 113.

*Assimilation into institutional law followed by express extinguishment*

- 110 Belgrave argues that, in recognising customary title, the Crown aimed to ensure that once it extended recognition to a group of owners it could proceed to extinguish those rights permanently. Crown recognition of groups and customary group decision-making gave way to the recognition of the individual interests of compliant chiefs and their supporters.<sup>141</sup>

*Assimilation by recognition followed by extinguishment through re-interpretation*

- 111 The most obvious example of this category of effective extinguishment is provided by the Native Land Court.<sup>142</sup> The Court's investigation of titles to land was expressed to be in accordance with Māori custom. However, it awarded titles only to individuals, and at one stage awarded title for land areas less than 5,000 acres to 10 owners or less. Many hapū resisted the individualisation of interests, but there were very few successes.<sup>143</sup>
- 112 The Native Land Court established its own rules for excluding groups of claimants in favour of others. In its attempt to codify custom, emphasis was given to physical evidence rather than whakapapa because of a prejudice against the oral nature of the latter in evidence. Māori customs relating to land were further distorted by the Court's treatment of pou whenua (posts to delineate resource areas)<sup>144</sup> as fixed markers analogous to survey pegs. Contrary to custom, the land title system forced Māori participants to adopt the fiction that ownership of land was unitary, and that survey lines could divide owners on one side from owners on the other.<sup>145</sup>
- 113 The creation of a title in a separate block of land turned tribal control of the block into individual, transferable interests thereby reducing a tribal estate into a series of unrelated economic commodities. In this fragmentation, broader spiritual, economic and cultural aspects of customary tenure were denied legal recognition and protection.<sup>146</sup>

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<sup>141</sup> Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 43.

<sup>142</sup> A brief analysis of the history of this Court is given in Chapter 4.

<sup>143</sup> Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 35.

<sup>144</sup> Durie notes that: "Resource areas were often delineated by stones, posts (pou whenua), trees, marks and natural features. They ranged from specific cultivations . . . to expansive hunting and foraging areas (takiraha). Districts (wā, takiwā) were also defined by reference to marks and natural features . . . Use areas were also proclaimed radially from a tree or other natural object, or from a pou rāhui or other marker placed not at the edge, but at the centre of the resource . . .": ET Durie *Custom Law* (unpublished Confidential Draft paper for the Law Commission, January 1994) 86.

<sup>145</sup> Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 41.

<sup>146</sup> Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 42.

*Alteration to the social structures through which the social controls of Māori custom law are exercised*

- 114 The individualisation of property rights in land and other tribally owned assets has had a profound effect on Māori social structures and management systems. The focus on individual rights of ownership of land stands in direct contrast to Māori customary rights in land, which were intertwined with matters of ancestry, kinship groups and kinship relations,<sup>147</sup> and processes of Māori communal decision-making. For example:
- In accordance with custom, a power of veto of sale was able to be exercised by rangatira, such as that exercised by Wiremu Kingi in relation to the Crown's attempt to purchase the Waitara in the 1850s. That power of veto was undermined by policies of individualisation.<sup>148</sup>
  - The 10 owner system<sup>149</sup> had the effect of deeming owners to be absolute owners, not trustees. They had no legal obligations to their tribal kin who lived with them on the land. Those individuals could sell the land without reference to their kin.

*Removal of the resources to which Māori custom law is applied*

- 115 Over the years, government policies which have put land and resources beyond the reach of Māori have undermined their relationships with their valued resources in accordance with their cultural preferences. The claims to the Waitangi Tribunal place these matters squarely before the Tribunal. The fisheries quota management system, which effectively privatised fisheries, is a clear example. As control over the fisheries resource base was transferred into non-Māori hands, the exercise of Māori custom law in this context was reduced:<sup>150</sup>
- . . . What is clear is that over the time since 1840 there has been a great diminution and a restriction in Māori fishing through circumstances, to use a neutral word, which have in the end limited the exercise of those rights.

TIKANGA TODAY

- 116 As Belgrave summarises, the ability of Māori to exercise custom law has been "restricted by loss of resources, by lack of recognition by the courts and by

<sup>147</sup> Writers who have investigated the formation and reformation of kinship groups include: Dame Anne Salmond; Dame Joan Metge; Justice Durie; and Angela Ballara – definition of iwi (for an overview of the issues surrounding the definition of iwi refer to Richard Boast et al *Māori Land Law* (Butterworths, Wellington, 1999) 21. See also S Heremaia and A Tunks "The 'Iwi Status' Decision: Clash of Ethics in the Allocation of the Māori Fisheries Resource" (1996) 1 NZELR 168; and Dr Mason Durie's comments in "Beyond Treaty of Waitangi Claims: The Politics of Positive Development" in Ani Mikaere and Stephen Milroy (eds) *Te Hunga Rōia Māori o Aotearoa, 1998 Tenth Annual Conference Proceedings: Ki Te Ao Marama 2000*, 15.

<sup>148</sup> Whaimutu Dewes *Māori Custom Law: He Kākano i Ruia Mai i Rangiatea, e Kore e Ngaro* (unpublished draft paper written for the Law Commission) referring to Michael Belgrave's *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 37.

<sup>149</sup> Richard Boast et al *Māori Land Law* (Butterworths, Wellington, 1999) 65.

<sup>150</sup> *Ngāi Tahu Māori Trust Board v Attorney-General* (2 November 1987) unreported, High Court, Wellington Registry, CP 559/87, 7.

Parliament and by persistent and prolonged promotion of individualism and assimilation.”<sup>151</sup>

- 117 Notwithstanding the withering process of attrition that Māori custom law has suffered, the tikanga that make up Māori custom law still survive, most notably in Māori controlled environments such as marae and hui, in a significant number of Māori homes and with regard to the protection and utilisation of natural resources, especially those of the forest and coast.<sup>152</sup> Increasingly over the last twenty years there has been a discernible push from Māori and other quarters for Māori custom law to be applied in a number of different areas of general law, including family law, criminal justice, and administration of land. The principal source of the demand is the Māori determination to use structures and processes that are essentially Māori in managing things Māori. As Dewes notes, this determination has been evident for some time in the Kohanga Reo movement and in Kura Kaupapa Māori.<sup>153</sup>
- 118 The drive for tikanga to be recognised becomes more urgent as the Crown increasingly seeks to divest itself of land and resources. Māori are striving to have the values that underlie tikanga preserved by whatever means possible, including legislation and by the courts.<sup>154</sup> In this section, we outline some explanations of the values underlying tikanga. In the next section, we give examples of how tikanga are being treated by the legal system in recent times as well as difficulties encountered in attempting to give them recognition.

### The spectrum of tikanga

- 119 Tikanga Māori reflect ideals of the law:<sup>155</sup>
- In any society there are people who are base and people who act variously but the record of conduct does not negate the existence of a higher ideal. In *Exploring Māori Values*, John Patterson observes that Christian society is not measured by what Christians do but by that to which they aspire. Similarly, one does not determine New Zealand values from the behaviour recorded by the courts.
- 120 In discussing the values underlying Māori law the Waitangi Tribunal has stated that:<sup>156</sup>
- . . . evidence of contrary conduct is not evidence that particular values do not pertain. The value a society places on peace and security, for example, is not negated by copious records of violence in that society – the sorts of records that might be

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<sup>151</sup> Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 11.

<sup>152</sup> Joan Metge *Comments provided to the Law Commission on our draft paper “Māori Custom and Values in New Zealand Law”* 16 February 2001, 2.

<sup>153</sup> Whaimutu Dewes *Māori Custom Law: He Kākano i Ruia Mai i Rangiātea, e Kore e Ngaro* (unpublished draft paper written for the Law Commission).

<sup>154</sup> Examples can be found in our discussion of the Māori Land Court (Chapter 4) and the Treaty of Waitangi (Chapter 5). Richard Boast et al *Māori Land Law* (Butterworths, Wellington, 1999) 275, Boast notes that there are now references to the Treaty in 32 separate Acts.

<sup>155</sup> ET Durie *Ethics and Values* (Te Oru Rangahau: Māori Research and Development Conference, Massey University, 7–9 July 1998) 6.

<sup>156</sup> Waitangi Tribunal *The Whanganui River Report – Wai 167* (GP Publications, Wellington 1999) 27.

compiled from newspaper accounts of proceedings in the courts. One must look to what people generally believe in or would aspire to, and not just to that which is sometimes done.

- 121 Mead differentiates between the knowledge-base or ideal of tikanga (te mātauranga) and the practice of tikanga (te whakahaere).<sup>157</sup> It is important to note that the way particular tikanga are practised is not necessarily the ideal manifestation of that tikanga.<sup>158</sup>
- 122 The separation between knowledge and practice also accounts in many respects for regional variations in tikanga. Mead argues that the knowledge-base of tikanga is common while it is in the practice that diversity may develop. In this way, tikanga vary from tribe to tribe due to differences in physical environments and social and tribal practices. At the same time, however, the areas of commonality are such that they apply not only to internal hapū management but also to inter-tribal relationships, resulting in settled protocols for all.
- 123 Similarly, changes in tikanga as a result of contact with settlers do not undermine Māori law. Metge points out that contact with other cultures produces outward change but very rarely produces a change in the fundamental value system which belongs to the contacted culture.<sup>159</sup> This is certainly true of tikanga Māori.

### **Ngā uara o ngā tikanga: the values underpinning tikanga**

- 124 The discussion that follows is an attempt to collate the views of a number of commentators on Māori values. The Commission does not inject its own view on these matters. Recognising that ultimately it is only Māori who can decide what their values are and how each value applies in a particular context, we wish only to highlight the mosaic of thinking and opinions that exist concerning Māori values and perhaps to stimulate further debate on these issues.
- 125 It is considered that there are a number of central values that underpin the totality of tikanga Māori. They include:<sup>160</sup> whanaungatanga; mana; tapu; utu; and kaitiakitanga. These values in no way form a definitive list. Each tribal grouping will have its own variation of each of these values. Some will also have slightly different ideas as to which values inform tikanga Māori.<sup>161</sup> Further reflection is required in the search within Māori society for the basic norms which might

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<sup>157</sup> Hirini Moko Mead *The Nature of Tikanga* (paper presented at Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000) 12. Bishop Manuhua Bennett would use the phrase “ngā whakarite” to describe the practice, or the agreed process, of tikanga (discussed with Bishop Bennett, 19 February 2001, Rotorua). Dame Joan Metge refers to a distinction between tikanga of high generality and tikanga that are more particular. She states that “Tikanga of high generality are very obviously values-based; in fact, they are couched in almost identical terms. They generate and are expressed through tikanga which are more particularly focused”: Joan Metge *Commentary on Judge Durie’s Custom Law* (unpublished paper for the Law Commission, 1996) 6. In understanding that particular tikanga derive from general principles it is possible to see that tikanga form a coherent system.

<sup>158</sup> Hirini Moko Mead *The Nature of Tikanga* (paper presented at Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000) 12.

<sup>159</sup> Joan Metge *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995).

<sup>160</sup> This list is taken from Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 9.

<sup>161</sup> For example, Durie’s list of fundamental principles or values that underpin Māori law is sevenfold and includes whanaungatanga, mana, manaakitanga, aroha, mana tupuna, wairua

constitute Māori law. There is a need for Māori to address the fields of Māori religion and philosophy in a much more profound way.<sup>162</sup> The major project on tikanga Māori currently being undertaken at Waikato University Law School under the direction of Judge Michael Brown is a step in the right direction.<sup>163</sup>

- 126 As always in tikanga Māori, the values are closely interwoven. None stands alone. They do not represent a hierarchy of ethics, but rather a koru, or a spiral, of ethics. They are all part of a continuum yet contain an identifiable core.<sup>164</sup>
- 127 We outline some explanations of these values below. We do not attempt to give each of them a precise definition. Rather, we have chosen to discuss the values generally, remembering that their connotations will differ depending on the context, and also understanding that seeking to explain Māori concepts in the English language is complex. As Metge reminds us:<sup>165</sup>

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. Commonly, several

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and utu: E T Durie *Custom Law* (unpublished Confidential Draft paper for the Law Commission, January 1994) 4–5. Manuka Henare's comments from the Royal Commission on Social Policy identify whanaungatanga, wairuatanga, and mana Māori (including mana, tapu and noa, tika, utu, rangatiratanga, waiora, mauriora, hauora and kotahitanga). Henare's list of ngā pou mana were whanaungatanga, taonga tuku iho, te ao turoa and turangawaewae. Clustered with whanaungatanga are tohatoha and manaaki: New Zealand Royal Commission on Social Policy, *The April Report – Report of the Royal Commission on Social Policy – Te Kōmihana A Te Karauna Mō Ngā Āhuatanga-Ā-Iwi*, Wellington, The Commission, c1988 (Appendix to the Journals of the House of Representatives of New Zealand, 1998, H2). Cleve Barlow gives mauri prominence: *Tikanga Whakaaro – Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1994). Mason Durie would consider adding tupu to the list, reflecting growth and survival of future generations: Mason Durie *Letter to the Law Commission commenting on the draft of "Māori Custom and Values in New Zealand Law"* 19 February 2001, 1. Hohepa has stated that the more important of the principles which support and guide tikanga include tapu, mana, pono, whanaungatanga, aroha and utu: Professor Pat Hohepa and Dr David V Williams *The Taking into Account of Te Ao Māori in Relation to the Reform of the Law of Succession* NZLC MP6 (Wellington, 1996) 14. Dame Joan Metge summarises the important values into six main groups: aroha, together with the associated value of whanaungatanga; the complementarity of taha wairua and taha tinana, together with the associated paired concepts of tapu and noa, ora and aitua, tika and hē; mana, with the associated values of whakapapa, mana tūpuna, mana atua, mana tangata, mana whenua, mana tāne and mana wahine; ngā mahi-a-ngākau, obligations arising from aroha and/or mana; utu; and kotahitanga: Joan Metge *Commentary on Judge Durie's Custom Law* (unpublished paper for the Law Commission, 1996) 11.

<sup>162</sup> Point made by Manuka Henare in *Te Tangata, Te Taonga, Te Hau: Māori Concepts of Property* (Property and the Constitution Conference, New Zealand Institute of Public Law, Victoria University of Wellington; 18 July 1998) 18. See also Michael Shirres *Te Tangata – The Human Person* (Accent Publications, Auckland, 1997), Moana Jackson "The Treaty and the Word: The Colonization of Māori Philosophy" in Oddie & Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) 1.

<sup>163</sup> See Preface.

<sup>164</sup> Manuka Henare *Te tangata, te taonga, te hau: Māori Concepts of Property* (Property and the Constitution Conference, New Zealand Institute of Public Law, Victoria University of Wellington, 18 July 1998) 6.

<sup>165</sup> Joan Metge *Commentary on Judge Durie's Custom Law* (unpublished paper for the Law Commission, 1996) 3.

sentences of explanation are needed to deal adequately with the similarities and divergences. For these reasons it is unwise (though tempting for the sake of brevity) regularly to translate the Māori word for a concept by a single English word or phrase, for listeners inevitably hear the English meaning.

128 In discussing the values, we also discuss a number of related concepts. These are:

- tikanga tangata – social organisation;
- tikanga rangatira – leadership; and
- tikanga whenua – land.

129 As a final comment, in exploring Māori values it is necessary to stress that a focus on heritage and tradition will not yield a complete picture – a forward looking dimension is also important. As Mason Durie reminds us:<sup>166</sup>

Māori values are not simply about celebrating the past but have always had a rationale that is premised on the future – survival.

### *Whanaungatanga*

130 Of all of the values of tikanga Māori, whanaungatanga is the most pervasive.<sup>167</sup> It denotes the fact that in traditional Māori thinking relationships are everything – between people; between people and the physical world; and between people and the atua (spiritual entities).<sup>168</sup> The glue that holds the Māori world together is whakapapa or genealogy identifying the nature of relationships between all

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<sup>166</sup> Mason Durie *Letter to the Law Commission commenting on the draft of “Māori Custom and Values in New Zealand Law”* 19 February 2001, 1.

<sup>167</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 9.

<sup>168</sup> Note that there are differing views as to the etymological root of “whanaungatanga.” Some writers consider that whanaungatanga derives from the same root as the verb whānau (with the first “a” being long), meaning to be born, while others regard whānau (with a short first “a”), meaning “lean, incline, bend down” to be the relevant verb.

Whanaungatanga is a noun formed by the addition of “-tanga” to the noun “whanaunga.” The noun “whanaunga” is set out in HW Williams *Dictionary of the Māori Language* (Legislation Direct, Wellington, 7th Edition: 1971, rep 2000) under the entry for the verb “whānau” (“lean, incline, bend down”) and defined as “relative, blood relative”. Metge discusses the implications of this:

Dr Anne Salmond once suggested to me that ‘whanaunga’ (and hence ‘whanaungatanga’) might be derived from whānau with a long first ‘a’ and be pronounced with a short first ‘a’ because of the length of the word, which is easier to say with a short first vowel, but to me it makes logical sense to accept that ‘whanaunga’ and ‘whanaungatanga’ come from a different root from ‘whānau’.

... ‘whanaungatanga’ covers all relationships formed on the basis of descent from a common ancestor and marriage, that is, it includes relatives popularly referred to as ‘blood relatives’ and spouses (i.e. marriage partners) and affines (i.e. relatives by marriage). ‘Whānau’, derived from the verb meaning ‘to be born,’ places the main stress on relationships formed on the basis of descent. The way the word ‘whānau’ is used by Māori makes it clear that its primary reference is to a group of people who share descent, and spouses and affines are included as adjuncts, for practical purposes . . . I wrestled for a long time with this problem and came up with the solution that the two meanings of ‘descent-group’ and ‘extended family’ had to be held in tension.

things.<sup>169</sup> That remains the position today. In traditional Māori society, the individual was important as a member of a collective. The individual identity was defined through that individual's relationships with others.<sup>170</sup> It follows that tikanga Māori emphasised the responsibility owed by the individual to the collective. No rights enured if the mutuality and reciprocity of responsibilities were not understood and fulfilled.<sup>171</sup>

131 Thus, the transfer of a right in respect of land lasted only so long as the relationship between the transferor and transferee remained healthy.<sup>172</sup> Indeed the transfer was itself designed to seal the relationship and ensure its ongoing vitality.<sup>173</sup> If it failed in that purpose and the relationship terminated, then the transfer also was voided. Similarly, failure to occupy one's allocated land would lead to its reversion to others.<sup>174</sup>

132 In Chapter 4 we refer to the history of the Māori Land Court and the law of succession to property to show how various Acts of Parliament sought to undermine the application of tikanga Māori to land. Despite such attempts whanaungatanga values remain very strong in modern Māori society and continue to inform the nature of the relationships between peoples and their ancestral lands.<sup>175</sup> Numerous whakataukī (sayings), identifying the connectedness of particular mountains, rivers or lakes, tribes and people, are constantly invoked to reaffirm whanaungatanga between people and their lands.

133 An example from Taitokerau explains:<sup>176</sup>

Ko Taramainuku te tangata, ko Tutaamoe te puke.

Taramainuku is the chief, Tutamoe the hill.

– an identification of the chieftainship with the mountain and a saying by which descendants of Taramainuku, a Ngāti Whatua chief, could claim the hill as ancestral territory.

134 More generally:<sup>177</sup>

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Metge considers that “whanaungatanga” encompasses a wider field than whānau. She would translate “whanaungatanga” as “the web of kinship”, whereas “whānau” is better rendered as “family group”: Joan Metge *Comments provided to the Law Commission on our draft paper “Māori Custom and Values in New Zealand Law”* 16 February 2001, 3. Whānau in this latter sense is discussed below in the section on Tikanga Tangata – Social Organisation.

<sup>169</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 9.

<sup>170</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 9.

<sup>171</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 9.

<sup>172</sup> ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 83.

<sup>173</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 9.

<sup>174</sup> See Durie's notes concerning concepts related to land: ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 61–104.

<sup>175</sup> ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 5, 62.

<sup>176</sup> Department of Māori Affairs (Whangarei) *Ngā Whakatauki o Te Tai Tokerau* (Government Printing Office, Auckland, 1987) 5.

<sup>177</sup> Department of Māori Affairs (Whangarei) *Ngā Whakatauki o Te Tai Tokerau* (Government Printing Office, Auckland, 1987) 11.

Te toto o te tangata, he kai;

Te oranga o te tangata, he whenua.

The blood of man is of food; the sustenance of man is of the land.

– although the life blood of man is formed from food, it is the land which provides the food and thus keeps him alive. The value of the land and the need to conserve it for the human community are recognised in this saying.

- 135 The corollary to the paramount importance of the collective in Māori society was that the community accepted responsibility for its members.<sup>178</sup> As David Williams explains:<sup>179</sup>

Thus the institution of “muru” and practices associated with it – a key element of the utu principles to maintain reciprocity and balance in society – provided a means of transferring goods and resources to aggrieved parties for the wrongdoing of another. It was not just an individual wrong doer who would suffer this sanction. His or her whānau would be levied. In spectacular examples, muru would be levied on a hapū basis. Nor would the aggrieved party act alone. The individual’s whānau, and in some cases, entire hapū, would claim the right to muru the relevant community. Thus, a certain degree of individual flair was encouraged, but the rugged individualism often valued by the pioneer settler culture was frowned upon in traditional Māori culture. This is encapsulated in the pejorative term “whakahīhi” (arrogant) which would be applied to those individuals who stepped out of line.

- 136 A consequence of whanaungatanga is that neat lines cannot be drawn between groups or between kin groups or between humans and the physical world. The whakapapa links between Māori, the land, the sea and other physical features has traditionally been celebrated by Māori people and remains celebrated today. The familiar refrain –

I te timatanga, ka moe a Rangi rāua ko Papa.

In the beginning was the joining between the heaven and the earth.

serves to remind Māori of the fact that for them humanity is directly descended from Rangi and Papa.<sup>180</sup> The myths and legends concerning them, their eldest son Tane Mahuta and his siblings is an indigenous body of knowledge which seeks to explain the origins of the universe and the way things are in the world. This Māori cosmogony features whakapapa and the personification of natural phenomena.

## Mana

- 137 Mana is at the heart of historical and modern Māori concepts of leadership.<sup>181</sup> It is defined in the Williams *Dictionary of the Māori Language*<sup>182</sup> as authority, control,

<sup>178</sup> ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 52. See also Moana Jackson *The Māori and the Criminal Justice System: He Whaiapaanga Hou – A New Perspective, Part 2* (Policy and Research Division, Department of Justice, Wellington, 1988) 39.

<sup>179</sup> David V Williams *He Aha Te Tikanga Māori* (unpublished revised draft as at 10 November 1998 of Joseph Williams’ paper of the same name, prepared for the Law Commission) 13. See also ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 44.

<sup>180</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 10.

<sup>181</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 11.

<sup>182</sup> HW Williams *Dictionary of the Māori Language* (Legislation Direct, Wellington, 7th Edition: 1971, rep 2000) 172.

influence, prestige, and power on one hand, and psychic force on the other. The definition conveys the key aspects of the concept. Mana encompasses political power, which is both ascribed through whakapapa and acquired through personal accomplishment.<sup>183</sup> It incorporates the dynamics of earthly politics, and the capacity to articulate the aspirations of the people.<sup>184</sup> It is also a power that has a spiritual aspect to it and is thought of as being received from the atua – “that which manifests the power of the gods”.<sup>185</sup>

- 138 For clarity of understanding Māori Marsden identified three aspects of mana:<sup>186</sup> mana atua – God given power; mana tūpuna – power from the ancestors; and mana tangata – authority derived from personal attributes. Hence:

Ko te mana i ahau, no ōku tūpuna nō tua whakarere.

My power and authority comes from my ancestors, from time out of mind.

- 139 The triadic nature of mana is important because it explains the dynamics of Māori leadership and the lines of accountability between leaders and their people.<sup>187</sup>

- 140 Mana tūpuna is ascribed mana. It meant traditionally that those with the senior whakapapa lines have a head start in the expectation of leadership positions. In most iwi that remains the position today.<sup>188</sup> Yet, as Williams points out, mana tūpuna did not always win the day traditionally and will not inevitably prevail today.<sup>189</sup>

Tikanga enables a person to trace descent through both male and female lines in every generation (technically known as an ambilineal descent system). Along with the ethic of whanaungatanga, this means that almost everyone with leadership potential will be able to identify sufficiently strong rangatira lines to claim a role in tribal leadership. The result is that there have always been many contenders for leadership roles.

- 141 Mana tangata or one’s political acumen and leadership qualities were traditionally very important and are perhaps even more important today.<sup>190</sup> The cunning, exuberance and courage of Maui Tikitiki, the youngest of Taranga’s five sons which saw him become the leader of his people is the most famous mythological example of mana tangata in operation.<sup>191</sup> A person (whether male or female) with

<sup>183</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 11.

<sup>184</sup> Mason Durie *Letter to the Law Commission commenting on the draft of “Māori Custom and Values in New Zealand Law”* 19 February 2001, 1.

<sup>185</sup> M Marsden “God, Man and Universe: A Māori View” in M King (ed) *Te Ao Hurihuri: The World Moves On* (Wellington, Hicks Smith, 1975) 194.

<sup>186</sup> See also Dame Joan Metge’s discussion of these concepts in *In and Out of Touch: Whakamaa in a Cross-Cultural Context* (Victoria University Press, Wellington, 1986) 67–68.

<sup>187</sup> M Marsden *Te Mana o Te Hiku o Te Ika* (1986, Wai 45: doc A7).

<sup>188</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 11.

<sup>189</sup> David V Williams *He Aha Te Tikanga Māori* (unpublished revised draft as at 10 November 1998 of Joseph Williams’ paper of the same name, prepared for the Law Commission) 16.

<sup>190</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 12.

<sup>191</sup> References to stories of Maui abound, both in academic works and general literature: see, for instance, Patterson J *Exploring Māori Values* (Dunmore Press, Palmerston North, 1992) Chapter 7; and the recent story collection by Hana Hiraina Erlbeck *Maui: The Legend of the Demi-God Maui-Tikitiki-a-Taranga* (Reed Publishing, Auckland, 1st edition, 2000).

impeccable whakapapa to claim a role as a rangatira may none the less be relegated to a ceremonial, minor, or only token role, unless the appropriate skills of mana tangata are shown.<sup>192</sup>

- 142 Williams states that the interplay between mana tūpuna and mana tangata in particular has tended to accentuate the importance of accountability between rangatira and people of a tribe both traditionally and today.<sup>193</sup> He goes on to say that:<sup>194</sup>

Rangatira continually were and are required to affirm the consensus of the people in public fora. Thus the institution of the hui and the rūnanga, when people gather to discuss issues of moment, were and remain the real seat of power and lawmaking. A leader taking the people in a direction which is not supported will quickly be corrected or, at length, abandoned in favour of a contender more willing to lead to where the people wish to go.

- 143 It is this high level of accountability and relatively low level of executive discretion on matters of significance to the hapū or iwi that places a premium on skill at oratory. Hence the proverb –

Ko te kai a te rangatira, he kōrero.

The art of rhetoric is the food of chiefs.

- 144 In the modern context it is important to mention that mana tangata has never been confined to men.<sup>195</sup> The word “tangata” properly includes both sexes, men being tane and women wahine. Respect for mana wahine is a traditional Māori value, not a modern development.<sup>196</sup> Mana wahine has been distorted by the perceptions of officials and writers during the contact period to diminish the importance of women.<sup>197</sup>

- 145 Metge emphasises the importance of relating respect for mana wahine to a number of factors, namely:<sup>198</sup>

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<sup>192</sup> Joan Metge *Commentary on Judge Durie’s Custom Law* (unpublished paper for the Law Commission, 1996) 18.

<sup>193</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 12.

<sup>194</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 12.

<sup>195</sup> See Dame Joan Metge’s discussion of mana tāne and mana wahine, as a complementary set, in *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) 91–98. It is also interesting to note Mason Durie’s point that neither has mana atua ever been confined to men: Mason Durie *Letter to the Law Commission commenting on the draft of “Māori Custom and Values in New Zealand Law”* 19 February 2001, 2.

<sup>196</sup> Joan Metge *Comments provided to the Law Commission on our draft paper “Māori Custom and Values in New Zealand Law”* 16 February 2001, 5. See also Salmond “Tipuna-Ancestors: Aspects of Māori Cognatic Descent” in Andrew Pawley (ed) *A Man and a half – essays in Pacific Anthropology and Ethnobiology in Honour of Ralph Bulmer* (Auckland, Polynesian Society, 1991) 334–347; Mason Durie *Letter to the Law Commission commenting on the draft of “Māori Custom and Values in New Zealand Law”* 19 February 2001 and *New Zealand Law Commission Justice: The Experiences of Māori Women Te Tikanga o te Ture Te Mātauranga o ngā Wāhine Māori e pā ana ki tēnei*: NZLC R53 (Wellington, 1999) Chapter 2.

<sup>197</sup> David V Williams *He Aha Te Tikanga Māori* (unpublished revised draft as at 10 November 1998 of Joseph Williams’ paper of the same name, prepared for the Law Commission) 16.

<sup>198</sup> Joan Metge *Comments provided to the Law Commission on our draft paper “Māori Custom and Values in New Zealand Law”* 16 February 2001, 5.

to the centrality of Papatūānuku in Māori thinking, to women as “te whare tangata” whence issues new life (the basis of whakapapa), and to the significance of female atua in Māori cosmology, among other things as the repositories and sources of knowledge

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- 146 Women are the eponymous ancestors of many hapū, and they were and are active leaders in all aspects of Māori endeavour.<sup>199</sup> A number of women were among the rangatira who signed the Treaty of Waitangi.<sup>200</sup> While Te Rauparaha is remembered as a great rangatira, much of his success depended upon his brother Nohorua, a tohunga, and his sister Waitohi, a diplomat. As Māori law recognised ambilateral and ambilineal descent, it is equally as important to whakapapa through tūpuna who were women and through those who were men. In Māori cosmogony female figures are not merely incidental to a patriarchal narrative as they tend to be in biblical mythology. Te reo Māori is gender inclusive in ways that the English language is not – *ia* means both he and she.<sup>201</sup> An affirmation of mana wahine is of paramount significance in order to understand the values of tikanga Māori.
- 147 Mana atua is also important. This emphasises the tapu nature of the leadership role and the respect which the community owes its chosen leaders.<sup>202</sup> As Williams elucidates, it means that, although consensus arrived at in hui or rūnanga is fundamental to Māori systems of decision-making and leadership, rangatira who wear the mantle of mana atua and mana tūpuna in abundance will be treated with awe and respect.<sup>203</sup>
- 148 In addition to rangatira, mana atua is also held by tohunga, both craft specialists and specialists in ritual and religious matters. Metge expands on this point:<sup>204</sup>
- [Specialists in ritual and religious matters] comprise on the one hand the tohunga ahurewa, priests selected from rangatira families but also tested for their intellectual capacity, and on the other those marked out by evidence of direct access to the gods and mana atua, matakite (seers and prophets) and tohunga mākutu (experts in sorcery). In post-European times the mantle of these earlier repositories of mana atua has been inherited by Christian priests and ministers, prophets like Ratana, Te Kooti, Te Whiti and Tohu, and tohunga who specialise in healing.
- 149 Thus it is inherent in the triadic nature of mana itself that traditional and contemporary Māori leadership is both pragmatically consensual and spiritual at

<sup>199</sup> See Ani Mikaere’s discussion of the role of women in Māori Society in *Patriarchy as the Ultimate Divide and Rule Tactic: The Assault on Tikanga Māori by Pākehā Law* (paper presented at Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000).

<sup>200</sup> To date, thirteen Māori women have been identified as signatories to the Treaty and more may be identified: Angela Ballara “Wāhine Rangatira Māori: Women of Rank and their Role in the Women’s Kotahitanga Movement of the 1890s” (1993) 27 *New Zealand Journal of History* 127, 133–134.

<sup>201</sup> Rose Pere *Taku Tamaiti Purotu* (paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000). Professor Pat Hohepa in Professor Pat Hohepa and Dr David V Williams *The Taking into Account of Te Ao Māori in Relation to the Reform of the Law of Succession* New Zealand Law Commission MP6 (Wellington, 1995) 25–26; A Mikaere *Collective Rights and Gender Issues: A Māori Woman’s Perspective* (paper presented to Collective Human Rights of Pacific Peoples Conference, 1998).

<sup>202</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 12.

<sup>203</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 12.

<sup>204</sup> Joan Metge *Comments provided to the Law Commission on our draft paper “Māori Custom and Values in New Zealand Law”* 16 February 2001, 5.

the same time. According to Williams, this is reflected in the etymology of the term rangatira.<sup>205</sup> “Ranga” is a word which means to weave. “Tira” is a word which denotes a group of people travelling. Thus the rangatira is considered to be a weaver of the people.<sup>206</sup> Hence:

He ranga Maomao kei te maana e tere ana

He iwi kei te whenua

Ma wai e raranga e puta atu ai ki te whai ao, ki te ao marama.

A school of Maomao swimming as one through the sea

A tribe on the land

Who will weave them together and lead them as one into the world of light.

### Tapu

- 150 The tikanga associated with tapu are very important in both the traditional and modern contexts. There is first the requirement to respect the tapu that all things carry. The traditional injunction to avoid touching, stepping over or otherwise desecrating tapu parts of the body and the requirement to keep food-related or noa things away from personal items are good examples of the persistence in modern times of traditional concepts of tapu.
- 151 Tapu and noa are complementary opposites, which together constitute a whole. Noa has its own importance, as a counter and antidote to tapu; the value of everyday, ordinary, relaxed human activity.<sup>207</sup>
- 152 In addition, the tapu attached to people, objects or places might be so significant as to require a special degree of deference or respect. The body of high ranking chiefs and places associated with death or forbidden activities all carried this special tapu in traditional times.<sup>208</sup> Again these values persist in modern Māori life. The tapu nature of the marae or wharehau (meeting house) requires that food be kept away and shoes removed before entry. The tapu related to death means that a body must never be left unattended or unprotected for fear that its tapu will be lost.<sup>209</sup>

<sup>205</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 12.

<sup>206</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 13.

<sup>207</sup> Joan Metge *Comments provided to the Law Commission on our draft paper “Māori Custom and Values in New Zealand Law”* 16 February 2001, 8. See also: Joan Metge *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) 85–86; Manuka Henare’s comments on tapu and noa in “Ngā Tikanga Me Ngā Ritenga o Te Ao Māori: Standards and Foundations of Māori Society” in New Zealand Royal Commission on Social Policy *The April report – report of the Royal Commission on Social Policy: Te Kōmihana A Te Karauna Mō Ngā Āhuatanga-Ā-Iwi* (Wellington, The Commission, c1988 (Appendix to the Journals of the House of Representatives of New Zealand); 1998, H2, (Vol III Part 1) 3) 18. See also Michael Shirres’ explication of tapu and noa, and tapu and mana in Michael Shirres *Te Tangata: The Human Person* (Accent Publication, Auckland, 1997) Ch 3, reviewed by Dame Joan Metge in *Stimulus* Vol 6 No 2 May 1998, 92.

<sup>208</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 15.

<sup>209</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 15.

153 The tikanga of tapu can be explained in various ways. On the one hand, tapu is seen as linked to a code for social conduct based essentially on keeping safe and avoiding risk.<sup>210</sup> It also has political purposes in terms of protecting the sanctity of certain persons, ensuring appropriate levels of respect for hapū and iwi leadership and in keeping ceremonial or special aspects of life separate from the ordinary run of the mill.<sup>211</sup> On the other hand, the mechanism of tapu is seen as centred in the spiritual, and it is this aspect of both modern and traditional understandings of tapu which would seem to ensure its efficacy.<sup>212</sup> The notion of wairua (spirituality) in association with tapu makes the spirit world a part of reality to be reckoned with, manipulated or accommodated with the same diplomacy as governs inter-personal relationships.<sup>213</sup>

154 Mason Durie has also explored various interpretations of tapu. He states:<sup>214</sup>

There are many interpretations of tapu. Now, most emphasise a sacred quality and are linked in some way to gods or divinities. Eldson Best for example conceptualised tapu as a product of religious observations, highly spiritual and somewhat apart from everyday life. Other authors link tapu with chieftainship, “high birth” and the discretion of tohunga to demarcate people and places of special significance. There was also a dynamic flow associated with tapu, so that its influence could spread by contact, or decline when needs changed.

But a more utilitarian view of the purpose of tapu was discussed by Te Rangi Hiroa. He drew a connection between the use of tapu and the prevention of accidents or calamities, implying that a dangerous activity or location would be declared tapu in order to prevent misfortune. More than a divine message from the gods, or the recognition of status, the conferment of tapu was linked to healthy practices. Durie took a similar view in *Whaiora*; he described tapu as a type of public health regulation, basically concerned with the avoidance of risk and the promotion of good health. In contrast noa was a term used to denote safety; harm was less likely to befall anyone who entered a noa location, ate food rendered noa by cooking, or touched a noa object.

155 Durie continues on to say that the different views of tapu and noa – one stressing the opposites of sacredness and secularity and the other emphasising danger and then safety – are not necessarily at odds even though they have different implications:<sup>215</sup>

Explanations of tapu as primarily religious in nature appeal to those who seek spiritual answers for societal conduct. The more temporal view holds sway where survival and health maintenance are seen as the main challenges for tribal societies. But common

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<sup>210</sup> Mason Durie *Letter to the Law Commission commenting on the draft of “Māori Custom and Values in New Zealand Law”* 19 February 2001, 2.

<sup>211</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 15.

<sup>212</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 15–16.

<sup>213</sup> David V Williams *He Aha Te Tikanga Māori* (unpublished revised draft as at 10 November 1998 of Joseph Williams’ paper of the same name, prepared for the Law Commission) 21.

<sup>214</sup> Mason Durie *The Application of Tapu and Noa to Risk, Safety, and Health* (presentation to Challenges, Choices and Strategies, Mental Health Conference 2000, Wellington, 16 November 2000) 3–4.

<sup>215</sup> Mason Durie *The Application of Tapu and Noa to Risk, Safety, and Health* (presentation to Challenges, Choices and Strategies, Mental Health Conference 2000, Wellington, 16 November 2000) 4.

to both views is the acceptance of tapu . . . as [a code] for social conduct and adaptation to the environment.

### *Utu*

- 156 Utu is often understood to mean revenge for wrong doing. However, the term has a much wider and richer meaning. It is often rendered by pūkenga (experts in customary matters) as tau utuutu or reciprocity.<sup>216</sup> In other words, as Metge puts it:<sup>217</sup>

‘utu’ refers to the return of whatever is received: the return of ‘good’ gifts (taonga and services) for good gifts, and the return of ‘bad’ gifts (insults, injuries, wrongs) for bad gifts.

- 157 Metge goes further to describe the essence of utu as being the maintenance of relationships by way of an appropriate *imbalance* of contribution:<sup>218</sup>

To return an exact equivalent was to stop the exchange dead: therefore the return was usually larger than the gift received or different in kind.

- 158 Williams explains that at a human level utu denoted reciprocity between individuals, between descent groups and between the living and the departed. Thus in traditional Māori terms, mana was not achieved through the acquisition of material wealth but rather by distributing that wealth to others.<sup>219</sup> It was through ritual “gift” distributions that reciprocal obligations were established. The recipient would be obliged to respond in due course with a greater gift, and so the cycle of gift exchange or tuku was initiated. Once initiated it would continue for generations.<sup>220</sup> There are many current examples of iwi and hapū who continue to engage in exchange relationships which commenced before Pākehā colonisation. Williams gives the following illustrations:<sup>221</sup>

A notable example is the Kīngitanga circuit of poukai which annually re-affirm the relationships between the King movement and many hapū of Tainui and Ngāti Maniapoto, and also some hapū from further afield in the Bay of Plenty and Manawatu. Ancient links between Ngāti Porou and Tainui on opposite coasts, and more recent alliances between Sir Apirana Ngata and Princess Te Puea, are symbolised in “Ngā tai e rua” marae at Tuakau. The complex weave of inter-tribal associations and relationships between ancient hapū, more recent waka alliances, and 19th century arrangements has led to the inclusion of Ngāti Porou and Ngāti Pukenga as iwi of Hauraki represented on the Hauraki Māori Trust Board. Ngāti Whatua of Orakei, with primary links through Te Taou to Taitokerau, also remember with gratitude their

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<sup>216</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 13.

<sup>217</sup> Joan Metge *Comments provided to the Law Commission on our draft paper “Māori Custom and Values in New Zealand Law”* 16 February 2001, 6.

<sup>218</sup> Joan Metge *Comments provided to the Law Commission on our draft paper “Māori Custom and Values in New Zealand Law”* 16 February 2001, 6.

<sup>219</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 13.

<sup>220</sup> Joan Metge *Cross-Cultural Communication and Land Transfer in Western Muriwhenua, 1832–1840* (Wai 45: doc F13, 1992).

<sup>221</sup> David Williams *He Aha Te Tikanga Māori* (unpublished revised draft as at 10 November 1998 of Joseph Williams’ paper of the same name, prepared for the Law Commission) 18.

sojourn at Awhitu, when in need of protection from Ngapuhi and, in appropriate circumstances, will identify themselves as te kei o Tainui. Throughout the country countless examples of continuing reciprocal relationships such as these will be found.

159 When discussing the positive and negative facets of utu, it is important to note that there were ways of negating the negative form and transmuting it into the positive:<sup>222</sup>

First, there was the exercise of generosity (aroha) on the part of a victorious rangatira in arranging a marriage exchange with a defeated enemy. Secondly, a group who had been defeated or acknowledged they had done wrong, could offer the other group a woman of status as a bride or a taonga presented in a way that indicated it was not to be reciprocated. Thirdly, there was the institution of muru, operative between allied hapū who wanted to avoid all-out war, whereby the group which considered itself to have received a bad gift (wrongdoing against one or more of its members) swooped on the offender's group and took what they considered appropriate compensation in the form of goods. Typically the offender's group set out or left accessible the goods they were prepared to lose (hiding the others) and offered no resistance to the raiders. The compensation thus transferred cancelled out the negative relationship between the groups and reinstated a positive one.

160 A key accompanying value to the principle of reciprocity inherent in the term utu is aroha.<sup>223</sup> Aroha was a strong motivating principle in pre-European Māori society, however it must be recognised that it underwent some modification and redefinition after conversion to Christianity, a modification carried out as much by Māori as by the missionaries.<sup>224</sup> Many famous stories exist that illustrate the exercise of aroha by chiefs of great mana:<sup>225</sup>

- the giving of the chief's son or daughter to a vanquished enemy in order to make them strong again and restore their mana;
- the transfer of extensive areas of land to a beaten enemy in order to ensure the survival of that tribe;
- the engaging in massive displays of generosity through hakari or traditional feasting and hui or traditional gatherings in order to create obligations of reciprocity and confirm relationships.

161 In each of these examples though, it should be remembered that the gifts were not given unconditionally. Following the principle of utu, each gift was expected to result in an appropriate return in due course (for example, offspring from the union, produce from the land, loyal support in war, comparable taonga); and that it was intended to establish or reinforce an on-going relationship.<sup>226</sup>

162 There are many modern examples of tau utuutu in action among iwi and hapū today. To give one example, it is significant that Tainui's establishment of the

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<sup>222</sup> Joan Metge *Comments provided to the Law Commission on our draft paper "Māori Custom and Values in New Zealand Law"* 16 February 2001, 6.

<sup>223</sup> See Dame Joan Metge's discussion of the concepts of aroha and manaaki in *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) 80–81.

<sup>224</sup> Joan Metge *Comments provided to the Law Commission on our draft paper "Māori Custom and Values in New Zealand Law"* 16 February 2001, 7.

<sup>225</sup> David Williams *He Aha Te Tikanga Māori* (unpublished revised draft as at 10 November 1998 of Joseph Williams' paper of the same name, prepared for the Law Commission) 19.

<sup>226</sup> Joan Metge *Comments provided to the Law Commission on our draft paper "Māori Custom and Values in New Zealand Law"* 16 February 2001, 7.

Matiu Rata scholarships is seen to be an acknowledgement and reinforcement of the ancestral links between Muriwhenua and Waikato.

### *Kaitiakitanga*

- 163 Kaitiakitanga is a term coined in relatively recent times to give explicit expression to an idea which was implicit in Māori thinking but which Māori had hitherto taken for granted.<sup>227</sup> It denotes the obligation of stewardship and protection. These days it is most often applied to the obligation of whānau, hapū and iwi to protect the spiritual wellbeing of the natural resources within their mana.<sup>228</sup> It is difficult to divorce kaitiakitanga either from mana, which provides the authority for the exercise of the stewardship or protection obligation; or tapu, which acknowledges the special or sacred character of all things and hence the need to protect the spiritual wellbeing of those resources subject to tribal mana; or mauri, which recognises that all things have a life-force and personality of their own. It is from the ethic of kaitiakitanga that the traditional institution of rāhui comes.<sup>229</sup>
- 164 A rāhui is an object or sign indicating that a resource has been made tapu.<sup>230</sup> Williams explains that:<sup>231</sup>
- Rāhui were traditionally invoked to prohibit entry into areas affected by the tapu of death, to ensure the future abundance of food resources through proper conservation practices, or in some cases, simply as a device to affirm the mana of the iwi or hapū over the resources in question. Breach of the rāhui would result in the offender's whānau being subjected to muru and, in some cases in the past, the offender being killed or injured by natural or supernatural means.
- 165 The institution of rāhui still persists today. Many iwi impose them in recognition of the presence of death, to protect sacred sites or for conservation purposes.
- 166 Kaitiakitanga also requires the observance of conduct respectful of the resources in question. Thus each hapū or iwi had and has clear prescriptions as to the manner in which fishing activity may be undertaken. It is common for example that the first fish is returned. It is also common that no gutting of fish or shelling of shell fish is allowed to occur below high water mark. The reason is that the dumping of fish or shell fish remains into the sea would provide both a spiritual and physical pollution of the sea and hence a detraction from its tapu.<sup>232</sup>

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<sup>227</sup> Joan Metge *Comments provided to the Law Commission on our draft paper "Māori Custom and Values in New Zealand Law"* 16 February 2001, 7.

<sup>228</sup> Waitangi Tribunal *The Whanganui River Report – Wai 167* (GP Publications, Wellington 1999) 265–283.

<sup>229</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 14.

<sup>230</sup> Joan Metge *Comments provided to the Law Commission on our draft paper "Māori Custom and Values in New Zealand Law"* 16 February 2001, 7. See also the definition of rāhui in HW Williams *Dictionary of the Māori Language* (Legislation Direct, Wellington, 7th Edition: 1971, rep 2000) 321; Waitangi Tribunal *The Te Roroa Report – Wai 38* (Wellington, 1992) 176.

<sup>231</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 14.

<sup>232</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 14. For a brief discussion of the treatment of the value of kaitiakitanga by the courts and the legislature, see paras 222–230.

## Tikanga tangata: social organisation

- 167 The common thread in all Māori social organisation was whanaungatanga or kin relationships.<sup>233</sup> Those kin relationships remain of central importance in modern Māori society.
- 168 The Waitangi Tribunal has explained that the significance of relationships is crucial to understanding Māori culture and a key to unlocking the past and the relationship that Māori sought with Europeans.<sup>234</sup> Further, “without this comprehension of the changing structure of Māori society we may not understand why it is that new groups continue to emerge on the Māori scene, or why older groups are resurrected”.<sup>235</sup>
- 169 The various levels of Māori social organisation have been characterised as whānau, hapū, iwi and waka.<sup>236</sup> To this list, Mason Durie would add kāinga.<sup>237</sup> It is interesting to note that the words “whānau”, “hapū” and “iwi” all have alternative meanings that accentuate the centrality of kin links to these levels of social organisation.

### Whānau –

refers to the extended family;<sup>238</sup> it can also mean “to give birth”.<sup>239</sup>

- 170 The whānau was the basic social unit of Māori society.<sup>240</sup> Whānau usually included grandparents or great grandparents and their direct descendants.<sup>241</sup>

<sup>233</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 16.

<sup>234</sup> See for example: Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* – Wai 143 (Wellington, 1996); Waitangi Tribunal *The Orakei Claim* – Wai 9 (Wellington, 1987); Waitangi Tribunal *The Te Roroa Report* – Wai 38 (Wellington, 1992); and Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* – Wai 8 (Wellington, 1985).

<sup>235</sup> ET Durie “Custom Law: Address to the New Zealand Society for Legal and Social Philosophy” (1994) 24 VUWLR 328.

<sup>236</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) and David V Williams *He Aha Te Tikanga Māori* (unpublished revised draft as at 10 November 1998 of Joseph Williams’ paper of the same name, prepared for the Law Commission).

<sup>237</sup> See para 175.

<sup>238</sup> While a traditional view of whānau is a group formed on the basis of descent and held together by bonds of kinship (mainly descent but including some marriage links), it is interesting to note that a broader interpretation within Māori society also seems to be emerging. Urban groups (where members are not all linked by kinship and where most live outside the traditional territories of the tribes from which they are descended) model themselves on the descent-based whānau but they are held together not by kinship but by shared kaupapa (purposes) and by limited shared action. Te Whānau o Waipareira is a prominent example of such a group. See the discussion in the Waitangi Tribunal Report *Te Whānau o Waipareira* – Wai 414 (Wellington, 1998).

<sup>239</sup> The concept of whānau is discussed further below, along with a number of related and current issues, at paras 234–256.

<sup>240</sup> Manuka Henare “Ngā Tikanga Me Ngā Ritenga o Te Ao Māori: Standards and Foundations of Māori Society” in New Zealand Royal Commission on Social Policy *The April Report – Report of the Royal Commission on Social Policy: Te Kōmihana A Te Karauna Mō Ngā Āhuatanga-Ā-Iwi* (Wellington, The Commission, c1988 (Appendix to the Journals of the House of Representatives of New Zealand); 1998, H2, (Vol III Part 1) 3) 11.

<sup>241</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 16. A more detailed description of whānau is provided by Metge who describes it traditionally

### *Hapū* –

denotes the larger village community (although some villages included several hapū groups);<sup>242</sup> it also means “to be pregnant”.

- 171 All Māori, through the whakapapa web, could claim membership of several hapū at once.<sup>243</sup>
- 172 Hapū is often incorrectly translated as sub-tribe with the connotation that the hapū is politically inferior to an iwi. The relationships between hapū and iwi are complex and are not in a vertical hierarchy of authority.<sup>244</sup>

### *Iwi* –

identifies the wider district or sometimes regionally based kin group, is commonly translated as “tribe”,<sup>245</sup> and claims descent from a single distant ancestor – often described as an eponymous ancestor because her or his name is incorporated in the iwi name; it is also the word commonly used for “bones”.

- 173 During the 19th century iwi became more regularly used to mean the several hapū of a region standing under the name of a common, remote and famous ancestor.<sup>246</sup>

### *Waka* –

much later, probably in the post contact period and as a response to Pākehā efforts to destroy the tribal base of Māori society, waka confederations became a unit of

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as “a domestic production/consumption unit formed round a core of persons descended from a key ancestor or ancestral pair but including in-married spouses, adopted children and slaves”. She goes on to say that “the word is also used for: (1) a sibling set without their parents; and (2) a descent category consisting of descendants of a common ancestor wherever they were living, whether together or scattered through other groups”: Joan Metge *Commentary on Judge Durie’s Custom Law* (unpublished paper for the Law Commission, 1996) 16.

<sup>242</sup> See ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 15ff.

<sup>243</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 16.

<sup>244</sup> See Dame Joan Metge’s comments on the complexity of the process of hapū formation and reformation in *Commentary on Judge Durie’s Custom Law* (unpublished paper for the Law Commission, 1996) 17.

<sup>245</sup> It is important to note that “iwi” has other meanings besides “tribe”. The three major dictionaries of the Māori language (HW Williams *Dictionary of the Māori Language* (Legislation Direct, Wellington, 7th Edition: 1971, rep. 2000), PM Ryan’s *The Reed Dictionary of Modern Māori* (Reed Publishing (NZ) Ltd, Auckland, 1995) and HM Ngata’s *English-Māori Dictionary* (Learning Media Ltd, Wellington, 1993) list seven meanings for the word “iwi.” The four that are relevant for present purposes are tribe, people, nation and race, all of which have more than one meaning. Metge expands on this point. In her experience: “Māori who are native-speakers of Māori use ‘iwi’ to refer not only to (1) the large cognatic descent-group usually called ‘tribe’ in English but also for (2) a federation of ‘tribes’ (for example Te Arawa), (3) ‘people’, ie a plurality of persons linked by common features and purposes, but not necessarily by descent; and (4) a whole nation, for example the Preamble to the Treaty of Waitangi refers to Queen Victoria’s subjects as “tona iwi”.” Another interesting variation is the term “tauiwi”. The prefix “tau” in this case is one meaning “strange”. Tauiwi can be used for any contrasting group, not only a different iwi/tribe. Tauiwi can even be used by a tangata whenua hapū for another hapū of the same iwi: Joan Metge *Comments provided to the Law Commission on our draft paper “Māori Custom and Values in New Zealand Law”* 16 February 2001, 8.

<sup>246</sup> David Williams *He Aha Te Tikanga Māori* (unpublished revised draft as at 10 November 1998 of Joseph Williams’ paper of the same name, prepared for the Law Commission) 22.

social organisation for some purposes.<sup>247</sup> This level of social organisation delineated the descendants of one of the migration canoes, usually a collection of iwi and hapū, claiming descent from the captain or crew of the waka and acting in concert.<sup>248</sup>

- 174 Waka is the Māori word for canoe, without any explicit physical connotations of kinship. The traditions of the Te Arawa and Waikato (Tainui) confederations of tribes are good examples of the development of a waka tradition.

### *Kāinga* –

in the sense of a community. Even in distant times, social organisation was not entirely dependent on whakapapa.<sup>249</sup>

- 175 The concept of kāinga highlights the importance of rules that did not necessarily require blood ties. For example, rules such as reciprocity and mutual advantage were probably more about survival than relatedness.<sup>250</sup>

- 176 Pre-contact Māori society was characterised by dynamic change with hapū frequently forming and reforming into autonomous groups as social and political exigencies required.<sup>251</sup> Williams explains that:<sup>252</sup>

The primary rights holding group was the hapū or village community. Hapū migrated extensively throughout their traditional lands and often adopted different names in order to reflect the varying land or resource rights being utilised in different parts of their traditional district.

- 177 Iwi or multiple hapū cohesion was relatively rare, being achieved for particular purposes such as off-shore fishing or warfare. This period was characterised far more by hapū autonomy and inter-hapū disputation.<sup>253</sup>

- 178 The contact period through to the middle of the 19th century was marked by unprecedented social change. There were significant migrations and relocations and an increase in large-scale warfare between unrelated or distantly related

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<sup>247</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 17.

<sup>248</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 17. See also Manuka Henare “Ngā Tikanga Me Ngā Ritenga o Te Ao Māori: Standards and Foundations of Māori Society” in New Zealand Royal Commission on Social Policy Report: *The April Report – Report of the Royal Commission on Social Policy: Te Kōmihana A Te Karauna Mō Ngā Āhuatanga-Ā-Iwi* (Wellington, The Commission, c1988 (Appendix to the Journals of the House of Representatives of New Zealand); 1998, H2, (Vol. III Part 1) 3) 13.

<sup>249</sup> Mason Durie *Letter to the Law Commission commenting on the draft of “Māori Custom and Values in New Zealand Law”* 19 February 2001, 2.

<sup>250</sup> Mason Durie *Letter to the Law Commission commenting on the draft of “Māori Custom and Values in New Zealand Law”* 19 February 2001, 2.

<sup>251</sup> ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 16–18.

<sup>252</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 17.

<sup>253</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 17.

groups. Eventually, the balance of power in musketry became less uneven leading to peace in most areas and some populations returning to their former villages. Nevertheless, Māori social life continued to be drastically affected by a very rapid decline in population resulting from the introduction of previously unknown diseases by traders and immigrants, against which Māori had no inherited immunity.<sup>254</sup>

179 The second half of the 19th century was characterised by the adoption of more regular habitation, permanent agriculture and larger aggregations at iwi or waka level. However there was also a sustained period of land and resource loss (and continuing population decline until the turn of the century) as a result of warfare, land confiscations and transactions with the Crown and settlers.

180 At no stage, from the period of first arrival in New Zealand through to the post-contact period, could Māori social structure be accurately described as a simple pyramid of whānau, hapū, iwi, waka in ascending order. Rather, traditional Māori society and post-contact Māori society were characterised by a high level of variation in kin units and aggregations.

181 Williams explains this point further:<sup>255</sup>

Thus, larger hapū themselves had hapū and acted as iwi whatever formal category applied. Whānau grew and became communities, acting in all ways as if they were hapū. Hapū and iwi names changed as political exigencies required. Whānau and hapū were subsumed through inter-marriage, land transfer or defeat in war. The only constant in the fluctuating collective fortunes of hapū and iwi was the whakapapa which tied the individuals together and to the land. The whakapapa which gave the greatest right to resources was (and remains) the most ancient line. Thus hapū and iwi names which reflect the usurpation of earlier inhabitants were always supplemented by a continuing recollection of the inter-marriages between the original tangata whenua and later arrivals so as to confirm the strongest line for mana tūpuna.

182 Changes in Māori society during the contact and early colonisation periods were dynamic, but never anarchic. In particular the changes taking place were always underpinned by the core values of whanaungatanga and utu – the centrality of relationships and the importance of reciprocity between the key social groupings.<sup>256</sup>

### **Tikanga rangatira: leadership**

183 Māori leadership roles are generally carried out by rangatira, kaumātua, ariki, and tohunga/pūkenga.

#### *Rank and mana*

184 Williams states that rangatira lead and represent their hapū, either regularly or sometimes for the purpose of a particular project.<sup>257</sup> They are the most significant

<sup>254</sup> David V Williams *He Aha Te Tikanga Māori* (unpublished revised draft as at 10 November 1998 of Joseph Williams' paper of the same name, prepared for the Law Commission) 23.

<sup>255</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 18.

<sup>256</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 18.

<sup>257</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 18. See also ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission,

leaders in community affairs as the community organisers and representatives. They bind and unite the various elements of the hapū.<sup>258</sup> They are not necessarily older persons, but they are the leaders who sum up the views of a hui and represent hapū or iwi in relationships with others.<sup>259</sup>

- 185 Kaumātua, and the gender specific terms koroua and kuia, are often treated as being synonymous with being an older person, but kaumātua status is not necessarily conferred on attaining a certain age.<sup>260</sup> Kaumātua status was, and remains, an active leadership role. A kaumātua has social seniority, life experience and wisdom – which may be acquired at a relatively young age in exceptional circumstances.<sup>261</sup>
- 186 Ariki were the most senior ranking blood representatives of a collection of hapū, an iwi or even a collection of iwi.<sup>262</sup> They held descent on senior lines from the leaders of significant founding canoes.<sup>263</sup> In some traditions ariki status was so tapu that the incumbent did not participate in the political affairs of the hapū or iwi. In other circumstances the ariki who was an active and successful leader would acquire enormous mana. Ariki status was not institutionalised through strict rules of succession in the way that these positions were held elsewhere in Polynesia.<sup>264</sup> They were sometimes chosen or appointed by consensus of the hapū or iwi groupings, as continues to be the case with the arikinui of Te Kīngitanga.<sup>265</sup>
- 187 There is no neat hierarchy of kaumātua, rangatira and ariki who provide leadership of whānau, hapū and iwi respectively. The title ariki is sparingly used these days and usually applied only to the ceremonial leader of a confederation of hapū or iwi – who may, but not necessarily, be the political leader of the waka or iwi.<sup>266</sup> An ariki tapairu

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January 1994) 30ff; Richard Mulgan's comments on rangatira in *Commentary on Chief Judge Durie's Custom Law Paper from the Perspective of a Pākehā Political Scientist* (unpublished paper for the Law Commission, Canberra, 1996) 12ff; Joan Metge *Commentary on Judge Durie's Custom Law* (unpublished paper for the Law Commission, 1996) 3–4 (second part).

<sup>258</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 18.

<sup>259</sup> Metge explains the word “rangatira” in the following way: “the word rangatira was applied in the first place to all members of the senior families of a hapū (persons descended through senior members of a succession of sibling sets), and then to one person singled out from their ranks as public leader and symbol, analogous to the head of a Scottish clan being known as (for example) The MacDonald . . . Both ranga and tira have meanings which emphasise the idea of group, referring respectively to “company (of persons)” and “company of travellers”: Joan Metge *Commentary on Judge Durie's Custom Law* (unpublished paper for the Law Commission, 1996) 3–4 (second part).

<sup>260</sup> See Dame Joan Metge's comments on this point in *Commentary on Judge Durie's Custom Law* (unpublished paper for the Law Commission, 1996) 2–3 (second part).

<sup>261</sup> See also Dame Joan Metge's discussion of “Kaumātua” in *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) 135–136.

<sup>262</sup> ET Durie “Custom Law” (unpublished confidential draft paper for the Law Commission, January 1994) 31.

<sup>263</sup> ET Durie “Custom Law” (unpublished confidential draft paper for the Law Commission, January 1994) 31.

<sup>264</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 19.

<sup>265</sup> David V Williams *He Aha Te Tikanga Māori* (unpublished revised draft as at 10 November 1998 of Joseph Williams' paper of the same name, prepared for the Law Commission) 25.

<sup>266</sup> David V Williams *He Aha Te Tikanga Māori* (unpublished revised draft as at 10 November 1998 of Joseph Williams' paper of the same name, prepared for the Law Commission) 25.

is a woman in a family of rank who is invested with special tapu. Dame Te Atairangikaahu is often spoken of as an ariki tapairu.

- 188 Tohunga or pūkenga are specialists in a range of crafts and fields of knowledge, from carving, weaving and tattooing to the spiritual, mystical and healing arts. Metge elaborates that:<sup>267</sup>

The word tohunga . . . is formed from ‘tohu’. [In] the noun form this means ‘sign’, so that tohunga can be interpreted as “one who is or has been marked out by signs”, signs indicating special contact with or gifts conferred by atua or tūpuna. These signs included external signs (birth accompanied by unusual natural phenomena such as comets, meteors, hurricanes etc, breech birth or birth in a caul) or intrinsic conditions held to be of supernatural origin, such as epilepsy and trances.

. . . In pre-contact Māori society practical and religious knowledge went hand in hand: a specialist in any particular craft knew and used the appropriate karakia and rituals. However, it is a good idea to distinguish those specialists who were primarily concerned with the practice of craft specialities (for example tattooing, carving, weaving, kūmara growing, deep sea fishing, birding) and those who were specialists in specifically religious knowledge and ritual.<sup>268</sup>

- 189 The Waitangi Tribunal in the Muriwhenua Land Report described mana in these terms:<sup>269</sup>

The concept of mana shows how Māori authority was neither centralised nor institutionalised, and how power moved up from the people and not down from a central authority. Accordingly authority was not divorced from personal power and influence. Although the necessary leadership traits were reinforced by beliefs that mana was a divine delegation, it was unlike the English divine right of kings in that power was only partly inherited and mainly acquired. The society was thus basically democratic and there was room for class mobility.

- 190 In areas where law or good practice require consultation or negotiation with Māori or participation of Māori, tikanga Māori establishes the identity of the traditional group to be consulted, the representative of that group and the process which is required to complete the consultation, participation or negotiation successfully. This is a growing source of uncertainty in most areas of government and in particular, in resource management and administration of Māori land.

- 191 Some local authorities have applied to the Māori Land Court under section 30(1)(b) of the Te Ture Whenua Māori Act 1993 Act for a determination of “the most appropriate representatives” of any Māori group who may be consulted.<sup>270</sup> In a decision on an application by the Tararua District Council<sup>271</sup> the Court set out

<sup>267</sup> Joan Metge *Commentary on Judge Durie’s Custom Law* (unpublished paper for the Law Commission, 1996) 5 (second part).

<sup>268</sup> Dame Joan Metge goes on to discuss the difference between tohunga ahurewa (“priests”) and tohunga makutu (“shamans”): Joan Metge *Commentary on Judge Durie’s Custom Law* (unpublished paper for the Law Commission, 1996) 5 (second part).

<sup>269</sup> Waitangi Tribunal *Muriwhenua Land Report – Wai 45* (GP Publications, Wellington, 1997) 29–30.

<sup>270</sup> Evelyn Stokes *Bicultural Methodology and Consultative Processes in Research* (a discussion paper, Department of Geography, University of Waikato, 1998). For a full discussion on this issue, see New Zealand Law Commission *Determining Representation Rights under Te Ture Whenua Māori Act 1993: An Advisory Report for Te Puni Kōkiri: SP8* (Wellington, 2001) (published as a companion paper to this paper).

<sup>271</sup> *Re Tararua District Council* 138 Napier MB 85, 1 November 1994.

some principles to be considered in determining appropriate representatives.<sup>272</sup> These include that: there was variation in relevant circumstances created by different tribal histories, especially since colonisation; representation is about obligations, not just an assertion of rights; tangata whenua status was not necessarily bound by 19th century determinations of the Native Land Court; customary authority must be sanctioned by a legitimate base; and the Court should look to local marae in matters of customary authority because this is probably the single most enduring institution in Māori culture (including the development of urban marae that meet the needs of the majority of urbanised Māori).

- 192 In discussing the institution of marae, Joseph states:<sup>273</sup>

Despite the corrosive effect of missionaries and official amalgamationist policies, the Marae as an institution has persisted from pre-European Māori society into the modern era. It therefore has no Western legal base . . . Each Marae reserve is vested in trustees appointed from and by the owning group thus all members of the hapū (tribe) have rights in their Marae. The Marae is therefore the focal point for community life in Māori communities . . .

In addition, the Marae provides common ground where the Pākehā can gain some awareness and insight into Māori life and the importance of biculturalism. The Marae is essentially an institution run by Māori for Māori with the inclusion granted to other groups on their terms. Marae therefore fulfil deeply felt needs for the maintenance of culture, assertion of identity, and resistance to amalgamation. Moreover, the Marae as an institution proclaims Aotearoa/New Zealand as a bicultural nation.

## **Tikanga whenua: land**

### *Connections to land*

- 193 Land was and remains integral to group identity and wellbeing.<sup>274</sup> Māori descended from the land and the stories of the ancestors are carved in it:<sup>275</sup>

Kei raro i te tarutaru, te tuhi o ngā tūpuna.

The signs or marks of the ancestors are embedded below the roots of the grass and the herbs.

- 194 In Māori idiom the people are the property of the land rather than the reverse. The term whenua means both land and placenta.
- 195 The connections with land are reflected in all five of the underlying tikanga values identified above. Whanaungatanga or the relationship with land, mana or the power and authority which hapū and iwi derive from it, utu or the reciprocal

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<sup>272</sup> See also our discussion of relevant principles in New Zealand Law Commission *Determining Representation Rights under Te Ture Whenua Māori Act 1993: An Advisory Report for Te Puni Kōkiri: SP8* (Wellington, 2001) (published as a companion paper to this paper). Other principles are set out as part of that discussion.

<sup>273</sup> R A Joseph *Historical Bicultural Developments – The Recognition and Denial of Māori Custom in the Colonial Legal System of Aotearoa/New Zealand* (paper prepared for Te Mātāhauariki Research Institute, University of Waikato FRST Project, 1999), 31.

<sup>274</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 20.

<sup>275</sup> Waitangi Tribunal *The Te Roroa Report – Wai 38* (GP Publications, Wellington, 1992) 49 quoting from evidence of Alex Nathan, Wai 38: doc D27.

relationship with it, kaitiakitanga or the obligation to protect it and tapu in its sacred character.

- 196 Williams opines that it is not possible to over-emphasise the fact that land had and retains a profound spiritual and emotional importance to Māori.<sup>276</sup> Hence the proverb:

Whatungarongaro te tangata, toitū te whenua.

People die, the land remains.

- 197 Hence also the affirmation in the preamble to Te Ture Whenua Māori Act 1993 that land is a taonga tuku iho of special significance to Māori people – with the key concept of taonga tuku iho to refer to ancestral links with land left untranslated even in the English text of the preamble.<sup>277</sup>

- 198 Symbolic interests were maintained in mountains, rivers, lakes, natural promontories, wāhi tapu and ancestral houses.<sup>278</sup> These were treasured as ancestral group symbols independently of use rights or any resource potential. Williams emphasises that:<sup>279</sup>

This right of identification was, and remains, a most significant right for Māori. It describes the relationship to ancestral land and serves as a reminder of the continuing responsibilities to tangata whenua, including the inherent right of recovery or reversion in cases of wrongful dispossession.

- 199 Such rights to land are not dependent upon ownership according to current law or continual occupation.<sup>280</sup> Even if land has been alienated, the sacred connection to the land remains:<sup>281</sup>

. . . the link between the person and the land by virtue of their history can never be erased . . . “ngā tapuwae o ngā tūpuna” [“footsteps of our ancestors”] . . . remain on the land forever. The fires never go out.

- 200 Māori customary attitudes to land emphasise its central importance to Māori society. Issues relating to land are explored further in Chapter 4.<sup>282</sup>

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<sup>276</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 20.

<sup>277</sup> Judgments recognising the special significance of land to Māori are relatively common. To give one example, see the family protection decision of *Re Ham* (High Court, Hamilton A217/85, 11 November 1988, unreported, High Court, Hamilton Registry, A217/85, 10) where the court stated that “it is accepted . . . that when dealing with Māori families the Court must pay regard to the strong attachment of the Māori to the land and to closely held deeply felt feelings within the family in that respect.” This point was affirmed by the Court of Appeal in *Re Ham; Mahu v New Zealand Guardian Trust Co Limited* (1990) 6 FRNZ 158.

<sup>278</sup> See, for example, the Waitangi Tribunal *The Whanganui River Report – Wai 167* (GP Publications, Wellington 1999).

<sup>279</sup> Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) 22.

<sup>280</sup> See Durie’s notes concerning concepts related to land in ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 61–104.

<sup>281</sup> Waitangi Tribunal *The Te Roroa Report – Wai 38* (GP Publications, Wellington, 1992), 49 quoting from evidence of Alex Nathan, Wai 38: doc D27.

<sup>282</sup> Also, for a brief discussion of some issues concerning whenua and their treatment in the legal system, see paras 231–233.

- 201 To conclude this chapter, we now turn to a general discussion of the way in which the legal system has recognised Māori custom.

## THE TREATMENT OF CUSTOM IN THE LEGAL SYSTEM

### Introduction

- 202 In a recent speech, the Chief Justice Dame Sian Elias stated:<sup>283</sup>
- . . . difficult issues . . . arise in the area of protection of cultural rights. They require assessment of the commitment the community is prepared to make to ensure the protection of cultural diversity. They entail judgments about community values and the allocation of resources which many see as unsuitable for judicial determination . . .
- Effective protection of cultural rights and effective protection of the rights to equality ultimately rest on community commitment, not the statement of rights, nor the courts. But where a case is properly brought before the courts, judges cannot avoid making decisions simply because the matter is difficult or politically contentious.
- 203 In recent years, judges are increasingly being required to develop an understanding of Māori cultural values and practices and how they apply to particular situations that confront them.

### Evidence and proof

- 204 As noted in the previous chapter,<sup>284</sup> the courts have developed a number of requirements for the recognition of custom law. Boast examines the New Zealand context and concludes that Māori custom law (as a type of indigenous customary law) is treated in a similar way to foreign law. Boast summarises the law regarding evidence and proof of Māori custom law as follows:<sup>285</sup>
- In the ordinary Courts matters of Māori customary law, like foreign law, must be proved by appropriately qualified experts, except where, by “frequent proof” the matter has become “notorious” to the Court (in which case judicial notice may be taken of the customary rule).
- The above applies to the proof of customary law in all contexts, whether by way of statutory incorporation, as an aspect of Native or Aboriginal title, or as an aspect of New Zealand common law.
- In the case of the use of Māori words in statutes, where the problem is one of statutory incorporation, a more flexible approach is acceptable, and the Court may rely on its general and linguistic knowledge, dictionaries, and other sources. However, the dividing line between incorporation of Māori words and incorporation of Māori law is a fine one, and where the distinction is doubtful, and especially where resolution of the point is significant to the litigants, it is desirable for evidence to be given by appropriately qualified experts and for this to be taken into account by the Court.
- 205 In *Public Trustee v Loasby*,<sup>286</sup> the first of Cooper J’s three tests required that the prerequisite for recognition of Māori custom law is that the custom be proved.

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<sup>283</sup> Sian Elias “Ethel Benjamin Commemorative Address 18 May 2000” LawTalk Issue 54, June 2000.

<sup>284</sup> See para 34ff.

<sup>285</sup> Richard Boast et al *Māori Land Law* (Butterworths, Wellington, 1999) 22.

<sup>286</sup> (1908) 27 NZLR 801.

Boast notes that there is some uncertainty over the means and standard of proof necessary, but it seems logical that proof should be by way of qualified experts.<sup>287</sup> In *Te Weehi v Regional Fisheries Officer*,<sup>288</sup> the customary rules in issue were proved in evidence by B A Nepia, a senior lecturer in Māori studies at Canterbury University, and W J Karetai, a respected local Ngāi Tahu kaumātua (elder). In *Hineiti Rirerire Arani v Public Trustee*, the Privy Council was content to rely on earlier published decisions of the Māori Appellate Court, and in addition, an affidavit giving information on Māori customary adoption was filed “by a distinguished New Zealand chief”.<sup>289</sup>

- 206 These cases illustrate that where recognition of custom is warranted, judges are more regularly showing a willingness to take a flexible approach. This trend is further highlighted by an appraisal of the courts’ use of their discretionary powers.

### Discretionary powers of the courts

- 207 The discretionary powers of the courts are an important mechanism in enabling the common law to retain respect and acceptability in a more informed, more critical, and more demanding modern society. They allow judges to determine how principles should be prioritised to ensure that justice is best served in the instant case.
- 208 In exercising its discretion, whether sourced in statute, the courts’ inherent jurisdiction or the power of review, the court will often need to take into account Māori values.
- 209 As early as 1910, in *Baldick v Jackson*,<sup>290</sup> the general qualifying language in the English Laws Act 1908 – that the law of England was part of New Zealand law only so far as applicable to the circumstances of New Zealand – allowed the recognition of the Treaty in a case concerning the ownership of whales. Chief Justice Stout held that the statute of 17 Edw II c 2 (right to whales part of the Royal prerogative) was not in force in New Zealand, as being inapplicable to the circumstances of the colony. The statute could not possibly be claimed “against the Māoris, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with.”<sup>291</sup>
- 210 Another relevant context is the sentencing of offenders. Section 16 of the Criminal Justice Act 1985 allows an offender to ask the court to call any person “to speak” about the ethnic or cultural background of the offender, the way the background may relate to the offence and the positive effects the background may have in helping avoiding further offending. The implementation of section 16 in appropriate cases has facilitated recognition of other cultural beliefs in a legal system based on the English tradition.
- 211 A further example relates to legislative authority giving judges wide discretion in deciding where to hold a court. Section 4(4) of the District Courts Act 1947 provides that “a [Judge] may hold or direct the holding of a particular sitting of a

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<sup>287</sup> Richard Boast et al *Māori Land Law* (Butterworths, Wellington, 1999) 20.

<sup>288</sup> [1986] 1 NZLR 680.

<sup>289</sup> (1919) NZPCC 1, 6.

<sup>290</sup> (1910) 27 NZLR 801.

<sup>291</sup> Cited in K Keith “The Treaty of Waitangi in the Courts” (1990) 14 NZULR 37, 50.

Court at any place he deems convenient". This has been interpreted to allow judges to sit on marae if they so wish.

- 212 Courts have long been able to draw on principles and material outside the text of particular statutes when considering the interpretation or application of the statutes. They do this for a variety of purposes, one being to protect and promote other principles and values that are external to the statute.<sup>292</sup>
- 213 Where the courts have stated that it is appropriate in interpreting a statute to permit or even to require reference to the Treaty of Waitangi or Māori interests even where the statute makes no reference to it.
- 214 In 1983, in *Auckland District Māori Council v Manukau Harbour Maritime Planning Authority*,<sup>293</sup> a case concerning maritime planning, the Court observed that the Treaty is a matter of public interest and in particular a matter of interest to Māori people as a group forming part of the wider public interest, and so the Treaty was brought into account. Since then, a statutory amendment in 1987 made specific provision for Māori interests to be brought into account in maritime planning.
- 215 Another example arose from the disposal of radio frequencies under the Radio Communications Act 1989 in *Attorney-General v New Zealand Māori Council*.<sup>294</sup> The Minister of Communications had declined a request from the Waitangi Tribunal to postpone the tender of frequencies pending the Tribunal's report on a claim that the broadcasting policy was inconsistent with a Treaty duty to protect Māori language and cultural interests. The Māori claimants sought judicial review of the Minister's decision in the courts. The majority of the Court held that the Minister's acceptance by affidavit of the relevance of the Tribunal's general recommendations about broadcasting and the Māori language in an earlier report (1986) had effectively made the Tribunal's further report and recommendations relevant considerations to be brought into account before proceeding with the tender process.
- 216 In 1987, Chilwell J in his lengthy and closely reasoned judgment in the *Huakina* case, stated that:<sup>295</sup>
- There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.
- 217 The judgement is also authority for a number of other notable points, including that: legislation can be interpreted and the common law developed by reference to other statutes even though they are not directly in point; the Treaty has had significant statutory recognition; Māori spiritual values are relevant; and courts increasingly take account of treaties and other international instruments even if the statute does not mention them. The judgment includes an extensive and valuable review of many other cases concerning the Treaty.

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<sup>292</sup> K Keith "The Treaty of Waitangi in the Courts" (1990) 14 NZULR 37, 59.

<sup>293</sup> (1983) 9 NZTPA 165.

<sup>294</sup> [1991] 2 NZLR 129.

<sup>295</sup> *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210.

218 The same principle was adopted by the Planning Tribunal in *Electricity Corporation of New Zealand Limited v Manawatu Regional Council*<sup>296</sup> in recommending minimum flows for the Whanganui river. The “cultural values of the tangata whenua” were held to be relevant for the purposes of section 20J of the Water and Soil Conservation Act 1967 under which minimum water flows may be set.

219 Further, Justice Durie makes the point that tikanga Māori may be brought into account without statutory direction:<sup>297</sup>

This is not a recent opinion. It was applied judicially in 1975, though not precisely in those terms, in the Māori Appellate Court case of *Tikouma* 3B2, in considering kin group obligations on the transfer of Māori land interests under section 213 of the old Māori Affairs Act 1953.

220 The need to apply tikanga Māori may arise in a general context such as the review of a Māori organisation or even such everyday situations as a request that karakia be given. The courts are moving away from the view that the legal process must involve total submission to and compliance with formal court procedures derived from an occidental culture. This understanding contains the seeds of an evolving jurisprudence, which draws on both British law and Māori custom law, and which has the potential to incorporate solutions based on Māori world views.

### Some examples

221 To conclude this section, we refer to issues by way of example concerning kaitiakitanga, whenua and whānau, and their treatment in the legal system.

#### *Kaitiakitanga and resource management law*

222 Kaitiakitanga is a critical element in activities impacting on resource management and fisheries.<sup>298</sup> The ethic of kaitiakitanga is becoming increasingly important as iwi and hapū assert their mana and respond to the obligations under current environmental legislation.<sup>299</sup> This became an issue of some significance for the Environment Court which, under section 7(a) of the Resource Management Act 1991,<sup>300</sup> must apply a statutory definition of kaitiakitanga. This definition, or previous applications of it, did not always conform with the understandings of tangata whenua appearing to give evidence of what kaitiakitanga meant for them. Therefore a 1997 amendment to the Resource Management Act definition now specifies that “kaitiakitanga” means “the exercise of guardianship by the tangata

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<sup>296</sup> Decision W70/90.

<sup>297</sup> ET Durie “Justice, Biculturalism and the Politics of Law” in Margaret Wilson and Anna Yeatman (eds) *Justice & Identity: Antipodean Practices* (Bridget Williams Books, Wellington, 1995) 38.

<sup>298</sup> For an overview of issues relating to Māori fisheries and custom law, see New Zealand Law Commission *The Treaty of Waitangi and Māori Fisheries – Mataitai: Ngā Tikanga Māori Me te Tiriti o Waitangi* NZLC PP9 (Wellington 1989).

<sup>299</sup> M Roberts, W Norman, N Minhinnick, D Wihongi and C Kirkwood *Kaitiakitanga: Māori Perspectives on Conservation* (unpublished paper, University of Auckland).

<sup>300</sup> This enactment repealed the former statutes, including the Town and Country Planning Act 1977, the Water and Soil Conservation Act 1967, and most of the Geothermal Energy Act 1953, and replaced them with a new integrated statute with a single set of express management criteria designed to be applied across the whole spectrum of resource management.

whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship”. The nature of tikanga Māori is therefore of direct relevance to the court’s jurisdiction when considering kaitiakitanga issues.

- 223 Prior to the 1997 amendment, perhaps the most notable acceptance of kaitiakitanga by the courts was *Haddon v Auckland Regional Authority*.<sup>301</sup> In this Planning Tribunal decision, the hapū concerned requested an inquiry into a recommendation from the Auckland Regional Council to the Minister of Conservation to extract sand from the seabed three to four kilometres off the coast of Pakiri Beach. The hapū argued that, as tangata whenua, it was the traditional kaitiaki over the resource. The Tribunal determined that the hapū should be able to exercise kaitiakitanga over the sand resource and to give guidance on how, and to what extent, it should be developed. The Tribunal recommended that the Minister adopt a three step process with regard to the consent to the restricted coastal activity in order to give section 7(a) of the Act a “meaningful effect” in Māori terms. The process involved:
- a) recognising that the resource represented the ancestral land and waters of the hapū (as a means to affirm the mana whenua of the hapū);
  - b) providing for practical recognition of the ancestral relationship of the hapū with the coastal resources; and
  - c) providing for kaitiakitanga over the resource and its future.
- 224 However, despite this recognition of kaitiakitanga, the Tribunal held that the proposed sand extraction was well within the principles of sustainable management, which is the over-arching purpose of the Resource Management Act, and therefore allowed it to proceed.
- 225 In *Rural Management Ltd v Banks Peninsula District Council*,<sup>302</sup> the local rūnanga was opposed to a proposed sewage outfall to the sea from a new subdivision, preferring a land-based alternative instead. As Hayes notes in a recent article:<sup>303</sup>
- Discharge of sewage into the sea, no matter how well treated, is highly offensive to Māori. Although in physical terms the discharge may not pollute the sea, it would harm the spiritual relationship Māori have with the sea, and the obligation of the kaitiaki would not be fulfilled.
- 226 In *Rural Management Ltd*, the interpretation of kaitiakitanga was limited to the statutory definition in the Act and the physical evidence; the spiritual relationship – the very essence of kaitiakitanga – was not given adequate recognition. In addition, kaitiakitanga was stated to be applicable not only to Māori, but also to consent authorities and applicants.
- 227 The 1997 amendment to the definition of kaitiakitanga in the Act made it clear that kaitiakitanga is only applicable to the exercise of guardianship by the tangata whenua of an area:<sup>304</sup>

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<sup>301</sup> [1994] NZRMA 49.

<sup>302</sup> [1994] NZRMA 412.

<sup>303</sup> Selwyn Hayes “Defining Kaitiakitanga and the Resource Management Act 1991” (1998) 8 Auckland University Law Review 893, 896.

<sup>304</sup> Selwyn Hayes “Defining Kaitiakitanga and the Resource Management Act 1991” (1998) 8 Auckland University Law Review 893, 897.

This correctly clarifies the view formed in *Rural Management Ltd* that non-Māori could claim the status of kaitiaki, which is a distinctly Māori concept and role.

- 228 Other than the concept of kaitiakitanga, a number of other philosophical concepts that form an important part of tikanga Māori are also referred to in the Resource Management Act 1991. Section 6(e) of the Act requires those with discretions under the Act to “recognise and provide for . . . the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga”. This provision cannot be applied without a knowledge of Tikanga Māori.
- 229 Section 8 of the Resource Management Act requires those with discretions to take into account the principles of the Treaty of Waitangi. The Treaty promises the protection of Māori custom and cultural values.
- 230 The Act pertains to an enormous area of law in which local government, central government and the mainstream courts have been required to understand and apply tikanga Māori.

### *Whenua and land law*

- 231 A failure to understand that the relationships of Māori to whenua are not dependent upon ownership according to current law or continual occupation led the Planning Tribunal into error for many years when it took a very narrow view of “ancestral land” in section 3 (1) (g) of the Town and Country Planning Act 1977 (now repealed). Section 3(1)(g) required consideration of the relationship of Māori people with their ancestral land. Initially, the section received a narrow treatment. Unless Māori still owned Māori Freehold Land in the area in question, the Tribunal refused to even consider issues raised by Māori under this section. This position was largely redressed by the High Court’s determination in *Royal Forest and Bird Protection Society v W A Habgood Ltd*,<sup>305</sup> upheld in the Court of Appeal in *Environmental Defence Society and Tai Tokerau District Māori Council v Mangonui County Council*,<sup>306</sup> that ancestral land was not restricted to that still in Māori ownership; it was the relationship that was seen to be important not the definition of the land. In other words, customary Māori attitudes to land had also to be brought into account.<sup>307</sup>
- 232 In *Habgood*<sup>308</sup> this sea change in judicial thinking on the recognition of Māori rights by the legal system can be seen in Holland J’s statement that:<sup>309</sup>

There may be a danger in interpreting what a European would describe as his or her ancestral land. What is required to be determined is the relationship of the Māori people and their cultures and traditions with their ancestral land.

- 233 In relation to land, a number of special Acts have been passed over the years in order to give effect to the settlement of particular Māori claims. Some of these deal with quite small parcels of land, but others are on a much more substantial scale.<sup>310</sup> Two notable examples are the Waikato Raupatu Claims Settlement Act 1995 and the Ngāi Tahu Claims Settlement Act 1998.

<sup>305</sup> 12 NZTPA 76.

<sup>306</sup> [1989] 3 NZLR 257 (CA).

<sup>307</sup> GS Orr and ET Durie “The Role of the Waitangi Tribunal” (1990) 14 NZULR 62, 77.

<sup>308</sup> *Royal Forest & Bird Society v W A Habgood Ltd* (1987) 12 NZTPA 76.

<sup>309</sup> (1987) 12 NZTPA 76, 80.

<sup>310</sup> Richard Boast et al *Māori Land Law* (Butterworths, Wellington, 1999) 286.

## *Whānau and family law*

### **Adoption and guardianship**

234 For centuries Māori have had a practice known as whāngai or atawhai,<sup>311</sup> a recognised practice whereby a child is given to family members to raise.<sup>312</sup> Although for the purposes of adoption law, whāngai placements are not legally recognised,<sup>313</sup> an informal system of “customary adoption” which corresponds with the traditional concept of whāngai placements<sup>314</sup> is still practised by Māori.<sup>315</sup> The principles that underpin whāngai are:

- openness;
- placement within the family; and
- whakapapa<sup>316</sup> and whanaungatanga.<sup>317</sup>

There are no particular formalities for whāngai, but whāngai placements are a matter of public knowledge and are made with the express or tacit approval of the whānau or hapū.<sup>318</sup>

235 Whāngai placements do not involve the secrecy that has surrounded Pākehā adoption practices. The child has two sets of parents and recognise his or her relationship to them both. The child is aware of his or her birth parents and other family members and usually maintained contact with them. Once the child is accepted in this way, the adopter and child will frequently regard each other as parent and child for all significant purposes, as will the other members of the whānau. As one Māori woman expressed it, “an atawhai, though not born of my womb is born of my heart”.<sup>319</sup> whāngai placements are not necessarily permanent and it is not uncommon for such a child to return to the birth parents later.

236 Whāngai placements are used for a variety of reasons<sup>320</sup> and with a number of results. The tikanga relating to whāngai varies among iwi.<sup>321</sup> Traditionally,

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<sup>311</sup> See Hirini Moko Mead *Tamaiti Whāngai: The Adopted Child: Māori Customary Practices* (paper delivered at the Adoption Conference, Victoria University of Wellington, 1990); F Acheson *Adoption Amongst the Māoris of New Zealand* (1922) 4 *Journal of Comparative Legislation and International Law* (3rd series) 60; Joan Metge *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) 228–257.

<sup>312</sup> Submission, Ministry of Women’s Affairs, 3 March 2000.

<sup>313</sup> Section 19 Adoption Act 1955.

<sup>314</sup> For a discussion of whāngai placements see New Zealand Law Commission *Adoption: Options for Reform* NZLC PP 38 (Wellington, 1999) paras 309–313.

<sup>315</sup> Joan Metge *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) 252.

<sup>316</sup> Genealogy.

<sup>317</sup> The centrality of relationships to the Māori way of life.

<sup>318</sup> See *Arani v Public Trustee* [1920] AC 198, 201.

<sup>319</sup> As reported in Joan Metge *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) 213.

<sup>320</sup> As with Pākehā adoption, infertility was often a reason why a child was offered as a whāngai to a relative. See New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* NZLC R65 (Wellington, 2000) para 154.

<sup>321</sup> Father Henare Tate provided this advice at a meeting with the Ministry of Justice Māori Focus Group as part of the Law Commission’s consultation in the Adoption Project. For this reason we have not attempted here to articulate the tikanga.

whāngai placement was a means of strengthening relations within a hapū or iwi and had the advantage of ensuring that land rights were consolidated within the tribe, rather than diluted. For this reason, whāngai placements were traditionally arranged between members of the same hapū or iwi, although relatives by marriage would sometimes be deemed acceptable candidates.

237 By way of contrast to the whāngai process, adoption is a legal process which transfers the legal status of parent to a particular child from one set of parents to another.

238 In *Hineiti Rirerire Arani v Public Trustee*, with reference to the Adoption of Children Act 1895, Lord Phillimore recognised the Māori customary law of adoption. He stated:<sup>322</sup>

The right of the Māori to adopt according to his own custom is not interfered with by giving him a further right to adopt in the form and under the conditions provided by the Act.

239 However, section 19(1) of the Adoption Act 1955 deems that, since the commencement of the Native Land Act 1909, no person shall be capable of adopting a child in accordance with Māori custom and with certain exceptions, no adoption is of any force or effect, whether in respect of intestate succession to Māori land or otherwise.<sup>323</sup> The fundamental difference in the way which the law, on the one hand, and Māori, on the other, regarded adoption was that the law's adoption policy focused on the relationships which were created and the perceived advantages for members of the new family. Insufficient attention was given to the relationship between child and birth parent which was destroyed and to the impact upon the child.<sup>324</sup>

240 The Guardianship Act 1968 (section 2) defines *guardianship* as “the custody of the child . . . and the right of control over the upbringing of the child”, and *custody* as “the right to possession and care of a child”. Under the Act, the only guardians as of right are the birth mother and the birth father if married to or living with the mother at the time of the birth. It is inconsistent with Māori ideology, however, that a child be seen as the possession of parents. Children are seen rather as “ā tātou tamariki” (the children of all) and are taonga of the whānau, hapū and iwi.<sup>325</sup>

### Custody disputes

241 Two judgments of the Family Court illustrate the role of Māori custom in custody disputes. In *Rikihana v Parson* a twelve year old boy of mixed parentage wished to live in New Zealand with his father and close to his Māori culture, rather than in Sydney where his mother had moved. Judge Inglis QC granted the father custody,

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<sup>322</sup> (1919) NZPCC1.

<sup>323</sup> See also *Whittaker v Māori Land Court* [1996] NZFLR 163.

<sup>324</sup> K Griffith *New Zealand Adoption: History and Practice* (Wellington, 1998), para 9. Mason Durie would also stress the importance of the Māori child having access to his or her tribal heritage. He notes that the right of all Māori children to inherit a tribal legacy is not always possible under current adoption laws: Mason Durie *Letter to the Law Commission commenting on the draft of “Māori Custom and Values in New Zealand Law”* 19 February 2001, 2.

<sup>325</sup> See D Durie-Hall and Dame J Metge “Kua Tutu Te Puehu, Kia Mau Māori Aspirations and Family Law” in Henaghan M and Atkin WR, (eds) *Family Law Policy in New Zealand* (Oxford University Press, Oxford, 1992) 54–82.

noting that there was more to it than the boy's love for his father. It was "a matter of N having recognised his own need to return to his own ground, his own place". He added:<sup>326</sup>

To return N to Australia would be like cutting off a sapling at the roots. He needs his father's home and his New Zealand family around and about him, to breathe in and live its values and awareness, to grow as a good young Māori.

- 242 The same judge elaborated upon his approach in *Makiri v Roxburgh* where he commented:<sup>327</sup>

A custody order excluding one parent altogether from the possession and care of a Māori child is seen as imposing European values on an ancient and strongly reviving culture . . . Though the Family Court in dealing with a guardianship case does not make special rules for any segment of the New Zealand community, it must and does recognise that each case involving the welfare of a child must be considered according to its own individual circumstances, important traditions and cultural values affecting the child being one such obvious factor . . .

### Family protection

- 243 There are cases in which judges arrive at outcomes with which they are obviously uncomfortable. By way of example, and without any intention to suggest that this area of adjudication is more problematic than other areas, two Family Protection Act cases illustrate the difficulties faced by judges. In *Re Stubbing*,<sup>328</sup> a woman adopted by the deceased as a baby, as a result of a decision of kaumātua in order to provide an heir for certain whānau lands, was held by Eichelbaum J (as he then was) to be owed no moral duty by the testator in respect of those lands. The judge regretted the lack of evidence on Māori custom from elders independent of the parties but made his determination anyway. The deceased had adopted two children. The plaintiff daughter was legally adopted under the Adoption Act specifically to secure the whānau inheritance, whilst the defendant son was adopted for the same reason by an adoption which may have been a legal adoption or a whāngai fostering by Māori custom (the judge did not think it important to pursue the difference, which was not clear on the papers). The case involved the respective rights of male and female children to inherit. The judge stated:<sup>329</sup>

. . . the effect of the evidence as to what was expected of the present testatrix in terms of custom was conflicting and equivocal . . . without intending to reflect on any of the deponents, but it would have helped to resolve the position had elders of standing, independent of the parties, been asked to depose about the conflicting matters.

- 244 It is evident that the judge felt discomfort in making a final order in such a case. He expressed the hope that in the light of his findings a decision could now be arrived at in a marae meeting.
- 245 *Re Wakarua*<sup>330</sup> is another case where the judge noted that there was no evidence before him of relevant aspects of Māori custom but he had to proceed to a decision anyway. The judge stated:<sup>331</sup>

<sup>326</sup> (1986) 4 NZFLR 289, 291.

<sup>327</sup> (1988) 5 NZFLR 673, 672.

<sup>328</sup> (1988) 4 FRNZ 392.

<sup>329</sup> (1988) 4 FRNZ 401.

<sup>330</sup> (1988) 4 FRNZ 650.

<sup>331</sup> (1988) 4 FRNZ 656.

there is no evidence before me in this case of relevant aspects of Māori custom that may be applicable to the case before me, nor have the affidavits addressed themselves particularly to issues which might arise therefrom.

246 Despite several repetitions of the opinion that the mother was not in any way to be blamed in the circumstances, this judgment arrives at the startling conclusion that agreeing to the Whāngai adoption of two children (of five born to her) amounted in law to the parent “deserting” and “failing to maintain” her children.

247 Whilst the statutes in question in these cases mentioned did not make the judges’ task easy, the Law Commission would urge the legal profession refer to Māori values when considering Māori issues. In principle it is most unfortunate if relevant information about Māori custom and values is not available to assist courts in considering Māori concepts and their implications. The President of the Law Commission, Justice Baragwanath, stated in 1997 that:<sup>332</sup>

Counsel have not performed their task where they have failed to identify some relevant Māori custom, not excluded by the cession or a statute, which therefore subsists as a matter of New Zealand law.

248 An options in these types of cases may be to appoint an amicus curiae to assist the court, and of course for counsel to perform their professional obligations to fully inform the court as to the concepts and their implications in the particular circumstances of the case.

249 The family law statutes enacted since 1950 reflect the assimilationist policies of the period “largely by ignoring Māori social policies and objectives, as if they did not exist.” Legislation such as the Marriage Act 1955, the Adoption Act 1955 and the Guardianship Act 1968 have all directly or indirectly ignored Māori values relating to the structure and constitution of the family.<sup>333</sup>

250 Notwithstanding the fact that statutes such as the Guardianship Act 1968, the Matrimonial Property Act 1976, and the Adoption Act 1955 do not expressly recognise Māori values, judicial cognisance and application of those values has continued to grow, with some judges exercising powers in a way that tries to meet Māori concerns.

251 A recent example where the Court sought to take Māori values into account is *B v Director-General of Social Welfare*.<sup>334</sup> In hearing an appeal by a grandmother against a decision of the Family Court refusing her custody of her granddaughter the court held that:<sup>335</sup>

The welfare of the child can never be considered in isolation. The cultural background of a child is significant and the special position of a child within a Māori whānau, importing as it does not only cultural concepts but also concepts which are spiritual and which relate to the ancestral relationships and position of the child, must be kept in the forefront of the mind of those persons charged with the obligation of making decisions as to the future of the child.

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<sup>332</sup> The Honourable Justice Baragwanath *Treaty of Waitangi Issues – The Last Decade and the Next Century* New Zealand Law Society Seminar, April 1997, 12.

<sup>333</sup> D Durie-Hall and Dame J Metge “Kua Tutu Te Puehu, Kia Mau Māori Aspirations and Family Law” in Henaghan M and Atkin WR, (eds) *Family Law Policy in New Zealand* (Oxford University Press, Oxford, 1992) 54 and 59.

<sup>334</sup> (27 May 1997) unreported, High Court, Wellington Registry AP 71/96).

<sup>335</sup> (27 May 1997) unreported, High Court, Wellington Registry AP 71/96) 13.

- 252 What the case shows is that, sometimes even in the absence of express statutory directions to do so, Māori values are being taken into consideration by the courts.
- 253 Child welfare is one area where the legislature does expressly require Māori values to be taken into account. The courts and the Director General of Social Welfare are required to understand and apply the values associated with whānau, hapū and iwi in dealing with Māori child welfare issues. The Family and Youth Courts under the Children and Young Persons and Their Families Act and the Director General of Social Welfare under section 23 of the Guardianship Act must understand and apply the tikanga relevant to kin relationships in order to exercise those powers appropriately.
- 254 In 1999 the Minister of Justice remitted to the Law Commission terms of reference for a review of adoption law.<sup>336</sup> One of the topics that the Commission was asked to consider was “whether special recognition should be given to Māori customary adoptions or any other culturally different adoption practices”. In September 1999 the Commission issued a discussion paper *Adoption: Options for Reform*<sup>337</sup> which was used as a basis for consultation, followed by a final report *Adoption and its Alternatives: a Different Approach and a New Framework*<sup>338</sup> in September 2000.
- 255 Much of the criticism levelled by Māori and other cultural groups at the Adoption Act relates to lack of input into decision making and the restrictions placed upon access to information and the disempowerment that this causes.
- 256 The responses to the Adoption discussion paper indicated that Māori values have gained widespread support and are regarded as providing the basis upon which to move forward. The principles that the paper advocates, such as openness and honesty, access to information about one’s self and one’s origin and family placement or placement within the same cultural group before adoption elsewhere is considered, may relieve some of the concerns that Māori have expressed in relation to the dominant cultural norms of the present Adoption Act.<sup>339</sup>
- 257 It is apparent that, with increasing frequency, the courts and the legislature are attempting to ensure that Māori custom law is respected in the law. The Māori Land Court has a critical role to play in supporting this trend.<sup>340</sup> In Chapter 4, we explore the scope for the Māori Land Court to apply Māori custom law in its special jurisdiction.

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<sup>336</sup> See Appendix 1 in New Zealand Law Commission *Adoption: Options for Reform* PP38 (Wellington, 1999) 117.

<sup>337</sup> New Zealand Law Commission *Adoption: Options for Reform* PP38 (Wellington, 1999).

<sup>338</sup> New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* R65 (Wellington, 2000).

<sup>339</sup> Note a recent Waitangi Tribunal Claim, Wai 879, registered on 11 December 2000. The claim concerns the need for the Crown to acknowledge Māori needs, values and beliefs in relation to customary adoption practices. The claimant claims that she has been prejudicially affected by the Guardianship Act 1968 and the Adoption Act 1955 that are contrary to the principles of the Treaty of Waitangi.

<sup>340</sup> Refer in particular to Chapter 6, where we discuss the possibility of an expanded jurisdiction for the Māori Land Court to enable the Court to facilitate the efficient administration of Treaty settlement assets by Māori.

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## 4

# Māori custom law and the Māori land court

### INTRODUCTION

- 258 **T**HE MĀORI LAND COURT IS NOT A COURT of Māori custom law despite its minute books containing a vast amount of material on custom law. This material is required to support applications for investigation of title.<sup>341</sup> However, there is some scope for the Māori Land Court to apply Māori custom law in its special jurisdiction.
- 259 For example, section 29 Te Ture Whenua Māori Act 1993 allows the Minister of Māori Affairs, the Chief Executive of Te Puni Kōkiri, or the Chief Judge of the Māori Land Court to refer any matter for inquiry to the Court. Where such an inquiry concerns a matter of tikanga, the Chief Judge shall appoint two or more persons with “knowledge and experience of tikanga Māori” to the court. This means that evidence as to tikanga in section 30 applications will be required. The problems and issues relating to the operation of section 30 are set out in the Law Commission’s advisory report for Te Puni Kōkiri – *Determining Representation Rights under Te Ture Whenua Māori Act 1993*, published as a companion paper to this one.
- 260 Section 6A(1) Treaty of Waitangi Act 1975 provides that the Māori Appellate Court may receive an application from the Waitangi Tribunal to consider:
- Māori custom or usage;
  - Rights of ownership of land or fisheries according to Māori customary law; and
  - The determination of Māori tribal boundaries whether of land or fisheries.<sup>342</sup>
- 261 Pursuant to section 61 Te Ture Whenua Māori Act, the High Court is also able to state a case to the Māori Appellate Court on matters of custom,<sup>343</sup> although a

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<sup>341</sup> An example of such evidence is the Ninety-Mile Beach case 1957 (1957) 85 Northern Minute Book 57; R P Boast “In re Ninety-Mile Beach revisited – the Native Land Court and the Foreshore in New Zealand legal history” (1993) 23 VUWLR 145. See also New Zealand Law Commission *The Treaty of Waitangi and Māori Fisheries – Mataitai: Ngā Tikanga Māori me te Tiriti o Waitangi* NZLC PP9 (Wellington, 1989).

<sup>342</sup> See “In re a claim to the Waitangi Tribunal by Henare Rakihiia Tau v the Ngāi Tahu Māori Trust Board” (1990) 4 South Island Appellate Court 672.

<sup>343</sup> By Part IIIA of the Fisheries Act 1983 the Court is given a special jurisdiction over Taiapure (local fisheries).

search of the case law shows only four decisions that refer to this section. In none of these cases did the High Court utilise the section 61 procedure.<sup>344</sup>

- 262 Notwithstanding these provisions, the specialist knowledge largely possessed by the Māori Land Court is not a knowledge of custom but of the complex laws designed to replace customary tenure. Chief Judge Durie (as he then was) has stated:<sup>345</sup>

Some knowledge of customary preference inevitably rubs off through the judges' long association with Māori people; but the experience so gained is anecdotal . . .

- 263 In this chapter, we discuss the evolving role of the Māori Land Court, which is sometimes referred to as “the people’s court” or a “court of social purpose”<sup>346</sup> since it is the relationship between kin groups and the land which is at the heart of the Court’s work. In doing so, we briefly examine the law governing succession to property to demonstrate the difficulties of legislating to deal with the complexities of the customary system, and allude to possible future options in this area.

## MĀORI LAND

- 264 New Zealand in its entirety was once held by Māori under their own customary tenure. This tenure is generally agreed to be a “collective” one, in that the land belonged to all members of a defined group (usually a hapū). No individual interests in the land were discernible, though the group might allocate particular functions and productive activities to individuals as their right. The relationship between Māori and the land was not one of ownership in the Western sense; Māori saw themselves as belonging to the land, rather than the land belonging to them. This is denoted, in the Māori language, by an “o” marking in prepositions of possession.<sup>347</sup>
- 265 Very little of this “customary land”<sup>348</sup> remains in that form of customary ownership. The principal way in which Māori now hold traditional land is under

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<sup>344</sup> *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority & Anor* (HC, New Plymouth, 14 Aug 2000, Chisholm J, CP 18–99); *Attorney-General v Māori Land Court & Ors* [1999] 1 NZLR 689; *Hauraki Māori Trust Board & Anor v Treaty of Waitangi Fisheries Commission & Ors* [1995] 2 NZLR 703; *Grace v Grace* (HC, Rotorua, 8 Aug 1993, Master Feenstra CP 39–92). The section 61 procedure is under utilised. In the interests of efficiency and justice, the Māori Land Court has an important role to play as the appropriate fact-finding body in matters of Māori Custom Law. The distinction between the role of the High Court and the Māori Land Court is illustrated by a recent foreshore case: In *Attorney-General and others v Te Tau Ihu o Te Waka a Maui* (19 October 1998, Chief Judge Durie, Judges Smith, Carter and Isaac, MAC 5 Te Waipounamu Appellate Court Minute Book 1–11), the Māori Appellate Court held a preliminary hearing on the issue of whether it should state a case for the High Court on the points involved. The Appellate Court decided that it would be premature to state a case to the High Court in the absence of a factual inquiry into evidence supporting the claims in the Māori Land Court.

<sup>345</sup> ET Durie “Custom Law: Address to the New Zealand Society for Legal & Social Philosophy” (1994) 24 VUWLR 326.

<sup>346</sup> ET Durie *Submission to the Royal Commission of Inquiry into the Māori Land Courts* (unpublished paper, 1979) 47–49.

<sup>347</sup> Professor Pat Hohepa and Dr David V Williams *The Taking into Account of Te Ao Māori in Relation to the Reform of the Law of Succession* NZLC MP6 (Wellington, 1995) para 77.

<sup>348</sup> This term (and the corresponding terms “Māori Freehold Land” and “General Land” used below) are taken from *Te Ture Whenua Māori* 1993, Part VI.

Crown grant (or its equivalent) following a determination of ownership by the Māori Land Court or its predecessors (“Māori Freehold Land”). In most cases, such land is not held under the Land Transfer Act 1952 which applies to land owned by non-Māori. It is recorded instead at the Māori Land Court. This land may have been partitioned into smaller blocks after the original grant. As each owner dies, the successors may be noted against the records held in the Court. These records are known to be in an imperfect state, partly because of administrative difficulties in the Court registry, and partly because not all successors take steps to have their succession formally recorded. An often quoted view, which can only be considered as an educated guess, is that up to 50 percent of Māori land interest holders are no longer alive and no succession have been formally recorded. This is considered to be a best guess.

- 266 Māori Freehold Land may be held by individual owners or groups of owners, or by Māori corporations under Part XIII of *Te Ture Whenua Māori* 1993, or by one of the various trusts which may now be created under Part XII of that Act. These arrangements are variations of legal structures of English law, and they appear not to alter the underlying concept of individual ownership. However, in practice they can return the management of the land to a more collective character. One form of trust which has been popular in recent years is the “whānau trust”,<sup>349</sup> where the land is managed by trustees and profits are applied for the benefit of the descendants of a named ancestor of the whānau. Even here, though, the trust can be terminated by the Court and the property restored to its individual owners.<sup>350</sup>
- 267 Any other land held by Māori (“General Land”) is held under the Land Transfer Act 1952 and is not affected by the special provisions governing Māori land in *Te Ture Whenua Māori* Act 1993. Some of this land may be ancestral land which has passed out of the Māori Land Court system but is still retained by members of its whānau,<sup>351</sup> or other land purchased by Māori from their own resources (or possibly from the proceeds of sale of other ancestral property). Māori who own such land can apply to have it converted back to Māori Freehold Land.<sup>352</sup>

### Some statistics<sup>353</sup>

- 268 There are 25,887 Māori Freehold Land titles. 12,441 (48 percent) are unsurveyed and 14,852 (57 percent) are not registered under the Land Transfer Act 1952. It is estimated that 1,160,720 superseded ownership orders and 119,000 current ownership orders kept in the Māori Land Court are not registered under the Land Transfer Act. Approximately 30,000 new orders kept in the Māori Land Court are not registered under the Land Transfer Act. Approximately 30,000 new orders are made annually.

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<sup>349</sup> *Te Ture Whenua Māori* 1993, s 214.

<sup>350</sup> *Te Ture Whenua Māori* 1993, s 241.

<sup>351</sup> See Appendix B.

<sup>352</sup> *Te Ture Whenua Māori* Act 1993, s 133.

<sup>353</sup> Department for Courts statistics cited in a submission of the Māori Land Court Judges, presented to the Māori Affairs Select Committee:

- (a) In respect of the *Te Ture Whenua Māori* Amendment Bill 1999; and
- (b) On 14 September 2000.

269 Māori Freehold Land:

- comprises approximately 1,515,071 hectares<sup>354</sup> (almost six percent of New Zealand's land mass – 15 percent of the North Island and approximately a quarter of the Waiariki, Tairāwhiti and Aotea Māori land districts, the South Island has the lowest percentage of Māori land ownership at only 0.43 percent);
- generally has many multiple owners (an average of 62 per title. The lowest 10 percent of titles have one owner each; the highest 10 percent average 425 owners each);
- is comprised in 25,887 titles with an average size of 58 hectares (the smallest 10 percent average 88 square metres each; the largest 10 percent average 522 hectares each);
- is generally found in the poorest land use capability classes (80 percent in non-arable classes);
- is more likely than any other private land to be land locked (up to one-third);
- is more likely than any other private land to be unsurveyed (12,441 unsurveyed titles or 48 percent); and
- is less likely than any other private land to be actively managed.<sup>355</sup>

## THE MĀORI LAND COURT

270 For well over a century<sup>356</sup> the Māori Land Court has been the only Crown institution with the power to determine Māori customary rights to land.

271 The role of the Court upon its establishment was to supervise the transition of land titles from customary title to statutory title, which was individualised and designed to be easily alienable.

272 The court's records include the testimony of thousands of Māori for every tribal group in the country.<sup>357</sup> Accordingly, the Māori Land Court Minute Books are an extremely rich source of tribal whakapapa and debate. The authority of these Māori voices is often cited in support of contemporary discussions about tikanga Māori.<sup>358</sup> However, appropriate use of these sources requires an understanding of

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<sup>354</sup> Information provided by the information management team, National Office, Department for Courts. It was produced from the Department's Māori Land Information System (MLIS) and is approximate only due to some information not yet loaded in to the system as part of the conversion from manual to electronic record.

<sup>355</sup> Ahu Whenua Trusts administer 49.56 percent of Māori freehold land and it is the most popular method of Māori land administration. The incorporation is well utilised by Māori land owners and is responsible for 13.69 percent of Māori land. However, 19.42 percent of Māori Freehold Land is not administered by either a trust or an incorporation.

<sup>356</sup> The Māori Land Court (previously the Native Land Court) was established pursuant to the Native Land Act 1862.

<sup>357</sup> Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 34.

<sup>358</sup> Angela Ballara Iwi: *the Dynamics of Māori Tribal Organisation from c.1769 to c.1945* (Wellington, Victoria University Press, 1998) 88–92 and J Sissons *Te Waimana: The Spring of Mana – Tuhoē history and the colonial encounter* (Dunedin, University of Otago Press, 1991) 58–61.

the reasons for which they were created:<sup>359</sup>

The Native Land Court was far from a neutral agency called into being to recognise Māori customary law. It was established to continue the process of land acquisition stalled by Māori resistance in the late 1850s at a time when the colonial government had with military force successfully contained the primary challenges to its native policy.

- 273 Since 1958, considerable historical research has been undertaken on the operations of, and the circumstances surrounding, the original Native Land Court. Many doubts have arisen about the accuracy of early judicial opinion on aspects of tikanga Māori.<sup>360</sup> Judges had no training in Māori law, by upbringing or by preparatory education. They also had no need to be so trained, for the historical function of that court was not to identify Māori custom law but to change it to an English form, and the issues generally before that court related not to custom but to a new form of statutory law.<sup>361</sup>
- 274 Indeed, some judges, writing extra-judicially, disclosed obvious prejudices. For example:<sup>362</sup>
- land should be alienated for the benefit of colonists and the moral benefit of Māori, compelling them to work for a living. Māori landlessness was the natural and unavoidable consequence of the contact of the two races; and
  - that “proper” land tenure was the English feudal system, and the natural order of progression required that and custom should be bent to fit it.
- 275 The Native Land Court decisions may be seen as representing a euro-centric view of Māori evidence. In particular, the techniques of oral tradition were rarely understood by the Court.<sup>363</sup> This led to confusion or inferences of distortion, lying or bad memory. Most especially:<sup>364</sup>

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<sup>359</sup> Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) 34. Note, however, an interesting twist to the Crown’s attitudes to land acquisition: the Crown waived its general pre-emptive rights to extinguish native customary title. This is clearly stated in the preamble to the Native Lands Act 1862, which cancelled the right of pre-emption set out in Article II of the Treaty of Waitangi: “AND WHEREAS . . . Her Majesty may be pleased to waive in favour of the Natives so much of the said Treaty of Waitangi as reserves to Her Majesty the right of pre-emption of their lands”. Boast, in *Māori Land Law* at 52, states: “The plan now was that when Māori owners had obtained a certificate of title to their lands and a subsequent Crown grant they could, if they wished, sell the land to whomever they chose in the open market. This was a complete reversal of the previous practice of Crown pre-emptive purchase by deed”.

<sup>360</sup> See in particular the Waitangi Tribunal *The Whanganui River Report – Wai 167* (GP Publications, Wellington 1999).

<sup>361</sup> Waitangi Tribunal *Pouakani Report – Wai 33* (GP Publications, Wellington, 1993) 227–246; Waitangi Tribunal *The Whanganui River Report – Wai 167* (GP Publications, Wellington 1999) xiv.

<sup>362</sup> ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 96–97.

<sup>363</sup> Joan Metge “Time and the Art of Māori Storytelling” (1998) 8 *New Zealand Studies*.

<sup>364</sup> ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 96.

the Court did not appreciate the idiom, the customary predilections for synecdoche, where ancestors are used as symbolic of their descendants and posited as living at a later period, retrospectively, where a current hapū is depicted as having always existed, and telescoping, where the outcome of drawn out warfare or migration over generations is posited on having happened in one or two battles or in a single movement. The practice of using singular personal pronouns (I, he), to stand for the whole hapū, and the use of hapū names as though all were involved or had agreed, does not appear to have been regularly appreciated.

- 276 Māori claims and the evidence to support them began to be formulated in terms of the judges' expectations.<sup>365</sup> The Waitangi Tribunal has recently stated that it considers that only local claims focusing on specific pieces of land were put, with little reference to tribal interests as a result, for the simple reason that, having regard to the Native Land Court process itself, there was little other practical option. In addition, it doubts that the Court was giving effect to contemporary Māori practice.<sup>366</sup> As a result:<sup>367</sup>

[t]he case would be framed to suit the mindset of the adjudicator, and evidence of custom manicured to suit the terms of English law, with more emphasis on local use and occupation.

- 277 This may have been particularly so since the 1870s when, with the use of lawyers and agents, evidence probably became even more tailored to suit the judges' predilections or boundaries.

- 278 In addition, the judges were dependent on interpreters. In relating the mores of one language to another, however, the interpreter's task was necessarily subjective. Some interpreters had their own personal agendas in assisting purchasers, either through being involved in purchases, or allied to particular Māori groups. They interpreted Māori evidence according to their own preconceptions of the structure of tribal societies, viewing evidence through cultural filters.<sup>368</sup> Although assessors appointed under the Act legitimised judges rulings, they often had little influence.

- 279 The culmination of all of these factors was that:<sup>369</sup>

[j]udgments of the early Native Land courts . . . clearly demonstrate the consequences of Pākehā misconceptions of Māori tikanga, resulting in large numbers of Māori being deprived of their ancestral entitlements.

- 280 Another commentator goes so far as to say that the work of the Court amounted to "judicial raupatu" or confiscation every bit as injurious to Māori as the "legislative raupatu" under the New Zealand Settlements Act 1863.<sup>370</sup>

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<sup>365</sup> Angela Ballara Iwi: *the dynamics of Māori tribal organisation from c.1769 to c.1945* (Wellington, Victoria University Press, Wellington 1998) 88–92 and J Sissons *Te Waimana: The Spring of Mana – Tuhoe history and the colonial encounter* (Dunedin, University of Otago Press, 1991).

<sup>366</sup> Waitangi Tribunal *The Whanganui River Report – Wai 167* (GP Publications, Wellington 1999) 51.

<sup>367</sup> Waitangi Tribunal *The Whanganui River Report – Wai 167* (GP Publications, Wellington 1999) 52.

<sup>368</sup> ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 96.

<sup>369</sup> ET Durie "Justice, Biculturalism and the Politics of Law" in M Wilson and A Yeatman (eds) *Justice & Identity: Antipodean Practices* (Bridget Williams Books, Wellington, 1995) 36.

<sup>370</sup> David Williams *Te Kooti Tango Whenua: The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999) 64.

281 However, Justice Durie has pointed out that criticisms of the Native Land Court need to be tempered by the fact that the Court was bound to give effect to the policies of its governing legislation:<sup>371</sup>

Its task was largely impossible, to award land ownership to individuals having regard to custom when custom did not admit of that arrangement. The judges were also “slaves” to the colonial perception of custom and their opinions were merely representative of contemporary colonial society.

282 The truth of this statement is evident in the history of the Māori Land Court’s dealings with succession interests in Māori land.

## SUCCESSION

283 The present law of succession to property owned by Māori is predicated on the assumption that Māori have individual title to all the assets that might pass to others on their death. It relies largely on the general law of succession, which applies in its entirety to succession to all property other than Māori Freehold Land.<sup>372</sup> It also applies to Māori Freehold Land, except to the extent that specific provisions found in Te Ture Whenua Māori Act 1993<sup>373</sup> displace the general law.

284 The law governing succession to property demonstrates the difficulties of legislating to deal with the complexities of the customary system, in that the legislation attempts to follow the principles of custom law, while at the same time fitting more conveniently into the scheme of the general law.

285 In Appendix B, we set out materials drawn from Professor Richard Sutton’s preliminary work in the Law Commission’s Succession Project (1994–1997).<sup>374</sup> Part I considers:

- the present rules applying to succession to property and, in that context, the argument sometimes raised that the law of succession may well become obsolete because it is predicated on individual title;
- the evolution of the law of succession, which is marked by a number of phases in history: from attempts to govern according to custom; to being governed according to settled rules; to assimilation with the general law; and, since 1993, a return to distinctive Māori succession rules; and
- the negative effects on Māori of attempts to assimilate Māori succession laws with the general law and possible ways to ameliorate those effects.

286 Part II discusses some particular problems with enacting rules of succession which are intended to reflect customary law. In other words, it considers the situations where the customary values and principles of Māori to succession are different from those of the general system. In these situations judges and the legislature

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<sup>371</sup> ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) 98.

<sup>372</sup> See Te Ture Whenua Māori Act 1993: s 101 (general law of wills, testamentary claims and estate administration); and s 110 (intestacy).

<sup>373</sup> Part IV.

<sup>374</sup> Dr Pat Hohepa, Dr David Williams and the late Mrs Waerete Norman also contributed to the Law Commission Succession Law Project.

have encountered major problems. As examples, Part II refers to Māori customs relating to the following topics:

- ōhākī (formal oral wills);
- the long-term effect of wills and gifts;
- the requirements for a valid marriage; and
- the requirements for a valid adoption.

### **Succession: the future**

287 As a result of Māori concerns about the particular matters raised in Appendix B, as well as about the law of succession generally, there is a need to consider the development of options and processes that will allow for succession laws that better comply with Māori custom.

288 In an earlier discussion paper,<sup>375</sup> the Law Commission advanced a number of criteria for good laws of succession. From the submissions we received at that time, we can say that they are relatively, if not totally, uncontroversial in New Zealand society. More than that, they appear to be consistent with the objectives of Māori custom as it relates to succession.

289 The minimum criteria for good laws of succession are as follows:

- (1) that they promote family cohesion; that is to say, the existence of strong social relationships that lend themselves to voluntary co-operation and mutual support amongst family members. They also recognise and respect differences between different family and cultural groups;
- (2) that they recognise the freedom of the current owner (as representative of the family) to make decisions about what is to happen to his or her property after death. This allows life-time arrangements which may depart from general succession practice, but which can nevertheless be beneficial for the owner or the family; and
- (3) that they allow people to administer estates of their deceased relatives efficiently and to resolve any disputes quickly and inexpensively. This is assisted if there are relatively clear rules to deal with situations that are commonly encountered. However, the need for clarity must always be balanced against a concern to achieve the outcome that is best for the particular family concerned.

290 The Law Commission's consultation with Māori in the Succession Project led us to think that Māori will strongly support the first of these objectives. Māori have stressed that, within any indigenous culture, iwi and hapū should be free to operate their own rules and principles, which may differ in various parts of the country. They appear also to accept the second objective, though perhaps with the caveat that somewhat lesser weight is to be given to the owner's will, and greater weight is to be given to family decisions made before or immediately after the owner's death. And they seem not to dissent from the third objective, though it is unclear just where they would draw between clarity and particular solutions that are in the best interests of family and whānau.

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<sup>375</sup> New Zealand Law Commission *Succession Law: Testamentary Claims* NZLC PP24 (Wellington, 1996) Chapter 2.

- 291 The important point to stress in this context is that the basic objectives of Māori custom are held in common with those of the wider society. There is of course much variation in the way that these objectives are achieved as inquiry moves from one society, or from one culture, to another. There are special requirements and concerns that will be found in one and not others. But, after those have been accommodated, the basic structure and purpose remains the same. This point was demonstrated to us by our work in the Adoption and Coroners projects.
- 292 In *Coroners*,<sup>376</sup> it became apparent to us that the perceptions of Māori, as well as of those who identify with Anglo-Saxon traditions, have evolved. Many Māori now recognise and appreciate the benefits to be gained from post-mortems being conducted in particular circumstances, including health gains. For others in wider society, there has been a changing view of death and a move to accord more respect to the body of a loved one. As one submitter commented:<sup>377</sup>
- Just as we changed our birth practices in the second part of the 20th century, we need to change our death practices in the first half of the 21st century.
- 293 In *Adoption*,<sup>378</sup> there was little support expressed during the consultation process for a return to strict customary adoption practices. Rather, submitters felt that the best approach was to develop an adoption regime that is responsive to cultural values. In the first place, there are Māori who are alienated from their cultural heritage and may be more comfortable within a general regime. But more importantly, a number of submitters noted that many of the values given prominence in Māori custom as regards adoption are now universal. For instance, it seems that New Zealand society as a whole has shifted its view about secrecy in adoption and now favours a principle of openness.
- 294 The lesson to be learned from such examples is that we need to be wary of completely supplanting particular customary practices into today's environment without taking into account how custom and society may have changed.<sup>379</sup> Both English and Māori culture have evolved and continue to do so. The extent to which we can draw on the best of each tradition enriches both.
- 295 In relation to succession, one general resolution from the hui was for a return to a marae-based dispute resolution process. We note that an expanded jurisdiction of the Māori Land Court will allow it to facilitate such a process, and in that way seek to join the best of the current system and tikanga. This and other options for the future are discussed further in Chapter 6.

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<sup>376</sup> New Zealand Law Commission *Coroners: A Review* NZLC PP36 (Wellington, 1999).

<sup>377</sup> Submission dated 13 October 1999 and referred to in New Zealand Law Commission *Coroners: A Review* NZLC PP36 (Wellington, 1999).

<sup>378</sup> New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* NZLC R65 (Wellington, 2000).

<sup>379</sup> The dynamism of Māori custom law is stressed in Chapter 1.

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## 5

# Māori custom law and the Treaty of Waitangi

296 **I**N EARLIER CHAPTERS we have already discussed the common law doctrine of aboriginal rights which imports the basic principles of land law and equity but with a significant overlay of Māori customary law. In *Te Runanganui o te Ika Whenua Inc. Society v Attorney-General*, Cooke P (as he then was) affirmed the point of overlay:<sup>380</sup>

It is as well to underline that in recent years the Courts in various jurisdictions have increasingly recognised the justiciability of claims of indigenous peoples . . . [including] the New Zealand courts in a line of cases in which it has been seen, not only that the Treaty of Waitangi has been acquiring some permeating influence in New Zealand law, but also that treaty rights and Māori customary rights tend to be partly the same in content.

297 Māori custom law is a source of Treaty law:<sup>381</sup>

The primary source of treaty law is of course the Treaty itself with its guarantees of real property rights, tribal autonomy, the protection of Māori customary law and equality.

298 The Treaty promised protection of Māori custom and cultural values.<sup>382</sup> The guarantee of rangatiratanga in Article II was a promise to protect the right of Māori to possess and control that which is theirs:<sup>383</sup>

in accordance with their customs and having regard to their own cultural preferences.

299 In this chapter we discuss the Treaty of Waitangi, the treaty law that has developed, and consider some issues arising from references to the Treaty or its

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<sup>380</sup> [1994] 2 NZLR 20.

<sup>381</sup> Joseph Williams “The Technical and Mechanical Issues” NZLS Seminar – *Treaty of Waitangi Issues: the Last Decade and the next Century*, 30.

<sup>382</sup> Waitangi Tribunal Report *Findings and Recommendations of the Waitangi Tribunal on an Application by Aila Taylor for and on behalf of Te Atiawa Tribe in Relation to Fishing Grounds in the Waitara District – Wai 6* (Department of Justice, Wellington, 1983) and Waitangi Tribunal *Te Reo Māori Report – Wai 11* (Wellington, 1986).

<sup>383</sup> Waitangi Tribunal Report *Findings and Recommendations of the Waitangi Tribunal on an Application by Aila Taylor for and on behalf of Te Atiawa Tribe in Relation to Fishing Grounds in the Waitara District – Wai 6* (Department of Justice, Wellington, 1983) 51. This phrase has been directly or indirectly quoted in numerous later Tribunal reports including Waitangi Tribunal Report *of the Waitangi Tribunal on the Orakei Claim – Wai 9* (Wellington, 1987) 134–135; Waitangi Tribunal *Ngāi Tahu Report – Wai 27* (Brooker & Friend Ltd, Wellington, 1991) 3 WTR 219, 824; Waitangi Tribunal *The Mohaka Review Report – Wai 119* (Wellington, 1992) 63.

“principles” in legislation. We also discuss the role of the Waitangi Tribunal and refer to the Treaty claims and settlement process.

## THE TREATY

### Legal significance

- 300 The purist view that the Treaty, not having been adopted in domestic law,<sup>384</sup> does not have legal significance is increasingly seen as unrealistic. The constitutional and social influence of the Treaty has been underscored by decisions of the ordinary courts and the Waitangi Tribunal. It has been described as:<sup>385</sup>

. . . simply the most important document in New Zealand’s history.

- 301 Professor J F Burrows in his text on Statute Law in New Zealand offers two reasons to describe Treaty relevance to Statute Law:<sup>386</sup>

*First*, a court would today be most reluctant to interpret a statute in a sense which was repugnant to the Treaty of Waitangi. Clear statutory words could doubtless achieve this result, but a presumption in favour of the Treaty principles must influence the interpretation of any ambiguous or unclear expressions. Thus in the *Huakina*<sup>387</sup> case it was held that in deciding whether to grant or refuse a water right under the Water and Soil Conservation Act 1967 the Tribunal should treat the Treaty as part of the context in which the legislation was to be interpreted. The Treaty, in other words, was part of the legal backdrop against which the legislation must be read. This presumption derives support from the guidelines for preparation of legislation recommended by the Legislation Advisory Committee and adopted by Cabinet in 1987: all prospective legislation should be examined with regard to its implications for the Treaty at policy approval stage.

*Secondly*, New Zealand domestic statutes are increasingly making express reference to the Treaty. The Treaty of Waitangi Act 1975 sets up the Waitangi Tribunal which can consider claims for breach of the Treaty, and has far-reaching powers to make recommendations with regard to property taken in contravention of the Treaty.

- 302 In *Huakina*, where the Treaty assisted statutory interpretation though the Treaty was not stated expressly in the legislation, Chilwell J stated:<sup>388</sup>

. . . the authorities . . . show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute of the obligations of the Crown to the Māori people . . . There can be no doubt that the Treaty is part of the fabric of New Zealand society.

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<sup>384</sup> Refer Chilwell J’s survey of the authorities in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

<sup>385</sup> Sir Robin Cooke (now Lord Cooke of Thorndon) (1990) 14 NZULR 1. Cf Chapman [1991] NZLJ 228, and the replies to Chapman by McHugh [1991] NZLJ 316, Rikys [1990] NZLJ 330 and Williams [1991] NZLJ 373.

<sup>386</sup> *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210 .

<sup>387</sup> J Burrows *Statute Law in New Zealand* (Butterworths, Wellington, 1992) 239. Note that the 1996 edition of the Cabinet Office Manual now provides in the context of development of the legislative programme that Ministers must draw attention to any aspects of a proposed bill that have implications for, or may be affected by, the Treaty of Waitangi.

<sup>388</sup> *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210.

- 303 There are now a number of statutes containing references to the Treaty of Waitangi.<sup>389</sup>
- 304 The cases *Attorney-General v New Zealand Māori Council*<sup>390</sup> and *Taiaroa v Attorney-General*<sup>391</sup> support the proposition that even if a statute conferring an administrative discretion makes no reference to the Treaty, the Treaty principles may be a relevant consideration.

### Significance accorded by Māori

- 305 Māori have always placed significance on the Treaty of Waitangi far in excess of that given to it by the rest of the community.<sup>392</sup> Chief Judge Durie (as he then was) made the point eloquently in 1988.<sup>393</sup>

The primacy Māori give to the Treaty of Waitangi is not new. For them, our current preoccupation with the Treaty cannot be seen as some quaint academic exercise or the pursuit of some new fashion currently in vogue. We do not understand the Treaty, in my view, if we do not also appreciate that Māori have promoted the Treaty for nearly 150 years. For the like period of time it has been the focal point of numerous tribal and pan tribal hui that began even before the wars of the 1860's. It has been the main concern in a welter of parliamentary petitions, the key issue in a rash of court cases, and the main burden of numerous pilgrimages and pleas to Buckingham Palace and Westminster, both this century and the last.

### *Two versions*

- 306 There has been much disagreement in Treaty discourse about the intent and nature of the rights and obligations accorded to Māori and the Crown under the Treaty. Many of the difficulties arise because the Treaty is written in both Māori and English. The abstract legal language of the English version of the Treaty is in complete contrast to the idiomatic Māori employed in the Māori text. The Treaty contains a Preamble and three Articles. There is also an argument for recognition of what has been termed as the Fourth Article.<sup>394</sup>

### *The Preamble*

- 307 In English, the Treaty provided for a transfer of sovereignty to the Crown (Article 1) in exchange for guarantees that tribal properties would be protected, and sold only to the Crown (Article 2). In addition, it promised Māori the same citizenship rights as British subjects (Article 3).<sup>395</sup> Most of the debate has centred around

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<sup>389</sup> See paras 352 and 353.

<sup>390</sup> [1991] 2 NZLR 129.

<sup>391</sup> High Court, Wellington Registry, CP 99–94 (unreported October 1994).

<sup>392</sup> See, for example, the resolutions of the national hui held on Turangawaewae marae in 1984, set out in David Williams "The Constitutional Status of the Treaty of Waitangi: An Historical Perspective" (1990) 14 NZULR 9, 12–13.

<sup>393</sup> ET Durie *Understanding the Treaty* (speech to the New Zealand Law Society, April 1989) 8.

<sup>394</sup> See paras 312–316.

<sup>395</sup> Mason Durie *Te Mana Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) 177.

Articles I and II and varying perspectives on how the Māori signatories understood the exchange. However, the Treaty begins, not with Article I and its controversy about sovereignty, but with the Preamble which contemplated a new society of Māori and immigrants, living together in peace. In this way, the Treaty promoted a vision for all New Zealanders.<sup>396</sup>

308 In the Māori version, the Māori signatories ceded kāwanatanga to Queen Victoria by Article 1 and reserved to themselves te tino rangatiratanga by Article 2.

309 The translation into Māori was undertaken by the Reverend Henry Williams of the Church Missionary Society. The Reverend Henry Williams was assisted in the task of translation by his son Edward, then 21, who had learnt his Māori in the course of growing up in close proximity to Māori communities, not as an adult learner, and possibly had more of a feel for its idioms than his father.<sup>397</sup> Professor Mason Durie explains that:<sup>398</sup>

Williams used the transliteration, “kāwanatanga”, as an equivalent for sovereignty. It failed to capture the concept of absolute power, and the choice of word was in contrast to his use of “mana” when describing Māori sovereignty in the 1835 Declaration of Independence. On the other hand for “full exclusive and undisturbed possession” in the second article Williams employed a much more powerful phrase – tino rangatiratanga. Williams’ translation had the net effect of converting the Māori version of Article II into a statement about continuing Māori authority and negated some of the strength of the English version of Article 1. He introduced an ambiguity.

310 Professor Sir Hugh Kawharu’s translation of Article II of the Māori text of the Treaty, prepared for the *New Zealand Māori Council* case,<sup>399</sup> which has been frequently relied upon in the superior courts and in the Waitangi Tribunal, is in these terms:

The Queen of England arranges [and] agrees to the chiefs, to the sub tribes to people all of New Zealand the unqualified exercise of their Chieftanship over their villages and over their treasures all.

311 He adds the footnote:

Unqualified exercise of the Chieftanship would emphasise to a chief the Queen’s intention to give them complete control according to *their* customs.

### The “fourth article”

312 At hui considering whether or not to adhere to the Treaty during the nine months that Treaty copies were taken around New Zealand in 1840, key issues of debate and discussion included concerns as to the status of Māori customary law and the role of chiefs in the new colonial order.

313 Scholars have argued for the vital importance of a “protocol” to the Treaty of Waitangi, sometimes called the “fourth article”, embracing respect for every form

<sup>396</sup> Justice Durie has referred to the notion of the settlers as people of the treaty (tangata tiriti) embracing all New Zealanders who are not tangata whenua (the indigenous people).

<sup>397</sup> Claudia Orange *The Treaty of Waitangi* (Allen & Unwin New Zealand Ltd, Wellington, 1987) 15.

<sup>398</sup> Mason Durie *Te Mana Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) 177.

<sup>399</sup> *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

of distinctiveness – including that of custom and religion.<sup>400</sup> They are referring to an oral statement made on Hobson’s behalf in English and Māori immediately prior to the first signings of the written form of the Treaty of Waitangi. The statement read to the meeting is as follows:

E mea ana te Kāwana ko ngā whakapono katoa o Ingarani, o ngā Weteriana, o Roma, me te ritenga Māori hoki e tiakine 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.

- 314 The imperial consul explicitly guaranteed protection of ritenga Māori (Māori custom).<sup>401</sup> The statement was written down and recorded by missionary witnesses but was not reported on in Hobson’s official despatches and it has been dismissed by the historian Claudia Orange as “a verbal commitment given only by chance” which “amounted to very little”.<sup>402</sup> There were however a number of other instances of both oral and written promises being made in the course of the Treaty’s travels in 1840 which apparently guaranteed governmental respect for Māori customary rights and which were officially recorded. Ward instances some of them:<sup>403</sup>

The officials, for their part, considered that by recognising customary Māori land claims in the Treaty they had taken all necessary measures to confirm chiefly privileges. Major Bunbury, Hobson’s first military commander, proffering the Treaty to Hapūku of Hawke’s Bay, stated that “It was not the intention of Her Majesty’s Government to lower the chiefs in the estimation of their tribes, and that his signature being now attached to the Treaty would only tend to increase his consequence by acknowledging his title”. In order to avert suspicion of the Treaty, Hobson also issued a circular letter repudiating suggestions that the Māori would be degraded by the advent of British authority, and telling the chiefs that “the Government will ever strive to assure unto you the customs and all the possessions belonging to the Māoris”. Finally, missionary George Clark was appointed Chief Protector of Aborigines and instructed to assure the Māori “that their native customs would not be infringed, except in cases that are opposed to the principles of humanity and morals”.

- 315 Chief Judge Durie, in extra-judicial remarks, and the Waitangi Tribunal in a 1997 report, have now clearly come down in favour of the view that the Crown representations in 1840 on respect for Māori custom are indeed important in

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<sup>400</sup> T L Buick *The Treaty of Waitangi: How New Zealand Became a British Colony* (Capper Press, Christchurch, 1976) 152–153.

<sup>401</sup> In the context of Māori custom law, Dame Joan Metge discusses the Māori words tikanga, kawa, ture and ritenga. The word “ritenga” is sometimes used as a synonym for tikanga. It is a noun formed from the adjective “rite” which has the basic meaning of “like” (similar to): Joan Metge *Commentary on Judge Durie’s Custom Law* (unpublished paper for the Law Commission, Wellington, 1996) 3–7. According to Williams, “ritenga” means “likeness” and also “custom, habit or practice”, that is, the repetition of the like actions: HW Williams *Dictionary of the Māori Language* (Legislation Direct, Wellington, 7th Edition: 1971, rep 2000) 343.

<sup>402</sup> Claudia Orange *The Treaty of Waitangi* (Allen & Unwin New Zealand Ltd, Wellington, 1987) 53.

<sup>403</sup> Alan Ward *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand* (Reprinted with corrections, Auckland University Press, Auckland, 1995) 45.

Treaty jurisprudence. Hobson's "fourth article" statement at Waitangi is one of the representations which has been highlighted. Durie has said:<sup>404</sup>

In any event a mono-legal regime had not been contemplated during the execution of the Treaty of Waitangi. On the contrary, Māori were specifically concerned that their own laws would be respected. There was no lack of clarity in their position that they were not about to give away the laws of their forebears. At Waitangi the debate became mixed with a dispute amongst the representatives of the missionary churches. There the governor's response, as translated to English, was read out for him as follows:

The Government says the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Māori custom, shall be alike protected by him.

This is sometimes called the fourth article. The government had adjourned to consider the matter and had delivered a written response.

By the time the Treaty reached Kaitaia however, the debate, and the Māori insistence on respect for their own law, had crystallised. Correctly in my view, Māori identified the issue as one not just of law but authority. Nopera Panakareao, the leading rangatira of Muriwhenua, put it this way in the Treaty debate at Kaitaia that, "the shadow of the land goes to the Queen but the substance remains with us".

Due to poor health the governor could not attend at Kaitaia but there Willoughby Shortland conveyed the Governor's explicit message:

The Queen will not interfere with your native laws or customs.

American precedent is undoubtedly correct in asserting that in treaties with indigenous people of oral tradition, verbal promises are as much a part of the Treaty as that subscribed to in the documentation. It cannot then be said, as a matter of fact, that the Treaty introduced the law of England if the corollary is that Māori laws then ceased to be applicable. The Treaty is rather authority for the proposition that the law of the country would have its source in two streams.

- 316 Similar arguments appear in a section of the Muriwhenua Land Report where the Tribunal acknowledged and gave weight to the importance of oral statements made by speakers for both partners to the Treaty debates, including Tamati Waka Nene's admonition to Hobson:<sup>405</sup>

You must preserve our customs and never permit our lands to be wrested from us.

## THE WAITANGI TRIBUNAL

### Jurisdiction

- 317 The Treaty of Waitangi Act 1975 established the Waitangi Tribunal,<sup>406</sup> which is charged with making recommendations on claims relating to the practical

<sup>404</sup> ET Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 Otago Law Review 449, 460–461. Durie's source of the fourth article text is W Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Wellington, 1890) 32. See also, Waitangi Tribunal *The Whanganui River Report – Wai 167* (GP Publications, Wellington 1999) 264.

<sup>405</sup> Waitangi Tribunal *Muriwhenua Land Report – Wai 45* (GP Publications, Wellington, 1997) 112–114. The source for Shortland's statement at Kaitaia is John Johnson's journal, 28 April 1840, Auckland Public Library.

<sup>406</sup> For a general account of the Waitangi Tribunal and its evolution, see R P Boast, "The Waitangi Tribunal: Conscience of the Nation or Just Another Court?" (1993) 16 Univ NSW LR 223.

application of the principles of the Treaty of Waitangi and determining whether certain matters are inconsistent with those principles. In carrying out its duties, the Tribunal is obliged to consider both the English and Māori versions of the Treaty and for the purposes of the Act it has:<sup>407</sup>

exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them.

318 By section 6(1) of the Act, the Tribunal is required to inquire into claims made by Māori that they are, or are likely to be, prejudicially affected by acts or omissions of the Crown<sup>408</sup> that are “inconsistent with the principles of the Treaty”.

319 The nature of the Tribunal’s jurisdiction and its procedures differ markedly from those of the regular courts. Professor Gordon Orr explains that:<sup>409</sup>

It is more concerned with investigating past and present acts and omissions of government and officials and examining Crown policy and practices than deciding questions of law. It frequently has to delve into a murky and confused past to uncover, as best as the available evidence will allow, what actually happened 100 or more years ago.

## Membership and procedure

320 A unique feature of the Waitangi Tribunal is that it is bicultural in its composition and modus operandi. Its membership comprising Māori and Pākehā (who together bring to the Tribunal skills in law, history, anthropology and an understanding of custom law) reflects “the partnership between the two parties to the Treaty”.<sup>410</sup> Further, the Tribunal is expressly authorised to regulate its procedure as it thinks fit and in so doing may have regard to and adopt such aspects of marae protocol as it thinks appropriate in any given case. The chairperson of the Tribunal has said that he does not know of any other body that:<sup>411</sup>

determines historical facts and interprets a cross-cultural treaty through a tribunal equally representative of both the cultures involved, and which, in hearing claims, utilises the procedural protocols of each.

321 Tribunal reports are admissible as evidence in High Court proceedings. In *Ngāi Tahu Māori Trust Board v Attorney-General*,<sup>412</sup> the Court said that:

. . . while the *Muriwhenua* judgment [*Te Rūnanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641] holds that the Waitangi Tribunal reports are not legally binding, it also holds that they may be admitted in Court proceedings under s 42 of the Evidence Act 1908 and underlines that they can be very helpful to the Courts and provide valuable evidence. A report by the Tribunal on Ngāi Tahu claims is awaited and may well extend to tribal sea fishery history and practices in the South Island

<sup>407</sup> Section 5(2) Treaty of Waitangi Act 1975.

<sup>408</sup> In full, section 6(1) refers to any ordinance, Act, regulation, order, proclamation, notice or other statutory instrument, policy or practice, or act or omission of the Crown.

<sup>409</sup> Gordon Orr *The Treaty of Waitangi: Legal Procedures and their Implications* (a paper presented at the Institute for International Research Seminar; Wellington; 28–29 September 1992) 4.

<sup>410</sup> Gordon Orr *The Treaty of Waitangi: Legal Procedures and their Implications* (a paper presented at the Institute for International Research Seminar; Wellington; 28–29 September 1992) 2.

<sup>411</sup> From a paper given by Chief Judge Durie at the Oxford Symposium on New Zealand Race Relations, 29 November 1989 – set out in W Renwick *The Treaty Now* (GP Books, Wellington, 1990) 17.

<sup>412</sup> (unreported 27 February 1990 CA 42/90) .

waters. If so, it could be of significance in the High Court's consideration of this case in the event of the case going to trial. If the litigation does continue the High Court Judges should be given the opportunity of deciding whether or not it is preferable to wait for that report.

322 In describing its role in interpreting evidence on tikanga Māori, the Waitangi Tribunal stated that:<sup>413</sup>

It is one thing for a Māori to give evidence in terms of their customs and quite another thing again to give evidence that explains them. It is how customary evidence is interpreted that is the more crucial matter. The Tribunal uses expert evidence, Māori or Pākehā, for that purpose. Today, we have the benefit of anthropologists who provide just that. Anthropology was but a fledgling discipline in 1958, and Māori studies had still to receive independent recognition in universities. Moreover, today there are Māori who are able to clarify the meaning behind the symbols and to impart knowledge of their customs in terms comprehensible to Europeans.

## Claims

323 Since 1983 there has been a flood of claims representing:<sup>414</sup>

. . . Some of the great causes of New Zealand history, including the Ngāi Tahu transactions, Māori fishing rights, the confiscation under the New Zealand Settlements Acts, and the Native Land Acts, are now squarely before the Tribunal.

324 The claims to land and other natural resources including rivers, foreshores, sea-beds, hunting and fishing rights have raised wider issues of whether resource management and development policies should reflect particular cultural preferences. Fundamentally, claimants seek the assurance of a place in the life of the nation.<sup>415</sup>

325 The Treaty has been a rallying point for diverse claims, listed by the then Chairperson of the Tribunal in 1986 as follows:

- 1 There are claims to particular land, hunting and fishing rights.
- 2 There are claims with regard to rivers, lakes, foreshores, and harbours.
- 3 There are claims to the just redress of past dispossessions and land losses.
- 4 There are claims to the better accommodation of Māori preferences in law, including for example, environmental laws, land laws, laws affecting the placement and adoption of children, laws governing the right to bring group actions and even laws on criminal matters and the punishment or treatment of offenders.
- 5 There are claims to a greater involvement in national administration, in the Legislature, Public Service, Judiciary and Local Government.
- 6 There are claims seeking a greater awareness of Māori attitude, culture and beliefs within the general public and the more sensitive provision of many Government services.

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<sup>413</sup> Waitangi Tribunal *The Whanganui River Report – Wai 167* (GP Publications, Wellington, 1999) 279.

<sup>414</sup> P Spiller, J Finn, R Boast *A New Zealand Legal History* (Brookers, Wellington, 1995) Ch 4.

<sup>415</sup> See also New Zealand Law Commission *The Treaty of Waitangi and Māori Fisheries – Mataitai: Ngā Tikanga Māori me te Tiriti o Waitangi* NZLC PP9 (Wellington, 1989) for a comprehensive overview of Government policies and Māori grievances in respect to fisheries, rivers, lagoons, harbours and sea-beds.

- 7 There are claims to the maintenance of Māori language, customs, tradition and identity; not just the freedom to indulge in customary practices but, according to the claims, the right to the state assisted propagation of them.
  - 8 There are claims to the right to self-determination through tribal or other special bodies.
  - 9 There are claims to a greater share of resources allocated for such things as broadcasting, welfare programmes and economic development.<sup>416</sup>
- 326 At the heart of many of these claims is the Māori desire to regain their culture and customs, which the Crown at various times has sought to suppress, deny and extinguish in breach of Treaty principles.<sup>417</sup> Thus, examples of Treaty breach include suppression of the Māori language, especially in schools;<sup>418</sup> suppression of Māori custom in relation to ownership of land;<sup>419</sup> and the destruction of Māori tribalism and autonomy.<sup>420</sup> The consequences of the suppression of culture and custom and the alienation of land and taonga are that Māori have suffered identity loss resulting in social and cultural impairment. The Taranaki Report particularly demonstrates the consequences of alienation and deprivation of resources.<sup>421</sup>

Taranaki Māori were dispossessed of their land, leadership, means of livelihood, personal freedom, and social structure and values. As Māori, they were denied their rights of autonomy, and as British subjects, their civil rights were removed. For decades, they were subjected to sustained attacks on their property and persons.

All were affected, even non-combatants, because everyone's land was taken, people were relocated, land tenure was changed, and a whole new social order was imposed. The losses were physical, cultural, and spiritual. In assessing the extent of consequential prejudice today, it cannot be assumed that past injuries have been forgotten over time. The dispossessed have cause for longer recall. For Māori, every nook and cranny of the land is redolent with meaning in histories passed down orally and a litany of land marks serves as a daily reminder of their dispossession. This outcome had been foretold. As Sir William Martin, our first Chief Justice, said, when opposing confiscation in 1864:

The example of Ireland may satisfy us how little is to be effected towards the quieting of a country by the confiscation of private land; ... how the claim of the dispossessed owner is remembered from generation to generation and how the brooding sense of wrong breaks out from time to time in fresh disturbance and crime.

<sup>416</sup> ET Durie "The Waitangi Tribunal: Its Relationship with the Judicial System" (1986) NZLJ 235, 236.

<sup>417</sup> See paras 334–351 for a discussion of these principles.

<sup>418</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on Te Reo Māori Claim – Wai 11* (Wellington, 1996). See also Judith Simon (ed); Linda Tuhivai Smith et al, *The native schools system 1867–1969 – Ngā Kura Māori* (Auckland University Press, Auckland, 1998).

<sup>419</sup> Waitangi Tribunal *The Te Roroa Report – Wai 38* (Wellington, 1992), see also Waitangi Tribunal *The Pouakani Report – Wai 33* (Wellington, 1993), Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi – Wai 143* (GP Publications, Wellington, 1995).

<sup>420</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim – Wai 9* (1987), Waitangi Tribunal *Muriwhenua Land Report – Wai 45* (GP Publications, Wellington, 1997).

<sup>421</sup> Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi – Wai 143* (GP Publications, Wellington, 1995).

327 The disregard of cultural values, combined with socio-economic disadvantage and ineffective services was a central theme in *Justice: The Experiences of Māori Women Te Tikanga o te Ture Te Mātauranga o ngā Wāhine Māori e pā ana ki tēnei*.<sup>422</sup> The Law Commission was informed by Māori women:<sup>423</sup>

. . . that they did not have ready access to the legal system, and too often said it was something of which they did not feel part. They usually expressed their feelings in terms of inadequate performance of the Treaty of Waitangi.

328 What the women saw as the relevant principles promised by the Treaty were:

- the values of Māori must be respected and protected (the Article II promise); and
- Māori should participate in the new society and feel as much at home in New Zealand and its institutions as other New Zealanders (the Article III promise, reinforced by the Preamble to the Treaty of Waitangi).

### The approach of the Waitangi Tribunal

329 The Tribunal has chosen to focus on the spirit of the Treaty of Waitangi rather than focus exclusively on the strict written terms.

330 The Waitangi Tribunal has come down clearly in favour of the view that Crown representations in 1840 that tikanga Māori would be respected are indeed important in Treaty jurisprudence.<sup>424</sup>

331 A critical promise of the Treaty was to develop a secure place for two cultures. As was stated in *The Mangonui Report*:<sup>425</sup>

It was inherent in the Treaty's terms that Māori customary values would be properly respected, but it was also an objective of the Treaty to secure a British settlement and a place where two people could fully belong. To achieve that end the needs of both cultures must be provided for, and where necessary, reconciled.

332 The Treaty is concerned with a reciprocal relationship between two parties. It is important to realise that it not only imposes obligations on the Crown; Māori also have obligations. Sir Apirana Ngata stated that:<sup>426</sup>

[the Treaty] has given Māori people rights which they would not have been accorded under any conqueror . . . We are the possessors of rights which we must qualify to exercise and of obligations which the Māori must discharge.

333 In balancing the rights and obligations between Māori and the Crown, both the Waitangi Tribunal and the courts have contributed to the development of a number of broad Treaty principles.

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<sup>422</sup> The Commission suggested strategies based on the Treaty of Waitangi by which State agencies could best promote justice for Māori women and drew extensively on the reports of the Waitangi Tribunal.

<sup>423</sup> New Zealand Law Commission *Justice: The Experiences of Māori Women Te Tikanga o te Ture Te Mātauranga o ngā Wāhine Māori e pā ana ki tēnei* NZLC R53 (Wellington, 1999) 1.

<sup>424</sup> See above, paras 315–316.

<sup>425</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim – Wai 17* (Wellington, 1988) 60.

<sup>426</sup> Cited in E Ramsden *Sir Apirana Ngata and Māori Culture* (A H & A W Reed, Wellington, 1948) 55–56.

## Treaty principles

- 334 The function of the Waitangi Tribunal is to investigate whether the matters complained of are inconsistent with the principles of the Treaty.<sup>427</sup>
- 335 The Waitangi Tribunal has made it clear that the Treaty of Waitangi encapsulates a mutual exchange to benefit the nation as a whole. Thus the Treaty must be applied to today's circumstances. At times, compromise is required to adjust to an evolving society. The Waitangi Tribunal has consistently stressed this point which lies behind and is acknowledged in the phrase "principles of the Treaty".
- 336 Similarly, in delivering the advice of the Privy Council in *New Zealand Māori Council v Attorney-General*,<sup>428</sup> Lord Woolf made the following observation:
- Both the 1975 Act and the 1986 Act refer to the "principles" of the treaty. In their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty). With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms.
- 337 The following principles, although by no means a definitive list, illustrate this approach.

## Property

- 338 The Waitangi Tribunal and the courts have elucidated that a fundamental principle of the Treaty is the protection and preservation of Māori property and taonga. The Māori version of the Treaty uses the phrase "wenua o ratou kainga me o ratou taonga katoa". W(h)enua signifies lands and kainga habitation; and the last three words can be literally translated as "all things valued or all things treasured."<sup>429</sup> Taonga may be tangible (such as fisheries) or intangible (such as the Māori language).

## Custom

- 339 We have already referred earlier in this chapter to the Treaty promise of the protection of Māori custom and cultural values. There are two further subsidiary principles. First, the right extends to control of property in accordance with

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<sup>427</sup> See the discussion concerning the Tribunal's jurisdiction, at paras 317–319.

<sup>428</sup> [1994] 1 All ER 623, 629.

<sup>429</sup> See the Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim – Wai 8*, (Wellington, 1985); Waitangi Tribunal *Report Findings and Recommendations of the Waitangi Tribunal on an Application by Aila Taylor for and on behalf of Te Atiawa Tribe in Relation to Fishing Grounds in the Waitara District – Wai 6* (Department of Justice, Wellington, 1983); Waitangi Tribunal *Report of the Waitangi Tribunal on the Te Reo Māori Claim – Wai 11*, (Wellington, 1986). See also *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC).

custom and having regard for cultural preferences.<sup>430</sup> Secondly, it extends to the protection of their tino rangatiratanga, being the full authority, status and prestige as regards Māori possessions and interests.<sup>431</sup> The right therefore encompasses the preservation for Māori of their customary title<sup>432</sup> and the Crown's obligation to take active steps to ensure that Māori have and retain full exclusive and undisturbed possession of their culture.<sup>433</sup>

### Partnership

- 340 In essence, this principle requires that the Crown and Māori act towards each other reasonably and with the utmost good faith.<sup>434</sup>
- 341 The Court of Appeal has emphasised that the principle of partnership does not necessarily involve an obligation of equal sharing in all things.<sup>435</sup>
- 342 In its report, *Justice: The Experiences of Māori Women: Te Tikanga o te Ture Te Mātauranga o ngā Wāhine Māori e pā ana ki tēnei*, the Law Commission explains that:
- The principle is not to be viewed narrowly as a commercial relationship; it is akin to the value of fraternité (fraternity) recognised in the motto of France.
- 343 We think that the concept is of a family – where value and respect should be accorded to each member.<sup>436</sup>

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<sup>430</sup> Waitangi Tribunal Report *Findings and Recommendations of the Waitangi Tribunal on an Application by Aila Taylor for and on behalf of Te Atiawa Tribe in Relation to Fishing Grounds in the Waitara District – Wai 6* (Department of Justice, Wellington, 1983) 51.

<sup>431</sup> Waitangi Tribunal Report of the Waitangi Tribunal on the Manukau Claim – Wai 8 (Wellington, 1985) 67.

<sup>432</sup> *Te Runanganui o te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, 24; Waitangi Tribunal Report of the Waitangi Tribunal on the Orakei Claim – Wai 9 (Wellington, 1987) 135.

<sup>433</sup> Waitangi Tribunal Report of the Waitangi Tribunal on the Orakei Claim – Wai 9 (Wellington, 1987) 135.

<sup>434</sup> Waitangi Tribunal *Muriwhenua Fishing Report – Wai 22* (Department of Justice, Wellington, 1988). However, see criticisms of this principle by Round D “Judicial Activism and the Treaty: the Pendulum Returns” (2000) 9 Otago Law Review 653.

<sup>435</sup> *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 at 152 per Cooke P.

<sup>436</sup> Bishop Manuhuia Bennett and Dame Joan Metge suggest that an understanding of the principle may be captured by what Hobson is reported to have said to each of the rangatira as they signed the Treaty of Waitangi:

“He iwi tahi tatou.” (See Claudia Orange *The Treaty of Waitangi* (Allen & Unwin New Zealand Ltd, Wellington, 1987) 55).

The usual translation “we are one people” misses the point. Dame Joan Metge states in *Comments provided to the Law Commission on our draft paper “Māori Custom and Values in New Zealand Law”* (16 February 2001) that the Māori has to be examined carefully:

- (1) ‘He’ may be singular or plural – it may identify ‘one people’ or two or more ‘peoples’.
- (2) ‘Iwi’ itself contains the idea of a whole made up of several parts.
- (3) ‘Tahi’ does mean ‘one’ as a dictionary entry but (according to H W Williams *Dictionary of the Māori Language* (Legislation Direct, Wellington, 7th Edition: 1971, rep 2000))

### *Recognition*

- 344 The Tribunal has drawn attention in recent times to the importance of decision-makers giving equal weight to the Māori worldview, the Māori value system, and Māori law and policies.<sup>437</sup>

### *Active protection*

- 345 The Tribunal has expressed the opinion that the Treaty guarantees oblige the Crown to take positive action in the protection of Māori Treaty interests. Implicit in this principle is the idea that the Crown cannot avoid its duty of active protection by delegating responsibilities to others.<sup>438</sup>

### *Autonomy*

- 346 This principle encompasses the right of Māori to determine their own policies, to actively participate in the development and interpretation of the law, to assume responsibility for their own affairs and to plan for the needs of future generations.<sup>439</sup>

### *Options*

- 347 The Waitangi Tribunal concluded in *The Muriwhenua Report*<sup>440</sup> that the Treaty of Waitangi recognises the right of Māori individuals to retain their identity and traditional practices and where they so desire to adopt partially or wholly their cultural practices.

### *Development*

- 348 This principle recognises that culture is not static. The integrity of tikanga Māori is not threatened, rather it is enhanced, by its ability to adapt and evolve as society changes.<sup>441</sup>

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‘in predicative or adjectival clauses strict idiom requires the use of kotahi’. Tahi used as an adverb means ‘together simultaneously’, e.g. mahi tahi is ‘working together’; since the verb in the sentence is the verb ‘to be’, ‘tahi’ could mean ‘being together’.

(4) ‘Tātou’ implies the involvement of several people belonging to at least two distinct groups: mātou plus koutou.

Hobson’s saying could better be translated as “We are distinct peoples, yet we are also together as one”.

<sup>437</sup> Waitangi Tribunal *Muriwhenua Land Report – Wai 45* (GP Publications, Wellington, 1997) 1–5.

<sup>438</sup> Waitangi Tribunal *Findings and Recommendations of the Waitangi Tribunal on an Application by Aila Taylor for and on behalf of Te Atiawa Tribe in Relation to Fishing Grounds in the Waitara District – Wai 6* (Department of Justice, Wellington, 1983).

<sup>439</sup> Waitangi Tribunal *Taranaki Report: Kaupapa Tuatahi – Wai 143* (GP Publications, Wellington, 1996).

<sup>440</sup> Waitangi Tribunal *Muriwhenua Land Report – Wai 45* (GP Publications, Wellington, 1997) 1–5.

<sup>441</sup> Waitangi Tribunal *Muriwhenua Fishing Report – Wai 22* (Department of Justice, Wellington, 1988).

### *Fiduciary duty*

- 349 The Tribunal considers it a fundamental principle of the Treaty that the Crown owes a fiduciary duty of good faith to Māori.<sup>442</sup> Such duty includes the obligations:
- to use any right of pre-emption to protect Māori from excess purchases, and not to use it to stifle competition for Māori land so as to deprive Māori of the fair price;
  - the duty not to use other unfair means when dealing with Māori; and
  - the obligation to abide by traditional Māori values.<sup>443</sup>

### *Economic protection*

- 350 This principle recognises the Crown obligation to protect, preserve and promote the economic development of Māori. This includes:
- a duty to ensure that Māori are now left with sufficient land and other resources for their maintenance and support and livelihood and that each hapū maintains a sufficient endowment for its foreseen needs;<sup>444</sup>
  - such endowment is not just an endowment sufficient to survive but sufficient to profit and to prosper;<sup>445</sup> and
  - Māori have a right to develop and expand such resources using modern technologies and are not to be consigned to those technologies known at the time of the Treaty.<sup>446</sup>
- 351 An overarching principle of the Treaty is that the Crown should remedy past breaches in all but very special circumstances.<sup>447</sup> In developing these Treaty principles, the Waitangi Tribunal has earned a reputation for sound judgment and reasoned argument:<sup>448</sup>

Not content to accept a jurisprudence shaped only by western custom and practice, the Tribunal has interpreted concepts of justice, fairness, and ownership from Māori perspectives, drawing on the rich evidence from Māori claimants and the knowledge and skills of individual Māori members themselves. Moreover, the Tribunal has been able to conceptualise Māori positions in terms of western law and history and in so doing has contributed greatly to New Zealand's understanding of its heritage.

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<sup>442</sup> *Te Rūnanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, CA 305–306.

<sup>443</sup> Waitangi Tribunal *The Te Roroa Report – Wai 38* (Wellington, 1992) 30.

<sup>444</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim – Wai 9* (Wellington, 1987) 147.

<sup>445</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim – Wai 22* (Wellington, 1988) 194.

<sup>446</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim – Wai 22* (Wellington, 1988) 220; Waitangi Tribunal *Ngāi Tahu Sea Fisheries Report – Wai 27* (GP Publications, Wellington, 1992) WTR 8, 253–254.

<sup>447</sup> *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, CA, 664–665.

<sup>448</sup> Mason Durie *Te Mana Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) 186.

## Treaty references in legislation

352 There has been much controversy in recent times about whether the term “the principles of the Treaty of Waitangi” should be incorporated into legislation. The Law Commission has submitted that Treaty reference is supportable if it is clarified by a more explicit expression of Parliament’s will. The Law Commission considered this matter in its submission to the Health Committee on the New Zealand Public Health & Disability Bill 2000. We reproduce some extracts from that submission:

- 3 It is desirable that Parliament so far as possible provide the courts with guidance as to Parliament’s precise intention. It would be counterproductive if a provision no doubt designed to emphasise commitment to the harmonious provision of health services were to give rise to uncertainty leading to disharmony and division.
- 5 The problem in essence is that the expression “the principles of the Treaty of Waitangi” is not one of legal art. There is no agreement as to what precisely the principles are. If Parliament uses so general a term this has two consequences.
  - One is that those required to comply with the statute cannot know with any certainty what it is that they must do or omit. In the end the only way to resolve such uncertainty is by obtaining a court ruling. Such a course results in expense and delay.
  - The second is that by using so general a term Parliament is in effect delegating its law-making function to the courts, which left with the job of trying to define Parliament’s intention are likely to have no alternative but themselves to invent the meaning that Parliament has failed to articulate.
- 6 The expression “principles of the Treaty of Waitangi” has been employed in a number of public acts. They are (leaving out statutes giving effect to Treaty settlements) in chronological order:

Treaty of Waitangi Act 1975 section 6(1)  
Environment Act 1986 (long title)  
State-Owned Enterprises Act 1986 section 9  
Conservation Act 1987 section 4  
Education Act 1989 section 181(6) (added 1990)  
Crown Minerals Act 1991 section 4  
Resource Management Act 1991 section 8  
Foreshore and Seabed Endowment Revesting Act 1991 section 3  
Harbour Boards Dry Land Endowment Revesting Act 1991 section 3  
Crown Research Institutes Act 1992 section 10  
Hazardous Substances and New Organisms Act 1996 section 8  
Crown Pastoral Land Act 1998 section 25 and 84  
Energy Efficiency and Conservation Act 2000 section 6  
Hauraki Gulf Marine Park Act 2000 section 6

The cases where use of the expression has led to litigation seem to warrant the conclusions

- that where the provision containing the expression stands on its own the use of the expression has led to uncertainty;
  - that where the provision containing the expression is fleshed out with more specific provisions it is the more specific provisions that tend to be applied so as to provide that certainty. There arises the question whether the wider expression is necessary or whether it is surplusage.
- 7 The best known example of the first class is section 9 of the State Owned Enterprises Act 1986. It is well documented that the meaning ascribed by the Court of Appeal

to the State Owned Enterprises Act 1986 section 9 was not that intended by the government of the day, a result that could have been avoided if the interests the government wished to protect had been identified and specified in the statute.

- 8 An example of the second class may be the Resource Management Act. The general reference in section 8 of that statute which reads:

TREATY OF WAITANGI—

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)

is fleshed out by such more specific provisions (some of which descend from earlier legislation) as section 6(e) which requires protection and provision for:

The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga

and section 7(a) which requires regard to kaitiakitanga, defined in section 2(1) as meaning:

The exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources, and includes the ethic of stewardship.

- 9 The consequence of this approach is that although the Resource Management Act section 8 has been invoked more generally (it was unsuccessfully relied on for example by the man who attempted to cut down the land mark pine tree on One Tree Hill), in practice the provisions that have mattered are those already referred to in sections 6 and 7.
- 10 If this argument is correct then more detailed research than is appropriate in the present context is likely to demonstrate that section 8 is really surplusage and could be repealed without the effect of the Resource Management Act being changed in any way.
- 353 Parliament should make its purpose clear, so that legislation can be seen clearly both as conforming with basic principles and also recognising, where appropriate, that distinctive treatment is legitimate.

### **The Treaty of Waitangi and Te Ture Whenua Māori Act 1993**

- 354 Te Ture Whenua Māori Act represented a change in policy direction by the Legislature to acknowledge the importance of the relationship of land to Māori and to promote land retention.<sup>449</sup> The Preamble to the Act contains a Treaty reference:

Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kāwanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whānau, and their hapū: and to facilitate the occupation, development, and utilisation of that land for

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<sup>449</sup> See the discussion in Appendix B, *Extracts from the Succession Law Project – Part I*.

the benefit of its owners, their whānau, and their hapū: And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles:

BE IT THEREFORE ENACTED by the Parliament of New Zealand as follows:

355 Section 2 of the Act provides:

(1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble to this Act.

356 Notwithstanding the Treaty reference in the Preamble, the scope for the Treaty to become the basis for the administration of Māori land is limited due to the prescriptive nature of the Act. The Māori Land Court does not have an inherent jurisdiction, but instead derives its powers from the exact provisions of the Act. It is therefore not free to read a Treaty duty or obligation into a provision since this would effectively expand its jurisdiction beyond the bounds of the Act. To give an example, it is a fundamental principle of the Act that Māori land be retained and developed “for the benefit of its owners, their whānau and hapū”. The specific jurisdiction of the Māori Land Court cannot be enforced to create new rights. For example, the Court of Appeal in *Grace v Grace*<sup>450</sup> affirmed that the policy of the Act is to promote the retention of Māori Freehold Land in the hands of its owners, their whānau and hapū and restricted spousal interests to life interests in matters of succession.

357 It would seem that if the Treaty is to be given effect, it will require the exercise of judicial discretion to the extent permitted by the provisions of the Act.

### **Treaty claims and settlement process**

358 We have discussed earlier in this chapter that a claim can be made under the Treaty of Waitangi Act 1975 by any Māori who is or is likely to be prejudicially affected by Crown actions which were or are inconsistent with the principles of the Treaty.

359 Generally claims to the Waitangi Tribunal are made on behalf of kin groups to which the claimant can establish relationships through whakapapa.

360 Once the Waitangi Tribunal has inquired into the claim it can make recommendations to the Crown:<sup>451</sup>

. . . that action be taken to compensate for or remove the prejudice or to remove other persons from being similarly affected in the future.

361 Once the Waitangi Tribunal has made recommendations in terms of section 6(3) of the 1975 Act it becomes a matter for Government to negotiate with the claimant group once a mandate to negotiate has been approved.<sup>452</sup>

362 In Chapter 4 we referred to section 30 of Te Ture Whenua Māori Act 1993 which provides a process whereby the appropriate representatives of hapū and iwi can be

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<sup>450</sup> [1995] 1 NZLR 1; [1994] NZFLR 961 (CA).

<sup>451</sup> Section 6(3) of the Treaty of Waitangi Act 1975.

<sup>452</sup> The Government may also enter into direct negotiations with claimants without the benefit of Waitangi Tribunal recommendations.

tested by a specially constituted Māori Land Court panel. The Law Commission's advisory report outlines the specific issues and problems of mandate and representation.<sup>453</sup> We therefore do not expand those issues here. We simply make the point that Māori dispute resolution requires a court facilitation process rather than a court determination process. Disputants can then decide for themselves the tikanga that should apply.

- 363 A significant issue discussed by the Māori Land Court and the Law Commission relates to the governance and administration of Treaty settlement assets as a consequence of the settlement of Treaty claims between Māori and the Crown. This proposal raises a number of questions and issues for further work which are outlined in the next chapter. A central question to be addressed is the place of tikanga in the business of tribal governance arrangements of kin owned assets arising as a result of Treaty of Waitangi settlements.
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<sup>453</sup> New Zealand Law Commission *Determining Representation Rights under Te Ture Whenua Māori Act 1993 – An Advisory Report for Te Puni Kōkiri* NZLC SP8 (Wellington 2001).

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## 6 Future work

### INTRODUCTION

364 **H**ISTORY HAS DEMONSTRATED that despite some of the earlier attempts by the courts to recognise Māori custom, their discretion in doing so was severely limited by clear parliamentary intention to the contrary. The legislature has been active in recognising, suppressing, denying and then making further attempts at recognising Māori custom law. This process is clearly evident in legislation dealing with Māori land tenure.<sup>454</sup> Notwithstanding the severe blows of history, tikanga underpinning Māori custom law survives. It does so largely because of the immense struggle by Māori since 1840 to hold onto tikanga.

365 In recent times, the history of this struggle has been re-written in the reports of the Waitangi Tribunal. The claims made through the Waitangi Tribunal demonstrate that Māori seek to re-establish a relationship with their lands and other resources. Fundamentally, Māori seek to reclaim their culture and identity.

366 The work of the Waitangi Tribunal is critical in the fact-finding process. Its great strength is to lay out the facts which can lead to a change of public perceptions and, importantly, public policies. The quality of successive tribunals and their balanced approach to the work before them has led to a process of reconciliation of Māori with the State. However there is still a distance to go, for example, in developing the complementary roles of the Waitangi Tribunal and the Māori Land Court in the claims resolution process.

367 The Māori Land Court too is progressively evolving, and continues to change. It now also has a crucial role in applying tikanga. In the past twenty years the Chief Judge of the Māori Land Court has also held the office of Chairperson of the Waitangi Tribunal. The Māori Land Court and the Tribunal are informed by the work of each other. In a recent submission to the Māori Affairs Select Committee the Māori Land Court Judges suggested that perhaps:<sup>455</sup>

The court is misnamed. It should probably have been called the Māori Lands and their Communities Court, for behind every block of land there is a kin group community. It is the relationship between that kin group and the land which gives the court its work.

368 The Māori Land Court is essentially a family court where te reo Māori is spoken, and where tikanga is observed in the processes of the court.<sup>456</sup> There is a

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<sup>454</sup> See Appendix B.

<sup>455</sup> Submission of the Māori Land Court Judges to the Māori Affairs Select Committee on Te Ture Whenua Māori Amendment Bill 1999.

<sup>456</sup> Based on anecdotal reports from the increasing numbers of Māori appointments to the Māori Land Court.

developing opportunity for the court to become the primary dispute resolution forum in respect of all assets held by traditional kin groups.<sup>457</sup>

- 369 Most importantly, Māori themselves support the recognition of tikanga Māori and a better relationship between tikanga and the general law.
- 370 The drive by Māori to guarantee recognition of tikanga secures significant justification from a legal and constitutional context. In a society that seeks to advance a relationship envisaged under the Treaty of Waitangi, the law and legal and political institutions should reflect the values underlying tikanga.
- 371 A legal system which is out of step with the values of the people it affects is incapable of achieving justice for those people.<sup>458</sup>
- 370 Proposals for law reform must therefore take into account the variety of Māori experiences and living arrangements in New Zealand today and to reflect the fact that tikanga Māori varies in content from community to community.
- 371 In this chapter we discuss ideas for a future work programme in the Law Commission to give effect to Māori values in the laws of New Zealand.
- 372 Our ideas are not exclusive. The Commission welcomes other ideas and comments on any of the ideas raised in this chapter.

## THE LAW COMMISSION

- 373 We consider:
- The basis upon which further work in the Law of Succession might proceed; and
  - The proposed After Settlement Asset Project (ASAP).

## SUCCESSION

- 374 The Law Commission's consultation with Māori in 1995–96 on matters of succession identified a number of concerns expressed by Māori. They were principally that:
- there were differences between tikanga and te ture and that tikanga should be given effect both generally and in relation to succession matters;
  - issues relating to adoption practices should be examined; and
  - the coronial system did not give effect to Māori cultural values and failed to understand that matters of burial and death are central to a culture.

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<sup>457</sup> See paras 382–401, After Settlement Assets Project.

<sup>458</sup> The New Zealand Law Commission noted in *Justice: The Experiences of Māori Women Te Tikanga o Te Ture Te Mātauranga o ngā Wāhine Māori e pā ana ki tēnei* NZLC R53 (Wellington, 1999) that the justice system was not meeting the needs of Māori women and their families. The consequence was that Māori women expressed little or no confidence in the system which is intended to bring all New Zealanders under the rule of law – the principle that peace and good order result from common acceptance of Parliament's laws.

- 375 The Law Commission has dealt with the adoption matters in its report *Adoption and Its Alternatives: A Different Approach and a New Framework* NZLC R65. It has also reported on the coronial system and made recommendations for reform in *Coroners* NZLC R62. In both of these reports, the Commission has considered matters of tikanga and made recommendations for change both to the substantive law and to the matters of procedure.
- 376 In matters relating to succession, we have identified some of the critical problems in Chapter 4 and Appendix B, both of which draw upon the earlier work in the Succession Law Project. In order to progress this important project and achieve concrete proposals for a law of succession firmly rooted in Māori custom, we consider that the following steps are required:
- The first step is to consider the antecedent rights of holders of ancestral property that is to be succeeded. It is our view that what is required is to undertake a proper analysis of the competing rights.
  - The second step is to consider how competing property claims should be handled. There is need to ensure that questions of succession on death be dealt with not in isolation from but in conjunction with questions of antecedent property rights.
  - The third step is to consider the processes to facilitate dispute resolution. It will be necessary to consider amendments to the jurisdictions of either the Māori Land Court or the ordinary courts.
- 377 The preliminary thinking in the Succession Law Project considered a number of options for reform:<sup>459</sup>
- The first option is to continue with Pākehā based rules and procedures which Māori use to reach Tikanga solutions. Specific tasks would be modified, but otherwise the procedures for dealing with Māori succession issues would remain in the hands of the Māori Land Courts.
  - The second option is to base a dispute resolution process solely on customary rights and procedures. Pākehā law would withdraw from the decision making process entirely. Problematic issues like cross-cultural marriages and inter-iwi issues would be left for a tikanga process to decide. Whenever an issue arose in a Pākehā court, an appropriate iwi and hapū representative would advise the court of the outcome.
  - The third option is the recognition by Pākehā law of the autonomy of Māori customs, with established procedures for an iwi decision making process. The recognition of a tikanga process by the courts would help facilitate a dialogue between the courts and iwi. This may be viewed as answering some of the more difficult questions (for example, jurisdictional problems, and cross-cultural marriages). The third option is the Commission's recommended approach.
- 378 Since the work regarding succession was done, the mediation provisions in Te Ture Whenua Māori Act 1993 are now in the process of being strengthened and

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<sup>459</sup> Richard Sutton *Draft Preliminary Paper on Māori Succession Laws* (NZLC, Revised Version, 17 April 1997) 78–79.

resources allocated.<sup>460</sup> In considering proposed changes, the Māori Affairs Committee recently stated:<sup>461</sup>

The amendments we proposed to [s 30] are extensive. They represent, in our eyes, a progressive shift away from the approach taken in the past by the Court in imposing decisions on parties, to a Court interested in facilitating the resolution of differences by the parties themselves or by mediation. Six of the proposed new sections provide either directly or indirectly for mediation.

These amendments were developed through an extended process involving a special consultation committee convened by officials with key interest group representatives to assist in its development. Quality submissions were made by participants resulting in the useful identification of particular issues and valuable discussion on their possible remedy. We also considered a very useful advisory report from the Law Commission.

- 379 The points addressed by the options considered in our succession law project are therefore being given expression in recent developments in this area. However much more work is needed.
- 380 One possibility concerns a proposed new project relating to assets received on settlement of Treaty claims. It may be that the new project could also consider the competing claims of Māori to both taonga and ancestral property.
- 381 We go on to discuss this project.

### **After Settlement Asset Project**

- 382 The ideas and planning of this project are drawn from the discussions between the Chief Judge of the Māori Land Court and the Law Commission. Indeed, the Commission has proposed this project for its future Work Programme for 2001. We set out the issues in this paper because:
- it is of such significance that it is right that the work commence;<sup>462</sup> and
  - the Law Commission welcomes responses to the ideas developed thus far, in order to refine the scope and purpose of the project.

### *Introduction*

- 383 A contemporary issue of major significance for all New Zealanders is the need to devise structures to ensure the success of settlements entered into by the Crown with Māori for historic grievances arising out of breaches of the principles of the Treaty of Waitangi. Of particular importance is the need to facilitate the efficient administration of the new class of kin-owned assets.
- 384 After a settlement has been negotiated, those with a mandate to govern the administration and allocation of the settlement assets must decide how the assets are to be administered and allocated to enable the betterment, economically and socially, of the group on whose behalf they have been negotiated.

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<sup>460</sup> Te Ture Whenua Māori Amendment Bill 1999.

<sup>461</sup> Te Ture Whenua Māori Bill – Māori Land Amendment Bill (Government Bill as reported back from the Māori Affairs Select Committee, 336–2) 4–5.

<sup>462</sup> It was an issue identified in the Māori Land Court Judges' submission on Te Ture Whenua Māori Amendment Bill 1999 to the Māori Affairs Select Committee as an issue confronting the Māori Land Court within the next five years.

385 As the Chief Judge of the Māori Land Court recently noted in relation to such assets:<sup>463</sup>

The next ten years will see inevitably an increase in kin-group discussion and disputation over issues such as:

- governance capacity;
- succession and/or membership of the beneficiary kin group;
- leadership accountability to the kin group;
- beneficiary participation in policy formulation for the kin group; and
- benefit distribution and utilisation.

386 There is need for a project to fulfil the following functions:

- (1) To assess the need for a distinct dispute resolution jurisdiction in respect of the discharge by tribal organisations of their trust/fiduciary/public law obligations in the administration, on behalf of kin groups, of settlement assets.
- (2) If it is determined that such a need has arisen or will arise, then to identify the circumstances in which such jurisdiction should be exercised and the principles which should guide its exercise.
- (3) To identify the forum and processes most appropriate to resolving these disputes within their cultural, commercial and administrative context.<sup>464</sup>
- (4) To propose, if it is considered appropriate, a legislative framework around which this jurisdiction might operate.

### *Reaching a settlement*

387 After a settlement has been negotiated, a Heads of Agreement or Memorandum of Understanding will be developed recording the parties' intentions to settle the claim in principle. The Ministry of Justice in the Post Election Briefing Documents for Incoming Ministers advised the requirements the Crown seeks from the negotiators:

#### 4.4.5 Governance entities

Most claimant groups do not have governance structures in place at the start of the negotiation process suitable to receive settlement assets. There is no single governance entity model; some claimants seek statutory bodies and others use incorporations or companies. Mandate disputes often concern issues associated with governance, such as whether settlement assets will be held centrally and what is the role of people outside the rohe.

Under the Terms of Negotiation and Heads of Agreement the Crown seeks agreement from claimant negotiators that before settlement assets can be transferred a governance structure needs to be in place that:

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<sup>463</sup> Submission of the Māori Land Court Judges to the Māori Affairs Select Committee on Te Ture Whenua Māori Amendment Bill 1999, 13.

<sup>464</sup> A possible model for such a process is proposed in Richard Sutton's *Draft Preliminary Paper on Māori Succession Laws* (NZLC, Revised Version, 17 April 1997) – see the discussion of Ngā Kaimaungarongo (Referees for customary processes) beginning in Ch 14.

- Is representative of, and accountable to, the claimant community
- Has a transparent decision making and dispute resolution process
- Has been ratified by the claimant community.

The Office of Treaty Settlements, like the Treaty of Waitangi Fisheries Commission, is currently working through what are the desirable characteristics for governance entities. An issue under consideration is the establishment of generic governance entity legislation.

The options include:

- (a) Dealing with governance entity issues on a case-by-case basis
- (b) Creating further generic requirements for governance entities, eg by legislation.

388 The Crown then requires a Deed of Settlement to be executed between the claimant group and the Crown recording the basis upon which both the claims and overlapping claims are to be settled. By this time, representation issues relating to the governance and allocation of settlement assets should have been well and truly solved. Legislation may be enacted to give effect to the settlement, for example, the Ngāi Tahu Claims Settlement Act 1998. If the system is operating well, issues will no longer relate to “what is the appropriate vehicle for asset allocation” but rather “how is the vehicle working”.

389 It is important to ensure that, in dealing with settlements and the settlement process, the New Zealand legal system furthers the objectives of the rule of law and can respond to an accepted set of rules, values or principles. In general terms it is important that the obligations of the parties be clear and the rules applied be sufficiently stable to allow those who are participating in the process to be assisted by them in reaching and enforcing arrangements made among them.

390 Examples are now arising of attempts to re-open what have generally been regarded (rightly or wrongly) by New Zealanders as full and final settlements. These cases have arisen because of the failure to define adequately the claimant group when mandate to negotiate for settlement is given, or to define the claimant group adequately in the legislation designed to give effect to the settlement. An example of such an attempt to re-open a settlement can be found in *Ngāti Apa ki Te Waiāpouamu Trust v Her Majesty the Queen of New Zealand*.<sup>465</sup> The question raised by the appeal was stated by Elias CJ:

. . . whether, in the Act which settles the Ngāi Tahu Treaty claims, Parliament has deprived the people of Ngāti Apa who live on the West Coast of the South Island of the status to raise their own claim.”

391 In other cases there has been disagreement over whether a particular group of Māori should be treated as part of the group for whose benefit the settlement has been made. See for example *Greensill v The Tainui Māori Trust Board*<sup>466</sup> unreported, *Te Rūnanga o Muriwhenua v Noho*<sup>467</sup> and *Kai Tohu Tohu o Puketapu Hapū Incorporated v The Attorney-General*.<sup>468</sup> The courts considered that these cases did

<sup>465</sup> (8 May 2000, Court of Appeal, CA154/99).

<sup>466</sup> (17 May 1995, High Court, Hamilton, M117/95, Hammond J).

<sup>467</sup> (2 December 1998, High Court, Whangarei, CP43/98, Fisher J).

<sup>468</sup> (5 February 1999, High Court, Wellington, CP344/97, Doogue J).

not raise justiciable issues. The issues of who represents whom and for what, and the nature of responsibilities between the leaders and the led, are issues which go to the heart of tikanga Māori. In the context of Māori custom they raise fundamental issues, although they may be viewed in the context of orthodox public law to be non-justiciable.

- 392 In the fisheries settlement particular difficulties occurred because of the way in which all Māori were treated as having the same type and quality of interest in fishery assets. This led to litigation over the interpretation of the term “iwi” and whether urban Māori should share in the overall settlement of fisheries claims into which the Waitangi Tribunal is now precluded from inquiring further by section 6(7) of the Treaty of Waitangi Act 1975. See, in particular, *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission*.<sup>469</sup> The issues in that case arise out of the meaning given to the word “iwi” in schedule 1A of the Māori Fisheries Act 1989.

### *The issues*

- 393 In discussing the need for this project, it is necessary to consider splicing together aspects based on Māori custom law, and those parts of the existing law based on equity and public law obligations, which can be transplanted to deal adequately with the contemporary problems. In the context of asset administration, there are major issues that arise:
- (a) How can the correct balance be struck between the need for “group” assets to be managed to maximise economic benefit (on the one hand) while preserving rights for members of the group who do not believe that the assets are being managed for their benefit to complain and be heard on such issues (on the other)?
  - (b) To what extent are the principles of equity derived from English law applicable in determining how the stewards of the assets should manage them for the benefit of those who are beneficially entitled to them?
  - (c) Do public law duties exist in respect of the stewardship and management of assets which flow to a group of Māori from a Treaty settlement?
  - (d) How does one regulate the rights of those who form part of the “group” among themselves? To what extent is some supervisory jurisdiction needed from a court or tribunal if the group is unable to reach its own resolution of issues through hui or through the use of mediation?
  - (e) Given that the group of Māori entitled to share in settlement assets will, in most cases, be linked through whakapapa, how does one take into account values underpinning Māori society such as whanaungatanga, manaakitanga and ahi kā? How can these cultural values be threaded into an appropriate structure for both:

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<sup>469</sup> [2000] 1 NZLR 285 (HC) and 331 (CA). See also Professor Mason Durie’s comments on this case, and his discussion concerning the need to facilitate positive Māori development: Mason Durie “Beyond Treaty of Waitangi Claims: The Politics of Positive Development” in Ani Mikaere and Stephen Milroy (eds) *Te Hunga Rōia Māori o Aotearoa, 1998 Tenth Annual Conference Proceedings: Ki Te Ao Marama 2000*, 14ff.

- governance of entities which hold assets on behalf of kin groups; and
  - the way in which those entitled to share in the assets can regulate matters between themselves?
- (f) How does one link all of the issues set out above with the needs of and for confidence in the management structures? How can these needs be balanced against other factors to secure economic growth of “group” assets and to maximise benefits to the entitles? In this regard:
- who has authority to bind the group?;
  - what power does the possession of mana give to a leader in the administration of assets?;
  - how can a structure be built which enables those dealing at arm’s length from the “group” to rely on an authority to bind the group while preserving rights of members to disagree among themselves?;
  - how does one engender confidence in relation to the management or administration of the assets for the benefit of the group? For example, how can a financial institution’s needs for quick decisions be met?; and
  - to what extent can practices be improved to recognise the need for financier confidence so that Māori can grow economically? There are two aspects to this:
    - (a) the need for a financier to have an incentive to lend to an entity (if a banker has to do extra work to understand the structures and the way in which the entities will work it may be less likely that the financier will lend to that particular group); and
    - (b) the need for education of financiers and building their own confidence in relation to corporate governance structures.

394 Some brief commentary on the issues set out above follows.

395 The public law element has been recognised in some cases. See, in particular, the recent series of litigation relating to governance issues in Waikato of *Tainui*,<sup>470</sup> also *Kai Tohu Tohu o Puketapu Hapū Incorporated v The Attorney-General*<sup>471</sup> and *Te Rūnanga o Te Ati Awa v Te Ati Awa Iwi Authority*<sup>472</sup> in which both Judges recognised that decisions made by certain tribal authorities could be reviewable under the Judicature Amendment Act 1972. In the latter case Robertson J expressly left open the extent of review after considering the observations made by the Court of Appeal in *Finnigan v New Zealand Rugby Football Union*.<sup>473</sup>

396 In determining the extent to which the court may intervene by way of review it would seem that the court will have regard to Tikanga Māori. But, as recognised by Robertson J in *Te Ati Awa* case evidence as to what constituted (in that case)

<sup>470</sup> *Mahuta v Porima* (High Court Hamilton M290/00 9 November 2000 Hammond J); *Porima v Te Kauhanganui o Waikato Inc* [2001] 1 NZLR 472; and *Mahuta v Porima* (High Court Hamilton M238/00 22 September 2000 Hammond J).

<sup>471</sup> (High Court Wellington CP 344/97 5 February 1999 Doogue J).

<sup>472</sup> (High Court New Plymouth CP 13/99 10 November 1999 Robertson J).

<sup>473</sup> [1985] 2 NZLR 181.

Tikanga a Te Ati Awa was geometrically opposed and it was difficult for the High Court to form a view on the issue. This has a bearing on both the extent to which such matters should be reviewable by the courts and, if reviewable, the appropriate court by which decisions should be reviewed. Are such decisions (properly) justiciable? If so, what forum should adjudicate? Should there be a specialist forum appointed on an ad hoc basis by the Chief Judge to deal with tikanga issues?<sup>474</sup>

- 397 Other examples where a public law element exists are:<sup>475</sup>
- Resource Management Act powers which may be delegated to tribal entities. The tribal groups would be exercising public law powers;
  - policy and planning processes exercised in respect of the administration of papakainga, tribal reserves and fishing reserves (mahinga mataitai); and
  - some issues already dealt with the Māori Land Court concerning the administration of kin-owned land.
- 398 In addressing corporate governance issues and in weighing orthodox corporate structures against Māori values of whanaungatanga and manaakitanga it is important to devise structures which enable disputes among beneficiaries to be resolved. Yet, to what extent are these issues justiciable?
- 399 Should Treaty settlement deeds be required to contain dispute resolution mechanisms in respect of issues which may arise among members of the group?
- 400 Is it possible to devise objective criteria by which certain types of disputes can be judged? If so, this would aid both understanding of the issues by disputants and assist determination in respect of justiciable issues.
- 401 As a consequence of reviewing all of the above matters and of splicing elements of trust, equity, public/private law, administrative law and custom law, it may be that an indigenous form of public law is developed which draws on the best of English legal traditions and Māori values. Ultimately the purpose of this law will be to provide a set of values or principles to guide the exercise of powers both by and within Māori socio-political kin groups.

## CONCLUSION

- 402 If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Māori values within New Zealand society, then the commitment must be total. It must involve a real endeavour to understand what tikanga Māori is, how it is practised and applied, and how integral it is to the social, economic, cultural and political development of Māori, still encapsulated within a dominant culture in New Zealand society.
- 403 However, it is critical that Māori also develop proposals which not only identify the differences between tikanga and the existing legal system, but also seek to find some common ground so that Māori development is not isolated from the rest of society.<sup>476</sup>

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<sup>474</sup> Compare ss 29 and 32 Te Ture Whenua Māori Act 1993.

<sup>475</sup> Submission of the Māori Land Court Judges to the Māori Affairs Select Committee on Te Ture Whenua Māori Amendment Bill 1999 (14 September 2000), 13, para 8.3.

<sup>476</sup> See Judge Michael Brown's address, *Actualising the Partnership* (Te Oru Rangahau Māori Research and Development Conference, Massey University 7–9 July, 1998).

404 The differences do not need to be seen as overwhelming. Māori and the courts each have a love of law, precedent and forebears, and these are commonalities that can be built upon.

405 It is fitting to finish with a quotation from the swearing in speech of Justice Durie who came to love two sources of law:<sup>477</sup>

It is now my great pleasure to sit beneath the NZ coat of arms, as revised in 1956, which may be thought to give some expression to the Kīngitanga depiction of the relationship between Māori and Pākehā, symbolised in the Kīngitanga saying – the English Queen on one side, the Māori King on the other, God over both and love uniting them together. In an earlier version of the coat of arms the figures on either side of the crest were looking straight ahead, but in 1956 their heads were turned to face each other. Sometimes, be it ever so slowly, we progress by symbols.

406 The Law Commission seeks to play its part, in co-operation with Māori and other New Zealanders to progress this vision in the development of the laws of New Zealand.

Tungia te ururoa, kia tupu whakaritorito

Te Tupu a te harakeke.

Burn off the overgrowth, so that new shoots  
of flax bush may grow.

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<sup>477</sup> Justice Durie was sworn in to the High Court, Wellington on 23 October 1998.

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## APPENDIX A

### History of the Custom Law Project

- A1 **T**HE LAW COMMISSION CONVENED a meeting in 1995 to discuss the proposal for a project that would focus on Māori custom. In attendance were kaumātua, Māori and non-Māori lawyers, anthropologists, historians and the Māori Committee to the Law Commission. The meeting supported the project. It identified a need to provide a basis for further development of the laws of New Zealand within a bicultural framework, and increased understanding of Māori concepts and contemporary values among members of the wider Māori and Pākehā communities. It considered, in particular, that there is a very real need for judges to be aware of Māori cultural practices and values. Although judges are not the only people who have the need or desire to understand the issues that are identified in this document, their impact on the lives and aspirations of the Māori community is palpable and significant.
- A2 The Māori Committee decided, with the support of the Law Commission, to promote a substantial research project which would involve extensive, multi-disciplinary and intercultural collaboration, starting with a review of the Chief Judge's draft *Custom Law* paper.
- A3 Initially, a project was planned to look at the jurisprudence of tikanga Māori over a period of several years. However, funding was not available for a project of this size. The Law Commission subsequently learned that the Waikato University Law School, under the direction of Adjunct Professor, Judge Michael Brown, intended to develop a major project on tikanga Māori.
- A4 The Law Commission agreed that it would not duplicate the Waikato project. Members of the Māori Committee together with the President and former Commissioner Denese Henare are members of the Advisory Board to the Waikato Project.
- A5 The Law Commission received funding from the Law Foundation in 1995 for a smaller project to prepare and publish an outline of tikanga Māori concepts. As the project evolved, however, it became apparent that a step was missing on the path to law reform in this area. Rather than focus exclusively on the qualities and characteristics of tikanga, the Commission identified a need for a broader understanding of how common law traditions view "custom law" and how Māori custom law currently interacts with the legal system.
- A6 In developing this paper, the Law Commission has always been aware of the need to call on multi-disciplinary thinking, of which law is only a part, from both Māori and non-Māori. To this end, commentary on the draft paper on Custom Law by Justice Durie was commissioned from a number of academic writers and lawyers. Dame Joan Metge, Dr Michael Belgrave and Professor Richard Mulgan have commented from anthropological, historical, philosophical and political science perspectives respectively. Mr Joseph Williams (now Chief Judge of the Māori Land Court) and Mr Whaimutu Dewes, both Māori lawyers, also prepared draft papers. Joe Williams' draft paper was subsequently edited by Dr David Williams. These contributions are incorporated into the study paper.

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## APPENDIX B

# The Succession Law Project

### HISTORY OF THE PROJECT

- B1 **I**N NOVEMBER 1994 Professor Pat Hohepa and Dr David V Williams prepared a working paper “The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession”.

This working paper guided the discussions and hui convened by the Law Commission in 1995 and 1996.

- B2 As part of its project to reform the law of succession, the Law Commission held six hui in December 1995. The hui were organised with the assistance of Marina Sciascia and held in the following places:

Hamilton	Wings Conference Centre, Te Rapa, 4 December
Gisborne	Te Poho o Rawiri Marae, 5 December
Blenheim	Omaka Marae, 6 December
Palmerston North	St Michael’s Māori Pastorate, 11 December
Hawera	Taiporohenui Marae, 12 December
Christchurch	Te Rehua Marae, 13 December

- B3 A further series of seven hui were held in May and June 1996, in the following places:

Ruatoria	St John’s Hall, 10 May
Mangere, Auckland	Ngā Whare Waatea Urban Marae, 24 May
Tauranga	Tauranga Moana Māori Community Centre, 6 June
Taupo	Great Lake Centre, 7 June
Glen Eden, Auckland	Hoani Waititi Marae, 8 June
Okaihau, Northland	Rahiri Marae, 10 June
Wellington	Mokai Kanga, 12 June

- B4 Presentations were made by the visiting group (Dr Pat Hohepa, Commissioner Richard Sutton, Dr David V Williams, the late Waerete Norman, Loretta Desourdy); then, general discussion.

- B5 There were two follow-up hui in Gisborne and Dunedin in February 1996.

- B6 A number of issues of concern to Māori were raised at the hui. A Note of the Points from the hui was collated by the Law Commission in 1998 and sent to the marae and groups which participated in the hui.

- B7 The Commission followed up the concerns: relating to tangi, body parts and coronial practices in *Coroners: A Review*,<sup>478</sup> New Zealand Law Commission *Coroners*: NZLC R62 (Wellington, 2000) and relating to adoption practices in *Adoption and Its Alternatives: A Different Approach and a New Framework*.<sup>479</sup>
- B8 A number of further concerns that were raised at the hui are set out below in extracts drawn from R Sutton, *Draft Preliminary Paper on Māori Succession Laws* (NZLC, Revised Version, 17 April 1997), an internal working paper compiled by the Succession Law Team led by former Commissioner Professor Richard Sutton and including researchers Loretta Desourdy and Russell Karu. Most of the following footnotes are from the original document but have been renumbered to run on consequetively. Footnotes in brackets have been added.

## EXTRACTS FROM THE SUCCESSION LAW PROJECT – PART I

- B9 The present law of succession to property owned by Māori is predicated on the assumption that Māori have individual title to all the assets that might pass to others on their death. It relies largely on the general law of succession, which applies in its entirety to succession to all property other than Māori Freehold Land.<sup>480</sup> It also applies to Māori Freehold Land, except to the extent that specific provisions found in Te Ture Whenua Māori Act 1993<sup>481</sup> displace the general law.
- B10 The law governing succession to property demonstrates the difficulties of dealing with the complexities of the customary system, in that the legislation purports to apply the principles of custom law, while at the same time distorting it to fit into the scheme of the general law.
- B11 In this section, we briefly outline the present rules applying to succession to property. In that context, we consider the argument that the law of succession may well become obsolete because it is predicated on individual title. We then discuss the evolution of the law of succession, which is marked by a number of phases in history: from attempts to govern according to custom; to being governed according to settled rules; to assimilation with the general law; and, since 1993, a return to distinctive Māori succession rules. Attempts to assimilate Māori succession laws with the general law had particularly devastating consequences for Māori. We therefore end this section with a discussion of the effects of the assimilation and possible ways to ameliorate them.

### **The present law of succession in relation to Māori freehold land**

- B12 There are six main rules governing succession to Māori Freehold Land.<sup>482</sup>
- B13 The first rule is that an owner may make a will which effectively disposes of his or her interest in land. But the person who takes beneficially under the will must be

<sup>478</sup> New Zealand Law Commission *Coroners: A Review* NZLC PP36 (Wellington, 1999).

<sup>479</sup> New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* NZLC R65 (Wellington, 2000).

<sup>480</sup> See Te Ture Whenua Māori Act 1993: s 101 (general law of wills, testamentary claims and estate administration); s 110 (intestacy).

<sup>481</sup> Part IV Te Ture Whenua Māori Act 1993.

<sup>482</sup> See Part IV Te Ture Whenua Māori Act 1993.

one of the people who might have taken under an intestacy.<sup>483</sup> The only alternative is to leave the property to people who are related by blood to the owner, or to other owners of the land, but these people must also be members of the “hapū associated with the land”.<sup>484</sup>

- B14 The second rule is that the widow or widower of an owner cannot take an outright interest in the land, whether under a will or an intestacy, or by testamentary claim. They can be given, at most, a life interest.<sup>485</sup>
- B15 The third rule is that on an intestacy, the primary takers, are the children of the deceased owner, or (if they have died) their issue.<sup>486</sup> After that, the takers are the owner’s brothers and sisters or their issue.<sup>487</sup> If there are no such persons, it is necessary to go back up the chain of title, until one finds living descendants who are closest to the dead owner.
- B16 The fourth rule concerns Whāngai children.<sup>488</sup> Formally adopted children (and other relatives by adoption) can take the property just as if they were natural children. Whāngai children who are not formally adopted can only take (a) under the will of the Whāngai parent;<sup>489</sup> or (b) by order of the court, on the intestacy of the Whāngai parent.<sup>490</sup> Beyond that, an adoption by Māori custom has no standing under the Act, even where the Whāngai child belongs to the same bloodline as the Whāngai parent.<sup>491</sup>
- B17 The fifth rule is that, if no one takes under any of the previous rules, the court must resort to tikanga Māori to determine who is to take the property.<sup>492</sup>
- B18 The sixth rule is that if the owner’s close family has been disinherited, or the owner has made promises to leave property by will and failed to honour them, the general law governing testamentary claims applies.<sup>493</sup> But nothing can be done under that law which results in the land going to someone to whom it could not have been left by will.<sup>494</sup>

### *Will the law of succession become obsolete?*

- B19 The Trust concepts in Te Ture Whenua Māori Act 1993 reflect principles of collective ownership. As some Māori land ownership returns to collective or

<sup>483</sup> Te Ture Whenua Māori Act 1993 (TTWMA) s 108.

<sup>484</sup> TTWMA s 108(2)(c), (d).

<sup>485</sup> TTWMA ss 108(4) (will); 109(2) (intestacy; the interest is terminable on re-marriage in this case).

<sup>486</sup> TTWMA s 109(1)(a).

<sup>487</sup> TTWMA s 109(1)(b). Half-brothers and half-sisters may take only if the common parent is the person through whom the land has descended to the owner.

<sup>488</sup> [The concept of whāngai adoption is discussed in Chapter 3].

<sup>489</sup> TTWMA s 108(2)(e).

<sup>490</sup> TTWMA s 115.

<sup>491</sup> Suppose, for example, A adopts her niece B. B has her own child C and dies before A. A then dies, leaving two brothers, one of whom is B’s father. C cannot take as A’s issue. The land goes to the two brothers equally and C gets nothing.

<sup>492</sup> TTWMA s 110.

<sup>493</sup> In particular, the Law Reform (Testamentary Promises) Act 1949; Family Protection Act 1955.

<sup>494</sup> TTWMA s 106.

quasi-collective forms, it is sometimes questioned whether Māori individual title will disappear and with it the need for succession to it. It is argued that internal rules will govern who may, and who may not, play a role in controlling a resource and receive the benefits of its use. For example, in the case of a whānau trust<sup>495</sup> the rights of individual owners are submerged beneath the trustees' power to manage the property, and select suitable beneficiaries of the profits gained from the land. A person's qualification to participate will come not from succession to a parent's interest in the land, but by virtue of descent from a named ancestor.

B20 In our view, the need for individual title and succession laws will continue to remain. First, there are Māori who prefer individual ownership of their land to collective ownership. Evelyn Stokes has suggested that:<sup>496</sup>

For many Māori, individual interests in Māori Freehold Land have been legitimated by usage over several generations.

B21 Secondly, the whānau trust and other structures under the Act do not take away individual ownership for all purposes. There will be times when administrators and the Courts will have to resort to the rules of succession.

B22 In relation to the continuing need for Māori succession laws, it is important to note that the laws of Māori succession are not just about property; they are about who is within, and who is without, particular whānau and hapū. Even without individual title, there would still be disputes about the rights of widows, children and Whāngai children to take part in the proceeds of, for example, whānau trusts. Legal action could be brought against trustees if they excluded from consideration those who qualify as "descendants" of the named ancestor, or if they consistently prefer one branch of a family from another. The problem of what to do about absentees (who may be in greater need than those on the land) is significant.

B23 These problems have much in common with those which arise in the law of succession. The end result is the same; that a claimant will, or will not, have access to resources as a member of a whānau. In fairness to claimants, effective and just procedures are needed to determine the outcome in individual cases. In the absence of such procedures, trustees' and administrators' decisions will be vulnerable to legal action.<sup>497</sup>

B24 There is much to be said for seeing the law of succession as part of a wider legal framework which governs all disputes about entry into Māori groups which have resources to distribute, and about the terms on which particular descendants of the named ancestor will be able to share in those resources. As a matter both of policy and principle, there is much to be said for the law treating both situations in a similar way. If so, the principles of the law of succession will continue to have an important role to play in Māori society.

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<sup>495</sup> For a discussion of Whānau trusts, and other forms of trust, see Te Ture Whenua Māori Act 1993 Part XII.

<sup>496</sup> E Stokes, Māori Customary Land Tenure and Individualisation of Title, Evelyn Stokes, unpublished draft paper for Waikato Project: Laws and Institutions for Aotearoa/New Zealand: Te Mātāhauariki.

<sup>497</sup> For example under Trustee Act 1956, s 68 (judicial review of trustees' decisions).

## History

- B25 The history of the law of succession in the Māori Land Court, as it applies to Māori ancestral property in particular, may be divided into four distinct phases:
- succession supposedly in accordance with Māori custom, 1861–1909;
  - succession according to settled rules, 1909–1967;
  - assimilation with the general law, 1967–1993; and
  - a return to distinctive Māori succession rules, 1993–present;

### *Succession in accordance with Māori customary law (1861–1909)*

- B26 When the Native Land title system was first introduced, it was not intended that the rights of Māori to succeed to property amongst themselves would be affected, at least not immediately:<sup>498</sup>

From 1861 to 1909, when the last Native Land Act was passed, the Legislature has recognised that descent of or succession to Native land is not in accordance with the descent of or succession to land owned by Europeans.<sup>499</sup>

- B27 The legislature instead instructed officials to enquire into who should succeed in accordance with Māori custom. Ownership would then be recognised, according to the report, certification or appropriate Court order. This technique allowed Māori custom law to develop, if not of its own accord, then by the offices of the Native Land Court.

- B28 The Native Land Court mixed its own values with those recognised by the Māori people. It also allowed for the development of principles of customary law in a way which might not (according to the then prevailing English jurisprudence) otherwise have been recognised by the Courts.<sup>500</sup> Chapman J in *Willoughby v Waihopa*<sup>501</sup> suggested that:<sup>502</sup>

a body of custom has been recognised and created in [the Native Land Court] which represents the sense of justice of its Judges in dealing with a people in the course of transition from a state of tribal communism to a state in which property may be owned

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<sup>498</sup> For discussions of the nineteenth century law of succession as it affected Māori interests, see J Salmond, *Memorandum on Native Land Bill: Notes on History of Native-land Legislation*, unpublished 1909; *Extract from Introduction to the Native Land Act 1909*, by Sir John Salmond, in Vol VI *Statutes of New Zealand* (1931ed), 92–94; *Willoughby v Waihopa* (1910) 29 NZLR 1123, 1133–1137 per Edwards J (dissenting).

<sup>499</sup> *Willoughby v Waihopa* at 1127 per Stout CJ.

<sup>500</sup> The practice was observed by the Privy Council in *Hineiti Rirerire Arani v Public Trustee* [1920] AC 198, 204–205, where the Court said “It may well be that this is a sound view of the law, and that the Māoris as a race have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the custom of such a race is not to be put on the level of an English borough or other local area which must stand as it has always stood, seeing that there is no quasi legislative internal authority which can modify it”.

<sup>501</sup> *Willoughby v Waihopa* at 1149.

<sup>502</sup> The sentiments implicit in this passage would not be favoured today, but it may be made more acceptable by inserting the word “voluntary” before “transition”, and replacing the word “savage” with the word “earlier”.

in severalty, or in the shape approaching severalty represented by tenancy in common. Many of the customs set up by that Court must have been founded with but slight regard for the ideas which prevailed in savage times.

- B29 It seems that Māori themselves were sometimes uncertain about which parts of the amalgam represented their former custom, and which were contributed by the Court.<sup>503</sup>
- B30 The technique of recognising ownership in accordance with the report, certification or appropriate Court order, and after official enquiry into who should succeed under Māori custom, was first introduced into the law of succession in 1861 in respect of Māori Freehold Land owned by those Māori who died without a will.<sup>504</sup> The new procedure was implemented because of legislative concern about problems that would arise as Māori customary land was converted into freehold title. Applying the general law of succession could well have resulted in an escheat to the Crown even where the Māori left a wife and children.<sup>505</sup>
- B31 The legislation was replaced in 1865.<sup>506</sup> A similar power was given to the Supreme Court (and, as regards lands held under Native customs and usages, the Native Land Court). The Courts were to determine who should succeed “according to law, as nearly as it might be reconciled with Native custom”.<sup>507</sup> This phrase appears to have given the Courts power to attempt to achieve a blend of English and Māori customary law. It was replaced by the Native Land Act 1873, which (while it did not contain a direction expressed in those terms) may well have been applied in the same way.
- B32 The technique was then given a wider application. In 1876 the Native Land Court was given power to ascertain the rights, in accordance with Māori custom, of succession to personal property.<sup>508</sup> In 1881,<sup>509</sup> the jurisdiction in respect of Māori Freehold Land was extended to the estates of Māori who had left wills, with the effect (on one view, at least)<sup>510</sup> that Māori who owned such land lost their testamentary power.<sup>511</sup>

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<sup>503</sup> See ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994).

<sup>504</sup> Intestate Native Succession Act 1861.

<sup>505</sup> See *Willoughby v Waihopa* at 1133.

<sup>506</sup> Native Lands Act 1865.

<sup>507</sup> Native Lands Act 1865, s 30.

<sup>508</sup> Intestate Succession Act 1876. Salmond observes that “until the passing of this Act the succession of Natives to personal property was governed by the ordinary law”; and, in *Willoughby v Waihopa* at 1133, Stout CJ surmises that “Property other than land would in the early days have been so trifling as to be hardly worthy of consideration. There is a prima facie improbability of the existence of a custom regulating its descent”. But compare the comments of Chapman J at 1151, where the instance of the mere pounamu of a chief is given.

<sup>509</sup> Native Land Court Act 1880, ss 45–46.

<sup>510</sup> *Willoughby v Waihopa*, 1135.

<sup>511</sup> If so, it was restored to them by the Native Succession Act 1881, s 3. However, there could be no devise to someone not of the Māori race: *Robertson v Wilson* (1890) 9 NZLR 579, 597 per Edwards J (by reason of the inherent inalienability of the memorial or certificate of title held under the Native Land Acts).

- B33 The legislation was consolidated in 1881.<sup>512</sup> However, in the case of freehold land not held under a Native Land Court memorial or certificate of title (“hereditaments”) the legislation provided that the Court should be guided in its decision by the law of New Zealand rather than Māori custom.<sup>513</sup> This change of direction was “so repugnant to the ideas of the Natives, and so contrary to their customs”<sup>514</sup> that it proved to be short-lived. In 1882, the earlier law was restored.
- B34 A legislative formula was adopted in the 1882 amendment which was more akin to that used in the 1865 legislation. The court was directed to decide “according to the law of New Zealand as nearly as it can be reconciled with Native custom”.<sup>515</sup> Subsequent versions of the legislation<sup>516</sup> retained the same provision.<sup>517</sup> The 1894 legislation<sup>518</sup> returned to a simpler formula (applicable to all Māori estates) which allowed enquiries to establish the “successor” to the dead person. The term “successor” was defined to mean “the person who, on the death of any Native, is, according to Native custom, or, if there be no Native custom applicable to any particular case, then according to the law of New Zealand, entitled to the interest of such Native in any land or personal property”.
- B35 This formulation still left open the question of whether any particular custom could apply to property, or interests in property, which would not have been known to Māori before 1840. It was arguable<sup>519</sup> that Māori succession customs could have no application to an interest in freehold land, since no such type of property was recognised in Māori custom. The majority of the Court of Appeal in *Willoughby v Waihopa*, however, had little difficulty in discerning a plain legislative intent that the Native Land Court should apply to these new forms of property principles derived from traditional customary law. The judgment of Chapman J<sup>520</sup> is especially instructive on the point. He suggests that a custom may grow up in respect of particular assets (such as bank shares or corporation debentures) which were not previously known to Māori.

#### *Succession according to settled rules (1909–1967)*

- B36 The technique of enquiring into who should succeed in accordance with Māori custom was partly abandoned in the 1909 legislation, in favour of a system of succession according to statutory provision. Some scope was still left for customary law, including local variants, but the framework within which the Court could work became fairly well settled.

<sup>512</sup> Native Succession Act 1881.

<sup>513</sup> Native Succession Act 1881 s 4.

<sup>514</sup> *Willoughby v Waihopa* at 1128 per Stout CJ.

<sup>515</sup> Native Lands Act Amendment Act 1882, s 4.

<sup>516</sup> Native Land Court Act 1886, s 43; Native Land Court Act Amendment Act 1888.

<sup>517</sup> Its effect is summarised by Edwards J in *Willoughby v Waihopa*, 1137.

<sup>518</sup> Native Land Court Act 1894.

<sup>519</sup> See, for example, Edwards J in his dissenting judgment in *Willoughby v Waihopa*.

<sup>520</sup> *Willoughby v Waihopa* 1151–1154. However, it must be put in the context of the general picture he paints of the on-going role of the Native Land Court.

- B37 New rules governing the law of succession were introduced by the Native Land Act 1909. These remained unchanged until 1968, being incorporated in the Native Land Act 1931 and the Māori Affairs Act 1953.
- B38 The legislation distinguished between “Natives” (being Māori of half-blood or more) and “Europeans”.<sup>521</sup> The basic principles introduced in 1909 were:
- 1.1 Māori could validly devise their property, provided certain procedural safeguards were observed.<sup>522</sup> However, land held under the Act (that is, Māori Freehold Land) could not be devised to someone who was not a Māori, unless that person was a child, wife, or blood relative<sup>523</sup> of the will-maker, or would have been entitled to succeed in the will-maker’s intestacy estate.<sup>524</sup> This rule remained in force until 1968.<sup>525</sup>
  - 1.2 On the death of any Māori owner intestate, all personal property, and any land that was not held under the Act, would pass under the general law as if that person were a European.<sup>526</sup> However, the widow or widower of the Māori had no direct claim to any of the property under this provision (see below, paragraph 1.4). This latter rule was not carried forward into the Māori Affairs Act 1953,<sup>527</sup> and thereafter the widow or widower took the normal statutory share of all the estate, other than Māori Freehold Land.<sup>528</sup>
  - 1.3 Māori Freehold Land would, on intestacy, pass according to Native custom.<sup>529</sup> This rule also remained in force until 1968,<sup>530</sup> but it was qualified in 1953.<sup>531</sup> The Court appears, at least by 1960, to have adopted a number of principles for succession to Māori land;<sup>532</sup> the property went first to the issue of the

<sup>521</sup> Certain Māori, however, were exempted from some of the consequences of the status by the Native Land Amendment Act 1912, s 17. See eg *Re Grace* [1916] NZLR 135.

<sup>522</sup> The will had to be signed before one of the witnesses designated in s 134; and had to be produced for probate within two years of death (Native Land Act 1909 s 138)

<sup>523</sup> The original provision, which provided only for relatives up to the fourth degree, was amended by the Native Land Amendment Act 1912, s 4.

<sup>524</sup> Native Land Act 1909 ss 133, 137. The property could also be disposed of by way of charitable trust: s 137(4).

<sup>525</sup> As ss 110–115 Māori Affairs Act 1953, repealed Māori Affairs Amendment Act 1967, ss75, 88(1). When compared with the current provisions of Te Ture Whenua Māori Act 1993, the restriction is a clumsy one, since a person may be a transferee when they are from a quite different hapū from the one associated with the land. That provision appeared to be supported, in our hui, as a true reflection of customary principle. If so, the prohibitions in the 1909 Act were not.

<sup>526</sup> Native Land Act 1909 ss 139(1).

<sup>527</sup> Māori Affairs Act 1953, s 116.

<sup>528</sup> See the Administration Act 1952, s 56.

<sup>529</sup> Native Land Act 1909 ss 139(2) On the considerable significance of the difference in wording of this new provision, see *In re Pareihe Whakatomo* [1933] NZLR s 123, ss 129–130. The Native Land Court was bound to follow a proved custom, and could not add to or embellish it by reference to rules of the general law.

<sup>530</sup> Problems arose with the proceeds of sale of Māori Freehold Land, which were often held on trust for the sellers for long periods. Later versions of the section (Māori Affairs Act 1953, ss 116, 456) made specific provision in respect of these proceeds.

<sup>531</sup> Section 117 of the Māori Affairs Act 1953 was designed to limit the operation of this provision.

<sup>532</sup> See N Smith, *Māori Land Law* (1960), 57.

deceased; if they had no issue, it passed back to the parent through whom the dead person obtained the property. If that person was dead, property is claimed by their issue. If no-one qualified, it would be necessary to go back one or more generations and work downwards from there.<sup>533</sup>

- 1.4 Widows and widowers had the right to apply to the Native Land Court for provision out of an intestate estate if they had insufficient property for their maintenance. They might be awarded all the personal estate, and a life interest in the real estate, or such part of that as may be required for their maintenance.<sup>534</sup> This or an equivalent provision<sup>535</sup> remained in force until 1963, when the provisions of the Family Protection Act 1955 were applied to the estates of deceased Māori (although the Native Land Court retained exclusive jurisdiction).<sup>536</sup>
- 1.5 Where wills of Māori did not make adequate provision for their widows,<sup>537</sup> children or orphan grandchildren, the Native Land Court was given similar powers to those given to the High Court as regards Europeans, by the Family Protection Act 1908.<sup>538</sup> This provision too was assimilated into the Family Protection Act 1955 in 1962.<sup>539</sup>
- 1.6 Jurisdiction in all matters to do with the administration of the estates of deceased Māori was entrusted exclusively to the Native Land Court, which had power to grant probate and issue letters of administration.<sup>540</sup> In the case of interests in Māori Freehold Land, however, the Court was to make direct vesting orders without the property passing through the administrator's hands (as it would do with the estate of other land).<sup>541</sup> In the case of personal property, the Court could (from 1922)<sup>542</sup> issue personalty orders which vested the property directly with the beneficiaries, without the need for formal grant of probate or letters of administration. No Māori Freehold Land was to be available to meet debts owed by the estate unless the land was charged<sup>543</sup> with their payment.<sup>544</sup>

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<sup>533</sup> Corresponding rules are now found in Te Ture Whenua Māori Act 1993, s 109, except that parents are omitted. Qualifications, analogous to those in s 117 of the Maori Affairs Act 1953 are not included in the 1993 Act.

<sup>534</sup> Native Land Act 1909 s 140.

<sup>535</sup> Māori Affairs Act 1953, ss 121–122.

<sup>536</sup> Māori Affairs Amendment Act 1962, s 8.

<sup>537</sup> No provision was made for widowers in this or later legislation, even though they could make claims under the Family Protection Act after 1908.

<sup>538</sup> Native Land Act 1909 s 141.

<sup>539</sup> Māori Affairs Amendment Act 1962, s 8.

<sup>540</sup> Native Land Act 1909 s 144–147.

<sup>541</sup> Native Land Act 1909 s 148; This rule would not apply where the owner expressly devised the property to a executor or any other person on trust, otherwise than as a “bare” (non–managerial) trustee: s 148(2). The property then vested in the trustee. Note that a European could take an interest in Māori freehold as executor or trustee, even though disqualified as a beneficiary: s 137(5).

<sup>542</sup> Native Land Amendment Act 1922, s 12, further amended in 1929, and by s 184 of the 1931 legislation. In 1962 it was replaced by a much more limited provision: Māori Affairs Amendment Act 1962, s 9.

- B39 The Native Land Act 1909 provided a stable framework for a distinctive Māori law of succession. Its implementation began with an emphasis on the particular legal needs of Māori compared with non-Māori. But in time the distinctive legal characteristics of Māori ancestral property, as compared with property held under Land Transfer Act 1952 title, were emphasised. The Act established a well-understood set of rules which were applied to Māori land. In respect of that land, the Court applied principles which had their origin in Māori custom, and which from time to time still required resolution of legal issues according to that custom. In respect of Land Transfer Act 1952 land, the general law of the country applied, irrespective of whether the land was owned by a Māori or a non-Māori.
- B40 If the law was to have continued developing along these lines organically, the next step might perhaps have been legislation which put the established “customary” rules into legislative form, and paid closer attention to how land might go out of (and be received back into) the protective enclave of the Māori land legislation. However, events took a very different turn.

#### *Assimilation with the general law (1967–1993)*

- B41 Successive colonial and dominion governments had always envisaged that laws made specifically for Māori were only temporary. Māori would ultimately be assimilated into English society and be subject entirely to the common law. This idea re-surfaced very strongly in two reports written for Government in the 1960s.<sup>545</sup> These reports were inspired by the notion that Māori would be drawn into the cities as the economy burgeoned in urban areas, so the need for a stable rural land base would be replaced by the need for adequate urban housing. The rural base, and legal interests that Māori held in ancestral lands, were best seen as a form of wealth that could be readily transmuted into another form, rather than as a part of a continuing ancestral inheritance. The most sensible course was to treat interests in Māori Freehold Land as no different from any other form of property that a New Zealander may own.
- B42 These considerations led the government of the day to enact legislation which would in time have completely dismantled the distinctive rules governing succession to Māori property, and removed the various protective provisions found in the 1909 legislation. As with its 1881 predecessor, much of the legislation was short-lived, although some parts still have legal effect.<sup>546</sup>

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<sup>543</sup> The words used in the section were “expressly devised in trust for or charged with the payment of debts”. As to the effect of a general direction in the will to pay debts, see *Henare te Apatari v Ereni Kopu* [1916] NZLR 470, 477; *Tatiana Wiremu te Hika and Wanihi Te Nuku v Public Trustee and Saunders*. [1918] GLR 493.

<sup>544</sup> Native Land Act 1909 s 142.

<sup>545</sup> Report of the Committee of Inquiry into Laws Affecting Māori Land and the Jurisdiction and Powers of the Māori Land Court (1965) 54.

<sup>546</sup> Although the relevant part of the legislation was almost completely repealed by Te Ture Whenua Māori Act 1993, s 362(2), that Part removed all the prior legislation, which was not re-instated by reason only of the repeal: Acts Interpretation Act 1924, s 20(f).

B43 In brief, the Māori Affairs Amendment Act 1967 provided that:

- 1.1 Māori could make wills in the same way as any other New Zealander.<sup>547</sup> All restrictions on disposing of an interest in Māori Freehold Land by will were repealed<sup>548</sup> (restrictions on the disposition of Māori Freehold Land were subsequently re-imposed in 1993);<sup>549</sup>
- 1.2 Succession on intestacy was also to be determined by the general law applicable to all New Zealand citizens. This general rule was subsequently confirmed;<sup>550</sup>
- 1.3 This Act applied to Māori Freehold Land, except in the case of Māori dying before 1 April 1968, when the previous law applied;<sup>551</sup>
- 1.4 The Māori Land Court's jurisdiction on an intestacy to hear widows and widowers' claims under the Family Protection Act 1955 was removed and given to the High Court, as regards persons dying after 1 April 1968.<sup>552</sup> The jurisdiction was completely removed in 1975<sup>553</sup> (no Family Protection Act jurisdiction was conferred by Te Ture Whenua Māori Act 1993);
- 1.5 The Māori Land Court's more general jurisdiction to hear widows, widower's, children's and grandchildren's claims under the Family Protection Act 1955 was similarly transferred to the High Court<sup>554</sup> (this remains the law, but the High Court is now unable to make Family Protection orders in favour of those who are not permitted successors under Te Ture Whenua Māori Act 1993);<sup>555</sup>
- 1.6 The Māori Land Court's jurisdiction to deal with probate and administration matters was similarly re-vested in the High Court.<sup>556</sup> Any administrator could require Māori Freehold Land to be vested in his or her name<sup>557</sup>. The court's power to make vesting orders of personalty was removed.<sup>558</sup> Māori Freehold Land became available to meet the deceased's unsecured debts<sup>559</sup> (the High Court continues to have exclusive authority to grant probate and letters of administration);<sup>560</sup> and

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<sup>547</sup> Māori Affairs Amendment Act 1967 s 75; Amending s 110 of the Māori Affairs Act 1953.

<sup>548</sup> Māori Affairs Amendment Act 1967 s 88(1).

<sup>549</sup> TTWMA s 108.

<sup>550</sup> Māori Affairs Amendment Act 1967 s 76 and confirmed in Te Ture Whenua Māori Act 1993 s 108.

<sup>551</sup> Māori Affairs Amendment Act 1967 ss 76, 88(3). Section 20 of the Māori Affairs Amendment Act appears to have re-instated the old law for estates of people dying before 1 January 1975, where steps had been taken to administer the estate or vest the property in successors. For those dying after 1 January 1975, there is a statutory intestacy regime based on customary principles: s 76A. It was subsequently adopted in Te Ture Whenua Māori Act 1993, s 109[0].

<sup>552</sup> TTWMA 1993 s 80.

<sup>553</sup> The Māori Purposes Act 1976, s 7(1).

<sup>554</sup> Māori Affairs Amendment Act 1967 s 80.

<sup>555</sup> TTWMA s 106.

<sup>556</sup> Māori Affairs Amendment Act 1967 s 80.

<sup>557</sup> Māori Affairs Amendment Act 1967 s 81.

<sup>558</sup> Māori Affairs Amendment Act 1967 s 88(1).

<sup>559</sup> Māori Affairs Amendment Act 1967 s 77.

<sup>560</sup> TTWMA ss 102–103.

<sup>561</sup> Māori Affairs Amendment Act 1974, s 27.

1.7 Māori Freehold Land, held by estates of all persons dying before 1 April 1968 and not vested in successors by 1 April 1973, would pass to the Māori Trustee for administration: s 84. On the same date, the Māori Land Court's jurisdiction to make intestacy orders and its residual probate jurisdiction (in respect of persons dying before 1968) would be transferred to the High Court: section 87 (these provisions were repealed before they could come into operation).<sup>561</sup>

B44 Although the 1967 Act operated for only a relatively brief time, it provided a significant “window” during which people could obtain interests in Māori land which they could not have done under the earlier (1953)<sup>562</sup> or later (1993) legislation. This was particularly so for wives, who might have received property:

(a) by will, during the entire 1968–1993 period;

(b) by testamentary claim again for the entire 1968–1993 period; and

(c) under an intestacy, during the 1968–1975 period.

It would also be true for de facto partners, in respect of wills and testamentary claims. As a result of receiving an outright interest (and not a life interest, as provided in the 1953 and 1990 legislation) they have been able to pass property on to their own second husbands and de facto partners, and to children of those subsequent unions. As a result, many Pākehā now have an indelible share in Māori Freehold Land, inconsistent with Māori custom.<sup>563</sup>

#### *A return to distinctive Māori succession rules (Te Ture Whenua Māori Act 1993)*

B45 With the passage of Te Ture Whenua Māori Act 1993, Parliament returned to the methods used in the 1909 legislation. However, the new Act placed greater emphasis on the origins of Māori land, and less on the personal status of the will-maker and their successors. Indeed, the term “Māori” includes any person who is a “descendant” of a person of Māori race, which could potentially include an enormous number of New Zealanders.

B46 The part of the Act which relates to the law of succession applies to all estates, except those where administration of the estate has been granted, or a beneficial interest has been vested in successors, before 1 July 1993.<sup>564</sup> A further exception is made for persons who died before 1 July 1994, leaving a will which was executed before 1 July 1993.<sup>565</sup> The Act establishes the following rules:

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<sup>562</sup> Although it has to be admitted that the 1953 legislation allowed property to be passed by will to a person who was not a Whānau member, as long as they were Māori of the half-blood or more.

<sup>563</sup> See the decision of Deputy Chief Judge McHugh in *Re Kaata (Cotter)*, noted in (December 1993) Māori Law Review. The Chief Judge could see no way, consistently with the relevant statutory provisions, of restoring land from the estate of the wife of a former deceased owner, into the hands of the blood relatives of that owner. (In that case, letters of administration had been granted during the 1968–1975 period.)

<sup>564</sup> TTWMA s 100(2)(a), (b).

<sup>565</sup> TTWMA s 100(2)(c).

- 1.1 Māori testators may leave their general property<sup>566</sup> by will, like any other New Zealander. But Māori Freehold Land can only be freely left to the willmaker's children, Whāngai or full siblings, and their issue.<sup>567</sup> The willmaker's spouse can be given, at most, a life interest, unless that spouse is personally qualified to take the land outright.<sup>568</sup> All other will beneficiaries must be qualified as descendants of prior owners of the land, or as members of the hapū associated with the land<sup>569</sup> (This is in contrast with the 1909 legislation, where any Māori of the half-blood or more could be selected);
- 1.2 On an intestacy, succession to property other than Māori Freehold Land is governed by the general law;<sup>570</sup>
- 1.3 With respect to Māori Freehold Land, intestate succession is determined by statutory rules. The deceased's husband or wife is entitled to an interest, but only until death or remarriage.<sup>571</sup> That apart, the Māori Land Court must look for the descendants who stand closest to the dead owner (or the owner's brothers and sisters), failing which the Court must look for the descendants of prior owners, ascending up the chain of title: section 109. The Court's power to act on customary law, in matters of succession, is limited to cases where there is no-one primarily entitled to the land under the statute.<sup>572</sup> However, there may be a number of issues (for example, with the Court's power under section 115 to decide whether Whāngai are qualified as "children") where the court must consider evidence of custom;<sup>573</sup>
- 1.4 Claims under the Family Protection Act must be heard in the High Court, which, in any testamentary claim, may not order the disposal of Māori Freehold Land in any manner that the deceased person could not have chosen in the will.<sup>574</sup> In the case of a widow, therefore, no more than a life interest can be awarded;<sup>575</sup>
- 1.5 Similar rules operate for children's and grandchildren's claims.<sup>576</sup> However, since they are all permitted successors of the deceased, this is not a significant limitation to the Court's power under the Family Protection Act 1955. It is more significant in the case of claims brought under the Law Reform (Testamentary Promises) Act 1949, which may be made by those who are not

<sup>566</sup> But not their rights in customary land, which is governed exclusively by tikanga.

<sup>567</sup> TTWMA s 108(2), 109(1).

<sup>568</sup> TTWMA s 108(4).

<sup>569</sup> TTWMA s 108(2)(c), (d), 109(1)(b),(c).

<sup>570</sup> TTWMA s 110.

<sup>571</sup> TTWMA s 109.

<sup>572</sup> TTWMA s 109, 110.

<sup>573</sup> Note, however, that although the preamble of the Act refers to the "protection of rangatiratanga", neither the preamble nor the general objectives of the Court stated in s 17 refer specifically to the wisdom of applying customary solutions to legal and administrative problems. The expertise of the Māori Appellate Court in "tikanga" is recognised in s 61(1)(b) (reference of particular issues from High Court).

<sup>574</sup> TTWMA s 106.

<sup>575</sup> TTWMA s 108(4).

<sup>576</sup> TTWMA s 108.

descendants of the deceased. The exercise of these powers in practice has given little indication that Māori custom can be effectively brought into account.<sup>577</sup> Commentators considering some of these decisions from a Māori perspective believe that the Courts should have insisted that much greater weight be given to customary values and practices;<sup>578</sup>

1.6 The High Court continues to have exclusive authority to grant probate and letters of administration.<sup>579</sup> However, with many issues which arise in the administration of the estate of a Māori, the Māori Land Court will have at least a concurrent jurisdiction,<sup>580</sup> and in those matters specifically referred to in the Act the jurisdiction will often be exclusive,<sup>581</sup>

### The effects of the assimilation period

B47 We have already seen that the law dramatically changed in the period beginning in 1967, when Māori succession law was largely assimilated into the law applying to other New Zealanders. This was not altered until the enactment of Te Ture Whenua Māori Act 1993.

B48 Those Māori who participated in hui facilitated by the Law Commission to discuss succession issues<sup>582</sup> appeared unanimous in the view that the 1967 legislation had disastrous consequences for many individuals and groups holding blocks of land, with very little countervailing benefit. They were concerned about how the effects of the assimilation period could be ameliorated. In particular, the following concerns, in particular, were repeatedly raised:

- property passing away from its whānau by succession;
- property passing beyond the control of the Māori Land Court; and
- fragmentation and the taking of “uneconomic” shares.

#### *Property passing away from its whānau by succession*

B49 As we have seen, the Māori Affairs Amendment Act 1967 allowed people who were not Māori to acquire Māori Freehold Land by will until 1993. Although not many Māori used that method of transmitting their property on death, a number of instances were given at our hui of Māori devising Māori Freehold Land to wives, husbands and de facto partners. One of the standard forms of will of that

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<sup>577</sup> For this reason, the Commission has, provisionally at least, proposed that the testamentary claims legislation it has put forward for discussion not be applied to Māori ancestral land: *Succession Law: Testamentary Claims* NZLC: PP 24 (1995), 3, 9–10, 110.

<sup>578</sup> Professor Pat Hohepa and Dr David V Williams *The Taking into Account of Te Ao Māori in Relation to the Reform of the Law of Succession* NZLC MP6 (Wellington, 1995) 42–43.

<sup>579</sup> TTWMA ss 102–103.

<sup>580</sup> See for its general powers, ss 18–26.

<sup>581</sup> Note in particular the Court’s broad concurrent jurisdiction as regards trusts of land owned by Māori: s 236(c). Under s 2 of the Trustee Act 1956, the term “trust” is widely used to include (inter alia) “the duties incidental to the office of an administrator within the meaning of the Administration Act 1969”.

<sup>582</sup> [Refer Hui set out in paras B2 and B3 in this Appendix.]

time left all the will-maker's property to the spouse. This standard form could easily be drawn up in a routine way by solicitors in urban areas, with no awareness of the consequences of such a will for Māori land owned by the client in their ancestral area. The standard legal education of that time was unlikely to alert lawyers to the customary expectations of Māori people, and the dangers involved in signing even the simplest form of will.<sup>583</sup> Māori may not have thought it appropriate to challenge their lawyers' apparently greater knowledge of legal matters in the Pākehā world.

- B50 Furthermore, there were a number of provisions in the general law which compelled Māori to make wills in favour of their spouses, even if they were reluctant to do so. The Matrimonial Property Act 1963, which applied to all estates, gave the Court fairly wide powers to make awards of capital, based on a wife or husband's contributions to property in a broad sense. There was also, by reason of the Family Protection Act 1955, a legal obligation to maintain one's spouse after death. That obligation came increasingly to be enforced by awards of capital, rather than the award of income or life interests. Few cases were taken by spouses of Māori during the period, as far as we can tell from the law reports and what was said at the hui. But the possibility of such claims was likely to affect the minds of lawyers advising Māori and writing their wills for them.
- B51 Even more significantly, where there was no will, the land could (until 1975) pass to a wife or husband on the intestacy of the Māori owner. At that time the general law of intestacy provided that a husband or wife was entitled to the deceased's personal chattels and the first \$12,000 of the estate,<sup>584</sup> as well as a proportion of the balance.<sup>585</sup> Given the low Government values for Māori land and the fact that much of it was held in relatively small shares, it was not unlikely that in a small estate the land would pass completely to the wife or husband. Even though they contravened customary law, the Māori Land Court was bound to give effect to these provisions because its power to apply customary law had been taken away.
- B52 At the hui convened by the Law Commission, Māori spoke of the effects of this legislation. In many cases the land passed out of the whānau altogether. A widow or widower receiving the land may well not have had the same reservations about selling the land as would members of the whānau. And even if they did not sell it, it would pass on to their own family after their death, since there was no longer any legal doctrine of reversion of title. Of course, much other land passed out of the hands of Māori at this time through the alienation process. The Law Commission was informed at the hui of parents who, for reasons of economic necessity, felt obliged to sell their land to support their family.

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<sup>583</sup> It is an open question whether many law students are much better informed today, although the subject Māori Land Law, or its equivalent, is taught as an optional course in all Universities offering law courses. The enrolment in the Māori Land course has steadily increased over the years. In addition, there is an increasing Māori content in the compulsory courses of Public and Property Law.

<sup>584</sup> Administration Act 1969, s 77(1)(a). The Act applied only to the estates of people dying on or after 1 January 1971: ss 75, 1(2). However, earlier legislation provided the spouse with a similar amount: Administration Act 1952, s 56(1)(a), as amended by the Administration Amendment Act 1965, s 4.

<sup>585</sup> One third if the dead person left children; two-thirds if they left parents; otherwise, the whole of the estate passed to the spouse. The earlier legislation was the same.

- B53 The legislation had different effects on land interests in blocks. Such interests could not be transferred without the concurrence of a majority of the owners,<sup>586</sup> although they could pass by will or intestate succession. This resulted in new owners coming into the blocks who were not members of the whānau associated with the land. Even if a new owner maintained an interest in the whānau, their interest in the block could pass to others who had no such concern. The role of land as a point around which whānau interest could focus was therefore seriously affected. In practice, decisions about the future of the land came to be made by a relatively small group of people.
- B54 Sometimes an interested member of the whānau would attempt to improve the situation by buying up alienated interests in their own ancestral land. But they were not always successful, and the task became more difficult as the land became increasingly fractionated. We were told that owners are often unwilling to sell at prices the whānau can afford. Clearly there is an element of “hold-out” – the land interests are of so little real value that the owner can hold out for virtually no cost until the whānau find the situation so inconvenient they are prepared to pay an inflated price.
- B55 Nevertheless, even if an interest in land has passed out of whānau hands, as long as it is still held as Māori freehold under Te Ture Whenua Māori Act 1993, all is not lost. There is still a possibility that it will return to the whānau in the ordinary course of events. Under section 148, no interest in Māori freehold can be alienated separately to someone who is not a member of one of the “preferred classes of alienee”. These people are generally descendants of those who are personally, or by their hapū, associated with the land by tikanga Māori.<sup>587</sup> The only exception is for alienations made in favour of the descendants of the alienating owner.
- B56 Where the alienating owner or owners together own the whole of the land, section 148 does not apply. The owners may, after confirmation from the Māori Land Court, transfer the block to any willing purchaser. The Māori Land Court must be satisfied that a right of first refusal has been given to any prospective purchasers who are members of the preferred class.<sup>588</sup>
- B57 Nor, if the owner retains an interest in it, can the land freely pass by intestacy or will. The intestate successors may include descendants of the stranger owner, and the full-blood brothers and sisters of the owner.<sup>589</sup> Other than that, the only outright<sup>590</sup> intestate successors are descendants of prior owners, who will be members of the whānau;<sup>591</sup> or persons entitled to succeed according to tikanga Māori.<sup>592</sup> Presumably the long-neglected doctrine of derived title and reversion to source would still apply to bring the property back to the whānau or hapū. A stranger owner who is childless and has no brothers and sisters may therefore be

<sup>586</sup> Māori Affairs Act 1953, s 215 (blocks with 10 or more owners).

<sup>587</sup> TTWMA s 4, interpretation section.

<sup>588</sup> TTWMA s 152(1)(f).

<sup>589</sup> TTWMA s 109 (1)(a), (b).

<sup>590</sup> Husbands and wives may take a life interest: s 109(2), 108(4).

<sup>591</sup> TTWMA s 109 (1)(c).

<sup>592</sup> TTWMA s 114.

obliged to return the property, on death, to the whānau or hapū associated with the land. This may happen in succeeding generations, should the lines of the stranger and his or her brothers and sisters run out.

- B58 The only way to avoid this consequence is for the owners to change the standing of the land from Māori Freehold Land under section 135 to General Land. In the case of land owned by 10 people or less,<sup>593</sup> this can be done by status order issued from the Māori Land Court.<sup>594</sup> To do this, all the owners (or a sufficient proportion of them) must agree, and they must satisfy the court that the land “can be managed or utilised more effectively as General Land”. Given that one of the major stated objectives of Te Ture Whenua Māori Act is to promote the retention of that land in the hands of its owners, their whānau and their hapū, one might expect the Court to scrutinise very carefully any such proposal to determine whether its principal objective is to release the land from restrictions which prevent ownership from being further dispersed amongst strangers.
- B59 Some of those consulted by the Law Commission considered that the law might be changed so as to make it even more difficult for strangers to retain land, against the wishes of its whānau. It may not be unreasonable to bring the intestate succession and will provisions in sections 109 and 108 more in line with the preferred classes of alienee categories provided in section 4. That is to say, only children or issue of each successive owner would count; their brothers and sisters would not. For example, suppose A (the stranger) left property to his son B, and B left it to his own daughter C, and C died without issue. The property would revert to the whānau at that point, even if both A and B had brothers and sisters, and each of them had living descendants. The reversion would be easier to demonstrate as each successive owner died than it would be under the present law.
- B60 Another possibility could be to pass a law enabling a majority of whānau owners, who have together (say) more than 80 percent of the ownership of the block, to pass a resolution for compulsory purchase of any uneconomic shares in the block owned by strangers. The valuation might be based on a proportionate share of government value, with the stranger owners having the opportunity to establish that the interest would be worth more to another outside buyer.
- B61 Further work is required to examine these proposals.<sup>595</sup>

#### *Property passing beyond the control of the Māori Land Court*

- B62 This concern relates to the provisions of the Māori Affairs Amendment Act 1967. The purpose of the 1967 legislation was to take unregistered Māori land off the Court register and put it on the land transfer register, and to ensure that all such land became general land and thus freely alienable.
- B63 Up until 1967, the protective provisions of the Māori Land Act applied to all “Māori Freehold Land”, being land “other than European land which, or any undivided share in which, is owned by a Māori”.<sup>596</sup> This could include Land

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<sup>593</sup> Compare s 137(1)(a), which allows the status of land which is more widely owned to be changed, but on much stricter grounds.

<sup>594</sup> TTWMA ss 135–137.

<sup>595</sup> [Refer to chapter 6]

<sup>596</sup> TTWMA s 129(2)(b).

Transfer land. The legislation envisaged that all Māori Freehold Land would be held under the Land Transfer Acts, at least within the provisional register.<sup>597</sup> However, in fact, most Māori freehold title is unregistered. As pointed out by EW Williams:<sup>598</sup>

The difficulty in practice has been that the existence in the Māori Land Court office of many unregistered orders affecting the title to Māori land has brought about virtually a supplementary registry of title standing, without any real legislative backing, outside the Land Transfer system. The only way, in general, in which Māori land has been removed from this registry is by its sale to Europeans.

- B64 The 1967 legislation, then, was designed to change the status of some Māori land. This objective could be carried through without the consent of individual owners and meant that such land was removed from the unofficial register of the Court and from the earlier protection of the Māori Land Court against imprudent alienation.<sup>599</sup> The customary law of succession ceased to apply to it. Nor was it any longer protected from the consequences of the bankruptcy of the Māori owner.
- B65 As viewed at the time, these particular changes could not, of themselves, be seen as startling or objectionable. Putting the land into the Land Transfer System was entirely consistent with Māori land legislation since 1894. In relation to the provisions against alienation of Māori Freehold Land, these were already fairly light-handed, the Court's principal concerns being to see that the Māori owner was fairly treated when selling the land and to ensure no trust obligations were being breached.<sup>600</sup> In relation to laws of succession and bankruptcy, the same rules were going to apply anyway to interests in land that remained Māori Freehold Land.<sup>601</sup>
- B66 However, viewed in retrospect after the passage of Te Ture Whenua Māori Act 1993, the results of the changes were far-reaching and significant. While all other Māori Freehold Land returned to its established protection, the land that had passed out of the Native Land Court records into the Land Transfer system did not. Owners of that land were deprived of the assurance that their land would not be needlessly dissipated by their descendants<sup>602</sup> and will not be available to their

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<sup>597</sup> The Native Land Act 1909 (following the Native Land Act 1894) provided for land whose title had been ascertained and made freehold to become Land Transfer land immediately: ss 92, 95. However, it retained its status as Māori Freehold Land as long as it was owned by a Māori: s 2, "Native freehold land". The rather tortuous path of earlier legislation, which led to this point, is discussed by Sir John Salmond in his legislative note, pp 3–6. Once alienated to a European, however, it did not revert to Māori Freehold Land merely because it was subsequently purchased by a Māori: s 129(2)(a). Corresponding provisions are found in the 1931 and 1953 legislation.

<sup>598</sup> Legislative note, "Māori Affairs Amendment Act 1967" (1968) NZ Universities Law Review 95, 96.

<sup>599</sup> According to Williams it was thought that as many as 15,000 separate parcels of land would be involved. In fact, the legislation (which depended for its effect on the initiative of local Māori Land Court Registrars and their staff) was very unevenly applied through the different Land Court districts, according to what we have been told.

<sup>600</sup> Māori Affairs Act 1953, ss 222, 224, 225, 227. See N Smith, *Māori Land Law* (1960), 139. There was some further easing of these provisions in the 1967 Amendment Act, which inserted the new sections 227 and 227A regarding Māori land generally.

<sup>601</sup> Section 147 Māori Affairs Amendment Act 1967, inserting a new s 455A.

<sup>602</sup> TTWMA s 152.

own and their descendants' general creditors.<sup>603</sup> They also lost the prospect of their land passing down to their descendants through a Māori system of succession.<sup>604</sup>

- B67 The only way these rights can be regained is by application to the Māori Land Court to have the status of the land changed back from General Land to Māori Freehold Land.<sup>605</sup> However, the application is not as of right; the Court must be satisfied that “it is desirable that the land become Māori Freehold Land, having regard to the history of the land, and to the identity of the owners and their personal association with the land”.<sup>606</sup> If there is dissent amongst the owners, an application by the majority will only be successful if a “sufficient” proportion of owners agree and the Court is further satisfied that the land “can be managed or utilised effectively as Māori Freehold Land”.
- B68 These tests for changing the status of land may or may not be appropriate for land which has been deliberately severed from association with its Māori heritage by its owners. It is certainly inappropriate for land which has been involuntarily deprived of its Māori status. Consideration might be given to laws providing for reversion of such land to Māori freehold status as of right, provided the land has been retained by the original owners or their descendants or beneficiaries since its status was changed to General Land. Application may be made by a majority of owners. Where a minority objects, the Court should decline to make an order only if satisfied that the majority decision is oppressive or unfair. The criteria for determining that would be similar to the considerations now stated in section 133. It would be for the dissentients to show that the majority were acting unfairly.
- B69 In regards to the necessary initiative and funding, it might be appropriate for Government to consider ways to ensure that willing owners did not incur expense. If the initiative were taken within government, the owners would simply need to signify their assent for the matter to be implemented. Additional funds might be necessary to deal with the costs of applications by dissentient owners.

### *Fragmentation and “uneconomic shares”*

- B70 We have already seen how fragmentation of individual titles is a matter of concern to Māori. Those in government responsible for Māori policy evidently shared that view. For a considerable time before 1968, there had been official concern about the extent to which ownership in small blocks of land was being fragmented amongst many successors. Two methods were used to deal with that problem.
- B71 First, the Courts were given limited powers to adjust successions so that small and uneconomic shares were avoided. Shares which would otherwise go to two or more beneficiaries could, with the consent of the beneficiaries, be vested in one of them or in another owner.<sup>607</sup> Then in 1957, further provision provided that even without their consent, beneficiaries' interests could be amalgamated with those of

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<sup>603</sup> TTWMA s 342, 343.

<sup>604</sup> The land can, however, be put into any of the trusts provided for in Part XII of Te Ture Whenua Māori Act 1993.

<sup>605</sup> TTWMA s 133.

<sup>606</sup> TTWMA s 133(3)(d).

<sup>607</sup> Section 136(2)(b) and (c) Māori Affairs Act 1953, as inserted by Māori Purposes Act 1957.

other beneficiaries in the Court's discretion.<sup>608</sup> No interest of a value greater than \$20<sup>609</sup> was to be compulsorily vested in this way and no compensation was payable.

- B72 This particular provision for compulsory vesting appears to have been relatively innocuous. Those with whom we consulted offered no complaint about it. In 1963, it was limited to cases where the interest had been made available to the Māori Trustee (in circumstances shortly to be explained) and the Māori Trustee had declined to accept it.<sup>610</sup> It was completely repealed in 1974.<sup>611</sup>
- B73 Secondly, and much more significantly, the Māori Affairs Act 1953 introduced, a provision allowing the Māori Trustee to acquire uneconomic interests. After amalgamating various shares in the manner described, the Court would normally vest the freehold land of a deceased Māori in the beneficiaries entitled to it.<sup>612</sup> But it was instructed not to do so in the case of any interest which was "uneconomic", that is to say, worth less than \$50.<sup>613</sup> All such interests had to be vested in the Māori Trustee.<sup>614</sup> The Trustee could, however, decline the interest, in which case it would pass to the beneficiary. Otherwise the interest passed to the Trustee by way of compulsory purchase: the Trustee paid the value fixed by the Court.
- B74 We shall deal presently with what happened to the interests so acquired. But it is convenient to deal first with the subsequent history of the "uneconomic share" legislation. The right to acquire uneconomic shares was extended during the period in question. Whereas it previously applied only to successions to estates, after 1967 it was used in a number of other situations where applications were made to the Court and people appeared to have, or were left with, uneconomic shares. These included schemes for the partition and consolidation of land, and the issuing of amalgamated and consolidated titles.<sup>615</sup>
- B75 The system of acquisition, however, did not survive the swing of opinion against the 1967 amendments. Compulsory acquisition of shares was abolished totally in 1974.<sup>616</sup> The land that was compulsorily acquired went to the office of the Māori Trustee for general Māori purposes. The office was established in 1930.<sup>617</sup> It was administered from within the Māori Affairs Department and took over the role of the Public Trustee in administering the estates of deceased Māori, and the affairs of Māori who were under a disability. It also dealt with property given to it by Māori and Māori groups to be held on trust. But its role was much wider than that. It was given control of a number of lands held or administered by Government for

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<sup>608</sup> Maori Affairs Act 1993 s 136(2)(d) and (e).

<sup>609</sup> These figures were originally in pounds (£) but have been converted in the text to the dollar equivalent.

<sup>610</sup> Māori Purposes Act 1963, s 4.

<sup>611</sup> Māori Affairs Amendment Act 1974, s 22(2).

<sup>612</sup> Māori Affairs Act 1953, s 136(4).

<sup>613</sup> \$50 in 1957 is worth \$300 in 1997 (Statistics New Zealand).

<sup>614</sup> Or, after 1962, a nominee to whom the Māori Trustee had disposed of the land.

<sup>615</sup> Māori Affairs Amendment Act 1967.

<sup>616</sup> Māori Affairs Amendment Act 1974, ss 23, 24.

<sup>617</sup> Native Trustee Act 1930.

Māori<sup>618</sup> as well as Native reserves<sup>619</sup> derived from various government dealings and inter-actions with Māori over the past seventy years.

- B76 The Māori Trustee, now operating under the Māori Trustee Act 1953, holds various funds, one of which is the General Purposes Fund. It is from the General Purposes Fund<sup>620</sup> that the funds were drawn to purchase uneconomic shares. The land so acquired, and proceeds of sale or rental, is not held on behalf of the original owners or indeed any particular beneficiary at all. On sale, the proceeds return in the first instance to the Conversion Fund,<sup>621</sup> which can then be used to purchase other interests in land, whether they are uneconomic shares<sup>622</sup> or lands sold by a willing owner.<sup>623</sup>
- B77 No specific provision is made for the income from the land, but as general proceeds of the Māori Trustee's activities they fall into the General Purposes Fund.<sup>624</sup> That fund may be expended in various ways to help promote the well-being of Māori.<sup>625</sup> The fund may also be applied to other Māori causes specified in the Act.<sup>626</sup> It can be used to buy land which, Māori or Māori body corporations wish to acquire.<sup>627</sup> And it can also be applied for more mundane purposes such as the payment of the salaries of Māori Trust office staff, the acquisition and running of buildings, and the office's required contribution to the Common Fund.<sup>628</sup>
- B78 An amount consisting of at least 10 percent, and not more than 40 percent, of the "profits" of the Māori trust office was to be paid to the Māori Education Foundation. This is a fund established by statute<sup>629</sup> and charged with financing and supporting the education of Māori.<sup>630</sup> The Fund provided financial grants for Māori education throughout the country. The Foundation has now been abolished, provision having been made for a charitable trust board to take its place.<sup>631</sup>
- B79 The process of taking interests in land from individual Māori and sharing it generally, while at the same time allowing other Māori to retain their larger interests, has been the subject of much complaint by those who were thus dispossessed. The belief exists that the policy was not consistently implemented, and that vagaries in the valuation system (and the accidents of who died when

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<sup>618</sup> Native Trust Act 1930 s 25.

<sup>619</sup> Native Trust Act s 27.

<sup>620</sup> via the Conversion fund, established under the Māori Affairs Act 1953, Part XIII.

<sup>621</sup> Māori Trustee Act 1953, ss31–41.

<sup>622</sup> Māori Affairs Act 1953 s 143.

<sup>623</sup> Māori Affairs Act 1953 s 151.

<sup>624</sup> Māori Trustee Act 1953, s 23(5).

<sup>625</sup> Māori Trustee Act 1953 s 32(1).

<sup>626</sup> Māori Trustee Act 1953 ss 33, 35.

<sup>627</sup> Māori Trustee Act 1953 ss 39, 40.

<sup>628</sup> Māori Trustee Act 1953 ss 36–37, 41.

<sup>629</sup> Māori Education Foundation Act 1961.

<sup>630</sup> Māori Education Foundation Act 1961 s 24.

<sup>631</sup> Māori Education Foundation (Abolition) Act 1993. They have changed their name to the Māori Education Trust which is a charitable trust.

and with how many descendants) made the system arbitrary in its effect. Even more significantly, the system ignored the symbolic and spiritual value of ownership of even a small interest and therefore affected the standing the former owner's family had in their own marae.

- B80 We understand that the Māori Trustee is aware of these problems and complaints. Some progress has been made in handing these interests in land back to the descendants of the original owners. Sadly, as time goes by, it has not proved possible to identify relevant lands with their former owners, because no records have been kept of the chain of descendants down to the present day. Nor have all the lands acquired under the economic shares regime been retained.

## EXTRACTS FROM THE SUCCESSION LAW PROJECT – PART II

- B81 In this section we discuss some particular problems with enacting rules of succession which are intended to reflect customary law. In other words, we consider the situations where the customary values and principles of Māori to succession are different from those of the general system. In these situations judges and the legislature have encountered major problems. It must be remembered that this is a law whose history is littered with unaccountable lapses, poorly conceived interventions and inconsistent u-turns. More than that, it appears that those framing the law have been reluctant to strengthen and develop those parts of the system which are distinctively Māori. For examples, we refer to Māori customs relating to the following topics:

- ōhākī (formal oral will);
- the long-term effect of wills and gifts;
- the requirements for a valid marriage;<sup>632</sup> and
- the requirements for a valid adoption.<sup>633</sup>

### Oral Wills (ōhākī)

- B82 The case of the Māori oral will, or “ōhākī,” is an example where a longstanding customary practice was no sooner recognised by the court than it was abolished by the legislature.
- B83 Under the present law, as we have seen, Māori are permitted to make written wills in respect of Māori freehold land. This is a power conferred on them by English law and Te Ture Whenua Māori Act 1993, and not by custom. The written will, as it is known in the general law, is not a part of Māori custom law.
- B84 Nevertheless, there was a strong Māori tradition of making an oral will. “The nearest approach to the written will of English law known to Māori was the ōhākī or death bed declaration” which would be “acted on without question by the

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<sup>632</sup> See also New Zealand Law Commission *Justice: The Experiences of Māori Women Te Tikanga o te Ture Te Mātauranga o ngā Wāhine Māori e pā ana ki tēnei* NZLC R53 (Wellington, 1999), Chapter 2.

<sup>633</sup> See also New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework*: NZLC R65 (Wellington, 2000).

relatives of the deceased after his death".<sup>634</sup> This indicates the strong spiritual significance of the *ōhākī*, which is made as a person recognises the signs of oncoming death and seeks peace with themselves and their family. The family too recognises the signs of oncoming death, and treats the occasion with appropriate respect.<sup>635</sup>

B85 When the Native Succession Act 1881 was before the House, a Māori member of Parliament, Ngatata, spoke strongly in favour of recognising the *ōhākī* by statute.<sup>636</sup> Although that was not done, in 1895 the Māori Appellate Court recognised the existence of the custom of *ōhākī* and was prepared to recognise it in respect of Māori freehold land.<sup>637</sup> The following requirements for a valid *ōhākī* appear to have been recognised in the Court:

- (a) It must be pronounced in the presence, or be made known to, the relatives of the donor.
- (b) It would rarely, if ever, be made in favour of a complete stranger in residence as well as in blood; if so, it was probably more as requital for some past service or to return some gifted land.
- (c) It has been contended that an *ōhākī*, to be effective, must be made in extremis, or under circumstances when the dying depositions are usually taken, but the Court has held that such a circumstance would not be essential to the validity of an *ōhākī*.<sup>638</sup>

B86 However the decision to recognise *ōhākī* was abrogated by statute within the year,<sup>639</sup> with the result that there was (and presumably still is) no customary law of wills which the Courts could recognise as the basis for the development of further custom.<sup>640</sup> Some unfortunate legal consequences of that situation will be discussed presently. However, for the present it is sufficient to note that Māori do still occasionally make use of this procedure. There has been a noted recent example where the technique was used to establish a successor in office.<sup>641</sup>

B87 The important point for present purposes is that, in an environment which is partly legislative and partly customary, a hasty legislative action can have far-reaching consequences for the customary system. It is suggested that as long as a custom continues or develops in an established customary context, a statutory provision which enables the custom to be recognised once more would be valid.

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<sup>634</sup> N Smith, *Māori Land Law* (1960), 59.

<sup>635</sup> The Commission is indebted for this insight to Tawa Te Rangi, telephone interview with Professor Sutton, 27 January 1997.

<sup>636</sup> Hohepa and Williams, *The Taking into Account of Te Ao Māori in Relation to the Reform of the Law of Succession* NZLC MP6 (Wellington, 1995), 41.

<sup>637</sup> PP 1907 G 5, p 11, cited N Smith, *Māori Land Law* (1960) 60.

<sup>638</sup> N Smith, *Māori Land Law* (1960) 60.

<sup>639</sup> Native Land Laws Amendment Act 1895, s 33.

<sup>640</sup> Cf *In re Hokimate Davis* [1925] NZLR 19, 20–21.

<sup>641</sup> Perhaps the most celebrated recent example was the recognition given by Dame Whina Cooper to Sir Graham Latimer not long before her death in 1995. See the *New Zealand Herald*, 3 March 1994, 1.

## The long term effect of wills and gifts

- B88 According to Māori custom, property which passed to someone by *ōhākī* or gift would revert back to the *whānau* of the original owner on the death of the recipient.<sup>642</sup> At first sight, it appeared that after 1909 this custom would continue to be recognised. However, Stout CJ held to the contrary in a case in 1925. He considered that a formally executed written will was not a transaction to which Māori custom could apply.<sup>643</sup>
- B89 The customary understanding of the law was expressly recognised in legislation by the insertion, in 1927, of a further provision dealing with intestate succession to Māori freehold land recognised the customary understand.<sup>644</sup> That provision stated that property that a deceased person had derived by, through or under a will was to be dealt with as if the devise were a gift.
- B90 This situation remained until 1953 at which time there was evidently some concern about the doctrines of “derived title” and “reversion to source” (presumably because of the complexity it caused where a deceased person had no obvious successors). The Māori Affairs Act 1953 still stated that intestate succession was governed by Native custom,<sup>645</sup> as had the 1909 Act, but it qualified this provision by the insertion of a new section which took precedence.<sup>646</sup>
- B91 Section 117 of the Māori Affairs Act 1953 was designed to limit the operation of the rule of reversion, as regards (a) property derived from wills or gifts which became effective after 1 April 1954; and (b) property acquired by purchase, exchange (but not exchanged for other Māori land) or vesting as a dwelling site. It was a complex provision, whose effect was to limit succession by custom to descendants of the deceased and certain prior owners. If no such persons existed, the property passed according to the general law.<sup>647</sup>
- B92 In the course of achieving this relatively limited,<sup>648</sup> but nevertheless important objective, section 117 begins with a new version of the old provision declaring wills to be the equivalent of gifts for the purpose of the custom of reversion to source. However, the new provision is restricted in its operation to wills made before the commencement of the Act.<sup>649</sup> This appears to have restored the old,

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<sup>642</sup> Referred to in *In re Hokimate Davis* [1925] NZLR 19, 20. It seems that the right of reversion depends on the particular circumstances of the case; see Smith, *ibid*, 36, where he instances wedding gifts, which were sometimes retained by a husband after the death of the wife whose family made the gift.

<sup>643</sup> *In re Hokimate Davis* [1925] NZLR 19, 20.

<sup>644</sup> Native Land Amendment Act 1927, s 4.

<sup>645</sup> Māori Affairs Act 1953 s 116(3).

<sup>646</sup> Māori Affairs Act 1953 s 117.

<sup>647</sup> An early example of its application is *In re Ngawhare, Hopkins v Te Kaponga* [1958] NZLR 464, where the deceased's half-brother took the property as an intestate successor under the general law. See generally Smith 53–55.

<sup>648</sup> In view of the provisions of s 117(3), it is difficult to agree with Smith's statement, at 55 (made in 1960), that “with certain exceptions *Māori custom* is now limited to wills of persons who have died before the commencement of the Act”, though it is true that the particular Māori custom concerned with reversion to source, following a will, is so limited.

<sup>649</sup> 1 April 1954.

and anomalous, distinction between gifts (where a derived title could be the basis for a Native customary claim, which could take precedence under subsection 117(3)) and wills (where there could be no such customary claim). It is not altogether clear whether this is what the legislature intended, and if so, why. But it may not be unreasonable to suppose that the reason behind the original 1927 provision was so obscure that it simply escaped the drafter of section 117. The matter was not of great concern to the drafter of the 1967 amendments, since that legislation was designed to bring the entire customary system to an end. Provisions to that effect were inserted in section 117,<sup>650</sup> as they were elsewhere.

- B93 The matter of derived title and reversion to source might have been re-visited in Te Ture Whenua Māori Act 1993. The Law Commission's discussions of the effect of those provisions with Māori at the hui in 1996 revealed that some Māori still think in traditional terms and are surprised to know that gifts and wills to spouses and favoured children do not revert to the original family on the death of the donee.
- B94 However, a different solution was adopted. The new law restricts wills and gifts to those in favour of people who are already members of the bloodline. It also restricts the testamentary rights of a person who happens to have acquired Māori freehold land, as a stranger to the bloodline. Through a will or intestacy, such a person can only pass property to their descendants, and their brothers and sisters of full blood, and the descendants of those brothers and sisters. Any other recipient must be a descendant of a previous owner of the land or a member of the hapū associated with the land.<sup>651</sup>
- B95 The present law is both more restrictive and less protective than Māori custom law. It is more restrictive because an owner of Māori freehold land is prevented from giving land away to strangers (perhaps in return for a favour), on the understanding that it will return to the family after the stranger has finished with it. It is less protective because once property is given away to a permitted recipient there is no machinery to get it back unless all the formalities of a legal trust are invoked at the time the gift is made. This illustrates that it can be extraordinarily difficult to draft legislation in English terms in a manner which reflects the subtleties of customary principle. One rule presumes that a gift is absolute unless specific arrangement is made to the contrary; the other presumes the opposite.
- B96 Decisions about whether Māori customary principles applying to ohaki and gifting are the most practicable and efficient should, as with any other property right that a person may have, be taken by those who create the rights, and are most affected by their operation.

### **The requirements for a valid marriage**

- B97 In recent times, Māori and British views on the significance of a formal marriage, and the legal consequences for children of informal unions, have become much more congruent. Interestingly, it is the British view that has moved, rather than the Māori one. With the Status of Children Act 1970, the legislature removed the traditional legal distinction between legitimate and illegitimate children – a distinction which came to be seen as grossly unfair to the latter. More recently,

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<sup>650</sup> Māori Affairs Amendment Act 1967, s 88(4).

<sup>651</sup> Te Ture Whenua Māori Act 1993, s 109(1).

there have been a number of statutory provisions dealing with the relationship between de facto couples, that is to say, couples whose union is “in the nature of marriage” though not formalised by marriage.<sup>652</sup> This distinction between married and unmarried couples still exists, however, in the law of succession. The Law Commission has proposed that de facto partners have equivalent rights to married partners to make claims against each others’ estates.<sup>653</sup>

- B98 This recent congruence of views renders the following discussion of historical interest only, rather than being directly relevant to any immediate law reform issue. It is nevertheless instructive because it illustrates the problems which arise where two communities have different views of the nature and purpose of a fundamental social institution such as a formal marriage.
- B99 The position in New Zealand in the early 1840’s was that the common law of marriage was imported, at least for British settlers and the purposes of the general law. It included the requirement that the marriage be formalised by a minister who has been episcopally ordained, such as a priest or deacon of the Church of England or the Roman Catholic Church.<sup>654</sup> An ordinance of 1842 extended the same power to ministers of any church or denomination. It was recognised, however, that this formality would not necessarily be observed by Māori, who had their own views of the nature of the union between a man and a woman, and the procedures customarily followed to establish that relationship.
- B100 When the first general marriage ordinance was passed in New Zealand in 1847, it provided that nothing in that ordinance should apply to marriage contracted between two Māori, other than in accordance with the terms of the ordinance itself.<sup>655</sup> Māori could, if they wished, formally marry in the manner required by the common law, or (at least until 1891) in the 1842 ordinance,<sup>656</sup> and their marriage would be valid in English law although the Marriage Acts would not apply to it.<sup>657</sup>
- B101 But a marriage according to common law or the 1842 ordinance was very different from the form of union recognised by Māori custom. The major difficulty in

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<sup>652</sup> Discussed *Succession Law: Testamentary Claims* NZLC: PP 24 (1995), 42–43. Of particular note is s 19 of the Bill of Rights Act 1990 which (as amended by the Human Rights Act 1993, s 145) prohibits discrimination on the basis of marital (or non-marital) status.

<sup>653</sup> *Succession Law: Testamentary Claims*, *ibid*, Ch 34 note xx [sic] New Zealand Law Commission *Succession Law: A Succession (Adjustment) Act* NZLC R39 (Wellington, 1997).

<sup>654</sup> See the discussion of this subject by Prendergast CJ in *Rira Peti v Ngarahi Te Paku* (1888) NZLR 235, following Privy Council authority.

<sup>655</sup> Marriage Ordinance 1842, s 44, subsequently re-enacted as Marriage Act 1854, s 47; Marriage Act 1880, s 2; Marriage Act 1904, s 2.

<sup>656</sup> See J Salmond, Native Land Bill 1909. *Memorandum on Native Land Bill: Notes on the History of Native-land Legislation*, unpublished 1909, p 11, who points out that the 1842 Ordinance was repealed in 1891, “apparently in forgetfulness of the fact that . . . it was still an operative enactment with respect to Māori marriages”. It is of interest that in *Rira Peti v Ngarahi Te Paku* one of the people whose union was in question had previously gone through forms of marriage, in the presence of clergymen, with two other women: see 240.

<sup>657</sup> See eg *Matiu v Monika Reweti* (1907) 26 NZLR 642, where the marriage formed the basis of a divorce petition on the grounds of adultery. There is a suggestion in that case that if one of the parties were only of half-blood, the couple would have to marry in accordance with the Marriage Act, although their belief that they were validly marrying may be sufficient to validate the marriage under that Act: see at 643. However, the author of the above note, as Salmond J, held subsequently that the privilege of informal marriage extended to all persons of Māori descent: *Parker v Parker* [1921] GLR 522.

persuading the settlers to accept customary marriage for the purposes of their law was that it was potentially polygamous, but it had other differentiating features. According to Elsdon Best,<sup>658</sup> the Māori were often endogamous, marrying within their tribe and even their sub-tribe. There was a proscription, however, against marrying cousins and other close relatives.<sup>659</sup> Different forms of marriage were recognised, ranging from formal religious ceremonies through to mating without ceremonial observance, but, as Salmond's note points out, "by Māori custom the contract of marriage is created by consent merely, without any formality of celebration".

- B102 A customary marriage did not necessarily carry with it any rights against property owned by the other spouse, but where a husband went to live with his wife's tribe some property arrangements were often made by the wife's family. As regards children, the existence or otherwise of any particular form of union did not generally appear determinative of their rights, at least in general.<sup>660</sup>
- B103 For the purposes of applying the general law, the Courts simply disregarded customary marriages. For example, in *Rira Peti v Ngarahi Te Paku*,<sup>661</sup> there was an argument about the effect of a formal will that was witnessed by a person who was living with one of the beneficiaries at the time. Arguably she was married to him according to customary law. If he was her husband, she could not take under the will. But Prendergast CJ declined to recognise the marriage for that purpose, observing that:

So far as I could myself form an opinion, the connection between [the parties] would not amongst Māoris be considered equivalent to the connection understood by us as that of husband and wife.<sup>662</sup>

- B104 Such a consequence was likely to cause great difficulties as Māori came to acquire property, particularly freehold interests in land, in respect of which custom law might not be recognised. Their children were technically illegitimate and could not succeed on an intestacy or by will which left property to unspecified "children" of the deceased owner. This, as has been seen, was an important reason why the legislature first provided that custom law would apply to succession to Māori freehold land and other assets during the 1861–1909 period.<sup>663</sup> That legislative approach worked, not because the parties were in some way "married" according to customary law, but because customary law took effect regardless of whether they were "married" or not. The situation became more difficult, however, as both the legislature and the Māori Land Court tried to develop legal rules in succession cases.

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<sup>658</sup> *The Māori*, Vol 1, cited in Smith, *Māori Land Law* (1960), 36.

<sup>659</sup> For example, those within two generations back from a common ancestor.

<sup>660</sup> A right to land was determined by whakapapa (genealogies). See ET Durie *Custom Law* (unpublished Confidential Draft paper for the Law Commission, January 1994).

<sup>661</sup> (1889) 7 NZLR 235.

<sup>662</sup> See also *R v Wairemu Kingi* [1909] 12 GLR 175; *Wi Tamihou's case* [1932] NZLR 1397. In two decisions of the Māori Appellate Court, cited in Smith at 38–39, that Court declined to recognise a customary union as a marriage for the purposes of (a) the general law presumption that property bought by the husband in the wife's name is advanced as an outright gift to her; and (b) a provision in a gift by will, that it shall become void if the husband "remarries".

<sup>663</sup> Discussed above.

B105 The Native Land Act 1909<sup>664</sup> provided that for the future, “marriages” between a Māori<sup>665</sup> and a European must be contracted according to the provisions of the Marriage Act 1908. Marriages between Māori must be contracted either (a) according to the provisions of that Act; or (b) in the presence of an officiating Minister, but without necessarily complying with the other requirements of the Marriage Act. The Marriage Act prohibitions of consanguineous marriage would now apply in both cases. This did not change the underlying position; a customary marriage would be recognised by Māori custom, which courts were bound to uphold under the 1909 Act.

B106 However, a number of provisions concerning succession referred to the position of a “husband” or “wife” of a deceased owner. It was clearly intended that these terms included only a person who was formally married to the owner by one of the methods permitted by law before or after the 1909 Act. The provisions were:

1.1 The power of a European to receive Māori freehold under a will – section 137(2)(a);

1.2 The power of a husband or wife as such to apply for a life interest in Māori freehold land, or for the personalty, of an intestate Māori – section 140(1) (however, existing customary marriages between two Māori were counted for this purpose: section 140(5). In 1929, this provision was extended to cover subsequent customary marriages as well);<sup>666</sup> and

1.3 The power of a “widow” to apply for provision out of the estate of a deceased Māori, where adequate provision had not been made by will (again, customary marriages were recognised).

B107 No doubt these provisions appeared logical at the time, given the close linkage between the last two and the Family Protection Act 1908, (which, as far as the Pākehā community was concerned, clearly did not apply to unions out of wedlock). Such customary rights as the non-married spouse might have were preserved, at least in the intestacy situation. However for a period of twenty years, people living in a relationship which would have been normal and accepted in the Māori community (whether or not one of them was a European) were not given the legal rights that were possessed by people similarly placed in the Pākehā community. The distinguishing feature of “marriage” operated differently within the two communities. This was not corrected until 1929.

B108 Similar problems arose with the term “child,” which at that time<sup>667</sup> meant only a legitimate child (the child of a married couple). There were two<sup>668</sup> areas of particular concern.

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<sup>664</sup> Sections 190–193.

<sup>665</sup> Meaning a Māori of half-blood or more.

<sup>666</sup> Native Land Amendment Act 1929, section 7(a).

<sup>667</sup> The position has now been changed by the Status of Children Act 1970, s 3. But the older rule still applies in the case of wills and deeds made, and the intestacies of persons dying, before 1 January 1970.

<sup>668</sup> A third potential area of concern related to a person’s right to will property to a “European” child or other descendant under s 137(2)(a), but that was dealt with; this paragraph refers to those who are “legitimate or illegitimate”. One could still cavil about the wording; the problem was handled somewhat differently by an amendment introduced in the Māori Affairs Amendment Act 1963, s 3, inserting a new subsection into s 114 of the Māori Affairs Act 1953.

1.1A Māori parent who left property to unspecified “children” in the will might not be taken to have included children by a customary marriage. This was put right in 1912. Wills were to be interpreted so that the term “child” included “illegitimate” children capable of succeeding to the property of their parent by Native custom.

1.2 Those Māori who could contest a will under the equivalent of the Family Protection Act 1908 were described as “children” and “grandchildren”. This provision had to be extended in 1927 to include “natural” children and grandchildren.<sup>669</sup>

B109 It would be surprising if a jurist of the calibre of Sir John Salmond made such a slip, when his own contemporaneous notes demonstrate clear insights into the nature of the problem. He appears to have assumed that the position with Māori was so well known that no court would consider that the word “child,” in this context, was intended to have such a narrow meaning, either in the statute or in the will of a Māori.<sup>670</sup> Be that as it may, the drafters of the 1927 amendments had no such confidence. They sowed the seeds for a future misapprehension, as will presently be seen.

B110 There matters rested for a considerable period, and eventually the issue dropped out of sight. In 1951 it was decided that there was no further need for a provision dealing with Māori customary marriages (although “illegitimate” children would continue to be recognised). Following statutory amendments made in that year,<sup>671</sup> it was provided that all marriages must be made in accordance with the Marriage Act 1955. No marriage in accordance with Māori custom, entered into on or after 1 April 1952, would be valid for any purpose.<sup>672</sup> With some qualifications,<sup>673</sup> customary marriages entered into before that date were valid for the purpose of bringing claims under the equivalent of the Family Protection Act 1955.<sup>674</sup>

B111 Not surprisingly, little attention has been given to the problem of customary marriage since then. There is no direct reference to it in *Te Ture Whenua Māori* 1993. That Act uses the term “spouse”, presumably with the intention that only legally married persons are included. As regards children and other descendants, it acknowledges that the Status of Children Act 1970 applies to all recent relationships of this character. For wills of Māori dying before 1970, the term “child” is once more taken to mean both a “legitimate” and an “illegitimate” child, as long as the child is capable of taking Māori freehold land by intestate succession in accordance with tikanga Māori: section 107.

B112 However, there is a final reminder of yet one more disastrous consequence of the 1968 legislation. Section 88 of the Māori Affairs Amendment Act 1967 stated that the equivalent of the 1912 provision (interpreting “child” in a will to include

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<sup>669</sup> Native Land Amendment Act 1929, s 7(b).

<sup>670</sup> For contemporaneous statements of legal principle, see *Wolters v Public Trustee* (1914) 33 NZLR 1395; *Public Trustee v Leslie* [1917] NZLR 841. There was some emphasis in these cases on interpreting the will according to what appeared on its face.

<sup>671</sup> Native Land Amendment Act 1951, s 8(6).

<sup>672</sup> Māori Affairs Act 1953, ss 78–79. The drafting of s 78 is, to say the least, curious.

<sup>673</sup> (1) The marriage had to be subsisting at the time of the death of the deceased owner; and (2) the deceased owner had not at that time to be legally married to another person.

<sup>674</sup> Māori Affairs Act 1953 s 119(3).

an illegitimate child), would not apply to the estates of Māori dying after 1 April 1968. This overlooked (a) that Māori may have made their wills before that date, relying on the earlier provision; and, more significantly, (b) that many family relationships might still exist which could only be linked through earlier customary marriages. The change was quickly repealed.<sup>675</sup> However it has left an indelible scar. The 1912 interpretative provision applies to the wills of Māori dying between all dates from 1912 to 1970, except for one brief period between 1 April 1968 and 24 October 1969. The 1993 legislature (with a newly acquired distaste for retrospective legislation) felt obliged to perpetuate this blot on the legislative landscape. There may, of course, be no consequences at all for the estates of the people involved if courts are prepared to interpret such wills sensibly and in their context. But it does make the outcome needlessly unpredictable.

### The requirements for a valid adoption

- B113 We will deal with this topic briefly.<sup>676</sup> The Law Commission has already considered the relevant principles and proposals for reform in *Adoption and Its Alternatives: A Different Approach and a New Framework*: R65. However, it is probably the principal example of problematic law-making, the history of which is already well documented in the judgment of Temm J in *Whittaker v Māori Land Court*.<sup>677</sup> This case serves as an illustration of how a modern estate can raise problems that can only be resolved by looking at the laws of the last century. There are, after all, many living people whose grandparents were born before 1900. This makes it all the more important to develop law slowly and consistently, and to avoid dramatic changes and U-turns in legislative policy.
- B114 The case concerned a Māori named Meriana, who in 1899 adopted a child, Ngawini, by customary law, and brought her up as her own. Ngawini was the daughter of Meriana's sister. Ngawini died in 1927 leaving a family of 11, the youngest child being barely 12 months old. The family was then brought up by Meriana, who was looked upon as their grandmother. Louise, who brought the present proceedings, was one of the children.
- B115 When Meriana died in 1947, a succession order was made in respect of her land in favour of her living brothers and sisters. It excluded Ngawini and her children. There the matter remained until Louise took the matter up with the Māori Land Court in 1987. She said the order was wrong, and she wanted it put right. When the Māori Land Court refused to overturn the order, she applied to the High Court for a review of that decision.
- B116 The position as far as Māori custom is concerned is that there was in 1899, and still is,<sup>678</sup> a recognised practice of adoption by relatives of a child. Very often the relative will be the child's grandparent or, as here, an aunt. Perhaps the child cannot be looked after by their birth parent; or perhaps an aunt wants children but cannot have them.

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<sup>675</sup> Māori Purposes Act 1969, s 4(1).

<sup>676</sup> New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework*: NZLC R65 (Wellington, 2000).

<sup>677</sup> [1996] NZFLR 163.

<sup>678</sup> Joan Metge *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) 252.

- B117 There are no particular formalities, but it appears that adoption (as known to law) is an event of notoriety, made with the express or tacit approval of the whānau or hapū.<sup>679</sup> Once the child is accepted in this way, the adopter and child will frequently regard each other as parent and child for all significant purposes, as will the other members of the whānau. That is not to say that the birth parent will not take an interest too, but that means less in a society where many whānau members share in what (to a Pākehā) is a traditional parenting role.
- B118 When Meriana adopted Ngawini, the adoption was lawful according to Māori custom. Although the legislature had introduced the Adoption Act 1895, which gave all citizens the capacity to adopt children by Court order, it was not obligatory for Māori to comply with it since their customary processes had always been sufficient, at least for the purposes of the law of succession. As with the marriage forms, however, Māori could avail themselves of the statutory adoption procedure if they wished to do so.
- B119 This, incidentally, raised a separate problem because sometimes Māori adopted European children. It appears to have been assumed that European children could not succeed, by custom, to Māori land. But when the 1895 procedures were used, the Native Land Court made a practice of treating that person as a child when applying Māori custom.<sup>680</sup> This caused some problems, for which, as we shall see, a drastic solution was enacted in 1909. But that is by the way to Meriana's story.
- B120 Meriana relied on the customary form of adoption. Not long afterwards the legislature passed the Native Land Claims Adjustment and Laws Amendment Act 1901, which provided<sup>681</sup> that claims to adoption could not be recognised unless it was registered in the Native Land Court. All Meriana had to do was notify the Registrar of the Court that she had taken Ngawini as an adopted child according to Māori custom. But she did not do so, so from 1902 she could not have succeeded in Meriana's estate, had Meriana died at that time.
- B121 The scene now shifts to the office of Sir John Salmond in what is currently Old Government Building in Lambton Quay, Wellington. He wrote of the Bill which was to become the Native Land Act 1909, at p11 of his notes:

. . . [b]y this Bill, adoption by Native custom is abolished, and adoption by order of the Native Land Court is substituted. Any such order of adoption has the same effect as adoption by a European under the Infants Act 1908. The jurisdiction of Magistrates over Native adoptions is taken away, and the adoption of a European child by a Native is prohibited.

- B122 The Act contained provisions to that effect.<sup>682</sup> It also provided in section 161 that no adoption in accordance with Native custom, even if made before the Act was passed, should have any force or effect, particularly as regards intestate succession to Māori land. As the Court points out in *Whittaker's* case,<sup>683</sup> these words are

<sup>679</sup> See *Hineiti Rirerire Arani v Public Trustee* [1920] AC 198, 201.

<sup>680</sup> *Hineiti Rirerire Arani v Public Trustee* s 204; a practice affirmed by the Privy Council's decision in the case. But compare the situation under the 1909 and 1931 Acts, *In re Pareihe Whakatomo* [1933] NZLR s 123.

<sup>681</sup> Native Land Claims Adjustment and Laws Amendment Act 1901 s 50.

<sup>682</sup> Native Land Act 1909 ss 161–164. It also provides that adoption in this form has the same effect as adoption under the Infants Act, but “subject to the rules of Native custom as to intestate succession to Native land”: s 168.

<sup>683</sup> At 167.

completely unambiguous. They retrospectively removed Ngawini's rights as an adopted child. Those rights would only have been preserved had the adoption been registered before 31 March 1910.<sup>684</sup>

- B123 There matters rested until 1927, when the legislative policy was completely reversed. Section 7 of the Native Land Amendment and Native Claims Adjustment Act 1927 re-instated customary adoptions made before 31 March 1902 if they were subsisting at the date of commencement of the Native Land Act 1909. There was an apparent snag. The section only applied "in the case of a Māori who dies or who has died subsequently to the to the commencement of the [1927] Act". Ngawini had died three weeks before the 1927 Act came into force. The judge read the term "principal Act" to mean the 1927 Act when, had he looked across to section 2 on the opposite page, he would have seen that the term referred to the 1909 Act. Section 7 was clearly intended to be retrospective, and to reconstitute Ngawini's adoption.<sup>685</sup> Perhaps, had the judge realised that, he would have held that it "saved Ngawini's adoption". But that is very doubtful in view of what happened next.
- B124 The reinstatement of customary adoptions proved to be short-lived. In 1930, further amending legislation was passed which baldly stated that section 7 was repealed.<sup>686</sup> Just what retrospective effect that provision, on its own, would have had is perhaps doubtful. But when the legislation was replaced in 1931, the original section 161 was largely re-instated as section 202. It provided, as before, that "no adoption in accordance with Native custom, whether made before or after the commencement of this Act, shall be of any force or effect". Clearly this provision was intended to have retrospective effect, as had its 1927 predecessor.
- B125 When Meriana died in 1943, therefore, Ngawini could not be recognised for the purposes of her estate. Thereafter, the proscription of customary adoption continued in much the same form until 1955. An abridged version was then inserted in the Adoption Act 1955.<sup>687</sup> That law is still in force.
- B126 In this example, the law recognised Ngawini as an adopted child of Meriana between 1899 and 1902. It did not so recognise her between 1902 and 1909, although Meriana could have dealt with any problems that caused by recording the adoption in the Native Land Court. Between 1909 and 1927, however, the law totally refused to recognise the adoptive relationship and (after Ngawini turned 15)<sup>688</sup> there was nothing at all Meriana could do about it. Between 1927 and 1930, the law once more recognised Ngawini's status as an adopted child. But from 1930 onwards, Ngawini was no longer Meriana's adopted child in the law's eye. This is a dramatic example of the erratic course of succession law.
- B127 There is a more general point. It is only in recent years that the virtues of open adoptions have once more been recognised, and the drawbacks in the form of adoption favoured in the 1955 and earlier Acts acknowledged.<sup>689</sup>

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<sup>684</sup> Native Land Act 1909 s 161(2); *Piripi v Dix* [1918] NZLR 691.

<sup>685</sup> See subsections (3)–(6), which contemplated going back to review the results of earlier orders of the Native Land Court. Review was excluded, however, where the Supreme Court had been involved: subsection (7).

<sup>686</sup> Native Land Amendment Act 1931, s 202.

<sup>687</sup> Adoption Act 1955 s 19.

<sup>688</sup> At which point, no formal adoption order could be made: Native Land Act 1909, s 165(a).

<sup>689</sup> Atkin, "Open Adoption and the Law", *Family Law Journal* 2 (2) Jun 1996: 44–45; see also New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework*: NZLC R65 (Wellington, 2000).

- B128 The disadvantages to Māori of the legislative system of succession, as it operated between 1909 and the present day, are all too apparent from the above examples. However, in summarising to this point, it is useful to consider the strengths and weaknesses of the system, as they might appear to an impartial observer.
- B129 The 1909 system provided a stable framework for the establishment and further development of Māori custom law. It at least provided a buffer between the succession practices adopted by Māori, and any ill-focused demands or criticisms which may have come from others in the community, although there was always the risk of swings in political opinion. And it was largely effective in assuring that property passed, on succession, downwards to the descendants of the land-owners, and not across families through the wives and husbands of former owners.<sup>690</sup>
- B130 The system also introduced some features of the general system which were presumably useful to Māori, notably the facility to will land (particularly after the ohaki was outlawed). Patterns of decision developed by the courts, while they may have eliminated some of the subtleties of customary law, may perhaps have been helpful as Māori became more dispersed in New Zealand, and knew less about the expectations of their home area. The power to make orders in favour of destitute wives and children also introduced, into the Māori system, notions about the use of property to support close relatives of the former owner.
- B131 But in those areas of custom which were distinctive to Māori, and which needed strengthening by succession law, the system proved inept:
- Māori customary forms of will-making were abolished;
  - limited gifts ceased to be given effect;
  - customary marriages were not recognised;
  - customary adoptions were not recognised; and
  - ordinary relationships between Māori parents and children were not provided for, or (when they were mentioned) were described as “illegitimate”.
- B132 When confronted by the adverse consequences of this diminution in standing of customary tradition, the reaction of the legislature was sometimes to forbid the consequence, rather than strengthen the custom. For instance, in considering the issue of Māori (unfettered by custom) willing their property away from their Māori descendants, the favoured solution was to prevent any person of half-blood or less from receiving Māori freehold land under the will, even on a temporary basis. In assessing the idea that, if a Māori formally adopted a European child, the land might pass out of Māori hands, the conclusion reached was simply to forbid Māori from adopting anyone who is not a Māori.
- B133 These events are an inescapable part of our history.

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<sup>690</sup> But only because will-making was uncommon; the will could leave Māori freehold land to anyone who was a Māori.

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